Court File No. CV-16-11389-00CL

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 URBANCORP TORONTO MANAGEMENT INC., 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

BOOK OF AUTHORITIES OF SPEEDY ELECTRICAL CONTRACTORS LTD.

April 24, 2018

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TO: **SERVICE LIST**

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Ontario Superior Court of Justice [Commercial List]

Mercado Capital Corporation v. Qureshi

2017 CarswellOnt 15109, 2017 ONSC 5572, 284 A.C.W.S. (3d) 254

MERCADO CAPITAL CORPORATION (Applicant) and HAFSA FAISAL QURESHI and POLLARD & ASSOCIATES INC., Trustee in Bankruptcy for the Estate of Faisal Iqbal Qureshi (Respondents)

Hainey J.

Heard: July 7, 2017
Judgment: September 20, 2017
Docket: CV-16-11610-00CL

Counsel: Michael S. Myers, James S. Quigley, for Applicant
Veena Pohani, Kristine Holder, for Respondent, Hafsa Faisal Qureshi

Subject: Estates and Trusts; Family; Insolvency; Property

APPLICATION by creditor for declaration that what it characterized as notional gift of 50 per cent of equity in matrimonial home to wife was void as undervalue transfer.

***Hainey J.*:**

Background

1 The applicant, Mercado Capital Corporation, seeks a declaration that what it characterizes as a notional gift of 50% of the equity in property located at 55 Davina Circle, Aurora, ("Davina") by Faisal Iqbal Qureshi ("Faisal"), a bankrupt, to his spouse, Hafsa Faisal Qureshi ("Hafsa"), is a transfer at undervalue and is therefore void pursuant to s. 96(1)(b)(i) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*").

2 Faisal and Hafsa were married for 15 years. They have three children. Their eldest child has been diagnosed with autism and epilepsy. He is a special needs child who requires around-the-clock care.

3 Hafsa was a stay at home mother throughout most of the marriage. She cared for their children and did all of the domestic work and household management. She supported Faisal at home while he earned the family income by operating various businesses.

4 In 2011, Faisal and Hafsa bought a family home at 278 Selwyn Avenue in Richmond Hill ("Selwyn"). According to Hafsa, her parents contributed $50,000 toward the purchase price of the home. Faisal and Hafsa lived there with their children for around four years. Selwyn was registered in Faisal's name although both Faisal and Hafsa believed that they each owned an equal share.

5 On February 18, 2015, Hafsa entered into an Agreement of Purchase and Sale on behalf of Faisal and herself to purchase Davina.

6 On June 30, 2015, Faisal and Hafsa sold Selwyn. The net proceeds from the sale were $372,177. They then closed the purchase of Davina on the same date. The purchase of Davina was funded with the $372,177 net proceeds from the sale of Selwyn, $256,240 from funds obtained by Faisal, $89,654 from Hafsa's parents and mortgage funds of $1,902,081.

Faisal and Hafsa were registered on title as joint tenants. They believed that they each had a 50% interest in Davina because it was their matrimonial home.

7 In 2016, Faisal and Hafsa's marriage broke down. Faisal moved out and began a relationship with another woman. For several months he lived with this woman in Dubai while Hafsa was left on her own in Aurora with their three children.

8 On June 2, 2016, the applicant brought an application for bankruptcy against Faisal. Faisal did not oppose the application and he was adjudged bankrupt on July 5, 2016. Pollard & Associates Inc. was appointed by the court as the trustee in bankruptcy of Faisal's estate ("Trustee").

9 In the summer of 2016, Davina was sold for $2,838,000. Faisal and Hafsa realized net proceeds from the sale of approximately $696,815. Hafsa's 50% share of the net proceeds is currently being held by the Trustee pending the outcome of this application.

10 Faisal is alleged to have been involved in a multi-million dollar fraud. In February 2017, while en route from Dubai to London, England, Faisal's passport was cancelled and he was forced to return to Canada. He was arrested upon arriving in Toronto and charged with multiple counts of fraud. He is currently living with his father in Markham. There is no evidence that Hafsa was aware of Faisal's alleged fraudulent activities.

11 Hafsa has no separation agreement with Faisal, no court ordered support or any firm commitment from him to pay child and spousal support. Davina was Hafsa's only asset. Because all of the proceeds from Davina are currently being held by the Trustee as a result of this application, Hafsa is entirely dependent on Faisal's goodwill and willingness to pay family support. She is currently living with her mother in Richmond Hill.

12 According to Hafsa, she needs her share of the net proceeds from Davina in order to build an independent life with her three children.

Facts

13 The parties entered into an agreed statement of facts that is attached as Appendix 1. It contains all of the relevant facts necessary for the determination of this motion.

Issue

14 The issue that I must determine is whether Hafsa is entitled to 50% of the net proceeds from the sale of Davina or whether she is disentitled to receive this amount because it constitutes a transfer from Faisal to her at undervalue and is therefore void pursuant to s. 96(1)(b)(i) of the *BIA*.

Positions of the Parties

15 The applicant submits that because Faisal was the sole wage earner in the family and Hafsa was a "stay at home" mother earning no income, Faisal "notionally" gifted one-half of the purchase price of Davina to her in order to enable her to acquire a one-half interest in their new home.

16 The applicant further submits that Faisal's "gift" to Hafsa had a fair market value of $359,035 and that Hafsa did not provide Faisal with any consideration for this gift. Accordingly, the gift to Hafsa, which occurred on June 30, 2015, less than one year before Faisal's initial bankruptcy event on June 2, 2016, is a transfer at undervalue pursuant to s. 96(1)(b)(i) of the *BIA*. It is therefore void as against the applicant.

17 Hafsa submits that there was no transfer or gift from Faisal to her when they purchased Davina and took title as joint tenants. She submits that even if there was, Hafsa's domestic services and childcare and her parents' direct financial contribution toward the purchase price of Selwyn and Davina constitute sufficient consideration to support the transfer to her of one-half of the equity in Davina, which was their matrimonial home.

Analysis

18 Section 96(1)(b) of the *BIA* provides as follows:

> **Transfer at undervalue**
>
> 96. (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
>
> . . .
>
> *(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.

19 The applicant submits in its factum that "this application fits squarely within the confines of the ratio" of the decision of Myers J. in *Lee, Re*, 2017 ONSC 388 (Ont. S.C.J.) at para. 16 as follows:

> Section 96 imposes a strict test to remedy non-arm's length transfers among family members. While the statute allows relief using the word "may", in my view, on proof of the requisite facts, relief should be granted at the amount calculated in accordance with the statute, in all but the most exceptional circumstances. This is especially so in the case of a non-arm's length transaction that is attacked within one year... In my view, judgment should be nearly automatic in such case.

20 I disagree that the decision in *Re Lee* applies to this case. There is much to distinguish this case from the case of *Re Lee* . In *Re Lee* , the bankrupt and his spouse were joint tenants of the property in question and severed their joint tenancy by the bankrupt transferring his one-half interest in the property to his spouse for nominal consideration. This left the bankrupt with no interest on title to the property within one year of the initial bankruptcy event. In my view this clearly constituted a deliberate attempt by the bankrupt to defeat his creditors. In this case there is no evidentiary basis for concluding that Faisal was attempting to defeat his creditors when Davina was purchased and held by Hafsa and him as joint tenants. This is a significant difference from the facts in *Re Lee* .

21 I agree with Myers J.'s conclusion in *Re Lee* on the facts of that case. However, I have concluded that his decision does not apply in this case because of the significant differences in the underlying facts.

22 In *Re Lee* , Myers J. acknowledged the discretionary nature of the relief provided for under s. 96 which provides that the court "may" declare a transfer at undervalue void. There is no jurisprudence concerning when it is appropriate to exercise the court's discretion not to declare a transfer at undervalue void under s. 96 of the *BIA*. It is, therefore, helpful to review the jurisprudence that considered the section of the *BIA* that s. 96 replaced when amendments were made to the *BIA* in 2009.

23 Section 96 of the *BIA* replaced the reviewable transaction provision contained in the former s. 100 of the *BIA*. This previous section also gave the court discretion by providing that a court "may" give judgment to the trustee for the difference in the value of the consideration in a reviewable transaction.

24 The relevant provisions of the previous s. 100 provided as follows:

> **Examination of consideration in a reviewable transaction**
>
> **100 (1)** Where a bankrupt sold, purchased, leased, hired, supplied or received property or services in a reviewable transaction within the period beginning on the day that is one year before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included, the court may, on the application of the trustee, inquire into whether the bankrupt gave or received, as the case may be, fair market value in consideration for the property or services concerned in the transaction.
>
> **Judgment for difference**
>
> **(2)** Where the court in proceedings under this section finds that the consideration given or received by the bankrupt in the reviewable transaction was conspicuously greater or less than the fair market value of the property or services concerned in the transaction, the court may give judgment to the trustee against the other party to the transaction, against any other person being privy to the transaction with the bankrupt or against all those persons for the difference between the actual consideration given or received by the bankrupt and the fair market value, as determined by the court, of the property or services concerned in the transaction.
>
> (Emphasis added)

25 The Ontario Court of Appeal in *Standard Trustco Ltd. (Trustee of) v. Standard Trust Co.* (1995), 26 O.R. (3d) 1 (Ont. C.A.) held that granting the remedy under the former s. 100 (2) of the *BIA* was discretionary having regard to factors such as the good faith of the parties, the intention with which the transaction took place and whether fair value was given and received by the parties.

26 The Supreme Court of Canada in *People's Department Stores Ltd. (1992) Inc., Re*, 2004 SCC 68 (S.C.C.) , endorsed the view of the Ontario Court of Appeal in *Standard Trust Co* . and held that "equitable principles guide the exercise of discretion".

27 Major and Deschamps JJ. concluded as follows at paras. 81 and 82 of the Supreme Court's decision in *Peoples Department Stores* :

> 81. The word "may" is found in both ss. 100(1) and 100(2) of the BIA with respect to the jurisdiction of the court. In *Standard Trustco Ltd. (Trustee of) v. Standard Trust Co.* (1995), 26 O.R. (3d) 1 (Ont. C.A.), a majority of the Ontario Court of Appeal held that, even if the necessary preconditions are present, the exercise of jurisdiction under s. 100(1) to inquire into the transaction, and under s. 100(2) to grant judgment, is discretionary. Equitable principles guide the exercise of discretion. We agree.
>
> 82. Referring to s. 100(2) of the BIA, in *Standard Trustco*, *supra*, at p. 23, Weiler J.A. explained that:
>
> > When a contextual approach is adopted it is apparent that although the conditions of the section have been satisfied the court is not obliged to grant judgment. The court has a residual discretion to exercise. The contextual approach indicates that the good faith of the parties, the intention with which the transaction took place, and whether fair value was given and received in the transaction are important considerations as to whether that discretion should be exercised.
>
> We agree with Weiler J.A. and adopt her position; ...

28 In light of this jurisprudence, which I have concluded applies to the exercise of my discretion under s. 96 of the *BIA*, it is not necessary for me to decide whether Hafsa's 50% interest in the equity of Davina resulted from a transfer at undervalue contrary to s. 96(1)(b)(i) of the *BIA*. Even if it did, which I doubt, I would exercise my equitable discretion not to declare her 50% interest in Davina void.

29 I have arrived at this conclusion by taking a contextual approach to the evidence. I find that Faisal and Hafsa were acting in good faith and intended that their joint tenancy in Davina represented the fact that it was their matrimonial home in which they each believed that they held a 50% interest. I find that there was no intention on the part of Faisal to defeat his creditors by taking title to Davina as a joint tenant with Hafsa. In adopting an equitable approach to the exercise of my discretion I have relied upon the following factors in deciding not to declare Hafsa's 50% interest in Davina void:

- Faisal's and Hafsa's good faith;
- The fact that Faisal did not take joint title in Davina to defeat his creditors;
- Hafsa's substantial non-monetary contribution to the family by her hard work managing the household and caring for their children, particularly in light of their special needs child;
- Hafsa's parents' contributions to the purchase price of both of their matrimonial homes;
- Hafsa's and Faisal's honest belief that Hafsa was entitled to a 50% interest in Davina because it was their matrimonial home;
- The fact that Hafsa and her children have no other guaranteed form of financial support and that Davina was her only asset which she needs to carry on an independent life with her children; and
- The fact that the Agreement of Purchase and Sale for Davina was signed by Hafsa in February 2015, well before the one year period preceding Faisal's initial bankruptcy event.

Conclusion

30 For all of these reasons the application is dismissed.

31 The Trustee is hereby ordered to deliver to Hafsa her share of the net proceeds from the sale of Davina within 15 days.

Costs

32 Hafsa is entitled to her costs of this application. If the parties cannot agree on costs they may schedule a 9:30 a.m. attendance with me at which time I will determine the issue of costs. The parties are to provide me with their costs outlines prior to the attendance.

33 I thank counsel for their helpful submissions.

Application dismissed.

Appendix 1

Court File No. CV-16-11610-00CL

ONTARIO SUPERIOR COURT OF JUSTICE COMMERCIAL LIST

BETWEEN:

MERCADO CAPITAL CORPORATION

Applicant

-and-

HAFSA FAISAL QURESHI and POLLARD & ASSOCIATES INC., Trustee in Bankruptcy for the Estate of Faisal Iqbal Qureshi

Respondents

AGREED STATEMENT OF FACTS

The Applicant MERCADO CAPITAL CORPORATION and the Respondent HAFSA FAISAL QURESHI agree to the following facts for the purpose of the hearing of this Application:

1. The Respondent Hafsa Faisal Qureshi ("**Mrs. Qureshi**") is the spouse of Faisal Iqbal Qureshi ("**Mr. Qureshi**"). They were married on December 28, 2001, They have three children together.

2 Mr. Qureshi is the sole owner of a business corporation named Client360 Group Inc. ("Client360").

3. Mrs. Qureshi has no ownership interest in Client360.

4. Throughout their marriage, Mrs. Qureshi has never assisted Mr. Qureshi with any of his business activities.

5. Throughout their marriage, Mrs. Qureshi has not been employed outside the home. Mrs. Qureshi obtained her MBA but did not work outside the house especially after Mr. and Mrs. Qureshi's eldest child became sick with autism and epilepsy.

6. Mr. and Mrs. Qureshi resided together at Mr. Qureshi's parents' house from the date of their marriage until 2011.

7. At some point prior to July 25, 2011, Mr. Qureshi borrowed the sum of $50,000.00 from Mrs. Qureshi's parents. Mr. Qureshi offered to repay the loan prior to purchasing the Selwyn Road property (as defined in paragraph 8). Mrs. Qureshi's parents declined his offer and said he could use the money for the purchase of Selwyn Road.

8. Mr. Qureshi purchased a house municipally known as 278 Selwyn Road ("Selwyn Road") in Richmond Hill on July 25, 2011. Only Mr. Qureshi held registered title to the Selwyn Road property.

9. Mr. Qureshi and Mrs. Qureshi resided at the Selwyn Road property together as husband and wife. This was a matrimonial home.

10. Mrs. Qureshi was responsible for raising the children and the performance of all household responsibilities.

11. Mr. Qureshi mortgaged the Selwyn Road property to Bay Point Financial Services Inc. ("Bay Point") on May 28, 2014 in exchange for a loan of $250,000.00 (the "Second Mortgage") which was fully advanced pursuant to his direction.

12. Mr. Qureshi swore (incorrectly) in an affidavit delivered to Bay Point in connection with the advance of the Second Mortgage and Mr. Qureshi made an incorrect statement of fact on the face of this $250,000 Second Mortgage instrument to the effect the Selwyn Road property was not a matrimonial home on May 28, 2014,

which was absolutely incorrect Selwyn Road was the Qureshi's matrimonial home from its purchase in July of 2011 until June 30, 2015.

13. Mr. Qureshi sold Selwyn Road on June 30, 2015. The net proceeds resulting from the sale, after encumbrances and expenses had been paid, was $372,177.02 (the "Selwyn Road Net Sale Proceeds").

14. On February 18, 2015, Mrs. Qureshi entered into an Agreement of Purchase and Sale (the "APS") on behalf of herself and Mr. Qureshi with a builder for the purchase of a new home municipally described as 55 Davina Circle ("Davina Circle") in Aurora.

15. The APS set out that two refundable deposits (the "Deposits") aggregating $256,250.00 were payable during the first 60 days after the execution of the APS.

16. Mr. Qureshi arranged to have the Deposits paid to the vendor.

17. Mr. Qureshi directed Client360 to pay the Deposits.

18. Client360 directly or indirectly paid the Deposits.

19. The actual amount of Deposits paid was $256,240.00.

20. Mr. and Mrs. Qureshi completed the transaction set out in the APS on June 30, 2015 when they took title to Davina Circle. They took tide to Davina Circle as joint tenants.

21. On closing, the vendor of Davina Circle credited Mr. and Mrs. Qureshi with the Deposits in the amount of $256,240.00.

22. The Selwyn Road Net Sale Proceeds in the amount of $372,177.02 were used to partially pay the purchase price of Davina Circle on June 30, 2015.

23. Mr. and Mrs. Qureshi mortgaged Davina Road and used the borrowed loan proceeds of $1,902,081.04 to partially pay the purchase price of Davina Circle.

24. Just prior to closing, Mr. Qureshi needed the additional sum of $89,654.80 (the "**Shortfall**") in order to complete the purchase.

25. On June 29, 2015, Mrs. Qureshi's parents provided Client360 with two bank drafts, one in the amount of $60,000 in Canadian funds and the other in the amount of $30,000 in US dollars (in order to assist Mr. and Mrs. Qureshi with their purchase of Davina Circle). The Canadian dollar draft ($60,000) was deposited into Client360's Canadian dollar current account and the US dollar draft ($30,000) was deposited into Client360's US dollar bank account

26. On or about June 30, 2015, Mr. Qureshi provided his real estate lawyer with a bank draft drawn on Client360's Canadian dollar current account in the amount of $89,654.80. This amount was used by Mr. and Mrs. Qureshi to cover the Shortfall.

27. The amount of funds used to purchase Davina Circle less the mortgage proceeds was $718,071.82.

28. Bank of Montreal commenced a lawsuit against Mr. Qureshi, Client360 and Mrs. Qureshi (among others) on September 11, 2015 alleging that Mr. Qureshi and Client360 had committed fraud against it

29. In early 2016, the Canadian Finance & Leasing Association circulated a document entitled "Toronto Police Advisory: Fraud & Money Laundering out of the GTA" in which the Toronto Police warned that Mr. Qureshi

and Client360 were individuals "of concern" with respect to "highly sophisticated and organized fraud/ money laundering operations operating out of the Greater Toronto Area".

30. Mercado Capital Corporation commenced a lawsuit against Mr. Qureshi and Client360 (and others) on March 18, 2016 alleging that Mr. Qureshi and Chent360 had committed fraud against it

31. Mercado Capital Corporation sought a Mareva injunction against Mr. Qureshi which Mr. Qureshi consented to.

32 Polaris Leasing Ltd. commenced a lawsuit against Mr. Qureshi and Client360 (and others) on April 14, 2016 alleging that Mr. Qureshi and Client360 had committed fraud against it

33. Mr. Qureshi departed from Canada in March or April of 2016.

34. Mr. Qureshi left Mrs. Qureshi for another woman in March or April of 2016.

35. Mr. and Mrs. Qureshi became separated in March or April of 2016.

36. The date of Mr. Qureshi's initial bankruptcy event was June 2, 2016, when Mercado Capital Corporation had a Bankruptcy Application issued against Mr. Qureshi

37. Mr. Qureshi was adjudged a bankrupt on July 5, 2016.

38. Pollard & Associates Inc. was appointed by the court to act as the trustee for Mr. Qureshi's estate.

39. Pollard & Associates Inc. has admitted the sum of $4,129,284.89 of unsecured debt owed by Mr. Qureshi's estate as at January 24, 2017.

40. Pollard & Associates Inc. has admitted Mercado Capital Corporation's claim of $1,131,133.59.

41. Mrs. Qureshi and Mr. Qureshi's trustee sold the Davina Circle property on November 28, 2016 for a sale price of $2,838,000.00.

42. The net sale proceeds from the sale of Davina Circle was $696,815.74. The sum of $348,407.87 was paid to Mr. Qureshi's estate.

43. The sum of $323,407.87 is being held by the trustee to the credit of the successful party in this Application pursuant to the 2016 Order of Mr. Justice Newbould.

44. In February of 2017, Mr. Qureshi's passport was cancelled and he was forced to return to Canada.

45. Mr. Qureshi was arrested at the airport upon his return to Canada in February of 2017 and charged with multiple counts of fraud over $5,000.00.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

PAPAZIAN HEISEY MYERS
Per: Michael S. Myers
of Counsel for the Applicant

VEENA POHANI & ASSOCIATES
Per: Veena Pohani
of Counsel for the Respondent,
Hafsa Faisal Qureshi

Graphic 1

2

1995 CarswellOnt 932
Ontario Court of Appeal

Standard Trustco Ltd. (Trustee of) v. Standard Trust Co.

1995 CarswellOnt 932, [1995] O.J. No. 3151, 129 D.L.R. (4th) 18,
26 O.R. (3d) 1, 36 C.B.R. (3d) 1, 58 A.C.W.S. (3d) 916, 86 O.A.C. 1

PRICE WATERHOUSE LIMITED (trustee of estate of STANDARD TRUSTCO LIMITED, bankrupt) v. STANDARD TRUST COMPANY and CANADA DEPOSIT INSURANCE CORPORATION

Doherty, Weiler and Abella JJ.A.

Heard: May 2 and 3, 1995
Judgment: October 20, 1995
Docket: Doc. CA C19296

Counsel: *P.S. Lamek, Q.C.*, and *W.E. Pepall*, for appellant Standard Trust Company.
Claude Thompson, Q.C., Michael MacNaughton, and *Ronald Baird*, for appellant Canada Deposit Insurance Corporation.
Steven Sharpe, Jeremy Freedman, and *Sandra Forbes*, for respondent.

Subject: Corporate and Commercial; Insolvency

Appeal from order granted by Farley J. on June 28, 1994 determining various matters prior to trial.

***Doherty J.A.* (dissenting):**

I. Overview

1 This appeal is a further chapter in the ongoing litigation spawned by the demise in the spring of 1991 of Standard Trustco Limited ("Trustco") and its wholly owned subsidiary, Standard Trust Company ("STC").

2 In August of 1990, Trustco, at the urging of various regulatory agencies, injected $25,000,000 in regulatory capital into STC. Unfortunately, the fiscal health of both Trustco and STC deteriorated. In April, 1991, Trustco was petitioned into bankruptcy and Price Waterhouse Limited ("PW") was appointed trustee of the bankrupt estate. On May 2, 1991, a winding up order was made against STC and Ernst & Young was appointed liquidator of STC.

3 PW looked at the dealings between Trustco and STC in August, 1990 and concluded that they amounted to a "reviewable transaction" within the meaning of s. 3 of the *Bankruptcy and Insolvency Act*, S.C. 1992, c. 27 (the "Act"). PW also took the position that Trustco had not received fair market value for the $25,000,000 it had injected into STC. Consequently, PW sought and obtained leave to commence an action under s. 100 of the Act against STC. The reasons of Houlden J.A., sitting as a judge of the Ontario Court (General Division), granting leave to commence the action, are reported at *Canada (Attorney General) v. Standard Trust Co.* (1991), 5 O.R. (3d) 660. The action was commenced by statement of claim dated February 26, 1992. STC defended the action. In December, 1992, Canada Deposit Insurance Corporation ("CDIC"), the principal creditor of STC, was granted leave to intervene in the action.

4 STC, as defendant, brought a motion for summary judgment in the action. In April, 1993, Farley J. provided detailed reasons for dismissing that motion. The reasons of Farley J. are reported at *Standard Trustco Ltd. (Trustee of) v. Standard Trust Co.* (1993), 13 O.R. (3d) 7 (Gen. Div.). STC was refused leave to appeal from that decision. PW

took the position that the reasons of Farley J. on the motion brought by STC finally disposed of several of the issues raised in the action. It moved under rules 20 and 21 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 for an order determining various matters prior to trial.

5 Farley J. accepted the position taken by PW and held:

> For the reasons expressed in my decision released April 20, 1993 [supra], the plaintiff is entitled to the relief requested.

6 The order of Farley J., dated June 28, 1994, provides that:

> STC is a person subject to being a party to a reviewable transaction as defined in the Act (para.1);
>
> PW as trustee is not bound by the conduct of, or equities attaching to, the creditors of Trustco (para.3);
>
> The equitable considerations of laches/acquiesence do not apply in the circumstances (para.4);
>
> The issue to be tried in the action is, whether and to what extent, the fair market value of the consideration received by Trustco was conspicuously less than the fair market value of the property supplied to STC by Trustco (paras. 5 and 6);
>
> If the trial court finds that there was a conspicuous difference in the fair market value of the consideration exchanged between Trustco and STC, PW is entitled, pursuant to s. 100 of the Act, to judgment for the difference so found (para. 2).

7 The order of Farley J. left two issues for trial. Was there a conspicuous difference between the consideration received by Trustco and the fair market value of the assets it transferred to STC, and if there was such a difference, what was the dollar value of that difference?

8 STC and CDIC both appealed from that order and the trial of the s. 100 action awaits the determination of this appeal.

II. Issues

9 Counsel's comprehensive facta and helpful oral arguments have narrowed the appeal to three questions:

> Did Farley J. err in holding that the dealings between Trustco and STC in August 1990, constituted a reviewable transaction within the meaning of s. 3 of the Act?
>
> Assuming the dealings did amount to a reviewable transaction, did Farley J. err in his interpretation of s. 100 of the Act?
>
> Assuming the dealings did amount to a reviewable transaction, and assuming Farley J. properly interpreted s. 100 of the Act, do the terms of his order go beyond the scope of those matters which could be determined by summary procedure prior to trial?

10 The facts underlying this appeal are somewhat complex. I am saved the task of summarizing them by the comprehensive reasons of Farley J. and Houlden J.A., supra, both of which set out the relevant facts.

Issue 1: Did Farley J. err in holding that the exchange of assets between Trustco and STC in August, 1990 was a reviewable transaction within the meaning of s. 3 of the Act?

11 Section 100(1) and s. 100(2) of the Act state:

> 100(1) Where a person who has sold, purchased, leased, hired, supplied or received property or services in a reviewable transaction becomes bankrupt within twelve months of the transaction, the court may, on the application of the trustee, inquire into whether the bankrupt ... received ... fair market value in consideration for the property ... concerned in the transaction.
>
> (2) Where the court in proceedings under this section finds that the consideration given or received by the bankrupt in the reviewable transaction was conspicuously greater or less than the fair market value of the property or services concerned in the transaction, the court may give judgment to the trustee against the other party to the transaction, against any other person being privy to the transaction with the bankrupt or against all those persons for the difference between the actual consideration given or received by the bankrupt and the fair market value, as determined by the court, of the property ... concerned in the transaction.

12 The term "reviewable transaction" is referred to in s. 3 of the Act. That section reads:

> 3.(1) For the purposes of this Act, a person who has entered into a transaction with another person otherwise than at arm's length shall be deemed to have entered into a reviewable transaction.
>
> (2) It is a question of fact whether persons not related to one another within the meaning of section 4 were at a particular time dealing with each other at arm's length.
>
> (3) Persons related to each other within the meaning of section 4 shall be deemed not to deal with each other at arm's length while so related.

13 Section 4 of the Act sets out persons (individuals and corporations) who are to be regarded as related. As STC was wholly owned by Trustco, the two entities are related persons for the purposes of the Act. It follows from s. 3(3) of the Act, that Trustco and STC are deemed not to have dealt with each other at arm's length. It would follow that any transaction between them would be deemed to be a reviewable transaction by s. 3(1) of the Act.

14 The appellants acknowledge that the dealings would have been a reviewable transaction for the purposes of the Act had they involved only STC and Trustco. They submit, however, that the August 1990 transaction involved not only Trustco and STC but also provincial and federal regulators and the CDIC. Mr. Thompson, for CDIC, seeks to draw a distinction between what he terms the transfer of assets between Trustco and STC and the broader transaction within which that transfer occurred. He contends that the applicability of s. 3 of the Act must be assessed by examining the entire transaction and not merely the transfer of assets between STC and Trustco which occurred as part of that larger transaction. Mr. Thompson submits that the transaction in August of 1990 was precipitated by and indeed dictated by the regulators who demanded an immediate injection of $25,000,000 in regulatory capital in exchange for allowing STC to continue to operate as a trust company. He further contends that CDIC regarded the infusion as irrevocable and relied on that infusion in continuing to insure deposits made with STC by members of the public and in undertaking to guarantee part of STC's indebtedness to its clearing bank.

15 In making this argument, Mr. Thompson was careful to avoid reliance on any coercive role played by the regulators and CDIC as somehow placing the transaction beyond the reach of s. 3 of the Act. He stressed that on the approach he urges, the regulators and CDIC received and gave consideration and were in every real sense parties to the overall transaction. He submits that their central participation in the overall transaction rendered it an arm's length transaction and took it outside of s. 3 of the Act.

16 The respondents submit that Houlden J.A. decided this very issue against the appellants on PW's application to commence the action. In the course of granting leave, Houlden J.A. said at p. 664:

> The trustee in bankruptcy is seeking to pursue a serious and substantial claim, a claim which, I have pointed out, meets the procedural requirements of s. 100.

17 One of the requirements in s. 100 is that the transaction be a reviewable transaction.

18 It does not appear from the reasons of Houlden J.A. that the argument advanced here was made before him, and I am prepared to assume that my colleague's reasons do not foreclose this argument. I am, however, satisfied that Mr. Thompson's argument, while attractive, must be rejected. The word "transaction" in s. 3 of the Act has no special meaning and should be given its normal English meaning. The agreements whereby Trustco transferred $25,000,000 to STC in exchange for certain assets owned by STC was "a piece of business" in which property passed between the two entities. It was, therefore, a transaction in the ordinary sense of the word: *Shorter Oxford Dictionary*, Vol. 2, p. 2344. I cannot accept the distinction between a transfer and a transaction urged upon the court by Mr. Thompson. To me, the transfer of assets remains a transaction even though it was part of a broader arrangement which could also be referred to as a transaction. The fact that third parties were instrumental in bringing about the transfer of assets, took or didn't take certain steps as a result of that transfer, and stood to profit or suffer as a result of that transfer in no way alters the essential nature of what happened between Trustco and STC. The appellant's argument comes down to the assertion that a non-arm's length transaction becomes an arm's length transaction when it is driven by non-related third party forces who have a financial or other interest in the transaction between the related parties. I see nothing in s. 3 or s. 4 of the Act which would permit the court to place this gloss on the language of the statute. This was a reviewable transaction and Farley J. did not err in so holding.

Issue 2: Did Farley J. err in his interpretation of s. 100 of the Act?

19 The appellants submit that even if the conditions precedent to the operation of s. 100 existed, the court hearing the action has a discretion under s. 100(1) to decline to make the inquiry requested by the trustee. They also submit that if the court chooses to conduct the s. 100 inquiry, it has a further discretion to refuse to grant the remedy provided for in s. 100(2) even if the trustee establishes all of the factual criteria necessary for the granting of that relief. The appellants contend that Farley J. should have found that either or both discretions existed under s. 100 and that they operated in this case to deny the trustee the relief claimed. Alternatively, the appellants contend that Farley J. should have left it to the trial judge to decide whether the discretion, which they contend is found in s. 100(1) and s. 100(2), should be exercised against PW.

20 Section 100, with the unnecessary words deleted, reads [emphasis added]:

> 100(1) Where a person who has sold ... property ... in a reviewable transaction becomes bankrupt within twelve months of the transaction, *the court may, on the application of the trustee, inquire* into whether the bankrupt ... received ... fair market value in consideration for the property ... concerned in the transaction.
>
> (2) Where the court in proceedings under this section finds that the consideration ... received by the bankrupt in the reviewable transaction was conspicuously ... less than the fair market value of the property ... concerned in the transaction, the *court may give judgment to the trustee* against the other party to the transaction, against any other person being privy to the transaction with the bankrupt or against all those persons for the difference between the actual consideration ... received by the bankrupt and the fair market value, as determined by the court, of the property ... concerned in the transaction.
>
> (3) In making an application under this section, the trustee shall state what in his opinion was the fair market value of the property ... concerned in the transaction and what in his opinion was the value of the actual consideration ... received by the bankrupt in the transaction, and the values on which the court makes any finding pursuant to this section shall be the values so stated by the trustee unless other values are proven.

21 Section 100 creates a cause of action in favour of the trustee. To avail itself of that action, the trustee must establish that:

> (i) the bankruptcy occurred within twelve months of the transaction;

(ii)the defendant was a party to or privy to the transaction;

(iii)the transaction is a reviewable one;

(iv) the consideration received by the bankrupt was conspicuously less than the fair market value of the property sold by the bankrupt.

22 The appellants acknowledge that the first two criteria set out above are met. I have found that Farley J. was correct in holding that the August 1990 transactions constituted a reviewable transaction. The fourth criteria is, of course, as yet undecided and will, if the order of Farley J. stands, be determined by the trial judge.

23 If the trustee succeeds in an action under s. 100, it obtains a money judgment for the difference between the fair market value and the consideration paid by the bankrupt. The judgment may be against any or all defendants who were a party to or privy to the reviewable transaction. In this case, PW in its statement of claim seeks judgment only against STC and the order of Farley J. directs that PW is entitled to judgment against STC for the difference, if any, between the consideration received by the bankrupt and the fair market value of the property. If PW obtains a money judgment against STC, it will become a creditor of STC in the on-going winding up proceedings involving STC.

24 In asserting that the court has a discretion both to entertain a s. 100 action and to refuse to grant judgment even if all of the criteria referred to above are met, the appellants rely on the use of the word "may" in both s. 100(1) and s. 100(2). Relying on s. 3 of the *Interpretation Act*, R.S.C. 1985, c. I-21, the appellants submit that the word "may" must be interpreted as permissive unless from a reading of the section in the context of the entire Act "a contrary intention appears". The appellants submit that no such contrary intention appears in s. 100 of the Act.

25 The interpretation of specific words in a statutory provision must be guided by an appreciation of the purpose underlying the entire section. Section 100 recognizes three self-evident propositions. First, normal market forces do not necessarily operate in a non-arm's length transaction. There is a real chance in such transactions that the consideration given or received will not reflect the fair market value of the property given or received. Second, a party to a non-arm's length transaction who receives less than fair market value suffers a financial loss equal to the difference between the consideration received and the fair market value. The other party to the transaction potentially gains an equivalent benefit. Third, the economic interests of the creditors of the party who suffers a loss as a result of a non-arm's length transaction are potentially harmed by that transaction.

26 Section 100 provide a mechanism whereby the trustee can recover for the benefit of the creditors the economic loss suffered by the bankrupt in the non-arm's length transaction. Recovery is effected by a judgment in the amount of the loss (fair market value less actual consideration received) against the person or persons who received the benefit equivalent to the loss suffered by the bankrupt. The operation of s. 100 does not depend on the legality or propriety of the non-arm's length transaction. Nor is the section concerned with the purpose or motive behind the non-arm's length transaction. It is designed to "balance the books" as between the bankrupt, who suffered the loss, and the other party or parties, who received the benefit.

27 Bearing that purpose in mind, I turn to the language of s. 100. The use of the word "may" in s. 100(1) presents little difficulty. I see no reason why "may" should not be interpreted as permissive. A court is not obliged to inquire into the transaction merely because the trustee brings the application. A court is master of its own process and may refuse to address the merits of an application where to do so would constitute an abuse of the court's process or contravene some other recognized principle whereby a court may properly deny a litigant an inquiry into the merits of a claim.

28 I do not read the reasons of Farley J. (or understand the submissions of PW) as denying any discretion under s. 100(1) of the Act. Farley J. said at p. 38:

> However, as STC pointed out, a bankruptcy court is invested with equitable jurisdiction. A bankruptcy proceeding is a proceeding in equity. A bankruptcy court can and, in appropriate cases, should apply equitable doctrines such as laches. STC submitted that the uncontradicted facts of this case, taken together with equitable principles and appropriate policy considerations, provide clear and ample support for the court to decline to inquire into the transaction pursuant to s. 100 of the Act.

29 In my view, the arguments advanced at pp. 40-43 under the heading "equitable considerations — the conduct of the creditors — acquiesence and laches" were germane to the exercise of the discretion found in s. 100(1). I accept that the conduct of the creditors, and laches or acquiescence by the trustee, could in a given case provide a proper basis upon which a court could refuse to conduct a s. 100(1) inquiry. I also agree with the conclusion of Farley J. that none of those considerations provided a basis upon which a court acting judicially could refuse PW's request for a s. 100(1) inquiry. In this regard, I specifically agree with his conclusion that the creditor's co- operation with Trustco after the funds were injected into STC provides no bar to the trustee seeking relief under s. 100.

30 I turn next to s. 100(2). For convenience, I will repeat the relevant language of that section [emphasis added]:

> (2) Where the court in proceedings under this section finds that the consideration ... received by the bankrupt in the reviewable transaction was conspicuously ... less than the fair market value of the property ... concerned in the transaction, the *court may give judgment to the trustee* against the other party to the transaction, against any other person being privy to the transaction with the bankrupt or against all those persons for the difference between the actual consideration ... received by the bankrupt and the fair market value, as determined by the court, of the property ... concerned in the transaction.

31 The appellants submit that the use of the word "may" in s. 100(2) gives the court a discretion to refuse the remedy provided for in that subsection even where the court is satisfied that the bankrupt received conspicuously less than fair market value in the reviewable transaction. The appellants submit that considerations such as the "good faith" of all the parties to the reviewable transaction and the role played by third parties, particularly regulators, in the transaction must be considered in the exercise of the discretion provided for in s. 100(2).

32 PW submits that no such discretion exists. It relies on *Rustop Ltd. v. White* (1979), (sub nom. *Clarkson Co. v. White*) 102 D.L.R. (3d) 403 (N.S. C.A.) reversing (1979), 36 N.S.R. (2d) 181 (T.D.) [hereinafter referred to as *Clarkson Co.*]. In *Clarkson Co.*, the trial judge had found that the transaction in question was a reviewable transaction which had occurred within twelve months of the bankruptcy. The court also found a conspicuous difference between the consideration received by the bankrupt and the fair market value of the property given up by the bankrupt. Hallet J., however, refused to grant judgment against any of the defendants. He said, at p. 196:

> The wording of s. 78 [now s. 100] indicates that there is a discretion in the Court as to whether the court will give judgment to the Trustee and presumably it is open to the court to look at the whole transaction in determining how the discretion should be exercised.

33 Hallet J. then considered the "whole transaction", emphasizing that it was not fraudulent, did not lead to the bankrupt's insolvency, and was not designed to defeat the interests of creditors. Based on these considerations, he concluded that it would be "unjust" to grant the remedy provided for in s. 100.

34 The Court of Appeal reversed and gave a judgment in favour of the trustee. Hart J.A. said at pp. 410-411 [emphasis added]:

> In my opinion, s. 78 [now s. 100] of the *Bankruptcy Act* was intended to permit the trustee to have reviewable transactions between the bankrupt and persons not dealing at arm's length made within one year of the bankruptcy without adequate consideration set aside. Once all of the conditions have been established as required by the legislation, then, although the remedy is in the permissive form, the Court has a duty to grant some judgment against

> any or all of the persons named in the section so that an asset improperly removed from the company may be restored for the benefit of its creditors. The section of the Act involved does not leave the judge with an unfettered discretion to grant or withhold the remedy on the grounds of fairness to the people concerned but indicates that the trustee has a right to judgment upon satisfying the requirements established by the legislation.
>
> . . . . .
>
> One of the purposes of the *Bankruptcy Act* is to prevent the transfer of assets of a bankrupt to a related persons during the year prior to the bankruptcy without adequate consideration, and when such a transaction has been established it is, in my opinion, the duty of the judge presiding at the hearing to enable the trustee to recover the value of the asset for the benefit of creditors and judgment should be given accordingly.
>
> There is nothing in s. 78, as there is in s. 79 [now s. 101], which says that disposal of an asset of the company must be made at a time when the company is insolvent or made in such a manner as to contribute to the insolvency before that asset can be recovered by the trustee. The only qualification is that the asset be disposed of without consideration to a related person within 12 months immediately prior to the bankruptcy. *I can find in the section no statutory discretion vested in the trial Judge which would permit him to refuse judgment to the trustee on the ground of unfairness. Once the trustee has shown the Court that the transaction falls within the prohibition of s. 78, it is, in my opinion, the duty of the trial judge to give judgment, against the related company or against the directors as being privy to the transaction, or against both.*

35 I agree with the appellants' contention that portions of the above quoted passage do not accord with the language of s. 100. The section does not allow a court to "set aside" reviewable transactions or "restore assets" to the bankrupt company, although a judgment obtained under the section may have a similar effect. Unlike other sections of the Act (e.g. s. 91), s. 100 leaves the transaction in place and provides for a money judgment in favour of the trustee against some or all who are party or privy to the transaction.

36 I also agree with the appellants' submission that it is inappropriate to describe the assets transferred from the bankrupt in a reviewable transaction as having been "improperly removed" from the bankrupt. The mere fact that the transfer was at less than fair market value does not without more render the transaction "improper" in the sense that it is fraudulent or otherwise contrary to law. As indicated above, s. 100 is not concerned with the propriety of the reviewable transaction at the time it occurred but with the recovery, for the benefit of the creditors, of the loss, if any, suffered by the bankrupt as a result of the transaction.

37 I do, however, accept the main thrust of the Court of Appeal's decision in *Clarkson Co.* In my opinion, broad notions of fairness cannot be relied on to deny a trustee its remedy where the trustee has established the criteria required by s. 100. I am also satisfied that considerations which are rendered irrelevant by the very language of s. 100 cannot be relied on to support the exercise of a judicial discretion to refuse the trustee a remedy to which it is otherwise entitled. Unlike other sections of the Act and related statutes, s. 100 is not concerned with whether the transaction was fraudulent, intended to advantage one creditor at the expense of others, or precipitated the bankrupt's insolvency. Parliament chose to define those transactions caught by s. 100 only by reference to the relationship of the parties, the date of the transaction and the loss suffered by the bankrupt as a result of the transaction. To introduce, under the guise of judicial discretion, considerations included by Parliament in other sections, but omitted in s. 100, is not to exercise a judicial discretion, but is instead to judicially amend the legislation by placing limitations on its operation which Parliament did not impose. I am, consequently, in agreement with the Nova Scotia Court of Appeal's conclusion in *Clarkson Co.* in so far as that court held that the reasons advanced by the trial judge did not provide a proper basis upon which he could refuse the s. 100(2) remedy.

38 I do not, however, read the word "may" in s. 100(2) as mandatory. In my view, the word does import a discretionary component in the granting of the remedy provided for in s. 100(2). That discretion is directed at the "target" of the judgment. The court may grant judgment against any or all of the persons referred to in s. 100(2). In exercising that discretion, the court will have regard to the purpose of s. 100 which is to recover the loss suffered by the bankrupt.

That recovery should be at the expense of the person or persons who received the equivalent benefit. Having concluded that the trustee has proved the loss (i.e. that the consideration received was less than fair market value) in addition to the other requirements in s. 100(1), the court must then consider whether any or all of the defendants to the trustee's action received some or all of the benefit equivalent to the loss suffered by the bankrupt in the transaction. If a particular defendant did not receive any benefit, then a court may refuse to grant judgment against that defendant. If the trustee has not sued any of those who reaped that benefit, then a court could properly refuse to grant judgment even though the trustee had established all of the preconditions in s. 100(1) and (2).

39 The appellants have not argued that STC was not a beneficiary of the transaction. The appellants rely on the bona fides of the transaction and the regulatory context in which it took place in submitting that PW should be denied relief under s. 100(2), even if it was deter mined that Trustco received conspicuously less than fair market value in return for the $25,000,000 advanced to STC. With respect to the bona fides of the transaction, the appellants submit that had Trustco not complied with the regulations demand for an additional $25,000,000 in regulatory capital, the regulators would have immediately terminated the operation of STC. Had that occurred, Trustco's very substantial investment in STC ($73,800,000) would have been lost. By injecting the additional $25,000,000, Trustco protected its existing investment and thereby served the interests of its shareholders and creditors. The appellants point out that the injection did not contravene any agreements with existing creditors and was accurately disclosed to the creditors immediately after it was made.

40 The appellants' submissions seem well-founded on the facts. However, in my view, they are relevant only to the valuation of the consideration received by Trustco. The submissions amount to an assertion that when the entirety of the circumstances are considered, Trustco in fact received fair market value for the $25,000,000 it advanced to STC. At the trial of the issue directed by Farley J., STC can adduce evidence of the value received by Trustco. It may attempt to show that the value included not only the value of the property received from STC, but also the value inherent in the opportunity to salvage Trustco's existing large investment in STC. If STC advances this claim, the trial judge will decide, based on the evidence, what value, if any, should be given to this opportunity to salvage Trustco's investment. If, however, the trial judge concludes, after considering all aspects of the valuation question, that Trustco in fact received conspicuously less than fair market value, I cannot read s. 100(2) as allowingthe court to refuse the remedy because Trustco entered into the transaction believing that it got good value and was acting in the best interests of its shareholders and creditors. To so read s. 100(2) would be to replace fair market evaluation with one based on the bankrupt's perception of the commercial efficacy of the transaction.

41 With respect to the regulatory context in which the transaction occurred, the appellants contend that the transaction was part of a solution devised by Trustco and the regulators in an attempt to preserve STC and protect the members of the public who had placed deposits with STC. The appellants argued that broader policy concerns than those which usually dictate commercial transactions were at play in this case, and must be acknowledged when deciding whether to "undo" the transaction by means of a s. 100(2) order. I agree with Farley J. at pp. 39-40 that absent statutory protection, transactions otherwise captured by s. 100(2) are not placed beyond the reach of that section because they were initiated by regulatory agencies with a view to fulfilling their obligation to protect the investing public. As with the argument based on the bona fides of the trans action, I regret this submission as relevant to the valuation exercise required by s. 100(2). It may be that the regulatory context will impact on the assessment of the value received by Trustco. This, too, is a matter to be decided by the trial judge on the basis of the evidence adduced by the parties.

42 In summary, while I agree with the appellant's submission that s. 100(1) and s. 100(2) contain a discretionary component and that the word "may" should be read as permissive, I cannot agree that the discretion found in either section could assist STC.

Issue 3: Was the order made by Farley J. an appropriate exercise of his summary jurisdiction?

43 All of the issues decided by Farley J. on PW's motion were initially placed before him on STC's application for summary judgment. PW relied on the same record that had been before Farley J. on the motion brought by STC.

On that motions, STC, supported by CDIC, took the position that all of the factual and legal questions relevant to those issues could properly be determined on a summary judgment motion. Farley J., at pp. 27-28, after considering the applicable principles, agreed with this submission. Unfortunately for STC and CDIC, his determination of those issues was unfavourable to them.

44 It seems passing strange that STC and CDIC would now take the position that Farley J. should not have decided the very issues they asked him to decide on their motion for summary judgment. I cannot accept this submission. In rejecting it, however, I do not rely on any notion of estoppel. In my view, save for the issues reserved for the trial judge, there are no material, factual, or legal issues in dispute and the summary procedures in rules 20 and 21 provided an appropriate means whereby the issues which required a full trial could be limited and defined.

III. Conclusion

45 I would dismiss the appeal with costs to PW in any event of the cause.

***Weiler J.A. (Abella J.A.* concurring):**

46 Trustco made a capital injection worth $25,000,000 into STC, a related company, and received subordinated debt and common shares of STC in exchange. Within one year of this transaction Trustco went bankrupt. Non-arm's length dealings between related companies are deemed to be reviewable under ss. 3 and 4 of the *Bankruptcy Act*, R.S.C. 1985, c. B-3 (now the *Bankruptcy and Insolvency Act*, S.C. 1992, c. 27). Pursuant to s. 100(1) of the Act, the court "may" inquire into the transaction at the request of the trustee. If the inquiry proceeds and a "conspicuous" difference is revealed between the amount STC received and the fair market value of the property STC gave, then, under s. 100(2), the court "may" order STC to make up the difference. According to s. 100(3), the values on which the court makes a decision as to whether the transaction took place at fair market value "shall" be the values stated by the trustee in bankruptcy unless other values are proven.

47 The issue in this appeal is whether Farley J., the motions judge, correctly interpreted s. 100, and more particularly, s. 100(2) of the Act, when he declared that if there was a conspicuous difference in the fair market value received by Trustco, the trustee was entitled to judgment for the difference against STC and that there was no discretion to refuse to make the order.

48 The appellant, STC, and the intervenor, CDIC, submit that under s. 100(1), the court has a discretion whether to inquire into this transaction and that no inquiry should take place. If the inquiry proceeds and a significant difference is found between what STC gave Trustco and the $25,000,000 STC received, it is submitted that under s. 100(2) the court has a discretion as to whether or not to grant a remedy against STC.

49 The respondent, PW, acknowledges that a discretion could exist under s. 100(1), but submits that the inquiry under s. 100(1) is proper in this case. If the inquiry is allowed to proceed and the conditions set out in s. 100(2) are satisfied, PW submits that the court is obliged to grant judgment in favour of the trustee. PW's position is that the word "may" in s. 100(2) is not discretionary. Once the conditions of the section have been met, namely, that there has been a transaction between the bankrupt and persons not dealing at arm's length, made within one year of the bankruptcy, and that it is conspicuous or obvious that fair market value was not given or received by the bankrupt for the property, the court must grant judgment in favour of the trustee for the amount of the difference.

Should an inquiry be conducted under s. 100(1)?

50 I have had the benefit of reading the reasons of Doherty J.A. He is of the opinion that the word "may" in s. 100(1) does give the court a discretion whether to conduct an inquiry or not, and that Farley J., the motions judge, recognized that he had such a discretion. In deciding whether the discretion should be exercised, Doherty J.A. agrees with Farley J. that the intention with which the transaction was done and the legality of the transaction were irrelevant considerations. Rather, Doherty J.A. would recognize a discretion not to allow the ac tion to proceed under s. 100(1) only if (a) the

creditors of Trustco had given their informed consent to the transaction before it occurred, (b) if the trustee had been guilty of laches in pursuing a remedy against STC, or (c) if to allow the inquiry to proceed would be an abuse of the court's process.

51 I agree with Doherty J.A.'s conclusion that the exercise of discretion under s. 100(1) would include equitable considerations. While I see no need to say that only some equitable considerations may be considered and not others, I am of the opinion that s. 100(1) is not the main focus of this appeal. STC's motion for dismissal of the proceeding commenced against it by PW was denied. STC was also denied leave to appeal to the Divisional Court from that interlocutory decision. This court's interpretation of s. 100(1) cannot, therefore, result in the inquiry being stopped. If I am wrong in this conclusion I would nevertheless conclude that the court's discretion to allow the inquiry to go ahead under s. 100(1) was properly exercised in this case. STC and the intervenor CDIC take the position that because a regulatory government body was involved in the transaction it should be exempt from review; I do not agree.

Was the order made by Farley J. an appropriate exercise of his summary jurisdiction?

52 The motion before Farley J. which forms the subject of this appeal was a cross-motion by PW to obtain a declaration that PW was entitled to summary judgment if the court found there was a conspicuous difference in the fair market value of the consideration exchanged between Trustco and STC. Farley J. granted the declaration. This was a final determination of the issue and is therefore properly before this court. It is up to this court to determine whether Farley J. properly exercised his jurisdiction in granting summary judgment.

53 Where there has been a motion and cross-motion for summary judgment under r. 20.04 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, the court is not bound to make a determination as to who succeeds in the law suit. The request of each party for summary judgment must be looked at independently of the order. If a party is entitled to summary judgment it must be on the basis that there is no genuine issue for trial, not because the other party has sought reciprocal relief: *Royal Bank v. Cadillac Fairview/JMB Properties* (1995), 21 O.R. (3d) 783 (C.A.); *T.F.P. Investments Inc. (Trustee of) v. Beacon Realty Co.* (1994), (sub nom. *T.F.P. Investments Inc. Estate v. Beacon Realty Co.*) 17 O.R. (3d) 687 (C.A.). It is the court, not the parties, that must be satisfied that there is no genuine issue for trial. On an appeal arising in these circumstances this court is entitled to reach its own conclusions as to which issues raise the need for trial and which do not: *Royal Bank v. Cadillac Fairview*, supra, at p. 786. To decide this question it is necessary to make brief reference to the facts.

54 Trustco's injection of capital into STC was made at the behest of the Superintendent of Financial Institutions (the "Regulator"), acting with his statutory mandate under the *Loan and Trust Corporations Act*, R.S.O. 1990, c. L-25. Following the capital injection, which occurred in August, 1990, the banks and other financial institutions which had lent Trustco money executed an agreement with Trustco in November, 1990 which allowed them to make demand for payment against Trustco on a day-to-day basis. If demand had been made at this time, the lenders would have faced potentially large losses. If, however, the capital injection was sufficient to enable STC to carry on business, Trustco and, by extension, the lenders would benefit. They took a wait and see approach. Also, in November, 1990, CDIC entered into an agreement with the Canadian Imperial Bank of Commerce ("CIBC"), one of Trustco's lenders, whereby in return for CIBC acting as STC's clearing agent, certain of the obligations of STC to CIBC were guaranteed by CDIC. One of the purposes of this agreement was to permit Trustco to continue to attempt to restructure STC's affairs. The other creditors of Trustco were aware of CDIC's guarantee and it enured to their benefit. They chose not to petition Trustco into bankruptcy until April, 1991 when, it would appear, they were refused the terms they wanted in exchange for their cooperation in restructuring STC's affairs. When Trustco went into bankruptcy shortly thereafter, STC was put into liquidation under the *Winding-up Act*, R.S.C. 1985, c. W-11.

55 CDIC insures deposits made by individuals with a trust company to a limited amount, and pursuant to that insurance, CDIC has paid out millions of dollars in claims to the depositors of STC. CDIC has a claim against STC for the amount it has paid on its behalf. If PW, the trustee in bankruptcy of Trustco, is found to be entitled to an order against STC for any difference in fair market value concerning the transaction in question, STC will have fewer assets

to which CDIC can look to recoup the money it has paid out in claims. Inasmuch as Trustco's creditors had the benefit of CDIC's intervention and efforts to save their investment in STC, CDIC takes the position that the trustee should not now seek to review the transaction. It is for this reason that CDIC was so anxious to have this proceeding terminated.

56 In granting PW's motion, Farley J. applied *Rustop Ltd. v. White* (1979), (sub nom. *Clarkson Co. v. White*) 102 D.L.R. (3d) 403 (N.S. C.A.), wherein it was held that once the conditions of s. 100(2) have been satisfied, the court has no discretion but must grant judgment. Farley J. was of the view that equitable considerations, such as the bona fides of the transaction, or the acquiescence of the creditors, had no role to play in determining whether an order should be made under s. 100(2). The question of whether Farley J. exercised his jurisdiction appropriately in making a declaration by way of summary judgment is largely dependent on whether his interpretation of s. 100(2) is correct.

Where the conditions of s. 100(2) have been satisfied, does the court have a discretion as to whether to grant judgment?

57 For ease of reference s. 100 is reproduced below [emphasis added]:

> 100.(1) Where a person who has sold, purchased, leased, hired, supplied or received property or services in a reviewable transaction becomes bankrupt within twelve months of the transaction, the court *may*, on the application of the trustee, inquire into whether the bankrupt gave or received, as the case may be, fair market value in consideration for the property or services concerned in the transaction.
>
> (2) Where the court in proceedings under this section finds that the consideration given or received by the bankrupt in the reviewable transaction was conspicuously greater or less than the fair market value of the property or services concerned in the transaction, the court *may* give judgment to the trustee against the other party to the transaction, against any other person being privy to the transaction with the bankrupt or against all those persons for the difference between the actual consideration given or received by the bankrupt and the fair market value, as determined by the court, of the property or services concerned in the transaction.
>
> (3) In making an application under this section, the trustee shall state what in his opinion was the fair market value of the property or services concerned in the transaction and what in his opinion was the value of the actual consideration given or received by the bankrupt in the transaction, and the values on which the court makes any finding pursuant to this section *shall* be the values so stated by the trustee unless other values are proven.

58 By virtue of s. 3(1) of the *Interpretation Act*, R.S.C. 1985, c. I-21, the expression "may" is to be construed as permissive unless a contrary intention appears. I do not disagree with the proposition that in certain circumstances the word "may" in a statute must be taken to mean "shall". But where, as here, the word "may" as well as the word "shall" are used within s. 100 the presumption that "may" is intended to be discretionary is strengthened: *Re Nova Scotia (Labour Relations Board)*, (sub nom. *Smith & Rhuland Ltd. v. R.*) [1953] 3 D.L.R. 690 (S.C.C.) at p. 692. In addition, consistency of expression requires that the same words used within a section be given the same meaning: *Driedger on the Construction of Statutes*, 3rd ed. (Toronto: Butterworths, 1994) at p. 163. Once equitable considerations are found to be relevant with respect to s. 100(1), as Doherty J.A. has found, consistency of interpretation requires, in my opinion, that equitable considerations be taken into account under s. 100(2).

59 Section 100(2) states in part "the court *may* give judgment to the trustee against the other party to the transaction, against any other person being privy to the transaction with the bankrupt or against all those persons" [emphasis added]. If, as Doherty J.A. says, the word "may" is to be interpreted as conferring a discretion on the court with respect to whether to grant judgment "against any other party to the transaction", *i.e.* privies, then consistency requires that it must also be interpreted so as to confer a discretion whether to grant judgment with respect to "the other party to the transaction". Recognition that there is a discretion with respect to the "other party" is a recognition that there is a discretion not to grant judgment at all.

60 I do not think that it must follow that because the equitable considerations mentioned in other sections of the Act dealing with the disposition of property by a bankrupt within a short time prior to bankruptcy are not specifically

mentioned in s. 100 it is an inappropriate exercise of judicial discretion to consider them in interpreting s. 100. If, however, one were to adopt this line of reasoning, it would be equally correct to say that a consideration which has been specifically excluded in another section should not be excluded in interpreting s. 100(2) in the absence of a statutory direction to do so. For example, s. 96(2) specifically excludes from consideration evidence of pressure by a creditor for repayment, if the effect is to create a preference. By contrast, s. 100(2) does not specifically exclude from consideration evidence of pressure or indeed of any of the circumstances surrounding the transaction. There would therefore be no reason to exclude from consideration any evidence of the circumstances surrounding the transaction, absent a statutory direction to do so.

61 It is a general rule of interpretation that words having a general meaning include the specific: *Driedger*, supra, at pp. 29 and 211. The effect of applying this rule is that the general discretion granted by the use of the word "may" in s. 100(s) includes the more narrow specific discretion contained in other provisions of the Act where there has been a questionable disposition of property by the bankrupt.

62 It is possible that the use of the word "may" in s. 100 is not meant to be either permissive or imperative, but is merely used to indicate that the court is empowered to do something which, otherwise, it would be without power to do. In such cases the question of whether or not the Legislature intended the power to be exercised (where the conditions prescribed for the exercise of the power are met) is an open one to be determined having regard to the context of the legislation in question: See *Falconbridge Nickel Mines Ltd. v. Ontario (Minister of Revenue)* (1981), 121 D.L.R. (3d) 403 (Ont. C.A.) per Thorson J.A., delivering the judgment of the court, at p. 408.

63 When regard is had to other sections of the Act where a bankrupt has disposed of property within a short time of going bankrupt, e.g., a preference (ss. 95-96), the transaction has been allowed to stand where the bona fides of the parties is shown. This is so even when the transaction is between related parties (s. 96(3)). Similarly, although no specific discretion is contained within s. 101, which deals with the paying of a dividend when a company has insufficient assets to meet its liabilities, the interpretation given to s. 101 in *Telsten Services Ltd., Re* (1981), 39 C.B.R. (N.S.) 68 (Ont. S.C.), indicates that the intention and bona fides of the directors would appear to be a relevant consideration in determining whether the payment will be considered to be dividend. Section 91(1) declares that any settlement of property is void against the trustee if the settlor becomes bankrupt within one year after the date of the settlement. Section 91(3)(*b*) states that the section does not extend to a settlement made in good faith and for valuable consideration.

64 It is instructive to note that s. 91(3)*b*) does not speak of fair market value but of valuable consideration. "[v]aluable consideration in the sense of the law may consist in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility given, suffered, or undertaken by the other.": *Currie v. Misa* (1875), L.R. 10 Ex. 153, 1 App. Cas. 554 (H.L.), quoted in *Fleming v. Bank of New Zealand*, [1900] A.C. 577 (P.C.) at p. 586. Property without a market value can nevertheless have a very real value to the owner: *Brinkos v. Brinkos* (1989), 69 O.R. (2d) 225 (Ont. C.A.) at p. 230. Fair value can be used to arrive at a value for a right which does not have a fair market value because it cannot be transferred. Fair value is a notional concept influenced by the nature of the property and the circumstances giving rise to the transaction. While fair value includes fair market value, other values included are investment value, value to owner, and liquidation value. Fair value allows adjustments to be made to recognize internal or external financing, liquidity discounts, and the reasonable expectations of the parties: see Cole, S., "Case Comment *Brinkos v. Brinkos* and the Concept of Value to Owner" (1990), 6 C.F.L.Q. 227 at p. 232. In a similar vein it seems that s. 91(3) of the Act recognizes that in deciding whether the settlement provisions apply, good faith and the receipt of valuable consideration, albeit not necessarily fair market value, are to be taken into account.

65 The modern approach to the interpretation of statutes is a contextual one: *Driedger on the Construction of Statutes*, 3rd ed. (Toronto: Butterworths, 1994) at p. 131, adopted with approval from the earlier edition of Driedger by the Supreme Court in *R. v. S. (S.)*, [1990] 2 S.C.R. 254 at p. 275. Context, as defined by Viscount Simonds in *Attorney General v. Prince Ernest Augustus of Hanover*, [1957] A.C. 436, at p. 461, includes other enacting provisions of the same statute.

66 When a contextual approach is adopted it is apparent that although the conditions of the section have been satisfied the court is not obliged to grant judgment. The court has a residual discretion to exercise. The contextual approach indicates that the good faith of the parties, the intention with which the transaction took place, and whether fair value was given and received in the transaction are important considerations as to whether that discretion should be exercised.

67 After taking into account the context, the court must adopt an interpretation that is appropriate. "An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its promotion of the legislative purpose; and (c) its acceptability, that is, the outcome is reasonable and just.": *Driedger*, supra, at p. 131.

68 I agree that generally the purpose underlying s. 100 is a recognition that when normal market forces do not operate, there is a loss to the bankrupt company and, as a result, the interests of creditors suffer. Here, however, Trustco's lenders knew in advance that Trustco's original $74,000,000 investment in STC was an investment in an industry which is regulated in the public interest for the protection of depositors and that normal market forces are not allowed to operate without regard to that interest. They were also aware that Trustco's $25,000,000 injection of capital into STC at the behest of the Regulator could result in their interests being enhanced if Trustco's already substantial investment in STC was to be saved. Consideration of these facts would not, in my opinion, offend the purpose of the section because those concerned knew at the outset that market forces would not be allowed to operate free from constraint. Conversely, I do not see how the regulatory context can be valued in determining the fair market value received by Trustco. How would one value, for example, CDIC's role in keeping STC going and hence in increasing or preserving the expectation and hope of all those concerned that STC would be able to work itself out of its capital difficulties? The willing purchaser in a fair market value situation is not concerned with the expectation of the parties but only with the value of the assets. If the regulatory context is to be considered, and in my opinion, a reasonable and just outcome requires that it be considered, it should be at the stage when the court is deciding whether to grant judgment to the trustee. At that stage the court will know that there is a con spicuous difference in the fair market value of the property given and received by the bankrupt. In deciding whether to exercise its discretion to grant judgment to the trustee it would then be appropriate for the court to consider the good faith of the parties, their intention, and whether fair value has been given for the property.

69 The wording of s. 100 strongly suggests that ordinarily fair market value is to be used to determine whether judgment should be granted to the trustee. That is as it should be. I am, however, of the view that the court is left with a residual discretion to decide whether or not to grant judgment based on equitable principles such as the ones I have mentioned. Clearly the onus of raising those equitable considerations and proving that they apply to the particular case must be borne by the party asserting them. In my opinion Farley J. erred in his interpretation of s. 100(2) of the Act by not recognizing that s. 100(2) confers a discretion on the courts which is to be exercised on the basis of equitable considerations.

Should summary jurisdiction have been granted?

70 PW is not entitled to a declaration that it is automatically entitled to judgment if the court finds that there was a conspicuous difference in the fair market value of the consideration exchanged between Trustco and STC as a result of the transaction injecting capital into STC. Farley J. erred in granting summary judgment to this effect. He should have dismissed PW's motion for such a declaration.

71 I do not agree with the declaration that the equities attaching to the creditors of Trustco are irrelevant. I regard the question of laches/acquiescence as an open one which has relevance to the interpretation of both s. 100(1) and s. 100(2). Adopting a contextual approach leads me to conclude that other equitable considerations such as the good faith of the parties, the intention with which the transaction was done, and whether fair value was given or received by the bankrupt, should be considered by the court in deciding whether to exercise its residual discretion under s. 100(2). I agree that an issue to be tried in the action is whether and to what extent the fair market value of the consideration received by Trustco was conspicuously less than the fair market value of the property given to STC by Trustco. The trial should

not, however, be limited to this issue. There is, in addition, an issue to be tried as to whether the court should exercise the power it has to order STC to pay Trustco any difference in fair market value even if it finds that the consideration received by Trustco was significantly less.

72 The application of the interpretation of s. 100(2) to the facts of this case is, in my opinion, a matter best left for trial after a determination of values has been made.

Conclusion

73 I would therefore allow the appeal to the extent of varying the order of Farley J. so as to delete paras. 2, 3 and 4. I would amend para.5, which orders that "there is a genuine issue for trial that the fair market value of the consideration received by Trustco was conspicuously less than the fair market value of the property it supplied to STC pursuant to the Transaction", by adding the words, "and a genuine issue for trial as to whether the court should exercise its power to grant judgment against STC having regard to equitable considerations." I would amend para. 6 in similar fashion.

74 The appellant should be entitled to the costs here and below in any event of the cause. There shall be no costs of the intervenor.

Appeal allowed.

3

2004 SCC 68, 2004 CSC 68
Supreme Court of Canada

People's Department Stores Ltd. (1992) Inc., Re

2004 CarswellQue 2862, 2004 CarswellQue 2863, 2004 SCC 68, 2004 CSC 68, [2004] 3 S.C.R. 461, [2004] S.C.J. No. 64, 134 A.C.W.S. (3d) 548, 244 D.L.R. (4th) 564, 326 N.R. 267 (Eng.), 326 N.R. 267 (Fr.), 49 B.L.R. (3d) 165, 4 C.B.R. (5th) 215, J.E. 2004-2016, REJB 2004-72160

In the Matter of the Bankruptcy of Peoples Department Stores Inc./Magasins à rayons Peoples inc.

Caron Bélanger Ernst & Young Inc., in its capacity as Trustee to the bankruptcy of Peoples Department Stores Inc./Magasins à rayons Peoples inc. (Appellant) v. Lionel Wise, Ralph Wise and Harold Wise (Respondents) and Chubb Insurance Company of Canada/Compagnie d'assurance Chubb du Canada (Respondent)

Iacobucci,* Major, Bastarache, Binnie, LeBel, Deschamps, Fish JJ.

Heard: May 11, 2004
Judgment: October 29, 2004
Docket: 29682

Proceedings: affirming *People's Department Stores Ltd. (1992) Inc., Re* (2003), 2003 CarswellQue 145, (sub nom. *Peoples Department Stores Inc. (Trustees of) v. Wise*) 224 D.L.R. (4th) 509, [2003] R.J.Q. 796, 41 C.B.R. (4th) 225 (C.A. Que.); reversing *People's Department Stores Ltd. (1992) Inc., Re* (1998), (sub nom. *Peoples Department Stores Inc./Magasin à rayons Peoples inc. (Syndic de)*) [1999] R.R.A. 178, 1998 CarswellQue 3442, 23 C.B.R. (4th) 200 (C.S. Que.)

Counsel: Gerald F. Kandestin, Gordon Kugler, Gordon Levine for Appellant
Éric Lalanne, Martin Tétreault for Respondents, Lionel Wise, Ralph Wise, Harold Wise
Ian Rose, Odette Jobin-Laberge for Respondent, Chubb Insurance Company of Canada

Subject: Corporate and Commercial; Insolvency; Income Tax (Federal)

APPEAL by bankruptcy trustee from judgment reported at *People's Department Stores Ltd. (1992) Inc., Re* (2003), 2003 CarswellQue 145, (sub nom. *Peoples Department Stores Inc. (Trustees of) v. Wise*) 224 D.L.R. (4th) 509, [2003] R.J.Q. 796, 41 C.B.R. (4th) 225 (C.A. Que.), allowing appeal by directors of bankrupt corporation from judgment allowing trustee's motion to recover funds of corporation and finding directors personally liable.

POURVOI du syndic de faillite à l'encontre de l'arrêt publié à *People's Department Stores Ltd. (1992) Inc., Re* (2003), 2003 CarswellQue 145, (sub nom. *Peoples Department Stores Inc. (Trustees of) v. Wise*) 224 D.L.R. (4th) 509, [2003] R.J.Q. 796, 41 C.B.R. (4th) 225 (C.A. Qué), qui a accueilli le pourvoi des administrateurs d'une société en faillite à l'encontre du jugement qui avait accueilli la requête en recouvrement des fonds de la société présentée par le syndic et condamné personnellement les administrateurs.

***Major, Deschamps JJ.*:**

I. Introduction

1 The principal question raised by this appeal is whether directors of a corporation owe a fiduciary duty to the corporation's creditors comparable to the statutory duty owed to the corporation. For the reasons that follow, we

conclude that directors owe a duty of care to creditors, but that duty does not rise to a fiduciary duty. We agree with the disposition of the Quebec Court of Appeal. The appeal is therefore dismissed.

2 As a result of the demise in the mid-1990s of two major retail chains in eastern Canada, Wise Stores Inc. ("Wise") and its wholly-owned subsidiary, Peoples Department Stores Inc. ("Peoples"), the indebtedness of a number of Peoples' creditors went unsatisfied. In the wake of the failure of the two chains, Caron Bélanger Ernst & Young Inc., Peoples' trustee in bankruptcy (the "trustee"), brought an action against the directors of Peoples. To address the trustee's claims, the extent of the duties imposed by s. 122(1) of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 ("CBCA"), upon directors with respect to creditors must be determined; we must also identify the purpose and reach of s. 100 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA").

3 In our view, it has not been established that the directors of Peoples violated either the fiduciary duty or the duty of care imposed by s. 122(1) of the CBCA. As for the trustee's submission regarding s. 100 of the BIA, we agree with the Court of Appeal that the consideration received in the impugned transactions was not "conspicuously" less than fair market value. The BIA claim fails on that basis.

II. Background

4 Wise was founded by Alex Wise in 1930 as a small clothing store on St-Hubert Street in Montreal. By 1992, through expansion effected by a mix of internal growth and acquisitions, it had become an enterprise operating at 50 locations with annual sales of approximately $100 million, and it had been listed on the Montreal Stock Exchange in 1986. The stores were, for the most part, located in urban areas in Quebec. The founder's three sons, Lionel, Ralph and Harold Wise (the "Wise brothers"), were majority shareholders, officers, and directors of Wise. Together, they controlled 75 percent of the firm's equity.

5 In 1992, Peoples had been in business continuously in one form or another for 78 years. It had operated as an unincorporated division of Marks & Spencer Canada Inc. ("M & S") until 1991, when it was incorporated as a separate company. M & S itself was wholly owned by the large British firm, Marks & Spencer plc. ("M & S plc."). Peoples' 81 stores were generally located in rural areas, from Ontario to Newfoundland. Peoples had annual sales of about $160 million, but was struggling financially. Its annual losses were in the neighbourhood of $10 million.

6 Wise and Peoples competed with other chains such as Canadian Tire, Greenberg, Hart, K-Mart, M-Stores, Metropolitan Stores, Rossy, Woolco and Zellers. Retail competition in eastern Canada was intense in the early 1990s. In 1992, M-Stores went bankrupt. In 1994, Greenberg and Metropolitan Stores followed M-Stores into bankruptcy. The 1994 entry of Wal-Mart into the Canadian market, with its acquisition of over 100 Woolco stores from Woolworth Canada Inc., exerted significant additional competitive pressure on retail stores.

7 Lionel Wise, the eldest of the three brothers and Wise's executive vice-president, had expressed an interest in acquiring the ailing Peoples chain from M & S as early as 1988. Initially, M & S did not share Wise's interest for the sale, but by late 1991, M & S plc., the British parent company of M & S, had decided to divest itself of all its Canadian operations. At this point, M & S incorporated each of its three Canadian divisions to facilitate the anticipated divestiture thereof.

8 The new-found desire to sell coincided with Wise's previously expressed interest in acquiring its larger rival. Although M & S had initially hoped to sell Peoples for cash to a large firm in a solid financial condition, it was unable to do so. Consequently, negotiations got underway with representatives of Wise. A formal share purchase agreement was drawn up in early 1992 and executed in June 1992, with July 16, 1992 as its closing date.

9 Wise incorporated a company, 2798832 Canada Inc., for the purpose of acquiring all of the issued and outstanding shares of Peoples from M & S. The $27- million share acquisition proceeded as a fully leveraged buyout. The portion of the purchase price attributable to inventory was discounted by 30 percent. The discount was designed to inject equity into Peoples in the fiscal year following the sale and to make use of some of the tax losses that had accumulated in prior years.

10 The amount of the down payment due to M & S at closing, $5 million, was borrowed from the Toronto Dominion Bank (the "TD Bank"). According to the terms of the share purchase agreement, the $22-million balance of the purchase price would be carried by M & S and would be repaid over a period of eight years. Wise guaranteed all of 2798832 Canada Inc.'s obligations pursuant to the terms of the share purchase agreement.

11 To protect its interests, M & S took the assets of Peoples as security (subject to a priority in favour of the TD Bank) and negotiated strict covenants concerning the financial management and operation of the company. Among other requirements, 2798832 Canada Inc. and Wise were obligated to maintain specific financial ratios, and Peoples was not permitted to provide financial assistance to Wise. In addition, the agreement provided that Peoples could not be amalgamated with Wise until the purchase price had been paid. This prohibition was presumably intended to induce Wise to refinance and pay the remainder of the purchase price as early as possible in order to overcome the strict conditions imposed upon it under the share purchase agreement.

12 On January 31, 1993, 2798832 Canada Inc. was amalgamated with Peoples. The new entity retained Peoples' corporate name. Since 2798832 Canada Inc. had been a wholly-owned subsidiary of Wise, upon amalgamation the new Peoples became a subsidiary directly owned and controlled by Wise. The three Wise brothers were Peoples' only directors.

13 Following the acquisition, Wise had attempted to rationalize its operations by consolidating the overlapping corporate functions of Wise and Peoples, and operating as a group. The consolidation of the administration, accounting, advertising and purchasing departments of the two corporations was completed by the fall of 1993. As a consequence of the changes, many of Wise's employees worked for both firms but were paid solely by Wise. The evidence at trial was that because of the tax losses carried-forward by Peoples, it was advantageous for the group to have more expenses incurred by Wise, which, if the group was profitable as a whole, would increase its after-tax profits. Almost from the outset, the joint operation of Wise and Peoples did not function smoothly. Instead of the expected synergies, the consolidation resulted in dissonance.

14 After the acquisition, the total number of buyers for the two companies was nearly halved. The procurement policy at that point required buyers to deal simultaneously with suppliers on behalf of both Peoples and Wise. For the buyers, this nearly doubled their administrative work. Separate invoices were required for purchases made on behalf of Wise and Peoples. These invoices had to be separately entered into the system, tracked and paid.

15 Inventory, too, was separately recorded and tracked in the system. However, the inventory of each company was handled and stored, often unsegregated, in shared warehouse facilities. The main warehouse for Peoples, on Cousens Street in Ville St-Laurent, was maintained for and used by both firms. The Cousens warehouse saw considerable activity, as it was the central distribution hub for both chains. The facility was open 18 hours a day and employed 150 people on two shifts who handled a total of approximately 30,000 cartons daily through 20 loading docks. It was abuzz with activity.

16 Before long, the parallel bookkeeping combined with the shared warehousing arrangements caused serious problems for both Wise and Peoples. The actual situation in the warehouse often did not mirror the reported state of the inventory in the system. The goods of one company were often inextricably commingled and confused with the goods of the other. As a result, the inventory records of both companies were increasingly incorrect. A physical inventory count was conducted to try to rectify the situation, to little avail. Both Wise and Peoples stores experienced numerous shipping disruptions and delays. The situation, already unsustainable, was worsening.

17 In October 1993, Lionel Wise consulted David Clément, Wise's (and, after the acquisition, Peoples') vice-president of administration and finance, in an attempt to find a solution. In January 1994, Clément recommended and the three Wise brothers agreed that they would implement a joint inventory procurement policy (the "new policy") whereby the two firms would divide responsibility for purchasing. Peoples would make all purchases from North American suppliers and Wise would, in turn, make all purchases from overseas suppliers. Peoples would then transfer to Wise what it had

purchased for Wise, charging Wise accordingly, and vice versa. The new policy was implemented on February 1, 1994. It was this arrangement that was later criticized by certain creditors and by the trial judge.

18 Approximately 82 percent of the total inventory of Wise and Peoples was purchased from North American suppliers, which inevitably meant that Peoples would be extending a significant trade credit to Wise. The new policy was known to the directors, but was neither formally implemented in writing nor approved by a board meeting or resolution.

19 On April 27, 1994, Lionel Wise outlined the details of the new policy at a meeting of Wise's audit committee. A partner of Coopers & Lybrand was M & S's representative on Wise's board of directors and a member of the audit committee. He attended the April 27th meeting and raised no objection to the new policy when it was introduced.

20 By June 1994, financial statements prepared to reflect the financial position of Peoples as of April 30, 1994 revealed that Wise owed more than $18 million to Peoples. Approximately $14 million of this amount resulted from a notional transfer of inventory that was cancelled following the period's end. M & S was concerned about the situation and started an investigation, as a result of which M & S insisted that the new procurement policy be rescinded. Wise agreed to M & S's demand but took the position that the former procurement policy could not be reinstated immediately. An agreement was executed on September 27, 1994, effective July 21, 1994, and it provided that the new policy would be abandoned as of January 31, 1995. The agreement also specified that the inventory and records of the two companies would be kept separate, and that the amount owed to Peoples by Wise would not exceed $3 million.

21 Another result of the negotiations was that M & S accepted an increase in the amount of the TD Bank's priority to $15 million and a new repayment schedule for the balance of the purchase price owed to M & S. The parties agreed to revise the schedule to provide for 37 monthly payments beginning in July 1995. Each of the Wise brothers also provided a personal guarantee of $500,000 in favour of M & S.

22 In September 1994, in light of the fragile financial condition of the companies and the competitiveness of the retail market, the TD Bank announced its intention to cease doing business with Wise and Peoples as of the end of December 1994. Following negotiations, however, the bank extended its financial support until the end of July 1995. The Wise brothers promised to extend personal guarantees in favour of the TD Bank, but this did not occur.

23 In December 1994, three days after the Wise brothers presented financial statements showing disappointing results for Peoples in its third fiscal quarter, M & S initiated bankruptcy proceedings against both Wise and Peoples. A notice of intention to make a proposal was filed on behalf of Peoples the same day. Nonetheless, Peoples later consented to the petition by M & S, and both Wise and Peoples were declared bankrupt on January 13, 1995, effective December 9, 1994. The same day, M & S released each of the Wise brothers from their personal guarantees. M & S apparently preferred to proceed with an uncontested petition in bankruptcy rather than attempting to collect on the personal guarantees.

24 The assets of Wise and Peoples were sufficient to cover in full the outstanding debt owed to the TD Bank, satisfy the entire balance of the purchase price owed to M & S, and discharge almost all the landlords' lease claims. The bulk of the unsatisfied claims were those of trade creditors.

25 Following the bankruptcy, Peoples' trustee filed a petition against the Wise brothers. In the petition, the trustee claimed that they had favoured the interests of Wise over Peoples to the detriment of Peoples' creditors, in breach of their duties as directors under s. 122(1) of the CBCA. The trustee also claimed that the Wise brothers had, in the year preceding the bankruptcy, been privy to transactions in which property had been transferred for conspicuously less than fair market value within the meaning of s. 100 of the BIA.

26 Pursuant to art. 2501 of the *Civil Code of Québec*, S.Q. 1991, c. 64 ("C.C.Q."), the trustee named Chubb Insurance Company of Canada ("Chubb"), which had provided directors' insurance to Wise and its subsidiaries, as a defendant in addition to the Wise brothers.

27 The trial judge, Greenberg J., relying on decisions from the United Kingdom, Australia and New Zealand, held that the fiduciary duty and the duty of care under s. 122 (1) of the CBCA extend to a company's creditors when a company is insolvent or in the vicinity of insolvency. Greenberg J. found that the implementation, by the Wise brothers qua directors of Peoples, of a corporate policy that affected both companies, had occurred while the corporation was in the vicinity of insolvency and was detrimental to the interests of the creditors of Peoples. The Wise brothers were therefore found liable and the trustee was awarded $4.44 million in damages. As Chubb had provided insurance coverage for directors, it was also held liable. Greenberg J. also considered the alternative grounds under the BIA advanced by the trustee and found the Wise brothers liable for the same $4.44 million amount on that ground as well. All the parties appealed.

28 The Quebec Court of Appeal, *per* Pelletier J.A., with Robert C.J.Q. and Nuss J.A. concurring, allowed the appeals by Chubb and the Wise brothers. The Court of Appeal expressed reluctance to follow Greenberg J. in equating the interests of creditors with the best interests of the corporation when the corporation was insolvent or in the vicinity of insolvency, stating that an innovation in the law such as this is a policy matter more appropriately dealt with by Parliament than the courts. In considering the trustee's claim under s. 100 of the BIA, Pelletier J.A. held that the trial judge had committed a palpable and overriding error in concluding that the amounts owed by Wise to Peoples in respect of inventory "were neither collected nor collectible". He found that the consideration received for the transactions had been approximately 94 percent of fair market value, and he was not convinced that this disparity could be characterized as being "conspicuously" less than fair market value. Moreover, he did not accept the broad meaning the trial judge gave to the word "privy". Pelletier J.A. declined to exercise his discretion under s. 100(2) of the BIA to make an order in favour of the trustee. In view of his conclusion that the Wise brothers were not liable, Pelletier J.A. allowed the appeal with respect to Chubb.

III. Analysis

29 At the outset, it should be acknowledged that according to art. 300 of the C.C.Q. and s. 8.1 of the *Interpretation Act*, R.S.C. 1985, c. I-21, the civil law serves as a supplementary source of law to federal legislation such as the CBCA. Since the CBCA does not entitle creditors to sue directors directly for breach of their duties, it is appropriate to have recourse to the *Civil Code of Québec* to determine how rights grounded in a federal statute should be addressed in Quebec, and more specifically how s. 122(1) of the CBCA can be harmonized with the principles of civil liability: see R. Crête and S. Rousseau, *Droit des sociétés par actions: principes fondamentaux* (2002), at p. 58.

30 This case came before our Court on the issue of whether directors owe a duty to creditors. The creditors did not bring a derivative action or an oppression remedy application under the CBCA. Instead, the trustee, representing the interests of the creditors, sued the directors for an alleged breach of the duties imposed by s. 122(1) of the CBCA. The standing of the trustee to sue was not questioned.

31 The primary role of directors is described in s. 102(1) of the CBCA:

> **102.** (1) Subject to any unanimous shareholder agreement, the directors shall manage, or supervise the management of, the business and affairs of a corporation.

As for officers, s. 121 of the CBCA provides that their powers are delegated to them by the directors:

> **121.** Subject to the articles, the by-laws or any unanimous shareholder agreement,
>
> (a) the directors may designate the offices of the corporation, appoint as officers persons of full capacity, specify their duties and delegate to them powers to manage the business and affairs of the corporation, except powers to do anything referred to in subsection 115(3);
>
> (b) a director may be appointed to any office of the corporation; and
>
> (c) two or more offices of the corporation may be held by the same person.

Although the shareholders are commonly said to own the corporation, in the absence of a unanimous shareholder agreement to the contrary, s. 102 of the CBCA provides that it is not the shareholders, but the directors elected by the shareholders, who are responsible for managing it. This clear demarcation between the respective roles of shareholders and directors long predates the 1975 enactment of the CBCA: see *Automatic Self Cleansing Filter Syndicate Co. v. Cunninghame*, [1906] 2 Ch. 34 (Eng. Ch.); see also art. 311, C.C.Q.

32 Subsection 122(1) of the CBCA establishes two distinct duties to be discharged by directors and officers in managing, or supervising the management of, the corporation:

> **122.** (1) Every director and officer of a corporation in exercising their powers and discharging their duties shall
>
> (a) act honestly and in good faith with a view to the best interests of the corporation; and
>
> (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

The first duty has been referred to in this case as the "fiduciary duty". It is better described as the "duty of loyalty". We will use the expression "statutory fiduciary duty" for purposes of clarity when referring to the duty under the CBCA. This duty requires directors and officers to act honestly and in good faith with a view to the best interests of the corporation. The second duty is commonly referred to as the "duty of care". Generally speaking, it imposes a legal obligation upon directors and officers to be diligent in supervising and managing the corporation's affairs.

33 The trial judge did not apply or consider separately the two duties imposed on directors by s. 122(1). As the Court of Appeal observed, the trial judge appears to have confused the two duties. They are, in fact, distinct and are designed to secure different ends. For that reason, they will be addressed separately in these reasons.

A. The Statutory Fiduciary Duty: Section 122(1)(a) of the CBCA

34 Considerable power over the deployment and management of financial, human, and material resources is vested in the directors and officers of corporations. For the directors of CBCA corporations, this power originates in s. 102 of the Act. For officers, this power comes from the powers delegated to them by the directors. In deciding to invest in, lend to or otherwise deal with a corporation, shareholders and creditors transfer control over their assets to the corporation, and hence to the directors and officers, in the expectation that the directors and officers will use the corporation's resources to make reasonable business decisions that are to the corporation's advantage.

35 The statutory fiduciary duty requires directors and officers to act honestly and in good faith *vis-à-vis* the corporation. They must respect the trust and confidence that have been reposed in them to manage the assets of the corporation in pursuit of the realization of the objects of the corporation. They must avoid conflicts of interest with the corporation. They must avoid abusing their position to gain personal benefit. They must maintain the confidentiality of information they acquire by virtue of their position. Directors and officers must serve the corporation selflessly, honestly and loyally: see K.P. McGuinness, *The Law and Practice of Canadian Business Corporations* (1999), at p. 715.

36 The common law concept of fiduciary duty was considered in *B. (K.L.) v. British Columbia*, [2003] 2 S.C.R. 403, 2003 SCC 51 (S.C.C.). In that case, which involved the relationship between the government and foster children, a majority of this Court agreed with McLachlin C.J. who stated, at paras. 40-41 and 49:

> ...Fiduciary duties arise in a number of different contexts, including express trusts, relationships marked by discretionary power and trust, and the special responsibilities of the Crown in dealing with aboriginal interests....
>
> What ... might the content of the fiduciary duty be if it is understood ... as a private law duty arising simply from the relationship of discretionary power and trust between the Superintendent and the foster children? In *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, at pp. 646-47, La Forest J. noted that there are

> certain common threads running through fiduciary duties that arise from relationships marked by discretionary power and trust, such as loyalty and "the avoidance of a conflict of duty and interest and a duty not to profit at the expense of the beneficiary". However, he also noted that "[t]he obligation imposed may vary in its specific substance depending on the relationship" (p. 646)....
>
> ...concern for the best interests of the child informs the parental fiduciary relationship, as La Forest J. noted in *M. (K.) v. M. (H.), supra*, at p. 65. But the duty imposed is to act loyally, and not to put one's own or others' interests ahead of the child's in a manner that abuses the child's trust.... The parent who exercises undue influence over the child in economic matters for his own gain has put his own interests ahead of the child's, in a manner that abuses the child's trust in him. The same may be said of the parent who uses a child for his sexual gratification or a parent who, wanting to avoid trouble for herself and her household, turns a blind eye to the abuse of a child by her spouse. The parent need not, as the Court of Appeal suggested in the case at bar, be consciously motivated by a desire for profit or personal advantage; nor does it have to be her own interests, rather than those of a third party, that she puts ahead of the child's. It is rather a question of disloyalty -- of putting someone's interests ahead of the child's in a manner that abuses the child's trust. Negligence, even aggravated negligence, will not ground parental fiduciary liability unless it is associated with breach of trust in this sense. [Emphasis added.]

37 The issue to be considered here is the "specific substance" of the fiduciary duty based on the relationship of directors to corporations under the CBCA.

38 It is settled law that the fiduciary duty owed by directors and officers imposes strict obligations: see *Canadian Aero Service Ltd. v. O'Malley* (1973), [1974] S.C.R. 592 (S.C.C.), at pp. 609-10, *per* Laskin J. (as he then was), where it was decided that directors and officers may even have to account to the corporation for profits they make that do not come at the corporation's expense:

> The reaping of a profit by a person at a company's expense while a director thereof is, of course, an adequate ground upon which to hold the director accountable. Yet there may be situations where a profit must be disgorged, although not gained at the expense of the company, on the ground that a director must not be allowed to use his position as such to make a profit even if it was not open to the company, as for example, by reason of legal disability, to participate in the transaction. An analogous situation, albeit not involving a director, existed for all practical purposes in the case of *Phipps v. Boardman* [[1967] 2 A.C. 46], which also supports the view that liability to account does not depend on proof of an actual conflict of duty and self-interest. Another, quite recent, illustration of a liability to account where the company itself had failed to obtain a business contract and hence could not be regarded as having been deprived of a business opportunity is *Industrial Development Consultants Ltd. v. Cooley* [[1972] 2 All E.R. 162], a judgment of a Court of first instance. There, the managing director, who was allowed to resign his position on a false assertion of ill health, subsequently got the contract for himself. That case is thus also illustrative of the situation where a director's resignation is prompted by a decision to obtain for himself the business contract denied to his company and where he does obtain it without disclosing his intention. [Emphasis added.]

A compelling argument for making directors accountable for profits made as a result of their position, though not at the corporation's expense, is presented by J. Brock, "The Propriety of Profitmaking: Fiduciary Duty and Unjust Enrichment" (2000), 58 *U.T. Fac. L. Rev.* 185, at pp. 204-5.

39 However, it is not required that directors and officers in all cases avoid personal gain as a direct or indirect result of their honest and good faith supervision or management of the corporation. In many cases the interests of directors and officers will innocently and genuinely coincide with those of the corporation. If directors and officers are also shareholders, as is often the case, their lot will automatically improve as the corporation's financial condition improves. Another example is the compensation that directors and officers usually draw from the corporations they serve. This benefit, though paid by the corporation, does not, if reasonable, ordinarily place them in breach of their fiduciary duty. Therefore, all the circumstances may be scrutinized to determine whether the directors and officers have acted honestly and in good faith with a view to the best interests of the corporation.

40 In our opinion, the trial judge's determination that there was no fraud or dishonesty in the Wise brothers' attempts to solve the mounting inventory problems of Peoples and Wise stands in the way of a finding that they breached their fiduciary duty. Greenberg J. stated, at para. 180:

> We hasten to add that in the present case, the Wise Brothers derived no direct personal benefit from the new domestic inventory procurement policy, albeit that, as the controlling shareholders of Wise Stores, there was an indirect benefit to them. Moreover, as was conceded by the other parties herein, in deciding to implement the new domestic inventory procurement policy, there was no dishonesty or fraud on their part.

The Court of Appeal relied heavily on this finding by the trial judge, as do we. At para. 84, Pelletier J.A. stated that:

> [TRANSLATION] In regard to fiduciary duty, I would like to point out that the brothers were driven solely by the wish to resolve the problem of inventory procurement affecting both the operations of Peoples Inc. and those of Wise. [This is a] motivation that is in line with the pursuit of the interests of the corporation within the meaning of paragraph 122(1)(*a*) C.B.C.A. and that does not expose them to any justified criticism.

41 As explained above, there is no doubt that both Peoples and Wise were struggling with a serious inventory management problem. The Wise brothers considered the problem and implemented a policy they hoped would solve it. In the absence of evidence of a personal interest or improper purpose in the new policy, and in light of the evidence of a desire to make both Wise and Peoples "better" corporations, we find that the directors did not breach their fiduciary duty under s. 122(1)(*a*) of the CBCA. See *820099 Ontario Inc. v. Harold E. Ballard Ltd.* (1991), 3 B.L.R. (2d) 123 (Ont. Gen. Div.) (aff'd (1991), 3 B.L.R. (2d) 113 (Ont. Div. Ct.)), in which Farley J., at p. 171, correctly observes that in resolving a conflict between majority and minority shareholders, it is safe for directors and officers to act to make the corporation a "better corporation".

42 This appeal does not relate to the non-statutory duty directors owe to shareholders. It is concerned only with the statutory duties owed under the CBCA. Insofar as the statutory fiduciary duty is concerned, it is clear that the phrase the "best interests of the corporation" should be read not simply as the "best interests of the shareholders". From an economic perspective, the "best interests of the corporation" means the maximization of the value of the corporation: see E.M. Iacobucci, "Directors' Duties in Insolvency: Clarifying What Is at Stake" (2003), 39(3) *Can. Bus. L.J.* 398, at pp. 400-1. However, the courts have long recognized that various other factors may be relevant in determining what directors should consider in soundly managing with a view to the best interests of the corporation. For example, in *Teck Corp. v. Millar* (1972), 33 D.L.R. (3d) 288 (B.C. S.C.), Berger J. stated, at p. 314:

> A classical theory that once was unchallengeable must yield to the facts of modern life. In fact, of course, it has. If today the directors of a company were to consider the interests of its employees no one would argue that in doing so they were not acting *bona fide* in the interests of the company itself. Similarly, if the directors were to consider the consequences to the community of any policy that the company intended to pursue, and were deflected in their commitment to that policy as a result, it could not be said that they had not considered bona fide the interests of the shareholders.
>
> I appreciate that it would be a breach of their duty for directors to disregard entirely the interests of a company's shareholders in order to confer a benefit on its employees: *Parke v. Daily News Ltd.*, [1962] Ch. 927. But if they observe a decent respect for other interests lying beyond those of the company's shareholders in the strict sense, that will not, in my view, leave directors open to the charge that they have failed in their fiduciary duty to the company.

The case of *Olympia & York Enterprises Ltd. v. Hiram Walker Resources Ltd.* (1986), 59 O.R. (2d) 254 (Ont. Div. Ct.), approved, at p. 271, the decision in *Teck, supra*. We accept as an accurate statement of law that in determining whether they are acting with a view to the best interests of the corporation it may be legitimate, given all the circumstances of a given case, for the board of directors to consider, inter alia, the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment.

43 The various shifts in interests that naturally occur as a corporation's fortunes rise and fall do not, however, affect the content of the fiduciary duty under s. 122(1)(*a*) of the CBCA. At all times, directors and officers owe their fiduciary obligation to the corporation. The interests of the corporation are not to be confused with the interests of the creditors or those of any other stakeholders.

44 The interests of shareholders, those of the creditors and those of the corporation may and will be consistent with each other if the corporation is profitable and well capitalized and has strong prospects. However, this can change if the corporation starts to struggle financially. The residual rights of the shareholders will generally become worthless if a corporation is declared bankrupt. Upon bankruptcy, the directors of the corporation transfer control to a trustee, who administers the corporation's assets for the benefit of creditors.

45 Short of bankruptcy, as the corporation approaches what has been described as the "vicinity of insolvency", the residual claims of shareholders will be nearly exhausted. While shareholders might well prefer that the directors pursue high-risk alternatives with a high potential payoff to maximize the shareholders' expected residual claim, creditors in the same circumstances might prefer that the directors steer a safer course so as to maximize the value of their claims against the assets of the corporation.

46 The directors' fiduciary duty does not change when a corporation is in the nebulous "vicinity of insolvency". That phrase has not been defined; moreover, it is incapable of definition and has no legal meaning. What it is obviously intended to convey is a deterioration in the corporation's financial stability. In assessing the actions of directors it is evident that any honest and good faith attempt to redress the corporation's financial problems will, if successful, both retain value for shareholders and improve the position of creditors. If unsuccessful, it will not qualify as a breach of the statutory fiduciary duty.

47 For a discussion of the shifting interests and incentives of shareholders and creditors, see W.D. Gray, "*Peoples v. Wise* and *Dylex*: Identifying Stakeholder Interests upon or near Corporate Insolvency — Stasis or Pragmatism?" (2003), 39 *Can. Bus. L.J.* 242, at p. 257; E. M. Iacobucci & K.E. Davis, "Reconciling Derivative Claims and the Oppression Remedy" (2000), 12 *S.C.L.R.* (2d) 87, at p. 114. In resolving these competing interests, it is incumbent upon the directors to act honestly and in good faith with a view to the best interests of the corporation. In using their skills for the benefit of the corporation when it is in troubled waters financially, the directors must be careful to attempt to act in its best interests by creating a "better" corporation, and not to favour the interests of any one group of stakeholders. If the stakeholders cannot avail themselves of the statutory fiduciary duty (the duty of loyalty, *supra*) to sue the directors for failing to take care of their interests, they have other means at their disposal.

48 The Canadian legal landscape with respect to stakeholders is unique. Creditors are only one set of stakeholders, but their interests are protected in a number of ways. Some are specific, as in the case of amalgamation: s. 185 of the CBCA. Others cover a broad range of situations. The oppression remedy of s. 241(2)(*c*) of the CBCA and the similar provisions of provincial legislation regarding corporations grant the broadest rights to creditors of any common law jurisdiction: see D. Thomson, "Directors, Creditors and Insolvency: A Fiduciary Duty or a Duty Not to Oppress?" (2000), 58(1) *U.T. Fac. L. Rev.* 31, at p. 48. One commentator describes the oppression remedy as "the broadest, most comprehensive and most open-ended shareholder remedy in the common law world": S.M. Beck, "Minority Shareholders' Rights in the 1980s" in *Corporate Law in the 80s* (1982), 311, at p. 312. While Beck was concerned with shareholder remedies, his observation applies equally to those of creditors.

49 The fact that creditors' interests increase in relevancy as a corporation's finances deteriorate is apt to be relevant to, *inter alia*, the exercise of discretion by a court in granting standing to a party as a "complainant" under s. 238(*d*) of the CBCA as a "proper person" to bring a derivative action in the name of the corporation under ss. 239 and 240 of the CBCA, or to bring an oppression remedy claim under s. 241 of the CBCA.

50 Section 241(2)(*c*) authorizes a court to grant a remedy

> if the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner
>
> > that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer...

A person applying for the oppression remedy must, in the court's opinion, fall within the definition of "complainant" found in s. 238 of the CBCA:

> (a) a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,
>
> (b) a director or an officer or a former director or officer of a corporation or any of its affiliates,
>
> (c) the Director, or
>
> (d) any other person who, in the discretion of a court, is a proper person to make an application under this Part.

Creditors, who are not security holders within the meaning of para. (*a*), may therefore apply for the oppression remedy under para. (*d*) by asking a court to exercise its discretion and grant them status as a "complainant".

51 Section 241 of the CBCA provides a possible mechanism for creditors to protect their interests from the prejudicial conduct of directors. In our view, the availability of such a broad oppression remedy undermines any perceived need to extend the fiduciary duty imposed on directors by s. 122(1)(*a*) of the CBCA to include creditors.

52 The Court of Appeal, at paras. 99-100, referred to *373409 Alberta Ltd. (Receiver of) v. Bank of Montreal*, [2002] 4 S.C.R. 312, 2002 SCC 81 (S.C.C.), as an indication by this Court that the interests of creditors do not have any bearing on the assessment of the conduct of directors. However, the receiver in that case was representing the corporation's rights and not the creditors' rights; therefore, the case has no application in this appeal. *373409 Alberta Ltd.* involved an action taken by the receiver on behalf of the corporation against a bank for the tort of conversion. The sole shareholder, director and officer of 373409 Alberta Ltd., who was also the sole shareholder, director and officer of another corporation, Legacy Holdings Ltd., had deposited a cheque payable to 373409 Alberta Ltd. into the account of Legacy. While it was recognized, at para. 22, that the diversion of money from 373409 Alberta Ltd. to Legacy "may very well have been wrongful vis-à-vis [373409 Alberta Ltd.]'s creditors" (none of whom were involved in the action), no fraud had been committed against the corporation itself and the bank, acting on proper authority, had not wrongfully interfered with the cheque by carrying out the deposit instructions. The statutory duties of the directors were not at issue, nor were they considered, and no assessment of the creditors' rights was made. With respect, Pelletier J.A.'s broad reading of *373409 Alberta Ltd.* was misplaced.

53 In light of the availability both of the oppression remedy and of an action based on the duty of care, which will be discussed below, stakeholders have viable remedies at their disposal. There is no need to read the interests of creditors into the duty set out in s. 122(1)(*a*) of the CBCA. Moreover, in the circumstances of this case, the Wise brothers did not breach the statutory fiduciary duty owed to the corporation.

B. The Statutory Duty of Care: Section 122(1)(b) of the CBCA

54 As mentioned above, the CBCA does not provide for a direct remedy for creditors against directors for breach of their duties and the C.C.Q. is used as suppletive law.

55 In Quebec, directors have been held liable to creditors in respect of either contractual or extra-contractual obligations. Contractual liability arises where the director personally guarantees a contractual obligation of the company. Liability also arises where the director personally acts in a manner that triggers his or her extra-contractual liability. See P. Martel, "Le 'voile corporatif' — l'attitude des tribunaux face à l'article 317 du Code civil du Québec" (1998), 58 R. du

B. 95, at pp. 135-36; *Brasserie Labatt ltée c. Lanoue*, [1999] J.Q. No. 1108 (C.A. Que.), *per* Forget J.A., at para. 29. It is clear that the Wise brothers cannot be held contractually liable as they did not guarantee the debts at issue here. Extra-contractual liability is the remaining possibility.

56 To determine the applicability of extra-contractual liability in this appeal, it is necessary to refer to art. 1457 of the C.C.Q.:

> Every person has a duty to abide by the rules of conduct which lie upon him, according to the circumstances, usage or law, so as not to cause injury to another.
>
> Where he is endowed with reason and fails in this duty, he is responsible for any injury he causes to another person by such fault and is liable to reparation for the injury, whether it be bodily, moral or material in nature.
>
> He is also liable, in certain cases, to reparation for injury caused to another by the act or fault of another person or by the act of things in his custody. [Emphasis added]

Three elements of art. 1457 of the C.C.Q. are relevant to the integration of the director's duty of care into the principles of extra-contractual liability: who has the duty ("every person"), to whom is the duty owed ("another") and what breach will trigger liability ("rules of conduct"). It is clear that directors and officers come within the expression "every person". It is equally clear that the word "another" can include the creditors. The reach of art. 1457 of the C.C.Q. is broad and it has been given an open and inclusive meaning. See *Regent Taxi & Transport Co. v. Congrégation des petits frères de Marie*, [1929] S.C.R. 650 (S.C.C.), *per* Anglin C.J., at p. 655 (rev'd on other grounds, [1932] 2 D.L.R. 70 (Que. K.B.)):

> ...to narrow the prima facie scope of art. 1053 C.C. [now art. 1457] is highly dangerous and would necessarily result in most meritorious claims being rejected; many a wrong would be without a remedy.

This liberal interpretation was also affirmed and treated as settled by this Court in *Lister v. McAnulty*, [1944] S.C.R. 317 (S.C.C.), and *Hôpital Notre-Dame de l'Espérance c. Laurent* (1977), [1978] 1 S.C.R. 605 (S.C.C.).

57 This interpretation can be harmoniously integrated with the wording of the CBCA. Indeed, unlike the statement of the fiduciary duty in s. 122(1)(*a*) of the CBCA, which specifies that directors and officers must act with a view to the best interests of the corporation, the statement of the duty of care in s. 122(1)(*b*) of the CBCA does not specifically refer to an identifiable party as the beneficiary of the duty. Instead, it provides that "[e]very director and officer of a corporation in exercising his powers and discharging his duties shall ... exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances." Thus, the identity of the beneficiary of the duty of care is much more open-ended, and it appears obvious that it must include creditors. This result is clearly consistent with the civil law interpretation of the word "another". Therefore, if breach of the standard of care, causation and damages are established, creditors can resort to art. 1457 to have their rights vindicated. The only issue thus remaining is the determination of the "rules of conduct" likely to trigger extracontractual liability. On this issue, art. 1457 is explicit.

58 The first paragraph of art. 1457 does not set the standard of conduct. Instead, it incorporates by reference s. 122(1)(*b*) of the CBCA. The statutory duty of care is a "duty to abide by [a rule] of conduct which lie[s] upon [them], according to the ... law, so as not to cause injury to another". Thus, for the purpose of determining whether the Wise brothers can be held liable, only the CBCA is relevant. It is therefore necessary to outline the requirements of the duty of care embodied in s. 122(1)(*b*) of the CBCA.

59 That directors must satisfy a duty of care is a long-standing principle of the common law, although the duty of care has been reinforced by statute to become more demanding. Among the earliest English cases establishing the duty of care were *Dovey v. Cory*, [1901] A.C. 477 (Eng. H.L.); *Brazilian Rubber Plantation & Estates Ltd., Re*, [1911] 1 Ch. 425 (Eng. Ch. Div.); and *City Equitable Fire Insurance Co., Re* (1924), [1925] 1 Ch. 407 (Eng. C.A.). In substance, these cases held that the standard of care was a reasonably relaxed, subjective standard. The common law required directors to avoid being grossly negligent with respect to the affairs of the corporation and judged them according to their own

personal skills, knowledge, abilities and capacities. See McGuinness, *supra*, at p. 776: "Given the history of case law in this area, and the prevailing standards of competence displayed in commerce generally, it is quite clear that directors were not expected at common law to have any particular business skill or judgment".

60 The 1971 report entitled *Proposals for a New Business Corporations Law for Canada* (1971) ("Dickerson Report") culminated the work of a committee headed by R.W. V. Dickerson which had been appointed by the federal government to study the need for new federal business corporations legislation. This report preceded the enactment of the CBCA by four years and influenced the eventual structure of the CBCA.

61 The standard recommended by the Dickerson Report was objective, requiring directors and officers to meet the standard of a "reasonably prudent person" (vol. II, at. p. 74):

> **9.19**
>
> (1) Every director and officer of a corporation in exercising his powers and discharging his duties shall
>
> . . . . .
>
> (b) exercise the care, diligence and skill of a reasonably prudent person.

The report described how this proposed duty of care differed from the prevailing common law duty of care (vol. I, at p. 83):

> **242.** The formulation of the duty of care, diligence and skill owed by directors represents an attempt to upgrade the standard presently required of them. The principal change here is that whereas at present the law seems to be that a director is only required to demonstrate the degree of care, skill and diligence that could reasonably be expected from him, having regard to his knowledge and experience -- *Re City Equitable Fire Insurance Co.*, [1925] Ch. 425 -- under s. 9.19(1)(b) he is required to conform to the standard of a reasonably prudent man. Recent experience has demonstrated how low the prevailing legal standard of care for directors is, and we have sought to raise it significantly. We are aware of the argument that raising the standard of conduct for directors may deter people from accepting directorships. The truth of that argument has not been demonstrated and we think it is specious. The duty of care imposed by s. 9.19(1)(b) is exactly the same as that which the common law imposes on every professional person, for example, and there is no evidence that this has dried up the supply of lawyers, accountants, architects, surgeons or anyone else. It is in any event cold comfort to a shareholder to know that there is a steady supply of marginally competent people available under present law to manage his investment. [Emphasis added.]

62 The statutory duty of care in s. 122(1)(*b*) of the CBCA emulates but does not replicate the language proposed by the Dickerson Report. The main difference is that the enacted version includes the words "in comparable circumstances", which modifies the statutory standard by requiring the context in which a given decision was made to be taken into account. This is not the introduction of a subjective element relating to the competence of the director, but rather the introduction of a contextual element into the statutory standard of care. It is clear that s. 122(1)(*b*) requires more of directors and officers than the traditional common law duty of care outlined in, for example, *City Equitable Fire Insurance Co., Re*, *supra*.

63 The standard of care embodied in s. 122(1)(*b*) of the CBCA was described by Robertson J.A. of the Federal Court of Appeal in *Soper v. R.* (1997), [1998] 1 F.C. 124 (Fed. C.A.), at para. 41, as being "objective subjective". Although that case concerned the interpretation of a provision of the *Income Tax Act*, it is relevant here because the language of the provision establishing the standard of care was identical to that of s. 122(1)(*b*) of the CBCA. With respect, we feel that Robertson J.A.'s characterization of the standard as an "objective subjective" one could lead to confusion. We prefer to describe it as an objective standard. To say that the standard is objective makes it clear that the factual aspects of the circumstances surrounding the actions of the director or officer are important in the case of the s. 122(1)(*b*) duty of care,

as opposed to the subjective motivation of the director or officer, which is the central focus of the statutory fiduciary duty of s. 122(1)(*a*) of the CBCA.

64 The contextual approach dictated by s.122(1)(*b*) of the CBCA not only emphasizes the primary facts but also permits prevailing socio-economic conditions to be taken into consideration. The emergence of stricter standards puts pressure on corporations to improve the quality of board decisions. The establishment of good corporate governance rules should be a shield that protects directors from allegations that they have breached their duty of care. However, even with good corporate governance rules, directors' decisions can still be open to criticism from outsiders. Canadian courts, like their counterparts in the United States, the United Kingdom, Australia and New Zealand, have tended to take an approach with respect to the enforcement of the duty of care that respects the fact that directors and officers often have business expertise that courts do not. Many decisions made in the course of business, although ultimately unsuccessful, are reasonable and defensible at the time they are made. Business decisions must sometimes be made, with high stakes and under considerable time pressure, in circumstances in which detailed information is not available. It might be tempting for some to see unsuccessful business decisions as unreasonable or imprudent in light of information that becomes available *ex post facto*. Because of this risk of hindsight bias, Canadian courts have developed a rule of deference to business decisions called the "business judgment rule", adopting the American name for the rule.

65 In *Pente Investment Management Ltd. v. Schneider Corp.* (1998), 42 O.R. (3d) 177 (Ont. C.A.), Weiler J.A. stated, at p. 192:

> The law as it has evolved in Ontario and Delaware has the common requirements that the court must be satisfied that the directors have acted reasonably and fairly. The court looks to see that the directors made a *reasonable* decision *not a perfect* decision. Provided the decision taken is within a range of reasonableness, the court ought not to substitute its opinion for that of the board even though subsequent events may have cast doubt on the board's determination. As long as the directors have selected one of several reasonable alternatives, deference is accorded to the board's decision [references omitted]. This formulation of deference to the decision of the Board is known as the "business judgment rule". The fact that alternative transactions were rejected by the directors is irrelevant unless it can be shown that a particular alternative was definitely available and clearly more beneficial to the company than the chosen transaction
>
> [reference omitted]. [Emphasis added; italics in original.]

66 In order for a plaintiff to succeed in challenging a business decision he or she has to establish that the directors acted (i) in breach of the duty of care and (ii) in a way that caused injury to the plaintiff: W.T. Allen, J.B. Jacobs, and L.E. Strine, Jr., "Function Over Form: A Reassessment of Standards of Review in Delaware Corporation Law" (2001), 26 *Del. J. Corp. L.* 859, at p. 892.

67 Directors and officers will not be held to be in breach of the duty of care under s. 122(1)(*b*) of the CBCA if they act prudently and on a reasonably informed basis. The decisions they make must be reasonable business decisions in light of all the circumstances about which the directors or officers knew or ought to have known. In determining whether directors have acted in a manner that breached the duty of care, it is worth repeating that perfection is not demanded. Courts are ill-suited and should be reluctant to second-guess the application of business expertise to the considerations that are involved in corporate decision making, but they are capable, on the facts of any case, of determining whether an appropriate degree of prudence and diligence was brought to bear in reaching what is claimed to be a reasonable business decision at the time it was made.

68 The trustee alleges that the Wise brothers breached their duty of care under s. 122(1)(*b*) of the CBCA by implementing the new procurement policy to the detriment of Peoples' creditors. After considering all the evidence, we agree with the Court of Appeal that the implementation of the new policy was a reasonable business decision that was made with a view to rectifying a serious and urgent business problem in circumstances in which no solution may have

been possible. The trial judge's conclusion that the new policy led inexorably to Peoples' failure and bankruptcy was factually incorrect and constituted a palpable and overriding error.

69 In fact, as noted by Pelletier J.A., there were many factors other than the new policy that contributed more directly to Peoples' bankruptcy. Peoples had lost $10 million annually while being operated by M & S. Wise, which was only marginally profitable and solvent with annual sales of $100 million (versus $160 million for Peoples), had hoped to improve the performance of its new acquisition. Given that the transaction was a fully leveraged buyout, for Wise and Peoples to succeed, Peoples' performance needed to improve dramatically. Unfortunately for both Wise and Peoples, the retail market in eastern Canada had become very competitive in the early 1990s, and this trend continued with the arrival of Wal-Mart in 1994. At paras. 153 and 155, Pelletier J.A. stated:

> [TRANSLATION] In reality, it was that particularly unfavourable financial situation in which the two corporations found themselves that caused their downfall, and it was M. & S. that, to protect its own interests, sounded the charge in December, rightly or wrongly judging that Peoples Inc.'s situation would only worsen over time. It is crystal-clear that the bankruptcy occurred at the most propitious time for M. & S.'s interests, when inventories were high and suppliers were unpaid. In fact, M. & S. recovered the entire balance due on the selling price and almost all of the other debts it was owed.
>
> . . . . .
>
> ...the trial judge did not take into account the fact that the brothers derived no direct benefit from the transaction impugned, that they acted in good faith and that their true intention was to find a solution to the serious inventory management problem that each of the two corporations was facing. Because of an assessment error, he also ignored the fact that Peoples Inc. received a sizable [sic]consideration for the goods it delivered to Wise. Lastly, I note that the act for which the brothers were found liable, i.e. the adoption of a new joint inventory procurement policy, is not as serious as the trial judge made it out to be and that, in opposition to his view, the act was also not the true cause of the bankruptcy of Peoples Inc. [Emphasis added.]

70 The Wise brothers treated the implementation of the new policy as a decision made in the ordinary course of business and, while no formal agreement evidenced the arrangement, a monthly record was made of the inventory transfers. Although this may appear to be a loose business practice, by the autumn of 1993, Wise had already consolidated several aspects of the operations of the two companies. Legally they were two separate entities. However, the financial fate of the two companies had become intertwined. In these circumstances, there was little or no economic incentive for the Wise brothers to jeopardize the interests of Peoples in favour of the interests of Wise. In fact, given the tax losses that Peoples had carried forward, the companies had every incentive to keep Peoples profitable in order to reduce their combined tax liabilities.

71 Arguably, the Wise brothers could have been more precise in pursuing a resolution to the intractable inventory management problems, having regard to all the troublesome circumstances involved at the time the new policy was implemented. But we, like the Court of Appeal, are not satisfied that the adoption of the new policy breached the duty of care under s. 122(1)(*b*) of the CBCA. The directors cannot be held liable for a breach of their duty of care in respect of the creditors of Peoples.

72 The Court of Appeal relied on two additional provisions of the CBCA that in its view could rescue the Wise brothers from a finding that they breached the duty of care: ss. 44(2) and 123(4).

73 Section 44 of the CBCA, which was in force at the time of the impugned transactions but has since been repealed, permitted a wholly-owned subsidiary to give financial assistance to its holding body corporate:

> **44.**(1) Subject to subsection (2), a corporation or any corporation with which it is affiliated shall not, directly or indirectly, give financial assistance by means of a loan, guarantee or otherwise
>
> . . . . .

(2) A corporation may give financial assistance by means of a loan, guarantee or otherwise

. . . . .

(c) to a holding body corporate if the corporation is a wholly-owned subsidiary of the holding body corporate;

74 While s. 44(2) as it then read qualified the prohibition under s. 44(1), it did not serve to supplant the duties of the directors under s. 122(1) of the CBCA. The Court of Appeal erred in concluding that s. 44(2) served as a blanket legitimization of financial assistance given by wholly-owned subsidiaries to parent corporations. In our opinion, it is incumbent upon directors and officers to exercise their powers in conformity with the duties of s. 122(1).

75 Although s. 44(2) authorized certain forms of financial assistance between corporations, this cannot exempt directors and officers from potential liability under s. 122(1) for any financial assistance given by subsidiaries to the parent corporation.

76 When faced with the serious inventory management problem, the Wise brothers sought the advice of the vice-president of finance, David Clément. The Wise brothers claimed as an additional argument that in adopting the solution proposed by Clément, they were relying in good faith on the judgment of a person whose profession lent credibility to his statement, in accordance with the defence provided for in s. 123(4)(*b*) (now s. 123(5)) of the CBCA. The Court of Appeal accepted the argument. We disagree.

77 The reality that directors cannot be experts in all aspects of the corporations they manage or supervise shows the relevancy of a provision such as s. 123(4)(*b*). At the relevant time, the text of s. 123(4) read:

123. ...

. . . . .

(4) A director is not liable under section 118, 119 or 122 if he relies in good faith on

(a) financial statements of the corporation represented to him by an officer of the corporation or in a written report of the auditor of the corporation fairly to reflect the financial condition of the corporation; or

(b) a report of a lawyer, accountant, engineer, appraiser or other person whose profession lends credibility to a statement made by him.

78 Although Clément did have a bachelor's degree in commerce and 15 years of experience in administration and finance with Wise, this experience does not correspond to the level of professionalism required to allow the directors to rely on his advice as a bar to a suit under the duty of care. The named professional groups in s. 123(4)(*b*) were lawyers, accountants, engineers, and appraisers. Clément was not an accountant, was not subject to the regulatory overview of any professional organization and did not carry independent insurance coverage for professional negligence. The title of vice-president of finance should not automatically lead to a conclusion that Clément was a person "whose profession lends credibility to a statement made by him." It is noteworthy that the word "profession" is used, not "position". Clément was simply a non-professional employee of Wise. His judgment on the appropriateness of the solution to the inventory management problem must be regarded in that light. Although we might accept for the sake of argument that Clément was better equipped and positioned than the Wise brothers to devise a plan to solve the inventory management problems, this is not enough. Therefore, in our opinion, the Wise brothers cannot successfully invoke the defence provided by s. 123(4)(*b*) of the CBCA but must rely on the other defences raised.

C. The Claim under Section 100 of the BIA

79 The trustee also claimed against the Wise brothers under s. 100 of the BIA. That section reads:

> **100.**(1) Where a bankrupt sold, purchased, leased, hired, supplied or received property or services in a reviewable transaction within the period beginning on the day that is one year before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included, the court may, on the application of the trustee, inquire into whether the bankrupt gave or received, as the case may be, fair market value in consideration for the property or services concerned in the transaction.
>
> (2) Where the court in proceedings under this section finds that the consideration given or received by the bankrupt in the reviewable transaction was conspicuously greater or less than the fair market value of the property or services concerned in the transaction, the court may give judgment to the trustee against the other party to the transaction, against any other person being privy to the transaction with the bankrupt or against all those persons for the difference between the actual consideration given or received by the bankrupt and the fair market value, as determined by the court, of the property or services concerned in the transaction.

80 The provision has two principal elements. First, subs. (1) requires the transaction to have been conducted within the year preceding the date of bankruptcy. Second, subs. (2) requires that the consideration given or received by the bankrupt be "conspicuously greater or less" than the fair market value of the property concerned.

81 The word "may" is found in both ss. 100(1) and 100(2) of the BIA with respect to the jurisdiction of the court. In *Standard Trustco Ltd. (Trustee of) v. Standard Trust Co.* (1995), 26 O.R. (3d) 1 (Ont. C.A.), a majority of the Ontario Court of Appeal held that, even if the necessary preconditions are present, the exercise of jurisdiction under s. 100(1) to inquire into the transaction, and under s. 100(2) to grant judgment, is discretionary. Equitable principles guide the exercise of discretion. We agree.

82 Referring to s. 100(2) of the BIA, in *Standard Trustco, supra*, at p. 23, Weiler J.A. explained that:

> When a contextual approach is adopted it is apparent that although the conditions of the section have been satisfied the court is not obliged to grant judgment. The court has a residual discretion to exercise. The contextual approach indicates that the good faith of the parties, the intention with which the transaction took place, and whether fair value was given and received in the transaction are important considerations as to whether that discretion should be exercised.

We agree with Weiler J.A. and adopt her position; however, this appeal does not turn on the discretion to ultimately impose liability. In our view, the Court of Appeal did not interfere with the trial judge's exercise of discretion in reviewing the facts and finding a palpable and overriding error.

83 Within the year preceding the date of bankruptcy, Peoples had transferred inventory to Wise for which the trustee claimed Peoples had not received fair market value in consideration. The relevant transactions involved, for the most part, transfers completed in anticipation of the busy holiday season. Given the non-arm's length relationship between Wise and its wholly-owned subsidiary Peoples, there is no question that these inventory transfers could have constituted reviewable transactions.

84 We share the view of the Court of Appeal that it is not only the final transfers that should be considered. In fairness, the inventory transactions should be considered over the entire period from February to December 1994, which was the period when the new policy was in effect.

85 In *Skalbania (Trustee of) v. Wedgewood Village Estates Ltd.* (1989), 37 B.C.L.R. (2d) 88 (B.C. C.A.), the test for determining whether the difference in consideration is "conspicuously greater or less" was held to be not whether it is conspicuous to the parties at the time of the transaction, but whether it is conspicuous to the court having regard to all the relevant factors. This is a sound approach. In that case, a difference of $1.18 million between fair market value and the consideration received by the bankrupt was seen as conspicuous, where the fair market value was $6.6 million,

leaving a discrepancy of more than 17 percent. While there is no particular percentage that definitively sets the threshold for a conspicuous difference, the percentage difference is a factor.

86 As for the factors that would be relevant to this determination, the court might consider, inter alia: evidence of the margin of error in valuing the types of assets in question; any appraisals made of the assets in question and evidence of the parties' honestly held beliefs regarding the value of the assets in question; and other circumstances adduced in evidence by the parties to explain the difference between the consideration received and fair market value: see L.W. Houlden and G.B. Morawetz, *Bankruptcy and Insolvency Law of Canada* (3rd ed. (loose-leaf)), vol. 2, at p. 4-114.1.

87 Over the lifespan of the new policy, Peoples transferred to Wise inventory valued at $71.54 million. As of the date of bankruptcy, it had received $59.50 million in property or money from Wise. As explained earlier, the trial judge adjusted the outstanding difference down to a balance of $4.44 million after taking into account, *inter alia*, the reallocation of general and administrative expenses, and adjustments necessitated by imported inventory transferred from Wise to Peoples. Neither party disputed these figures before this Court. We agree with the Court of Appeal's observation that these findings directly conflict with the trial judge's assertion that Peoples had received no consideration for the inventory transfers on the basis that the outstanding accounts were "neither collected nor collectible" from Wise. Like Pelletier J.A., we conclude that the trial judge's finding in this regard was a palpable and overriding error, and we adopt the view of the Court of Appeal.

88 We are not satisfied that, with regard to all the circumstances of this case, a disparity of slightly more than six percent between fair market value and the consideration received constitutes a "conspicuous" difference within the meaning of s. 100(2) of the BIA. Accordingly, we hold that the trustee's claim under the BIA also fails.

89 In addition to permitting the court to give judgment against the other party to the transaction, s. 100(2) of the BIA also permits it to give judgment against someone who was not a party but was "privy" to the transaction. Given our finding that the consideration for the impugned transactions was not "conspicuously less" than fair market value, there is no need to consider whether the Wise brothers would have been "privy" to the transaction for the purpose of holding them liable under s. 100(2). Nonetheless, the disagreement between the trial judge and the Court of Appeal on the interpretation of "privy" in s. 100(2) of the BIA warrants the following observations.

90 The trial judge in this appeal had little difficulty finding that the Wise brothers were privy to the transaction within the meaning of s. 100(2). Pelletier J.A., however, preferred a narrow construction in finding that the Wise brothers were not privy to the transactions. He held, at para. 136, that:

> [TRANSLATION] ... the legislator wanted to provide for the case in which a person other than the co-contracting party of the bankrupt actually received all or part of the benefit resulting from the lack of equality between the respective considerations.

To support this direct benefit requirement, Pelletier J.A. also referred to the French version which uses the term *ayant intérêt*. While he conceded that the respondent brothers received an indirect benefit from the inventory transfers as shareholders of Wise, Pelletier J.A. found this too remote to be considered "privy" to the transactions (paras. 140-41).

91 The primary purpose of s. 100 of the BIA is to reverse the effects of a transaction that stripped value from the estate of a bankrupt person. It makes sense to adopt a more inclusive understanding of the word "privy" to prevent someone who might receive indirect benefits to the detriment of a bankrupt's unsatisfied creditors from frustrating the provision's remedial purpose. The word "privy" should be given a broad reading to include those who benefit directly or indirectly from and have knowledge of a transaction occurring for less than fair market value. In our opinion, this rationale is particularly apt when those who benefit are the controlling minds behind the transaction.

92 A finding that a person was "privy" to a reviewable transaction does not of course necessarily mean that the court will exercise its discretion to make a remedial order against that person. For liability to be imposed, it must be established that the transaction occurred: (a) within the past year; (b) for consideration conspicuously greater or less

than fair market value; (c) with the person's knowledge; and (d) in a way that directly or indirectly benefited the person. In addition, after having considered the context and all the above factors, the judge must conclude that the case is a proper one for holding the person liable. In light of these conditions and of the discretion exercised by the judge, we find that a broad reading of "privy" is appropriate.

IV. Disposition

93 For the foregoing reasons, we would dismiss the appeal with costs to the respondents.

Appeal dismissed.

Pourvoi rejeté.

Footnotes

* Iacobucci J. took no part in the judgment.

4

1983 CarswellBC 1474
British Columbia Supreme Court

Kootenay Savings Credit Union v. Crowe

1983 CarswellBC 1474, [1983] B.C.W.L.D. 1990, 22 A.C.W.S. (2d) 213

Kootenay Savings Credit Union, Petitioner and Allan Dominique Crowe, Respondent

Cooper L.J.S.C.

Judgment: May 6, 1983
Docket: Nelson No. SC25/83

Counsel: *Philip M. Goody, Esquire*, for the Petitioner
David Miller, Esquire, for the Respondent

Subject: Corporate and Commercial; Property

***Cooper L.J.S.C.*:**

1 The Petitioner seeks an order nisi of foreclosure. The petition includes a claim for personal judgment, order for sale and the other usual relief.

2 The respondent asks that the petition be set aside or that the originating application proceed by way of trial with directions as to conduct of the trial.

3 The mortgage upon which the proceeding is based is expressed to be collateral to a mortgage dated on the same date and in like amount and payable in the same terms as the collateral mortgage. The primary mortgage was approved and granted on the basis of the respondent herein granting the collateral mortgage.

4 The mortgagors of the primary mortgage the brother and sister-in law of the respondent, defaulted and the mortgagee seeks payment. Action was first commenced against the collateral security and then against the primary security. The primary mortgagors have abandoned their property, have separated and are unemployed. The respondent is also unemployed and is unable to meet the payments due under his collateral mortgage.

5 The collateral mortgage provides, inter alia,

> Notwithstanding the foregoing it is clearly understood and agreed by the Parties hereto that this mortgage is given only as Collateral to a mortgage dated the 1st day of May, 1979 made by Robert Franklin Crowe and Margaret Easton Crowe as Mortgagors and Kootenay Savings Credit Union, as Morgagee covering Lot 10, Block "B", District Lot 206-A, Plan 622-A, Municipality of Salmo and Nelson-Slocan Assessment District and shall remain in force until such time as the amount owing under the said Mortgage will have been paid in full, at which time a Discharge of Mortgage will be given to the Mortgagor herein.
>
> Notwithstanding anything to the contrary herein contained, the Mortgagee will not call upon the Mortgagor to make any payment of principal or interest under this Indenture until default is made under the aforesaid mortgage. If and when default is made under the said Mortgage, monthly payments as hereinbefore called for under this Collateral Mortgage will be due and payable, commencing as from the date of default under the said mortgage, and all of the remedies, provises, matters and things contained in this Indenture shall at all relevant times be available to the Mortgagee.

6 It is clear that default has occurred and that under the terms of the Respondent's mortgage "all of the remedies" contained in the mortgage are "available to the mortgagee", including the benefit of the mortgager's covenent that "on default the mortgagee shall have quiet possession of the said lands free from all encumbrances."

7 The Petitioner refers to *Mayhew v. Adams* (1930) 3 W.W.R. 539 at P.543 where Martin J.A. on behalf of the Saskatchewan Court of Appeal says:

> The general rule is that a mortgagee, when default has taken place, may pursue all his remedies concurrently; he may at the same time bring his action for the land and proceed on the covenant and other collateral securities.

In that case, the local master had directed an order *nisi* for foreclosure and directed a stay of proceedings pending the period of redemption. The full court held that the stay should not have been made because although the mortgagee had claimed a larger sum than she was entitled to, there was no misconduct.

8 The Respondent says his mortgage was merely for the purpose of helping out his brother by "backing" his mortgage, that he received no money pursuant to the terms of the mortgage and it was never intended that he would, and that no consideration passed and the collateral mortgage is therefore unenforceable. The respondent cites a number of cases dealing with assigned mortgages where no funds had been advanced. In these cases, the assignees had been held to take the assignment subject to the equities and the mortgages were void. Certainly that is not the case in respect of the collateral mortgage now before the court where clearly the consideration for granting the mortgage was the payment of the mortgage moneys to the holder of the primary mortgage.

9 It is then urged on behalf of the Respondent that a triable issue has been raised and the court should direct a trial under Rule 50(5)(i) and Rule 52(11)(d). The purpose of the latter rule is to direct that an application in Chambers which ought not to be disposed of in a summary way, be put on the trial list. In *First City Developments Ltd. v. Landel Holdings Ltd. et al* (1979), 13 B.C.L.R. 358 the Court said that it must first ascertain from the pleadings and affidavits which facts are in dispute and determine whether there is a *bona fide* triable issue to be resolved. In the case at bar, there appears to be no serious dispute in the facts. The Respondent seems to be seeking a trial in order to enable him to claim against the primary mortgagors by way of Third-party contribution or indemnity. It would seem to me that that is not an issue between the Petitioner and the Respondent and therefore it is not a fact in dispute which should require a trial.

10 In my view, the Respondent may obtain at least some measure of the relief he seeks by an order under Section 16 of the *Law and Equity Act* which provides that

> 16. The court may, before or after judgment in a proceeding
>
> (a) by a mortgagee, for the foreclosure of the equity of redemption in mortgaged property
>
> on application of a person who has an interest in the property or land, direct a sale of the property or land on the terms the court considers just.

11 The Respondent says in the affidavit filed in support of his motion that he has no "registered" interest in the property described in the primary security. It would appear therefore that any application for an order under Section 16 must be sought by either the mortgagee or the registered owners of the primary security. In the exercise of the court's equitable jurisdiction I am prepared to entertain an application by Robert Franklin Crowe or Margaret Easton Crowe, the owners of the primary security, for an order for sale of their lands and premises. I am also prepared to adjourn the hearing of the application for order nisi on the collateral mortgage until the completion of any such sale.

12 I accordingly adjourn the hearing of the petition for order nisi in this action for 30 days.

1983 CarswellBC 1474, [1983] B.C.W.L.D. 1990, 22 A.C.W.S. (2d) 213

End of Document

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2017 ABCA 429
Alberta Court of Appeal

Beazer v. Tollestrup Estate

2017 CarswellAlta 2689, 2017 ABCA 429, [2018] A.W.L.D. 871,
[2018] A.W.L.D. 925, 288 A.C.W.S. (3d) 584, 63 Alta. L.R. (6th) 25

Harry D. Beazer, Marion I. Beazer, and Leonard Jensen (Respondents / Plaintiffs) and James Tollestrup, Litigation Representative for the Estate of Carol Mary Tollestrup (Appellant / Defendant) and Mark A. Baldry (Respondent / Third Party Defendant)

Ronald Berger, Patricia Rowbotham, Brian O'Ferrall JJ.A.

Heard: May 18, 2017
Judgment: December 15, 2017
Docket: Calgary Appeal 1601-0295-AC

Proceedings: reversing in part *Beazer v. Tollestrup Estate* (2016), [2016] A.J. No. 1040, 2016 CarswellAlta 1946, 2016 ABQB 567, J.H. Langston J. (Alta. Q.B.)

Counsel: K.E. Staroszik, Q.C., A. Louie, for Appellant
D.C. Thompson, for Respondent, Harry D. Beazer and others
E.W. Halt, Q.C., E. Scrimshaw, for Respondent, Mark Baldry

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Estates and Trusts; Insolvency; Property; Public

APPEAL from a judgment reported at *Beazer v. Tollestrup Estate* (2016), 2016 ABQB 567, 2016 CarswellAlta 1946, [2016] A.J. No. 1040 (Alta. Q.B.), for mortgages held by three of respondents registered against property owned by estate as valid and enforceable, and for trial judge's decision claim against lawyer.

Berger, Rowbotham JJ.A.:

1 The appellant, James Tollestrup, is the litigation representative of the estate of Carol Tollestrup. He appeals a trial decision which found that mortgages held by three of the respondents registered against property owned by the estate are valid and enforceable: *Beazer v. Tollestrup Estate*, 2016 ABQB 567, [2016] A.J. No. 1040 (Alta. Q.B.) (QL) [Reasons]. He also appeals the trial judge's conclusion that the lawyer who recommended and prepared the disputed mortgages was not negligent in his representation of Ms Tollestrup.

2 The appeal from the finding that the mortgages were valid and enforceable is dismissed. We conclude that there is no reviewable error in the trial judge's conclusion as to the lawyer's advice recommending the mortgages. However, we allow the appeal in relation to the lawyer's negligence in preparing the mortgages. The assessment of damages resulting from that negligence is remitted to the Court of Queen's Bench.

I. Background

3 In September 2008 Ms Tollestrup prepared a will with the assistance of a lawyer, the respondent, Mark Baldry. The will made specific bequests to seven of her children, totalling 40% of the residue of the estate. The remaining 60% was to be divided equally among her friend Leonard Jensen and her two sisters, Marion Beazer and Karen Olsen. Her

only significant asset was her home and adjoining property near the City of Lethbridge (the "Property"). Ms Tollestrup believed the Property was worth approximately $6 million but that was not supported by the evidence of the realtors who ultimately listed the Property. One expert estimated the Property to be valued at slightly over $1 million. Mr Baldry did no independent investigation to verify the value of the Property.

4 Ms Tollestrup was concerned about her children interfering with the sale of the Property and the potential for them to contest her will. Ms Tollestrup acknowledged that the Beazers (her sister Marion and her husband Harry) and Mr Jensen had assisted her throughout her life. Ms Tollestrup lived in a cottage on the Beazers' land for five years. The Beazers calculated expenses of $266,948 related to Ms Tollestrup's stay at the cottage and other services they provided or paid for on her behalf. These expenses included food, telephone, insurance, utilities, labour costs, rental of the cottage, and the costs of repairing the cottage once she left. According to the Beazers, Ms Tollestrup told them that she would compensate them for their help. Mr Jensen cleaned and repaired the Property and made mortgage payments on her behalf. He calculated those costs as $36,593 in 2007 and $112,623 in 2008. Included were legal fees, money advanced as loans, expenses, maintenance, travel expenses, and trailer rental. Mr Jensen also gave Mr Baldry a cheque for $42,000 to remove an encumbrance from the title to the Property.

5 Mr Baldry's office prepared promissory notes and mortgages providing security to Marion Beazer and Harry Beazer (the Beazers) in the amount of $400,000, Mr Jensen in the amount of $100,000, and Ms Olsen in the amount of $200,000 (Ms Olsen's mortgage is not an issue in this appeal). Ms Tollestrup executed an additional promissory note and mortgage in favour of Mr Jensen in the amount of $50,000. Mr Jensen testified that he understood that the mortgage for $100,000 was for the money he previously advanced to Ms Tollestrup and the mortgage for $50,000 related to the discharge of the encumbrance and associated costs.

6 In November 2008, Ms Tollestrup listed the Property for $4 million. There was one offer to purchase for $1 million and a counter-offer of $2 million but no sale resulted. In February 2009 she listed the Property for $3 million, and later that month for $4,350,000. Again, no sale resulted.

7 In November 2009, Ms Tollestrup made a new will that made no provisions for Mr Jensen or the Beazers. Mr Jensen and the Beazers became aware of this and consulted a lawyer. In January 2010, the Beazers and Mr Jensen made a demand for the money owing on the mortgages. Ms Tollestrup's new lawyer (not Mr Baldry) responded to the demand, contending that no consideration was provided by the Beazers and Mr Jensen for the mortgages.

8 In March 2010, the Beazers and Mr Jensen issued a statement of claim (Action No 1006-00192, "Beazer action") seeking a declaration that the mortgages were valid and enforceable, and an order for possession or the appointment of a receiver. Ms Tollestrup defended, alleging that the mortgages were invalid as there had been no consideration for them. In the alternative, she alleged that she executed the promissory notes and mortgages under duress or undue influence by the Beazers and Mr Jensen. She also commenced her own action (Action No 1006-01042, "Tollestrup action") seeking a declaration that the mortgages were invalid and that Mr Baldry was negligent. In addition to defending, the Beazers and Mr Jensen third-partied Mr Baldry. In November 2011, the two actions were consolidated.

9 Ms Tollestrup died on July 18, 2012. Her son, James Tollestrup, was appointed litigation representative for the purposes of the consolidated action.

II. Decision on Appeal

10 The trial judge found that the mortgages held by the Beazers and Mr Jensen were valid. He referred to the *Bills of Exchange Act*, RSC 1985, c B-4 [*BEA*], the *Land Titles Act*, RSA 2000, c L-4, and the *Law of Property Act*, RSA 2000, c L-7: Reasons at paras 9-10.

11 Although the trial judge held that the mortgages were valid, he found nothing owing on them because the mortgages referred to the future advancement of funds: Reasons at para 10. He rectified them in two respects. In the preamble, the words "to be lent" were replaced with "having been lent": Reasons at para 95. Paragraph 8(e) of the mortgages was

changed from "the whole of the monies hereby secured shall, at the option of the mortgagee, become due and payable" to "the whole of the monies hereby secured shall become due and payable upon the sale of the said land, or upon the death of the mortgagor": Reasons at para 96.

12 The trial judge held that the parties' common intention was that the mortgages would not create new obligations since the money had already been lent to (i.e., benefitted) Ms Tollestrup. As well, the obligations created by the mortgages were only intended to crystallize upon the disposition of the Property, by sale or death: Reasons at para 93.

13 The trial judge found that although the amounts could not be ascertained with specificity, he was "satisfied that Carol did owe the Beazers and Mr Jensen a significant amount of money and . . . she felt an obligation to repay these people": Reasons at para 81. He found that she "proposed the amounts which were used . . . based on Carol's assessment of actual dollars advanced or a combination of such figures plus a 'bonus' for all the trouble she inflicted on these people": *ibid.*

14 In regard to Mr Baldry's alleged negligence, the trial judge found that although "it could have been more thoroughly done," he was not satisfied that Mr Baldry was negligent in his representation of Ms Tollestrup with the solutions he proposed to address her concerns: Reasons at para 88.

15 In the result, after rectifying the mortgages, the trial judge found that the mortgages held by the Beazers and Mr Jensen were valid and enforceable by way of foreclosure proceedings under the *Law of Property Act*. Since the Property had not been sold, the mortgages became due and payable on the date of Ms Tollestrup's death. The third party action against Mr Baldry was dismissed: Reasons at para 97.

III. Grounds of Appeal and Standard of Review

16 The appellant contends that the trial judge erred by:

i. failing to consider that the mortgages were granted based on the mistaken belief that the property was worth $6 million, and failing to consider that the enforcement of the mortgages in these circumstances was unconscionable;

ii. finding that there was sufficient consideration for the mortgages;

iii. rectifying the mortgages to change the consideration and the date of default; or in the alternative, not making further rectifications to the mortgages; and

iv. failing to find Mr Baldry liable for negligence.

17 The appellant does not dispute the validity of Mr Jensen's second mortgage but contends that the amount should be reduced to $42,284 from $50,000. We can address this summarily. The amount of the mortgage is a finding of fact with which we will not interfere absent palpable and overriding error. The trial judge found that the amounts were based upon Ms Tollestrup's estimates and included expenses and in some instances a bonus. This would explain the difference in the amounts.

18 The grounds of appeal involve primarily challenges to the facts and inferences found by the trial judge. Accordingly, the standard of review is palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33 (S.C.C.) at paras 10 and 23, [2002] 2 S.C.R. 235 (S.C.C.). Those issues which involve determining whether the facts satisfy a legal test are also reviewed for palpable and overriding error absent an extricable error of law: *Housen* at paras 36 — 37.

19 The appellant also challenges the interpretation of the mortgages, and their rectification. While the mortgages are standard form in the sense that they were a precedent in the lawyer's office, the circumstances underlying their creation is the main thrust of the litigation. Principles of contractual interpretation are applied to the words of a written contract considered in light of its factual matrix: *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53 (S.C.C.) at para 50, [2014] 2 S.C.R. 633 (S.C.C.). Accordingly, we review this issue on a reasonableness standard.

20 As regards the allegations of Mr Baldry's negligence, this ground of appeal, properly characterized, raises an error in the trial judge's application of the law to the facts which is reviewed for palpable and overriding error.

IV. Analysis

A. Mistaken Belief and Unconscionability

21 The appellant submits that the mortgages are based on a common mistake and therefore void *ab initio* or, alternatively, are voidable in equity. "Mistake" arises in two contexts in this appeal. The first is in relation to the rectification of the mortgages. The trial judge's reasons address common mistake in this context. The mistakes were in relation to whether money had been lent and the time of default. We address this ground of appeal later in these reasons.

22 The second context in which "mistake" arises is in relation to the misapprehension of the value of the Property. The trial judge's reasons did not address the doctrine of common mistake or its remedy in this context. The pleadings do not allege common mistake or seek a contractual remedy for mistake. It appears, therefore, that this argument arises for the first time on appeal.

23 At best, there is some reference to mistake in the context of the appellant's plea of misrepresentation. The appellant alleged that the Beazers and Mr Jensen misrepresented the value of the Property to Ms Tollestrup and Mr Baldry. These allegations are made in the Amended Amended Statement of Defence to the Beazer action and in the Amended Amended Statement of Claim in the Tollestrup action.

24 Some argument strayed into the area of mistake. In his opening remarks, the appellant's counsel submitted, vis-à-vis his statement of defence:

> the mortgages were founded and based on a misrepresentation by the plaintiffs as to the value of Carol's property. The plaintiffs represented to Carol and Mr Baldry that the farm was worth [$]6,000,000. After paying the first mortgage, it was only worth [$]800,000. The plaintiffs . . . knew or ought to have known, **were it not for this misrepresentation, which I really say is a mistake** ... a collective misapprehension as to value, **so we're not alleging that the plaintiffs engaged in a misrepresentation, everybody believed that the property was worth [$]6,000,000 and it wasn't.** ... Carol and Mr Baldry relied on this, and . . . the notes and mortgages would not have been prepared had they known otherwise. (emphasis added)
>
> [T]his is our evolving understanding of the events relating to what happened with respect to the mortgage[s] where we say the question is, are the mortgages invalid by reason of the plaintiffs and Karen Olsen's misrepresentation . . . to Carol and solicitor, Mark Baldry, or in any event, a misapprehension by them that was known to the plaintiffs as to the value of Carol's property, [$]6,000,000 versus [$]1,000,000.

25 There is also some reference to mistake in the context of the allegations of Mr Baldry's alleged negligence.

26 The appellant cannot be granted relief for mistake in common law or in equity, because common mistake as to the Property's value was not fundamental to Ms Tollestrup's intention to grant the mortgages. A mistake cannot render a contract void unless it is fundamental in character and goes to the root of the contract: *Bell v. Lever Brothers Ltd.* (1931), [1932] A.C. 161 (U.K. H.L.) at 225-27, [1931] UKHL 2 (U.K. H.L.) (BAILII); see also GHL Fridman, *The Law of Contract in Canada*, 6th ed (Toronto: Thomson Reuters Canada Limited, 2011) at 242.

27 At common law, mistakes as to the quality or value of the subject matter, rather than the identity of the subject matter, cannot render a contract void *ab initio* unless the mistake is fundamental to the contract: *Bell* at 218; Fridman at 242. Moreover, the mistake must go to the parties' intention to contract rather than the motivation for doing so: Fridman at 243; *Stone's Jewellery Ltd. v. Arora*, 2009 ABQB 656 (Alta. Q.B.) at para 27, (2009), 314 D.L.R. (4th) 166 (Alta. Q.B.). The equitable doctrine of mistake arises when a mistake renders the enforcement of a contract unconscionable: *Solle v. Butcher* (1949), [1950] 1 K.B. 671 (Eng. C.A.) at 692, [1949] 2 All E.R. 1107 (Eng. C.A.). Because of the mistake, the

contract is voidable and rescission can be granted. Rescission is a discretionary remedy and available even where the mistake is insufficient to render the contract void *ab initio* at common law: *Stone's Jewellery* at paras 28-30.

28 To invoke the equitable doctrine of mistake, both parties must be "under a common misapprehension either as to facts or as to their relative and respective rights, provided that the misapprehension was fundamental and that the party seeking to set it aside was not himself at fault": *Solle* at 693. The applicability of the equitable doctrine of mistake is uncertain in Canada but it has not been abandoned in Alberta: *Andrews v. Coxe*, 2003 ABCA 52, 320 A.R. 258 (Alta. C.A.).

29 In this case, the mortgages were granted to repay the Beazers and Mr Jensen. A mistake as to the value of the land did not affect Ms Tollestrup's intention to repay her obligations and was not fundamental to the contract.

30 Similarly, the contract is not voidable under the equitable doctrine of mistake. Though the equitable doctrine is available if the mistake is not made out in common law, the mistake must still be fundamental to the contract. Additionally, for the equitable doctrine of mistake to be invoked, the party seeking to invoke the doctrine must not be at fault. As owner of the property, Ms Tollestrup had some responsibility for ascertaining the Property's true value.

31 The appellant also asks that we exercise our equitable jurisdiction to rescind the contract on the basis of unconscionability. There is a plea of duress as well. There is no basis for equitable relief given the trial judge's clear findings which are amply supported by the record. He found that Ms Tollestrup and Ms Olsen were of the view that the Property was worth $6 million, so any suggestion that the Beazers and Mr Jensen mispresented this is not supported by the evidence. The trial judge also found that it was Ms Tollestrup alone who valued the indebtedness and gave Mr Baldry the instructions regarding her will and the value of each of the mortgages. Moreover, Mr Baldry had no doubt regarding Ms Tollestrup's capacity to instruct him.

32 We also note that on this record there is no plea of mistake in relation to the value of the Property and no proper argument in relation to the doctrine of mistake at common law or in equity.

33 Accordingly, we dismiss this ground of appeal.

B. Validity of the Mortgages

34 Each mortgage was issued as collateral security to a promissory note. In September 2008, Ms Tollestrup executed promissory notes in favour of the Beazers and Mr Jensen for $400,000 and $100,000 respectively. As regards the amount of indebtedness, the trial judge concluded that it was Ms Tollestrup who quantified the debt obligation: Reasons at para 81. He also stated that:

> I am satisfied that many of these costs are not actual costs but rather convenient translations of how a stranger may have dealt with Carol. However, it is clear that Carol was a significant economic burden on all with whom she associated. I am also satisfied that no one did any real calculations upon which Carol's directions to Mr Baldry were based. However, Carol's professed indebtedness to these people was significant (at para 80).

35 The promissory notes provided for interest of 5% per annum from the date of demand to the date of payment. The promissory notes also stated that "the within indebtedness shall not be payable, and the Payee's or Holder's cause of action under this promissory note shall not arise, until such time as the Payee or Holder has made a formal, written demand for payment".

36 Section 176(1) of the *BEA* defines a promissory note as "an unconditional promise in writing made by one person to another person, signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money to, or to the order of, a specified person or to bearer". Section 52 provides that "valuable consideration" for a bill may be constituted by any consideration sufficient to support a simple contract, or an antecedent debt or liability. Although section 52 specifically refers to bills of exchange, the provisions of the *BEA* that apply to bills also apply to

promissory notes under Part IV, except as otherwise provided and with such modifications as the circumstances require: s 186(1). Simply put, an antecedent debt is valuable consideration for a promissory note.

37 The Beazers and Mr Jensen performed services and expended money for Ms Tollestrup's benefit before she executed the promissory notes. The promissory notes are based on past debts but stand as independent instruments with valuable consideration in the form of antecedent debt: *BEA*, s 52(1). Accordingly, the promissory notes are valid.

38 The mortgages (titled "Mortgage Collateral to Promissory Note") were collateral security for repayment of the promissory notes.

39 A mortgage is security for a debt. More specifically, a "mortgage is a contract pursuant to which a borrower (mortgagor) pledges his land as security for the repayment of money he has borrowed from a lender (mortgagee): *Daniels v. Mitchell*, 2005 ABCA 271 (Alta. C.A.) at para 20, (2005), 371 A.R. 298 (Alta. C.A.).

40 In addition to the requirements for registration under the *Land Titles Act* (about which there is no complaint), a "mortgage is a contract and the basic laws of contract apply. There must be the proverbial parties, property and price": *Royal Bank v. Exner* (1995), 170 A.R. 1, 1995 CarswellAlta 29 (Alta. Q.B.) (WL Can) at para 31 [*Exner* cited to WL Can].

41 A contract requires consideration. Consideration is "some right, interest, profit or benefit accruing to the one party or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other": *Spruce Grove (Town) v. Yellowhead Regional Library Board* (1982), 1981 ABCA 369 (Alta. C.A.) (CanLII) at para 7, (1982), 143 D.L.R. (3d) 188 (Alta. C.A.). If the act or forbearance has passed and is independent of the giving of the promise, this is "past consideration" which is generally insufficient to create a valid contract: Fridman at 109 citing *Eastwood v. Kenyon* (1840), 11 Ad. & El. 438 (Eng. K.B.)). A moral obligation arising from a past benefit is not good consideration: *Grant v. Von Alvensleben* (1913), 13 D.L.R. 381, 1913 CarswellBC 241 (B.C. C.A.) (WL Can) at para 6 [*Von Alvensleben* cited to WL Can]. A subsequent promise is only binding when the request, the consideration and the promise, form substantially one transaction: *ibid* at para 7.

42 However, even an act done prior to the giving of a promise to make a payment or to confer some other benefit may be consideration for the promise if three conditions are established: *Pao On v. Lau Yiu Long*, [1979] 3 All E.R. 65, [1980] A.C. 614 (Hong Kong P.C.). These three conditions are that:

> [t]he act must have been done at the promisor's request, the parties must have understood that the act was to be remunerated either by payment or the conferment of some other benefit, and payment, or the conferment of a benefit, must have been legally enforceable had it been promised in advance (at 74).

43 With respect to consideration for past debts, if some new factor is introduced this could be a sufficient difference or novelty to entitle a court to hold that there was fresh (not past) consideration for a new promise: Fridman at 110. A mortgage may be valid in such circumstances. For example, forbearance to sue can be valid consideration: *Alberta Drywall Supply Ltd. v. Hauk* (1984), 55 A.R. 226 (Alta. Q.B.), 1984 CanLII 1349. The extension of time for payment can amount to consideration: *Liberty Mortgage Services Ltd. v. 123 Street Investments Ltd.*, 2011 ABQB 542, 523 A.R. 321 (Alta. Q.B.). Lowering an interest rate may be sufficient consideration: *ibid* at para 39. However, merely "allowing the loan to exist without taking collection action" is not: *Lewis v. Central Credit Union Ltd.*, 2012 PECA 9 (P.E.I. C.A.) at para 24, (2012), 323 Nfld. & P.E.I.R. 177 (P.E.I. C.A.).

44 *Scarcella v. Militano*, 2001 MBQB 152, 157 Man. R. (2d) 190 (Man. Q.B.) involved a demand loan between family members secured by a mortgage, which the court found to be valid despite a claim that the mortgage was unenforceable due to a lack of consideration. The 18-month restriction on the mortgagee's demand right provided the mortgagor with a significant benefit: para 35. The court goes on to note at para 34:

> [T]here is law to support a finding that in some situations a promise or undertaking given to support past consideration may be enforceable. Cf. pages 122 through 125 of S.M. Waddams, ***The Law of Contracts*** (3rd ed., 1993). At p. 124, Waddams notes:
>
> > Another case where the distinction between prior debt and subsequent promise became significant was where the subsequent promise was incorporated in a bill of exchange, for example, a promissory note. It was held that the promissory note was enforceable against the maker (even by the promisee) although the consideration was an antecedent debt.
> >
> > [. . .]
> >
> > It is sometimes said by modern commentators that these instances are of no significance since they have been "taken out" of the common law by statute. But the view thereby implied by the relationship between common law and statute seems questionable. These instances of enforcement for past consideration all grew up at common law because justice was seen to require the results reached. Parliament agreed with this conclusion. This would appear to strengthen rather than weaken the argument that there will continue exist instances where justice requires the enforcement of promises because of some antecedent event.

45 Waddams cites no cases for these propositions but *Adams v. Woodland* (1878), 3 O.A.R. 213 (Ont. Co. Ct.) 1878 WL 16702 (WL) is referred to immediately preceding these passages. In *Adams*, Burton JA said that although "payment of the debt remained simply a voluntary duty, binding only *in foro conscientiae*, still an express promise [in the form of a promissory note] operated to revive the liability . . . ": at 214.

46 The same logic applies here. The funds and benefits advanced to Ms Tollestrup were in the past and repayment was a voluntary duty binding only as a matter of conscience that would not suffice for consideration for the mortgages. However, that changed when the promissory notes were executed. All the mortgages granted by Ms Tollestrup were collateral to the promissory notes and provided that:

> . . . the Mortgagor shall pay to the Mortgagee the sum of [amount varied for each respondent] in lawful money of Canada, at the time and places, in the manner, and with interest thereon at the rate provided in the Promissory Note or any extensions or renewals of or substitutions for the Promissory Note.
>
> In regard to default, the mortgages noted that, "the whole of the moneys hereby secured shall, at the option of the Mortgagee, become due and payable".

47 Having determined that past consideration is good consideration for a promissory note, and that the mortgages were collateral to the promissory note, the promissory notes constitute the consideration necessary to make the mortgages valid.

48 In the alternative, a prohibition on the mortgagee's right to demand payment can provide the mortgagor with a significant benefit and can amount to consideration: *Scarcella*. Although the promissory notes were payable on formal, written demand, the mortgagee's right to demand payment was deferred. The trial judge found that "the obligations created by the mortgages only crystalized upon the disposition of the land, that is, through a sale or the death of the mortgagor.": Reasons at para 93. The deferred right of the mortgagees to demand payment was a benefit to the mortgagor, sufficient to amount to consideration.

49 The trial judge's conclusion that the mortgages were valid is reasonable and supported by the record. We are not persuaded of any reviewable error and dismiss this ground of appeal.

C. Rectification

1. Rectification Generally

50 Rectification is an equitable remedy designed to correct errors in the recording of terms in written legal instruments: *Canada (Attorney General) v. Fairmont Hotels Inc.*, 2016 SCC 56 (S.C.C.) at para 38, [2016] 2 S.C.R. 720 (S.C.C.). It must be used "with great caution" since a "relaxed approach to rectification as a substitute for due diligence at the time a document is signed would undermine the confidence of the commercial world in written contracts": *ibid* para 13.

51 As the Supreme Court held in *Fairmont Hotels* at para 12:

> If by mistake a legal instrument does not accord with the true agreement it was intended to record — because a term has been omitted, an unwanted term included, or a term incorrectly expresses the parties' agreement — a court may exercise its equitable jurisdiction to rectify the instrument so as to make it accord with the parties' true agreement. Alternatively put, rectification allows a court to achieve correspondence between the parties' agreement and the substance of a legal instrument intended to record that agreement, when there is a discrepancy between the two. Its purpose is to give effect to the parties' true intentions, rather than to an erroneous transcription of those true intentions (Swan and Adamski, at]§8.229).

52 While a court may rectify an instrument that inaccurately records an agreement, it may not change the agreement to salvage what a party hoped to achieve, or to cure a party's error in judgment in entering into an agreement: *Fairmont* at paras 3 and 19. The court's task "is to restore the parties to their original bargain, not to rectify a belatedly recognized error of judgment by one party or the other": *Sylvan Lake Golf & Tennis Club Ltd. v. Performance Industries Ltd.*, 2002 SCC 19 (S.C.C.) at para 31, [2002] 1 S.C.R. 678 (S.C.C.). It should not be used to "escape, after-the-fact, what has turned out to be a bad bargain" (Geoff R Hall, *Canadian Contractual Interpretation Law*, 2nd ed (Markham, Ont: LexisNexis Canada, 2012) at 167) or because it becomes evident in hindsight that it was a bad deal (Fridman at 777).

53 Typically, a court will require evidence with a "high degree of clarity, persuasiveness and cogency before substituting the terms of a written instrument with those said to form the party's true . . . intended course of action": *Fairmont* at para 36. When there is a common mistake, the party applying for rectification must show that:

> the parties had reached a prior agreement whose terms are definite and ascertainable; that the agreement was still effective when the instrument was executed; that the instrument fails to record accurately that prior agreement; and that, if rectified as proposed, the instrument would carry out the agreement (*Fairmont* at para 14).

54 The jurisdiction to rectify may be exercised in respect of a wide range of contracts, including bills of exchange, transfers of shares, and conveyancing documents: John McGhee, *Snell's Equity*, 31st ed (London, UK: Sweet & Maxwell, 2005) at 333.

2. Rectification of the Mortgages by the Trial Judge

a. Rectification of the Preamble

55 The trial judge rectified the preamble of the mortgages so that "to be lent" was replaced with "having been lent" because he found a common mistake in that "the parties clearly acknowledged that the funds being discussed related to a sum which had already been advanced": Reasons at para 95.

56 Given the conclusion that the mortgages were valid, the four conditions from *Fairmont* are satisfied. The parties reached a prior agreement whose terms are definite and ascertainable and the agreement was still effective when the mortgages were executed; the mortgages failed to record accurately that prior agreement (i.e., no new funds were to be advanced); and that, if rectified as proposed (i.e., substituting "to be lent" with "having been lent"), the mortgages would carry out the agreement.

57 Rectification was appropriate with respect to the preamble because it accurately reflected the parties' common intention. The appellant acknowledges that if this court finds that the mortgages are agreements capable of rectification, no one contemplated future advances and the mortgages should be corrected to reflect this.

b. Rectification of Paragraph 8(e)

58 Paragraph 8 of the mortgages sets out the provisions relating to default:

> That in the event of default in the payment of any part of the moneys secured by this Mortgage, or on breach of any covenant, understanding agreement or stipulation expressed or implied herein; or should there be any event of default or breach of covenant under the Promissory Note, or any extensions or renewals thereof or substitutions therefor:
>
> [. . .]
>
> (e) The whole of the moneys hereby secured shall, at the option of the Mortgagee, become due and payable. . . .

59 The trial judge rectified paragraph 8(e) by replacing the underlined words with "become due and payable upon the sale of the said land, or upon the death of the mortgagor". The trial judge held that the mortgages had to be rectified since they and the promissory notes were created in contemplation of the disposition of the Property. Therefore, the mortgages had to reflect the fact that the obligations created under them only crystallized upon the disposition of the Property, through sale or death.

60 Unfortunately, as rectified, paragraph 8(e) is now inconsistent with paragraph 2 (with emphasis):

> That the Mortgagor shall pay to the Mortgagee the sum of [amount relevant to each mortgage] in lawful money of Canada, at the time and places, in the manner, and with interest thereon at the rate provided in the Promissory Note or any extensions or renewals of or substitutions for the Promissory Note.

61 The promissory notes state that it is payable when "the Payee or Holder has made a formal, written demand for payment". We therefore exercise our equitable discretion to rectify paragraph 2 by deleting the words "in the manner" to mirror the rectification of paragraph 8(e).

3. Further Rectification Requested by the Appellant

62 The appellant requests that we further rectify the mortgages. He asks that we delete paragraph 8(f) which provides that: "The Mortgagee may forthwith take such proceedings to realize on its security created by this Mortgage by foreclosing the same or otherwise as it may be law [sic] be entitled to do."

63 The trial judge found that the mortgages became due and payable at Ms Tollestrup's death. In other words, the event of default occurred on July 18, 2012. The ability to foreclose earlier is inconsistent with this finding. It follows that the respondent mortgagees had no right to foreclose until Ms Tollestrup's death. Although their foreclosure action was premature, we are not persuaded to delete Article 8(f).

64 The appellant also asks that we delete the interest (5%) payable under the Promissory Notes and paragraph 9(g) of the mortgages which creates a charge on the land for evaluator and surveyor fees and solicitor client costs for exercising or enforcing remedies under the mortgage. He submits that the parties did not ask for these terms; indeed no one read the mortgages. The general explanation given by Mr Baldry to Ms Tollestrup did not include a discussion of interest.

65 Although the date of default has been rectified, there is nothing on this record that would support a conclusion that the mortgagees were not entitled to interest or costs, as of the date of default. Both are standard provisions of a mortgage.

66 In conclusion, we deny the appellant's request for further rectification to the mortgages.

D. Solicitor's Negligence

67 Although the trial judge acknowledged that the mortgages which Mr Baldry recommended were "curious" and "unorthodox" and he "could have done more to investigate the information before him," he found no negligence: Reasons at paras 84, 87 — 88.

68 The appellant submits that the trial judge erred in finding that Mr Baldry exercised the knowledge, skill and care of a prudent solicitor in the circumstances. In our view there are two distinct aspects to the alleged negligence: (1) the recommendation that Ms Tollestrup grant mortgages; and (2) the drafting of the mortgages.

1. Evidence of Mr Baldry

69 Mr Baldry has been a member of the Alberta bar since 1985 and practises law in Taber, Alberta. In 2008 his practice consisted of real estate, estate planning, wills, dependent adult work and some civil litigation. His clients were small town clients, families and small corporations. His estate work involved mainly "husband and wife" matters. His real estate practice included conveyancing, granting of security and commercial and agricultural mortgages. He typically referred tax matters to accountants. His trust work involved mainly testamentary trusts for minors and disabled children.

70 Mr Jensen recommended Mr Baldry to Ms Tollestrup. Ms Tollestrup, Mr Jensen, Ms Olsen and the Beazers met Mr Baldry at his office on September 3, 2008. Mr Baldry testified that there were two main topics of discussion: the Property and its proposed sale and the preparation of a will for Ms Tollestrup.

71 Mr Baldry testified that Ms Tollestrup advised him that there was a proposed sale of the Property with the City of Lethbridge, and that the Government of Alberta might be involved as there was a proposed ring road on the west side of Lethbridge, connecting Highway 3 to the west side of Lethbridge. Ms Tollestrup was confident that a sale was imminent. Ms Tollestsrup and Ms Olsen were certain that this was a sought after property. They anticipated a sale price of $6 million. Mr Baldry testified that the two women appeared to have researched the value of the land and were well versed in it, and mentioned the name of a prominent realtor in Lethbridge. He had no reason to doubt their information or the research they had done. At no time did Mr Baldry conduct an independent investigation of the value of the Property.

72 Ms Tollestrup was concerned about a caveat and certificate of pending litigation on the Property's title filed by McNabb, a financial consultant who had assisted her in the past. She said she was indebted to him for $3,500 but his encumbrances reflected an indebtedness of over $40,000. She asked Mr Baldry to find a way to remove the encumbrances. Mr Baldry advised Ms Tollestrup to retain litigation counsel as he did not do much litigation. Mr Baldry testified that throughout this meeting, Ms Tollestrup spoke with familiarity about other encumbrances on the title, including a bank mortgage. He had the impression that Ms Tollestrup understood the nature of a mortgage.

73 Ms Tollestrup also instructed Mr Baldry that she wished to have a will prepared. She wanted the bulk of her estate to go to the Beazers, Ms Olsen and Mr Jensen, as they had assisted her greatly over the years while her children had not stood by her during her divorce. Mr Baldry testified that Ms Tollestrup said she did not trust her children. Ms Tollestrup also instructed Mr Baldry to prepare an Enduring Power of Attorney and a Personal Directive.

74 Ms Tollestrup returned to Mr Baldry's office on September 12, 2008. She reviewed the draft will and made changes. She expressed a concern regarding her children's ability to get in the way of the planned sale of the Property and in carrying out the bequests. In response to her questions regarding contesting the will, Mr Baldry advised her that anyone could contest a will but that in his opinion the challenge would be unsuccessful. According to Mr Baldry, Ms Tollestrup was very concerned with repaying the Beazers, Ms Olsen and Mr Jensen for their assistance. She asked him for his advice on how to avoid the interference of her children. He suggested securing the obligations by way of mortgages against the Property. He explained that upon its sale or Ms Tollestrup's death, the Beazers, Ms Olsen and Mr Jensen would be paid as secured creditors, despite possible attempts to contest the sale or the will.

75 Ms Tollestrup instructed Mr Baldry to prepare a $400,000 mortgage to the Beazers and a $100,000 mortgage to Mr Jensen. Mr Baldry did not inquire into the calculation of these amounts and assumed they related to past indebtedness. The trial judge found that it was Ms Tollestrup alone who quantified her debt obligations: Reasons at para 81.

76 On September 19, 2008 Ms Tollestrup returned to Mr Baldry's office to execute the documents. Mr Baldry testified that he went over the wording of the promissory notes with her. She understood their terms, the amounts, that they were demand notes and no interest was payable until demand. The mortgage documents were created from precedents. Mr Baldry did not recall reviewing the language of the mortgages as they were seen as temporary and would be discharged upon the sale of the land. Although he assumed the mortgages were intended to secure past obligations, he did not amend the mortgages to reflect that. Mr Baldry also prepared mortgage discharges to be executed by the Beazers and Mr Jensen to be held until the sale closed to ensure that if any of the mortgagees passed away in the interim, the sale of the Property would not be held up by probate.

77 Mr Baldry also dealt with the McNabb matter. He contacted a lawyer who agreed to represent Ms Tollestrup. After negotiations with McNabb as to the amount owed, Mr Jensen advanced the funds necessary to clear the title of McNabb's caveat and certificate of pending litigation. In return, Ms Tollestrup instructed Mr Baldry to prepare an additional promissory note in the amount of $50,000 and another mortgage in favour of Mr Jensen.

78 Mr Baldry acknowledged that he did not inquire into Ms Tollestrup's assets or financial needs when drafting her will, nor did he discuss the impact of taxes payable by her or her estate upon sale of the Property.

79 Mr Baldry acknowledged that at the relevant time, he had never established an alter ego trust for a client. However, he was familiar with the term and understood it to be an *inter vivos* trust established to achieve tax planning goals and to determine who would receive the settlor's assets. It "sound[ed] correct" to Mr Baldry that an alter ego trust allows the property of the settlor to be transferred out of the estate into a trust so that the property is no longer part of the settlor's estate on death.

2. Evidence of Mr Boettger Q.C.

80 Roy Boettger Q.C. was qualified to give expert opinion evidence on the standard of care of a lawyer practising in the area of estate planning and administration, wills, trusts and business transactions, including real estate transactions as they related to estate planning.

81 Mr Boettger's report addressed a number of questions asked by the appellant's counsel regarding the standard of care of a reasonably competent lawyer preparing a will. Specifically, Mr Boettger was asked to consider: (i) the inquiries, if any, that should be made to determine the value of the estate, particularly where the only asset is a large acreage; (ii) the options to prevent delay due to interference in estate administration; (iii) whether a mortgage against the testator's only asset would be recommended; and (iv) what advice should be given where a testator, immediately upon executing a will, instructs the *inter vivos* transfer of a part of the estate to some of the beneficiaries. Mr Boettger reviewed the September 12, 2008 will, the certificate of title as at September 3, 2008, and the mortgages.

82 The thrust of Mr Boettger's evidence was that there were other alternatives which could have addressed Ms Tollestrup's concerns that her children might interfere with the disposition of her estate to the Beazers and Mr Jenson.

83 He stated that the obvious way to address such concerns is to remove the asset from the probate proceeding. In relation to Ms Tollestrup's situation, he suggested joint ownership of the Property, or the creation of an *inter vivos* trust, more specifically an alter ego trust, with the Property as the trust's property. The trust could be administered throughout the client's lifetime with the designation of a successor trustee and beneficiaries that would share in the trust property following the client's death.

84 Mr Boettger opined that an immediate mortgage against the client's only asset in favour of an intended beneficiary would not be a common or prudent recommendation. It would not eliminate delay in the administration of the estate. To the contrary, it could prolong it. The property is still an asset of the estate subject to administration, whether or not there was a mortgage on the property. Moreover, there are many other disadvantages to the mortgage. If the client wished to sell the property for her personal needs, it would be necessary to have the cooperation of the mortgagee. If the client wished to change the beneficiaries under her will, the mortgagee might not be willing to relinquish his or her interest under the mortgage.

85 Mr Boettger acknowledged that he had not considered that the mortgages may have been granted to acknowledge a pre-existing debt, and that his report did not discuss those debts. He agreed that it would be important to know whether a client had been through long and bitter divorce proceedings. He acknowledged that as part of the consideration of the class of beneficiaries, it would be important to know whether the client was estranged from her children, and whether there were others who had provided financial and emotional support. He agreed that knowledge of an imminent sale of a client's property would also be important information. He testified, however, that such knowledge would not necessarily exclude the consideration of the trust vehicles to which he had testified.

86 Mr Boettger opined that if a client came to him with clear instructions on how they wanted to repay a debt, he would not refuse their instructions, but he would use the initial instructions to open a dialogue to determine what the client was trying to achieve. If the client wanted to acknowledge the debt, Mr Boettger would ensure that they understood that the debt reduced the amount left in their estate. If there was an impending sale of the client's property, Mr Boettger would want to know the terms of the sale, the source of the cash to close and whether the client would still be financially solvent after the sale.

87 Mr Boettger acknowledged that while the advice regarding an alter ego trust would likely not be on the mind of the average lawyer in small town Alberta, it is the obligation of a lawyer to remain current with respect to the law.

88 The trial judge found Mr Boettger's evidence to be of some assistance but not determinative because it was "articulated in a vacuum": Reasons at para 88. "He was unaware of the totality of the circumstances confronting Mr Baldry. For example, Mr Boettger did not consider the scenario of acknowledgment of and security for a pre-existing debt, which was a major issue facing Mr Baldry" *ibid.* He found many of the opinions unhelpful in the situation confronting Mr Baldry.

89 The trial judge concluded that it had not been demonstrated that Mr Baldry failed in the exercise of his duty to Ms Tollestrup: Reasons at para 84. As to context, he said:

> When Mr Baldry dealt with Carol and the others in his office, it was apparent that he was being asked to draft a will whose primary focus was the repayment to the individuals who had helped Carol. It is equally clear that the mortgages and promissory notes were in furtherance of that objective. The wisdom of approaching this task as he did may be curious. However, one must view the situation in its proper context. Lawyers are not soothsayers or clairvoyants. They deal with everyday people in everyday situations. Mr Baldry could have done more to investigate the information before him. But he was satisfied that Carol was in charge of her situation. He was satisfied that a sale of Carol's property was imminent, a conclusion which is supported by the evidence of the other parties who testified at trial. It was apparent that all in attendance had Carol's best interest at heart. **It was obvious to Mr Baldry that Carol wanted to ensure that her debt obligations would be satisfied at all costs.** The information available to Mr Baldry was that the property was about to be sold, and none of the parties before him disputed Carol's opinion of the value. His efforts, based on the available facts, were to put in place an immediate and tamper proof method of paying Carol's debts. The paying of the McNabb encumbrance was but one of the steps taken.
>
> . . . Mr Baldry's actions must be viewed in the context of the situation in which he found himself and the information available to him. While his solutions may have been somewhat unorthodox, they must be assessed having regard

> to the circumstances with which he was confronted. The situation he faced was that of an older client who was apparently focused and who described a poor relationship with family members. She was surrounded by people she obviously trusted and who apparently were focused on her welfare. There was concern expressed about encumbrances on title and the potential for disruptive behaviour from children. And the resources which would be the foundation for the will, and the basis for the mortgages and promissory notes, would soon be liquidated. **It could have been more thoroughly done but I am not satisfied that Mr Baldry was negligent in his representation of Carol Tollestrup with the solutions he proposed to address her concerns. His potential negligence lies in his failure to properly draft the mortgages.** The debt had been long since created. There were no future funds to be advanced, as contemplated by the wording of the mortgages. The inconsistency in the wording resulted in my conclusion that nothing was owing on those mortgages (at paras 87 and 88, emphasis added).

3. Analysis of the Negligence Claim

90 The appellant contends that the trial judge erred by failing to specifically state what constitutes the standard of care of a reasonably competent solicitor. The trial judge can be assumed to know it. The duties owed by a lawyer to his client are:

> . . . as follows: (a) to be skillful and careful; (b) to advise his client in all matters relevant to his retainer, so far as may be reasonably necessary; (c) to protect the interests of his client; (d) to carry out his instructions by all proper means; (e) to consult with his client on all questions of doubt which do not fall within the express or implied discretion left to him; and (f) to keep his client informed to such an extent as may be reasonably necessary, according to the same criteria (*Millican v. Tiffin Holdings Ltd.* (1964), 49 D.L.R. (2d) 216 (Alta. T.D.) (QL) at para 12 [*Millican* cited to QL], rev'd (1965), 53 D.L.R. (2d) 674 (Alta. C.A.), aff'd [1967] S.C.R. 183 (S.C.C.)).

91 Unlike a will which is revocable, the mortgages were not. The appellant's main submission is that the mortgages deprived Ms Tollestrup of any ability to deal with her only asset in the event she needed it. The appellant submits that in meeting the standard of care of a prudent solicitor in these circumstances Mr Baldry ought to have advised Ms Tollestrup of the risks inherent in granting the mortgages and he ought to have considered alternatives to the mortgages. It was clear from the evidence of the expert that in his opinion a mortgage was not prudent in the circumstances.

92 Although this argument has merit, it fails to take into account the unique circumstances faced by Mr Baldry. The trial judge found that Ms Tollestrup's main concern was to ensure that her friends were repaid. The trial judge said, "It was obvious to Mr Baldry that [Ms Tollestrup] wanted to ensure that *her debt obligations would be satisfied at all costs*": Reasons at para 87, emphasis added. The trial judge correctly noted that Mr Baldry's actions were to be viewed in the context of the situation in which he found himself and the information available to him. He was faced with an older client who was focused, who had a poor relationship with her family and was surrounded by people she trusted at that time. She was concerned about the potential for disruptive behavior from her children. As everyone believed that the sale of the Property was imminent, the Beazers and Mr Jensen would soon receive the amounts that Ms Tollestrup wished them to have. This was the context in which the advice was given. The trial judge concluded that although the solution was unorthodox, it was not negligent. There was ample evidence on this record to support his conclusion. Nor was the trial judge bound to accept the evidence of the expert. He gave clear reasons as to why he did not accept that opinion. Given the standard of appellate review, we are not persuaded of any palpable and overriding error in the trial judge's conclusion that Mr Baldry's conduct in recommending the mortgages met the standard of care.

93 Nevertheless, we are persuaded that Mr Baldry did not meet the standard of care of a reasonably prudent solicitor when he drafted the mortgages. He admitted that he used a precedent, but did not recall reviewing the language of the mortgages. Although he knew that the mortgages were intended to secure past obligations, he did not amend the documents to reflect this. Additionally, he did not modify the documents to say the mortgages were only enforceable on sale or death, which was clearly what was contemplated. The trial judge observed that Mr Baldry's "potential negligence" lay in failing to properly draft the mortgages. There were no future funds to be advanced as contemplated by the wording of the mortgages.

94 We allow the appeal on this narrow ground. By agreement, the trial judge did not assess damages. We direct the matter to the Court of Queen's Bench for an assessment of damages resulting from Mr Baldry's negligence in failing to properly draft the mortgages to reflect that they were given for funds already advanced and were not enforceable until Ms Tollestrup's death or the sale of the Property. These damages would include the legal costs of rectifying the mortgages.

V. Conclusion

95 The promissory notes are valid pursuant to statute. The mortgages are valid because the consideration thereof was the promissory notes or the delay in the ability of the mortgagees to demand payment. Rectification to change the mortgages' preamble from "to be lent" to "having been lent" was appropriate. This reflected the parties' common intentions. The appellant acknowledges that if we found the mortgages capable of rectification, there is agreement that no one contemplated future advances of funds and the mortgages should reflect this. There is no error in rectifying paragraph 8(e) from "the whole of the monies hereby secured shall, at the option of the mortgagee, become due and payable" to "the whole of the monies hereby secured shall become due and payable upon the sale of the said land, or upon the death of the mortgagor". We exercise our discretion to rectify paragraph 2 of the mortgages to accord with this.

96 As articulated at paras 93 and 94, we allow the appeal in part in respect of the trial judge's decision regarding the claim against Mr Baldry. All other grounds of appeal are dismissed.

***O'Ferrall J.A.* (dissenting):**

97 I concur with my colleagues that the appeal of the trial judge's declaration of the validity of the mortgages granted by the deceased to the respondents ought to be dismissed. However, it is because I agree with my colleagues on the validity of the mortgages that I would have dismissed the estate's appeal of the dismissal of its claim that the lawyer who recommended, prepared and registered the mortgages was negligent.

98 This dissent is based on the trial judge's finding of fact that the focus of the lawyer's instructions was on documenting an arrangement whereby the appellant would repay the respondents who had helped her financially. The bequests in the will were simply one of the means by which the deceased chose to repay her debts. Had the trial judge found that the focus of the deceased's instructions was on estate planning, a different conclusion may have ensued.

99 The trial judge found that the lawyer was potentially negligent in his failure to properly draft the mortgage documents; but the "potential negligence", as the trial judge called it, comes to naught because the estate did not suffer loss as a consequence of the lawyer's failure to make the appropriate amendments to the standard form of mortgage. The estate suffered a loss because the deceased, the Beazers and Mr. Jensen failed to honour their agreements.

100 In my view, neither the estate nor the Beazers and Mr. Jensen can be heard to complain about what the lawyer did because what he did is what they instructed him to do. The parties agreed on an arrangement involving promissory notes secured by mortgages which would only be enforceable on a disposition of the deceased's property, either by sale or by death. In the facts of this case, the parties cannot be heard to complain that they ended up in litigation because the form of the mortgage documents used by the lawyer did not reflect all of the terms of their agreement. And the reason they cannot complain is that they knew full well what their agreement was and what role the mortgage played in that agreement. A *bona fide* third party without notice of the arrangements, such as a purchaser of the mortgages, might have had a complaint, but not the deceased or her estate.

101 The estate was not harmed by what the lawyer did. It was harmed by the actions of the deceased. The fact that the deceased questioned the validity of mortgages which she clearly intended to grant is not something the lawyer should be held responsible for. It might be argued that the lawyer should be held liable to the estate for the costs it incurred in defending the Beazers' and Mr. Jensen's premature mortgage foreclosure actions. But, in my view, it was open to the trial judge to find that the lawyer was not liable in this regard because it was not foreseeable that the Beazers and Mr. Jensen, who well knew their mortgages were not due and payable, would commence foreclosure proceedings before they

were entitled to. Nor was it foreseeable that the Beazers and Mr. Jensen would claim amounts in excess of the principal amounts of the promissory notes which the mortgages were intended to secure when they knew they were not entitled to those amounts. The Beazers and Mr. Jensen might have been held liable for the estate's costs in defending those actions and claims, but not the lawyer.

102 The trial judge found that the lawyer was instructed by a deceased whose primary focus was repaying people who had helped her financially and otherwise. It appears that the deceased wanted what she considered to be her debt repaid "at all costs". It was the deceased who wished to characterize her obligations as debts and in order to document them as debts, the lawyer suggested that the deceased sign promissory notes. The trial judge found that the effect of the promissory notes was carefully explained to the deceased. In other words, the deceased knew she was agreeing to create a debt obligation.

103 The deceased also wished to provide the Beazers and Mr. Jensen security for the amounts she promised to pay. One of her motives in providing security was to make sure her promise to make these payments could not be attacked by members of her family should she die. Consequently, in order to unassailably secure payment of the promissory notes, the deceased granted mortgages in certain amounts against her property on the outskirts of Lethbridge.

104 The decision to grant mortgages as security was also driven by the deceased's anticipation that her property would soon sell and that her friends would receive payments out of the proceeds of that sale during her lifetime. Instead of mortgages, the lawyer might have employed another form of encumbrance prescribed in section 102 of the *Land Titles Act*, RSA 2000, c L-4, i.e. a charge on the land to secure payment of a sum of money; but the result would have been the same. Therefore, there was no need for the lawyer to provide detailed explanations of the mortgages to the deceased. These were not conventional mortgages. They were simply intended to be charges on the land in the form of mortgages.

105 The parties also agreed on what would happen if the property did not sell and the deceased died. In that event, the promissory notes would be immediately payable and the mortgages immediately enforceable. Furthermore, the parties agreed on what would happen if one of the mortgagees died before the deceased. The debt would disappear. The Beazers and Mr. Jensen executed discharges of the mortgages which were to be held in trust for that purpose. In the meantime, the mortgages the deceased granted would simply remain fixed charges on her property. They were clearly not conventional mortgages.

106 The lawyer testified that when he took his instructions from the deceased, there was no doubt what those instructions were. He testified that the deceased was completely in charge of her situation and that she wanted to ensure what she considered to be her debt obligations would be satisfied no matter what. The trial judge accepted this evidence and I see no error in such acceptance.

107 The estate cannot now seek to be indemnified by the lawyer for the costs it incurred in denying the enforceability of the mortgages which the deceased willingly granted. Nor, in my view, can the lawyer be held liable to the estate for the costs the estate incurred in defending the excessive claims advanced by the Beazers and Mr. Jensen. I use the phrase excessive claims because the Beazers and Mr. Jensen were well aware that the mortgages in question were never intended to be conventional mortgages enforceable in accordance with their terms. The rectifications which the trial judge and this Court were required to make to the mortgages were only required because the Beazers and Mr. Jensen attempted to enforce these mortgages as conventional mortgages when they knew that was never intended by the deceased, and because the estate took the position that the mortgages were not valid at all. The need for rectification was not a consequence of the lawyer's negligence. Rectification was necessitated by the fact that the Beazers and Mr. Jensen repudiated their agreement and made more of the mortgages than was intended and by the fact that the deceased repudiated her agreement by seeking to set the mortgages aside altogether. On the facts of this case, neither the estate, the Beazers, nor Mr. Jensen can be heard to claim that the lawyer's choice of instruments or his drafting caused them any loss. Both chose to make claims which did not reflect the agreement they made. And that is why I hold the view that the deceased's estate cannot be heard to claim that it was the lawyer's choice of security instrument or his drafting which caused its loss.

108 In the result, I would have upheld the trial judge's dismissal of the parties' claims against the lawyer.

Appeal allowed in part.

6

1984 CarswellAlta 261
Alberta Court of Queen's Bench

Alberta Drywall Supply Ltd. v. Hauk

1984 CarswellAlta 261, [1984] A.W.L.D. 758, 27 A.C.W.S. (2d) 468, 53 C.B.R. (N.S.) 62, 55 A.R. 226

ALBERTA DRYWALL SUPPLY LTD. v. HAUK and HAUK

Master Quinn [in Chambers]

Judgment: June 19, 1984
Docket: Edmonton No. 8303-39499

Counsel: *R.A. Philion*, for plaintiff.
D.R. Wieber, for defendants.

Subject: Corporate and Commercial; Insolvency

Application in mortgage foreclosure action for order nisi/order for sale.

Master Quinn:

1 This is a mortgage foreclosure action in which a statement of defence has been filed by the defendant registered owners, Alfred and Paulette Hauk ("Hauks").

2 The plaintiff makes this application for summary judgment, which would be an order nisi/order for sale.

3 The affidavit of Paulette Hauk has been filed in opposition to the application for summary judgment. The affidavit discloses the following pertinent facts:

4 1. Hauks are the shareholders of Cougar Drywall Ltd. ("Cougar") which at times material to these proceedings was indebted to Alberta Drywall Supply Ltd. ("Drywall").

5 2. In August 1982 Alfred Hauk signed a personal guarantee in favor of Drywall whereby he promised to pay the indebtedness of Cougar to Drywall.

6 3. In or about September 1982 Drywall advised Hauks that Drywall was not satisfied that it was adequately secured by the guarantee of Alfred Hauk and that legal action would be taken by Drywall to collect the balance owing unless the Hauks granted the mortgage which is the subject matter of these proceedings.

7 4. The mortgage in question was executed on 16th November 1982 and registered on 17th November 1982.

8 5. On 26th January 1983 Cougar ceased doing business and the Hauks declared personal bankruptcy.

9 6. The amount of the equity of the Hauks in the subject property is less than the amount of exemption to which they are entitled under the bankruptcy provisions.

10 7. Drywall has not made any claim in the bankruptcy proceedings although it was invited to do so by the trustee in bankruptcy.

11 The defence put forward by the defendants is as follows:

12 1. That the defendants entered into personal bankruptcy within 90 days after the execution of the mortgage, and that Drywall has accordingly obtained an unlawful preference as to its debt having regard to s. 73 of the Bankruptcy Act, R.S.C. 1970, c. B-3.

13 2. That there was never a debt owing by Paulette Hauk to Drywall. That she never guaranteed payment of the Cougar debt to Drywall and that there was no consideration to support any promise to pay Drywall that she may have made.

14 3. That Drywall has never made a demand for payment from Alfred Hauk with reference to the guarantee that he gave to Drywall.

15 Section 73 of the Bankruptcy Act is as follows:

> 73.(1) Every conveyance or transfer of property or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any insolvent person in favour of any creditor or of any person in trust for any creditor with a view to giving such creditor a preference over the other creditors shall, if the person making, incurring, taking, paying or suffering the same becomes bankrupt within three months after the date of making, incurring, taking, paying or suffering the same, be deemed fraudulent and void as against the trustee in the bankruptcy.
>
> (2) Where any such conveyance, transfer, payment, obligation or judicial proceeding has the effect of giving any creditor a preference over other creditors, or over any one or more of them, it shall be presumed *prima facie* to have been made, incurred, taken, paid or suffered with a view to giving such creditor a preference over other creditors, whether or not it was made voluntarily or under pressure and evidence of pressure shall not be receivable or avail to support such transaction.
>
> (3) For the purposes of this section, the expression "creditor" includes a surety or guarantor for the debt due to such creditor.

16 It should be noted that a transfer or charge made within the three-month period shall be deemed fraudulent and void as *against the trustee in bankruptcy*. If the transactions is to be attacked, it should be attacked by the trustee in bankruptcy. *C.N.R. v. Harnett* (1979), 31 C.B.R. (N.S.) 203 (Nfld. C.A.), is authority for the proposition that only a trustee can attack a transaction as being a fraudulent preference under s. 73. In the present case it is not the trustee who is attacking the mortgage. In point of fact the trustee has sent a letter dated 15th February 1983 to Drywall in which he states that he is taking no interest in the matter and asking Drywall to accept the letter as the trustee's "statement of no interest". I take it that the trustee intended the said letter to be a disclaimer by the trustee pursuant to s. 12(1) of the Bankruptcy Act. In my opinion the defendants have no status to rely upon s. 73 aforesaid. I do not think it makes any difference that they are raising the matter by way of a statement of defence to the plaintiff's action rather than in proceedings in which they themselves are plaintiffs.

17 Paragraph 13 of the affidavit of Paulette Hauk indicates that the equity in the property in question available to be mortgaged to Drywall was less than the exemption to which the defendants were entitled. By s. 47 of the Bankruptcy Act a bankrupt is entitled to the same exemption he would be entitled to under provincial law. The bankrupts would each be entitled to an exemption of $8,000 on the property in question, which is the house in which they reside. According to the evidence the market value of the house is $35,500 and the amount owing on the first mortgage is $28,000, leaving an equity of $7,000, which is well within the exemption.

18 Section 73 of the Bankruptcy Act does not apply to situations where a bankrupt has been dealing with his exempt property: *Can. Credit Men's Trust Assn. v. Umbel*, 13 C.B.R. 40, [1931] 3 W.W.R. 145 (Alta. S.C.). The bankrupts were dealing with their exempt property when they granted the mortgage in question herein to Drywall, and s. 73 does not apply to the transaction. I am of the opinion that the defendants do not have a good defence based upon s. 73 aforesaid.

19 It is submitted that there was no consideration for the mortgage in question because there was no money advanced to the defendants by the plaintiff at the time the mortgage was signed and registered. The mortgage was given as security for a pre-existing debt. According to the evidence, Alfred Hauk was personally indebted to the plaintiff under a guarantee at the time the mortgage was granted, and the consideration given by the plaintiff for the mortgage was the forbearance of the plaintiff to take action against Alfred Hauk on his guarantee and against Cougar Drywall. It is further submitted on behalf of Paulette Hauk that she was never personally indebted to the plaintiff and that there was no consideration flowing to her.

20 It is trite law that forbearance to sue is good consideration, and there can be no doubt that there was good consideration so far as Alfred Hauk is concerned. The argument advanced for Paulette Hauk is predicated upon the fallacy that consideration must flow from the plaintiff as promisee to Paulette Hauk as promisor. This sort of argument is often advanced in chambers applications. In Anson's Law of Contract, 24th ed. p. 97, the following statement appears:

> **Consideration must move from the Promisee**
>
> This means that a party who wishes to enforce a contract must be able to show that he himself has furnished consideration for the promise of the other party. It is not, however, necessary that it should have been intended to benefit the other party. So it need not move to the promisor.

21 In the context of the present case this means that consideration must move from Drywall as promisee, but that the consideration (the forbearance to sue) does not necessarily have to flow to Paulette Hauk. In the present case the consideration flowed to Alfred Hauk, but that is no reason for holding that there was no consideration to support Paulette Hauk's promise. I accordingly find that there was good consideration for the mortgage in question and that it is binding upon both of the defendants.

22 It is submitted that no demand has been made on the guarantee granted by Alfred Hauk to the plaintiff. The guarantee is not in the evidence before me, and it therefore cannot be said that any demand is required. The affidavit of Paulette Hauk filed in opposition to the present application indicates that the mortgage in question was granted by the defendants in consideration of the plaintiff, Drywall, forbearing suit against Alfred Hauk on his guarantee. The only reasonable inference that can be made is that a demand was in fact made to Alfred Hauk for payment under the guarantee.

23 I am therefore of the opinion that the defendants do not have a valid defence and that the plaintiff is entitled to an order nisi/order for sale with a redemption period expiring one day from the date of service, the total debt owing on the property exceeding even the market value. Subsequent encumbrancers may be served by ordinary registered mail at the address shown for them at the land titles office. Notice of intention to advertise is dispensed with. Costs will be on a solicitor-client basis. If the subject property is not occupied by the defendants, the plaintiff is hereby appointed as receiver of rents and profits, such appointment to be without bond and such appointment will not operate as a stay of these proceedings.

Order nisi/order for sale granted.

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2016 ONCA 406
Ontario Court of Appeal

Montor Business Corp. (Trustee of) v. Goldfinger

2016 CarswellOnt 8324, 2016 ONCA 406, [2016] W.D.F.L. 3770, 267 A.C.W.S. (3d) 274, 351 O.A.C. 241, 36 C.B.R. (6th) 169, 58 B.L.R. (5th) 243

In the Matter of the Bankruptcy of Summit Glen Waterloo/2000 Developments Inc., of the City of Toronto, in the Province of Ontario

A. Farber & Partners Inc., the Trustee of the Bankruptcy Estate of Montor Business Corporation, Annopol Holdings Limited and Summit Glen Brantford Holdings Inc., Applicant (Appellant/ Respondent by way of cross-appeal) and Morris Goldfinger, Goldfinger Jazrawy Diagnostic Services Ltd., Summit Glen Bridge Street Inc., Mahvash Lechcier-Kimel, Annopol Holdings Limited and Summit Glen Brantford Inc., Respondents (Respondents/Appellants by way of cross-appeal)

E.A. Cronk, S.E. Pepall, P. Lauwers JJ.A.

Heard: October 14-15, 2015
Judgment: May 30, 2016 *
Docket: CA C57879

Proceedings: affirming *Montor Business Corp. (Trustee of) v. Goldfinger* (2013), [2013] O.J. No. 4871, 8 C.B.R. (6th) 200, 2013 CarswellOnt 14983, 2013 ONSC 6635, D.M. Brown J. (Ont. S.C.J. [Commercial List]); additional reasons at *Montor Business Corp. (Trustee of) v. Goldfinger* (2014), 2014 CarswellOnt 1169, 9 C.B.R. (6th) 86, 2014 ONSC 756, D.M. Brown J. (Ont. S.C.J. [Commercial List])

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Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Estates and Trusts; Insolvency; Property; Public; Restitution; Torts

APPEAL by trustee in bankruptcy from judgment reported at *Montor Business Corp. (Trustee of) v. Goldfinger* (2013), 2013 ONSC 6635, 2013 CarswellOnt 14983, 8 C.B.R. (6th) 200, [2013] O.J. No. 4871 (Ont. S.C.J. [Commercial List]), dismissing trustee's request to set aside payments and transactions arising from settlement; CROSS-APPEAL from setting aside of certain payment on basis that it was contrary to s. 2 of *Fraudulent Conveyances Act* and was oppressive under s. 248 of *Ontario Business Corporations Act*.

***S.E. Pepall J.A.*:**

Introduction

1 A failed relationship between an investor, Dr. Morris Goldfinger, and a real estate developer, Jack Lechcier-Kimel ("Kimel"), and the subsequent bankruptcy of several of Kimel's companies has generated three appeals. The appeals involve claims to funds asserted by A. Farber & Partners Inc. ("Farber"), the Trustee in bankruptcy of five companies: Annopol Holdings Limited ("Annopol"), Summit Glen Brantford Holdings Inc. ("SG Brantford"), Summit Glen Waterloo/2000 Developments Inc. ("SG Waterloo"), Summit Glen Group of Companies Inc. ("SG Group") and Montor Business Corporation ("Montor"). All but Montor were companies owned and controlled by Kimel or his then-spouse, Mahvash Lechcier-Kimel ("Mahvash").

2 In the primary appeal, which is the subject matter of these reasons, Farber, in its capacity as Trustee of Annopol, challenges the trial judge's refusal to set aside transactions arising from a settlement between Goldfinger, Kimel and some of Kimel's companies. In particular, Farber seeks to set aside certain transactions arising from the settlement: (1) payments totalling $2.5 million to Goldfinger from Annopol (the "Payments"); and (2) mortgages granted to Goldfinger by SG Brantford and Summit Glen Bridge Street Inc. ("SG Bridge") over their respective properties, and Annopol's subordination of mortgage security in favour of Goldfinger (the "Brantford/Bridge 2008 Transactions").

3 The trial judge rejected Farber's assertions that the transactions were:

- transfers at undervalue under s. 96 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*");
- unjust preferences under s. 4 of the *Assignments and Preferences Act*, R.S.O. 1990, c. A.33 (the "*APA*");
- fraudulent conveyances under s. 2 of the *Fraudulent Conveyances Act*, R.S.O. 1990, c. F.29 (the "*FCA*");
- oppressive under s. 248 of the Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16 (the "*OBCA*"); and
- an unjust enrichment.

4 Goldfinger cross-appeals on the basis that the trial judge erred in setting aside a $471,000 payment in his favour from SG Brantford. The trial judge found that the payment was contrary to s. 2 of the *FCA* and oppressive under s. 248 of the *OBCA*.

5 In the remaining two appeals, both Farber and Goldfinger or his company, 1830994 Ontario Ltd., take issue with the treatment of certain claims asserted in the various bankruptcy proceedings. These appeals are addressed in separate sets of reasons released contemporaneously with these reasons, bearing court file numbers C57898 and C58356.

6 For the reasons that follow, I would dismiss this appeal and Goldfinger's cross-appeal.

Background Facts

A. The Parties' Relationship

7 Kimel was a real estate developer. He incorporated numerous companies for that purpose. He attracted investors to lend to and invest in his companies. Those companies would then lend money to other Kimel companies that would in turn acquire real estate. The investor loans were to be repaid from the proceeds generated from selling the real estate. The investors would also receive a portion of the profit generated from the sales.

8 Goldfinger was not a real estate developer; he was a radiologist. He was also a good friend of Kimel. He decided to lend and invest money into some of Kimel's companies. From February 1999 to December 2005, Goldfinger lent approximately $6.5 million to Kimel's companies, $2,956,000 of which he claimed was advanced to Annopol. Annopol's affairs were directed by Kimel. Annopol then lent these funds to other Kimel companies for the purpose of acquiring properties in the Kitchener/Waterloo and Brantford areas.

9 The terms of the arrangements with Goldfinger were not reduced to writing. Goldfinger described the funds advanced as "interest-free loans" and claimed that he was engaged in a "joint venture" with Kimel.

10 In 2007, the relationship between Goldfinger and Kimel broke down. Goldfinger discovered that Kimel had misled him and that many of the properties that had been acquired were encumbered by mortgages of which he was unaware. He sought explanations and the return of his money, but Kimel stalled. Goldfinger retained counsel who, in letters dated November 12 and 13, 2007, threatened litigation. Goldfinger prepared a draft affidavit in support of a request for a court-appointed receiver over some of Kimel's companies, including Annopol. In that affidavit, he asserted that he had

repeatedly requested an accounting from Kimel without success and had concluded that Kimel had not been dealing in good faith. Kimel also retained counsel.

B. The First Settlement

11 The parties commenced settlement negotiations and negotiated the dissolution of their business relationship (the "First Settlement"). Goldfinger and Kimel reached a resolution independently and arrived at an amount to be paid to Goldfinger, but the overall structure and details of the settlement were negotiated with the assistance of counsel. The parties agreed that Goldfinger would withdraw from the various projects and would be repaid his shareholder loans of $6.5 million, plus an additional $5 million in return for his shares in the various companies. At the time, this latter sum was thought to represent his equity in the properties.

12 As agreed, between December 2007 and January 2008, Annopol paid $2.5 million to Goldfinger. The Payments were broken down as follows. On December 5, 2007, Annopol transferred $1.5 million to Goldfinger. Annopol also issued four cheques in his favour dated December 12 and 28, 2007 in the amount of $300,000 each and December 21, 2007 and January 10, 2008 in the amount of $200,000 each, for a total of $1 million. Each cheque bore the notation "re-purchase shares". Annopol relied on transfers of funds from other Summit Glen entities to cover the amounts paid to Goldfinger.

13 The settlement was memorialized in a Memorandum of Agreement (the "Memorandum") dated December 11, 2007 but signed on May 20, 2008 and amended on June 6, 2008. The terms of the Memorandum originated around the time that the aforesaid payments were made. Goldfinger testified that the Payments of $2.5 million were consideration in contemplation of the settlement. Kimel also stated that the Payments were made in anticipation of the settlement.

14 The parties to the Memorandum were: Goldfinger, Kimel, Mahvash, Annopol, and enumerated Summit Glen companies including SG Brantford and SG Bridge (collectively, the "Summit Glen Companies").

15 The Memorandum provided that:

- Notwithstanding that shares of the Summit Glen Companies had not been formally issued, Goldfinger was, and for all purposes deemed to be, the legal and beneficial owner of 50% of the share capital of each of the Summit Glen Companies.

- The Summit Glen Companies acknowledged the $6.5 million debt to Goldfinger which, in aggregate, was allocated to each of them in separate amounts. The advances were described as shareholder loans.

- The Memorandum accurately recorded the parties' understanding of the discussions that had taken place.

- Each of the Summit Glen Companies was to deliver an interest-free promissory note for its share of the $6.5 million to Goldfinger, one-half payable on December 11, 2008 and the other half payable on December 11, 2009.

- Kimel and each of the Summit Glen Companies were to guarantee the payment of $6.5 million.

- The Summit Glen Companies were to provide $6.5 million in collateral mortgages to Goldfinger. These included mortgages on 176 Henry St., Brantford, which was owned by SG Brantford, and on 70 Bridge St. W., Kitchener, which was owned by SG Bridge.

- Kimel would purchase Goldfinger's shares for $5 million. The parties agreed that the $2.5 million already paid represented a partial payment of the purchase price. The remainder was to be paid by a $1.5 million secured promissory note and a $1 million unsecured promissory note.

- Each of the Summit Glen Companies, including SG Brantford and SG Bridge, was to guarantee payment to Goldfinger of these secured and unsecured promissory notes and was to give collateral third mortgages as security

for the guarantees. SG Brantford granted a third mortgage over 176 Henry St. in Brantford and SG Bridge granted a third mortgage over 70 Bridge St. W. in Kitchener to secure the sum of $1.5 million.

• Annopol, Kimel and Mahvash postponed all of their claims against the Summit Glen Companies, including SG Brantford and SG Bridge, in favour of Goldfinger.

• Annopol also postponed its mortgages, including those over 176 Henry St. and 70 Bridge St. W., in favour of Goldfinger (the "Annopol Subordinations").

• Kimel and the Summit Glen Companies provided Goldfinger with an indemnity and they, together with Mahvash and Annopol, also provided him with a release.

16 Lawyers acted for the parties on the settlement, but Goldfinger's lawyers testified that Kimel and Goldfinger had agreed on the $2.5 million figure prior to approaching them.

17 The settlement "was designed in such a way as to repay to Goldfinger the amounts already lent to the SG Companies and to enable Goldfinger to extract an amount representing his notional equity or profit in the various real estate developments": reasons, at para. 213.

18 The Memorandum transactions closed in June 2008 and Goldfinger received the promissory notes, guarantees, postponements and mortgages due to him pursuant to the terms of the Memorandum.

C. The BrantfordlBridge 2008 Transactions

19 Prior to the closing, the 176 Henry St. property owned by SG Brantford was subject to: a first mortgage of $2.85 million in favour of First National Financial Corporation ("First National"); a second mortgage of $450,000 in favour of Montor; and a third mortgage of $750,000 in favour of Annopol. Montor was owned by Jack Perelmuter, an accountant who had provided accounting services to Kimel's companies.

20 As a result of the settlement, SG Brantford provided Goldfinger with two mortgages over 176 Henry St. and Annopol agreed to postpone its third mortgage in favour of Goldfinger's two mortgages. As such, Goldfinger's mortgages were in third and fourth position on the property and Annopol's mortgage was in fifth place.

21 The 70 Bridge Street property owned by SG Bridge was subject to a mortgage in favour of Annopol. As a result of the settlement, SG Bridge provided Goldfinger with two mortgages over 70 Bridge Street and Annopol postponed its mortgage in favour of Goldfinger's two mortgages.

D. Events Surrounding the Bankruptcies

22 By July 2008, Goldfinger alleged that Kimel had breached the terms of the Memorandum and he proceeded to serve demand notices on some of Kimel's companies.

23 Meanwhile, the global credit market crisis was brewing, with matters coming to a head with Lehman Brothers' Chapter 11 filing in mid-September 2008.

24 In November 2008, the 176 Henry St. property had to be refinanced, as the first mortgage in favour of First National was due. It was renegotiated and the principal sum secured was increased. As part of the transaction, Kimel signed an agreement on behalf of Montor to subordinate its second mortgage so that the principal amount of the first mortgage could be increased. SG Brantford then paid $471,000 to Goldfinger, and his third and fourth mortgages were discharged. This payment to Goldfinger was made in the absence of any payment to Montor.

25 On December 1, 2008, Goldfinger obtained an order appointing Zeifman & Partners Inc. as receiver of a number of Kimel's companies to which Goldfinger had made loans, including SG Waterloo, but not including Annopol. Following this, some other Kimel companies defaulted on loans.

26 Perelmuter assigned his company, Montor, into bankruptcy on February 6, 2009. Farber was subsequently appointed Montor's Trustee in bankruptcy.

27 Annopol and SG Brantford were each adjudged bankrupt on May 27, 2010, the initial bankruptcy event having occurred on May 26, 2009, in the case of Annopol, and on April 30, 2009 in the case of SG Brantford. Farber was appointed Trustee in bankruptcy of both companies, as well as of SG Group and SG Waterloo. SG Waterloo was adjudged bankrupt on June 28, 2010, the date of its initial bankruptcy event being April 3, 2009.

E. The Litigation

28 As mentioned, Farber, in its capacity as Trustee in bankruptcy of Annopol, challenged the $2.5 million Payments from Annopol to Goldfinger. It argued that the Payments were: (1) transfers at undervalue contrary to s. 96 of the *BIA*; (2) unjust preferences under s. 4 of the *APA*; (3) fraudulent conveyances under s. 2 of the *FCA*; (4) oppressive under s. 248 of the *OBCA*; and (5) an unjust enrichment.

29 The trial judge heard the proceedings in a hybrid trial conducted over the course of eight days. He heard *viva voce* evidence and also reviewed extensive documentary records, including several transcripts of out-of-court cross-examinations.

30 The trial judge dismissed all of Farber's challenges to the Payments. Farber now appeals from that judgment, arguing that the trial judge erred in upholding the Payments on each of the grounds set out above.

31 Also relying on the same statutory provisions, before the trial judge Farber challenged the Brantford/Bridge 2008 Transactions (the mortgages granted by SG Brantford and SG Bridge to Goldfinger and the Annopol Subordinations) and the $471,000 paid to Goldfinger. The trial judge dismissed Farber's claims with the exception of the $471,000 payment to Goldfinger, which he found to be contrary to s. 2 of the *FCA* and s. 248 of the *OBCA*. On appeal, Farber submits that the trial judge erred in failing to set aside the Brantford/Bridge 2008 Transactions under the *OBCA*.

32 Goldfinger cross-appeals from the trial judge's decision ordering him to repay Farber the $471,000.

Appeal Relating to the Payments

A. Are the Payments Transfers at Undervalue under the BIA?

(i) Introduction

33 Dealing first with the *BIA* claim, Farber challenged the Payments as transfers at undervalue contrary to s. 96 of the *BIA*. In order to succeed on this ground, Farber was required to establish that:

(a) the Payments were transfers at undervalue;

(b) the transfer occurred:

(i) within one year before the initial bankruptcy event (May 26, 2009), if Goldfinger was at arm's length with the debtor, Annopol; or

(ii) within five years before the initial bankruptcy event (May 26, 2009), if Goldfinger was not at arm's length with the debtor, Annopol; and

(c) the debtor, Annopol, was insolvent at the time of the Payments or was rendered insolvent by the Payments; and

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

34 As I will discuss, undervalue means either that no consideration has been received by the debtor or that the consideration received is conspicuously less than the fair market value of the consideration given by the debtor: *BIA* s. 2. Section 96 is reproduced in Schedule "A" attached to these reasons.

(ii) Trial Judge's Decision on s. 96 of the BIA

35 Before the trial judge, Farber argued that it had established all of the s. 96 requirements and therefore was entitled to an order that the Payments were transfers at undervalue.

36 The trial judge rejected this argument. He found that the transfers were not at undervalue because consideration was given to Annopol by Goldfinger.

37 The trial judge explained that forbearance from suit, either actual or promised, can constitute good consideration. He found that Goldfinger had lent $6.5 million to Kimel's companies and could bring proceedings for that amount. Moreover, formal demand had been made on Kimel and in November 2007, Goldfinger had his counsel prepare an affidavit for him to swear in an action he was contemplating against Kimel, Annopol and the Summit Glen Companies, for the appointment of a receiver over a number of their properties. Instead, Goldfinger settled and did not proceed with his threatened litigation.

38 The trial judge held that the terms of the settlement reflected a compromise of Goldfinger's claims to recover his investment of $6.5 million. Goldfinger deposed that: (1) but for the prior payment of $2.5 million, he would not have entered into the settlement and would have proceeded with the litigation against Kimel and his various companies; and (2) over the course of his dealings, $2.956 million of his money had been deposited into Annopol. Goldfinger's forbearance from suit was not consideration that was conspicuously less than the fair market value of the Payments and there were no transfers at undervalue. This was the ratio of the trial judge's decision on s. 96 of the *BIA*.

39 Nonetheless, he proceeded to consider the other elements Farber was required to establish under s. 96 of the *BIA*.

40 The trial judge concluded that at the time of the Payments (December 2007 and January 2008), Annopol was insolvent using a balance sheet test.

41 The trial judge also addressed the nature of the relationship between Goldfinger and Annopol and considered whether they were at arm's length. Although the Memorandum deemed Goldfinger to be a shareholder, the trial judge found that Goldfinger was not a registered shareholder of Annopol. He found that this deal structure was simply a technical device that was probably tax-driven. Goldfinger never exercised any control over the affairs of Annopol, or any of Kimel's other companies. As a result, Goldfinger and Annopol were not related persons within the meaning of ss. 4(2) and (3) of the *BIA*.

42 In addition, he addressed s. 4(4) of the *BIA*, which provides that "[i]t 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." He concluded that they were acting at arm's length.

43 Although the trial judge accepted that Goldfinger and Kimel had been close friends, he acknowledged that one had to examine the nature of their relationship at the time the Payments were made. Goldfinger had not been involved in the operation of Kimel's companies and had quite limited information about their affairs. In 2007, Goldfinger discovered that he had been misled. He sought explanations, but Kimel stalled. Although Goldfinger and Kimel arrived at the amount of $2.5 million together, the overall structure and details of the settlement were negotiated with the assistance

of counsel. The trial judge determined that the facts did not disclose bonds of "dependence, control or influence", which are generally necessary in order to find that two parties are not acting at arm's length.

44 Given that the parties were found to be at arm's length, to succeed under s. 96 of the *BIA*, Farber had to show that the Payments were made within one year prior to the initial bankruptcy event. Annopol's initial bankruptcy event was May 26, 2009 and therefore, the one-year statutory review period commenced on May 26, 2008. The Payments, having occurred between December 5, 2007 to January 10, 2008, were outside the one-year statutory review period reflected in s. 96(1)(a) of the *BIA*. Accordingly, the trial judge concluded that the Payments were not reviewable under s. 96.

45 Lastly, the trial judge considered whether, by making the Payments, Annopol intended to defraud, defeat or delay a creditor. He accepted Farber's submission that Annopol's intention should be determined by reference to the intention of Kimel, who directed Annopol's affairs.

46 The trial judge recognized that an inference of intent may arise from suspicious facts or circumstances, sometimes referred to as "badges of fraud". He found that when making the Payments, Kimel and Goldfinger did not intend to defraud, defeat or delay any of Annopol's creditors. In making that finding, he relied on the following facts:

- the terms of the Memorandum, which originated around the time the Payments were made, indicated that the parties thought the Summit Glen Companies would continue as going concerns and that the properties would generate sufficient value to repay the remaining amount owing to Goldfinger by December 11, 2009;

- the parties to the Memorandum also believed that the properties owned by the Summit Glen Companies had significant future value;

- the Memorandum was not put together in a rush, but was negotiated over six months and both parties were represented by counsel;

- the parties were at arm's length;

- the two lawyers' evidence on the parties' thought processes at the time suggested a genuine belief in the sufficient value of the subject properties;

- consideration was given;

- the Payments and the Memorandum were not put in place in the face of claims by Annopol's judgment creditors; and

- this was all done prior to the collapse of the credit markets, which occurred months after the execution of the Memorandum.

(iii) Farber's s. 96 Submissions on Appeal

47 On appeal, Farber advances three arguments with respect to the trial judge's treatment of the s. 96 *BIA* claim.

48 First, in concluding that the Payments were not transfers at undervalue, Farber submits that the trial judge erred in deciding that Goldfinger provided valuable consideration. Compromising his potential legal claim did not amount to sufficient consideration, as s. 96 requires that the consideration be given at the same time as the transfer and the compromise only occurred at the time of the Memorandum. Furthermore, Annopol did not receive anything in exchange for the Payments; the Memorandum lists the $2.5 million as payment for a debt owing by Kimel. Farber also submits that the trial judge erred in failing to examine the sufficiency of the consideration provided — there was no documentary evidence of any forbearance or settlement with Annopol at the time of the Payments.

49 Second, Farber submits that the trial judge erred in finding that the parties were acting at arm's length. Although he identified the correct test, he failed to apply it. Specifically, he failed to consider the parties' relationship at the time of the Payments and that the Payments were the opposite of what one would expect from arm's-length parties. The trial judge also failed to consider that Goldfinger refused to produce his e-mail exchanges with Kimel from the time of the Payments and failed to consider Goldfinger's evidence that he used his relationship with Kimel to obtain the Payments.

50 Third, Farber argues that the trial judge erred in his analysis of Annopol's intention to defraud, defeat or delay a creditor. Again, Farber states that the trial judge focused on the evidence relating to the Memorandum rather than the Payments themselves and also failed to identify and consider the badges of fraud that were present. In addition, Annopol had a subjective intent to defraud its creditors, HSBC and a third-party investor, Srubiski, and its actions were deliberate. It had borrowed money from those creditors on the basis that the funds would be invested in real estate; instead, Annopol gave the money to Goldfinger. The effect of the Payments was to defraud and defeat its creditors.

(iv) Analysis

(1) Transfers at Undervalue

51 Section 2 of the *BIA* defines a "transfer at undervalue" as follows:

> [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.

52 In the absence of evidence to the contrary, Farber's opinion on both the fair market value of the property or services and the value of the actual consideration given or received by the debtor are to be accepted by the court: see s. 96(2) of the *BIA*.

53 Weighing the adequacy of consideration is not an exercise in precision but one of judgment. Nominal or grossly inadequate consideration is insufficient and may be an indication or badge of fraud: see *Feher v. Healey*, [2006] O.J. No. 3450 (Ont. S.C.J.) at para. 45, aff'd 2008 ONCA 191 (Ont. C.A.).

54 Forbearance from suit and a settlement agreement may constitute adequate consideration: see *Ronald Elwyn Lister Ltd. v. Dunlop Canada Ltd.*, [1982] 1 S.C.R. 726 (S.C.C.), at p. 743; *Stott v. Merit Investment Corp.* (1988), 63 O.R. (2d) 545 (Ont. C.A.), at pp. 558-60, leave to appeal dismissed, [1988] S.C.C.A. No. 185 (S.C.C.).

55 Here, formal demand had been made on Kimel and in November 2007 Goldfinger had his counsel prepare an affidavit for him to swear in an action he was contemplating against Kimel, several of the Summit Glen Companies and Annopol. Rather than proceeding with the litigation, Goldfinger negotiated a resolution to the parties' dispute. He abandoned his pursuit of the legal action against Kimel and his companies, including Annopol. But for the $2.5 million payment, he would have commenced and continued with his litigation.

56 The evidence supports the finding that Goldfinger was genuinely threatening legal action. In particular, the record contains Goldfinger's draft affidavit and, as well, his lawyer prepared a memorandum referring to the proposed settlement and that as a result, "Jack [Kimel] staves off receivership". In addition, Annopol was to be a beneficiary of a release under the settlement. The trial judge did not err in concluding that Goldfinger's forbearance constituted consideration.

57 One must then consider whether the consideration given by Goldfinger was adequate, or, to use the language of s. 2 of the *BIA*, was "conspicuously less than the fair market value" of the consideration given by Annopol.

58 Of the $6.5 million invested by Goldfinger, $2.956 million had been paid to Annopol. Based on the record before him, it was open to the trial judge to conclude that a payment of $2.5 million in return for a compromise of Goldfinger's

remaining rights was adequate consideration. At a minimum, Goldfinger paid Annopol and Kimel $2.9 million. Given the potentially ruinous consequences of a lawsuit, the trial judge did not err in concluding that the Payments did not constitute a transfer at undervalue.

59 Farber also asserts that s. 96 requires that consideration be given at the same time as the transfer and, in this case, the compromise only occurred at the time of the Memorandum.

60 Section 96 does not address timing and Farber provided no authority for this proposition. However, assuming without deciding that Farber's proposition is correct, the trial judge found at para. 274 of his reasons that the terms of the settlement originated around the time the $2.5 million was paid. This finding of fact is also relevant to the trial judge's determination that the Payments were not motivated by a desire to defraud, defeat or delay a creditor.

61 This finding was also available on the record. Goldfinger testified that he and Kimel came up with the terms of the settlement themselves and only then approached the lawyers to structure and paper the agreement. In one of his affidavits, he stated that the parties had reached an agreement in November 2007, before the first payment was made. The evidence of Goldfinger's two lawyers lends credence to Goldfinger's version of events.

62 In addition, one of the lawyers, Carl Schwebel, prepared a memo dated November 28, 2007 that recorded discussions with Goldfinger, Kimel and members of Schwebel's firm at a meeting that same day. Although not identical to the terms of the Memorandum, the memo recorded the terms of the settlement negotiated by Goldfinger and Kimel, including the payment of $2.5 million.

63 In light of this evidence, I would not give effect to Farber's submission that the trial judge erred in his transfer at undervalue analysis.

(2) Acting at Arm's Length

64 Given my conclusion on the transfer at undervalue issue, it is not strictly necessary to address Farber's other arguments about s. 96 of the *BIA*. I will do so because my conclusions on the balance of the s. 96 factors inform my conclusions on Farber's other grounds of appeal attacking the validity of the Payments.

65 On the issue of whether the parties were at arm's length, Farber does not challenge the trial judge's description of the applicable test or his finding that Goldfinger and Annopol were unrelated. Rather, it challenges his application of the test and his conclusion that Goldfinger and Annopol were acting at arm's length.

66 Section 4(4) of the *BIA* states: "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." As a result, absent a palpable and overriding error, the trial judge's finding on this issue is entitled to deference.

67 The trial judge considered the *dicta* in *Abou-Rached, Re*, 2002 BCSC 1022, 35 C.B.R. (4th) 165 (B.C. S.C.), at para. 46:

> [A] transaction at arm's length could be considered to be a transaction between persons between whom there are no bonds of dependence, control or influence, in the sense that neither of the two co-contracting parties has available any moral or psychological leverage sufficient to diminish or possibly influence the free decision-making of the other. Inversely, the transaction is not at arm's length where one of the co-contracting parties is in a situation where he may exercise a control, influence or moral pressure on the free will of the other. Where one of the co-contracting parties is, by reasons of his influence or superiority, in a position to pervert the ordinary rule of supply and demand and force the other to transact for a consideration which is substantially different than adequate, normal or fair market value, the transaction in question is not at arm's length.

68 He also considered *Piikani Nation v. Piikani Energy Corp.*, 2013 ABCA 293, 556 A.R. 200 (Alta. C.A.), which identified factors that provide guidance on non-arm's length analysis in the context of *Income Tax Act*, R.S.C. 1985,

c. 1 (5th Supp.) jurisprudence. These factors, enumerated at para. 29 of *Piikani*, are: was there a common mind which directed the bargaining for both parties to a transaction; were the parties to the transaction acting in concert without separate interests; and was there *de facto* control?

69 There was no common mind directing Goldfinger and Annopol or indeed, Kimel. They were adverse in interest and on the verge of litigation. The evidence also fails to suggest that they were acting in concert. As discussed, the trial judge did not fail to consider the parties' relationship at the time of the Payments. Nor did Goldfinger or Annopol exercise *de facto* control over the other.

70 Goldfinger was never involved in the operation of the companies, had little information about their operation or finances, discovered Kimel had misled him and then threatened to sue. As mentioned, although Goldfinger and Kimel decided on the amount Goldfinger would be paid, the overall structure and details of the settlement were negotiated with the assistance of counsel.

71 Farber argues that the Payments were the opposite of what one would expect from arm's length parties and that the trial judge erred in declining to draw certain inferences from the evidence. However, the trial judge is the fact finder, not this court, and he was not required to recite every piece of evidence in his 372 paragraphs of reasons. Moreover, there was a dearth of evidence suggesting that the parties were not at arm's length and the trial judge did not err in finding to the contrary. I would reject this argument.

(3) Intention to Defraud, Defeat or Delay a Creditor

72 The burden was on Farber to establish the requisite intent under s. 96 of the *BIA*. An inference of intent may arise from the existence of one or more badges of fraud. However, the presence of such indicia does not mandate a finding of intent. 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: see *Fancy, Re* (1984), 46 O.R. (2d) 153 (Ont. Bktcy.), at p. 159.

73 Case law has identified the following, non-exhaustive list of "badges of fraud" (see *DBDC Spadina Ltd. v. Walton*, 2014 ONSC 3052 (Ont. S.C.J. [Commercial List]), at para. 67; *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.), at para. 52):

- the transferor has few remaining assets after the transfer;
- the transfer was made to a non-arm's length person;
- the transferor was facing actual or potential liabilities, was insolvent, or about to enter a risky undertaking;
- the consideration for the transaction was grossly inadequate;
- the transferor remained in possession of the property for his own use after the transfer;
- the deed of transfer contained a self-serving and unusual provision;
- the transfer was secret;
- the transfer was effected with unusual haste; or
- the transaction was made in the face of an outstanding judgment against the debtor.

74 As stated, Farber complains that the trial judge failed to consider the presence of badges of fraud, focused on the evidence relating to the Memorandum rather than the Payments themselves, and ignored Annopol's intent to defraud its creditors.

75 The trial judge found that the terms of the settlement originated around the time that the $2.5 million was paid. Furthermore, the evidence suggested that the parties expected the Summit Glen Companies and Annopol to continue as going concerns. As is evident from paras. 260 and following of his reasons, the trial judge did consider the issue of badges of fraud, but ultimately concluded that there was no intent. Indeed, his findings undermine Farber's assertions that badges of fraud were present. He assessed the evidence and made findings of fact that supported his reasons for finding an absence of intent. Those findings were available on the record. I see no basis to interfere with them.

76 As for Farber's submissions relating to Annopol's alleged subjective intent to defraud its creditors, HSBC and Srubiski, the evidence did not support such a finding of intent. Neither the Payments nor the settlement were effected in the face of claims by Annopol's judgment creditors. No evidence was tendered from any creditor and there was no evidence that established that Annopol paid creditor funds to Goldfinger.

77 In conclusion, I would reject Farber's submissions on s. 96 of the *BIA*.

B. Are the Payments Unjust Preferences under the APA?

(i) Introduction

78 At the trial, Farber also argued that the Payments were void as unjust preferences pursuant to s. 4 of the *APA*. To be successful, Farber needed to establish that:

(a) Annopol was insolvent at the time of the Payments;

(b) Annopol intended to defeat, hinder, delay or prejudice a creditor; and

(c) Goldfinger was not a creditor of Annopol within the meaning of s. 5(1) of the *APA*.

79 Sections 4 and 5 of the *APA* are reproduced in Schedule "A" attached to these reasons.

(ii) Trial Judge's Decision on the APA

80 The trial judge did not accept Farber's *APA* argument. He found that the first and third requirements under the *APA* were satisfied — Annopol was insolvent, and Goldfinger was not a creditor of Annopol within the meaning of s. 5(1) of the *APA*. However, the trial judge relied on his earlier analysis under s. 96 of the *BIA* to conclude that the second requirement was not met: Annopol did not have the requisite intent to defeat, hinder, delay or prejudice a creditor.

(iii) Parties' APA Submissions on Appeal

81 On appeal, Farber reiterates its position on intent. In response, Goldfinger takes issue with the trial judge's finding that he was not a creditor within the meaning of s. 5(1).

(iv) Analysis

82 I have already addressed the issue of intent under s. 96 of the *BIA* and that analysis is equally applicable to the requirement of intent under the *APA*. For these reasons, I would dismiss Farber's *APA* ground of appeal. Given that conclusion, there is no need to address Goldfinger's submission on his status.

C. Are the Payments void under the FCA?

(i) Introduction

83 Before the trial judge, Farber submitted that the Payments were also contrary to s. 2 of the *FCA*. To succeed, Farber had to demonstrate that:

(a) Annopol made the Payments with an intent to defeat, hinder, delay or defraud creditors or others; and

(b) Goldfinger did not provide good consideration in exchange for the Payments; or

(c) if Goldfinger did provide good consideration, he had notice or knowledge of Annopol's intent to defeat, hinder, delay or defraud creditors or others.

84 Sections 2 and 3 of the *FCA* are reproduced in Schedule "A".

(ii) Trial Judge's Decision on the FCA

85 The trial judge confined his *FCA* analysis to an examination of intent. He concluded that the evidence concerning intent under the other statutes applied equally to Farber's claim under the *FCA*. Consequently, he dismissed the *FCA* claim.

(iii) Farber's Submissions on Appeal

86 On appeal, Farber submits that the trial judge erred in failing to consider the factual matrix surrounding the Payments; the evidence relating to Annopol's actual or imputed intent; and that Goldfinger was wilfully blind.

(iv) Analysis

87 I have already addressed the issue of intent, which is equally fatal to this ground of appeal. There is therefore no need to address the issue of Goldfinger's knowledge. The trial judge was correct in dismissing Farber's claim under the *FCA*.

D. Oppression Claim

(i) Introduction

88 Before the trial judge, Farber submitted that the Payments were oppressive within the meaning of s. 248 of the *OBCA*. To succeed, Farber had to establish that:

(a) it was a "complainant" within the meaning of s. 245 of the *OBCA*; and

(b) the Payments were oppressive, unfairly prejudicial or unfairly disregarded the interests of Annopol's creditors.

Section 248 of the *OBCA* is reproduced in Schedule "A".

(ii) Trial Judge's Decision on Oppression

89 The trial judge proceeded with his analysis of the oppression claim on the basis that Farber, as Trustee in bankruptcy of Annopol, had status as a complainant under s. 245 of the *OBCA*. In that regard, he noted that in *Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp.* (2003), 68 O.R. (3d) 544 (Ont. C.A.), at para. 46, this court held that where it was likely the creditors of a bankrupt would have been recognized as complainants for the purpose of challenging a transaction under s. 248 of the *OBCA*, it was proper to recognize the Trustee of the bankrupt as a complainant "in effect on behalf of the creditors" of the bankrupt.

90 The trial judge accepted that creditors of a corporation have a reasonable expectation that the corporation will not engage in conduct that runs afoul of provincial preference legislation or the preference/transfer for undervalue provisions of the *BIA*. However, the trial judge had already found that the Payments by Annopol to Goldfinger did not run afoul of the *BIA*, the *APA* or the *FCA*, and he therefore relied on the same findings to conclude that the Payments did not violate the reasonable expectations of Annopol's creditors.

91 Farber also argued that Goldfinger was a shareholder of Annopol at the time of the Payments and the $2.5 million represented the repurchase of shares or the payment of a dividend. However, the trial judge rejected this contention. Rather, in substance, Goldfinger received the re-payment of $2.5 million of the funds he had loaned to Kimel and his companies, together with some additional security. He wrote, at para. 300 of his reasons: "The business substance of the December, 2007 and January, 2008 payments was that Goldfinger received back some of the principal he had invested; there was no profit or equity yet available for distribution." For these reasons, he rejected Farber's oppression claim.

(iii) Parties' Oppression Submissions on Appeal

92 Goldfinger submits that while the court has discretion to recognize a Trustee in bankruptcy as a complainant under the *OBCA*, the exercise of that discretion was unjustified in this case. Furthermore, Farber put forward no evidence on the reasonable expectations of the creditors on whose behalf it purported to act. Goldfinger submits that the trial judge erred in recognizing Farber as a complainant.

93 For its part, Farber asserts that Goldfinger is raising the issue of Farber's status as a complainant for the first time on this appeal. The decision was within the trial judge's discretion and there is no basis on which this court should interfere.

94 On the issue of oppression, Farber reiterates that the Payments were unlawful preferences. In addition, Farber submits that Annopol's creditors expected that its funds would be used for real estate development. The Payments to Goldfinger resulted in unfair prejudice, as Annopol's creditors will likely recover nothing from its bankrupt estate. Annopol and Kimel acted with unfair disregard for Annopol's creditors' interests. As a result, Farber submits that Goldfinger should be ordered to repay the $2.5 million to Annopol's bankrupt estate.

(iv) Analysis

95 Dealing first with the issue of Farber's status as a complainant, s. 245 of the *OBCA* defines "complainant" for the purposes of the oppression remedy as follows:

> (a) a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,
>
> (b) a director or an officer or a former director or officer of a corporation or of any of its affiliates,
>
> (c) any other person who, in the discretion of the court, is a proper person to make an application under this Part.

96 Farber relied on subsection (c) in support of its position that it should be given standing as a complainant. In *Olympia & York Developments Ltd.*, at para. 45, this court held that Trustees in bankruptcy are neither automatically barred nor automatically entitled to standing, but it is a matter of discretion in each case whether to grant standing.

97 I do not read the trial judge's reasons as having conclusively held that Farber was a proper person to be a complainant under s. 245. Rather, given his other findings, the trial judge simply proceeded on the assumption that Farber, in its capacity as Trustee in bankruptcy of Annopol, was a complainant. In light of his conclusion on the merits of the oppression claim, and my concurrence with it, I see no need to interfere with his approach. I would also observe that Goldfinger objected to Farber's status to assert a claim for oppression for the first time on this appeal.

98 Turning to the merits of the oppression ground of appeal, this court has recognized that the oppression remedy contained in s. 248 of the *OBCA* is a "flexible, equitable remedy that affords the court broad powers to rectify corporate malfeasance": see *Unique Broadband Systems Inc., Re*, 2014 ONCA 538, 121 O.R. (3d) 81 (Ont. C.A.), at para. 107. The granting of an oppression remedy is a discretionary decision.

99 In *BCE Inc., Re*, 2008 SCC 69, [2008] 3 S.C.R. 560 (S.C.C.), the Supreme Court addressed the oppression provision found in the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, which is similar to the provision found in the *OBCA*.

At para. 68, the Court outlined the following two-step test: (1) Does the evidence support the reasonable expectations asserted by the claimant? and (2) Does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest?

100 The Court addressed the concept of reasonable expectations under the first part of the test, at paras. 62 and 63:

> [T]he concept of reasonable expectations is objective and contextual. The actual expectation of a particular stakeholder is not conclusive. In the context of whether it would be "just and equitable" to grant a remedy, the question is whether the expectation is reasonable having regard to the facts of the specific case, the relationships at issue, and the entire context, including the fact that there may be conflicting claims and expectations.
>
> Particular circumstances give rise to particular expectations. Stakeholders enter into relationships, with and within corporations, on the basis of understandings and expectations, upon which they are entitled to rely, provided they are reasonable in the context. These expectations are what the remedy of oppression seeks to uphold. [Citations omitted.]

101 The court addressed the second stage of the test, at para. 67:

> Even if reasonable, not every unmet expectation gives rise to a claim under [s. 248]. The section requires that the conduct complained of amount to "oppression", "unfair prejudice" or "unfair disregard" of relevant interests. "Oppression" carries the sense of conduct that is coercive and abusive, and suggests bad faith. "Unfair prejudice" may admit of a less culpable state of mind, that nevertheless has unfair consequences. Finally, "unfair disregard" of interests extends the remedy to ignoring an interest as being of no importance, contrary to the stakeholders' reasonable expectations. The phrases describe, in adjectival terms, ways in which corporate actors may fail to meet the reasonable expectations of stakeholders. [Citations omitted.]

102 The trial judge's analysis under the *BIA*, the *APA* and the *FCA* effectively disposed of that part of Farber's submissions relating to unjust preferences. As for Farber's argument that there was unfair disregard for the interests of Annopol's creditors, this submission must be placed in context. While Kimel stated that he was not thinking of his creditors when he made the Payments, Kimel and his companies were facing the prospect of potentially ruinous litigation. He believed that the Payments would permit the companies to continue as going concerns and that they would generate profit. The evidence did not suggest that this was a misguided proposition at that time. The cataclysmic, and unforeseen, economic meltdown that enveloped the global economy months after the Payments were made cannot be ignored. In this context, the trial judge did not err in exercising his discretion and dismissing Farber's claim of unfair disregard for the interests of Annopol's creditors.

103 As for the expectations of HSBC and Srubiski as creditors, Farber claims that Annopol paid Goldfinger with funds it had received from Srubiski. The trial judge found that it was not possible to trace the vast majority of funds to any particular source or creditor. As the trial judge noted, Kimel's evidence was that money *may* have come from Srubiski or Mahvash. There was also no conclusive evidence that the funds paid by Annopol to Goldfinger came from Srubiski. Moreover, the line of credit from HSBC was provided to SG Group and not to Annopol. Consequently, HSBC was not a creditor of Annopol. HSBC, a sophisticated party, would have known that it was not a creditor of Annopol. There could be no reasonable expectation to the contrary.

104 The trial judge's decision reflected an exercise in discretion and is entitled to deference. I would not accede to Farber's submissions on oppression.

E. Did the Payments Unjustly Enrich Goldfinger?

(i) Introduction

105 Before the trial judge, Farber submitted that the Payments unjustly enriched Goldfinger. To succeed, Farber had to establish that:

(a) the Payments enriched Goldfinger;

(b) there was a corresponding deprivation suffered by Annopol; and

(c) there was no juristic reason for that enrichment.

(ii) Trial Judge's Decision on Unjust Enrichment

106 The trial judge gave brief reasons for his dismissal of Farber's unjust enrichment claim. In essence, he relied on his reasons for dismissal of the oppression claim, stating at para. 304 of his reasons: "Farber also advanced a claim sounding in unjust enrichment on the basis that the $2.5 million payments were a re-purchase of shares or equity distribution. For similar reasons [*i.e.* similar to those for dismissing the oppression claim], I dismiss that claim."

(iii) Parties' Submissions on Appeal

107 Farber submits that the trial judge failed to consider the test for unjust enrichment, which it says was met based on the evidence. Farber says that the first two parts of the test were easily satisfied on the basis of the Payments from Annopol to Goldfinger. With respect to lack of a juristic reason, the Payments were contrary to the reasonable expectations of Annopol's creditors and it was contrary to public policy for Goldfinger to have received the Payments from an insolvent company.

108 Goldfinger responds that he merely received his money back and Annopol got what it bargained for. The Payments were a repayment of an obligation and in line with the parties' expectation of a settlement of their dispute. Settlement of disputes is supported by public policy and may constitute the rationale for a payment.

(iv) Analysis

109 As Iacobucci J. noted in *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629 (S.C.C.), at para. 30, the test for unjust enrichment requires that a claimant establish the following three elements:

a) an enrichment of the defendant;

b) a corresponding deprivation of the plaintiff; and

c) an absence of juristic reason for the enrichment.

110 As noted in *Garland*, at para. 31, the first two elements are determined by applying a "straightforward economic approach". Iacobucci J. explained, at para. 36: "Where money is transferred from plaintiff to defendant, there is an enrichment."

111 The analysis in respect of the third element proceeds in two steps.

112 At the first stage, the claimant has the burden of demonstrating that "no juristic reason from an established category exists to deny recovery." The established categories include a contract, a disposition of law, a donative intent, and other valid common law, equitable or statutory obligations: see *Garland*, at para. 44.

113 If the claimant can show that there is no established juristic reason, then, at the second stage, the defendant bears the burden of demonstrating that there is another reason to deny recovery. When determining if there is a reason to deny recovery at this stage, courts are required to consider the reasonable expectations of the parties and public policy considerations: see *Garland*, at paras. 45-46.

114 As this court noted in *Campbell v. Campbell* (1999), 43 O.R. (3d) 783 (Ont. C.A.), at pp. 794-95, and *Simonin v. Simonin*, 2010 ONCA 900, 329 D.L.R. (4th) 513 (Ont. C.A.), at para. 24:

> [W]hat is at the heart of the third requirement is the reasonable expectation of the parties, and whether it would be just and fair to the parties considering all of the relevant circumstances, to permit the recipient of the benefit to retain it without compensation to those who provided it.

115 Applying these principles to the issues on appeal, the first two requirements for unjust enrichment were clearly met. Goldfinger was enriched and there was a corresponding deprivation to Annopol. The real issue turns on the third element: was there a juristic reason for the enrichment?

116 Farber was unsuccessful in attacking the Memorandum and, in any event, it did not ask that the Memorandum be set aside. A contract is a recognized category on which to reject a claim for unjust enrichment. The settlement provided an established rationale for the Payments and hence amounted to a juristic reason. In addition, Goldfinger's advance of $2.9 million to Annopol amounted to a juristic reason.

117 Finally, a juristic reason may be made out based on an examination of the reasonable expectations of the parties. On the facts of this case, Goldfinger advanced funds to whichever company Kimel requested. He advanced a total of about $2.9 million to Annopol itself. Kimel treated all the companies as, effectively, a common pool. Therefore, it was in line with past practice and the reasonable expectations of the parties that Goldfinger received payment in respect of funds from Annopol.

118 This ground of appeal therefore fails.

Appeal Relating to the Brantford/Bridge 2008 Transactions

A. Are the Brantford/Bridge 2008 Transactions Oppressive under the OBCA?

(i) Introduction

119 As mentioned, Farber had originally advanced an oppression claim with respect to the Brantford/Bridge 2008 Transactions. Ultimately, the dispute devolved into a claim to approximately $280,000 in proceeds from the sale of the Bridge Street property that is held in trust pending resolution of the action. The payment of this sum turns on whether the Brantford/Bridge 2008 Transactions were oppressive within the meaning of s. 248 of the *OBCA* and therefore ought to have been set aside by the trial judge.

(ii) Trial Judge's Decision on the Brantford/Bridge 2008 Transactions and Oppression

120 The trial judge relied on his findings under the *BIA*, the *APA* and the *FCA* claims to conclude that Goldfinger's charges over the SG Brantford and SG Bridge properties, as well as the Annopol Subordinations, did not violate the reasonable expectations of creditors. There was no intent to defeat, hinder, delay or defraud creditors. He concluded that no s. 248 *OBCA* remedy was justified.

(iii) Farber's Submissions on Appeal

121 Farber submits that the trial judge did not consider whether the transactions should be set aside pursuant to s. 248 of the *OBCA*. Its primary submission is that the trial judge dismissed its claim on the basis of lack of intent; however, this is an irrelevant consideration in an oppression analysis. Goldfinger was at best an unsecured creditor, and Annopol held prior security over the Henry Street and Bridge Street properties. As a result of the Memorandum, Goldfinger became secured. But for the transactions, Annopol's creditors would be entitled to the $280,000 in sale proceeds.

122 Farber argues that the trial judge erred in failing to make a finding of oppression and in refusing to set aside the Brantford/Bridge 2008 Transactions.

(iv) Analysis

123 The trial judge clearly turned his mind to the oppression claim as is evident from paras. 317, 327, 328, 348, 349 and 351 of his reasons. It is a fair inference from his reasons and his conclusion on the Brantford/Bridge 2008 Transactions that he was of the view that his prior findings supported his conclusion that they did not violate the reasonable expectations of creditors.

124 The trial judge relied on his same reasons, found at paras. 274-280, for concluding that Annopol did not intend to defeat, hinder, delay or defraud its creditors by making the Payments to Goldfinger. In addition, the trial judge's reasons were that the Payments were part of a global settlement meant to avoid potentially ruinous litigation; the settlement in question was concluded at arm's length after fairly lengthy negotiations; and the parties' compromise was reasonable at the time they reached it.

125 The trial judge's decision that the Payments and the Brantford/Bridge 2008 Transactions were defensible for the same reasons was justified on the record. Both sets of transactions resulted from the same settlement. Therefore, the validity of the Brantford/Bridge 2008 Transactions falls to be decided on the same basis as that applicable to the Payments. For the reasons given, I would reject Farber's submissions with respect to the Brantford/Bridge 2008 Transactions.

Cross-Appeal

A. Is the $471,000 Payment to Goldfinger a Fraudulent Conveyance?

(i) Introduction

126 Farber, in its capacity as Trustee in bankruptcy of SG Brantford, asked the trial judge to order Goldfinger to return the sum of $471,000 to SG Brantford. Goldfinger objected.

(ii) Trial Judge's Decision

127 To recap, about five months after the Memorandum, the mortgage from the first mortgagee, First National, on 176 Henry St., a property owned by SG Brantford, came due. As part of the refinancing, the First National mortgage was to be increased. To complete the refinancing with First National, SG Brantford had to arrange for the postponement of the second mortgage in favour of Montor.

128 The trial judge was not prepared to find that Kimel forged Montor's signature on the postponement. He instead found that the Montor postponement was signed by Kimel purporting to act as the secretary-treasurer of Montor.

129 However, he did find that the postponement arose as a result of Kimel's and SG Brantford's deliberate misrepresentation of the true state of affairs to Montor. Moreover, Perelmuter, the sole shareholder of Montor, was unaware that part of the refinancing proceeds would be paid to a junior secured creditor, namely Goldfinger. The trial judge concluded that Kimel and SG Brantford made the misrepresentation in order to defeat, hinder, delay or defraud Montor.

130 He held that the evidence on intent as of November 26, 2008 was materially different from the evidence at the time of the Memorandum. By November 2008, Goldfinger knew that Kimel and his companies, including SG Brantford, had defaulted on their obligations. He and Kimel also knew that there were insufficient funds to pay Goldfinger's charges over the SG Brantford and SG Bridge properties if Montor were to be paid from the refinancing.

131 On the trial judge's findings, when Kimel and SG Brantford misrepresented the true state of affairs to Montor, they did so intending to defeat, hinder, delay or defraud Montor. Goldfinger had notice or knowledge of that intent within the meaning of s. 3 of the *FCA*.

132 The trial judge concluded that Goldfinger knew that the payment of $471,000 to him would prefer his interests over those of Montor. He based his conclusion on the *FCA*, but held that he would have reached a similar result under s. 248 of the *OBCA*. Therefore, the payment by SG Brantford to Goldfinger of $471,000 in preference to the payment of that amount to Montor violated s. 2 of the *FCA* and was not saved by s. 3 of the *FCA*.

133 Accordingly, Goldfinger was ordered to repay the sum of $471,000 to Farber, as Trustee in bankruptcy of SG Brantford.

(iii) Goldfinger's Submissions on Appeal

134 Goldfinger argues that he was not involved with, and did not know, the terms of the postponement. He asserts that the trial judge erred in finding that he had the intent to defeat Montor's interest. He had nothing to do with the postponement of the Montor mortgage. Goldfinger was unconditionally entitled to payment of the $471,000.

135 He asks that if his cross-appeal is denied, he should, in the alternative, be given judgment for the restoration of his position, including judgment for $183,000 representing the net proceeds from the sale of the Henry Street property on August 31, 2010 being held by the Trustee pending the outcome of the appeals.

(iv) Analysis

136 I would reject Goldfinger's cross-appeal. As Goldfinger notes in his factum, at para. 53, where the issue on appeal involves the trial judge's interpretation of the evidence as a whole, his findings should not be overturned absent palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.), at paras. 23-24.

137 The trial judge's conclusion on this issue rested on factual findings. In particular, he found that Goldfinger had notice or knowledge of Kimel's and SG Brantford's intent to defeat, hinder, delay or defraud Montor and that he knew the $471,000 payment would prefer his interests over those of Montor. Goldfinger has not identified any palpable and overriding error that would serve to displace these findings.

138 For these reasons, I would dismiss the cross-appeal.

139 Further, I see no basis on which to grant the alternative relief Goldfinger requests. Based on the evidence, even with the repayment of the $471,000, there will be a significant shortfall in recovery on account of Montor's mortgage. Moreover, no such request was made of the trial judge.

Disposition

140 For these reasons, I would dismiss both the appeal and the cross-appeal. As agreed by the parties, I would order Farber to pay Goldfinger $40,000 in costs of the appeal and Goldfinger to pay Farber $20,000 in costs of the cross-appeal, both sums inclusive of disbursements and applicable taxes.

E.A. Cronk J.A.:

I agree

P. Lauwers J.A.:

I agree

Schedule "A"

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

96 (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.

Assignments and Preferences Act, R.S.O. 1990, c. A.33

4. (1) Subject to section 5, every gift, conveyance, assignment or transfer, delivery over or payment of goods, chattels or effects, or of bills, bonds, notes or securities, or of shares, dividends, premiums or bonus in any bank, company or corporation, or of any other property, real or personal, made by a person when insolvent or unable to pay the person's debts in full or when the person knows that he, she or it is on the eve of insolvency, with intent to defeat, hinder, delay or prejudice creditors, or any one or more of them, is void as against the creditor or creditors injured, delayed or prejudiced.

(2) Subject to section 5, every such gift, conveyance, assignment or transfer, delivery over or payment made by a person being at the time in insolvent circumstances, or unable to pay his, her or its debts in full, or knowing himself, herself or itself to be on the eve of insolvency, to or for a creditor with the intent to give such creditor an unjust

preference over other creditors or over any one or more of them is void as against the creditor or creditors injured, delayed, prejudiced or postponed.

(3) Subject to section 5, if such a transaction with or for a creditor has the effect of giving that creditor a preference over the other creditors of the debtor or over any one or more of them, it shall, in and with respect to any action or proceeding that, within sixty days thereafter, is brought, had or taken to impeach or set aside such transaction, be presumed, in the absence of evidence to the contrary, to have been made with the intent mentioned in subsection (2), and to be an unjust preference within the meaning of this Act whether it be made voluntarily or under pressure.

(4) Subject to section 5, if such a transaction with or for a creditor has the effect of giving that creditor a preference over the other creditors of the debtor or over any one or more of them, it shall, if the debtor within sixty days after the transaction makes an assignment for the benefit of the creditors, be presumed, in the absence of evidence to the contrary, to have been made with the intent mentioned in subsection (2), and to be an unjust preference within the meaning of this Act whether it be made voluntarily or under pressure.

(5) The word "creditor" when used in the singular in subsections (2), (3) and (4) includes any surety and the endorser of any promissory note or bill of exchange who would upon paying the debt, promissory note or bill of exchange, in respect of which the suretyship was entered into or the endorsement was given, become a creditor of the person giving the preference within the meaning of those subsections.

5. (1) Nothing in section 4 applies to an assignment made to the sheriff for the area in which the debtor resides or carries on business or, with the consent of a majority of the creditors having claims of $100 and upwards computed according to section 24, to another assignee resident in Ontario, for the purpose of paying rateably and proportionately and without preference or priority all the creditors of the debtor their just debts, nor to any sale or payment made in good faith in the ordinary course of trade or calling to an innocent purchaser or person, nor to any payment of money to a creditor, nor to any conveyance, assignment, transfer or delivery over of any goods or property of any kind, that is made in good faith in consideration of a present actual payment in money, or by way of security for a present actual advance of money, or that is made in consideration of a present actual sale or delivery of goods or other property where the money paid or the goods or other property sold or delivered bear a fair and reasonable relative value to the consideration therefor.

(2) In case of a valid sale of goods or other property and payment or transfer of the consideration or part thereof by the purchaser to a creditor of the vendor under circumstances that would render void such a payment or transfer by the debtor personally and directly, the payment or transfer, even though valid as respects the purchaser, is void as respects the creditor to whom it is made.

(3) Every assignment for the general benefit of creditors that is not void under section 4, but is not made to the sheriff nor to any other person with the prescribed consent of creditors, is void as against a subsequent assignment that is in conformity with this Act, and is subject in other respects to the provisions thereof until and unless a subsequent assignment is executed in accordance therewith.

(4) Where a payment has been made that is void under this Act and any valuable security was given up in consideration of the payment, the creditor is entitled to have the security restored or its value made good to him before, or as a condition of, the return of the payment.

(5) Nothing in this Act,

(a) affects the *Wages Act* or prevents a debtor providing for payment of wages due by him or her in accordance with that Act;

(b) affects any payment of money to a creditor where the creditor, by reason or on account of the payment, has lost or been deprived of, or has in good faith given up, any valid security held for the payment of the debt so paid unless the security is restored or its value made good to the creditor;

(c) applies to the substitution in good faith of one security for another security for the same debt so far as the debtor's estate is not thereby lessened in value to the other creditors; or

(d) invalidates a security given to a creditor for a pre-existing debt where, by reason or on account of the giving of the security, an advance in money is made to the debtor by the creditor in the belief that the advance will enable the debtor to continue the debtor's trade or business and to pay the debts in full.

Fraudulent Conveyances Act, R.S.O. 1990, c. F.29

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.

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

248. (1) A complainant and, in the case of an offering corporation, the Commission may apply to the court for an order under this section.

(2) Where, upon an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates,

(a) any act or omission of the corporation or any of its affiliates effects or threatens to effect a result;

(b) the business or affairs of the corporation or any of its affiliates are, have been or are threatened to be carried on or conducted in a manner; or

(c) the powers of the directors of the corporation or any of its affiliates are, have been or are threatened to be exercised in a manner,

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer of the corporation, the court may make an order to rectify the matters complained of.

(3) In connection with an application under this section, the court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing,

(a) an order restraining the conduct complained of;

(b) an order appointing a receiver or receiver-manager;

(c) an order to regulate a corporation's affairs by amending the articles or by-laws or creating or amending a unanimous shareholder agreement;

(d) an order directing an issue or exchange of securities;

(e) an order appointing directors in place of or in addition to all or any of the directors then in office;

(f) an order directing a corporation, subject to subsection (6), or any other person, to purchase securities of a security holder;

(g) an order directing a corporation, subject to subsection (6), or any other person, to pay to a security holder any part of the money paid by the security holder for securities;

(h) an order varying or setting aside a transaction or contract to which a corporation is a party and compensating the corporation or any other party to the transaction or contract;

(i) an order requiring a corporation, within a time specified by the court, to produce to the court or an interested person financial statements in the form required by section 154 or an accounting in such other form as the court may determine;

(j) an order compensating an aggrieved person;

(k) an order directing rectification of the registers or other records of a corporation under section 250;

(l) an order winding up the corporation under section 207;

(m) an order directing an investigation under Part XIII be made; and

(n) an order requiring the trial of any issue.

(4) Where an order made under this section directs amendment of the articles or by-laws of a corporation,

(a) the directors shall forthwith comply with subsection 186 (4); and

(b) no other amendment to the articles or by-laws shall be made without the consent of the court, until the court otherwise orders.

(5) A shareholder is not entitled to dissent under section 185 if an amendment to the articles is effected under this section.

(6) A corporation shall not make a payment to a shareholder under clause (3) (f) or (g) if there are reasonable grounds for believing that,

(a) the corporation is or, after the payment, would be unable to pay its liabilities as they become due; or

(b) the realizable value of the corporation's assets would thereby be less than the aggregate of its liabilities.

Appeal and cross-appeal dismissed.

Footnotes

* Affirmed at *Montor Business Corp. (Trustee of) v. Goldfinger* (2013), 2013 ONSC 6635, 2013 CarswellOnt 14983, 8 C.B.R. (6th) 200 (Ont. S.C.J. [Commercial List]).

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2015 ONSC 1781
Ontario Superior Court of Justice

Juhasz (Trustee of) v. Cordeiro

2015 CarswellOnt 4744, 2015 ONSC 1781, [2015] O.J. No. 1654, 24 C.B.R. (6th) 69, 252 A.C.W.S. (3d) 400

Pollard and Associates Inc., Trustee in Bankruptcy for the Estate of Agnes Juhasz, Applicant and Rui Cordeiro and Agnes Juhasz, Respondents

H. Wilton-Siegel J.

Heard: November 25, 2014
Judgment: March 18, 2015
Docket: CV-14-10692-00CL

Counsel: Michael Hackl for Applicant
Sean N. Zeitz for Respondent, Rui Cordeiro

Subject: Civil Practice and Procedure; Insolvency; Property

APPLICATION by trustee for summary judgment seeking declaration that transfer of bankrupt's interest in property was void under s. 96 of *Bankruptcy and Insolvency Act*.

***H. Wilton-Siegel J.*:**

1 On this application, Pollard & Associates Inc. (the "Trustee"), the trustee in bankruptcy of Agnes Juhasz ("Juhasz"), seeks a declaration that a transfer of her interest in a property known municipally as 131 Ulster Street in the City of Toronto (the "Property") is void under s. 96 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA"). In the alternative, the Trustee seeks an order that Rui Cordeiro ("Cordeiro"), the transferee, pay the difference between the value of Juhasz's interest in the Property and the value of the consideration received by Juhasz on the transfer.

Procedural Matter

2 This proceeding was commenced as an application by the Trustee. The Trustee initially argued that the application should be converted into an action for purposes of a trial. However, after further consideration, the Trustee took the position that the facts were not in dispute, as did Cordeiro, with the result that the application proceeded.

3 While the factual background to this proceeding is largely not in dispute, the Court is, however, required to make certain findings of fact that are central to the issues on this application based on inferences from the factual context. The Court has considered the possibility of requiring a trial of these issues in a manner analogous to the limited trial envisaged by the current Rule 20 of the *Rules of Civil Procedure* and as contemplated by the principles in *Hryniak v. Mauldin*, 2014 SCC 7 (S.C.C.).

4 Apart from one issue addressed below, however, I have rejected this approach for two reasons. First, the parties seek a determination on tins application rather than the additional expense of a trial. Second, the parties have already made full disclosure and conducted extensive discoveries of Juhasz and Cordeiro. There is, therefore, no suggestion that there is material evidence that would be available to the court if a trial were ordered.

5 Accordingly, the Court has proceeded to address this application on the basis of the principles applicable to a summary judgment, as informed by the principles articulated by Karakatsanis J. in *Hryniak*.

Background

6 Cordeiro and Juhasz were business partners who acquired two properties for renovation, development and resale in 2010 and 2011, having had a business relationship for several years. Juhasz was a real estate agent who sourced the properties and attended to the financial administration of the properties. Cordeiro was a contractor who was responsible for the work done on the properties.

The Property and the Adjacent Property

7 On November 5, 2010, Cordeiro and Juhasz purchased the Property as equal tenants in common for a purchase price of $670,000. They intended to renovate and re-sell the Property, with each of them contributing one-half of the capital costs and expenses of the Property. In July 2011, Cordeiro and Juhasz acquired the adjacent property at 129 Ulster Street (the "Adjacent Property") on the same basis and for the same purpose, although in this case Juhasz acquired her interest together with her two sons. The Property and the Adjacent Property were semi-detached rental apartment buildings. The Property had four units and one illegal unit in the basement; the Adjacent Property had five apartments.

8 For a number of years, however, Juhasz had failed to report substantial business income for income tax purposes, which was derived from buying and selling real estate with Cordeiro. The Canada Revenue Agency ("CRA") advised Juhasz in the spring of 2011 that it was conducting an audit of her income. Subsequently, in 2012, the CRA assessed Juhasz for over $2.7 million in unpaid income tax, interest and penalties.

9 In the summer of 2012, Juhasz advised Cordeiro that she was having financial difficulties. At that time, she proposed to transfer her interest in the Property to her two sons. For this purpose, Juhasz engaged an appraiser, Ian G. McLean ("McLean"), to conduct appraisals of the Property and the Adjacent Property. McLean provided a report dated August 10, 2012 (the "McLean Report"), which is described below.

10 While the McLean Report was being prepared, Cordeiro advised Juhasz that he was not agreeable to the transfer of Juhasz's interest in the Property to her sons as they were no more able to bear Juhasz's share of the renovation and financing expenses than Juhasz. He proposed that she could take over the project failing which he would do so. However, they took no further action with respect to the Property at that time. Instead, they concentrated on completing the renovations of the Adjacent Property.

11 In November 2012, Juhasz and Cordeiro listed the Adjacent Property for sale at $2.3 million. In January 2013, they entered into an agreement to sell the Adjacent Property for $2,025,000, which transaction closed on May 5, 2013.

12 On or about March 6, 2013, Juhasz and Cordeiro attended at the office of a lawyer and executed separate documentation authorizing and directing the lawyer to register a transfer of Juhasz's 50% interest in the Property to Cordeiro.

13 A deed of transfer transferring Juhasz's undivided 50% interest in the Property to Cordeiro was registered by the lawyer on March 6, 2014 (the "Transfer"). The consideration reflected in the deed of transfer was $368,942.74, which it is agreed represents one-half of the amount outstanding at that time under two mortgages on the Property for which both Juhasz and Cordeiro were jointly and severally liable. Cordeiro and Juhasz say that Cordeiro assumed Juhasz's obligations in respect of these mortgages effective as of the Transfer. This alleged consideration implies a value of the Property of $737,885.48

14 Cordeiro explains the six-month delay in effecting the Transfer after obtaining the McLean Report as reflecting their joint concentration on the completion of the renovations of the Adjacent Property and its re-sale, together with a lack of appreciation of the significance of delaying the Transfer.

15 Subsequently, Cordeiro renovated the Property after obtaining possession of the occupied units and a minor variance to legalize the basement unit. The renovations were commenced in April 2013. It is not clear whether the renovations have now been completed.

16 Cordeiro produced an unaudited statement reflecting renovation costs totalling $508,261.71 plus related professional fees of $7,784.58. However, he can only produce invoices for $212,561.71 of the construction work, of which approximately one-half represents his own invoice, without any supporting documentation, for the value that he estimates for his own work on the Property. He also says $295,000 was paid to sub-contractors and trades in cash and there are therefore no invoices available to evidence these payments.

17 During his cross-examination in July 2014, Cordeiro testified that he had entered into an agreement for the sale of the Property for $1.8 million. However, it appears this transaction did not close. While Cordeiro suggests that the transaction failed to complete as a result of the commencement of these proceedings, this explanation cannot be verified on the record before the Court.

The Bankruptcy Proceedings of Juhasz

18 Earlier, on January 23, 2013, the National Bank of Canada ("NBC") issued a statement of claim seeking payment of approximately $49,000, being the amount owing under a line of credit that it had extended to Juhasz which went into default in August 2012. Juhasz was aware of the NBC action from mid-February 2013. The statement of claim was served on Juhasz during March 2013, apparently shortly after the Transfer. Juhasz filed a statement of defence in the NBC action in April 2013. NBC subsequently obtained summary judgment against Juhasz on October 1, 2013.

19 On February 27, 2014, NBC commenced an application for bankruptcy order against Juhasz. On April 1, 2014, Juhasz was adjudged bankrupt and the Trustee was appointed the executor of her estate.

Evidence Regarding the Value of the Property

20 The McLean Report appraised the Property and the Adjacent Property as of July 27, 2012. The McLean Report appraised the Adjacent Property on an "as is" basis at $950,000, based primarily on a capitalization of income approach. The Adjacent Property was undergoing a total renovation and was unoccupied at the time of the appraisal. In reaching that conclusion, the McLean Report concluded that the value of the Adjacent Property on a completed basis was $1,183,000, based on a capitalization of income approach.

21 The McLean Report appraised the Property at $720,000, based on a direct comparison approach, for which McLean considered the Adjacent Property to be the best comparator. No renovations had been commenced on the Property, which was described as being in a state of disrepair, and was appraised as a shell. At that time, three units of the Property had been gutted by the previous owner and Juhasz and Cordeiro were seeking to evict a tenant from one of the two remaining units. To obtain a value for the Property, the McLean Report adjusted the value of the Adjacent Property downward to reflect vacant possession and a superior location of the Adjacent Property. The McLean Report also looked at the previous arm's length sale price of the Property, as increased by the average price increase of 10.67% in the greater Toronto area since the date of such sale.

22 In support of its position, the Trustee obtained a "consulting report" of Lebow Hicks Appraisal Inc. dated September 26, 2014 (the "Consulting Report"). The Consulting Report is expressly stated not to be an appraisal of the Property. The Consulting Report addressed only the estimated change in the value of the Property between November 5, 2010, when Juhasz and Cordeiro purchased the Property, and March 6, 2013, the date of the Transfer. The Consulting Report estimated the change in value based on two factors: (1) changes to typical rental income levels and expected capitalization rates during the relevant period; and (2) changes to the risk profile of the Property. The Consulting Report concluded that these factors yielded an increase in the value of the Property from $670,000 to $900,000 as of the date of the Transfer.

23 In a review report dated October 30, 2014 (the "Review Report"), McLean criticized the Consulting Report for its assumptions that the Property was an investment property and that the estimated change should therefore be derived based on a rental income model. The Review Report instead proceeded on the basis of the average increase in the price of single family dwellings over the relevant period as calculated according to two separate indices. When averaged, this price change yielded an increase in the value of the Property to $790,935.

Applicable Law

24 This application seeks a declaration under s, 96 of the BIA which reads 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.

25 For this purpose, the following provisions of s. 4 of the BIA address the requirements for establishing an ami's length relationship:

> (2) For the purposes of this Act, persons are related to each other and are "related persons" if they are
>
> (a) individuals connected by blood relationship, marriage, common-law partnership or adoption; ...
>
> (4) 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.

26 In addition, the following definition of "transfer at undervalue" in s. 2 of the BIA is relevant for present purposes:

"transfer at undervalue" means 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;

Issues on the Application

27 It is not disputed that the initial bankruptcy event occurred on February 27, 2014, when NBC filed its application to petition Juhasz into bankruptcy, and that she was adjudged bankrupt on April 1, 2014. Accordingly, the Transfer, which occurred on March 6, 2013, falls within the period contemplated by paragraphs 96(1)(a)(i) and 96(1)(b)(i), which runs from February 27, 2013 to April 1, 2014.

28 Cordeiro acknowledges, and in any event, it is clear that Juhasz was insolvent on March 6, 2013. Juhasz acknowledges that her liabilities to CRA alone amounted to over $2.7 million at that date and that her liabilities exceeded her assets.

29 I propose therefore to consider the following remaining issues pertaining to the application of s. 96 to the Transfer in the following manner. First, I will address a preliminary issue — whether Juhasz and Cordeiro believed, or were willfully blind to the possibility, that the Property had a value in excess of the amount reflected in the Transfer. I will then address the following requirements of a claim under s. 96 of the BIA in order:

1. Were Juhasz and Cordeiro dealing at arm's length at the time of the Transfer?

2. Did Juhasz intend to defraud, defeat or delay a creditor in effecting the Transfer? and

3. Was the Transfer a "transfer at undervalue"?

Preliminary Determination

30 A central issue in this proceeding is whether Juhasz and Cordeiro considered that there was any equity in the Property i.e. any value over and above the outstanding amount under the mortgages against the Property totalling $737,885.48 at the time of the Transfer. I find that they knew that there was a reasonable likelihood, or were willfully blind to the likelihood that, there was such value for the following reasons.

31 Juhasz and Cordeiro were experienced business people. As such, they would have been keenly aware of the value of the Property as renovated. In particular, they would have been aware that the implied value of the Property had increased substantially over the appraised value in the McLean Report as a result of the sale of the Adjacent Property. I note that McLean expressed the same opinion on his cross-examination.

32 The McLean Report appraised the Adjacent Property, which was in the course of renovation, at $950,000 on an "as is" basis and at $1,183,000 on a completed basis. It sold six months later for $2,025,000. Even taking into consideration the remaining costs of the renovation, this sale transaction necessarily implied a substantially higher value for the Property both as a renovation property and in a completed state than would have been assumed in July 2012. Juhasz and Cordeiro would also have been aware that this increase in the value of the Adjacent Property over its appraised value was due to their ability to rent the renovated units at rates that exceeded the rental rates provided by Juhasz to McLean and assumed in the McLean Report.

33 In addition, as Juhasz was insolvent and therefore incapable of satisfying her one-half of the mortgage obligations, Cordeiro would have known that he would be fully liable for any deficiency in the value of the Property. He would not have assumed this additional risk unless he was satisfied that renovation of the Property was financeable and would result in a value that exceeded the aggregate of the mortgage financing and the renovation financing required to renovate the Property. Such a scenario implies that the value of the Property at the date of the Transfer at least equalled the outstanding amount under the mortgages.

34 However, Cordeiro would not have taken sole ownership of the Property by the Transfer if he did not also believe that there was a reasonable profit to be made from renovation of the Property. By definition, there must therefore have been sufficient value in the development potential, i.e. the right to renovate the Property, that Cordeiro was prepared to take an assignment of Juhasz's interest and spend his time renovating it. If he had believed there was no such value, or even negligible value, the opportunity would not have justified his time and the risk associated with any renovation in a potentially volatile market. His best course of action would have been to cut his losses by selling the Property with Juhasz, which he chose not to do.

35 While Juhasz did not take advantage of Cordeiro's offer to let her purchase his half-interest, the evidence indicates this was because she lacked the funds, not that she believed there was no development potential in the Property. Given her financial position, there would have been no reason to contemplate assigning the Property to her sons if she did not believe that she had any equity in the Property. In other words, the evidence suggests that Juhasz shared the same view of the value of the Property as Cordeiro.

36 Lastly, I am not persuaded that Cordeiro and Juhasz failed to obtain a new appraisal because they believed that the appraisal in the McLean Report remained valid. For the reasons stated above, they would have known that there was a real likelihood that the Property was worth more that McLean's appraisal of $720,000. They could have updated the McLean Report. However, that would have delayed the Transfer at a time when the parties appear to have wanted to move quickly in response to NBC's actions in attempting to serve its statement of claim in its action against Juhasz, Critically, they did ask McLean to do an update but he wasn't able to do it "because of time restriction". Given the sale price of the Adjacent Property, I think they also knew that an updated appraisal would have increased the valuation and, therefore, among other tilings, the land transfer tax payable on the Transfer, which Cordeiro was to bear. Because these considerations are at least as likely explanations for their failure to obtain a new valuation, I do not think that the failure of Juhasz and Cordeiro to obtain an updated appraisal in March 2013 is evidence of an honest belief on their part that the value of the Property had not risen since July 2012.

37 In short, I conclude on the evidence that Juhasz and Cordeiro knew that there was a reasonable likelihood that, or were wilfully blind to the likelihood that, the value of the Property exceeded the amount of the consideration for the Transfer expressed in the deed of transfer. They chose not to obtain an updated appraisal from McLean because they considered that it was a higher priority to effect the Transfer. Accordingly, they were prepared to take the risk that the Transfer might be challenged at some time in the future in order to complete the Transfer as quickly as possible in view of the likelihood of bankruptcy proceedings involving Juhasz given the NBC action as well as the CRA reassessment.

Were the Parties at Arm's Length?

38 The Trustee concedes that Juhasz and Cordeiro are not "related" for purposes of the presumption of a non-arm's length relationship in s. 4(5) of the BIA. In particular, there is no evidence that Juhasz and Cordeiro were in a common-law partnership. Accordingly, s. 4(4) of the BIA governs the issue of whether the parties dealt at arm's length on the date of the Transfer. It is therefore a question of fact whether or not these parties were at ami's length at the time of the Transfer.

39 The Trustee submits that Juhasz and Cordeiro were not acting at arm's length based on a number of factors, including that they were effectively partners dealing with partnership property and that they used the same lawyer for the Transfer. The Trustee also says that the parties intended that Juhasz would continue to provide the financial administration for the Property while under renovation, although there is no evidence that she actually did so. Cordeiro submits that the mere existence of a business relationship is not sufficient to establish a non-aim's length relationship.

40 There is little guidance in the BIA regarding the factors to be considered in addressing whether, as a matter of fact, parties were or were not at arm's length at the date of a transfer of property. The Trustee suggests that the Court should have regard to certain criteria identified by Rothstein J. in *McLarty v. R.*, [2008] 2 S.C.R. 79 (S.C.C.) at para.

62 in the context of income tax legislation, as well as to statements in Income Tax Folio S1-F5-C1 (the "IT Folio"). The latter refers, in particular, to the "common mind" principle, in which parties act in concert in respect of a transaction of material interest, and the absence of separate economic interests in respect of parties acting in their separate interests. It also refers to a key factor being "whether there are separate economic interests which reflect ordinary commercial dealing between parties acting in their separate interests".

41 Section 96 is directed at transfers by insolvent persons for a consideration that is materially or significantly less than the fair market value of the property. In this context, the concept of a non-arm's length relationship is one in which there is no incentive for the transferor to maximize the consideration for the property being transferred in negotiations with the transferee. It addresses situations in winch the economic self-interest of the transferor is, or is likely to be, displaced by other non-economic considerations that result in the consideration for the transfer failing to reflect the fair market value of the transferred property.

42 While I do not think that the existence of a partnership or joint venture relationship is sufficient on its own to establish a non-arm's length status, I consider that the absence of any economic interest of a transferor at the point of termination of a business relationship, together with evidence of accommodation of the wishes of the transferee, can support a finding that there was a non-arm's length relationship.

43 In the present circumstances, Juhasz accommodated Cordeiro's wish not to have to deal with third party creditors through a trustee in bankruptcy, i.e. to have a trustee in bankruptcy become his "partner" with respect to the Property. For her part, given the extent of her liabilities, any economic interest in the Property resided, in substance, with Juhasz's creditors. These circumstances appear to fall squarely within the circumstances envisaged in the IT Folio. Juhasz was in a position to accommodate Cordeiro's wishes with respect to the Property because she did not have a sufficient separate economic interest in the Transfer to engage in ordinary commercial dealings in the form of a negotiation with Cordeiro in which each party acted in his or her separate economic interest. Rather, the parties appear to have acted in concert to ensure control in Cordeiro's hands without separate economic interests coming into play.

44 I think the presence of these factors is sufficient, on a balance of probabilities, to establish that parties were not acting at arm's length in respect of the Transfer.

Did Juhasz Intend to Defraud, Defeat or Delay a Creditor?

45 Given the foregoing determination, it is not necessary to address whether Juhasz intended to defraud, defeat or delay a creditor as the circumstances in this proceeding are described by the provisions of paragraph (b) of s. 96(1) of the BIA. I have addressed this issue, however, in case I have erred in reaching the conclusion that Juhasz and Cordeiro were not dealing at arm's length.

46 The effect of the Transfer was to put any equity in Juhasz's interest in the Property beyond the reach of her creditors who, according to the record before the Court were primarily NBC and the CRA (disregarding a third creditor whose debt is secured against Juhasz's former residence but may not be fully secured). As such, the effect of the Transfer was clearly to defeat her creditors. The issue is whether Juhasz intended this effect.

47 The Trustee points to the following "badges of fraud" in the present circumstances: (1) Juhasz had few remaining assets after the Transfer; (2) Juhasz and Cordeiro were business partners; (3) Juhasz had significant liabilities and was being pursued by NBC which was trying to serve its statement of claim on her; (4) Juhasz knew she was insolvent at the time of the Transfer; (5) Juhasz and Cordeiro relied on an appraised value in the McLean Report, which they knew was outdated; (6) Juhasz received no consideration for the Transfer beyond Cordeiro's assumption of her share of the mortgage liabilities; and (7) Juhasz admitted subsequently transferring her residence into the name of her son in order to try to defeat her creditors.

48 The Trustee says that these considerations establish an intent to defeat Juhasz's creditors. Alternatively, the Trustee argues that such evidence raises a presumption of such intent that places the onus on Cordeiro to explain away the circumstantial evidence of fraudulent intent, which the Trustee argues Cordeiro has failed to do.

49 Cordeiro says that the evidence indicates that he and Juhasz intended to effect the Transfer properly rather than defeat Juhasz's creditors. He points to the use of the McLean Report appraisal of the Property, the declaration and payment of land transfer tax on the Transfer, the use of a lawyer, the presence of consideration for the Transfer, and the absence of any concealment. Cordeiro's explanation for the delay in effecting the Transfer from July 2012 to March 2013 has been set out above.

50 Juhasz denies any intention to defeat her creditors in effecting the Transfer. However there are a number of difficulties with Juhasz's credibility. First, Juhasz appears to have had an initial intention of "bankruptcy-proofing" her interest in the Property by transferring her interest to her sons. Second, Juhasz subsequently transferred her interest in her Clarksburg farm residence to her son for the same purpose. Third, Juhasz concealed substantial business income from the CRA, which ultimately resulted in a very large reassessment against her. In these circumstances, I do not think the Court can give any credence to Juhasz's expression of her intention in transferring the Property.

51 Juhasz originally intended to transfer her interest in the Property to her sons with a view to retaining her equity in the Property beyond the reach of her creditors. However, ultimately, Juhasz transferred her interest in the Property to Cordeiro who was not one of her creditors. In this regard, I acknowledge that Cordeiro could be regarded as a contingent creditor by virtue of their joint and several liability on the mortgages. However, it follows from their own position — that the consideration for the Transfer was the assumption of that liability — that the Property had a value at least equal to the amount secured by the mortgages and, therefore, that there was no significant possibility of a deficiency claim by Cordeiro against Juhasz in respect of such liability. While it is possible that there was an understanding between Juhasz and Cordeiro regarding an entitlement of Juhasz to a portion of any profits realized, there is no evidence of any such agreement before the Court. Accordingly, Juhasz's intention must be analyzed in the context of an absolute transfer of her interest to a third party. In this context, the following considerations are relevant.

52 First, Cordeiro testified that his reason for requiring a transfer was that he was concerned that a trustee in bankruptcy would not be prepared to finance Juhasz's share of the financing and renovation expenses of the Property. While his concern may have been well-founded, Cordeiro would have been able to acquire the Trustee's interest in the Property at fair market value. In any event, the issue for the Court is not Cordeiro's intention but Juhasz's intention.

53 Second, Juhasz's original intention was clearly to defeat her creditors by transferring her interest in the Property to her sons. For the reasons set out above, I have concluded that Juhasz believed there was a reasonable likelihood that, or was wilfully blind to the likelihood that, there was equity in the Property even taking into account the amount outstanding under the mortgages securing the Property. As mentioned, her intention to transfer her interest in the Property to her sons makes no sense unless she believed that there was equity in her interest in the Property. The issue becomes, therefore, whether her intention changed in agreeing to transfer her interest to Cordeiro.

54 Third, the relevant wording in s. 96 is to the effect that "the debtor intended to defraud, defeat or delay a creditor." Of significance, it is not that "the intention of the debtor was to defraud, defeat or delay a creditor." If it were the latter, I think an applicant would be required to establish that the principal intention of the debtor was to defeat his or her creditors. However, the wording of s. 96 does not require such a determination. Instead, I think it requires only that an applicant establish that one of the debtor's motives or intentions was to defraud, defeat or delay a creditor.

55 Fourth, it is probable that the timing of the Transfer was prompted by Juhasz's impending bankruptcy proceedings, given NBC's concurrent actions in issuing and attempting to serve the statement of claim in its action on top of the on-going audit of the CRA. In addition to the timing of the Transfer relative to these events, the perception of an urgent need

to address the Transfer is also evidenced by the decision of Juhasz and Cordeiro to effect the Transfer without obtaining an updated appraisal from McLean, who apparently required more time than was acceptable to Juhasz and Cordeiro.

56 Fifth, Juhasz was well aware at the time of her Transfer that she was insolvent and that bankruptcy proceedings were likely, as she had very substantial liabilities and no assets. She had two principal creditors — NBC and the CRA, setting aside a third creditor who was at least partially secured against her residence. There is no evidence that she ever sought to reach an accommodation with these creditors by making available the assets that she had at her disposal or to make a proposal to her creditors generally using her remaining assets including the proceeds of sale of her interest in the Property. Instead, the proceeds of the sale of her interest in the Adjacent Property were applied to repay loans to family members. Subsequently, she also attempted to transfer her Clarksburg residence to her son. These factors suggest a consistent course of action directed toward preventing her assets from being used to satisfy her obligations to the CRA and NBC, to the extent possible, in a bankruptcy proceeding or otherwise.

57 Sixth, it is important to note that there was no formal agreement between Cordeiro and Juhasz regarding the Property and, in particular, no obligation on the part of Juhasz to transfer her interest in the Property to Cordeiro if she became financially unable to bear her share of the renovation expenses. She was free to retain her interest in the Property for the benefit of her creditors.

58 Lastly, given the determination that Juhasz had knowledge that there was a reasonable likelihood that there was equity in her interest in the Property, she would also have been aware that any such value would be assigned to her trustee in bankruptcy in the eventual bankruptcy proceedings. She therefore had a choice between giving such equity to Cordeiro or retaining it for the benefit of all of her creditors in the bankruptcy. Alternatively, if she had intended to ensure that her creditors received the value of her interest in the Property, she could have ensured that result by basing the consideration for the Transfer on an updated appraisal from McLean. As mentioned, the reason for not doing so — a need for haste in view of NBC's actions — suggests that her priority was to complete the Transfer as quickly as possible rather than to effect a Transfer that preserved value for her creditors.

59 Given the foregoing, I think the Court can infer that one of Juhasz's intentions in agreeing to the Transfer was to defeat her principal creditors. She chose to transfer the equity in the Property to Cordeiro rather than retain it for the benefit of all creditors in the bankruptcy proceedings that she knew were inevitable. She also chose not to establish a current fair market value for the Property, and therefore for her interest in the Property, in order to have proceeds to pay her principal creditors. In short, the evidence indicates that Juhasz decided that, to the extent there was any equity in the Property, she preferred to have Cordeiro take the benefit of that equity by virtue of their business partnership rather than to have that equity remain available for her creditors.

Was the Transfer a "transfer at undervalue"?

60 Based on the foregoing determinations, the Trustee has satisfied the requirements of both paragraphs 96(1)(a) and 96(1)(b). Accordingly, the issue arises as to whether the Transfer was a "transfer at undervalue"? For this purpose, it is necessary to address both: (1) the difference between the value of the consideration received by Juhasz and the value of the consideration given by her on the Transfer; and (2) whether the difference in (1) qualifies the Transfer as a "transaction at undervalue". I will address each issue in turn.

The Difference Between the Value of the Consideration Received by Juhasz and the Value of the Consideration Given by Juhasz on the Transfer

61 Section 96 requires a determination by the Court of the difference between the value of the consideration received by Juhasz and the value of the consideration given by her. In this case, the two are intimately related.

62 The Trustee submits that the value of the consideration given by Cordeiro was nil, given Juhasz's insolvency and the amount of her liabilities. The Trustee also bases his submission on the fact that the parties were jointly and severally

liable on the mortgages secured against the Property, that the mortgagees did not release Juhasz from her liability, and that Cordeiro did not execute an assumption agreement in favour of Juhasz.

63 Cordeiro argues that the Property remained charged in favour of the mortgagees who were entitled to be satisfied out of the proceeds of sale of the Property. He also says that, notwithstanding the absence of an executed assumption agreement, he agreed to exchange his right of contribution and indemnity against Juhasz for a transfer to him of her interest in the Property.

64 The evidence demonstrates that, even if there was no formal assumption agreement executed by Cordeiro in favour of Juhasz, both of these parties proceeded on the basis that Cordeiro assumed Juhasz's obligation regarding the mortgages on the Transfer. Cordeiro serviced the mortgages after the Transfer until the date of discharge and has paid all other Property-related expenses since the date of the Transfer. In particular, he has paid all of the renovation expenses. He has also discharged the two mortgages on the Property at the time of the Transfer in favour of alternate financing for which he is solely liable.

65 In analyzing this issue, I accept that, as an unsecured claim, the value of Cordeiro's right of contribution and indemnity was effectively nil, given Juhasz's insolvency and the amount of her liabilities. As such, it is arguable that Cordeiro gave nil consideration for Juhasz's interest in the Property. On the other hand, the determination of the Court regarding the value of the Property weighs in favour of Cordeiro's position that he provided consideration in an amount equal to one-half of the outstanding mortgage obligations at the date of the Transfer.

66 In this case, the issues of the value received by Juhasz and the value given by Juhasz cannot be separated in the manner suggested by the Trustee. Put another way, there must be consistent treatment of Juhasz's share of the mortgage liabilities. Accordingly, the issues of value can be addressed in one of two ways with equal merit: (1) on the basis that Cordeiro gave no consideration and Juhasz assigned her equity in the Property; or (2) on the basis that Cordeiro gave consideration equal to the share of Juhasz's mortgage obligations assumed on the Transfer and Juhasz assigned her gross interest in the Property without taking into consideration her share of the mortgage liabilities.

67 Although the result is the same in either case, I think the second approach is the analytically correct approach, given the determination that the value of the Property exceeded the outstanding mortgage liabilities on the date of the Transfer. On that basis, Juhasz and Cordeiro were each effectively severally liable in respect of 50% of the mortgage liabilities, as each would be entitled to recover any amount paid in excess of such amount by way of a subrogation claim against the other's interest in the Property. Accordingly, the Transfer should be analyzed as a two-part transaction: (1) the assumption by Cordeiro of Juhasz's mortgage liabilities totaling $368,942.74; and (2) immediately thereafter, a transfer by Juhasz of her interest in the Property at its gross value, that is without any related mortgage liabilities, on the basis that such liabilities were effectively discharged by Cordiero's agreement to assume them.

Was the Transfer a "Transaction At Undervalue"?

68 As set out above, as applied to the present circumstances, a "transfer at undervalue" means a disposition of property for which the consideration received by the debtor is conspicuously less than the fair market value of the consideration given by the debtor. In the present circumstances, based on the analysis in the preceding section, the consideration received by Juhasz has been established to be $368,942.74. The consideration given by Juhasz is the value of her 50% undivided interest in the Property. Accordingly, the critical question for determining whether the Transfer was a "transaction at undervalue" is the value of the Property at the date of the Transfer.

69 Pursuant to s. 96(2), in making this application, the Trustee is required to state the Trustee's opinion of the fair market value of the Property at the date of the Transfer. The Trustee originally valued the Property at $1.8 million based on Cordeiro's testimony on cross-examination that he had entered into an agreement for the sale of the Property at that price and his failure to produce evidence of renovation expenses. Clearly, however, extensive renovation of the Property had to have occurred to achieve a sale price of $1.8 million. As a result of the materials provided by Cordeiro in his

responding motion record described above, the Trustee took the position at the hearing that the value of the Property was $1.4-$1.5 million. This would imply a value for Juhasz's 50% interest in the Property of $700 - $750,000.

70 Cordeiro argues that the Trustee had the onus of proving its estimate of the value of the Property at the date of the Transfer. He says that the Trustee has failed to satisfy this onus and, on this basis, the Court should find the value of the Property to be the amount of the outstanding mortgages. I do not agree that s. 96(2) imposes an onus of proof on the Trustee. Instead, the purpose of s.96(2) is, absent evidence to the contrary, to make a trustee's opinion of value available to a court for purposes of a proceeding under that provision. However, in the present circumstances, I think the evidence from each party is insufficient to establish the value of the Property at the time of the Transfer.

71 Cordeiro relies on the McLean Report. However, it is clearly outdated given the sale price of the Adjacent Property in January 2013. McLean testified in his cross-examination that the sale price of the Adjacent Property would have had a significant impact on the value of the Property even as a shell building.

72 On the other hand, the Trustee's current proposed fair market value of $1.4-1.5 million is derived by the deduction of estimated renovation costs from a contract selling price of $1.8 million. This is not a viable method of determining the fair market value of an unrenovated rental property insofar as it totally excludes any consideration of development risks and corresponding profit.

73 Further, the Consulting Report does not provide a basis for a determination of value by the Court. The Trustee did not rely on the Consulting Report in making its submissions at the hearing of this application. In any event, the Consulting Report was not an appraisal of the fair market value of the Property at the date of the Transfer. The Review Report similarly does not address the fair market value of the Property. It is also suspect insofar as it proposes a methodology based on the average increase in single-family residential dwellings, which the Property is not.

74 Although it appears likely that the value of the Property at the date of the Transfer exceeded the value of the outstanding mortgages secured against the Property, the Court is not in a position to make a determination as to the fair market value of the Property at such date based on the evidence before it. It therefore cannot determine by how much the consideration that Juhasz gave on the Transfer exceeded the consideration received by her. It is therefore also not possible on the evidence before it for the Court to determine whether the Transfer constituted a "transaction at undervalue". These are also not issues which the Court can resolve on the basis of an onus of proof.

75 In these circumstances, I think that the philosophy in *Hryniak* requires that the Court order a trial of the issue of the value of the Property at the date of the Transfer.

76 Accordingly, it is ordered that a summary trial be conducted limited to a determination of the value of the Property at the date of the Transfer. After the Court has made such determination, the Court would be in a position to address the issue of whether the Transfer constituted a "transfer at undervalue" and the appropriate remedy, if any, in favour of the Trustee.

Summary trial ordered, limited to determination of value of property at date of transfer.

9

1970 CarswellOnt 82
Ontario Supreme Court, In Bankruptcy

Van der Liek, Re

1970 CarswellOnt 82, [1970] O.J. No. 1053, 14 C.B.R. (N.S.) 229

Re Van der Liek

Houlden J.

Judgment: October 20, 1970

Counsel: *C. H. Morawetz, Q.C.* , for trustee.
J. Cannings , for Anna Maria Van der Liek.

Subject: Corporate and Commercial; Insolvency
Annotation

Section 64(2) of the Bankruptcy Act creates a prima facie presumption of a fraudulent preference if the conveyance, transfer, payment, etc. has the effect of giving any creditor a preference over other creditors. In the present case the learned Bankruptcy Judge dealt with the difficult question as to whether the trustee must prove that the creditor who received the conveyance, transfer, payment, etc. did receive a preference over other creditors as at the date of bankruptcy or as of the date when he received the conveyance, transfer, payment, etc.

One can visualize a situation where payments were made to all creditors of the debtor two months before bankruptcy and subsequently the debtor incurred new debts as a result of which he was declared bankrupt two months later. In this case it would seem that the payments to all the creditors two months before bankruptcy could not be attacked as a preference because at the time of the payment all creditors were treated alike. In another situation, one particular creditor might have been paid two months before bankruptcy while other creditors were not paid at that time. However, the debts of all other creditors were paid, let us say, six weeks before bankruptcy but subsequent thereto new debts were incurred and bankruptcy was declared six weeks later. Likewise, in this case neither the payment which was made two months before bankruptcy nor the payments which were made six weeks before bankruptcy could be attacked as fraudulent preferences.

It would seem that the provisions of s. 64(2) bear out the dictum of the learned Bankruptcy Judge that the trustee must show that the effect of the conveyance, transfer, etc. was *at the date when it was made* to give preferential treatment to the creditor who received it.

Houlden J.:

1 This is an appeal from a decision of the registrar [13 C.B.R. (N.S.) 28] in which he found that certain security obtained by the Royal Bank of Canada constituted a preference. The matter has been settled but there are certain items on which I wish to comment, realizing that my comments are obiter but I make them in the hope that they may be of assistance to solicitors practising in the bankruptcy court. I should point out that neither counsel appearing on the appeal was in any way involved in the trial proceedings.

2 In order to raise the prima facie presumption that there has been a fraudulent preference so that the onus is cast upon the defendant to rebut it, the trustee must establish three things:

3 1. The conveyance, transfer, charge, payment, etc., took place within three months of bankruptcy. If the conveyance, etc. is in favour of a related person, the period is, of course, 12 months under s. 64A [en. 1966-67, c. 32, s. 11]. Ordinarily

there is no problem in establishing the date of the transaction but occasionally difficult questions arise. For instance, it has been held that the day on which the petition is filed in the case of a receiving order, is excluded in calculating the three-months, period: *Re Dawes; Ex parte Official Receiver* (1897), 4 Mans. 117.

4 2. It must be proved that the debtor was an insolvent person at the date of the alleged preference: *Re Manuel; Ex parte Brody, Chernin and Mendelson* (1923), 3 C.B.R. 628 (N.S.) ; *Re Hart Brothers Construction Ltd.* (1954), 34 C.B.R. 116, 12 W.W.R. (N.S.) 711 (B.C.) Section 2 (j) defines "insolvent person" and the section provides three definitions of insolvency.

5 The court will not presume insolvency. It must be proved and if it is not, then the application must be dismissed: *Re Audio Records Ltd.; Hamel v. Galet* (1962), 4 C.B.R. (N.S.) 99 (Que.) .

6 In this case, the proof of insolvency left a great deal to be desired, and I would like to say a few words about how insolvency should be proved to the court. The usual method is to call two or three creditors whose claims were overdue at the date of the preference. It might be possible for the trustee to prepare a balance sheet to show insolvency within the meaning of s. 2(j)(iii) but from my own experience, the records of a bankrupt are usually in such a state that this is very difficult and the method I have suggested is usually the most convenient way of establishing insolvency.

7 3. It must be shown that as a result of the conveyance, transfer, etc., the creditor received a preference. At the trial of this application, the trustee proved that the giving of the mortgage conferred a preference over other creditors at the date of the bankruptcy. In my judgment, this is not right. In preparing for the hearing of this appeal, I was surprised to find no case which had squarely faced this issue. There are a number of cases which say that it must be shown that there is a preference in fact, but none deals with the issue of what is the relevant time. Until I am overruled by a higher court, I propose to require that in applications attacking fraudulent preferences, it must be shown that the effect of the conveyance, transfer, etc. was *at the date when it was made* to give preferential treatment to the creditor who received it.

8 The matter of preference or no preference is ordinarily proved by evidence of other creditors that their accounts which were outstanding at the relevant date, were still unpaid at the time of the bankruptcy so that the creditor who received the security, etc. will, as a result of receiving it, be given different treatment than other creditors. The creditors, who give this evidence, will ordinarily be the same creditors who prove the insolvency.

9 When the trustee has proved these three essentials, he need proceed no further and the onus is then on the creditor to satisfy the court, if he can, that there was no intent on the part of the debtor to give a preference. If the creditor can show on the balance of probabilities that the dominant intent of the debtor was not to prefer the creditor but was some other purpose, then the application will be dismissed, but if the creditor fails to meet the onus, then the trustee succeeds.

End of Document

10

1983 CarswellOnt 201
Ontario Supreme Court, In Bankruptcy

Thorne Riddell v. Fleishman

1983 CarswellOnt 201, 21 A.C.W.S. (2d) 438, 47 C.B.R. (N.S.) 233

Re TOYERAMA LIMITED; THORNE RIDDELL v. FLEISHMAN

Saunders J.

Heard: April 26-27, 1983
Judgment: September 15, 1983

Counsel: *T.R. Hawkins*, for plaintiff.
F.M. Catzman Q.C., for defendant.

Subject: Corporate and Commercial; Insolvency

Application by trustee to declare payment and debenture fraudulent preference.

***Saunders J.*:**

1 This is a trial of an issue ordered by Hollingworth J. The issues are whether a payment of $37,862.82 by the bankrupt, Toyerama Limited ("Toyerama"), to Edith Fleishman, and the giving of a bearer debenture in the principal amount of $35,000 by Toyerama to her, are fraudulent and void as against the trustee as preferences within the provisions of s. 73 of the Bankruptcy Act, R.S.C. 1970, c. B-3.

2 The business of Toyerama was the acquisition of toys from manufacturers. The acquisitions were usually of surplus stock which the manufacturers had not disposed of in the previous season. The toys were acquired by Toyerama under many different arrangements in the spectrum from outright cash sales to pure consignments. The toys were sold either to retailers or to consumers through leased retail outlets of Toyerama.

3 The Christmas season plays a predominant part in the toy industry. December is the largest selling month and the period from 1st October to 31st December is the largest selling quarter (61 per cent of 1978 Toyerama sales). Toyerama would often accept delivery early in the year and store the toys in its warehouse in anticipation of sale the following autumn. Manufacturers were anxious at the end of a season to deliver their surplus inventory to Toyerama, knowing that Toyerama would be unable to sell it until the next season. This, no doubt, was to make way for new products. A substantial number of manufacturers did not expect to be paid by Toyerama until the next season was over in late December or the following January.

4 The 1978 season was not good for the toy industry and, accordingly, not good for Toyerama. In January 1979 Toyerama had a large unsold inventory on hand and considerable indebtedness. Also, the manufacturers had larger than usual amounts of surplus stock available for disposal. Toyerama made an informal proposal to certain of its creditors in January 1979 whereby the creditors were asked to postpone payment for one year until the end of the 1979 season. It would appear that creditors with an aggregate indebtedness of $190,000 accepted the proposal.

5 Unfortunately, the 1979 season was worse than 1978 and on 25th January 1980 Toyerama made an assignment in bankruptcy.

6 In these proceedings the trustee attacks two transactions between Toyerama and the defendant Edith Fleishman. Edith Fleishman is the former wife of Marvin Fleishman, the president and principal shareholder of Toyerama. Their

marriage took place in 1952. There were four children. The couple separated in the summer of 1977 and were divorced in 1982. Since the separation they have dealt with each other at arm's length, but, it would appear, with relatively little rancour. Their son Allan Fleishman is an officer and shareholder of Toyerama Limited and was employed by it. He appears to have been on good terms with both his mother and father.

7 Shortly after the separation in 1977, Edith Fleishman established a retail business under the name of "Toyaround" which was substantially the same business as Toyerama. Her business was not successful and closed down with considerable inventory on hand. Toyerama, in November 1978, agreed to buy the inventory from her for $37,862.82 which it was said was its retail value less 35 per cent. Toyerama agreed to pay her for the inventory one year later and to pay monthly interest in the interim. Its obligation was evidenced by a promissory note which came due on 9th November 1979.

8 Mr. and Mrs. Fleishman had made a separation agreement in September 1977, shortly after their separation, but that agreement was replaced by a second agreement dated 20th November 1978. While the second agreement does not say so, both Edith Fleishman and Marvin Fleishman testified that the purchase of the inventory by Toyerama was a condition precedent to Edith Fleishman entering it.

9 The second agreement obliged Marvin Fleishman to make certain lump sum payments to his wife. It was agreed that he would cause Toyerama to execute a second floating charge in favour of his wife whereby amounts owing by him to her and certain amounts owing to her by Toyerama and others would be secured. She, in turn, agreed to provide a mortgage on the former matrimonial home as collateral security for part of the bank indebtedness of Toyerama. By debenture dated 12th January 1979, Toyerama agreed to pay Edith Fleishman the sum of $274,596.81 with interest at 10 per cent on 31st January 1980. The debenture contained a second floating charge on all its assets subject to a first charge in favour of the Royal Bank of Canada. In para. 14 of the debenture, Edith Fleishman (who did not execute the debenture in her personal capacity but only as secretary-treasurer of Toyerama) acknowledged that she was the beneficiary of the principal amount of the indebtedness to the extent of $42,191.54 and that the beneficiaries of the remainder were certain trusts bearing the name of members of the Fleishman family.

10 Shortly before 9th November 1979 Marvin Fleishman says he received an "amusing" card from his wife reminding him of the due date for payment of the inventory. Toyerama Limited made the payment by cheque dated on the due date and its bank account was debited with the amount paid on the following 13th November. The payment to Edith Fleishman for the inventory is the first transaction attacked by the trustee in these proceedings.

11 By agreement dated 20th September 1979 Toyerama purchased all the shares and shareholder loans of Yogi Yogurt Limited for an aggregate purchase price of $28,840. Marvin Fleishman testified that he considered the purchase a good investment for Toyerama because Yogi Yogurt had the benefit of certain contracts as well as some assets which would be available for disposal. He felt that the purchase was a normal business transaction even though at that time Toyerama was not doing very well. While this transaction is not attacked by the trustee in these proceedings, it is noted that both Marvin Fleishman and his son Allan Fleishman were shareholders in Yogi Yogurt Limited and received from the purchase $6,970 in the aggregate. The records of Toyerama indicate that approximately $97,000 was advanced by Toyerama to Yogi Yogurt Limited between 1st October and 31st December 1979.

12 Edith Fleishman was asked to loan $35,000 to Toyerama to assist it in the Yogi Yogurt purchase. Marvin Fleishman said that while that was the expressed reason for the request, he was more concerned that she did not deal with the inventory payment in an improvident fashion. Allan Fleishman seems to have had the same opinion and to have also felt that it was better to obtain the funds from his mother than from the bank. In what can be assumed to be a simultaneous transaction with the inventory payment, Edith Fleishman, by cheque dated 9th November 1979, advanced $35,000 to Toyerama. The cheque was credited to the Toyerama bank account on 13th November 1979, the same day as the inventory payment was debited. In return Toyerama gave Edith Fleishman a demand promissory note, dated 10th November 1979, for $35,000 bearing interest at 17 $^{1}/_{2}$ per cent per annum. Subsequently, by demand debenture, dated 29th November 1979, Toyerama agreed to pay Edith Fleishman $35,000 with interest at 15 per cent. The debenture

contained a fixed and floating charge on its assets. Allan Fleishman said he discussed providing this security with his mother when she was considering making the loan. Marvin Fleishman says that the debenture was given at the insistence of her lawyers and that he was prepared to accede to their request. It is to be recalled that Edith Fleishman had received a floating charge debenture the previous January for the indebtedness to the trusts and to her under the separation agreement. The giving of the $35,000 debenture is the second transaction attacked by the trustee.

13 Section 73 of the Bankruptcy Act provides as follows:

> 73.(1) Every conveyance or transfer of property or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any insolvent person in favour of any creditor or of any person in trust for any creditor with a view to giving such creditor a preference over the other creditors shall, if the person making, incurring, taking, paying or suffering the same becomes bankrupt within three months after the date of making, incurring, taking, paying or suffering the same, be deemed fraudulent and void as against the trustee in bankruptcy.
>
> (2) Where any such conveyance, transfer, payment, obligation or judicial proceeding has the effect of giving any creditor a preference over other creditors, or over any one or more of them, it shall be presumed *prima facie* to have been made, incurred, taken, paid or suffered with a view to giving such creditor a preference over other creditors, whether or not it was made voluntarily or under pressure and evidence of pressure shall not be receivable or avail to support such transaction.
>
> (3) For the purposes of this section, the expression "creditor" includes a surety or guarantor for the debt due to such creditor.

14 The two impugned transactions fall within those described in s. 73 and took place within three months of the bankruptcy. At the time they were made, there were unpaid creditors of the bankrupt and it is not disputed that the transaction had the effect of giving Edith Fleishman a preference over those creditors. There are, therefore, two issues to be decided:

15 (1) Was Toyerama an insolvent person at the time the transactions were entered into? The onus of establishing that Toyerama was insolvent is on the trustee and if it is unable to satisfy that onus its claim must be dismissed.

16 (2) If Toyerama was an insolvent person, were the impugned transactions entered into with a view of giving Edith Fleishman a preference over the other creditors? Because of the provisions of s. 73(2) the onus here is on Edith Fleishman to show that the transactions were not entered into with such a view.

17 On both issues it is important to consider the circumstances and general activity of Toyerama. There had been a bad season in 1978 which necessitated the informal proposal to creditors made in January 1979. The 1979 season was worse. The October sales were off by 16 per cent from the previous year. It was to get much worse. December sales dropped by 42 per cent and Marvin Fleishman described this as a disaster. The trustee is understandably concerned about the pattern of payments made by Toyerama in the months preceding its bankruptcy. There were relatively few payments to trade creditors, but Edith Fleishman received payment for her inventory in November 1979, and her loan of $35,000 and the January 1979 debenture in her favour were paid off in January 1980. The indebtedness to the bank which was guaranteed to a limited extent by both Marvin Fleishman and Allan Fleishman was reduced and available credit from that source not fully utilized. Such a pattern is consistent with an intention to reduce the potential personal loss to members of the Fleishman family at the expense of creditors in the event of a bankruptcy. On the other hand, there is an explanation for the pattern. Because of the nature of the business, a number of trade creditors had formally postponed their claims and others were not expecting payment until January 1979. Marvin Fleishman made a strenuous effort in December to persuade Edith Fleishman to postpone the payment of the 1979 debenture and to continue her agreement to guarantee a portion of the bank indebtedness. She refused to do so on the advice of her solicitors and, believing her security to be in jeopardy, issued a writ with respect to the $35,000 loan on 21st January 1979. Toyerama was legally obliged to make

the payments due to her and other members of the family in January 1980. The reduction of the bank loan out of cash flow reduced interest cost. It should also be noted that in December 1979 Toyerama made a substantial investment in Yogi Yogurt and also entered into a new warehouse lease.

18 The situation of Toyerama at the beginning of 1979 was not good but had not yet reached a disastrous state. It is my conclusion on the basis of the evidence that when Edith Fleishman was paid for the inventory and given security for the $35,000 loan that Toyerama then intended to continue to carry on business for an indefinite period and was not contemplating either ceasing such business or making an assignment in bankruptcy.

19 Section 2 of the Bankruptcy Act defines "insolvent person" as follows:

> 2. In this Act ...
>
> "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, or
>
> (*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; ...

20 Evidence was given about the books and records of Toyerama by Mr. Leyshon-Hughes, a vice-president of the trustee, and by Miss E. Bentley, one of its estates officers. In the opinion of Leyshon-Hughes, the books of Toyerama were current and had been adequately maintained. Either or both of Mr. Leyshon-Hughes and Miss Bentley had reviewed the invoices, files and other documents available to them. From these sources several tables were prepared which were put in evidence concerning the financial situation of Toyerama. In addition, there were unaudited financial statements prepared by a chartered accountant as at 30th September 1979 (the Toyerama year-end) which showed an excess of liabilities over assets and a substantial operating loss for the period covered by the statements. The evidence indicated that there were a number of unpaid creditors. Some had agreed in writing to defer payment until January 1980 or to some other date. Some had stipulated payment terms on their invoices which had not been met, while others showed no payment terms but had rendered bills prior to 9th November 1979. Marvin Fleishman testified that many of the creditors whose invoices indicated that their account was overdue did not expect payment until after the 1979 season or had verbally agreed to defer payment. Mr. Leyshon-Hughes said that the trustee did not inquire into these circumstances. No unpaid creditors were called by the trustee and the evidence of Marvin Fleishman on the arrangements he had made, although somewhat vague, stands uncontradicted.

21 The onus is on the trustee to establish on the balance of probabilities that Toyerama Limited was insolvent when it made the payment for the inventory and agreed to give the debenture for $35,000 to Edith Fleishman. To satisfy this onus, it must meet the test in one of paras. (*a*), (*b*) and (*c*) in the statutory definition of insolvency.

22 In dealing with para. (*a*), the evidence is that Toyerama in the last calendar quarter of 1979 had funds in its bank account and further bank credit available. Counsel for the trustee argued that it was a management decision not to pay the trade creditors and that Toyerama, having been prevented by its management from making the payments, was "unable" to do so. I do not agree with that submission. I agree with counsel for Mrs. Fleishman that "unable" does not mean "unwilling". If a person has ample funds to meet obligations and chooses not to do so, he, in my opinion, is not insolvent by reason of para. (*a*) of the definition. The unpaid creditors may enforce their claims if they choose to do so. In the context of the definition I see no difference between a person who has the funds and a person who has the funds available to him if he chooses. The trustee has not satisfied me on the balance of probabilities that in November 1979 Toyerama Limited was unable to meet its obligations as they generally became due.

23 The issue raised by para. (*b*) is more difficult. There were unpaid creditors in substantial amounts. Marvin Fleishman said that some amounts were disputed and that many creditors had either agreed to wait or understood that they would not be paid until the end of the 1979 season. This was because of the nature of the business where most of the sales were made in the last quarter of the year. No doubt there were some creditors who had not agreed or who had not accepted the understanding that payment would be late. No inquiry was made by the trustee as to these arrangements. Some trade creditors were paid in November and December 1979, and of these some may have been dealing with Toyerama on a C.O.D. basis. The problem is that there is no direct evidence from any of the unpaid creditors which might affirm or deny the arrangements Marvin Fleishman says were made. Leyshon-Hughes on cross-examination said he could not say either way whether the bankrupt was meeting its current obligations. I am unable to find, on the evidence, that in November 1979 Toyerama Limited had ceased to pay its current obligations in the ordinary course of business as they generally became due.

24 Finally, with respect to para. (*c*), the unaudited balance sheet of Toyerama as at 30th September 1979 showed an excess of liabilities over assets. It would be a fair inference that the situation did not improve in October or November 1979. The principal property of Toyerama was its accounts receivable and inventory. Its fixed assets were shown on the financial statement at a cost of approximately $57,000. There was no evidence of the fair valuation of the assets and as previously indicated the amount of obligations due and accruing due is uncertain. There is no basis for finding Toyerama insolvent because of para. (*c*) of the definition.

25 I conclude that the trustee has not satisfied the onus on it to show on the balance of probabilities that Toyerama was an insolvent person in November 1979. The claim by the trustee must therefore be dismissed.

26 The second issue should, nevertheless, be considered in the event that I am wrong in my conclusion on insolvency. On this issue, Edith Fleishman has the onus of establishing that the transactions were not entered into with a view to giving her a preference over other creditors. In several cases, it has been said that if a creditor can show on the balance of probabilities that the dominant intent of the debtor was not to prefer the creditor but was some other purpose, the onus has been satisfied: see *Re Mac-Wall Contr. Ltd.* (1970), 14 C.B.R. (N.S.) 52 (Ont. S.C.); and *Re Van der Liek* (1970), 14 C.B.R. (N.S.) 229 (Ont. S.C.). The test is an objective one and in *Re Holt Motors Ltd.; Can. Credit Men's Assn. Ltd. v. Stonewall Credit Union Soc. Ltd.* (1966), 9 C.B.R. (N.S.) 92, 56 W.W.R. 182, 57 D.L.R. (2d) 180 (Man. Q.B.), Bastin J. said at p. 95:

> In order to meet the presumption created by s. 64 [now s. 73] the respondent must show that the purpose of creating the securities was not to place the respondent in a preferred position over the other creditors. In light of all the circumstances existing on 23rd July 1965, it is for me to determine what was the intention. This must be a matter of inference. The test which I consider should be applied is an objective and not a subjective one; that is to say, the intention which should be attributed to the parties will always be that which their conduct bears when reasonably construed and not that which, long after the event, they claim they believe was present in their minds.

27 As previously stated, I have found that there was no intention on the part of the Toyerama management in November 1979 to cease carrying on business. The relationships amongst Toyerama, Edith Fleishman, Marvin Fleishman and Allan Fleishman were complex. Edith Fleishman and Marvin Fleishman dealt with each other at arm's length. Allan Fleishman worked with his father, but appeared to have a good relationship with his mother. They owned a joint bank account and he was in the habit of giving her financial advice. There was a firm obligation to pay her for the inventory and Edith Fleishman was insisting in November 1979 that it be paid for on time; likewise, in the following December she refused to extend the payment date for the debenture given the previous January. In November 1979 Allan Fleishman says there was no discussion as to whether or not to pay his mother and she was paid promptly on the due date. There were other creditors at that time, but the arrangements with them are uncertain. Marvin Fleishman says he proposed the loan of $35,000 because he was apprehensive as to what Edith Fleishman might do with the inventory payment. He says that he wanted to protect her. He had more than an altruistic interest in doing so because of his continuing support obligations to her. He agreed to give her security for the loan because she and her solicitor asked

for it and this was consistent with the arrangement that had been made with respect to the indebtedness covered by the January 1979 debenture. It seems to me that the purpose of the transactions with Edith Fleishman was to preserve the delicate relationship between her and her former husband and was not to prefer her over other creditors. There was no intention that I can infer from the evidence of an intention not to pay the other creditors in due course. Mrs. Fleishman has, therefore, satisfied me on the balance of probabilities that Toyerama did not enter the impugned transactions with a view of giving Edith Fleishman a preference over other creditors.

28 In the result, the claim is dismissed. Both the trustee and Edith Fleishman should have their costs out of the estate.

Application dismissed.

11

1930 CarswellOnt 32
Ontario Supreme Court, In Bankruptcy

Benoit, Re

1930 CarswellOnt 32, 12 C.B.R. 58

In re Vital Benoit

W. J. Reilley, Esq., Registrar

Judgment: November 11, 1930

Counsel: *R. F. Wilson*, for petitioner.
H. F. Parkinson, K.C., and *A. F. Gignac*, for debtor.

Subject: Corporate and Commercial; Insolvency

***Reilley, Esq.* (Registrar):**

1 Pursuant to the order of Middleton, J.A., made November 6, 1930, wherein he directed that it be refer red to the Registrar to dispose of the matters in dispute raised in the notice of contestation, I did proceed, in the presence of counsel for the petitioning creditor and for the debtor, to hear the evidence adduced thereon, this 11th day of November, 1930.

2 At the close of the hearing, I intimated to counsel that on the evidence adduced there appeared to be no available act of bankruptcy proven, and counsel thereupon agreed that I should first make a report in respect of that particular dispute raised in the notice of contestation, reserving to both parties any rights with respect to other objections raised therein.

3 The petitioner states that the debtor has ceased to meet his liabilities generally as they become due, and bases his claim thereon on certain individual facts in support thereon, as follows:

4 (1) Non-payment of moneys alleged to be due in the petition herein; (2) non-payment of taxes on certain property in the city of Windsor, situated on Josephine Avenue; (3) non-payment of a certain promissory note made by the debtor in favour of one Joseph Rivard, dated May 30, 1930, for $2,112.39, payable two months after date, with interest at 7%; (4) non-payment of instalment of taxes on the Royal Oak Hotel property, due in May, 1930, amounting to $159.28, and (5) non-payment of instalment of taxes due on Hotel Metropole property, amounting to $129.60.

5 The only evidence submitted on behalf of the petitioner was the production of certain affidavits and questions and answers on an examination of the debtor on an affidavit filed herein.

6 The affidavit evidence was submitted in toto subject to the objection of counsel for the debtor, and I am of the opinion that under these circumstances where a petitioner makes allegations which are disputed, the only proper way in which evidence can be given is *viva voce*. Assuming, however, for the sake of argument, that the evidence submitted by the petitioner might have been taken for what it is worth, I am satisfied that the statements and evidence of the debtor sufficiently set up a complete rebuttal to the allegations therein.

7 The debt on which the petition is founded is one which the solicitor for the debtor, Mr. Gignac, of the firm of Drake, Fleming, Foster & Gignac, in his evidence stated that his firm had advised the debtor that he was not responsible legally for the debt. The debtor had purchased certain property at the corner of London and Bridge Streets on which he had been making certain payments and with respect of which he had received notice on or about the first of August of further payments due. Subsequent to that time he was advised by his solicitors that he was not legally responsible for any further payment and thereupon saw the petitioner and offered to give the property back to him.

8 It was found there were some $2,000 of taxes unpaid, and the petitioner, according to the evidence of the debtor Benoit, was somewhat reluctant to take back the property and assume the unpaid taxes. At the time the petition was filed Benoit states that he was awaiting further reply from the petitioner who had not definitely stated that he would not take back the property. Benoit, although having paid a considerable amount thereon, was willing to lose what he had invested in it.

9 On September 27, a notice was mailed by Wilson & Thompson, solicitors for the petitioner, to the debtor, demanding payment; Benoit states that this notice was not received until September 29, and on the same day the petition was filed.

10 Under these circumstances, I cannot find that there was any such failure to meet the demand for payment as to constitute an act of bankruptcy. I prefer to accept Benoit's version of the negotiations therein, and at the time when the petition was filed negotiations were still pending with regard to this property. I cannot find that there were any circumstances connected therewith that would indicate that Benoit had failed to meet his liabilities generally as they became due. Even assuming as before that the affidavits submitted as proof were admissible, W. G. Thompson, a solicitor of the city of Windsor, in his affidavit states that Benoit when interviewing him at his office threatened to make an assignment if pressed for this money. Taking all the circumstances into consideration, to me it is almost inconceivable that such a statement would be made.

11 Benoit denied making such a statement and in proof of his ability to pay submitted a statement (Exhibit 9) showing that he has real property in and about the city of Windsor to the amount of $576,000 over and above all liabilities or charges thereon. His statement of value was corroborated by J. A. Marantette, a realtor of several years' experience in Windsor, who stated that he was familiar with all the properties therein and confirmed the values placed upon the real estate of the debtor.

12 Accordingly, I cannot find that this statement alone of Thompson's can have such a bearing or effect as would make it appear that the debtor on this one transaction alone had committed an act of bankruptcy.

13 As to the Josephine Avenue property, the debtor built and sold several houses some three or four years ago. During the summer of 1930 one of the purchasers defaulted and the mortgagee sued the debtor on his covenant. The debtor states that owing to his neglect in keeping proper books and records of his many properties, more than for any other reason, he overlooked the matter and judgment was entered against him, but since the petition was filed he has paid all arrears and the taxes owing on this property.

14 With respect to the third item, namely, the promissory note, an affidavit was filed by the holder on behalf of the petitioning creditor to the effect that this note was overdue and unpaid. Since the petition was filed, however, the debtor has received a letter from Rivard in which he acknowledges in full interest to October 31, 1930, and a new note of the same date for the amount payable three weeks after date. The debtor states that Rivard has since told him that he regretted having made the affidavit in support of the petition.

15 As to the fourth item, instalment of $159.28, taxes due in May, 1930, on the Royal Oak Hotel Property, these taxes have since been paid.

16 As to the fifth item, of unpaid taxes due on the Metropole Hotel, amounting to $129.60, the debtor states that under the lease thereof the tenant has covenanted to pay the taxes.

17 The statement of the debtor with regard to the petitioner's debt is that if he is found legally liable, he is willing and able to pay any judgment obtained thereon. The debtor is a very large property holder in and about the city of Windsor, and outside of looking after these properties he claims that his whole attention is given to that of farming certain properties which he holds in that vicinity. The debtor owns, according to the statement filed (Exhibit 9) some eighteen properties, of which only four parcels are vacant and on the rest there are mortgages of a very nominal amount. Parcel No. 2 is valued at $129,000 and there is a mortgage of $6,000 thereon; Parcel No. 7, valued at $30,000, with a

mortgage of $6,000; Parcel No. 10, value $45,000, mortgage of $10,000; Parcel No. 11, value $20,000, mortgage of $5,000; Parcel No. 12, value $65,000, mortgage of $7,000; Parcel No. 14, value $71,000, mortgage of $6,000; Parcel No. 15, value $20,000, mortgage of $5,000; Parcel No. 16, value $20,000 mortgage of $5,000; Parcel No. 17, value $34,500, mortgage of $5,500; Parcel No. 18, value $49,000, mortgage of $13,000. Certain of the other properties enumerated appear to be houses on which there are small mortgages.

18 The debtor affirmatively states that with respect to all the property which he owns on which there is any charge that none of them is in arrears and all taxes are paid to date.

19 Accordingly, in view of this situation, I cannot find that because of his failure to pay certain small amounts for taxes that he has committed an available act of bankruptcy. On the contrary, it is rather significant that his financial statement shows that his obligations under all the mortgages thereon are so well provided for. The debtor impressed me very favourably while in the witness box; he was entirely frank in his evidence and stated that any apparent delay or neglect in meeting some of these small debts was due to his not keeping a proper record of his commitments, but that is no reason why I should not believe him explicitly in regard to the statement made by him while under oath.

20 The circumstances on which this petition is founded are attacked by the debtor and I find there is an honest dispute as to the debtor's liability, and as the petitioner himself stated that judgment, if obtained, could be collected in full (see Q. 40. Q. You knew if you obtained judgment against Mr. Benoit, he was able to pay it? A. Sure), it does not appear to me to be a case in which a debtor should be brought into the Bankruptcy Court on a dispute of this nature. I cannot find, accordingly, that the debtor has committed any act of bankruptcy within the meaning of *The Bankruptcy Act*.

12

2017 ONCA 1014
Ontario Court of Appeal

Ernst & Young Inc. v. Essar Global Fund Limited

2017 CarswellOnt 20162, 2017 ONCA 1014, 139 O.R. (3d) 1, 286 A.C.W.S. (3d) 658, 54 C.B.R. (6th) 173

Ernst & Young Inc. in its capacity as Monitor of all of the following: Essar Steel Algoma Inc., Essar Tech Algoma Inc., Algoma Holdings B.V., Essar Steel Algoma (Alberta) ULC, Cannelton Iron Ore Company and Essar Steel Algoma Inc. USA (Plaintiff / Respondent) and Essar Global Fund Limited, Essar Power Canada Ltd., New Trinity Coal, Inc., Essar Ports Algoma Holding Inc., Algoma Port Holding Company Inc., Port of Algoma Inc., Essar Steel Limited and Essar Steel Algoma Inc. (Defendants / Appellants / Respondent)

R.A. Blair, S.E. Pepall, K. van Rensburg JJ.A.

Heard: August 15-17, 2017
Judgment: December 21, 2017
Docket: CA C63581/C63588

Proceedings: affirming *Ernst & Young Inc. v. Essar Global Fund Ltd.* (2017), 137 O.R. (3d) 438, 46 C.B.R. (6th) 107, 66 B.L.R. (5th) 189, 2017 CarswellOnt 4049, 2017 ONSC 1366, Newbould J. (Ont. S.C.J. [Commercial List]); additional reasons at *Ernst & Young Inc. v. Essar Global Fund Ltd et al* (2017), 50 C.B.R. (6th) 148, 2017 ONSC 4017, 2017 CarswellOnt 12508, Newbould J. (Ont. S.C.J.); and refusing leave to appeal *Ernst & Young Inc. v. Essar Global Fund Ltd et al* (2017), 50 C.B.R. (6th) 148, 2017 ONSC 4017, 2017 CarswellOnt 12508, Newbould J. (Ont. S.C.J.); additional reasons to *Ernst & Young Inc. v. Essar Global Fund Ltd.* (2017), 137 O.R. (3d) 438, 46 C.B.R. (6th) 107, 66 B.L.R. (5th) 189, 2017 CarswellOnt 4049, 2017 ONSC 1366, Newbould J. (Ont. S.C.J. [Commercial List])

Counsel: Patricia D.S. Jackson, Andrew D. Gray, Jeremy Opolsky, Alexandra Shelley, Davida Shiff, for Appellants, Essar Global Fund Limited, New Trinity Coal, Inc., Essar Ports Algoma Holding Inc., Essar Ports Canada Holding Inc., Algoma Port Holding Company Inc., Port of Algoma Inc., and Essar Steel Limited
Clifton P. Prophet, Nicholas Kluge, Delna Contractor, for Respondent, Ernst & Young Inc. in its capacity as Monitor of Essar Steel Algoma Inc. et al.
Eliot N. Kolers, Patrick Corney, for Respondent, Essar Steel Algoma Inc.
Peter H. Griffin, Monique Jilesen, Kim Nusbaum, for Appellants, GIP Primus, L.P. and Brightwood Loan Services LLC

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency

APPEAL by certain defendants from judgment reported at *Ernst & Young Inc. v. Essar Global Fund Ltd et al* (2017), 2017 ONSC 1366, 2017 CarswellOnt 4049, 46 C.B.R. (6th) 107, 66 B.L.R. (5th) 189, 137 O.R. (3d) 438 (Ont. S.C.J. [Commercial List]), respecting ruling on oppression claim; APPLICATION by arm's length lender for leave to appeal order reported at *Ernst & Young Inc. v. Essar Global Fund Ltd et al* (2017), 2017 ONSC 4017, 2017 CarswellOnt 12508, 50 C.B.R. (6th) 148, 71 B.L.R. (5th) 324 (Ont. S.C.J.), respecting costs.

***S.E. Pepall J.A.*:**

1 This appeal concerns a successful oppression action brought pursuant to s. 241 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 (the "*CBCA*"). It involves the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the

"*CCAA*") restructuring proceedings of the respondent, Essar Steel Algoma Inc. ("Algoma") [1], one of Canada's largest integrated steel mills and the respondent, Ernst & Young Inc., the court-appointed Monitor.

2 The supervising *CCAA* judge authorized the Monitor to commence an action for oppression against Algoma's parent, the appellant Essar Global Fund Limited ("Essar Global"), and the remaining appellants, other companies owned directly or indirectly by Essar Global (the "Essar Group"). The action arose in the context of a recapitalization of Algoma and a transaction between Algoma and Port of Algoma Inc. ("Portco"), two companies indirectly owned by Essar Global, in which Algoma's port facilities in Sault Ste. Marie (the "Port") were conveyed to Portco.

3 Portco is a single purpose company established by Essar Global. As Portco's name suggests, it currently controls the Sault Ste. Marie Port. Portco obtained control in November 2014 in a transaction between Algoma, Portco, and Essar Global (the "Port Transaction"). The Port Transaction effectively provided Portco with the ability to veto any change in control of Algoma's business. The interveners below and appellants on appeal, GIP Primus, L.P. and Brightwood Loan Services LLC (collectively "GIP"), are arm's length lenders who loaned Portco US$150 million to effect the transaction.

4 The trial judge found the Port Transaction and other conduct of Essar Global to be oppressive and granted a remedy that was designed to address that oppression. Essar Global and some of the members of the Essar Group, together with GIP, appeal from that judgment. The appellants advance a number of arguments, many of them factual, in support of their appeal. The appellants' two principal legal submissions are first, that the Monitor lacked standing to bring an oppression claim and second, that the alleged harm was to Algoma and that therefore the appropriate redress was a derivative action.

5 For the reasons that follow, I would dismiss the appeal.

A. FACTS

(1) Algoma's Operations

6 The City of Sault Ste. Marie sits on the shore of St. Mary's River, a waterway that links Lake Superior to Lake Huron at the heart of the Great Lakes, close to the Canada/U.S. border. The steel production operations that are owned by Algoma have been the primary employer and economic engine of the City since construction of the steel mill in 1901. Not surprisingly, the City's Port, which is situated next to Algoma's buildings and facilities, is integral to the steel operations. Indeed, Algoma is the Port's primary customer and its employees have traditionally run the Port operations. Raw materials used to produce steel are shipped to the Port and the steel that is produced is shipped to market from the Port. The relationship is one of mutual dependence.

7 Unfortunately, Algoma was in and out of *CCAA* protection proceedings both in 1991 and in 2001. In late 2013, Algoma faced another liquidity crisis and restructured under the *CBCA* in 2014. The recent *CCAA* filing occurred on November 9, 2015.

(2) The Essar Group

8 Essar Global is a Cayman Islands limited liability company and the ultimate parent of the respondent Algoma, which it acquired through its subsidiaries in 2007. Essar Global is also the parent of the appellants Portco, Essar Power Canada Ltd., New Trinity Coal Inc., Essar Ports Algoma Holding Inc., Algoma Port Holding Company Inc., and Essar Steel Limited. Its investments are managed by Essar Capital Limited ("Essar Capital"), which is based in London, England. These companies are part of the Essar Group, a multinational conglomerate that was founded in India by two brothers, Sashi and Ravi Ruia. Members of the Ruia family are the beneficial owners of the Essar Group.

(3) Algoma's Recapitalization

9 In late 2013, Algoma was facing a liquidity crisis. Algoma anticipated being unable to meet a coupon payment due to unsecured bondholders in June 2014, and its US$346 million term loan was to mature in September 2014. Although Essar Global had been injecting substantial funds into Algoma, it was hesitant to advance further cash to Algoma. Algoma decided to consider mechanisms to restructure and reduce its debt and therefore embarked on a recapitalization project.

10 At the time of the discussions relating to the recapitalization, Algoma's Board of Directors consisted of five appointees affiliated with the Ruia family or the Essar Group, and three independent directors. In early January 2014, the Board of Directors placed responsibility for Algoma's recapitalization efforts in the hands of Essar Global and Essar Capital employees. Algoma personnel had no day-to-day control over the recapitalization project.

11 Although the three independent directors had begun expressing concerns about their roles on the Board as early as the fall of 2013, in the face of Algoma's serious financial challenges, their concerns became more acute. Specifically, they were concerned that their requests for timely, full disclosure of information and full participation in the strategic decisions of the Board had not been properly taken into account by the other Board members. On January 19, 2014, the three sent a memo to the Board proposing the establishment of an independent committee to work with outside financial advisors to evaluate options and alternatives for Algoma's recapitalization. The Board held a meeting on February 11, 2014, and rejected this proposal by a vote of four to three, the three being the independent directors. In response, one of the three independent directors resigned. The other two initially remained on the Board.

12 On February 17, 2014, one of the remaining independent directors, Thomas Dodds, wrote to Prashant Ruia seeking a meeting. Prashant Ruia was then the vice-chair of Algoma's Board, the son of one of the founders of Essar Group, and a director of Essar Capital. Mr. Dodds wrote:

> If your expectation of [the Algoma] Board is to simply be a formality and our role as independent directors is to essentially "rubberstamp" shareholder and management decisions, we are not prepared to continue serving as directors.
>
> As you know, Directors and particularly independent directors have a legal, fiduciary responsibility to all the stakeholders of the Company starting with the Company first, followed by the shareholders, employees, community and others. This Director responsibility may on occasion conflict with the objectives of the shareholder who may, understandably, be more interested in matters of import to themselves. Most of the time there will be no conflict between the responsibilities of the Directors, objectives of the shareholder and that of the Company stakeholders as broadly defined. However, there are other occasions when they do.
>
> What we as independent directors have experienced in the last few Board meetings is a complete disregard for any discussion or wholesome debate on alternatives to re-financing or contingency planning at [Algoma].
>
> . . .
>
> In addition when we ask questions, or propose alternatives, we are asked to wait a while for additional information and told that everything will work out.
>
> We cannot discharge our responsibilities under such an environment.

13 The two remaining independent directors resigned on February 21 and May 5, 2014, respectively. In his resignation letter, Mr. Dodds explained his rationale, stating:

> I lacked confidence that I was receiving information and engaged in decision-making in the same manner as those Board members who are directly affiliated with the company or its parent.

14 The trial judge found, at para. 15 of his reasons, that the four directors who voted against the independent committee were "Essar-affiliated directors", that it was clear that the Ruia family did not want an independent committee, and that the Essar-affiliated directors voted accordingly.

15 The trial judge also found that the recapitalization and the Port Transaction were run by Joe Seifert, Chief Investment Officer of Essar Capital. The trial judge rejected the contention that Mr. Seifert was merely an advisor to the Board that independently made all of the critical decisions. Rather, Essar Global and Essar Capital, led by Mr. Seifert, directed and made decisions relating to the recapitalization and the Port Transaction. As the trial judge noted at para. 49, the evidence was "overwhelming" that Essar Global and Essar Capital were "calling the shots".

(4) Restructuring Support Agreement

16 Essar Global engaged Barclays Capital, an investment bank, to pursue alternative financing structures for Algoma on behalf of Essar Global. Barclays introduced GIP to Mr. Seifert of Essar Capital. In May 2014, representatives of Essar Global, GIP, and Barclays met to discuss Algoma's infrastructure assets and potential asset disposition transactions. They discussed the possibility of a transaction in which Algoma might sell its Port assets to a new corporate entity to generate cash proceeds, but not for the purpose of recapitalizing Algoma. Rather, the proceeds would flow upstream to Essar Global. In light of Algoma's prior insolvencies, GIP thought it important that a separate corporate entity distinct from Algoma be established to hold the Port assets. By the end of June 2014, Algoma had an exclusivity agreement with GIP regarding GIP's loan to finance the Port Transaction.

17 Soon after entering into the exclusivity agreement with GIP, on July 24, 2014, Algoma entered into a Restructuring Support Agreement (the "RSA") with Essar Global and an *ad hoc* committee of Algoma's unsecured noteholders. The RSA set out the principal terms of a restructuring. It provided for a reduction of Algoma's debt through the exchange of the unsecured notes in return for the payment of a percentage of their original principal amount and the issuance of new notes. The note restructuring would be implemented through a court-approved *CBCA* Plan of Arrangement. As a condition of the RSA and pursuant to an Equity Commitment Letter dated July 23, 2014, Essar Global agreed to acquire equity in Algoma for cash in the minimum amount of US$250 million and subject to a maximum of US$300 million. The trial judge found that Essar Global never intended to honour this obligation.

18 The Equity Commitment Letter provided a remedy in the event of a breach. The Plan of Arrangement contained a release of any claim arising out of the Equity Commitment Letter in favour of Essar Global, the noteholders, and the other corporations participating in the Arrangement.

19 It was a condition of the proposed Plan of Arrangement that Essar Global would comply with its RSA obligation to provide the aforementioned cash equity infusion. However, as early as March 28, 2014, representatives of the Ruia family had made it clear that they did not have US$250 million for equity. Efforts were made to reduce Essar Global's contribution. In late July 2014, one of the Ruia representatives wrote that ideally the equity contribution would be kept to US$150 to US$160 million.

20 Nonetheless, an application for approval of the Plan of Arrangement was made to the court. The recapitalization contemplated by the RSA was approved as an arrangement under s. 192 of the *CBCA* on September 15, 2014.

21 Beginning in October 2014, roadshow presentations were made to market the securities being offered through the recapitalization. However the transaction marketed did not accord with the transaction contemplated by the RSA. First, the roadshow presentation described an Essar Global cash equity contribution in Algoma of less than US$100 million, not the US$250 to US$300 million described in the RSA. Second, the presentation provided for the cash to be generated from the sale of the Port by Algoma. The RSA did not allow for such a sale absent the noteholders' consent. No such consent had been obtained. In addition, the proceeds of any sale were to be used to reduce Algoma's debt.

22 The roadshow was unsuccessful and investors failed to subscribe for the securities marketed. The lead bookrunner attributed this failure to the perception among investors that the transaction described in the roadshow presentation contemplated an insufficient contribution of equity into Algoma by Essar Global.

23 And so it was that Algoma was left without the cash to repay or refinance its debt.

24 Ultimately, the RSA was amended on November 6, 2014, such that Essar Global contributed US$150 million rather than the cash contribution of between US$250 and US$300 million originally contemplated by the Equity Commitment Letter. The amended RSA went on to provide that upon fulfillment of this revised contribution, Essar Global was deemed to have satisfied all of its obligations under the Equity Commitment Letter. The releases contained in the original filing were repeated in the amended Plan of Arrangement.

25 As subsequently discussed, in light of the amended RSA, an amended Plan of Arrangement was approved on November 10, 2014.

(5) Port Transaction

26 The Port Transaction closed on November 14, 2014. In summary, Algoma sold to Portco the Port assets consisting of the Port buildings, the plant, and machinery, but not the land. Algoma leased the realty to Portco for a term of 50 years. Portco agreed to provide Port cargo handling services in return for a monthly payment from Algoma to Portco. Algoma agreed to provide to Portco the services necessary to operate the Port in return for a monthly payment from Portco that would be less than the monthly payment paid by Algoma to Portco for cargo handling services.

27 Turning to the details of the Port Transaction, Algoma and Portco entered into a Master Sale and Purchase Agreement ("MSPA"). Under the MSPA:

(i) Algoma conveyed to Portco all of the fixed assets owned and used by Algoma in relation to the Port, and agreed to lease the realty to Portco;

(ii) Portco agreed to pay Algoma US$171.5 million to be satisfied by:

- a cash payment by Portco of US$151.66 million; and
- the issuance of an unsecured promissory note in the amount of US$19.84 million payable in full on November 13, 2015.

28 To fund these obligations, Portco obtained a US$150 million term loan from GIP. GIP Primus, L.P. lent US$125 million, while Brightwood Loan Services LLC lent US$25 million. This term loan was secured by all of Portco's current and future real and personal property and supported by two guarantees in favour of GIP: one from Essar Global, and another from Algoma Port Holding Company Inc., Portco's direct parent.

29 Pursuant to the MSPA, Algoma and Portco executed five additional documents: a promissory note, a lease, a Shared Services Agreement, an Assignment of Material Contracts Agreement, and a Cargo Handling Agreement.

(i) Promissory Note

30 The promissory note was for US$19.84 million payable by Portco to Algoma. Portco immediately assigned its obligations under the promissory note to Essar Global. Essar Global therefore became the obligor under the note and Algoma released Portco from its obligation. As of the date of the trial, the promissory note remained unpaid. At para. 27 of a subsequent decision released on June 26, 2017, the trial judge granted a declaration that any amounts owing to Algoma under the promissory note given by Portco to Algoma have been set-off against amounts owing by Algoma to

Portco under the Cargo Handling Agreement: [*Essar Steel Algoma Inc. et al Re*] 2017 ONSC 3930, 53 C.B.R. (6th) 321 (Ont. S.C.J.). The decision allows for set-off against Portco, but preserves GIP's right to repayment.

(ii) Lease

31 Under the lease, Portco leased from Algoma the Port lands, roads, and outdoor storage space for a 50-year term. Portco prepaid Algoma the rent for the entire 50-year period. The present value of this leasehold interest was stated to be US$154.8 million. Algoma maintained responsibility for all maintenance, repairs, insurance, and property taxes.

(iii) Shared Services Agreement

32 Under the Shared Services Agreement, Algoma was to be responsible for providing all the services necessary for Portco to fulfill its obligations under the Cargo Handling Agreement. These services were to be provided by Algoma employees, not Portco employees. Portco agreed to pay Algoma US$11 million annually subject to escalation at the rate of 3 percent per annum beginning in 2016.

(iv) Assignment of Material Contracts

33 Under the Assignment of Material Contracts Agreement, Algoma provided a covenant in favour of GIP, which precluded Algoma from selling or assigning any material contract relating to the Port, including the Cargo Handling Agreement except by way of security granted to its other third party lender.

(v) Cargo Handling Agreement

34 Under the Cargo Handling Agreement, Portco agreed to provide Algoma with cargo handling services for an initial 20-year term with automatic renewal for successive three-year periods unless either party gave written notice of termination to the other. Algoma agreed to pay Portco based on tonnage with a minimum monthly assured volume of US$3 million. In other words, Algoma was obliged to pay a minimum of US$36 million annually to Portco for 20 years subject to an escalation in price of 1 percent per annum commencing in 2016. Therefore, while Algoma was entitled to US$11 million annually under the Shared Services Agreement, it had to pay Portco at least US$36 million annually under the Cargo Handling Agreement, such that Portco would receive an annual revenue stream from Algoma of US$25 million. This amount was intended to service GIP's term loan at US$25 million a year. However, GIP's loan had a term of eight years, and therefore Portco would have the full benefit of the US$25 million for at least 12 years of the initial 20-year term of the Cargo Handling Agreement, and potentially for 42 years if the Agreement was not terminated.

35 Section 15.2 of the Cargo Handling Agreement also contained a change of control clause that stated that the "Agreement may not be assigned by either Party without the prior written consent of the other Party." This provision became particularly contentious because it effectively gave Portco — and therefore Portco's parent, Essar Global — a veto over any party acquiring Algoma in the *CCAA* proceedings.

36 Although inclusion of the change of control provision in the Cargo Handling Agreement was driven by GIP, the trial judge found that it was effectively for the benefit of Essar Global, as it gave Portco a veto. Furthermore, the trial judge noted at para. 117 that Essar Global had in fact relied on s. 15.2 to its benefit, by holding out its change of control rights to dissuade competing bidders for Algoma in the restructuring process while Essar Global continued to express its own interest as a prospective bidder.

37 In discussing the financial ramifications of the Shared Services Agreement and the Cargo Handling Agreement, the trial judge observed at para. 26 of his reasons:

> When the costs of operating the Port (shared services) are netted from the cargo handling charges, the result is that Algoma will pay approximately $25 million per year to Portco, which is the amount required by Portco to service the Term Loan each year. That amount of $25 million for 20 years comes to $500 million, far more than the amount needed to repay the $150 million GIP loan.

38 Duff & Phelps assessed the fair value of the Portco Transaction as ranging between US$150.9 million and US $174.2 million with a midpoint of US$161.7 million. However, this assessment failed to take into account the change of control provision in the Cargo Handling Agreement. Deloitte LLP reviewed Duff & Phelps' assessment and concluded it was reasonable. [2]

(6) Final Recapitalization

39 Ultimately the recapitalization of Algoma consisted of the following transactions:

(a) Algoma issued US$375 million in senior secured notes pursuant to an offering memorandum;

(b) Algoma entered into a new US$50 million senior secured asset-based revolving credit facility and a new US$375 million term loan;

(c) Algoma's unsecured noteholders were paid a portion of their principal and were issued new junior secured notes;

(d) Algoma completed the Port Transaction;

(e) Essar Global contributed US$150 million in cash in exchange for common equity, and also contributed US$150 million in debt forgiveness; and

(f) All other Algoma lenders were repaid in full.

40 In addition, GIP entered into a secured term loan for US$150 million with Portco, secured by a GSA over all of Portco's assets. It also received guarantees — one from Essar Global and one from Algoma Port Holding Company Inc. — guaranteeing Portco's liabilities. In November 2014, the transactions in furtherance of Algoma's recapitalization, including the Port Transaction, were approved unanimously by Algoma's Board of Directors after receiving advice and on the recommendation of Algoma's management. By this time, the Board consisted of four directors: Mr. Kishore Mirchandani, who became a director on June 23, 2014; Mr. Naresh Kothari, who became a director on August 24, 2014; the Board's chair, Mr. Jatinder Mehra of Essar Global; and Algoma's CEO, Mr. Kalyan Ghosh. Mr. Ghosh, and Mr. Rajat Marwah, Algoma's CFO, both testified that they supported the Port Transaction not because it was ideal, but because there was no other option given Essar Global's failure to capitalize Algoma as it had committed to do.

41 As mentioned, the approved Plan of Arrangement that included the original RSA had to be amended in light of the revised equity contribution. A *CBCA* Plan of Arrangement incorporating the recapitalization and authorizing the amendment of the September 2014 approval order was granted by Morawetz J. on November 10, 2014.

42 Based on the materials before this court, it would appear that the Port Transaction was not mentioned or brought to Morawetz J.'s attention. In this regard, the trial judge found that there was no reference to the Port Transaction in the affidavits filed in support of the amendment to the Plan of Arrangement. The Port Transaction is not mentioned in that order or in any endorsement.

43 The outcome of the Port Transaction was that all Port assets were transferred from Algoma to Portco, the Port lands were leased to Portco for 50 years, and Portco obtained change of control rights. Portco paid Algoma US$151,660,501.50 in cash, provided the US$19,840,000 promissory note, and was obliged to pay Algoma US$11 million per annum under the Shared Services Agreement. In turn, Algoma was obliged to pay Portco US$36 million per annum for an initial term of 20 years under the Cargo Handling Agreement, subject to renewal, netting Portco US$25 million per annum as against the Shared Services Agreement payments. Meanwhile, under the revised RSA, Essar Global contributed cash of US$150 million to Algoma rather than the original cash commitment of US$250 to US$300 million.

(7) Insolvency Protection Proceedings

44 On November 9, 2015, Newbould J. granted an order placing Algoma, Essar Tech Algoma Inc., Algoma Holdings B.V., Essar Steel Algoma (Alberta) ULC, Cannelton Iron Ore Company, and Essar Steel Algoma Inc. USA (the "*CCAA* Applicants") under *CCAA* protection. As mentioned, he appointed Ernst & Young Inc. as the Monitor. The order contained various paragraphs addressing the rights and obligations of the Monitor, including a direction to perform such duties as were required by the Court. On November 20, 2015, Morawetz J. granted an Amended and Restated Initial Order that, among other things, directed the Monitor to review and report to the Court on any related party transactions (expressly including the Port Transaction).

45 During the *CCAA* proceedings, on February 10, 2016, a sales and investment solicitation process ("SISP") for Algoma's business and property was approved by the Court. Essar North America, a subsidiary of Essar Global, submitted a bid but was disqualified in April 2016 under the terms of the SISP because it failed to provide sufficient evidence of financial ability to purchase. In May and July of 2016, Essar Global persisted in its efforts to be the purchaser of the *CCAA* Applicants. On May 10, 2016, counsel to Portco, who was also counsel to Essar Global, wrote to counsel for Algoma to highlight matters of particular concern in connection with the *CCAA* process. The letter stated that any prospective bidder was to be told of the consent or veto right:

> Portco and [Algoma] are party to a Cargo Handling Agreement pursuant to which [Algoma] has committed to long-term use of the port. Portco, has, of course, a keen interest in any successor to [Algoma] as counterparty to that agreement and would like it to be clear to prospective bidders that, pursuant to the terms of the Cargo Handling Agreement, Portco has a consent right in the event of any assignment by [Algoma] of the agreement or a change of control of [Algoma].
>
> Again please confirm that this has been made clear to prospective bidders.

46 On June 20, 2016, the Monitor filed its Thirteenth Report, which described the Portco Transaction and indicated that there may be grounds for further review of that transaction. The Monitor noted that the renegotiated equity commitment resulted in Essar Global contributing the sum of US$150 million in equity rather than US$250 to US$300 million, and that the Portco Transaction transferred control of one of Algoma's most critical assets, the Port, to Essar Global. The Monitor stated that it remained "particularly concerned about the effect on the completion of a restructuring transaction of the restrictions on assignment in the Portco Transaction documents."

47 On September 26, 2016, Deutsche Bank AG, who led the Debtor-in-Possession ("DIP") Lenders of Algoma and also represented the interests of potential bidders in the *CCAA* process, applied for an order empowering the Monitor to commence certain proceedings and make certain investigations.[3] On September 26, 2016, Newbould J. granted an order authorizing the Monitor to commence and continue proceedings under s. 241 of the *CBCA* in relation to related party transactions, including but not limited to the Port Transaction.

48 The action proceeded on an accelerated timetable due to the progress of the *CCAA* restructuring.[4] On October 20, 2016, the Monitor commenced proceedings claiming oppression pursuant to s. 241 of the *CBCA* against Essar Global and others in the Essar Group including Portco. It pleaded that by reason of its role as a court officer directed to commence the oppression proceedings and to oversee the interests of all stakeholders of Algoma, it was a complainant within the meaning of ss. 238 and 241 of the *CBCA*.

49 It alleged that since June 2007, the Essar Group had exercised *de facto* control over Algoma and had engaged in a course of conduct that consistently preferred the interests of the Essar Group and in particular, Essar Global, to those of Algoma and its stakeholders. This included the transfer to the Essar Group of long-term control over, and a valuable equity interest in, Algoma's Port facilities, an irreplaceable and core strategic asset of Algoma. The value of control over the Port to Algoma and its stakeholders was immeasurable, since Algoma's business could not function without access to the Port.

50 The Monitor pointed out that the Essar Group obtained its control and equity interest in the Port through a cash contribution of less than US$4.7 million. It pleaded that the US$150 million raised as part of the Port Transaction came from third party lenders, namely GIP, and was money raised against the security and value of the Port facilities, an asset of Algoma, as well as a promissory note that remained unpaid, and a guarantee from Essar Global. The Monitor also stressed that the control obtained by the Essar Group was not only over the Port facilities, but extended to any sale of the Algoma business such that Essar Global had an indirect veto on transactions involving Algoma's enterprise. Essar Global also obtained a right to substantial payments under the Cargo Handling Agreement.

51 The oppression occasioned was exacerbated by the fact that the borrowed monies raised through the transaction were a substitution for monies Essar Global had promised to contribute as equity in Algoma.

52 The Monitor also argued that s. 15.2 of the Cargo Handling Agreement itself constituted oppression, because it was for the long-term benefit of Essar Global and not in the interests of Algoma's non-shareholder stakeholders. The Monitor took the position that the provision gave Portco and Essar Global a veto over any party acquiring Algoma in the *CCAA* process, thus negatively affecting the sales process. The Monitor also argued that the change of control provision was not necessary for the protection of GIP because it had its own change of control rights under its credit agreement.

53 In addition, the Monitor pleaded that the oppression and prejudice to creditors was continuing as Essar Global and other related companies had insisted that bidders for Algoma's business under the SISP, which was approved by the court on February 11, 2016, be advised of Portco's consent rights under the change of control clause in the Cargo Handling Agreement.

54 Essar Global and the remaining defendants filed their defence rejecting the Monitor's allegations, describing the action as "an improper and ill-conceived leverage tactic". They asserted that the litigation was an attempt to attack the Port Transaction for the benefit of other bidders under the sales process, including the DIP Lenders. They pleaded that the Monitor had no standing, the claim was improperly pleaded, an oppression remedy seeking to unwind or claim damages in respect of the Port Transaction was unavailable at law, and in any event there was no oppression, prejudice, or unfairness.

55 Portco's lenders, GIP, were granted intervener status as parties on December 22, 2016. They noted that they were *bona fide*, arm's length, and independent commercial parties and no cause of action or wrongful conduct was asserted by the Monitor against them. Nonetheless, the Monitor was seeking remedies that eviscerated the security held by them. They asserted that the Monitor did not have standing and could not establish any oppressive conduct in any event. Moreover, the structure of the Port Transaction was transparent to all of Algoma's stakeholders. Lastly, even if the court granted a remedy to the Monitor, it had no jurisdiction to prejudice the interests of GIP. The Monitor subsequently amended its statement of claim to modify the language on the relief claimed relating to the indebtedness and security interests in favour of GIP.

56 Various procedural motions were brought. Others who are not before this court intervened: Deutsche Bank AG; the Ad Hoc Committee of Algoma's Noteholders; Algoma Retirees; and two locals from the union United Steelworkers, Locals 2724 and 2251. The Essar Group and GIP brought motions to strike on the basis that the Monitor lacked standing and later also sought an order for particulars. On December 1, 2016, Newbould J. ordered that the standing motions be dealt with at the trial scheduled for January 30, 2017. On January 5, 2017, he urged the Monitor to give as many particulars as it could regarding the relief it might seek.

57 On January 30, 2017, Essar Capital served a motion for an order re-opening the SISP and to make information available to Essar Global to allow it to consider submitting a bid. Newbould J. dismissed the request. At para. 114 of his reasons, the trial judge found that Essar Global was still interested in purchasing the assets of Algoma.

58 The action proceeded to a five-day trial before Newbould J. commencing on January 31, 2017.

B. TRIAL JUDGMENT

59 The trial judge organized his reasons for decision under six principal headings: the Monitor's standing; who directed the recapitalization and the Port Transaction; reasonable expectations and were they violated; the business judgment rule; and the appropriate remedy. I will summarize his conclusions on each issue.

(1) Monitor's Standing

60 As mentioned, both Essar Global and GIP challenged the Monitor's standing as a complainant under the oppression provisions of the *CBCA*. They also argued that only persons directly damaged by the oppressive conduct could bring the action and that this action was in substance a derivative claim by Algoma. The trial judge rejected these arguments.

61 He found that the stakeholders harmed were Algoma's trade creditors, pensioners, retirees, and employees. At para. 32, he noted that Algoma owed CDN$911.9 million as of the date of the Port Transaction to a group of creditors including trade creditors, pensioners, retirees, and the City of St. Sault Marie.

62 The trial judge acknowledged at para. 34 that normally a monitor, who is a court officer, is to be neutral and not take sides. However, there are exceptions. Under s. 23(1)(k) of the *CCAA*, a monitor must carry out any function in relation to the debtor that the court may direct. At para. 35, the trial judge also pointed to the *CCAA* proceedings of Nortel Networks Corp. as a precedent: *Nortel Networks Corp., Re* (October 3, 2012), Doc. Toronto 09-CL-7950 (Ont. S.C.J. [Commercial List]). In those proceedings, a monitor was authorized to act as a litigant after all of Nortel's directors and senior executives had resigned.

63 Moreover, the trial judge observed that determining whether someone is a complainant under s. 238 of the *CBCA* is a discretionary decision. In *Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp.* (2003), 68 O.R. (3d) 544 (Ont. C.A.), this court confirmed that a trustee in bankruptcy acting on behalf of the creditors of a bankrupt estate could be a complainant within the meaning of s. 238. In so doing, the court noted the need for flexibility to ensure that the remedial purpose of the oppression provisions is achieved. The trial judge saw no reason why the principle of collective action — which posits that it is more efficient for creditors to pursue their claims in a bankruptcy collectively with a trustee acting as their representative rather than individually — should not be followed in the present *CCAA* proceeding. At para. 37, he concluded that the Monitor had taken the action as an adjunct to its role in facilitating a restructuring and was therefore a proper complainant.

64 To respond to Essar Global and GIP's arguments that the claim was properly a derivative action and that no person had been personally harmed beyond Algoma, at para. 40 the trial judge relied on *Rea v. Wildeboer*, 2015 ONCA 373, 126 O.R. (3d) 178 (Ont. C.A.), at para. 27. There, Blair J.A. commented that the derivative action and the oppression remedy are not mutually exclusive. Although on the facts of *Wildeboer*, Blair J.A. had struck out a statement of claim pleading the oppression remedy, the trial judge distinguished *Wildeboer* on the basis that the relief sought was for the benefit of the corporation and there was no allegation that individualized personal interests were affected by the alleged wrongful conduct.

(2) Essar Global Directed the Recapitalization and the Portco Transaction

65 The trial judge observed that in some respects, it did not matter who made the decisions regarding the recapitalization and the Port Transaction — if the conduct was oppressive, relief could be granted. Nonetheless, he found at para. 49, that the evidence was "overwhelming" that Essar Global and Essar Capital were "calling the shots."

66 At para. 52, he accepted the evidence of Mr. Ghosh and Mr. Marwah that they did not negotiate the economic terms of the refinancing or the Port Transaction. Nor was either involved in the renegotiation of the RSA.

67 The trial judge relied on other evidence, including Algoma's annual Business Plan dated February 3, 2014, to support his factual findings. He also considered evidence of the witnesses. He found at paras. 56-57 that some of the witnesses

had been evasive, including: Rewant Ruia, the Ruia family's lead in the Essar Group's North American operations; Mr. Seifert,; and Rajiv Saxena, the Executive Director of Essar Steel India Ltd.

68 After reviewing the evidence, the trial judge noted at para. 58 that he was satisfied that Mr. Seifert, who represented the Essar Group's interests, had primary responsibility for pursuing the recapitalization negotiations and Algoma's refinancing via the Port Transaction. He concluded at para. 60:

> I am satisfied that representatives of Essar Global including Essar Capital carried out the Recapitalization and Portco Transaction negotiations and made the critical decisions. Algoma management were handed the economic terms of the Recapitalization and Port Transaction and implemented them from an operational perspective. Algoma management did not negotiate the terms. Their role was to support the negotiations with regard to non-economic, primarily operational, issues.

(3) Reasonable Expectations and their Violation

69 The trial judge identified the two-step process to determine whether a violation of reasonable expectations has occurred under s. 241 of the *CBCA*, which is described at para. 68 of *BCE Inc., Re*, 2008 SCC 69, [2008] 3 S.C.R. 560 (S.C.C.): (i) does the evidence support the reasonable expectation asserted by the complainant; and (ii) does the evidence establish that the reasonable expectation was violated by conduct that is oppressive, unfairly prejudicial, or unfairly disregards a relevant interest?

70 He described the reasonable expectations asserted by the Monitor as relating to the loss by Algoma of a critical asset and the change of control clause in the Cargo Handling Agreement. He stated at para. 64:

> The Monitor contends that the reasonable expectations of the creditors of Algoma, including the trade creditors, employees, pensioners and retirees, were that Algoma would not deal with its core assets like the Port in such a way as it would lose long-term control and value over those assets to a related party on terms that permitted the related party to veto or thwart Algoma's ability to do significant transactions or restructure, as was done in this case.

71 At para. 67, the trial judge did not accept that the expectations of creditors such as the employees, pensioners, and retirees were governed only by their agreements with Algoma. Furthermore, the evidence, including the inferences drawn from the circumstances that existed at Algoma in 2014, supported the expectations relied upon by the Monitor. He noted at para. 73 that stakeholders have a reasonable expectation of fair treatment and this was particularly so in Sault Ste. Marie, where Algoma is of critical importance to the local economy and relied upon greatly by trade creditors and employees.

72 He concluded at para. 75 that:

> [T]he reasonable expectations of the trade creditors, the employees, pensioners and retirees of Algoma were that Algoma would not deal with a critical asset like the Port in such a way as to lose long-term control over such a strategic asset to a related party on terms that permitted the related party to veto and control Algoma's ability to do significant transactions or restructure and which gave unwarranted value to the third party.

73 The trial judge held that the reasonable expectations of the trade creditors, employees, pensioners, and retirees were violated in two principal ways: first, the Port Transaction itself; and second, the change of control veto provided to Portco, and thus Essar Global, in the Port Transaction.

74 The Port Transaction was caused by Essar Global's breach of both the RSA and the Equity Commitment Letter. Because the lease of the land from Algoma to Portco was for 50 years and Essar Global was in a position to terminate the Cargo Handling Agreement after 20 years, Algoma would be at Essar Global's mercy for the duration of these agreements. The trial judge found at para. 78 that the transfer of the Port assets to Portco was driven by GIP's desire for

a "bankruptcy remote" special purpose vehicle. GIP was aware of Algoma's previous insolvencies and would only lend to a new entity that held the Port assets and that was separate from Algoma.

75 The Port Transaction and the GIP secured loan to Portco would not have been necessary had Essar Global lived up to its obligations under the RSA and the Equity Commitment Letter under which Essar Global had pledged a cash investment of US$250 to US$300 million. The trial judge found at para. 82 that Essar Global had no intention of living up to its promises and had acted in bad faith in this regard. The content of the roadshow presentations reflected the discordance with the RSA. The alternative transaction in the roadshow presentations contemplated cash being contributed to the recapitalization through the sale of the Port. That these presentations failed was partially attributable, as the trial judge found at para. 82, to Essar Global's insufficient contribution of cash equity into Algoma.

76 The trial judge concluded that Essar Global's decision not to fund Algoma according to the terms of the Equity Commitment Letter made it necessary to carry out the Port Transaction. GIP's loan of US$150 million reduced the amount of cash equity Essar Global promised to advance to Algoma. Essar Global's failure to inject cash equity into Algoma as agreed was the root cause of the Port Transaction and the transfer of control. This was, as the trial judge concluded at para. 89, an exercise in bad faith. Had an independent committee of Algoma's Board of Directors been struck, Essar may have been held to its bargain rather than looking to third party financing from GIP under the Port Transaction structure. The Board's failure to examine alternatives to effect Algoma's recapitalization indicated a lack of regard for the interests of Algoma's stakeholders.

77 Additionally, the long-term value given to Essar Global by the Port Transaction was itself oppressive (although in stating this, the trial judge noted that the Monitor did not pursue its claim that the Port assets were transferred to Portco at an undervalue).

78 As for the release in the amended RSA, the trial judge observed that it was a release of any claim arising out of the Equity Commitment Letter. The trial judge found at para. 100 that the Monitor was not making a claim under that Letter, nor was it asking that Essar Global provide the equity it had promised in that commitment. Rather, Essar Global's failure to live up to its commitment was part of the factual circumstances to be taken into account in considering whether Algoma's stakeholders were treated fairly under the Port Transaction.

79 The trial judge also observed that when the court approved the amended Plan of Arrangement under the amended RSA, it did not have knowledge of the Port Transaction. There was no reference to the Port Transaction in the affidavits filed in support of the amendment to the Plan of Arrangement; there was no finding relating to the release of Essar Global; the trade creditors, the employees, pensioners and retirees were not parties to the motion approving the amended RSA; and the order was obtained without opposition.

80 Ultimately he concluded that the Port Transaction was itself unfairly prejudicial to, and unfairly disregarded, the interests of Algoma's trade creditors, employees, pensioners, and retirees.

(4) Change of Control Provision

81 The trial judge determined at para. 104 that the change of control provision gave effective control to Portco (*i.e.* Essar Global) over who may acquire the Algoma business. Any buyer of Algoma or its business would need to be assigned the Cargo Handling Agreement so that it could operate the steel mill. Therefore the veto under this clause was effectively a veto over any change of control of the Algoma business.

82 Although the evidence indicated that the change of control provision was included for GIP's protection, the trial judge found that this end could have been achieved in other ways. For example, as the trial judge pointed out at para. 110, the parties could have included a provision in the Assignment of Material Contracts Agreement that prevented a change of control of Algoma without GIP's explicit consent. Such an alternative might have been considered had there been a committee of independent directors with advisors independent of Essar Global. But, as the trial judge concluded

at para. 111, the reality was that there was no pushback on the change of control provision that was implemented, and which gave Portco/Essar Global a veto.

83 The trial judge concluded at para. 113 that the change of control provision was of considerable value to Essar Global. Furthermore, as mentioned, the trial judge stated at para. 117 that Essar Global had in fact relied on s. 15.2 to its benefit by holding out its change of control rights to dissuade competing bidders for Algoma in the restructuring process while Essar Global continued to express its own interest as a prospective bidder.

84 The May 10, 2016 letter from Portco's counsel, which sought confirmation from Algoma's counsel that prospective bidders would be advised of Portco's rights, exemplified this. In the letter, Essar Global effectively held out its consent to any change of control right to dissuade competing bidders for Algoma in the restructuring process while it continued to express its own interest as a prospective bidder. The trial judge observed at para 115 that: "[I]t is clear that the dictate of Portco through its solicitors that prospective purchasers should be made aware of the change of control provision was successful".

85 The trial judge also observed that the evidence established that Portco's right to refuse assignment of the Cargo Handling Agreement was a material impediment to restructuring Algoma as Algoma could not survive without access to the Port. He concluded that the change of control provision in favour of Portco in the Cargo Handling Agreement was unfairly prejudicial to, and unfairly disregarded, the interests of Algoma's trade creditors, employees, pensioners, and retirees.

(5) The Business Judgment Rule

86 The trial judge also determined that the business judgment rule, which accords deference to a business decision of a Board of Directors so long as the decision lies within a range of reasonable alternatives, did not provide a defence to Essar Global. The Board had not followed advice that it insist Essar Global comply with its commitments under the RSA and the Equity Commitment Letter. As the trial judge stated at para. 123, the result of this was the Port Transaction, which was:

> [A]n exercise in self-dealing in that Algoma's critical Port asset was transferred out of Algoma to a wholly owned subsidiary of Essar Global with a change of control provision that benefitted Essar Global at a time that a future insolvency was a possibility.

87 Moreover, there was no evidence that the Board even considered whether protection to GIP could be provided in the absence of the change of control provision in favour of Portco and hence Essar Global. This failure was unreasonable.

(6) Remedy

88 The trial judge stated at para. 136 that if there were no less obtrusive way to remedy the oppression, he would have ordered that Portco's shares be transferred to Algoma. However, mindful that a remedy for oppression should be approached with a scalpel, he instead relied on s. 241(3) of the *CBCA* to order a variation of the Port Transaction. He accordingly deleted s. 15.2 of the Cargo Handling Agreement and inserted a provision in the Assignment of Material Contracts Agreement, which provided that, if GIP becomes the equity owner of Portco, its consent would be required for a change of control of Algoma. He rejected the suggestion that either GIP or Essar Global were taken by surprise by this relief.

89 He also addressed the imbalance created by the 50-year term of the lease between Algoma and Portco as against the 20-year term of the Cargo Handling Agreement (with automatic renewal for successive three year periods, barring either party's termination). As the Port was critical to Algoma's operation and survival, Algoma's ability under the Cargo Handling Agreement to refuse an extension after 20 years was illusory and, in reality, the renewal provision was one-sided in favour of Essar Global.

90 He concluded at para. 144 that the payments under the Cargo Handling Agreement were an unreasonable benefit in favour of Essar Global. If the Agreement lasted only the initial 20-year term, Portco/Essar Global would receive US $300 million after GIP's loan was paid off. If the Agreement was not terminated before the end of its 50 year life, Portco/Essar Global would receive an additional US$750 million for the last 30 years.

91 Accordingly, the trial judge ordered that the lease, the Cargo Handling Agreement, and the Shared Services Agreement be amended to provide Algoma with the option to terminate any of these three agreements once GIP's loan matured and was paid. If Portco elected not to renew after 20 years, or any of the three-year extensions, those three agreements would terminate, and Algoma would then owe Portco US$4.2 million plus interest.

92 The trial judge decided at para. 147 that the appropriate place for Portco to assert its claims for a declaration that the US$19.8 million promissory note had been paid as a result of set-off and for amounts owing under the Cargo Handling Agreement was in the ongoing *CCAA* proceedings.

(7) Costs

93 Lastly, following the release of the judgment, Essar Global agreed to pay costs of CDN$1.17 million to the Monitor. The trial judge then ordered Essar Global to pay Algoma CDN$1.5 million in costs and ordered that no costs be payable by the Monitor or by or to GIP.

C. ISSUES

94 There are eight issues to be addressed:

1. Did the Monitor lack standing to be a complainant under s. 238 of the *CBCA*?

2. Could the claim of the Monitor only be brought as a derivative action under s. 239 of the *CBCA* rather than an oppression action under s. 241 of the *CBCA*?

3. Did the trial judge err in his analysis of reasonable expectations?

4. Did the trial judge err in his analysis of wrongful conduct and harm?

5. Did the trial judge err in tailoring a remedy?

6. Was there procedural unfairness?

7. Should the fresh evidence be admitted?

8. Should leave to appeal costs be granted to GIP and the costs award varied?

D. ANALYSIS

(1) Standing of the Monitor

95 Essar Global submits that the Monitor is not a proper complainant given the conflict between it and the stakeholders it represents. The trial judge failed to consider whether the Monitor could avoid conflicts.

96 GIP supports the position of Essar Global. It states that the trial judge erred in assuming that the court's broad jurisdiction under the *CCAA* could be combined with the equally broad jurisdiction under the *CBCA* to create a super remedy that would interfere with the contractual rights of non-offending third parties. A trustee in bankruptcy is a representative of the creditors of the bankrupt. A monitor owes duties to all stakeholders, not just creditors. Its duty to Essar Global as sole shareholder of Algoma cannot be reconciled with the Monitor's oppression claim against it. Also,

Algoma can be directed to make the Cargo Handling Agreement payments to GIP directly and therefore the Monitor owed a fiduciary duty to GIP.

97 In addressing this issue, I will first discuss the evolution of the role of a monitor. I will then discuss who can be a complainant under the *CBCA* oppression provisions. Lastly, I will consider whether in the particular circumstances of this case, the trial judge was correct in concluding that the Monitor could have standing to bring an oppression action.

(a) The Purpose of CCAA Restructurings

98 As has been repeatedly described, the *CCAA* was originally enacted in 1933 to respond to the ravages of the Great Depression and to allow large corporations with outstanding bonds and debentures to restructure their debt in a court-supervised process through plans of arrangement or compromise negotiated with their creditors.

99 As outlined by Deschamps J. in *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60, [2010] 3 S.C.R. 379 (S.C.C.) [hereinafter Century Services], the *CCAA* fell into disuse after amendments in 1953 that limited its application to companies issuing bonds. Courts breathed new life into the statute in the early 1980s in response to an economic recession, and the *CCAA* became the primary vehicle through which major restructurings were attempted. Amendments to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*"), introduced in 1992, allowed insolvent debtors to make proposals to creditors under that statute, and were expected to supplant the *CCAA*. However, the *CCAA* continues to be employed as the vehicle of choice to restructure large corporations, particularly where flexibility is needed in the restructuring process: Roderick J. Wood, *Bankruptcy & Insolvency Law*, 2nd ed. (Toronto: Irwin Law, 2015), at pp. 336-337; and *Century Services*, at para. 13.

100 The corporate restructuring process at the heart of the *CCAA* "provide[s] a constructive solution for all stakeholders when a company has become insolvent": *Indalex Ltd., Re*, 2013 SCC 6, [2013] 1 S.C.R. 271 (S.C.C.), at para. 205. There are a number of justifications for why such a process is desirable. The traditional justification for *CCAA*-enabled restructurings, as explained by Duff C.J. shortly after the statute's enactment, was to rescue financially-distressed corporations without forcing them to first declare bankruptcy: *Reference re Companies' Creditors Arrangement Act (Canada)*, [1934] S.C.R. 659 (S.C.C.), at p. 661.

101 The restructuring process can also allow creditors to obtain a higher recovery than may otherwise be available to them through bankruptcy or other liquidation proceedings, by preserving the corporate entity or the value of its business as a going concern: Wood, at pp. 338-339. Additionally, restructuring proceedings can provide an opportunity to evaluate the root of a corporation's financial difficulties, and develop strategies to achieve a turnaround, whether the best option be a full restructuring, or a liquidation of the corporation within the restructuring regime: Wood, at p. 340.

102 The benefits of the restructuring process are not limited to creditors. Even early commentary lauded restructurings as promoting the public interest by salvaging corporations that supply goods or services important to the economy, and that employ large numbers of people: see Stanley E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act" (1947), 25 Can. Bar Rev. 587, at p. 593. This view remains applicable today, with restructurings "justified in terms of rehabilitating companies that are key elements in a complex web of interdependent economic relationships in order to avoid the negative consequences of liquidation": *Century Services*, at para. 18.

103 To summarize, by enabling the restructuring process, the *CCAA* can achieve multiple objectives. It permits corporations to rehabilitate and maintain viability despite liquidity issues. It allows for the development of business strategies to preserve going-concern value. It seeks to maximize creditor recovery. It can serve to preserve employment and trade relationships, protecting non-creditor shareholders and the communities within which the corporation operates: see Janis P. Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2nd ed. (Toronto: Thomson Reuters, 2013), at pp. 13-17. The flexibility inherent in the restructuring process permits a broad balancing of these objectives and the multiple stakeholder interests engaged when a corporation faces insolvency.

104 It is against this background that the role of a monitor must be considered.

(b) The Role of the Monitor

105 Originally, the *CCAA* was a very slim statute and made no mention of a monitor. Born of the court's inherent jurisdiction, the term "monitor" was first used in *Northland Properties Ltd., Re* (1988), 29 B.C.L.R. (2d) 257 (B.C. S.C.). In that case, an interim receiver was appointed whose role was described at p. 277 as that of a monitor or watchdog. As a watchdog, the monitor could "observe the conduct of management and the operation of the business while a plan was being formulated": A.J.F. Kent and W. Rostom, "The Auditor as Monitor in CCAA Proceedings: What is the Debate?" (2008), online: Mondaq www.mondaq.com. The monitor was thus a court-appointed officer.

106 The 1997 amendments to the *CCAA* gave legislative recognition to the role of the monitor and made the appointment mandatory. The 2007 amendments to the *CCAA* expanded the description of the monitor's role and responsibilities. In essence, its minimum powers are set out in the Act and they may be augmented through the exercise of discretion by the court, typically the *CCAA* supervising judge. This framework is reflected in s. 23 of the *CCAA*, which enumerates certain duties and functions of a monitor. Paragraph 23(1)(k) directs that a monitor shall carry out "any other functions in relation to the company that the court may direct." Its express duties under s. 23(1)(c) include making, or causing to be made, any appraisal or investigation that the monitor "considers necessary to determine with reasonable accuracy the state of the company's business and financial affairs and the cause of its financial difficulties or insolvency". It is then to file a report on its findings.

107 Not surprisingly, as with the *CCAA* itself, the role of the monitor has evolved over time. As stated by David Mann and Neil Narfason in their article entitled "The Changing Role of the Monitor" (2008) 24 Bank. & Fin. L. Rev. 131, at p. 132:

> Born out of invention, the role has developed from one of passive observer to one of active participant. The monitor has enhanced communication, mediated disputes, provided input into plans of reorganization, and provided expert advice in complex affairs. As the business community has become more sophisticated and global, so too has the monitor — taking on larger mandates, often times involving complex, cross-border restructurings.

108 Examples of the use of expanded powers for a monitor are found in *Philip's Manufacturing Ltd., Re* (1992), 67 B.C.L.R. (2d) 385 (B.C. C.A.), where the British Columbia Court of Appeal ordered a monitor to report on the causes of financial problems of the company and report on improper payments made to management, shareholders and directors, and in *Woodward's Ltd., Re* (1993), 77 B.C.L.R. (2d) 332 (B.C. S.C.), where Tysoe J. (as he then was) held that a monitor was to review all transactions and conveyances for fraud, preferences, or other reviewable features and act in a similar manner to a trustee in bankruptcy.

109 Under s. 11.7(1) of the *CCAA*, a monitor must be a licensed trustee in bankruptcy, and as such, under s. 13 of the *BIA*, is subject to the supervision of the Office of the Superintendent of Bankruptcy. The monitor is to be the eyes and the ears of the court and sometimes, as is the case here, the nose. The monitor is to be independent and impartial, must treat all parties reasonably and fairly, and is to conduct itself in a manner consistent with the objectives of the *CCAA* and its restructuring purpose. In the course of a *CCAA* proceeding, a monitor frequently takes positions; indeed it is required by statute to do so. See for example s. 23 of the *CCAA* that describes certain duties of a monitor.

110 Of necessity, the positions taken will favour certain stakeholders over others depending on the context. Again, as stated by Messrs. Kent and Rostom:

> Quite fairly, monitors state that creditors and the Court currently expect them to express opinions and make recommendations. . . . [T]he expanded role of the monitor forces the monitor more and more into the fray. Monitors have become less the detached observer and expert witness contemplated by the Court decisions, and more of an active participant or party in the proceedings.

(c) A Monitor as Complainant in an Oppression Action

111 Turning to the issue of a monitor and an oppression action, there is some difference in academic opinion on the suitability of the oppression remedy in insolvency proceedings. Professor Stephanie Ben-Ishai has argued that the remedy should be unavailable for use once the debtor has entered a court-supervised reorganization under the *BIA* or the *CCAA*.[5] Professor Janis Sarra has countered that the oppression remedy continues to be an important corporate law remedy that should be available in such proceedings.[6] I do not understand the appellants to be taking the former position; rather they simply argue that the Monitor has no standing.

112 Section 238 of the *CBCA* defines a complainant as:

> (a) a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,
>
> (b) a director or an officer or a former director or officer of a corporation or any of its affiliates,
>
> (c) the Director, or
>
> (d) any other person who, in the discretion of a court, is a proper person to make an application under this Part.

For the purposes of this analysis, s. 238(d) is the relevant subsection.

113 Section 241*of* the *CBCA* describes the oppression remedy:

> (1) A complainant may apply to a court for an order under this section.
>
> (2) If, on an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates
>
> (a) any act or omission of the corporation or any of its affiliates effects a result,
>
> (b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or
>
> (c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner
>
> that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of.

114 The question here is whether the trial judge erred in concluding that the Monitor had standing to be a complainant. There are two elements to this analysis: can a monitor be a complainant under the *CBCA*; and should the Monitor have been a complainant in this case? I would answer both questions affirmatively.

115 As is clear from s. 238(d) of the *CBCA*, a court exercises its discretion in determining who may be a complainant, and this discretion is broad. There has been much jurisprudence on who qualifies as a complainant. In *Olympia & York*, a trustee in bankruptcy, acting on behalf of the creditors of the bankrupt estate, was entitled to be a complainant in an oppression action involving an oppressive agreement between the debtor and a non-arm's length party. As this court said in that case at para. 45:

> . . . the trustee is neither automatically barred from being a complainant nor automatically entitled to that status. It is for the judge at first instance to determine in the exercise of his or her discretion whether in the circumstances of the particular case, the trustee is a proper person to be a complainant.

116 Admittedly, a monitor differs from a trustee in bankruptcy in that the latter represents the interests of the creditors whereas the monitor has a broader mandate. However, like a trustee in bankruptcy, a monitor is neither automatically barred from being a complainant nor automatically entitled to that status.

117 Section 241 speaks of *a* proper person, not *the* proper person, therefore allowing for discretion to be exercised in the face of more than one proper person. The appellants did not direct us to any authority saying that a monitor could not be a complainant. Paragraph 23(1)(k) of the *CCAA* expressly provides that a monitor shall carry out any functions in relation to the company that the court may direct. Moreover, s. 23(1)(c) directs a monitor to conduct any investigation that the monitor considers necessary to determine the state of the company's business and financial affairs. It does not strain credulity that this responsibility will frequently place a monitor at odds with the shareholders or other stakeholders.

118 Additionally, there is nothing in the *CCAA* itself to suggest that a monitor cannot be authorized to act as a complainant. Indeed, the broad language of s. 11 of the *CCAA*, which permits a supervising court to "make any order it considers appropriate in the circumstances", is permissive of such orders. As this court and the Supreme Court have made clear, the broad language of s. 11 "should not be read as being restricted by the availability of more specific orders": *U.S. Steel Canada Inc., Re*, 2016 ONCA 662, 39 C.B.R. (6th) 173 (Ont. C.A.), at para. 79, citing *Century Services*, at para. 70. Courts can, and sometimes should, make "creative orders" in the context of *CCAA* proceedings: *U.S. Steel*, at paras. 80, 86-87.

119 Generally speaking, the monitor plays a neutral role in a *CCAA* proceeding. To the extent it takes positions, typically those positions should be in support of a restructuring purpose. As stated by this court in *Ivaco Inc., Re* (2006), 83 O.R. (3d) 108 (Ont. C.A.), at paras. 49-53, a monitor is not necessarily a fiduciary; it only becomes one if the court specifically assigns it a responsibility to which fiduciary duties attach.

120 However, in exceptional circumstances, it may be appropriate for a monitor to serve as a complainant. In my view, this is one such case.

121 Here, in para. 37(c) of the Amended and Restated Initial *CCAA* Order dated November 20, 2015, the Monitor was directed to investigate whether there were potential related party transactions that should be reviewed. It then reported back to the supervising *CCAA* judge that there were, and on that basis the *CCAA* judge authorized the Monitor to commence proceedings under s. 241 of the *CBCA*. The Monitor proceeded with the oppression action in the interests of the restructuring consistent with the objectives of the *CCAA*. The trial judge ultimately found that aspects of the Port Transaction, such as the change of control clause in the Cargo Handling Agreement that gave Essar Global control over who can be a buyer of the Algoma business, were oppressive and also harmful to the restructuring process. The Monitor took the action as an "adjunct to its role in facilitating a restructuring".

122 Moreover, it cannot be said that the Monitor was a fiduciary. Indeed, the appellants did not say this in their pleadings, opening submissions, or closing submissions before the trial judge. The remedy granted by the trial judge was directed at the oppression and removed an insurmountable barrier to a successful restructuring. In addition, it was brought in the face of Essar Global demonstrating a continuous desire to acquire Algoma and, as evident from the letter sent by its counsel, a desire to discourage others from doing so.

123 It will be a rare occasion that a monitor will be authorized to be a complainant. Factors a *CCAA* supervising judge should consider when exercising discretion as to whether a monitor should be authorized to be a complainant include whether:

(i) there is a *prima facie* case that merits an oppression action or application;

(ii) the proposed action or application itself has a restructuring purpose, that is to say, materially advances or removes an impediment to a restructuring; and

(iii) any other stakeholder is better placed to be a complainant.

These factors are not exhaustive, and none of them is necessarily dispositive; they are simply factors to consider.

124 In the circumstances that presented themselves here, the *CCAA* supervising judge was justified in providing authorization. A *prima facie* case had been established; the Monitor had reviewed and reported to the court on related party transactions; the oppression action served to remove an insurmountable obstacle to the restructuring; and the Monitor could efficiently advance an oppression claim, representing a conglomeration of stakeholders, namely the pensioners, retirees, employees, and trade creditors, who were not organized as a group and who were all similarly affected by the alleged oppressive conduct.

125 Quite apart from meeting the aforementioned criteria, I would also observe that as the presiding judge in the *CCAA* proceeding and the trial judge, Newbould J. had insight into the dynamics of the restructuring and was well positioned to supervise all parties including the Monitor to ensure that no unfairness or unwarranted impartiality occurred.

126 Lastly, I do accept the appellants' position that the *Nortel* proceedings relied upon by the trial judge in support of his conclusion were quite different from this case. In *Nortel*, the monitor's powers were expanded by an order authorizing the Monitor to exercise any powers properly exercisable by a Board of Directors of Nortel or its subsidiaries. But this expansion was a response to the resignations of the Boards of Nortel and its subsidiaries, not, as here, a response to the results of investigations the Monitor had been directed to pursue. That said, the case does illustrate the need to avoid rigid definition of a monitor's role and responsibilities.

127 In conclusion, I would not give effect to the appellants' submission that the trial judge erred in granting the Monitor standing to pursue an action for oppression.

(2) Derivative or Oppression Action

128 In addition to attacking the standing of the Monitor to bring the action, the appellants also submit that the Monitor was precluded from bringing the action in the form of an oppression remedy proceeding pursuant to s. 241 of the *CBCA*. In their view, the action could only have been brought as a derivative action pursuant to s. 239 of that *Act*. They say the claim asserted is a corporate claim belonging to Algoma, if anyone, and the stakeholders, on whose behalf the Monitor asserts the claim, were not harmed directly or personally but only derivatively through harm done to Algoma. I disagree.

129 In support of their submission, the appellants rely heavily on the decision of this Court in *Wildeboer*. This case is not *Wildeboer*, however.

130 In *Wildeboer*, "insiders" who controlled the corporation had misappropriated many millions of dollars from the corporation. The *sole claim* advanced by the complainant minority shareholder by way of oppression remedy was for the return of the misappropriated funds *to the corporation*. There was *no claim* asserted by the complainant, of any kind, *for a personal remedy qua shareholder*. As the court noted at para. 45, "[t]he substantive remedy claimed is the disgorgement of all the ill-gotten gains back to Martinrea [the corporation in question]."

131 The *Wildeboer* decision must be read in that context. It does not stand for the proposition that in all cases where there has been a wrong done to the corporation, the action must be brought as a derivative action. Consistent with a number of other authorities, this court expressly re-affirmed the principles that the derivative action and the oppression remedy are not mutually exclusive and that there may be circumstances giving rise to overlapping derivative actions and oppression remedies where harm is done both to the corporation and to stakeholders in their separate stakeholder capacities. This is clear from para. 26:

> I accept that the derivative action and the oppression remedy are not mutually exclusive. Cases like *Malata* [*Malata Group (HK) Ltd. v. Jung*, 2008 ONCA 111, 89 O.R. (3d) 36] and *Jabalee* [*Jabalee v. Abalmark Inc.*, [1996] O.J. No.

> 2609 (C.A.)] make it clear that there are circumstances where the factual underpinning will give rise to both types of redress and in which a complainant will nonetheless be entitled to proceed by way of oppression. Other examples include: *Ontario (Securities Commission) v. McLaughlin*, [1987] O.J. No. 1247 (Ont. H.C.); *Deluce Holdings Inc. v. Air Canada* (1992), 12 O.R. (3d) 131 (Ont. Gen. Div. [Commercial List]); *Covington Fund Inc. v. White*, [2000] O.J. No. 4589 (Ont. S.C.J.), aff'd [2001] O.J. No. 3918 (Ont. Div. Ct.); *Waxman v. Waxman*, [2004] O.J. No. 1765 (C.A.), at para. 526, leave to appeal refused, (2005), [2004] S.C.C.A. No. 291 (S.C.C.).

132 Or, as Armstrong J.A. put it in *Malata Group (HK) Ltd. v. Jung* [2008 CarswellOnt 699 (Ont. C.A.)], at para. 30:

> [T]here is not a bright line distinction between the claims that may be advanced under the derivative action section of the Act and those that may be advanced under the oppression remedy provisions.

133 In short, there will be circumstances in which a stakeholder suffers harm in the stakeholder's capacity as stakeholder, from the same wrongful conduct that causes harm to the corporation. In my opinion — unlike in *Wildeboer*, where the harm alleged was solely harm to the corporation — this case falls into the overlapping category.

134 For the purposes of this analysis, it is the nature of the claim put forward by the claimants, on whose behalf the Monitor was pursuing the oppression remedy, that must be examined. As the trial judge noted at para. 31, the Monitor initially cast quite widely the net of stakeholders affected by the Port Transaction and on whose behalf it was claiming a remedy. By the time of the hearing, however, the net's reach had been narrowed to Algoma's trade creditors, employees, pensioners, and retirees.

135 In oppression remedy parlance, the nub of the exercise lies in determining whether the claimant has identified a "reasonable expectation" and shown that it has been violated by wrongful conduct that is "oppressive" (in the broad sense contemplated by the *Act*) *of the interests of the claimant*: see *BCE*. The Monitor asserted at the hearing, and the trial judge found at para. 75:

> [T]hat the reasonable expectations of the trade creditors, the employees, pensioners and retirees of Algoma were that Algoma would not deal with a critical asset like the Port in such a way as to lose long-term control over such a strategic asset to a related party on terms that permitted the related party to veto and control Algoma's ability to do significant transactions or restructure and which gave unwarranted value to the third party.

136 It was alleged, and the trial judge found, that these reasonable expectations had been violated both by aspects of the Port Transaction itself, and by the change of control veto provided to Portco, and thus Essar Global, in the Port Transaction.

137 The appellants argue that the reasonable expectations asserted relate only to harm done to Algoma. The trial judge disagreed, as do I. As he concluded at para. 37:

> Aspects of the Port Transaction, such as the change of control clause in the Cargo Handling Agreement that gives the parent control over who can be a buyer of the Algoma business, are harmful to a restructuring process and negatively impact creditors. [Emphasis added]

138 On this basis, at para. 40, the trial judge distinguished *Wildeboer* because the Monitor was asserting "that the personal interests of the creditors ha[d] been affected."

139 The appellants place considerable emphasis on certain language contained in *Wildeboer* to the effect that, in circumstances where there may be overlapping derivative and oppression claims, the wrong must both harm the corporation and must also affect the claimant's "individualized personal interests". They interpret these comments as mandating not only that each claimant must suffer an identifiable individual harm but also that this harm must be different from other individualized personal harms suffered by others in their same class.

140 For example, the appellants rely on certain aspects of the following comments by this court at paras. 29, 32-33 of *Wildeboer*:

> On my reading of the authorities, in the cases where an oppression claim has been permitted to proceed even though the wrongs asserted were wrongs to the corporation, those same wrongful acts have, for the most part, also directly affected the complainant in a manner that was different from the indirect effect of the conduct on similarly placed complainants.
>
> . . .
>
> The appellants are not asserting that their personal interests as shareholders have been adversely affected in any way other than the type of harm that has been suffered by all shareholders as a collectivity. Mr. Rea — the only director plaintiff — does not plead that the Improper Transactions have impacted his interest *qua* director.
>
> Since the creation of the oppression remedy, courts have taken a broad and flexible approach to its application, in keeping with the broad and flexible form of relief it is intended to provide. However, the appellants' open-ended approach to the oppression remedy in circumstances where the facts support a derivative action on behalf of the corporation misses a significant point: the impugned conduct must harm the complainant personally, not just the body corporate, *i.e.*, the collectivity of shareholders as a whole.

141 While pertinent to the *Wildeboer* context, some of the foregoing language, when read in isolation and out of context, may be misconceived when it comes to a more general application. However, I do not read *Wildeboer* as precluding an oppression remedy in respect of individuals forming a homogenous group of stakeholders — for example, trade creditors, employees, retirees, or pensioners — simply because each of them, separately, may have suffered the same type of individualized harm.

142 Instead, I read the reference at para. 29 to the complainant being directly affected "in a manner that was different from the indirect effect of the conduct on similarly placed complainants" to be another way of capturing the notion expressed in paras. 32-33 that the individualized harm is to be distinct from conduct harming only "the body corporate, *i.e.*, the collectivity of shareholders as a whole."

143 Were the appellants correct in their submissions, as counsel for the Monitor points out, this court would not have upheld an oppression remedy on behalf of *all* shareholders of a company that had suffered harm as a result of a non-market executive compensation contract: see *UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc.* (2002), 214 D.L.R. (4th) 496 (Ont. S.C.J. [Commercial List]), aff'd (2004), 42 B.L.R. (3d) 34 (Ont. C.A.), at para. 153. Nor would it have upheld an oppression remedy claim on behalf of *a class* of shareholders who were harmed as a result of the existence of a transfer pricing regime that was disadvantageous to the company, as it did in *Ford Motor Co. of Canada v. Ontario (Municipal Employees Retirement Board)* (2006), 79 O.R. (3d) 81 (Ont. C.A.). *Wildeboer* contains no suggestion that these authorities are no longer good law; nor would it have done.

144 The same may be said, in my view, about a group of creditors who have suffered similar harm from a corporate wrong that affects both their interests as creditors and the interests of the corporation. While the oppression remedy is not available as redress for a simple contractual breach (such as the failure to pay a debt), it has long been held to be available, in appropriate circumstances, to creditors whose interests "have been compromised by unlawful and internal corporate manoeuvres against which the creditor cannot effectively protect itself": *J.S.M. Corp. (Ontario) Ltd. v. Brick Furniture Warehouse Ltd.*, 2008 ONCA 183, 41 B.L.R. (4th) 51 (Ont. C.A.), at para. 66. See also: *Fedel v. Tan*, 2010 ONCA 473, 101 O.R. (3d) 481 (Ont. C.A.), at para. 56.

145 The question is whether the impugned conduct is "oppressive" (in the broad sense contemplated by the *CBCA*) and, if so, whether the stakeholder has suffered harm in its capacity as a stakeholder as a result of that conduct.

146 Moreover, the circumstances that presented themselves emphasize the need for flexibility in the availability of the oppression remedy. The court and the Monitor were faced with *prima facie* evidence of oppression including bad faith and self-dealing. There was *prima facie* evidence of personal harm to the pensioners, employees, retirees, and trade creditors. While leave of the court is required for a derivative action, in substance, in the context of a *CCAA* proceeding, court supervision is present, thereby neutralizing the need for the derivative action procedural safeguard of leave.

147 I would also note that GIP argues that the decision not to bring this action by way of derivative action may have been a strategic decision made because Algoma was contractually prohibited from seeking to set aside or vary the contracts arising from the Port Transaction, including the Cargo Handling Agreement and the lease. If anything, this argument supports the conclusion that it was appropriate for this action to be brought as an oppression claim.

148 In conclusion, at law, the Monitor was at liberty to bring an action for oppression. I will now turn to the issue of reasonable expectations.

(3) Reasonable Expectations

149 Essar Global and GIP submit that the trial judge erred in his analysis of reasonable expectations. They argue that there was no evidence of any subjectively held expectations, that the trial judge did not consider whether the expectations were objectively reasonable, and that he failed to consider factors identified in *BCE*.

150 The Monitor and Algoma respond by saying that the existence of reasonable expectations is a question of fact that can be proved by direct evidence or by the drawing of reasonable inferences. In this case, the trial judge properly considered the evidence that was before him to conclude that the pensioners, employees, retirees, and trade creditors held expectations that had been violated and that those expectations were objectively reasonable.

151 In his analysis, the trial judge correctly identified the two prongs of the oppression inquiry identified by the Supreme Court at para. 68 of *BCE*: (i) does the evidence support the reasonable expectation asserted by a claimant; and (ii) does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice", or "unfair disregard" of a relevant interest?

152 In identifying these two prongs, at paras. 58-59, the Supreme Court made two preliminary observations:

> First, oppression is an equitable remedy. It seeks to ensure fairness — what is "just and equitable". It gives a court broad, equitable jurisdiction to enforce not just what is legal but what is fair. . . . It follows that courts considering claims for oppression should look at business realities, not merely narrow legalities.
>
> Second, like many equitable remedies, oppression is fact-specific. What is just and equitable is judged by the reasonable expectations of the stakeholders in the context and in regard to the relationships at play. Conduct that may be oppressive in one situation may not be in another. [Citations omitted.]

153 As also stated in *BCE* at para. 71:

> Actual unlawfulness is not required to invoke s. 241; the provision applies "where the impugned conduct is wrongful, even if it is not actually unlawful." The remedy is focused on concepts of fairness and equity rather than on legal rights. In determining whether there is a reasonable expectation or interest to be considered, the court looks beyond legality to what is fair, given all the interests at play.

154 Evidence of an expectation "may take many forms depending on the facts of the case": *BCE*, at para. 70. The "actual expectation of a particular stakeholder is not conclusive": *BCE*, at para. 62. Furthermore, a stakeholder's reasonable expectation of fair treatment "may be readily inferred", because fundamentally all stakeholders are entitled to expect fair treatment: *BCE*, at paras. 64, 70. Once the expectation at issue is identified, the focus of the inquiry is on whether it has been established that the particular expectation was reasonably held: *BCE*, at para. 70.

155 The Monitor particularized the reasonable expectations in issue. It stated that the stakeholders had reasonable expectations that the Essar Group would not cause Algoma to engage in transactions for their benefit to the detriment of Algoma and its stakeholders, cause Algoma to transfer long-term control over an irreplaceable and core strategic asset of Algoma (*i.e.* the Port) to the Essar Group, and, among other things, provide the Essar Group with a veto. The source and content of the expectations were stated by the Monitor to include commercial practice, the nature of Algoma, and past practice. These particulars would all feed an expectation of fair treatment.

156 Based on the reasonable expectations particularized by the Monitor, as already noted, the trial judge found at para. 75 that:

> [T]he reasonable expectations of the trade creditors, the employees, pensioners and retirees of Algoma were that Algoma would not deal with a critical asset like the Port in such a way as to lose long-term control over such a strategic asset to a related party on terms that permitted the related party to veto and control Algoma's ability to do significant transactions or restructure and which gave unwarranted value to the third party.

157 There was evidence of subjective expectations before the trial judge. For example, at para. 65 of his reasons, the trial judge considered the evidence of subjective expectations of two trade creditors explaining that they were unaware of the Port Transaction and would not have expected an outcome in which Algoma no longer had full control over the Port facility.

158 The trial judge also drew reasonable inferences from the evidence and circumstances that existed at Algoma in 2014 in support of the expectations relied upon by the Monitor, as he was entitled to do: see *Ford Motor*, at para. 65. In that regard, he noted that Algoma had gone through a number of insolvencies and restructurings since the early 1990s. Given the cyclical nature of the steel business, it was reasonable for the stakeholders to expect a restructuring in the future. The reasonableness of this restructuring-related expectation was confirmed by GIP's insistence on a "bankruptcy remote" structure for its loan "given the fluctuating prices of steel and Algoma's history of insolvencies", as GIP said in its factum.

159 Based on the evidence of subjective expectations and the reasonable inferences the trial judge drew from the record, it cannot be said that there was no evidence supporting the trial judge's conclusion that a future restructuring was not reasonably foreseeable.

160 The trial judge also concluded that it was objectively reasonable for the stakeholders to expect, as he noted at para. 73, that Algoma would not lose its ability to restructure absent the consent of Essar Global — particularly in Sault Ste. Marie, where Algoma is the major industry on which trade creditors and employees rely. Put differently, it would not be reasonable to expect that the shareholder would have the right to veto any restructuring in a *CCAA* proceeding in which it was not an applicant and have the right to prefer its own interests over those of others such as the retirees, pensioners, trade creditors, and employees. Contrary to the assertions of the appellants, the trial judge expressly considered those issues.

161 Similarly, Essar Global submits that the foreseeability of another insolvency was contradicted by Mr. Marwah's affidavit evidence on the application for approval of the Plan of Arrangement, where he deposed that he believed that Algoma would be solvent. I would not give effect to this argument, as the trial judge's conclusion on the foreseeability of the insolvency is a factual finding, based on his review of the record as a whole. Essar Global has not demonstrated that this finding is subject to any palpable and overriding error.

162 The appellants' complaint that the trial judge failed to consider any of the factors identified in *BCE* is also misplaced. In that decision, the Supreme Court stated at para. 62:

> As denoted by "reasonable", the concept of reasonable expectations is objective and contextual. . . . In the context of whether it would be "just and equitable" to grant a remedy, the question is whether the expectation is reasonable

> having regard to the facts of the specific case, the relationships at issue, and the entire context, including the fact that there may be conflicting claims and expectations.

163 Essar Global's argument that the trial judge did not turn his mind to the *BCE* factors ignores the trial judge's explicit reasons on this point. At para. 68 of his decision, the trial judge referred to the factors identified by the Supreme Court as "useful" in determining whether an expectation was reasonable. These factors include: i) general commercial practice; ii) the nature of the corporation; iii) the relationship between the parties; iv) past practice; v) steps the claimant could have taken to protect itself; vi) representations and agreements; and vii) the fair resolution of conflicting interests between corporate stakeholders.

164 The trial judge correctly noted that, due to the fact-specific nature of the inquiry into reasonable expectations, not all listed factors must be satisfied in any particular case. I agree with his conclusion. The *BCE* factors are "not hard and fast rules", but are merely intended to "guide the court in its contextual analysis": Dennis H. Peterson and Matthew J. Cumming, *Shareholder Remedies in Canada*, 2nd ed. (Toronto: LexisNexis, 2017), at]§17.47.

165 Nonetheless, the trial judge did consider a number of the *BCE* factors based on the facts before him. For instance, at para. 68, he concluded that Algoma's prior sale of a non-critical asset, relating to factor iv), past practice, was not helpful in determining reasonable expectations. This was because the sale of a non-critical asset differs from the sale of a critical asset, as in the Port Transaction. Also under the rubric of past practices, he considered Algoma's prior insolvencies and restructuring proceedings. He concluded that while it was reasonable for stakeholders to expect that significant corporate changes might be necessary for Algoma in the future, it was not reasonable for them to expect that Algoma would lose its ability to restructure without the prior agreement of its parent, Essar Global.

166 As the trial judge's reasons reveal, he specifically considered the *BCE* factors and made findings on the objective reasonableness of the expectations at issue. I endorse the comments of the Monitor found at para. 80 of its factum:

> In this case, Justice Newbould found that the employees, retirees, and trade creditors all had a reasonable expectation that Essar Group would not engineer a transaction that deprived Algoma of a key strategic asset, rendering it incapable of restructuring or engaging in significant transactions without the approval of Essar Global, for minimal cash consideration in circumstances where there had been no consideration of alternative transactions. This was entirely supported by the entirety of the record adduced at trial.

167 This was essentially a factual exercise. There was conflicting evidence before the trial judge. However it was for the trial judge to weigh the evidence and make factual findings. That is what he did. Based on the record before him, those factual findings were available to him. He considered both subjective expectations and whether the expectations were objectively reasonable. I see no reason to interfere.

168 I therefore reject the appellants' submissions on reasonable expectations.

(4) Wrongful Conduct and Harm

169 Essar Global also takes issue with the trial judge's conclusion that Essar Global's conduct was wrongful and harmful.

170 First, Essar Global submits that the trial judge inappropriately relied on the Equity Commitment Letter. It argues that the court approved the amended Plan of Arrangement that released Essar Global from any claim relating to the Equity Commitment Letter, and that reliance on a released obligation in connection with the wrongful conduct requirement of oppression was an impermissible collateral attack on the approval order.

171 I disagree. I can state no more clearly than the trial judge did at para. 100 of his reasons:

> The Monitor is not making a claim under the Equity Commitment Letter or asking that Essar Global provide the equity it agreed to provide in that commitment. Nor is the Monitor asking that the release be set aside. The Monitor

contends, and I agree, that the failure of Essar Global to fund as agreed in the RSA and Equity Commitment Letter is a part of the factual circumstances to be taken into account in considering whether the affected stakeholders who were not party to the agreements were treated fairly by the Port Transaction.

172 An amended Plan of Arrangement became necessary when Essar Global did not provide the promised equity contribution, the roadshow presentations were unsuccessful, and the Port Transaction was the only available means to generate sufficient cash for Algoma.

173 I also note that the trial judge recognized that the trade creditors, the employees, pensioners and retirees were not parties to nor did they play any role in the amended Plan of Arrangement proceedings. Although the release was in both the original RSA and the amended RSA, it would appear that there was no express reference to the Port Transaction being part of the Plan of Arrangement, nor was there any mention of it in any endorsement or the order approving the amended Plan of Arrangement.

174 In addition, the trial judge did not make his finding of wrongful conduct based on Essar Global's breach of the Equity Commitment Letter. Rather, he found that the totality of Essar Global's conduct regarding the Recapitalization and Port Transaction satisfied the wrongful conduct requirement.

175 Taken in context, the trial judge made no error in his treatment of the release in favour of Essar Global.

176 Second, Essar Global submits that the trial judge made factual errors relating to Essar Global's cash contributions. In particular, it submits that he erred in concluding that the cash Essar Global did advance in the recapitalization, namely US$150 million rather than the US$250 to US$300 million that was originally promised, was generated by the Port Transaction when it was not. They also complain that he erred in granting an oppression remedy when the Equity Commitment Letter provided for a limited remedy in the event of a breach.

177 The reasons of the trial judge on Essar Global's cash contribution are admittedly somewhat confusing. In para. 20 of his reasons, he states that Essar Global's revised cash contribution under the amended RSA was "to be funded largely not by Essar Global but by a loan from third party lenders to Portco of $150 million." Reading that paragraph in isolation might lend credence to the appellants' submission. That said, having regard to the record before him and reading the reasons as a whole, I am not persuaded that the trial judge misunderstood Essar Global's contribution to the recapitalization.

178 The relevant contributions made to Algoma in November 2014 consisted of:

- US$150 million in cash from Essar Global under the amended RSA;
- US$150 million in debt reduction in the form of loan forgiveness for certain loans owed by Algoma to members of the Essar Group under the amended RSA; and
- US$150 million in cash generated from the Port Transaction.

179 Essar Global only provided Algoma with US$150 million in cash equity, not the US$250 to 300 million in cash equity it had originally promised. The debt forgiveness would not assist Algoma in addressing its impending liquidity issues in the same way a cash injection would. Additionally, as the trial judge noted at para. 88, the US$150 million in debt reduction related to loans at the bottom of Algoma's capital structure, and therefore this reduction was of "questionable value" to Algoma at the time.

180 Algoma, the Monitor and Essar Global all provided the trial judge with written submissions describing the cash equity contribution as consisting of US$150 million in cash from Essar Global and US$150 million in cash from the Port Transaction. The contributions were also repeatedly referenced in the record. For example, the affidavit of Mr. Seifert — which the trial judge considered in great detail — clearly sets out Essar Global's cash contribution to Algoma and the

US$150 million in cash paid by Portco to Algoma under the Port Transaction as separate transactions. Similarly, these contributions are described as separate transactions in the affidavits of Messrs. Marwah and Ghosh.

181 The trial judge's reasons establish that he understood that there were two separate cash payments made to Algoma — one made by Essar Global in satisfaction of its commitments under the amended RSA and one made by Portco under the Port Transaction. He also understood that these cash payments were made in addition to Essar Global's forgiveness of US$150 million debt owed to it by Algoma.

182 Specifically, at para. 85, the trial judge noted that in October 2014, after the original RSA had been executed, Essar Global contemplated reducing the amount of its cash contribution promised under the RSA and the Equity Commitment Letter. The roadshow presentation prepared regarding Algoma's capitalization showed that Essar Global proposed to contribute less than US$100 million of *cash* rather than the US$250-$300 million required. He obviously understood that there was to be a cash component to Essar Global's contribution separate and apart from the proceeds of the Port Transaction.

183 In addition, at para. 88, the trial judge noted that the Port Transaction "*reduced* the amount of cash equity previously promised by Essar Global to be advanced to Algoma" (emphasis added). This shows that the trial judge understood that the proceeds from the Port Transaction were not *replacing* Essar Global's promised cash contribution. The trial judge recognized that the cash equity contribution of US$150 million and the debt reduction of US$150 million were insufficient to successfully refinance Algoma, and using the Port Transaction proceeds was the only way to generate the additional US$150 million in cash necessary. The trial judge highlighted at para. 96 that Algoma's CEO, Mr. Ghosh, had indicated that "he had had to agree to the Port Transaction" as it was the "only way" to refinance Algoma, since Essar Global's contribution was only "bringing in $150 million".

184 Even if the appellants were correct in this regard, which I do not accept, on their analysis, they themselves admit that Essar Global's contribution was short by US$50 million.

185 No matter the correct figure, Essar Global's conduct created a situation where Algoma had no choice but to accept the Port Transaction. There was no palpable and overriding error in the trial judge's understanding of the recapitalization requirements.

186 In any event, the reduction in Essar Global's cash contribution was only one aspect of Essar Global's overall conduct considered by the trial judge. He did not conclude that the cash equity reduction was itself the oppressive act. Accordingly, again, any factual error regarding Essar Global's actual cash contribution was not a palpable and overriding error.

187 As mentioned, Essar Global also asserts that the remedy for breach contained in the Equity Commitment Letter precluded any oppression remedy. No one was suing for breach of the Equity Commitment Letter. Rather, it formed part of the context that included a failure to explore alternatives, the Port Transaction itself, control rights that were proffered as a disincentive to other bidders and that erased any possibility of a successful restructuring, all in disregard of the expectations of the pensioners, employees, retirees, and trade creditors.

188 Third, although not identified as a ground of appeal nor advanced as such in their factum, in oral argument, the appellants submitted that the alleged breach of the Equity Commitment Letter did not cause Algoma to enter the Port Transaction.

189 Essar Global contends that the trial judge made factual errors in finding a causal connection between Essar Global's equity commitment and the Port Transaction. It argues that the Port Transaction was a key component of the recapitalization before the execution of the Equity Commitment Letter.

190 At trial, the trial judge rejected Essar Global's argument, finding at para. 87 that the Port Transaction was contemplated as a possible transaction when first introduced in May 2014, but that the transaction was not a certainty.

He accurately noted that the first Plan of Arrangement that was approved by the Court required Essar Global to comply with its cash funding commitment of US$250 to US$300 million pursuant to the Equity Commitment Letter and that the Port Transaction was not a part of that plan. He found that the Port Transaction had to be carried out because of Essar Global's decision not to fund Algoma according to the terms of the Equity Commitment Letter.

191 The causal connection between Essar Global's equity commitment and the Port Transaction is a factual matter and the trial judge's factual finding was supported by the evidence.

192 Furthermore, the Port Transaction that was floated in May 2014 was an entirely different transaction, in which the proceeds of sale would flow upstream to Essar Global and would not be used to recapitalize Algoma. Moreover, the RSA prohibited a related party transaction without noteholder consent, and the proceeds of any sale in excess of US$2 million had to be used to reduce Algoma's debt.

193 I am not persuaded that the trial judge made any palpable and overriding error in his finding.

194 Fourth, Essar Global submits that the trial judge erred in disregarding the business judgment rule, which should have applied to prevent judicial second-guessing of the Board's decisions.

195 The trial judge correctly described the business judgment rule relying on para. 40 of *BCE*:

> In considering what is in the best interests of the corporation, directors may look to the interests of, *inter alia*, shareholders, employees, creditors, consumers, governments and the environment to inform their decisions. Courts should give appropriate deference to the business judgment of directors who take into account these ancillary interests, as reflected by the business judgment rule. The "business judgment rule" accords deference to a business decision, so long as it lies within a range of reasonable alternatives . . . It reflects the reality that directors, who are mandated under s. 102(1) of the *CBCA* to manage the corporation's business and affairs, are often better suited to determine what is in the best interests of the corporation. This applies to decisions on stakeholders' interests, as much as other directorial decisions.

196 Two additional points should be made with respect to the business judgment rule. First, the rule shields business decisions from court intervention only where they are made prudently and in good faith: *CW Shareholdings Inc. v. WIC Western International Communications Ltd.* (1998), 160 D.L.R. (4th) 131 (Ont. Gen. Div. [Commercial List]), at pp. 150-151.

197 Second, the rule's protection is available only to the extent that the Board of Directors' actions actually evidence their business judgment: *UPM-Kymmene*, at para. 153.

198 In deciding that the rule afforded no defence to Essar Global, the trial judge, at para. 123, relied on the fact that the Board did not follow "advice to go after Essar Global on its cash equity commitment". The trial judge went on to note that had Algoma's Board formed an independent committee in February 2014, events may have evolved differently, and the Board may have accepted the advice to hold Essar Global to its commitment.

199 Essar Global takes issue with this conclusion by asserting that the trial judge should not have characterized Algoma's Board as lacking independence because of its decision not to strike an independent committee. Essar Global points out that there was no evidence that Mr. Ghosh — who cast the deciding vote in that decision — was not free to vote as he chose.

200 Essar Global's argument ignores the trial judge's key finding that the four directors who voted against the independent committee in February 2014, including Mr. Ghosh, were not independent. The trial judge noted at para. 15 that he could "not overlook" that Mr. Ghosh had been with Essar Steel India, adding that Algoma's CFO, Mr. Marwah, had described these four directors as "Essar-affiliated directors". On this basis, it was open for the trial judge to find that the Essar-affiliated directors were not free from the influence of Essar Global and the Ruia family, particularly

when considered alongside his extensive comments at paras. 43-60 finding that the critical decisions regarding Algoma's recapitalization and the Port Transaction were made not by Algoma's Board, but by Essar Global and Essar Capital as led by Mr. Seifert.

201 Specifically, the trial judge made findings of fact at paras. 51-53 regarding the limited role played by Algoma's Board and management. He accepted the evidence of Messrs. Ghosh and Marwah that they did not negotiate the economic terms of the debt refinancing or the Port Transaction. He also accepted the evidence of Mr. Ghosh that the Transaction was approved because there was no realistic alternative to generate sufficient cash to complete the recapitalization. He rejected the contradictory evidence of Mr. Seifert because the evidence of Messrs. Ghosh and Marwah was consistent with the documentary evidence. In my view, the trial judge was entitled to weigh the evidence as he did and make these findings of fact that were not infected by any palpable and overriding error.

202 Essar Global maintained before the trial judge, as they do before this court, that the Algoma Board's decisions were nonetheless shielded from court intervention because the Board had the benefit of sophisticated advisors throughout the recapitalization process. And yet, the only evidence tendered of any such advice was advice that the Board elected not to follow.

203 At para. 122, the trial judge described this advice, which was provided at least in part by Ray Schrock, described by the appellants as Algoma's lawyer. Mr. Schrock told the Board that unsecured noteholders would not react well to the Port Transaction and were likely to seek a higher infusion of cash from Essar Global, as promised in the Equity Commitment Letter. Mr. Schrock said that the Board should insist that Algoma press Essar Global to fulfill its equity commitments. There was no evidence that steps were taken in this regard and the trial judge found that this advice was not followed.

204 Additionally, the circumstances surrounding the resignation of the independent directors from Algoma's Board lend support to the trial judge's conclusion that reliance on the business judgment rule was unavailable. Mr. Dodds' letter stated that his decision to resign was driven by his conclusion that as an independent director, he lacked confidence that he was "receiving information and engaged in decision-making in the same manner as those Board members who are directly affiliated with the company and/or its parent". It was open to the trial judge to reach the conclusions he did. In these circumstances, the business judgment rule was of little assistance.

205 Essar Global also submits that the trial judge should not have gone on to censure the activities of the Board in November 2014 (when the Board approved the transactions) by relying on the Board's February 2014 decision regarding the independent committee.

206 The trial judge did not censure the decisions of the Algoma Board solely based on the February 2014 meeting. The February meeting, and the events surrounding it, are part of a larger context that included the November 2014 meeting, all of which the trial judge considered, and all of which demonstrated that the Board's decisions regarding the recapitalization were not made prudently or in good faith, as found by the trial judge, and thereby failed to attract the application of the business judgment rule.

207 Specifically, the trial judge found at para. 123 that, if the Board had acquiesced to forming an independent committee, or listened to the truly independent directors before they resigned in frustration, subsequent steps taken in pursuit of the recapitalization transaction "may have been taken differently". He then went on to say that:

> What happened in the Port Transaction was an exercise in self-dealing in that Algoma's critical Port asset was transferred out of Algoma to a wholly owned subsidiary of Essar Global with a change of control provision that benefited Essar Global at a time that a future insolvency was a possibility.

208 Additionally, the trial judge found that the Board had accepted the inclusion of the contentious change of control provision in the Cargo Handling Agreement without considering alternatives. If the provision was truly for the benefit

of GIP, it could have been accomplished in another way, without providing Essar Global with an effective veto over a change of control of Algoma.

209 All this evidence speaks to the Board's lack of business judgment and good faith, the failure to consider reasonable alternatives, and the Algoma Board's limited role in directing the recapitalization. There is no palpable and overriding error in the trial judge's conclusion that the Board was precluded from relying on the business judgment rule. His decision was amply supported by the record.

210 Essar Global makes an additional point relating to the business judgment rule: that, in any event, no independent committee was required under corporate law.

211 It is a contrivance for Essar Global to impugn the trial judge's conclusion regarding the business judgment rule on the basis that an independent committee was not required. Although it is true that an independent committee was not legally or technically required, the Board's decision not to strike one, in the circumstances surrounding the November 2014 restructuring transactions, speaks volumes. The decision not to strike an independent committee must be considered alongside the evidence I have already reviewed: the Board's lack of independence, the Board's failure to follow its advisors' advice, the Board's failure to consider alternatives, and the Board's acquiescence to recapitalization transactions that primarily benefited the interests of Essar Global over those of Algoma. Again, the totality of the evidence supports the Board's lack of good faith, and renders the business judgment rule inapplicable.

212 There is one final argument Essar Global raises in invoking the business judgment rule. It claims that it was procedurally offensive for the trial judge to criticize the directors for not following Mr. Schrock's advice because evidence of the advice was not before him. It adds that, had the directors relied on legal advice from Mr. Schrock in the legal proceedings, privilege had not been waived.

213 Here, the minutes of the Board meeting held in November 2014 describe Mr. Schrock as "informing the Board [that] the [unsecured noteholders] would not react well to the proposed changes and that they were likely to push [Essar Global] for a higher infusion of cash/equity into [Algoma] as set forth in the Commitment [L]etter". Mr. Schrock also commented that the proposed Port Transaction "was likely to cause concern by the [unsecured noteholders]". Accordingly, Mr. Schrock advised the Board to "insist that [Algoma] should press all parties to fully satisfy their . . . obligations regarding the equity contributions".

214 To the extent that Mr. Schrock's comments amounted to legal advice, I would first note that his advice was only one piece of the evidentiary puzzle in the broader factual context. Even if Mr. Schrock's advice, and the Board's failure to implement it, are disregarded, the record still amply supports the trial judge's conclusions on this issue.

215 I would also add that Essar Global's claim that the evidence of Mr. Schrock's advice was not before the trial judge is incorrect. The Board minutes were included in the record as an exhibit to an affidavit tendered by Essar Global. Finally, as for Essar Global's argument that privilege had not been waived, any privilege that may have attached to Mr. Schrock's advice belonged to Algoma and not Essar Global.

216 Fifth, Essar Global submits that the involvement of Algoma's management and Board in the Port Transaction sanitizes that transaction, because the trial judge concluded that Messrs. Ghosh and Marwah acted in good faith thinking they were doing the best for Algoma in the circumstances. Essar Global also claims that the trial judge erred by holding otherwise because the Monitor failed to attack the Board's process in its pleading. I do not accept these arguments.

217 Despite Essar Global's argument, this court has established that good faith corporate conduct does not preclude a finding of oppression: *Brant Investments Ltd. v. KeepRite Inc.* (1991), 3 O.R. (3d) 289 (Ont. C.A.).

218 Moreover, Essar Global's argument on this point ignores the trial judge's findings that Algoma's Board and management played a limited role in the Port Transaction. It also ignores evidence that indicates that Messrs. Ghosh and Marwah's support was only given because there was no alternative to address Algoma's financial straits. This factual

background demonstrates why it was open for the trial judge to conclude that the Port Transaction was oppressive, despite the good faith of Messrs. Ghosh and Marwah.

219 On the pleadings issue, I note that the Monitor pleaded that the Port Transaction was the result of Essar Global's "*de facto* control" of Algoma. In response, Essar Global pleaded that the Port Transaction was in the best interests of Algoma, based on the approval of the transaction by Algoma's Board and senior management, who were acting on an informed basis and with the benefit of financial advice. Given the way in which Essar Global framed its defence in its pleadings, it cannot now say that issues related to the Board's process were not properly before the trial judge.

220 Turning to the appellants' last argument relating to wrongful conduct and harm, they submitted that the trial judge identified two potential harms caused by Essar Global, neither of which is actionable in the oppression action: the undervalue of the Port Transaction to Algoma and the impairment of Algoma's ongoing restructuring.

221 In my view, it is inaccurate to characterize the trial judge's findings and analysis as concluding that harm flowed to stakeholders because the Port Transaction did not provide sufficient value to Algoma.

222 Specifically, he did not find that the US$171.5 million in consideration paid by Portco to Algoma constituted undervalue. Indeed his remedy that GIP be repaid in full suggests the contrary. Rather, he found that Essar Global received an unreasonable benefit from the Port Transaction.

223 Moreover, it was an exercise in self-dealing. As the trial judge stated at para. 144:

> For the balance of the first 20 years under the Cargo Handling Agreement after the GIP loan matures, if that agreement survives only to that date, Algoma will pay a further 12 years at $25 million, or $300 million, to Portco which will benefit Essar Global after the balance of the GIP loan is paid off. If the Cargo Handling Agreement is not terminated before the end of its life of 50 years, that will be another 30 years at $25 million, or $750 million, paid to Portco/Essar Global. Taken with the small amount paid by Essar Global, the $4.2 million in cash (and the $19.8 million note that it has refused to pay), it means that Essar Global will obtain an extremely large amount of cash from Algoma for little money. I realize that if Algoma became solvent and able to pay its debts, it would be able to pay a dividend to Essar Global (or the appropriate subsidiary) so long as Essar Global remained its shareholder. Whether and when Algoma could become solvent with its pension deficits that have existed for some time and be in a position to pay dividends to its shareholder is a significant unknown. But the payments under the Cargo Handling Agreement do not require any solvency test and are in the financial circumstances Algoma finds itself in, a clear contractual benefit for little money. It is an unreasonable benefit that was prejudicial to, and unfairly disregarded, the interests of the creditors on whose behalf this action has been brought by the Monitor.

224 The trial judge also concluded that the mismatched terms of the Cargo Handling Agreement (20 years renewable) and the 50-year lease offered Essar Global an additional benefit. In that regard, he was not bound to accept the evidence of the appellants' expert. He reasoned, at para. 142, that the Port was critical to Algoma's functioning, and therefore that Algoma would not be in a position to terminate the Cargo Handling Agreement for the duration of the lease:

> The other concerns are with respect to the obligations in the Cargo Handling Agreement. I have a concern with the imbalance in the term of the lease to Portco for 50 years against the term of the Cargo Handling Agreement for 20 years with automatic renewal for successive three year periods unless either party gives written notice of termination to the other party. If Essar Global thought that it wanted an increased payment after 20 years, it could refuse to continue the Cargo Handling Agreement and put Algoma at its complete mercy. If the market did not support an increased payment, or indicated that the payments from Algoma to Portco should be less in the future, Algoma would still be at the mercy of Essar Global. As the Port facilities are critical to the operation and survival of Algoma, it would be foolhardy indeed for Algoma to refuse to extend the Cargo Handling Agreement. The language in the Cargo Handling Agreement that Algoma can refuse to extend it after 20 years is illusory and not realistic. In reality, it is a provision that is one-sided in favour of Essar Global.

225 The change of control provision or veto was also an exercise in "self-dealing". The consent provision unnecessarily tied Algoma's strategic options to Essar Global. The trial judge properly found that the insertion of control rights in the Cargo Handling Agreement served no practical purpose to GIP and the same rights could have been provided for in the Assignment of Material Contracts.

226 As the trial judge concluded at para. 138:

> In my view, and I so order, the appropriate relief for the oppression involving the change of control clause in the Cargo Handling Agreement is to delete section 15.2 from that agreement and to insert a provision in the Assignment of Material Contracts agreement that if GIP becomes the equity owner of Portco, Algoma or its parent cannot agree to or undertake a change of control of Algoma without the consent of GIP.

227 There was evidence from Messrs. Ghosh and Marwah that supported the trial judge's conclusion that harm had flowed from the presence of the change of control provision and the ensuing letter from counsel. They were not cross-examined and no competing evidence was tendered by the appellants. It was also open to the trial judge to interpret the letter sent by Portco's counsel to Algoma's counsel as a veto threat to potential bidders while Essar Global continued to be interested in being a bidder. I would not give effect to this argument.

228 On the issue of the impairment of Algoma's ongoing restructuring, the appellants argue that no harm could have flowed from this, as the restructuring was not, in fact, impaired. Specifically, they argue that the only evidence of impairment consisted of statements in the affidavits of Messrs. Ghosh and Marwah that potential bidders for Algoma were concerned about the change of control clause. I would reject this argument as well. Again, I note that the appellants chose not to cross-examine on these affidavits, nor did they object to their admission into evidence. They cannot now, after the fact, impugn the trial judge's reliance on these statements.

229 Additionally, the appellants argue that it was premature for the trial judge to conclude that the control clause impaired the restructuring, because Portco/Essar Global was never asked to consent to a new transaction or to new owners. However, at para. 117, the trial judge noted that the change of control rights had to be considered alongside Essar Global's holding itself out as a prospective buyer in any bidding process for Algoma. That Essar Global has never been asked to consent to a new transaction was immaterial, as it remained in Essar Global's "interest to dissuade other buyers in order for it to achieve the lowest possible purchase price". In coming to this conclusion the trial judge pointed to the letter from counsel for Portco/Essar Global on May 12, 2016, which "sp[oke] volumes" by "clearly invit[ing] any bidder to understand that Essar Global has control rights."

230 I see no error in the trial judge's conclusion.

(5) The Remedy

231 Turning then to the issue of the remedy. Essar Global submits that the trial judge erred in striking out the control clause in the Cargo Handling Agreement and in granting Algoma the option of terminating the Port agreements upon repayment of the GIP loan. They argue that he was only permitted to rectify the harm that was suffered. Deleting the provision was an overly broad remedy that was unconnected to the reasonable expectations of the stakeholders and instead, he should have considered a nominal damages award.

232 GIP supports the submissions of Essar Global. It argues that the remedy awarded was not sought by any party, no evidence had been called in respect of that remedy, and no submissions were made. The practical effect of granting Algoma a termination right is that GIP does not have the security for which it bargained and it was prejudiced, despite its lack of involvement in the oppression found against Essar Global. GIP also argues that the Monitor and Algoma are seeking to set-off amounts owed by Essar Capital to Algoma against amounts owed to GIP, which results in additional prejudice.

233 I would not give effect to these submissions. First, trial judges have a broad latitude to fashion oppression remedies based on the facts before them. Once a claim in oppression has been made out, a court may "grant any remedy it thinks fit": *Pente Investment Management Ltd. v. Schneider Corp.* (1998), 42 O.R. (3d) 177 (Ont. C.A.), at para. 4. The focus is on equitable relief, and deference is owed to the remedy granted: *Fedel*, at para. 100.

234 Second, the trial judge properly identified the need to avoid an overly broad remedy, stating at para. 136 that there were "less obtrusive ways" of remedying the oppression than ordering shares of Portco be transferred to Algoma (the remedy the Monitor had originally requested). Varying the transaction as he did was one such way. The trial judge's remedy removes Portco's control rights (the main obstacle to a successful restructuring) and, after GIP is paid, restores the Port to the ownership of Algoma. If GIP becomes the equity owner of Portco, its consent will be required to any change of control. Unlike a damages award, the remedy was responsive to the oppressive conduct. It served to vindicate the expectations of the stakeholders that Algoma would retain long-term control of the Port and that Essar Global would not have a veto over its restructuring efforts.

235 Third, the remedy granted preserves the security GIP had bargained for and therefore GIP has not suffered any prejudice as a result of the remedy. The trial judge's remedy, as described at para. 145, ensures that GIP is to be paid in full. Until "payment in cash of all amounts owing to GIP" is made, the Port remains in Portco's hands and the contractual remedies held by GIP to enforce its security remain in place. Moreover, Essar Global guaranteed Portco's liabilities to GIP under GIP's loan in the Port Transaction, which further demonstrates GIP's lack of prejudice. As GIP's own affiant indicated, this guarantee provides GIP with "an extra layer of protection in the event the debtor is unable to repay the loan".

236 Finally, regarding the issue of set-off, I note that the arguments made by GIP in support of this ground were made prior to Newbould J.'s subsequent ruling dealing with this issue. In that decision, he held that Algoma had set-off amounts owed under the promissory note against Essar Global, but he preserved GIP's right to repayment. This decision is a full answer to GIP's arguments on this point, and ensures that GIP will not suffer any prejudice as a result of the remedy granted in response to Essar Global's oppressive conduct.

(6) Was There Procedural Unfairness?

237 Essar Global submits that the trial judge erred in basing his decision and relief on bases that were not pleaded. GIP supports the position of Essar Global, with particular focus on the remedy that was ultimately imposed.

238 As mentioned, the trial judge was the supervising *CCAA* judge and deeply acquainted with the facts of the restructuring. Of necessity, and on agreement of all parties to the oppression action, the timelines for pleadings, productions, and examinations were truncated. Additionally, no party objected at trial that the process had been procedurally unfair. Given the context and the complexity of the dispute, the pleadings were not as clear as they might have been in a less abbreviated schedule. That said, on a review of the record, I am not persuaded that there was any procedural unfairness with respect to the claims or that the appellants did not know the case they had to meet.

239 The focus of at least GIP's complaint lies in the remedy. The appellants are correct that the precise remedy awarded by the trial judge was not pleaded. A trial judge must fashion a remedy that best responds to the oppressive conduct and that is not overly broad. While it is desirable for a party seeking oppression relief to provide particulars of the remedy, a trial judge is not bound by those particulars. Because the discretionary powers under the oppression remedy must be exercised to *rectify* the oppressive conduct complained of (see: *Naneff v. Con-Crete Holdings Ltd.* (1995), 23 O.R. (3d) 481 (Ont. C.A.), at para. 27), it follows that the remedy will, by necessity, be linked to the oppressive conduct that was pleaded. Therefore a party against whom a specifically-tailored oppression remedy is ordered cannot fairly complain that the remedy caught them by surprise. This conclusion is consistent with *Fedel*, where this court upheld oppression remedies imposed by the trial judge where the relief granted had not been specifically pleaded or sought in argument.

240 Moreover, absent error, a trial judge's decision on remedy is entitled to deference. As I have discussed, there is an absence of error. Furthermore, in this case, there is no prejudice to GIP. Its position is preserved by the remedy granted by the trial judge. At the same time, the remedy is responsive to Essar Global's oppressive conduct.

241 That said, the trial judge did consider whether Essar Global and GIP could fairly argue that they were taken by surprise by his remedy. At para. 141, he rejected this position, holding that the issue of the change of control clause was pleaded by the Monitor, and affidavit material filed by both Essar Global and GIP provided evidence on the provision's significance. At para. 146, he concluded that issues relating to the relief he ordered were "fully canvassed in the evidence and argument", and that the remedy he ordered in fact was less intrusive than the remedy originally pled by the Monitor. And although he did not think an amendment was necessary, he nonetheless ordered that the Monitor would be granted leave to amend its claim to support the relief he granted.

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

(7) Fresh Evidence

243 Essar Global seeks to introduce fresh evidence on appeal that addresses the independence of Algoma's Board of Directors. It takes the position that the trial judge's rejection of the independence of two directors, Messrs. Kothari and Mirchandani, played a significant role in his decision. It adds that the lack of independent directors was not pleaded by the Monitor and so Essar Global had no reason to adduce this evidence earlier.

244 Messrs. Mirchandani and Kothari joined Algoma's Board in June and August 2014, respectively, after the three independent directors resigned. They were therefore on the Board when the Port Transaction was approved in November 2014.

245 Whether "a proper case" exists to allow fresh evidence is determined by applying the test outlined in *R. v. Palmer* (1979), [1980] 1 S.C.R. 759 (S.C.C.), or the slightly modified test from *Sengmueller v. Sengmueller* (1994), 17 O.R. (3d) 208 (Ont. C.A.).

246 As this court has noted, the two tests are quite similar: see *Korea Data Systems Co. v. Chiang*, 2009 ONCA 3, 93 O.R. (3d) 483 (Ont. C.A.), at para. 77. Under the *Palmer* test, the party seeking to admit fresh evidence must demonstrate that the evidence could not, by due diligence, have been adduced at trial; that the evidence is relevant in that it bears on a decisive issue in the trial; that the evidence is credible; and that the evidence, if believed, could be expected to affect the result.

247 Under the *Sengmueller* test, the moving party must demonstrate that the evidence could not have been obtained by the exercise of reasonable diligence prior to trial; that the evidence is credible; and that the evidence, if admitted, would likely be conclusive of an issue on appeal.

248 Essar Global has failed to meet either the *Palmer* or the *Sengmueller* test for two main reasons.

249 In both its original and its amended statement of claim, the Monitor alleged that representatives of Essar Global were members of Algoma's Board and exercised *de facto* control over Algoma, such that they made decisions for the benefit of Essar Global while unfairly disregarding the interests of Algoma's stakeholders. Essar Global cannot claim to have been caught by surprise by the issue of the Board's independence being in play. The fresh evidence could have been obtained with reasonable diligence prior to trial.

250 In any event, the evidence would not have affected the result at trial, and is not conclusive of any issue on appeal. The fresh evidence Essar Global asks to proffer consists of the affidavit of Mr. Mirchandani, which states that he and Mr. Kothari were determined to be independent Board members as a result of a conflict of interest policy and by virtue of the questionnaires they each completed.

251 However, there was evidence before the trial judge essentially to this effect, including Algoma's October 2014 offering memorandum, which stated that the Board included two independent directors. Indeed, the trial judge commented on this evidence in footnote 7 of his reasons, and rejected it in concluding that Messrs. Mirchandani and Kothari were not truly independent of Essar Global.

252 Additionally, and as I have already discussed elsewhere in these reasons, the remainder of the record strongly supported the Board's lack of independence. Even if the trial judge had Mr. Mirchandani's affidavit before him, it would not have made a difference.

253 I would therefore dismiss the motion for fresh evidence.

(8) Costs

254 GIP claimed costs of CDN$750,156.18 against the Monitor payable on a partial indemnity scale. It claimed it was entirely successful because it successfully resisted relief sought by the Monitor that would have prejudiced GIP. The trial judge exercised his discretion and observed that success between the Monitor and GIP was divided. He also relied on GIP's appeal as a basis to conclude success was divided. He therefore did not order any costs in favour of or against GIP.

255 GIP seeks leave to appeal the trial judge's costs award. Before this court, GIP in essence renews the arguments made before the trial judge. The awarding of costs is highly discretionary and leave is granted sparingly. I see no error in principle in the trial judge's exercise of discretion nor was the award plainly wrong: *Hamilton v. Open Window Bakery Ltd.* (2003), 2004 SCC 9, [2004] 1 S.C.R. 303 (S.C.C.), at para. 27.

256 At trial, GIP was unsuccessful in challenging both the Monitor's claim of standing and its claim that the Port Transaction was oppressive. It also seems incongruous for GIP to suggest that it was entirely successful in defeating the Monitor's claims, while it appeals the trial decision.

257 I see no basis on which to interfere with the costs award of the trial judge and would refuse leave to appeal costs.

E. DISPOSITION

258 For these reasons, I would dismiss the appeal, the motion for fresh evidence and the motion for leave to appeal costs.

259 As agreed, I would order that the Monitor and Algoma are entitled to costs of the appeal fixed in the amounts of CDN$100,000 and CDN$60,000 respectively, inclusive of disbursements and applicable taxes on a partial indemnity scale. At the oral hearing, the parties had not agreed on whether the award should be payable on a joint and several basis and requested more time to consider the matter. On September 15, 2017, counsel wrote advising that they had still not agreed on this issue. GIP requested the opportunity to make additional costs submissions on this issue at the appropriate time. Under the circumstances, I would permit GIP to make brief written submissions on this issue by January 10, 2018. Essar Global shall have until January 17, 2018 to file its submissions. The Monitor and Algoma shall have until January 24, 2018 to respond.

R.A. Blair J.A.:

I agree.

K. van Rensburg J.A.:

I agree.

Appeal dismissed; application dismissed.

Footnotes

1 Algoma was named in the proceeding below as a defendant, but supports the position taken by the respondent, Ernst & Young Inc. It is therefore a respondent on this appeal.

2 In early 2015, Essar Consulting obtained two additional valuations of the Port assets, one in February from Royal Bank of Canada and one in April from ICICI Securities. The RBC valuation, which was an exhibit to the affidavit of Joseph Seifert, was between US$165 and US$200 million. The ICICI valuation, which was an exhibit to the affidavit of Anshumali Dwivedi, was US$349 million.

3 Although Deutsche Bank intervened in the proceedings below, it was not involved in this appeal.

4 Before this court, no submissions on urgency were advanced.

5 Stephanie Ben-Ishai and Catherine Nowak, "The Threat of the Oppression Remedy to Reorganizing Insolvent Corporations" in Janis P. Sarra, ed., *Annual Review of Insolvency Law, 2008* (Toronto: Carswell, 2009) 429, at pp. 430-431 and 436.

6 Janis Sarra, "Creating Appropriate Incentives, A Place for the Oppression Remedy in Insolvency Proceedings" in Janis P. Sarra ed., *Annual Review of Insolvency Law, 2009* (Toronto: Carswell, 2010) 99, at p. 99.

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13

1994 CarswellAlta 353
Alberta Court of Queen's Bench, In Bankruptcy

Norris, Re

1994 CarswellAlta 353, [1994] A.W.L.D. 831, [1994] A.J. No. 699, [1995] 1 W.W.R. 292, 161 A.R. 77, 23 Alta. L.R. (3d) 397, 28 C.B.R. (3d) 167, 50 A.C.W.S. (3d) 175

Re Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended; Re bankruptcy of DAVID CARL NORRIS

Agrios J.

Judgment: September 21, 1994
Docket: Doc. Edmonton BKCY 39553

Counsel: *K.A. Rowan*, for Browning, Smith Inc., trustee in bankruptcy of David Carl Norris.
S.J. Bocock, for Minister of National Revenue.

Subject: Corporate and Commercial; Insolvency

Application by trustee in bankruptcy for declaration that payment to Revenue Canada was fraudulent preference.

***Agrios J.*:**

1 In this bankruptcy I held that a payment of $8,548.40 made to Revenue Canada was a fraudulent preference within the meaning of s. 95 of the *Bankruptcy and Insolvency Act*.

2 At the time the decision was rendered, I indicated to counsel that should they require written reasons I would be happy to provide such and I now do so at the request of counsel for Revenue Canada.

Facts

3 The facts are not in issue. On November 25, 1992 Revenue Canada received a payment on taxes of $8,548.40 from David Carl Norris. On January 26, 1993 Mr. Norris made a voluntary assignment into bankruptcy.

4 Revenue Canada had made a series of demands on the bankrupt. There was a letter on September 12, 1992, a notice of October 9, 1992 amending the balance owing and again demanding payment, and a final letter on October 24, 1992 making still a further demand and stating that if arrangements were not made for payment, legal action such as garnishee of income or instructions to the Sheriff to seize and sell assets might be made. On October 29, 1992 the bankrupt called Revenue Canada in response to the last letter, and requested a one-month grace period, which was granted and the aforementioned payment was received on November 25, 1992.

Issues

5 There is no serious dispute that the prima facie presumption under s. 95 as raised by the Trustee had established the three required criteria, namely:

1. that the transfer took place within three months of bankruptcy;

2. that at the date the transfer was made, it gave the creditor a preference in fact;

3. that the debtor was an insolvent person at the date of the payment.

6 Section 95(2) of the Act provides that the presumption may be rebutted on a balance of probabilities that the dominant intention of the debtor was not to prefer the creditor. There were only two issues that Revenue Canada could use to rebut the presumption:

1. they were a diligent creditor;

2. alternatively, the payment was made in the ordinary course of business.

Ordinary Course of Business

7 I have accepted the submission of counsel for the Trustee. As stated in its brief of law, all of the cases cited by Revenue Canada can fairly be characterized as payments made by the debtor in the ordinary course of its business to trade creditors for two reasons Firstly, so that the bankrupt might take advantage of favourable payment terms or, secondly, to secure a continued supply of goods and services from those trade creditors in order that it might continue in its business. There is no doubt that evidence that after payment on account, goods were supplied to the bankrupt by a trade creditor which, under normal circumstances, rebut the presumption. I accept Mr. Rowan's submission that Revenue Canada was not a trade creditor and there was no evidence that would assist Revenue Canada to be considered a trade creditor in having received a payment in the ordinary course of business.

Diligent Creditor

8 The case of *Houston v. Thornton* (1973), 18 C.B.R. (N.S.) 102 (Ont. S.C.), followed by *Coopers & Lybrand Ltd. v. O'Brien Electric Co.* (1983), 47 C.B.R. (N.S.) 243 (N.B. Q.B.), is cited for the following proposition [p. 103]:

> Both creditors had substantially overdue accounts and both were exerting every effort to obtain payment of their accounts. As has been so often said, our law does not penalize a diligent creditor. In order for me to set aside these transactions, I must find that there was a fraudulent scheme on the part of the debtor to prefer these creditors over other creditors.
>
> On the evidence, I cannot find any such scheme. Rather, I think it is a situation where diligent creditors have managed to obtain substantial payments on their accounts at a time when other creditors, who were not as diligent, did not obtain payment.
>
> ... The only reason for making the payments to the respondents was because the respondents were pressing more vigorously than other creditors for payment of their accounts.

9 I have again accepted the submissions of counsel for the Trustee that these authorities are characterized by a theme of an extremely aggressive creditor whose actions would cause an imminent business crisis unless they were dealt with. As Mr. Rowan stated: "The payments were motivated by a desire to 'get the creditor off the debtor's back', and because the continued actions of the creditor would cause an immediate business crisis."

10 Frankly, in my view, the forwarding of three letters, one of which threatened legal action and the subsequent granting of one month's grace period, could best be described as steps that any ordinary creditor would take, making demands and threatening legal proceedings. I accept the proposition that the actions of Revenue Canada, when compared with those in the cited authorities, did not amount to such aggressive action such as to create an imminent business or personal crisis for the bankrupt. Had Revenue Canada in fact taken garnishee proceedings or instructed seizure, I should have held otherwise.

11 Accordingly, as the presumed intention was not, in my view, rebutted on the balance of probabilities, I ordered that Revenue Canada pay the Trustee the sum of $8,546.40.

Application allowed.

1994 CarswellAlta 353, [1994] A.W.L.D. 831, [1994] A.J. No. 699, [1995] 1 W.W.R. 292...

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19

1936 CarswellSask 15
Saskatchewan King's Bench

A.R. Colquhoun & Son Ltd., Re

1936 CarswellSask 15, [1937] 1 W.W.R. 222, 18 C.B.R. 124

In re A. R. Colquhoun & Son Limited

Canadian Credit Men's Trust Association Limited v. Campbell, Wilson & Strathdee Limited

MacDonald, J.

Judgment: November 25, 1936

Counsel: *J. L. McDougall, K.C.*, for trustee.
H. F. Thomson, K.C., for defendant.

Subject: Corporate and Commercial; Insolvency

A motion on behalf of the trustee in bankruptcy to set aside payments of money and transfers of property made by the debtor to Campbell, Wilson & Strathdee Ltd. on the ground that the same gave a preference to Campbell, Wilson & Strathdee Ltd. over the other creditors within the meaning of sec. 64 of *The Bankruptcy Act* [9 C.B.R. 141]. The motion was also for an accounting for certain goods which had been returned by the debtor to said company within three months prior to the filing of the petition in bankruptcy. The debtor in order to hold a sale by which he hoped to reduce his stock and accumulate some ready money had exchanged with said company said goods, then unsaleable, for other goods which were more readily saleable.

***MacDonald, J.* (oral) (after stating the nature of the motion):**

1 Before any such payment or transfer of property can be set aside these conditions must be fulfilled as summarized in 2 *Halsbury*, 1st ed., p. 280:

> (1)The debtor must at the date of the transaction be unable to pay from his own money his debts as they fall due; (2) the transaction must be in favour of a creditor, or of some person in trust for a creditor; (3) the debtor must have acted with the view of giving such creditor a preference over his other creditors; (4) the debtor must be adjudged bankrupt on a bankruptcy petition presented within three months after the date of the transaction sought to be impeached.

2 Now in this case I find on the evidence the following facts: That any payment made by the debtor to Campbell, Wilson & Strathdee Ltd. within the three months in question were payments made for goods delivered during that period or for goods delivered in the month prior thereto, the ordinary time of credit for which expired during the period in question. I also find as a fact that during all that time there was the hope, however ill founded on the part of the debtor, that he would be able to extricate himself from his financial difficulties and that these goods were supplied with the hope of enabling the debtor to realize his expectations. As to the return of goods by the debtor to the creditor I am satisfied on the evidence that the same was done through an arrangement by which other goods would be supplied to the debtor in their place and the fact exchanges were made did not affect the assets of the bankrupt available for distribution among other creditors, because if these goods had not been returned to Campbell, Wilson & Strathdee Ltd. the new goods supplied in lieu thereof would have had to be paid for in cash.

3 Under this state of facts the question arises whether what the debtor did was done with a view of giving a preference to Campbell, Wilson & Strathdee Ltd. In *2 Halsbury*, 1st ed., p. 282, I find the following:

> Again, in order that a transaction may be a fraudulent preference, not only must the person who derives the advantage from the transaction be a creditor, but the act must have been done in his favour, and not in favour of anyone else. Where, therefore, although the creditor be in fact preferred in the sense of obtaining a benefit not shared by the debtor's other creditors, yet the act was done by the debtor with a view of benefiting himself, and not the creditor, then, even if all the other elements of fraudulent preference be present, the transaction cannot, on the ground that the creditor derives an advantage, be set aside.

4 For instance in *Sharp v. Jackson*, [1899] A.C. 419, 68 L.J. Q.B. 866, the facts were that a trustee who was in solvent circumstances and had committed a breach of trust, on the eve of insolvency, conveyed properties to make good his breaches of trust. It was held that as such conveyance took place with a view of protecting the trustee from the consequences of the breaches of trust, it was not a preference within the meaning of the Act. But perhaps the statement of the law which best fits the facts of this case is that by Blackburn, L.J., in *Tomkins v. Saffery* (1877), 3 App. Cas. 213, at 235,[1] where he says:

> Now I think you must say it is not with a view to give an undue preference, if a man makes a payment to a creditor in the ordinary course of business. Supposing a bankrupt, although knowing that he is very likely to stop payment next week, struggles on and makes a payment without being particularly asked; supposing he pays his debts and sends his money to meet his bills on those days on which they become due, and does other things so as to keep himself alive and in good credit for the time; that would not have been undue preference I think, because those payments were not made 'in favour of' certain creditors as against others, but were made in the hope — a desperate hope perhaps — that if he were able to keep himself alive something might turn up in his favour.

5 That is a statement so applicable to the facts of the present matter that I find it unnecessary to add anything. The motion is dismissed.

Footnotes

1 Although the Law Journal reports the same case, 47 L.J. Bk. 11, the report therein does not include the statement quoted. — Ed.

1952 CarswellOnt 104
Ontario Supreme Court, In Bankruptcy

Trafalgar Motors, Re

1952 CarswellOnt 104, 33 C.B.R. 87

In re Trafalgar Motors

Smily J.

Judgment: November 24, 1952

Counsel: *E. Houser* , for the applicant.
P. B. C. Pepper , for the respondent.

Subject: Corporate and Commercial; Insolvency

Smily J. **(orally):**

1 This is an application by the trustee for an order that: "The Royal Bank of Canada do repay to the Trustee the sum of $8,500.00 being the amount of a cheque received by it from the Debtor in or about the month of April, 1951, on the ground that such payment is void as a fraudulent preference."

2 When this matter originally came before the Court, I had considerable doubt as to whether this payment in question, the giving to the bank of $8,500 by the debtor company by way of a deposit in its account with the bank, was a preference within the meaning of s. 64 of *The Bankruptcy Act* [B. & G. 158]. I think the case is fairly close to the line, and certainly I think the trustee was justified in attacking the transaction from the evidence which he had before him. I have, since the matter came before the Court, given considerable consideration to the authorities on such matters, and having in mind that they indicate that it must be shown that the creditor and the debtor both had the view of giving the creditor a preference, and some cases have gone so far as to say that that must be the dominant view, I have come to the conclusion on the evidence which has now been given that the giving of this $8,500 (and I am using that term instead of "payment" to avoid any question as to the meaning of the word), by the debtor to the bank, in the manner mentioned, was not with such a view. I accept the evidence given by the bank manager, Mr. Peat, and by the inspector, Mr. Stephenson, and also by Mr. Isard, of the circumstances relating to this matter, and that evidence does, in my opinion, explain the transaction in such a light that I do not think it was a preference within the Act.

3 I am of the opinion that the bank has rebutted any *prima facie* assumption under s. 64(2). I do believe that the circumstances might have appeared suspicious and I think that it might have appeared to the bank, from all these circumstances, that the financial position of the debtor was not a good one, but I do not think that goes so far as to indicate to the bank that the debtor was insolvent. The fact that cheques had been presented to the bank, cheques of the debtor for which there were no funds, might, and I think should, suggest that the financial position of the debtor might not have been very good, but on the other hand, I do not know whether it necessarily went even that far. In a business such as the one this debtor carried on, where I would infer that trade paper was given to a finance company referred to as "Traders Finance", from which there would be money coming in on the strength of it, the debtor might be able to count on money coming from this finance company to cover the cheques that were issued, and if that was so its financial position might not have been actually unsound, and in any event I do not think the company could be said to have committed an act of bankruptcy, consisting of the failure to pay its debts as they became due. I do not think that those circumstances would go that far, nor do I think they would constitute a sufficient notice to the bank, within the authorities, to require the bank to make some inquiry as to the financial condition of the debtor. It would not put the

bank in a position, if it did not inquire, that it was purposely abstaining from inquiring in circumstances which would make it incumbent upon it to do so.

4 I have referred to an explanation that might cover the matter of the cheques being presented when there were not sufficient funds, and the fact that the bank called the loan, that is, demanded payment of the note, is not, to my mind, particularly significant in fixing on the mind of the bank notice of insolvency on the part of the debtor. It must be remembered that the note was a demand note and would not be payable until demand had been made for its payment, and I think the manager of the bank was justified in, as he said, protecting the bank by demanding payment so that the loan would then become a debt, and the note would then become owing to the bank.

5 Further, as to the assignment of book debts and accounts generally, which the bank took and which at first would look to be rather suspicious inasmuch as it was taken about this same time when the cheques were being presented without sufficient funds, this was explained by the bank manager and also by the inspector of the bank when they said that it should have been taken at the time the accommodation was arranged with the debtor and the note was taken and the loan was made. It was shown that it was the intention at that time, and in fact was a condition of the loan being made, that this assignment would be taken, but apparently it was overlooked by the bank manager at Oakville, Mr. Peat, and it was only when the inspector, Mr. Stephenson, in checking the records of the bank noticed that the assignment had not been taken that it was drawn to Mr. Peat's attention and he then took steps to rectify the omission.

6 I accept the explanation of Mr. Peat and Mr. Stephenson with respect to that, and in my opinion this explains the taking of this assignment and removes the suspicion that would otherwise surround it. It also rebuts the *prima facie* presumption raised by subs. 2 of s. 64. The evidence is substantially that at this time, although the debtor company was, as one might say, in a bad way, efforts were being made by Mr. Isard for one of the officers, Mr. Darlington (and by the officers generally, I have no doubt), to continue the business of the company, and the position of the company from the standpoint of the bank manager was that these efforts were being made, and that some consideration was being given to the situation by the officers. Mr. Darlington apparently was considering putting more capital into the company, persons were interested in putting money into it or buying the business and continuing it, and that seemed to be the picture rather than that the company was insolvent, and might shortly go into bankruptcy. In other words, the emphasis at that time seems to have been on the possibility of money being put into the business or on the possibility of steps being taken to carry on the business as a going concern. It did appear that Mr. Cook, who had the same type of business, was interested in the prospect of continuing the business, and having in mind that the location was a good one, and that it might appeal to a person like Mr. Cook, who, as I say, was engaged in a similar business, the possibility of his continuing the business would seem to be not at all improbable and would probably overshadow, in the minds of the persons interested, the matter of immediate bankruptcy. I do not think that the evidence with respect to the payment or giving of the $8,500 to the bank, although it may be said to be suspicious, goes far enough to show that the company had in view, by the making of this payment or giving of this money to the bank, that the bank should have a preference over other creditors.

7 The fact that the officers of the company were liable on a guarantee, of course, raised a suspicion that they were desirous of protecting themselves. I think the explanation given in the evidence is consistent with that not being the dominant view. As to the bank manager taking the steps he did, I do not think one can criticize him for taking steps to protect the position of the bank in regard to the indebtedness of a customer. The mere fact that he took aggressive action to liquidate that indebtedness should not, I think, fasten on the bank the suggestion that it was trying to obtain an advantage over other creditors. While that may be the effect of what was done, I do not think that the action was open to objection.

8 Now as to whether this indebtedness of $8,500 was covered by the assignment, already referred to, given to the bank. While I do not think it is essential for a decision of the matter, it does go to one feature of the case, and I do think it was wide enough to include this money. It includes "all accounts, debts, dues, payments of every nature and kind, assigned or secured and now due, or accruing or growing due, or which might hereafter come due" to the bank or to the debtor company. It is very wide and I think at the time this transaction was entered into with Mr. Cook and the documents were signed by the company, although the payment was made simultaneously, or about simultaneously, as counsel for

the trustee states, there would be an obligation under that. The evidence does not show, certainly, that the money was paid before the documents were signed, or before the agreement was entered into, and when the agreement was entered into there would be an obligation to pay the money and I think that would be an account or debt within the meaning of this assignment. That would add, I think, to the position of the bank to show that the receipt of this money was not a preference within the meaning of the section.

9 I do not know if I need refer to the question whether the transfer by the bank of this money from the deposit account to the loan account constitutes a payment. The authorities are quite clear on that, that that is not a payment at all.

10 In the result, therefore, I must hold that the trustee's application to require the bank to repay to the trustee this sum of $8,500, the amount of a cheque that was received by the bank and on the evidence was put into the deposit account of the debtor company at the bank in or about the month of April 1951, must fail, on the ground that such payment was not made with a view of giving a preference, and I must hold that the payment to the bank, or receipt by the bank, of this money is not a fraudulent preference. I mentioned before that I did not think the evidence went far enough to show that it was given to the bank by the debtor with a view of making it a preference or of preferring the bank. I might also have added that the evidence does not show that it was taken by the bank with such a view, and on the evidence I think I should find, and I do find, that it was not taken by the bank with such a view. The costs of the bank shall be paid out of the estate. The trustee of course is also entitled to his costs out of the estate. Is there enough money to pay these?

11 MR. HOUSER: "There is money in the estate, but with all due respect I am wondering if this is a case where the bank should have costs. It was a matter in which you felt the trustee was justified in bringing in the motion because of the suspicious character of the transaction."

12 THE COURT: "I do not think that is the fault of the bank. I think the trustee was justified in bringing the matter to the Court."

13 MR HOUSER: "Then all we are doing, if the trustee has been justified in bringing the matter to the Court, and the bank has been able to answer, is penalizing the ordinary creditors further by the payment of costs. Now I think the bank has had considerable success in retaining their funds. At least they can contribute to the bankruptcy, which is a very poor one, the costs of this proceeding. As far as their solicitors are concerned, I would think that the net result is that the bank should be very happy with such a result. I will leave it with your Lordship."

14 MR. PEPPER: "I am sympathetic, but my instructions are to ask for costs and I am afraid the bank is entitled to costs. Is my friend putting it on the basis that there is no money?"

15 THE COURT: "He is putting it on the basis that it means that the creditors are paying the costs. It is not an easy thing to deal with equitably. It is difficult for the creditors, but I suppose, in a sense, it is difficult for the bank."

16 MR. HOUSER: "I am not quarrelling with your Lordship, but the $8,500 was paid in full one week prior to the time that the creditors found their debtor in bankruptcy with a dividend of perhaps 10 or 15 cents on the dollar, and as you stated in your judgment, the circumstances are such as to warrant the motion being brought. If your Lordship had reached the other conclusion, that the circumstances were not such as to warrant the motion, then I would never have raised the question as to costs. I think in these circumstances if the estate pays the solicitor for the trustee his expenses, that would be a severe enough penalty on the creditors, without having to pay both parties."

17 THE COURT: "I think there is a lot in what you say, Mr. Houser. I will give it thought and give judgment on it later. If you have nothing further to add, Mr. Pepper?"

18 MR. PEPPER: "I have, my Lord. I do not think the bank should be penalized just because my friend had reason, or the trustee had reason, because in so many cases a plaintiff has reason for bringing his action."

19 MR. HOUSER: "If the bank manager had not omitted to take the assignment of accounts receivable we would never have been before your Lordship."

20 THE COURT: "Yes, that looked suspicious."

16

1940 CarswellOnt 64
Ontario Supreme Court, In Bankruptcy

Aboud, Re

1940 CarswellOnt 64, [1941] 1 D.L.R. 801, 22 C.B.R. 121

In re Abraham Aboud

Urquhart J.

Judgment: October 30, 1940

Counsel: *J. D. F. Ross*, for the trustee.
S. Cohen, for Lena Aboud, wife of the debtor.

Subject: Corporate and Commercial; Insolvency; Civil Practice and Procedure

The motion of the trustee was accordingly dismissed.

***Urquhart J.*:**

1 This is an application by the trustee for an order declaring fraudulent and void, as against the trustee, a certain chattel mortgage, made by the debtor to his wife, which mortgage is dated January 3, 1940, and was registered in the office of the Clerk of the County Court on January 5, 1940, and also for an order declaring that the said Lena Aboud is a restricted creditor within the meaning of sec. 116 of *The Bankruptcy Act* [14 C.B.R. 14].

2 Mr. and Mrs. Aboud, and Mr. Aboud's daughter, were examined by the trustee at great length and the trustee bases his case on what is to be found in these examinations. Although it does not appear that the mortgagee, Mrs. Aboud, had much chance to examine at the time she was represented on the examinations by her solicitor and her counsel has consented to argue the case on the evidence brought out on these examinations. Both sides have waived any question as to the regularity of the proceedings.

3 The facts are as follows: the debtor made an assignment in bankruptcy on March 8, 1940. On January 3, 1940, the chattel mortgage in question was given to secure the sum of $660, which was advanced at that time by Mrs. Aboud to her husband, the debtor. The creditor, Mrs. Aboud, appeared before me and, with the consent of all parties, was asked some questions about herself and her husband. These people have been in Canada about 30 years. The husband is a storekeeper and has been keeping a store in Havelock, which is the subject of the bankruptcy, since just before the last Great War. His wife is 51 years of age and he is 60, but neither one of them speaks good English. She is a woman of little or no education. The books of the business were run by their son who was about 24 years of age. Some years ago, the husband had two businesses, the one in Havelock and one in Marmora. Their daughter-in-law wanted to buy the debtor out of the latter and she applied to the wife of the debtor, Lena Aboud, for a loan of $1,200. The money was money earned by Mrs. Aboud before she was married and it had been her custom to keep her money in a cash box in the house. She did not know much about banks or understand banking very well so she kept her money by her. She took the money to Marmora and paid it over to the daughter-in-law and then within a day or two she had a lawyer draw the chattel mortgage which is still subsisting and about half paid off. Mrs. Aboud in her examination does not show a great knowledge of business but she says as follows in regard to this chattel mortgage:

Q. 83. And it was your suggestion that you take a chattel mortgage?

A. Yes, my suggestion.

Q. 84. Do you know what a chattel mortgage is?

A. What is it?

Q. 85. I am asking you what is it?

A. With a chattel mortgage I am sure of my money.

Q. 86. Who told you that?

A. I used to hear that a long time ago.

Q. 87. Have you ever been in business at all — had any business experience?

A. No I didn't my dad used to tell us lots of things, I just have that.

4 It is clear from these questions that she understood in a general way what a chattel mortgage was but particularly she understood that when she loaned money and took a chattel mortgage back she was secured.

5 No question has been raised about the validity of the chattel mortgage at Marmora, although the trustee went to great lengths to investigate same.

6 Mrs. Aboud was also questioned about the chattel mortgage in question here and she says that in January her husband asked her for a loan and she loaned him the sum of $660. There is a considerable suggestion that he was being pressed by his creditors, for example:

Q. 162. Under what circumstances did he borrow this money from you?

A. Well he needed he said for the business he asked me I would lend it he said he was stuck for the business.

Q. 163. I suppose you were very much interested in knowing how Mr. Aboud's business was getting on?

A. No, his business different from my business.

Q. 164. He came to you in January and he said he was stuck for some money in the business?

A. Yes.

Q. 165. You knew as a matter of fact that business was not very good?

A. I know his business wasn't paying because I know from my son.

7 It is clear that she knew that some creditors the debtor could not pay were getting after him (see question 168). He asked her to help him out. She adopted almost the same procedure in this instance as she had adopted in the case of the loan to her daughter-in-law. There is some dispute between husband and wife as to what had been asked for. The debtor says in his examination that he asked for precisely $660. She said that he took all she had. The money was handed over and the chattel mortgage was taken within a day or two in much the same manner as the earlier chattel mortgage transaction was conducted.

8 It is conceded by both sides — and the case was argued on that basis — that although there was the slight lapse of time between the date of the handing over of the money and the signing of the chattel mortgage, it was all part of a contemporaneous transaction and was so regarded and that this woman loaned the money, as she had in the previous instance above mentioned, on the strength and faith of the chattel mortgage.

9 The chattel mortgage in question covers practically the whole stock-in-trade of the debtor. Mrs. Aboud says that she went down to the store herself and saw what she wanted to put in the mortgage, making a list of the various articles that she wanted inserted therein.

10 The money received was handled by the husband in a rather peculiar manner but I do not see that that affects the situation very much. He did not put the $660 which he received into the bank but he kept it by him and as creditors sent in drafts he would pay into the bank the amount of the draft and the bank would pay the amount out to the creditor. It is conceded that all moneys received by the debtor from his wife actually went out in payment to the creditors, I presume to the most pressing creditors.

11 It is quite clear from the evidence of both husband and wife that the wife had no connection with the business of her husband and had nothing to do with it at all and did not know, except what she had been told by her son, that the creditors were pressing. No entry went into the books of the debtor about this transaction with the wife nor did the payments made to the creditors go in the books.

12 The husband in his evidence, question 302, said that his wife did not know that he was in very bad shape, and a subsequent question, 304, only goes to show that the son knew that business was slow and that they could not do very much business. Soon creditors started to sue the debtor and he settled with them but he said his wife knew nothing about this either.

13 The argument for the trustee is largely based upon the provisions of sec. 116 of *The Bankruptcy Act*. Section 116 reads as follows [14 C.B.R. 14]:

> 116. Where a married man has been adjudged bankrupt or has made an authorized assignment his wife shall not be entitled to claim any dividend as a creditor in respect of any money or other estate lent or entrusted by her to her husband for the purpose of his trade or business, or claim any wages, salary or compensation for work done or services rendered in connection with his trade or business, until all claims of the other creditors of her husband for valuable consideration in money or money's worth have been satisfied.

14 He further argues that it is proved that the wife had knowledge of the insolvency and that there was a concurrent intent to create a preference, or that the wife, if she did not know of the insolvency, knew that creditors were pressing and that it was her duty to inquire.

15 Now sec. 116 and the following sections were put into the Act in 1932 for the purpose of protecting creditors against fictitious and other claims that were so often made by close relatives of the debtor and which had the effect of cutting down the dividends whether or not the claims were allowed or disallowed.

16 The trustee argues that had the wife in this case loaned the money without taking security, her claim for a dividend would be restricted, that is, it would have to stand aside until the claims of all other creditors for valuable consideration had been satisfied, and therefore if the wife was a restricted creditor the fact that she had taken security would not make her position any higher. She would still remain a restricted creditor. He also said that she was presumed to know the law and that she took the risk of becoming such restricted creditor when she made the loan.

17 I do not think I can agree with this argument. To deal with the last point first, she loaned but she did not intend to take any risk; she loaned only upon security and it was upon a security that she knew from previous experience was effective.

18 Then, secondly, it must be noted that sec. 116 only prevents the wife claiming a dividend and therefore it is evident that this section refers only to unsecured creditors or to creditors whose security is deficient, viz., those who have valued their security at less than the amount of their claim, which the wife did not do in this case. So that it seems clear to me that if the wife is a secured creditor and if she is content to rely on her security and not to claim a dividend, that this section

has no application to her. If she had valued her security at less than the amount of her claim then, of course, she would be deferred as to the balance of her claim until the claim of other creditors had been satisfied. But she has not done this.

19 The trustee also argues that the onus is shifted by virtue of sec. 64 to the creditor and this section reads as follows [9 C.B.R. 141]:

> 64. Every conveyance or transfer of property or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any insolvent person in favour of any creditor or of any person in trust for any creditor with a view of giving such creditor a preference over the other creditors shall, if the person making, incurring, taking, paying or suffering the same is adjudged bankrupt on a bankruptcy petition presented within three months after the date of making, incurring, taking, paying or suffering the same, or if he makes an authorized assignment, within three months after the date of the making, incurring, taking, paying or suffering the same, be deemed fraudulent and void as against the trustee in the bankruptcy or under the authorized assignment.
>
> 2. If any such conveyance, transfer, payment, obligation or judicial proceeding has the effect of giving any creditor a preference over other creditors, or over any one or more of them, it shall be presumed *prima facie* to have been made, incurred, taken, paid or suffered with such view as aforesaid whether or not it was made voluntarily or under pressure and evidence of pressure shall not be receivable or avail to support such transaction.
>
> 3. For the purpose of this section, the expression 'creditor' shall include a surety or guarantor for the debt due to such creditor.

20 It will be noted so far as we are concerned here that it must be a charge on property to which the section applies. It must be made by an insolvent person and in favour of a creditor with a view of giving such a creditor a preference over other creditors. Does this section apply to a transaction of the sort in question?

21 As I understand the case, to make a charge or transfer a fraudulent conveyance, the following elements must be present: (1) the debtor must know himself to be on the eve of insolvency and he must be on the eve of insolvency; (2) the intention of the debtor must be to give the favoured creditor the unjust preference; (3) the effect of the transaction must be to give him that preference; (4) the creditor must have known the debtor's situation; (5) he must have intended to get that preference, and (6) that the preference must be a fraudulent preference.

22 I cannot see how we can, on the evidence in this case, assume that even considering that the debtor knew himself to be on the eve of insolvency — which is very doubtful — there is an intention on one side to give and on the other side to take an unjust preference. This appears to me to be a business transaction to enable the debtor to stay in business and the result of the transaction, as far as other creditors are concerned, is that all the moneys received by the debtor in regard to the matter actually went to the creditors and in reduction of their claims.

23 Then, again, the bankruptcy does not appear to me to be a very substantial one as there was only a deficiency of some $680 on the statement of affairs given by the debtor, although the actual deficiency after sale of the assets was considerably more as it always is in such cases.

24 It seems to me that the intention of sec. 64 was to prevent a creditor who has in the past loaned money or sold goods without security from getting a preference by taking security or a transfer shortly before the bankruptcy. Now Mrs. Aboud had not already involved herself in any way. The debtor came to her and asked her to advance the money and she was willing to do so on certain terms and the debtor complied with those terms and the business was helped along and no moneys were pocketed by the debtor for his own use. Were it not for the decision *In re Goldstein* (1922), 3 C.B.R. 404, 53 O.L.R. 60, 3 Can. Abr. 1189, 1199, 1237, under all these circumstances I would have thought that sec. 64 does not throw any onus on the creditor in this case, as it was not a transaction made with a view to give the creditor a preference in my opinion but was an ordinary business transaction whereby the creditor loaned money to help in the

business on contemporaneous security. She might easily have saved her money. The mortgage was, as I see it, not made with the object of defrauding creditors in any way.

25 The *Goldstein* case presents much similarity to the present. In that case the creditor, a sister-in-law, was already a substantial creditor of the debtor to the extent of nearly $1,000 advanced by her at different times. She refused on the debtor's application for a loan to advance anything further to the debtor without security. However, she arranged with him to loan him $1,200 on a second mortgage for $1,500 on certain land owned by the debtor, the excess being in the nature of a bonus, which bonus was subsequently disallowed by the Court. She knew that the bank was pressing him for payment of $1,000 but there was no evidence that at the time of the loan she knew more about his financial condition other than that he owed her about $1,000 and required a somewhat similar sum to pay off the bank. She thought that he was in a good business and that it would pick up. The debtor said he did not tell her he was insolvent and that so far as he knew she did not know that he was insolvent. Within a month he assigned. The money had been used, $1,000 to pay off the bank loan and $200 for the confinement of the debtor's wife, which were the reasons for which the advance was made.

26 Fisher J., at p. 407 (53 O.L.R. 63), says: "The onus is on the appellant ..., under s. 32(1)(ii) of the Act" (now section 65 of the Act), so I must also find that the onus in the present case is on the creditor. Fisher J. goes on to say:

> The learned registrar came to the conclusion that in consequence of the debtor not being able to pay his debts she (the appellant) must be taken to have been aware of his insolvency, and that the result of the loan by the appellant to the debtor was to make her a secured creditor, contrary to sec. 31 of the Act, and her mortgage *prima facie* null and void under sec. 32, as she knew or should have known, that the debtor was insolvent and the element of good faith was lacking. If that were so, it would be impossible for any one finding himself in need of ready money to mortgage his property to relieve a pressing claim. I do not think the Act contemplated that construction. The mortgage does make her a secured creditor but the cash she advanced was paid to the bank and the debtor's liabilities were reduced, to the advantage of the creditors. In my view of the facts, I am of opinion that the debtor's dominant motive in securing this loan and giving the mortgage was to obtain money to pay the bank, and thus relieve the pressure from that source. Sec. 31 of *The Bankruptcy Act* prohibits a fraudulent preference, but when there is no evidence of an intention to prefer on the part of the debtor, and no concurrent intent on the part of the creditor, the transaction is not fraudulent within the meaning of sec. 31. This was held by Mr. Justice Orde in *In re Webb* (1921), 51 O.L.R. 5, 2 C.B.R. 16, wherein he decided that there must be a common or concurrent view or intent on the part of a debtor and also on the part of the creditor to create a preference before sec. 31 of *The Bakruptcy Act* applies, following *Benallack v. Bank of B.N.A.* (1905), 36 S.C.R. 120, 20 Can. Abr. 1038; *Molsons Bank v. Halter* (1890), 18 S.C.R. 88, 3 Can. Abr. 1152, 1215; *Gibbons v. McDonald* (1892), 20 S.C.R. 587, 3 Can. Abr. 1155, and a long line of cases upon *The Assigments and Preferences Act* ...

27 His decision was affirmed by the Appellate Division, reported at p. 65 (53 O.L.R.), where Meredith C.J.O. says:

> The respondent made an advance to the debtor of $1,200, and took a mortgage as security. It is now sought to have the mortgage set aside as being void against creditors. The transaction cannot be said to be a fraudulent preference within the meaning of sec. 31 of *The Bankruptcy Act*. There was no evidence of intent to prefer on the part of the debtor nor of concurrent intent on the part of the creditor, and the presumption which that section makes is rebutted. The security was given for a present loan, and not for an existing debt, and sec. 31 has therefore, no application.

28 To my mind the two cases are so similar in facts, in the intention of the parties and the knowledge of the parties that the above reasoning would apply with equal force to the present case. There appears to me in the present case to be no concurrent intent and the transaction seems to be an honest transaction to enable the debtor to continue to carry on his business and there is no fraud that I can find. The circumstances are wholly explained by both debtor and creditor and therefore the trustee must fail in his attack on the chattel mortgage.

29 On the second point of the motion, the creditor has made no claim for more than her security and so in my opinion it is unnecessary to answer the question as to the effect of sec. 116, except in so far as it has been answered in dealing with the main motion.

30 The creditor having succeeded, her costs must be paid out of the estate. With some hesitation, as I think that on the evidence taken on the examinations the motion had little chance of success, I direct the trustee's costs to be paid out of the estate. Trustees, however, especially when advised by counsel, should exercise great care in bringing motions of this sort, because if they are unsuccessful the other party is put to expense which greatly exceeds any costs which may be allowed. This is particularly true of the present case.

31 Order accordingly.

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1922 CarswellOnt 80
Ontario Supreme Court, In Bankruptcy

Goldstein, Re

1922 CarswellOnt 80, [1923] 1 D.L.R. 864, 3 C.B.R. 404, 53 O.L.R. 60

In re Goldstein

Trustee v. Needle

Fisher, J.

Judgment: October 17, 1922

Counsel: *A. M. Lewis*, for appellant, mortgagee.
J. A. Soule, for the trustee.

Subject: Corporate and Commercial; Insolvency

An appeal from the judgment of Holmested, K.C., registrar in bankruptcy, delivered on September 29, 1922, in which the learned registrar set aside and declared invalid a certain land mortgage given by the debtor to Annie Needle, the creditor appellant, securing $1,500.

***Fisher, J.*:**

1 The mortgage is dated February 1, 1922, and registered February 4, 1922, and is a second mortgage against the lands described therein. The mortgaged property is valued at about $4,500. There is due on the first mortgage registered against the land $3,000 for principal.

2 The learned registrar took *viva voce* evidence and it appears from that evidence and material filed that the debtor admitted that he had been in insolvent circumstances for many years prior to the date of the giving of the mortgage. He started in a boot and shoe business in Hamilton about eight years ago having a capital of about $300 and at that time was indebted in the sum of $1,000 to several creditors incurred in a confectionery business carried on by him for some years prior to his entering into the boot and shoe business. These creditors were not pressing him, and obtaining credit in his boot and shoe business he was enabled to carry on until he made an authorized assignment on February 28, 1922, to F. H. Lamb, an authorized trustee. At the time of the authorized assignment he was doing his banking business with the Bank of Hamilton. The appellant is a sister-in-law of the debtor, and at different times, since 1914, he had borrowed sums of money from her amounting in all at the date of the mortgage in question to $995.85.

3 The debtor had been asked on several occasions for payment of this money by the appellant; she was put off and the money was not paid. She thought his business would improve and sometime she would get her money. In July, 1921, the debtor became ill and had to go to Chicago for treatment. He had an equity of redemption in certain other lands in Hamilton which he sold to the appellant for $750. This money was used to defray his expenses and cost of living during the period he was ill.

4 In the latter part of January, 1922, he again requested a further loan of money from appellant and she refused to lend him any more owing to his existing indebtedness to her, without security, and it was arranged that if he would give her a second mortgage (the one attacked in this case) for $1,500 she would advance him $1,200, and this was done. The $300 was to be a bonus for making the loan. She thought she was entitled to this as she had never received any interest on the moneys the debtor already owed to her. At the time he requested the loan of $1,200 he informed the

appellant his bank was pressing him for money and he must have $1,000 to pay to the bank. The $200 he wanted to defray expenses in connection with his wife's confinement. There is no evidence before the Court that the appellant, at the time this mortgage was given, knew anything of the financial condition of the debtor other than he owed her $995.85 and that he required $1,000 to pay to his bankers. She thought he was in a good business and that his business would "pick up." The debtor swore that he did not tell her he was insolvent when he applied to her for the loan of $1,200 and that so far as he knew she had no knowledge that he was insolvent. She knew however that he was not able to pay her the $995.85. He was her brother-in-law, and she was not pressing him for this. Within a month — on February 28, 1922 — after the mortgage in question was given the debtor assigned.

5 The question for determination is — was this mortgage given "with a view" and has it "the effect" of giving to the appellant a preference over the other creditors of the debtor? If so it is clearly within sec. 31 of *The Bankruptcy Act* [1 C.B.R. 38] and void as against the present trustee, *unless* the appellant can show the mortgage was made in good faith and she had no knowledge of any act of bankruptcy committed by the debtor before that time. There is no dispute that the appellant advanced the $1,200 at the time the mortgage was given, and that the debtor immediately paid $1,000 to the bank. There was in this transaction an adequate valuable consideration given at the time the mortgage was taken, and the real question for the Court to decide is — did the mortgagee at the time she took the mortgage and paid over the $1,200 have notice of any act of bankruptcy of the debtor?

6 The onus is on the appellant to show this [the want of notice] under sec. 32 (1) (ii.) of the Act [1 C.B.R. 39 and 571]. Has she satisfied this onus? If she has not, as I have stated this transaction comes within the meaning of sec. 31 of the Act and is invalid.

7 There is no question that the debtor was, at the time of the giving of the mortgage, an insolvent person within sec. 31. The definition of those words is found in par. (*t*) of sec. 2 [1 C.B.R. 5]. There is no question too that he had been unable to meet his obligations as they became due, but I think I am right in concluding she was not aware of any available act of bankruptcy of the debtor at the time she took the mortgage [2]. There is no evidence that she had any object in assisting the bank in obtaining $1,000 from the debtor. It was no advantage to her. There was no attempt on her part to include in the mortgage the $995.85 he already owed her, and I can find no element of bad faith on the part of the mortgagee — she gave adequate valuable consideration. One might reasonably conclude that as the appellant knew $1,000 was to be paid to the bank that this payment would enable the debtor to continue to carry on his business and that there was no intention to prefer; see *Burns v. Royal Bank*, 2 C.B.R. 241.

8 The learned registrar came to the conclusion that in consequence of the debtor not being able to pay his debts she must be taken to have been aware of his insolvency, and that the result of the loan by the appellant to the debtor was to make her a secured creditor contrary to sec. 31 of the Act, and *prima facie* null and void under sec. 32, as she knew or should have known the debtor was insolvent and the element of good faith was lacking. If that were so, it would be impossible for anyone finding himself in need of ready money to mortgage his property to relieve a pressing claim. I do not think the Act contemplated that construction. The mortgage does make her a secured creditor but the cash she advanced was paid to the bank and the debtor's liabilities were reduced to the advantage of the creditors. In my view of the facts, I am of opinion that the debtor's dominant motive in securing this loan and giving the mortgage was to obtain money to pay the bank and thus relieve the pressure from that source. Sec. 31 of *The Bankruptcy Act* prohibits a fraudulent preference, but when there is no evidence of an intention to prefer on the part of the debtor and no concurrent intent on the part of the creditor the transaction is not fraudulent within the meaning of sec. 31. This was held by Mr. Justice Orde in *In re Webb* (1921) 51 O.L.R. 5, 2 C.B.R. 16, wherein he decided that there must be a common or concurrent view or intent on the part of a debtor and also on the part of the creditor to create a preference before sec. 31 of *The Bankruptcy Act* applies, following *Benallack v. Bank of B.N.A.* (1905) 36 S.C.R. 120; *Molsons Bank v. Halter* (1890) 18 S.C.R. 88; *Gibbons v. McDonald* (1892) 20 S.C.R. 120; and a long line of cases upon *The Assignments and Preferences Act* of Ontario.

9 I must therefore hold that the security attacked in this case is not void, and the appeal is allowed with costs; the trustee to have his costs out of the estate.

Appeal allowed.

Footnotes

1 PREFERENCES. — PROTECTED TRANSACTIONS — BANKRUPTCY ACT, SEC. 32. Although notice of an available act of bankruptcy is not shown, it seems that there is a want of good faith under sec. 32 if payments are made by the bankrupt when in a hopeless state of insolvency for the one purpose of preferring particular creditors so that his guarantors might be relieved from their obligations under their guaranties held by the particular creditors, if the latter knew that purpose when the money was paid. *Briscoe v. Molsons Bank* (1922) 2 C.B.R. 382, 21 O.W.N. 470, per Meredith, C.J.C.P.

2 For subsequent amendments to sec. 3 of *The Bankruptcy Act* declaring what are acts of bankruptcy, see 1922, Can., ch. 8, sec. 3. [2 C.B.R. 612.]

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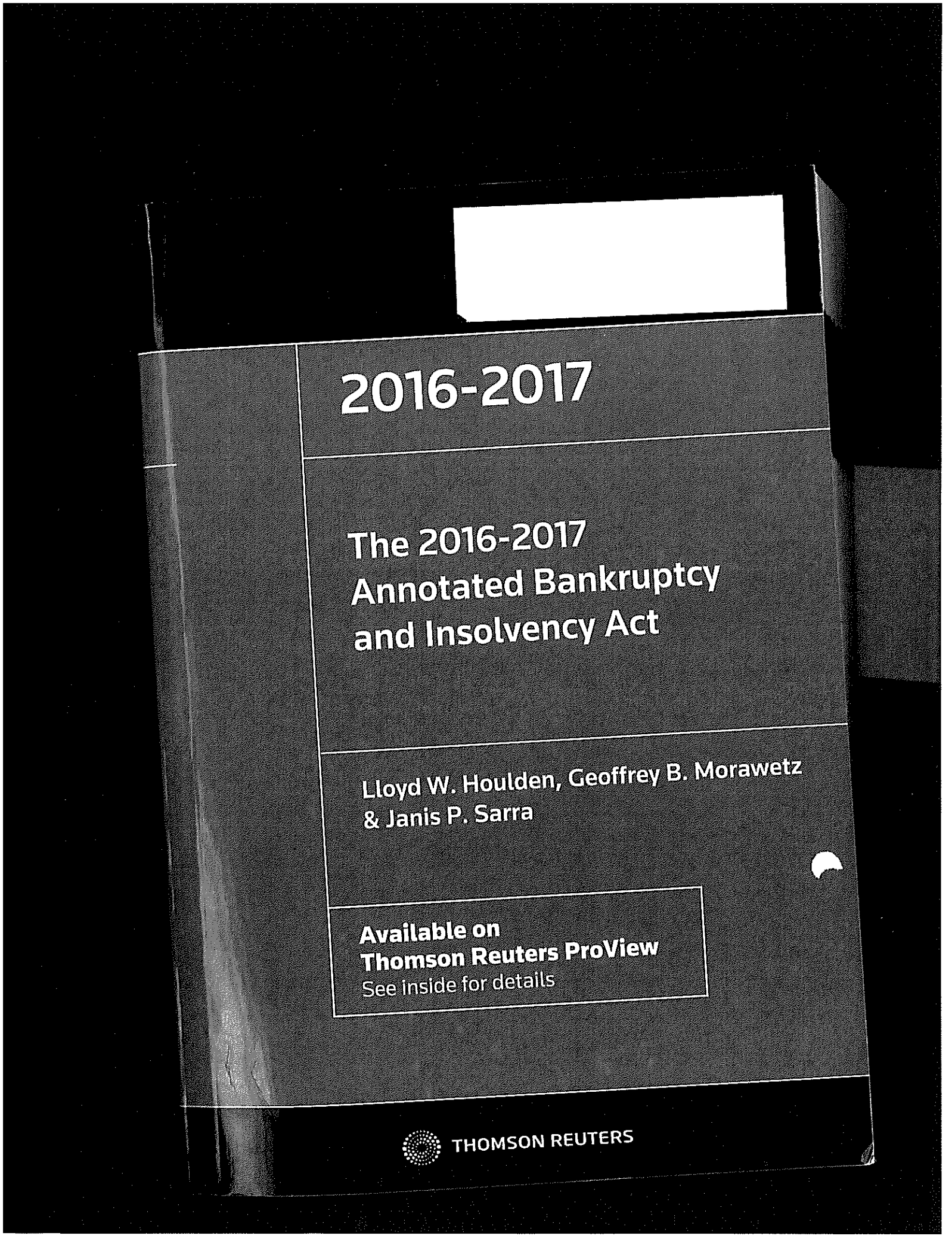
2016-2017
The 2016-2017 Annotated Bankruptcy and Insolvency Act
Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra
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See inside for details
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In Québec, for a Paulian action under ss. 1631 to 1636 of the *Civil Code*, there is a time limitation of one year. Section 1635 of the *Code* specifies that the action is forfeited unless it is brought within one year from the day on which the creditor learned of the injury resulting from the act which is attacked, or, where the action is brought by a trustee in bankruptcy on behalf of all the creditors, from the date of appointment of the trustee: s. 1635, Québec *Civil Code*.

Courts have held that judgment should be given against the principal creditor, not against the guarantor: *Re Mendelson-Luke-Ennis Galleries Ltd. (No. 2)* (1963), 5 C.B.R. (N.S.) 134 (Ont. S.C.); *Complete Book Services Ltd. (Trustee of) v. Harlequin Enterprises Inc.* (1987), 66 C.B.R. (N.S.) 163 (Ont. Master); *Re Speedy Roofing Ltd.* (1987), 66 C.B.R. (N.S.) 213 (Ont. S.C.); affirmed (1990), 79 C.B.R. (N.S.) 58 (C.A.). However, it might be prudent where the guarantor is directly affected by the determination of the question to join the guarantor in the motion against the principal creditor in order to have all parties before the court: *Re Pickin' Chicken Internat. Ltd.* (1970), 16 C.B.R. (N.S.) 69 (Ont. S.C.); *Re Speedy Roofing Ltd.* (1987), 66 C.B.R. (N.S.) 213 (Ont. S.C.); affirmed (1990), 79 C.B.R. (N.S.) 58 (C.A.); but see *McIntyre v. Prokop Drugs Ltd.* (1972), 17 C.B.R. (N.S.) 311 (Sask. Q.B.). In the *Mendelson-Luke-Ennis* case, *supra*, judgment was given against the principal creditor with costs and the motion was dismissed against the guarantor without costs. It was suggested in *Re Bernard Motors Ltd.*, *supra*, that the principal creditor could claim for reimbursement against the guarantor. It would seem that this right should exist even though the principal creditor has returned the security that it was holding to the guarantor; but see *contra Re Speedy Roofing Ltd.* (1987), 66 C.B.R. (N.S.) 213; disapproved on this point on appeal (1990), 79 C.B.R. (N.S.) 58. The claim for reimbursement cannot, however, be dealt with in the court sitting in bankruptcy; it must be claimed in an action brought in the ordinary civil courts: *Re Speedy Roofing Ltd.*, *supra*, and *Bank of Montreal v. Kenny* (1980), 33 C.B.R. (N.S.) 11 (Man. Co. Ct.).

F§227 — Fraudulent Preference as an Act of Bankruptcy

A debtor commits an act of bankruptcy if it makes any conveyance or transfer of property or any part thereof or creates any charge thereon that would be void as a fraudulent preference: s. 42(1)(c) of the *Act*. See notes under D§11 "Particular Acts of Bankruptcy".

F§228 — Provincial Legislation Dealing with Preferences

(1) — Generally

A trustee's authority to attack fraudulent conveyances and preferences made prior to bankruptcy arises under ss. 30(1)(d), 95 and 96 of the *BIA*. For conveyances that fall outside the time periods set out in the *BIA*, a trustee can still resort to provincial property statutes dealing with preferences and fraudulent transfers: *Robinson v. Countrywide Factors Ltd.* (1977), [1978] 1 S.C.R. 753, 23 C.B.R. (N.S.) 97 (S.C.C.); *Indcondo Building Corp. v. Sloan* (2010), 2010 CarswellOnt 9785, 103 O.R. (3d) 445, 73 C.B.R. (5th) 265 (Ont. C.A.).

Under the *Preferences Acts*, it is necessary to prove (1) a gift, conveyance, assignment or transfer, or delivery over; (2) an intent to give a creditor an unjust preference over creditors or over any one of them; and (3) at the time of the gift, conveyance, *etc.*, the debtor was in insolvent circumstances or unable to pay his or her debts in full or knew that he or she was in insolvent circumstances. There are important differences between the matters to be proved under s. 95 and those to be proved under the *Preferences Acts*.

Redemptions made by the directing mind of an insolvent investment partnership to certain equity investors of a fraudulent "ponzi" scheme were void as fraudulent preferences under

provincial preferences legislation, even though the investors had no knowledge of any fraud, since payment of investment funds qualifies as a transfer of property and "ponzi" schemes are insolvent from the moment that the first investment contract is entered into: *Re Titan Investments Ltd. Partnership* (2005), 2005 CarswellAlta 1153, 14 C.B.R. (5th) 112 (Alta. Q.B.).

The Ontario Court of Appeal dismissed an appeal by certain creditors from a judgment that set aside their beneficial interest in a mortgage as an unjust preference pursuant to the Ontario *Assignments and Preferences Act* (*APA*). The interest in the mortgage was granted to the creditors with the intent to give them an unjust preference. The Court of Appeal agreed with the superior court judge that, on the facts, the beneficial interest in the mortgage was not granted to the creditors "as security for a present actual advance of money" within the meaning of s. 5(1) of the *APA*: *Re Harry Snoek Ltd. Partnership*, 2012 CarswellOnt 14128, 5 C.B.R. (6th) 140, 2012 ONCA 765 (Ont. C.A.).

(2) — Insolvency

"Being in insolvent circumstances or unable to pay his or her debts in full or knows that he or she is on the eve of insolvency" are alternatives, not conjunctives, and the trustee need only prove one of them: *Robinson v. Countrywide Factors Ltd.* (1977), 23 C.B.R. (N.S.) 97, [1977] 2 W.W.R. 111, 72 D.L.R. (3d) 500, 14 N.R. 91 (S.C.C.). "Insolvent circumstances" is the inability to pay debts in the ordinary course as they become due: *Robinson v. Countrywide Factors Ltd.*, *supra*.

(3) — Debtor-Creditor Relationship

To succeed under the preferences statutes, the trustee must, as under s. 95, prove that there existed a relationship of debtor-creditor between the parties. If the alleged preference was given to someone who is not a creditor, the statutes have no application: *Re Barnett* (1983), 46 C.B.R. (N.S.) 211, 43 A.R. 215 (Q.B.).

(4) — Proof of Intent

Under the provincial legislation, if an action is not taken within sixty days after the preferential transaction occurs or within sixty days of making an assignment for the benefit of creditors, there is no presumption of intent to give an unjust preference. If the sixty-day period has elapsed, the burden is on the trustee to prove that the debtor intended to give a preference: *Re Colonial Aluminum Industries Ltd.* (1961), 2 C.B.R. (N.S.) 164 (Ont. S.C.); *Kisluk v. B.L. Armstrong Co.* (1982), 44 C.B.R. (N.S.) 251 (Ont. S.C.).

To succeed under the Preferences Acts, it is necessary to establish a concurrent intent, *i.e.*, intent on the part of the debtor to give and an intent on the part of the creditor to receive a preference: *Burton v. R & M Insurance Ltd.* (1977), 5 Alta. L.R. (2d) 14, 26 C.B.R. (N.S.) 49, 9 A.R. 589, 81 D.L.R. (3d) 455 (T.D.); *Re Barnett* (1983), 46 C.B.R. (N.S.) 211, 43 A.R. 215 (Q.B.); *Hudson v. Benallack*, 21 C.B.R. (N.S.) 111, [1976] 2 S.C.R. 168; *Cdn. Commercial Bank v. Prudential Steel Ltd.* (1986), 66 C.B.R. (N.S.) 172, 49 Alta. L.R. (2d) 58, 75 A.R. 121 (Q.B.); *Alberta (Director of Employment Standards) v. Sanche* (1992), 15 C.B.R. (3d) 58, 5 Alta. L.R. (3d) 243, (sub nom. *Evans (Bankrupt), Re)* 134 A.R. 149 (Q.B.); *Krumm v. McKay* (2003), 47 C.B.R. (4th) 38, 2003 CarswellAlta 961 (Alta. Q.B.).

MARRIOTT AND DUNN

PRACTICE IN MORTGAGE REMEDIES IN ONTARIO

The Practice in Mortgage Actions,
Power of Sale and Receiverships

FIFTH EDITION

VOLUME 2

by

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Ontario Ltd., 42 R.P.R. (2d) 267, 1994 CarswellOnt 751 (Gen. Div.) at R.P.R. p. 272 stated that:

> A memorandum of a promise to pay the debt of another must show who is the promisee as well as the promisor: *Huron (County) v. Kerr* (1868) 15 Gr 265; *White v. Tomalin* (1890) 9 O.R. 513; *A. MacDonald & Co. v. Fletcher* (1915) 22 B.C.J. 298; and 18 *Halsbury*, 3rd ed., p. 434. However, I cannot find in the authorities any requirement that such should appear either in the body or in any other particular part of the writing. The requirements of the statute are satisfied if the names of the parties appear upon the face of the memorandum, either expressed or by reasonable construction or by reference to other documents physically or referentially attached thereto: *Richard v. Stillwell* (1885) 8 O.R. 511; *Freeman v. Freeman* (1891) 7 T.L.R. 431; and *McEwan v. Dynon* (1877) 3 Vict LR 271 (26 *English & Empire Digest*, p. 46).

In *Connelly v. 904 Water Street Ontario Ltd.*, above, the court held that s. 4 of the Statute of Frauds had been satisfied by the agreement of purchase and sale and the mortgage. The *Ontario Marble Co. v. Creative Memorials Ltd.*, above, was adopted in *SPX Canada Inc. v. Watts*, 1995 CarswellBC 2020 (S.C.) where the court reviewed the operation of the Statute of Fraud extensively. In *Ferrell Builders Supply Ltd. v. 1234932 Ontario Ltd.*, 35 B.L.R. (3d) 115, 2003 CarswellOnt 2279 (S.C.J.), the project manager of the principal debtor who had signed the credit application as a principal of the principal debtor with confirmed authority, was found liable as the guarantor, s.4 of the Statute of Frauds having been satisfied.

In *Shoppers Trust Co. v. Langley Custom Homes Ltd.*, above, the motions court judge found that that the mortgage loan commitment and the mortgage had been signed by the individual defendants thus creating a likelihood that there was a sufficient memorandum to satisfy the Statute of Frauds. In the case of a mortgage, where the word "guarantor" without any further explanation is used, s. 4 of the Statute of Frauds has been satisfied since the only reasonable interpretation of the word is that payments on the mortgage are guaranteed: *Connelly v. 904 Water Street Ontario Ltd.*, 42 R.P.R. (2d) 267, 1994 CarswellOnt 751 (Gen. Div.) at R.P.R. p. 272 where Box 12 of the charge/mortgage of land simply contained a signature identified as the 'guarantor' without adding any language to explain what exactly what the signature meant.

But see *Kalsi v. Achary*, 2012 BCSC 361, 2012 CarswellBC 668, where no separate guarantee was signed and the mortgage contained no guarantee terms. The defendant guarantors simply signed the mortgage designating them as guarantors. The mortgagee's claim was dismissed on the grounds that there was no guarantee. The court found that no agreement was reached between the parties as it could not be determined what obligations the 'guarantors' had agreed to.

§51.3 Consideration

A guarantee, as with any other contract, requires offer, acceptance and consideration to become effective. Often, the only consideration supporting the guarantee agreement is the performance of the primary loan agreement to which it is collateral.

Consideration at law may consist of a detriment suffered by the lender and need not consist of a direct benefit to the guarantor; advancing moneys to a third party or forbearing to proceed against third parties is adequate consideration: *Bank of Montreal v. Sorich*, 6 C.B.R. (3d) 113, 1991 CarswellBC 473 (S.C.); Bank of *Montreal v. McCabe*, 1998 CarswellOnt 907 (Gen. Div.); *Bank of Nova Scotia v. Hooper*, 150 N.B.R. (2d) 111, 1994 CarswellNB 161 (Q.B.), affirmed 1994 CarswellNB 535 (C.A.); *Rusonik v. Canada Trust Co.*, 39 R.P.R. 263, 1986 CarswellOnt 678 (H.C.), additional reasons (December 16, 1986), Doc. 40730/79 (Ont. H.C.), affirmed 1988 CarswellOnt 2153 (Ont. C.A.).

A new mortgage advance used to payout the principal debtor's pre-existing indebtedness to the same creditor, so that money does not actually pass in the full amount, remains good and sufficient consideration: *Community Trust Co. v. Issajenko* 1995 CarswellOnt 4235 (Gen. Div.), affirmed 1996 CarswellOnt 5031 (C.A.).

The contention that a guarantee is without consideration is specious where the contract specifically states that the consideration is lending money to another: *National Bank of Canada v. Salisbury Convenience Store Ltd.*, 1992 CarswellNB 510 (Q.B.), affirmed 1993 CarswellNB 359, (sub nom. *National Bank of Canada v. Scholten*) 135 N.B.R. (2d) 236 (C.A.). Consideration is established and benefit is received when moneys are advanced in accordance with the guarantor's wishes: *Paz Diamonds Israel v. R.M. Diamonds* (1996), O.T.C. 241 (Gen. Div.); *Wilex Management Ltd. v. C.W. Auto Body Co.* (1981), 69 D.L.R. (3d) 695 (Man. Co. Ct.).

The consideration for any guarantee flows from the creditor to the principal debtor: *Canadian Acceptance Corp. v. Rothfros*, 14 N.B.R. (2d) 380, 1976 CarswellNB 130 (C.A.) at N.B.R. p. 386. However, it has been found to be more direct, such as where a spouse cohabits with the principal debtor who draws money under the guaranteed account; it may be inferred from these circumstances that the spouse benefits both directly and indirectly from the advance of moneys: *Royal Bank of Canada v. Batchelar*, 1998 CarswellOnt 137 (Gen. Div.), additional reasons 1998 CarswellOnt 151 (Gen. Div.).

It is not necessary that a guarantor benefit from the consideration, it is enough that, but for the guarantee the mortgagor would not have received the mortgage loan: *Nap Dumond Ltée v. Nelco Ltd.*, 33 N.B.R. (2d) 667, 1980 CarswellNB 211 (Q.B.), affirmed 33 N.B.R. (2d) 661, 1981 CarswellNB 142 (C.A.). A forbearance agreement can be sufficient consideration to support a guarantee: *Bank of Montreal v. Maple City Ford Sales (1986) Ltd.*, 2002 CarswellOnt 3039 (S.C.J.), affirmed 2004 CarswellOnt 4574 (C.A.).

A guarantee needs fresh consideration and a forbearance from legal proceedings to collect the past indebtedness will suffice if this is specifically negotiated with the guarantor directly and it may be established that the guarantor has expressly requested the forbearance: *Crears v. Hunter* (1887), 19 Q.B.D. 341 (Eng. C.A.) at p. 344. Granting the principal debtor an extension in which to pay the debt is sufficient consideration to support a guarantee, even where the written document was executed after the indulgence was extended: *Agrifoods International Cooperative Ltd. v. South Trail Restaurant Inc.*, 195 A.R. 360, 1997 CarswellAlta 3 (Master).

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 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

Court File No. CV-16-11389-00CL

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