Tab 7

CITATION: Purcaru v. Seliverstova et al., 2015 ONSC 6679
COURT FILE NO.: FS-10-16657-00
DATE: 20151029

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
FELICIA PURCARU	)	*Morris Cooper*
Applicant	)	for the applicant
	)	
	)	
	)	
- and -	)	
	)	
	)	
	)	
ANNA SELIVERSTOVA, MARINA SELIVERSTOVA, MIRCEA PURCARU, REDINA INC., DARIBO CONSULTING INC., and DAN PURCARU	)	*Gary S. Joseph* for the respondents Anna Seliverstova and Marina Seliverstova,
	)	
Respondents	)	
	)	
	)	
	)	
	)	**HEARD**: October 5-9 and 12-15, 2015

F.L. Myers J.

REASONS FOR DECISION

Background

[1] The applicant Felicia Vacaru, formerly Purcaru, is the ex-wife of the respondent Dan Purcaru. The respondent Marina Seliverstova is or was in a relationship with Dan Purcaru. They lived together from August, 2005 to April, 2007 at minimum. Felicia Vacaru and Marina Seliverstova agree on at least one thing in this trial:

> Dan Purcaru is a bad man.

[2] He is worse than that. He has admitted to "egregious" breaches of several court orders that caused "serious prejudice" to his ex-wife and their two children." *Purcaru v Purcaru*, 2010 ONCA 92 at para. 34. In the family law application, McWatt J. found Dan Purcaru in contempt

of court due to some of his breaches of court orders. Dan Purcaru chose to serve four months in jail rather than fulfill his legal obligations to his ex-wife and to his children. *Purcaru v Purcaru*, 2011 ONSC 2320. Dan Purcaru still has not purged his contempt. In fact, Kelly J. struck Dan Purcaru's pleadings in this application due to his continuing efforts to impede the course of justice for the applicant and their children. *Purcaru v Purcaru*, 2010 ONSC 4031 at paras. 83 to 87.

[3] By order dated May 6, 2009, Paisley J. granted a divorce to the applicant and Dan Purcaru. Mr. Justice Paisley held Dan Purcaru liable to the applicant for over $1 million in arrears of support and for equalization of net family property. In addition, he ordered Dan Purcaru to pay the applicant costs of over $400,000 plus ongoing child-support of $7,534 per month.

[4] The Court of Appeal upheld the judgment in the decision referenced above. Other than for brief periods prior to court proceedings which he brought, Dan Purcaru has failed to pay the amounts he owes. He has refused to make proper disclosure and has hidden his assets in breach of court orders. His illegal acts have forced the applicant to bring proceedings to chase Dan Purcaru's assets in order to obtain at least partial payment of the amounts to which she and the children are entitled.

[5] In this application, Felicia Vacaru asks the court to set aside a number of transactions in which Dan Purcaru is alleged to have fraudulently conveyed his assets so as to avoid his liability to her and to their children. In addition to suing Dan Purcaru, the applicant sues Marina Seliverstova, her daughter Anna Seliverstova, and Mircea Purcaru. Marina Seliverstova is said to be the recipient of much of Dan Purcaru's property. Anna Seliverstova holds paper title to one property on behalf of her mother. Mircea Purcaru is Dan Purcaru's brother. He is in Romania. Dan Purcaru sent him $325,000 in a flagrant breach of at least two court orders. Mircea Purcaru has not responded to this proceeding despite service upon him of the notice of the proceeding by mail in accordance with the order Czutrin J. (as he then was) dated April 8, 2010.[1]

[6] The applicant initially sued two of Dan Purcaru's corporations. However, the corporations were not parties to any of the specific transactions on which the applicant has now focused. Accordingly, the applicant withdrew her claims against the corporations. Nothing further will be said about them.

[7] The applicant brought this proceeding in the Family Court of the Superior Court of Justice pursuant to an order of Czutrin J. dated April 8, 2010. Under the *Family Law Rules*, O.Reg. 114/99, for proceedings in this court, the form of originating process is an application rather than an action. Under Rule 1(8.4), a consequence of striking a party's pleadings is to allow an uncontested trial of the case without further participation by the party in default. Unlike

[1] Romania is a signatory to *The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*. However, it has not objected to service by mail under Art. X of the convention. Accordingly service by mail was appropriate and effective in this case.

Rule 19.02(1)(a) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, in family law default proceedings, there is apparently no automatic deemed admission of the truth of the allegations made by an applicant.[2]

[8] Although Dan Purcaru attended this trial to hear the opening arguments and closing arguments of counsel, in accordance with Rule 1(8.4) and the decision of Kelly J., he did not ask to be heard as a party. During the trial, I ruled that the respondent Marina Seliverstova was entitled to call Dan Purcaru as a witness. Despite being a party, Dan Purcaru consented to an order excluding him from the courtroom as a witness until he gave his testimony.

[9] It is fundamentally important in this proceeding that the rights and obligations of the various parties be kept separate. There is no liability under our law for having a relationship with a dishonest person. Moreover, even dishonest people are only liable upon proof of facts that establish a recognized basis for imposing liability at law. While a person's past dishonesty may be relevant in a number of ways during a civil trial, there is no tort liability for breach of a court order *per se*. While the recitals above concerning Dan Purcaru's proven misconduct provide a necessary background for understanding this application, the burden is upon the applicant to establish her entitlement to relief against each respondent individually. I approach this proceeding on the basis that for the applicant to obtain relief against each of the respondents, she must meet her burden of proof for each element of the relief sought against each of them.

The Basic Legal Framework

[10] The applicant sues under the provisions of the *Fraudulent Conveyances Act*, R.S.O. 1990, c. F-29. She asserted no other causes of action. Oversimplifying for the purpose of an introduction, the *Fraudulent Conveyances Act* provides that the court can declare a transfer of property void if the intention of the person who made the transfer was to defeat or delay his or her creditors. The statute is designed to stop a debtor from hiding assets from creditors by fraudulently transferring the assets to another person. If it is applicable, an order under the statute makes property that was fraudulently conveyed available for execution on behalf of the creditors of the transferor. In addition, if the transferred property has been disposed of prior to the transaction being declared void, s.12 of *the Assignments and Preferences Act*, R.S.O. 1990, c.A-33 allows the creditors to execute against proceeds received by the transferee.

[11] It is very difficult for an applicant to prove a person's hidden intention to defraud creditors. Therefore, the law provides that the court can infer the existence of a transferor's fraudulent intention to defeat or delay creditors where there are recognized "badges of fraud" associated with a transaction. The badges of fraud are facts or fact patterns that courts have held to be indicative of fraudulent transactions. Facts such as: secrecy, transfer of property when an action or execution is pending, transfer of property to non-arm's-length parties, transfers made with undue haste, and transfers for a conspicuously insufficient price, are all recognized

[2] I note that the deemed admission under Rule 19.02 would not apply in a proceeding brought by way of application in any event.

examples of badges of fraud. There are others such as the breach of family law orders requiring a party to preserve his or her assets pending a trial. If the court draws the inference of fraudulent intent due to the existence of badges of fraud, then an evidentiary burden will fall to the respondents to explain their conduct to try to rebut the inference of fraudulent intent. Of course the ultimate persuasive burden remains on the applicant throughout. *A&B Landscaping & Interlocking Ltd. v. Bradsil,* 1993 CarswellOnt 664 (Ont. Ct. Gen. Div.) at para 69. *Business Development Bank of Canada v. Samarsky*, [2012] ONSC 3002 at para 15. *Conte Estate v. Allessandro*, [2002] O.J. No. 5080 at para 21 and 22.

[12] The statute and the case law interpreting it also provide that where a purchaser or transferee has paid for property, it is not enough to prove that the seller had a fraudulent intention. Rather, to set aside a transaction where a buyer has paid for property, the applicant must also prove that by participating in the transaction the buyer too intended to defeat or delay the creditors of the seller.

[13] In this case, much of the testimony and argument of both sides was directed toward the issue of whether Marina Seliverstova violated any court orders that prohibited her from transferring or depleting property or whether she helped Dan Purcaru violate orders that she knew had been made against him. There was much tracing of timelines to contrast transaction dates with various court proceedings, all designed to show what Marina Seliverstova knew or did not know about various orders at the time of the impugned transactions. The relevancy of these facts stems from the applicant's argument that the court should infer that Marina Seliverstova had a fraudulent intent if she took part in a transaction that amounted to a breach of either an order that bound her or an order that, to her knowledge, bound Dan Purcaru. I will deal with some of those facts below. However, as an overview, I note that in my view, this issue was overstated to some degree and deflected the parties from other issues.

[14] Breach of interlocutory orders preventing a family law litigant from transferring assets relates to but one badge of fraud. There are many others that are as or more significant factors to assist the court determine whether to draw an inference of fraudulent intent. Notice of an order may be fleeting. In some cases, there are legal nuances as to the meaning of different orders. For example, an order prohibiting the depletion of assets does not have the same meaning or effect as an order preventing dissipation of assets. There is no blanket rule that the breach of an order necessarily leads to a finding of fraudulent intent or, conversely, that a transaction performed in the absence of notice of an order prohibiting it is necessarily valid. The court must consider the facts applicable to each challenged transaction and determine whether a case has made out on the totality of the evidence balancing all relevant facts and legal factors. *Bell v. Williamson*, 1945 CarswellOnt 40 (O.H.C.J.), at para 31.

Credibility and Reliability of the Evidence of the Parties

[15] Mr. Joseph argued strenuously that the applicant lied to the court and ought to be disbelieved. She said, for example, that her divorce trial started before Belobaba J. on June 2, 2008 and that Marina Seliverstova was present in court that day. It does not appear from the court record that a trial started on June 2, 2008. Marina Seliverstova presented evidence

indicating that she was working from home that day. On June 10, 2008, Belobaba J. wrote an endorsement regarding an appearance on June 2 and again that day. In between, the applicant and Dan Purcaru had been closeted with Goodman J. holding an intensive settlement conference.

[16] The applicant also swore that she made an agreement with Marina Seliverstova to continue the order of Greer J., where it appears that the lawyers for the parties in fact made the opposite agreement. The applicant also asserts that Dan Purcaru made two payments to his brother each of more than $300,000 where the common sense view of the financial records would seem to indicate that there was only one draw made by Dan Purcaru which was then moved around and ultimately forwarded to his brother. For these and other reasons, Mr. Joseph says that the court should disbelieve the "aura of deceit" painted on Marina Seliverstova's innocent countenance by the dishonest applicant.

[17] In my view, Mr. Joseph has confused the concepts of credibility and reliability. The applicant was a very difficult witness in cross-examination. She made allegations that she could not support. She assumed the worst in the absence of absolutely clear, independent, documentary proof of the opposite. Who wouldn't? The applicant has been subjected to over a decade of abuse. Apart from an ineffective, brief jail term, Dan Purcaru has evaded with impunity his moral responsibilities and his legal obligations as set out in multiple court orders. Who wouldn't be frustrated? Who wouldn't assume that someone is lying after all the lies and deceit that the applicant has endured?

[18] This does not make the applicant a dishonest witness in my view. People's memory of facts can be inaccurate for a number of reasons. Lying is but one. It is well understood psychologically that peoples' memories may often shade events to fit their strong desires. I did not perceive the applicant to be sitting beside me during the trial trying to deliberately mislead me. She was frustrated and angry to be sure. She did not want to give an inch with understandable reason. I did however come to question the reliability of her memory at times in light of the overwhelming frustration and the zeal to succeed that led the applicant to re-characterize unhelpful facts.

[19] It is important to recall as well that the issues in the trial fundamentally concern the intentions of Dan Purcaru and Marina Seliverstova. Most of the relevant facts do not turn on the reliability of the applicant's memory in any event. Much of the applicant's evidence was simply describing the legal narrative of years of court proceedings and explaining the conclusions that she reached based on imperfect or deceitful disclosure that had been provided to her at various times. I readily understand the applicant's view that seeing records evidencing two separate movements of amounts of over $300,000 should be assumed to be to completely independent transactions, barring proof to the contrary. Moreover, as discussed further below, the frequent, inexplicable movements of funds by Dan Purcaru and Marina Seliverstova were likely designed to create just such confusion. However, the court will determine the facts on the balance of probabilities despite the applicant's assumptions.

[20] In contrast to the applicant's evidence, Marina Seliverstova gave evidence in a somewhat more matter-of-fact manner. Although argumentative at some points, on financial matters she

was clear, organized, and presented an understandable story. Her strong intellect and detailed memory shone through. However, in my view, much of her testimony was a pack of lies. Her purported rationales for the movements of funds between herself and Dan Purcaru at times lacked common sense. Moreover, I view it as significant that Marina Seliverstova was very careful with her own funds. She moved her own funds to different bank accounts to obtain small upticks in interest rates. To save on the cost of borrowing, she deliberately applied for and borrowed from credit cards that offered special introductory low interest rates. Dan Purcaru carefully tracked household expenses to the penny for sharing between himself and Marina Seliverstova. At times, Marina Seliverstova charged tiny amounts of interest to Dan Purcaru. For example, he paid her $18 and $36 in interest on two alleged short term advances of $5,000 each. In putting title to a unit at 30 Gloucester Street in her daughter's name, Marina Seliverstova carefully took back a proper, formal mortgage from her daughter to protect herself. She is not a person to throw around her own money without ensuring that she obtained the best available return (or paid the lowest available cost) and was secured. Yet, when it comes to her story with Dan Purcaru, she says that she advanced him very substantial loans, with no formal terms, no interest required or paid, and no documentation. Her story that she loaned Dan $165,000 for the purchase of a unit at 30 Gloucester Street supposedly secured by her tenancy in common on a different property made no sense in legal or financial terms. Moreover, it was clear from the evidence of Donald Grant, the lawyer for Dan Purcaru and Marina Seliverstova on that transaction that he asked them to sign proper legal documentation to protect Ms. Seliverstova's purported interests as lender, such as a promissory note and a loan agreement, and they deliberately refused to do so. Marina Seliverstova says that she made this cavalier investment after she and Dan Purcaru had broken up and she had developed real concerns about his mental health. It makes no sense that she would expose her funds to risk with an unwell former boyfriend whom she was watching fight his wife tooth and nail to avoid meeting his obligations to her and even to his own children. Marina Seliverstova is a person who accounts for $18 in interest and makes her own daughter sign formal debt and security documents. How could she trust Dan Purcaru to repay massive, undocumented loans and why would she make such loans, that would have represented a sizeable portion of her net worth, with no interest or upside in the various properties being bought and sold? The only sensible conclusion is that Marina Seliverstova was not loaning her own hard earned funds to Dan Purcaru as she claimed. Rather, she was filtering back to him some of his own money that he had laundered through her in earlier undisclosed transactions.

[21] It was painfully obvious during the trial that Dan Purcaru and Marina Seliverstova created an impenetrable web of transactions and made only partial disclosure to try to support Marina Seliverstova's story. While Marina Seliverstova has made some disclosures which she characterized as extensive, in almost every case there are breaks or discontinuity in the line of transactions so that one can never be sure as to precisely where money originated, was mixed around, and then ended up. It might be as she claims. But it may not be so. For the reasons stated in the specific situations below, I do not accept the credibility of Marina Seliverstova's evidence. In short, I do not believe her.

[22] The applicant was not wrong, in my view, to question the veracity of Dan Purcaru and Marina Seliverstova in the absence of a clear documentary trail as proof of their stories. Only

they had the ability to provide the full accounting of how they jumbled and mixed their funds. Where the applicant was wrong however, was in insisting upon proof to a level of certainty rather than to a 51/49 balance of probabilities that applies in a civil trial.[3]

The Facts

[23] The applicant challenged four transactions in this proceeding:

1 Marina Seliverstova's purchase of unit 902, 30 Gloucester St., Toronto;

2 Dan Purcaru's transfer of money to Marina Seliverstova to enable her to acquire unit 1710, 30 Gloucester St., Toronto;

3 The charge granted on June 3, 2008 by Dan Purcaru and Marina Seliverstova in favour of the Canadian Imperial Bank of Commerce on their house at 37 Gloucester Street in the amount of $500,000; and

4 Dan Purcaru's transfer of money to Marina Seliverstova to enable her to acquire unit 1809, 30 Gloucester St., Toronto, in the name of her daughter, Anna Seliverstova.

[24] I propose to deal with these claims by first discussing the court orders that were in place at various times. I will then provide additional details of each of the transactions.

A. **Court orders**

i. The order made by Jarvis J. on October 17, 2006

[25] The applicant and Dan Purcaru separated in 2003. The applicant applied for a divorce and corollary relief in September, 2004. The applicant learned that Dan Purcaru owned interests in two properties on Gloucester Street in Toronto that he had not disclosed initially in the proceedings. On October 17, 2006, Jarvis J. ordered:

> On a temporary without prejudice basis, the respondent Dan Purcaru shall not sell, deplete or otherwise encumber the property, municipally known as 37 Gloucester Street, Toronto, Ontario, M4Y 1L8 until further order of the Court or written agreement.

[26] 37 Gloucester St. is a house. Dan Purcaru and Marina Seliverstova purchased it in August, 2005 as tenants in common. They lived there together until at least April, 2007. Mr. Justice Jarvis's order recites that both Dan Purcaru and Marina Seliverstova were in court that day. Accordingly, both knew that Dan Purcaru could not sell, deplete, or encumber the house while the order subsisted.

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[3] The parties agree that the regular civil burden of proof applies in this case. *F.H. v. McDougall*, [2008] SCC 53, at para.49.

ii. The order made by Greer J. on October 24, 2006

[27] The applicant brought a motion to add Marina Seliverstova as a party to her family law proceeding in October, 2006. Marina Seliverstova was represented by counsel (who was not Mr. Joseph). By minutes of settlement signed on October 19 and 20, 2006, the applicant and Marina Seliverstova agreed to adjourn the motion to November 23, 2006 subject to an interim order on the following terms:

> On a temporary without prejudice basis, Ms. Marina Seliverstova shall not sell, deplete or otherwise encumber the Gloucester property known municipally as 37 Gloucester Street, Toronto, Ontario, M4Y 1L8 ("Gloucester Property") until further order of the Court or written Agreement.

iii The order made by Herman J. on January 16, 2007

[28] On November 15, 2006, shortly before the return of the motion to add her as a party, Marina Seliverstova delivered an affidavit in response to the applicant's motion. The motion was adjourned to December 12, 2006. In her affidavit, Marina Seliverstova said that she paid her own funds for roughly half of the house at 37 Gloucester Street that she then occupied with Dan Purcaru. The house cost $740,000. Marina Seliverstova said that she paid the deposit in the amount of $50,000 using $14,000 drawn on a line of credit, $13,000 borrowed from a friend, and the balance in cash taken from a safe in her home. She said that she gave another $250,000 to Mr. Grant who was acting on the purchase. The $250,000 was made up of: (a) $138,261.77 drawn on a new mortgage that she placed on her unit 902, 30 Gloucester St., Toronto; and (b) a further $111,738.23 some of which was borrowed from her mother and some of which was taken from RESP investments that she had made for her children.

[29] In total, Marina Seliverstova says she paid $300,000 toward the purchase of 37 Gloucester. By contrast, she said that Dan Purcaru paid $154,000 to Mr. Grant towards the purchase. Marina Seliverstova testified that because she had contributed significantly more than he did, Dan Purcaru agreed that he would make all mortgage payments and further lump sum payments toward the mortgage until their contributions balanced out. Early on, Dan Purcaru made a $90,000 lump sum payment toward the mortgage. In addition, he made all mortgage payments between September, 2005 in August, 2006, In her November, 2006 affidavit, Marina Seliverstova concluded, "[w]e have now each contributed roughly half toward the equity in the home."

[30] Leaving aside for the moment issues as to the frailty of this evidence, at that time the applicant believed Marina Seliverstova. Therefore, she agreed to drop her motion to add Marina Seliverstova as a party to her divorce proceeding. She also agreed, expressly, to rescind the interim order of Greer J. She said so explicitly in her reply affidavit sworn December 8, 2006. On that same date, the applicant's counsel (who was not Mr. Cooper) delivered a motion confirmation form to counsel for Marina Seliverstova and the court. The confirmation form included the following:

> 2. **Adding a party:** the Wife is no longer seeking this relief. The Wife is consenting to the existing order of Justice Greer being rescinded and that her [*sic*] aspect of her Notice of Motion against the husband's common-law spouse is to be withdrawn. This is proceeding on consent. The husband's common-law spouse may be attending Court on Tuesday to argue for a costs award against the Wife. The Wife disputes the common-law spouses's [*sic*] entitlement for costs as against the Wife.

[31] The motion did not proceed on December 12, 2006, but came on before Herman J. on January 16, 2007. Marina Seliverstova was present in court to argue for costs herself. She says that once she understood that the motion to add her as a party would not proceed and that the order against her made by Greer J. would be rescinded, she fired her lawyer to save money. Madam Justice Herman declined to award costs in favour of Marina Seliverstova. Rather, she found that the motion had been reasonably brought in light of the non-disclosure by Dan Purcaru concerning his assets up to that time.

[32] Madam Justice Herman's endorsement does not mention the order made by Greer J. That order has never been formally rescinded by another court order. Marina Seliverstova did not ask for an endorsement rescinding it. It is clear from the costs decision however, that Herman J. was considering whether she ought to award costs in favour of Marina Seliverstova. Implicit in that consideration is that the applicant was no longer proceeding with relief against Marina Seliverstova as confirmed in both her affidavit and her lawyer's motion confirmation form. There was no reason for Herman J. to even consider awarding costs in favour of Marina Seliverstova if Herman J. had just made or continued an order against her. The only purpose for considering awarding costs in favour of Marina Seliverstova was that the applicant had been unsuccessful in her effort to add Marina Seliverstova as a party as indicated by the withdrawal of her motion and the rescission of the interim order made by Greer J.

[33] Mr. Joseph notes that the order made by Greer J., by its terms, continued until further order of the court *or* written agreement of the parties. He argues that the applicant's affidavit and her motion confirmation form satisfy the writing requirement and evidence an agreement to terminate the order. I agree: Mr. Cooper argued that there could not have been an agreement because the issue of costs was left outstanding. However, it is perfectly appropriate for counsel to agree to settle one issue while leaving another issue open for argument. That is what occurred in this case. Accordingly, the order made by Greer J. is no longer in force. It ceased being in force on December 8, 2006 despite the silence of endorsement made by Herman J. This is consistent with the explicit words of the order made by Greer J.

[34] In her testimony, the applicant said that she expected the order made by Greer J. to remain in place. This is simply inconsistent with her own explicit affidavit and her lawyer's unambiguous confirmation form. The applicant was not able to offer any specifics of negotiation that might have led to a change of position or an agreement to keep the order of Greer J. in existence. When challenged on cross-examination, she reverted to arguing that since there is no order rescinding the order made by Greer J., it was up to Marina Seliverstova to prove that the order is no longer in force. I find that Marina Seliverstova has done so.

[35] That does not end the relevance of the order made by Herman J. however. At the same motion hearing, the applicant also sought a non-depletion order against Dan Purcaru. She succeeded. As a result, Herman J. made the following order against Dan Purcaru:

1 The Respondent shall not deplete his assets until further order of the Court or written agreement.

2 The Respondent shall give the Applicant reasonable notice if he plans to dispose of either 30 Gloucester Street or 37 Gloucester Street.

[36] In her decision holding Dan Purcaru in contempt, McWatt J. ruled that the order made by Herman J. concerning 37 Gloucester Street was fundamentally different than the order made previously by Jarvis J. concerning the same property. The two orders could not live together. As the order made by Jarvis J. was expressly made subject to further order of the court, McWatt J. held that it terminated upon the making of the order of Herman J. I agree. Therefore, as of January 16, 2007, the only order that remained and limited Dan Purcaru's entitlement to deal lawfully with his properties was the order made by Herman J.

[37] Marina Seliverstova said that she paid no attention to the order made by Herman J. She claims that she did not know what was going on between her then-spouse and the applicant in the same courtroom at that same hearing. This is not credible in the least. First, Marina Seliverstova said several times that she responded extensively and with great thoroughness to the applicant's motion to add her as a party. She said the same thing in relation to another motion brought against her in 2010. In both cases, Marina Seliverstova delivered detailed, thorough affidavits that did indeed lay out very full stories that must have taken time and care to create and document. In the fall of 2006, Marina Seliverstova was still living with Dan Purcaru. She not only saw him investing time and effort in dealing with the litigation but she found herself being drawn into it. She read the applicant's affidavit and materials on the motion to add her as a party. It is inconceivable, given the detail of her response, that she was not fully conversant with the details of the case. Moreover, it would have been completely contrary to her very intelligent and rigorous approach to her affairs for Marina Seliverstova not to have dug into the details to ensure that she was able to respond with thoroughness as she did. Furthermore, if Marina Seliverstova ignored the order of Herman J. then she would have thought that the order made by Jarvis J. remained in force. In either case, I find that Marina Seliverstova plainly understood that the applicant was asserting rights in 37 Gloucester Street as that was the same assertion that formed the basis of the motion to add her as a party and the interim injunction granted by Greer J. to which Marina Seliverstova had consented. Whether or not Marina Seliverstova read the order made by Herman J. or understood the details and nuances of an anti-depletion order (and its effect on the order of Jarvis J.), I find that she fully comprehended that the applicant was asserting rights against the house and Dan Purcaru's interest in it. She understood that the house at 37 Gloucester Street was the subject of the family law proceedings and orders of the court were being made that limited Dan Purcaru's entitlement to move his properties away from his ex-wife's reach.

iv. The order made by Belobaba J. on June 10, 2008

[38] The family law proceeding between the applicant and Dan Purcaru came to trial for the first time before Belobaba J. on June 2, 2008. Rather than proceeding with the trial that day, the applicant and Dan Purcaru agreed to attend before Goodman J. to try to settle. Several days of negotiations followed.

[39] As will be discussed below, during the second day of the settlement conference, Dan Purcaru and Marina Seliverstova met at the bank and signed documents to establish a $500,000 line of credit secured by a collateral second mortgage against their house at 37 Gloucester Street. Dan Purcaru drew the full amount of the credit facility shortly after. The equity in 37 Gloucester Street was depleted by this transaction in a clear breach of the order made by Herman J.

[40] On June 10, 2008 Dan Purcaru and the applicant attended again before Belobaba J. Their effort to settle had failed. Dan Purcaru sought an adjournment of the trial to give him time to respond to a late expert report that had been delivered on behalf of the applicant that sought to trace Dan Purcaru's funds based on the partial disclosures that had been made to that time. In granting the adjournment of the trial, Belobabá J. also ordered:

> THIS COURT ORDERS THAT:
>
> 3. The Respondent, Dan Purcaru, be restrained from encumbering, assigning or conveying his assets in Daribo Consulting Inc., Redina Inc. or his co-operative apartments at 37 Gloucester Street, Toronto, Ontario, M4Y 1L8, and 30 Gloucester Street, Units 1604 and 1902, Toronto, Ontario, M4Y 1L5, save with the prior written consent of the Wife, Felicia Purcaru or by an order of this Honourable Court.

[41] Dan Purcaru did not disclose to the applicant, Goodman J., or Belobaba J., that as they were speaking, he and Marina Seliverstova had granted a mortgage against their house at 37 Gloucester Street and had already started to draw heavily on the line of credit that it secured.

[42] Marina Seliverstova says that she had no knowledge of the order made by Belobaba J. She denies being in court on June 2 or 10, 2008 as mentioned above. There is no record of Marina Seliverstova having attended either proceeding although, as she was not a party, there is no reason for a record of her attendance in court to have been made. The applicant testified that Marina Seliverstova was in court on June 2, 2008 and that the trial started that day. She also believes that she saw Marina Seliverstova outside of the courthouse with Dan Purcaru's lawyer on June 3, 2008. Marina Seliverstova presented emails that support her evidence that she was at home working on her computer with third parties on June 2, 2008. I do not think that anything turns on this issue *vis-à-vis* Marina Seliverstova. At the time that Marina Seliverstova and Dan Purcaru signed the documents to deplete the equity in 37 Gloucester Street on June 3, 2008, only the order of Herman J. was outstanding. I have already made my findings as to Marina Seliverstova's knowledge concerning that order and the prior order made by Jarvis J. In my view, the actual movements of money that were carried out by Dan Purcaru thereafter were simply the implementation of arrangements already made. Of course Dan Purcaru knew of the order made by Belobaba J., and was not deterred from continuing to move equity out of 37 Gloucester Street in direct defiance of that order too. But once he and Marina Seliverstova were

already defying the order made by Herman J., I do not see the addition of another order affecting the determination of their intentions at the time. The issue here is what did he intend at the time and, if Marina Seliverstova gave consideration, what did she intend?

v. The order made by Czutrin J. on October 28, 2008

[43] On October 23, 2008, Czutrin J. found that Dan Purcaru had "ignored previous disclosure orders and requests for information." He made the following order:

> The Respondent is restrained from transferring, depleting, or disposing of any property of which he is registered owner.

[44] There is no indication in the evidence that Marina Seliverstova was in court that day.

vi The divorce judgment and subsequent orders

[45] As noted above, Paisley J. adjudged Dan Purcaru to be indebted to the applicant for over $1 million in the trial decision dated May 6, 2009.

[46] As also mentioned above, by order dated July 15, 2010, *Purcaru v. Purcaru*, 2010 ONSC 4031 (CanLII), Kelly J. struck Dan Purcaru's pleadings and denied him standing in this application. She held that his status would be reinstated once he paid the amounts ordered by Paisley J. and the costs ordered against him by the Court of Appeal.

[47] By order dated October 28, 2010, to which Marina Seliverstova consented, Czutrin J. vested in the applicant title to the house at 37 Gloucester Street, and units 1604 and 1902 of 30 Gloucester Street as partial realization on Dan Purcaru's liability. In an endorsement dated February 7, 2014, Czutrin J. held that the applicant had received $663,672 from the sale of those properties and that at least $1,075,773 remained outstanding. The amount of Dan Purcaru's liability was and is growing at approximately $7,500 per month. While during this trial the applicant did not provide a clear accounting for every penny that she had received, there is no doubt that after the divorce trial decision was rendered, she was and has remained a creditor of Dan Purcaru. Moreover, it is equally undeniable that once the applicant commenced her application for divorce and corollary relief, the applicant became a contingent creditor of Dan Purcaru with 100% likelihood of obtaining some award or settlement. In his evidence Dan Purcaru confirmed that during the process leading up to trial, he viewed the applicant as his sole real creditor. I note that he also has a significant outstanding liability to the tax man as well.

[48] I now turn to filling in the remaining details about the various transactions that were the subject of the applicant's request for relief.

B. The Description of the Impugned Transactions

i Marina Seliverstova's purchase of unit 902, 30 Gloucester St., Toronto

[49] Marina Seliverstova purchased this unit in 2001 for $162,000 all-in. She paid $80,000 and financed the rest with a mortgage from DUCA Credit Union Ltd. She provided proof that she had sufficient investments in 1998 to fund the down payment for this purchase three years later. She did not show that those funds were in fact used on the purchase or remained in existence three years later. After closing the purchase, Marina Seliverstova lived in this unit with her children. She says that she paid off her mortgage quickly in 2002 using funds provided by her mother in Russia. She gave no proof of that assertion.

[50] Marina Seliverstova only met Dan Purcaru in late 2004. As will be discussed below, Marina Seliverstova took a new mortgage on this unit to provide part of the funds that she says that she invested with Dan Purcaru to buy 37 Gloucester Street. Madam Justice Kelly found this to be suspicious in an earlier endorsement with which I agree. But the spin cycle of money through the Purcaru/Seliverstova laundering service did not have any bearing on the initial purchase of unit 902 three years earlier by Marina Seliverstova.

[51] A third party vendor transferred this property to Marina Seliverstova. It was not transferred to Marina Seliverstova by Dan Purcaru. There is no indication that this property was transferred to Marina Seliverstova to defeat Dan Purcaru's creditors. In fact, in 2001, the applicant and Dan Purcaru were still living together. She was not even a creditor or contingent creditor at that time.

[52] In closing argument, the applicant rightly declined to seek relief against this transaction. There is no basis to impugn the purchase of this unit by Marina Seliverstova in 2001. If the applicant was seeking some form of tracing order to look to the equity in this property because some of Dan Purcaru's money ended up invested in this property later as Kelly J. surmised, there was no evidence presented at the trial to bear out such a claim.

[53] This aspect of the application is dismissed.

ii. Dan Purcaru's transfer of money to Marina Seliverstova to enable her to acquire unit 1710, 30 Gloucester St., Toronto;

1. Marina Seliverstova says that she funded the purchase of unit 1710 with funds from 37 Gloucester Street

[54] Understanding this story first requires more facts concerning the purchase of the house at 37 Gloucester Street. As mentioned above, Marina Seliverstova says that she paid $300,000 toward that purchase consisting of: (a) the deposit of $50,000; (b) $138,261.77 drawn on a new mortgage that she placed on unit 902, 30 Gloucester St; and (b) a further $111,738.23 some of which was borrowed from her mother and some taken from RESP investments that she had made for her children.

[55] Dan Purcaru had previously advised that he paid the $50,000 deposit on 37 Gloucester Street. Mr. Grant, the lawyer for the parties on the purchase, recalled being told that the deposit had been paid by both of them although he did not have specific details. There is a bank draft from Marina Seliverstova's bank to the real estate agent evidencing that the deposit was paid from her account.

[56] There is clear evidence of Marina Seliverstova advancing $138,261.77 to Mr. Grant from a fresh mortgage placed on her unit 902. As I noted earlier, there is no evidence of whether Dan Purcaru had anything to do with those funds. If, for example, he had paid off the prior mortgage for Marina Seliverstova and then she borrowed afresh, different considerations might apply. But that has not been proved beyond the level of shear speculation.

[57] The explanation for the remainder of the funds which Marina Seliverstova claims she paid for the purchase of 37 Gloucester Street does have problems however. Marina Seliverstova provided evidence of over $68,000 being moved from AGF accounts in her children's names into her bank. In addition, she received a wire from Hellenic Bank ostensibly from her mother in Russia for just over $100,000. She only needed a further $111,000 on top of the funds obtained from her new mortgage on unit 902. That was only a few thousand more than her mother had

loaned her. So why would Marina Seliverstova have cashed out an additional $68,000 that she had so carefully invested in her children's tax-protected RESPs?

[58] This uncertainty manifests in unexplained movements of $85,000 into Marina Seliverstova's chequing account at around the same time of this purchase. She said in re-direct examination that this was a piece of the money that she received from her mother that she had placed in another savings account for a short period of time to earn interest on it. That might be true. But since she moved money incessantly through and among different accounts but only chose to disclose some of the statements from the relevant time, there is no clear line established to see where the money originated and how it ended up where it is alleged to have ended up. For example, in one case, Dan Purcaru made a deposit into Marina Seliverstova's chequing account. There are two receipts for transactions for the same amount within minutes of each other. The applicant says that there must have been two equal deposits made. Marina Seliverstova says that all that happened was that Dan Purcaru made one deposit into her chequing account and the bank automatically moved the deposited funds from her chequing account into her line of credit. She said that she could not deposit funds directly into her line of credit. They had to be deposited into her chequing account and then they would be moved by the bank in accordance with standing instructions. There are two problems with this story. First, Exhibit 17, one of Marina Seliverstova's statements for her line of credit account, shows both transfers into the line of credit account *and* the deposit of cheques directly into the account contrary to Marina Seliverstova's oral evidence. In addition, why would Dan Purcaru have a receipt for an internal bank transfer? He was not the account holder. He made a deposit into Marina Seliverstova's chequing account as any stranger can do. But the financial institution would not then give a stranger a receipt to evidence the internal movement of the accountholder's funds.

[59] Nothing turns on the specifics of this deposit or these deposits except that they evidence that (a) Dan Purcaru and Marina Seliverstova managed their cash so as to maximize confusion and minimize accountability i.e. as a laundering operation; and (b) they made only partial disclosures of their affairs as necessary to fit the prevailing story at any given point in time. As more documents were located (by a court appointed receiver for example) their story has evolved to try to match the state of the records. There were other seemingly unconnected individual movements of funds proven in the applicant's recitation of the documents in chief that were not explained. I have no doubt that I have been provided only with a piece of the real picture by Dan Purcaru and Marina Seliverstova's selective disclosures.

[60] Marina Seliverstova said that her mother in Moscow kept her money in Hellenic Bank because it also had a branch here. Her mother had other bank accounts in Toronto banks as well including at least one joint account with Marina. The wire transfer ostensibly from Marina Seliverstova's mother came from Limassol which Marina tried to slough off as a Greek office of the Greek Hellenic Bank. However, Limassol is in Cyprus. Why was the mother's money wired from an Hellenic Bank branch in Cyprus? Why wasn't it simply transferred from Moscow directly to the Toronto branch internally by the bank given that the supposed purpose of using Hellenic Bank was that it had branches in both Moscow and Toronto? Moreover, Marina testified twice that the money was a loan from her mother. As discussed below, she says that Dan Purcaru paid her out of 37 Gloucester Street. Yet she did not repay the loan to her mother.

Neither did she prove any terms of the alleged loan. I do not accept that this money was a loan from Marina Seliverstova's mother. Marina Seliverstova was able to act in her mother's name for the joint account here. The delivery of a wire in the mother's name from a bank in Cyprus and the sloshing of the wired funds through undisclosed accounts raises more questions than it answers.

[61] Back to the $50,000 deposit. As discussed above, Marina testified that she drew $14,000 on a line of credit, borrowed $13,000 from her ubiquitous friend, and paid the rest (i.e. $23,000) with spare cash that she kept lying around in a safe. Why did she need to borrow from a friend when she had over $50,000 extra coming from her "mother" and her children's RESPs? She never showed the alleged loan from her friend being repaid from the movements of excess cash into her accounts on which she relied. She never showed how the $14,000 was repaid to her line of credit.

[62] Therefore, while I am satisfied that there is no proof that the $138,000 that was advanced on the new mortgage on unit 902 was infected by Dan Purcaru, little of the rest of the story holds together.

2. Marina Seliverstova funds from Dan Purcaru to buy unit 1710

[63] It was Marina Seliverstova's evidence in November, 2006 and at trial that she and Dan Purcaru were each to own half of 37 Gloucester Street. She says she put in $300,000 compared to his $154,000. Therefore, she said, he was to pay the mortgage until they were even.

[64] Marina Seliverstova now adds that by August, 2006 she was not sure how long she was going to remain in 37 Gloucester Street with Dan Purcaru. She decided to buy unit 1710 in 30 Gloucester Street for herself and for her oldest daughter to use in the interim. The unit cost $165,000 all-in. She continued to own unit 902 in that building so it is not clear why she needed unit 1710 if she wanted to leave Dan Purcaru.

[65] Dan had already paid $90,000 into the mortgage on 37 Gloucester Street and he was making the monthly mortgage payments. By four payments through August, 2006 and on September 1, 2006, Dan Purcaru paid a total of $85,000 to Marina Seliverstova that she paid into the purchase of unit 1710. For the rest, she says, she borrowed on her line of credit on unit 902 and she ran up some credit cards that had promotional rates available. No documentary proof was provided for these alleged borrowings.

[66] The line of credit on unit 902 must have been a special financial product. Normally one cannot borrow more than a percentage of the value of a mortgaged property. The unit was bought in 2001 for $162,000. In August 2005, Marina Seliverstova borrowed $138,000 against unit 902 secured by a new mortgage to fund the purchase of 37 Gloucester Street. That is roughly 85% of its purchased value of a few years prior. Yet, she says, there was still room available in this credit facility for her to borrow an undisclosed chunk of the remaining $80,000 that Marina Seliverstova required to pay for unit 1710. She did not produce documents showing

this alleged draw from her line of credit. Absent contemporaneous verification by banking records that were available to her, I do not accept her evidence on this point

[67] In addition, as discussed above, in November, 2006 Marina Seliverstova testified that after Dan Purcaru paid down $90,000 of the mortgage on 37 Gloucester Street, and paid monthly mortgage payments for a year, Dan Purcaru and she were "roughly equal" in their ownership of 37 Gloucester Street as they had agreed. This was the evidence that the applicant believed that led her to accept that Marina Seliverstova truly owned nearly 50% of the equity in that property and induced her to discontinue her efforts to add Marina Seliverstova as a party to the family law case. Mistake.

[68] It turns out that Marina Seliverstova's evidence in November, 2006 was not quite complete. She left out two pieces that seem to me to matter. First, she did not mention the $85,000 that Dan Purcaru had already paid to her in August and on September 1, 2006. By November, 2006, if Marina Seliverstova's story is to be believed, her investment in the property was down to about $215,000. By that time Dan Purcaru had invested his $154,000, plus $90,000 toward the mortgage, plus another $8,400 in mortgage principal payments in the year, plus $85,000 to Marina Seliverstova or about $337,000 in total. The story in November 2006 that they were "roughly equal" was not roughly true. As mentioned above, since the Applicant's discovery of the extra $85,000 paid by Dan Purcaru to Marina Seliverstova, her story has evolved from an agreement to share the property 50/50 into a claim that Dan Purcaru was slowly buying out her 50% interest in the property. There was no mention of this in Marina Seliverstova's November, 2006 affidavit. There is more to come on this.

[69] The other piece that Marina Seliverstova left out of the story was provided by each of the two witnesses whom she called to testify on her behalf at the trial.

[70] Dan Purcaru testified for Marina Seliverstova. It was his testimony that he wanted to use the big front room with the bay window at 37 Gloucester Street for his business. As he intended to occupy more of the house than Marina Seliverstova and her family, they agreed to hold title 2/3 for him and 1/3 for her. All joint expenses incurred on the house for the next 1 ½ years during which they live together there were split 2:1 accordingly. He also testified that he paid some of the deposit although he was unsure of how much came from him. If this were true, it would be evidence of money being paid out of Marina Seliverstova's accounts having originated with Dan Purcaru as the applicant alleges.

[71] Dan Purcaru's story of a 2:1 ownership ratio came out of the blue. It was inconsistent with his own testimony in the family law case and with Marina Seliverstova's testimony of a 50/50 sharing. Why should he suddenly be believed now?

[72] The price of the house was $740,000. Two-thirds would be roughly $500,000 with land transfer tax and legals factored into the mix. Dan Purcaru paid $154,000 and Marina Seliverstova ostensibly paid $250,000. The deposit was another $50,000. That left about $300,000 for the mortgage. If Dan paid the deposit of $50,000 and his $154,000 – that's $204,000 down. When the $300,000 mortgage is added, his share becomes $500,000 and

Marina Seliverstova's share would have been $250,000. That works out to 2:1 as Dan Purcaru said. But that is just manipulating numbers.

[73] Marina Seliverstova's other witness at the trial was Donald Grant, the lawyer who acted for Dan Purcaru and Marina Seliverstova on the purchase. He brought his files with him. Mr. Grant's file for this transaction includes a draft agreement that he prepared for Dan Purcaru and Marina Seliverstova to document a 2:1 sharing of the property as sworn by Dan Purcaru. Mr. Grant said that because he had a joint retainer, he was duty-bound to express the parties' interests with clarity so as to properly protect both Dan Purcaru and Marina Seliverstova. He was clear that he obtained the information that formed the basis of his draft agreement from Dan Purcaru and Marina Seliverstova.

[74] Ultimately Dan Purcaru and Marina Seliverstova did not sign the agreement. All we know with any certainty therefore is that they told the lawyer that they were contributing on a 2:1 ratio. This seems to fit with one iteration of the numbers, but given the movements of funds around and between accounts, with only partial disclosures of the pieces that Dan Purcaru and Marina Seliverstova want the court to see, there is no certainty to the actual origination of the funds said to support either a 2:1 sharing or a "roughly equal" sharing as Marina Seliverstova later claimed and claims.

[75] The relevancy of this lengthy recitation of the machinations concerning 37 Gloucester Street is that Marina Seliverstova now claims that the $85,000 that she used to buy unit 1710 was paid to her by Dan Purcaru as partial payout of her interest in 37 Gloucester Street. Marina Seliverstova claims that Dan Purcaru had her almost fully bought out in 2007 and this becomes relevant to a later piece of the story. But it all turns on the basic proposition that she bought one-half of 37 Gloucester Street with Dan Purcaru and he slowly paid her out over time. She says that this is why she consented to the order made by Czutrin J. vesting 37 Gloucester Street in the applicant as noted above. She says that she had no remaining equity in the property by that time although her name remained on title. Her position begs the question of whether she ever had much equity at all in the property.

[76] As to the $85,000 paid to her by Dan Purcaru that she used to pay for some of unit 1710 in 30 Gloucester Street, I do not accept Marina Seliverstova's story. Her November, 2006 sworn evidence of having a roughly equal investment with Dan Purcaru in 37 Gloucester Street wholly failed to disclose this movement of funds. The fact that Dan Purcaru and Marina Seliverstova told their lawyer that they were buying the house on a 2:1 basis but did not sign documents that would have protected Marina's interest is consistent both with the 50/50 story being untrue but also with the 2:1 story being just something that they were saying at the time. They wove a tangled web and I find that they did so just for the purpose Sir Walter Scott suggested – to deceive.

[77] I find that there was no consideration for Dan Purcaru's movement of $85,000 in four tranches to Marina Seliverstova in August and September, 2006. The movement was part of their cooperative effort to move Dan Purcaru's money away from the applicant and court enforcement. I do not accept that Dan Purcaru was buying out Marina Seliverstova's fifty

percent interest in 37 Gloucester with that payment. The 50/50 story was used in November, 2006 based on rough numbers that had been disclosed by that time. Marina Seliverstova did not disclose the further $85,000 that had already been paid to her. There was no legitimate reason to withhold disclosure in light of her claim that she tried to give the fullest, transparent disclosure so as to avoid being dragged into Dan Purcaru's divorce proceedings. There was no 50/50 agreement and hence the chart created by Marina Seliverstova that carefully discloses payments over time that purport to show Marina being eventually paid out on that basis was a construct for this case.

[78] In addition, I have already rejected above Marina Seliverstova's claim that she obtained the rest of the money to fund this purchase from her bottomless line of credit on unit 902 and the promotional credit card offers that she did not produce. I find it far more likely that all of the funds for this purchase emanated from Dan Purcaru and I so find.

[79] I have previously found that there is no evidence undermining Marina Seliverstova's evidence that she contributed at least $138,000 to 37 Gloucester Street. It is also true that she consented to the order to Czutrin J. vesting that property in the applicant. This suggests that whatever investment Marina Seliverstova had in 37 Gloucester Street was moved or repaid to her prior to that time. She had little choice but to consent to the order in light of her testimony that she had been paid out of her 50% interest in that property by the end of 2007. It is clear that whatever she put into 37 Gloucester Street, Marina Seliverstova admits to receiving at least $300,000 from Dan Purcaru. As I have already noted, there were a number of other transactions that were never explained over and above those noted in Marina Seliverstova's chart. I do not know if and when Marina Seliverstova received back whatever she may have put into the purchase of 37 Gloucester Street. The people who do know, Dan Purcaru and Marina Seliverstova, have declined to make forthright and complete disclosure. What I am satisfied of is that there is no basis to find that Marina Purcaru had a 50% interest in 37 Gloucester Street and hence there was no deal to buy out her 50% interest. Therefore the payments in August and September of 2006 and other payments that funded the purchase of unit 1710 were not made with consideration.

iii. The charge granted by Dan Purcaru and Marina Seliverstova in favour of the Canadian Imperial Bank of Commerce on their house at 37 Gloucester Street in the amount of $500,000 on June 3, 2008;

[80] As mentioned above, on June 3, 2008, the second day of the settlement conference before Goodman J., that was to have been the second day of the family law trial, Dan Purcaru and Marina Seliverstova signed the documents to create a secured $500,000 line of credit against 37 Gloucester Street. Dan Purcaru left the courthouse in mid-afternoon and met Marina Seliverstova at the bank at Yonge and Sheppard to sign the documents. He then returned to the courthouse to rejoin the settlement conference.

[81] When this property was vested in the applicant by Czutrin J., it came with the collateral second mortgage fully drawn. The applicant had to pay the bank $500,000 from the proceeds of

sale. The $500,000 is sitting largely with Dan Purcaru's brother in Romania and partly in unit 1809 of 30 Gloucester Street that is considered below.

[82] In the application for the credit facility that she co-signed, Marina Seliverstova represented to the bank that she was Dan Purcaru's spouse. By June, 2008, she apparently had been living separate and apart from Dan Purcaru since April, 2007. However, there is evidence that she travelled overnight with Dan Purcaru to the US several times. They took a vacation to a resort in Cuba together. They also went to an Ontario resort together - all after April, 2007. Moreover, later in June, 2008, Marina Seliverstova was concerned when she did not hear from Dan Purcaru as expected. She went to 37 Gloucester Street, stood on a garbage container to climb over a wooden fence and went inside to find him having attempted to commit suicide. There are diner receipts showing the two eating meals together shortly thereafter. She also visited him while he was in jail for contempt. I find that they did not end their relationship in April 2007.

[83] In their loan documents Dan Purcaru and Marina Seliverstova also represented to the bank that there were no orders preventing the encumbering of 37 Gloucester Street. As noted above, the order of Herman J. was outstanding and did indeed prevent depletion of Dan Purcaru's interest in the property. I find that putting a $500,000 mortgage on a property intending to take the money out shortly thereafter was indeed a depletion in breach of the order.

[84] Dan Purcaru testified that he intended to use the $500,000 line of credit to fund legal fees for his divorce trial, to fund a settlement offer that he intended to make to his wife, and to continue to re-pay Marina Seliverstova for her interest in 37 Gloucester Street as she had requested. The funds could have been used to help fund a settlement of the family law proceeding. In fact Dan Purcaru made a settlement offer to the applicant that day. But it was quickly rejected. Settlement does not begin to explain the repeated, multiple drawings and deposits of $50,000 amounts that Dan Purcaru spun out of and then back into the line of credit in the succeeding weeks. These movements of funds are consistent only with a spin cycle to disguise payments and to obfuscate.

[85] There is an additional important point about this charge however. It was a transaction between Dan Purcaru and Marina Seliverstova as chargors and a third party bank as chargee. The bank, in effect, bought a mortgage interest in 37 Gloucester Street. From the bank's perspective, the transaction was presumably a normal borrowing by property owners. The bank gave valuable consideration for its mortgage interest. It agreed to lend up to $500,000 to Dan Purcaru and Marina Seliverstova. There was no suggestion that the bank had any fraudulent intention in the transaction. These points are relevant to the legal analysis below.

[86] Dan Purcaru testified that he went home to Romania in the summer of 2008 to obtain a second opinion concerning a recent medical diagnosis that he had received. While he was there, he said, his brother asked for a loan. Dan Purcaru was feeling alone and possibly in need of his brother's care. He said that he felt that he had no choice but to lend his brother the $325,000 sought. He drew the funds from the $500,000 line of credit.

[87] I do not accept Dan Purcaru's evidence at all. He was not alone. His relationship with Marina Seliverstova continued. Moreover, it is all too convenient that Dan Purcaru no longer needed the $500,000 line of credit for legal expenses and to fund a settlement with the applicant in their family law proceedings when his brother unexpectedly asked for a loan of just the amount remaining available in secured line of credit. The court was not favoured with the brother's proposed purpose for the loan or any testimony from him at all. Dan Purcaru made no disclosure the existence of the line of credit until the opening of trial before Paisley J. in May, 2009.

iv. Dan Purcaru's transfer of money to Marina Seliverstova to enable her to acquire unit 1809, 30 Gloucester St., Toronto, in the name of her daughter, Anna Seliverstova.

[88] Dan Purcaru paid $165,000 to Marina Seliverstova to help fund the purchase of unit 1809 of 30 Gloucester Street in June, 2008. She says that the funds were paid to her by Dan Purcaru as repayment of loans that she had made to him previously so that he could buy unit 1604 at 30 Gloucester Street.

1. <u>There was no loan from Marina Seliverstova to Dan Purcaru on unit 1604.</u>

[89] According to Marina Seliverstova and her purported accounting chart, by late 2007, Dan Purcaru had basically bought her out of her 50% interest in 37 Gloucester Street. He had continued to pay her amounts from disparate sources over time. Marina Seliverstova's chart shows that Dan Purcaru made five payments to her totalling almost $200,000 in 2007.

[90] In January, 2008, Dan Purcaru is said to have approached Marina Seliverstova and asked to borrow $135,000 so he could buy unit 1604 of 30 Gloucester Street. Dan Purcaru testified that he wanted the unit for his children so that they would have a place to live and attend U of T or Ryerson that would be right across the street from his house at 37 Gloucester Street. In January, 2008, the two children, whom he had not seen in years, were about five and eight years old respectively. They were at least ten years away from attending university. Dan Purcaru said that he thought that the unit would be a good investment in the meantime. This unit is one of the ones that was vested in the applicant and sold pursuant to an order of Czutrin J.

[91] Marina Seliverstova says that she agreed to loan $135,000 to Dan Purcaru as he requested. She loaned the money with no interest. She says that because her name was still on title to 37 Gloucester Street, she felt that her loan was secured even though, in her story, she had no equity left in that property. As I alluded to above, this story makes no sense. An interest in common on title to a house in which the parties believe that one owner has bought out the other's interest, is of no relevancy to a loan made to buy a new investment elsewhere. Marina Seliverstova's name being on title did not secure her loan at all.

[92] Marina Seliverstova testified that whether or not her name remaining on title to 37 Gloucester Street secured her new loan legally, she believed that it did. Re-enter Mr. Grant. He

did not have his file for this transaction. He thinks he may have given it to lawyers for Marina Seliverstova at an earlier time. But he was not sure of that. All that remains in his possession is an affidavit that he swore at the request of Marina Seliverstova or her counsel that confirms that Dan Purcaru bought unit 1604 with $135,000 borrowed from Marina Seliverstova. Mr. Grant drafted an agreement to document the loan. He felt it prudent and necessary to protect Marina Seliverstova's interest as lender. The terms of the loan as told to Mr. Grant were that there would be no interest payable on the loan and it would be repayable from the sale or refinancing of unit 1604 at some unspecified time in future by Dan Purcaru. Marina Seliverstova and Dan Purcaru refused to sign the draft agreement or even a promissory note. Accordingly, Marina Seliverstova knew that the "loan" story, such as it was, did not have anything to do with 37 Gloucester Street. It was repayable only on the sale or refinancing of unit 1604, 30 Gloucester Street.

[93] By January, 2008, Marina Seliverstova says she had moved out of 37 Gloucester Street. She had determined that Dan Purcaru needed help with mental health issues. Again, why she would give him a loan totally undocumented and refuse legal advice to document it is a mystery that undermines her story. The legal advice also undermines her claim that she believed that her name remaining on title to 37 Gloucester Street was somehow security. Moreover, this story only works if one accepts the premise that Marina Seliverstova had been paid out of her 50% interest in 37 Gloucester Street by the payments in August/September 2006 through 2007. I have rejected that premise previously.

[94] It follows that when she gave $135,000 to Dan Purcaru in January, 2008, Marina Seliverstova was simply returning a portion of his money to him. The same is true for the further $30,000 that Marina Seliverstova provided to Dan Purcaru ostensibly to fund his legal fees in May, 2008. There were no loans. Therefore, when Dan Purcaru paid $165,250 to Marina Seliverstova in June, 2008, he was not repaying a loan. Rather, he was simply giving his money to her without consideration to invest in unit 1809 of 30 Gloucester Street.

2. Marina Seliverstova bought unit 1809 with Dan Purcaru's money

[95] Marina Seliverstova bought unit 1809 and put it in her daughter's name in order to take advantage of a first-time buyer's incentive provided by the government. It is common ground in this proceeding that Anna Seliverstova held the property for her mother. Anna Seliverstova confirmed on discovery that she had no interest in the property and she viewed it as her mother's unit. To protect her interest, Marina Seliverstova had her daughter sign a mortgage for the full amount that Marina paid for the unit. A trust or nominee agreement might have been simpler and more consistent with reality. The documents used were designed to create an impression of an arm's length relationship of lender/borrower between mother and daughter that does not exist.

v Additional facts

[96] In August, 2010, shortly after Dan Purcaru's pleadings were struck in this proceeding, Marina Seliverstova commenced a lawsuit against the expert witnesses who testified for the applicant against Dan Purcaru at the family law trial in May, 2009. Marina Seliverstova sought

damages against the experts for their testimony in the family law proceedings. The claim against the experts was struck out shortly after it was commenced. It is another basis to suggest that Marina Seliverstova remains in a relationship with Dan Purcaru and was actively helping him well after they would have the court believe that their relationship had ended. In fact, Dan Purcaru provided documents to Marina Seliverstova just weeks before this trial to assist her in her position. In 2009, Marina Seliverstova paid for a family membership at the YMCA in Dan Purcaru's name. In light of these facts, their foreign travel together, and continued movement of substantial amounts of money back and forth between them, I find that their relationships was, and remains a non-arm's length relationship. They do not function at arm's length like strangers transacting business in the commercial market place.

Law and Analysis

[97] Sections 2 and 3 of the *Fraudulent Conveyances Act*, R.S.O. 1990, c F.29 provide:

> **Where conveyances void as against creditors**
> **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.
>
> **Where s. 2 does not apply**
> **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.

[98] Section 12 of the *Assignments and Preferences Act*, R.S.O. 1990, c. A.33 provides as follows:

> **Following proceeds of property fraudulently transferred**
> **12.** (1) In the case of a gift, conveyance, assignment or transfer of any property, real or personal, that is invalid against creditors, if the person to whom the gift, conveyance, assignment or transfer was made has sold or disposed of, realized or collected the property or any part thereof, the money or other proceeds may be seized or recovered in an action by a person who would be entitled to seize and recover the property if it had remained in the possession or control of the debtor or of the person to whom the gift, conveyance, transfer, delivery or payment was made, and such right to seize and recover belongs not only to an assignee for the general benefit of the creditors of the debtor but, where there is no such assignment, to all creditors of the debtor.

Taking proceeds under execution
(2) Where there is no assignment for the benefit of creditors and the proceeds are of such a character as to be seizable under execution, they may be seized under the execution of any creditor and are subject to the *Creditors' Relief Act, 2010*.

[99] As averted to briefly above, under the applicable case law, where a person transfers property for no consideration, only the intention of the transferor is considered under s.2 of the statute. The transferor's intention to defraud creditors may be inferred upon proof that the transaction occurred in conjunction with one or more badges of fraud. In that case, an evidentiary burden to support the *bona fides* of the transaction will fall upon the respondents.

[100] Mr. Justice Brown (as he then was) described the operation of the statute as follows in *DBDC Spadina Ltd v. Walton*, 2014 ONSC 3052 at paras 66 and 67:

> The decision of Anderson J. in *Re Fancy*[21] often is referred to as a classic enumeration of the badges of fraud. In the 1988 decision of *Ricchetti v. Mastrogiovanni* this Court dealt with *Re Fancy* as follows:
>
> > The law on the subject of fraudulent conveyances is accurately stated by Mr. Justice Anderson in *Re Fancy* (1984), 1984 CanLII 2031 (ON SC), 51 C.B.R. (N.S.) 29 ....
> >
> > > The plaintiff must prove that the conveyance was made with the intent defined in that section [i.e. section 2 of the *Fraudulent Conveyances Act*]. 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. Although the primary burden of proving his case on a reasonable balance of probabilities remains with the plaintiff, the existence of one or more of the traditional "badges of fraud" may give rise to an inference of intent to defraud in the absence of an explanation from the defendant. In such circumstances there is an onus on the defendant to adduce evidence showing an absence of fraudulent intent. Where the impugned transaction was, as here, between close relatives under suspicious circumstances, it is prudent for the court to require that the debtor's evidence on bona fides be corroborated by reliable independent evidence.
> >
> > The "badges of fraud" referred to by Mr. Justice Anderson are those et [*sic*] out in *Re Dougmor Realty Holdings Ltd.*, (1966), 1966 CanLII 214 (ON SC), 59 D.L.R. (2d) 432:
> >
> > > (1) Secrecy
> > >
> > > (2) Generality of Conveyance

(3) Continuance in possession by debtor

(4) Some benefit retained under the settlement to the settlor.

The above passages set out the test to be applied. The badges of fraud alleged by the plaintiff are established.[22]

[67] The case law[23] has identified the following circumstances as constituting "badges of fraud" for purposes of ascertaining the intention of a debtor: (i) the transferor has few remaining assets after the transfer; (ii) the transfer was made to a non-arm's length person; (iii) there were actual or potential liabilities facing the transferor, he was insolvent, or he was about to enter upon a risky undertaking; (iv) the consideration for the transaction was grossly inadequate; (v) the transferor remained in possession or occupation of the property for his own use after the transfer; (vi) the deed of transfer contained a self-serving and unusual provision; (vii) the transfer was effected with unusual haste; or, (viii) the transaction was made in the face of an outstanding judgment against the debtor. As well, the effect of a transaction on creditors may provide evidence of the debtor's intent. For example, if the effect of a conveyance without adequate consideration is to defeat, hinder or delay creditors, then that effect may well justify an inference that, in making the conveyance, there was such an intention. The inference can be rebutted by cogent evidence that there was no such intention, but that the conveyance was made for an honest purpose.[24]

(notes omitted)

[101] In this case, all transactions between Dan Purcaru and Marina Seliverstova were non-arm's length transactions. While generally people do not have to tell the world about their transactions, at all material times Dan Purcaru was subject to disclosure obligations under the *Family Law Rules*. His breaches of disclosure orders and obligations have been documented by others judges previously. Secrecy was not just a badge of fraud. In this case his non-disclosure was outright illegal. While some disclosures concerning 37 and 30 Gloucester Street were made by Dan Purcaru and Marina Seliverstova in 2006, the bulk of the information that led to the tracing effort conducted for this trial was found later by the court appointed receiver. Dan Purcaru and Marina Seliverstova not only hid information, they disclosed untrue information until required to change their stories as further information was discovered on behalf of the applicant.

[102] In light of the holdings above concerning the advances of funds that preceded the purchase by Marina Seliverstova of units 1710 and 1809 of 30 Gloucester Street, it follows that I am satisfied that those advances were made by Dan Purcaru with the intention to defeat, hinder, delay, or defraud his creditors and are hence void as against those creditors. The respondents' explanations have already been found to be lacking of cogency and credibility. While unnecessary for these two transactions that were not supported by good consideration, I find that Marina Seliverstova shared Dan Purcaru's intention to defeat, hinder, delay, or defraud his creditors. There was no intention to make a gift to Marina Seliverstova claimed. The extensive

efforts to which they went to launder Dan Purcaru's funds and hide the truth of the transactions that they conducted in light of the multiple badges of fraud surrounding the transactions, especially in light of Marina Seliverstova's knowledge of the divorce proceedings, leads me to readily conclude that Marina Seliverstova was an active and knowing participant in Dan Purcaru's effort to defeat the rights of the applicant.

[103] The granting of the mortgage to CIBC was not in itself a fraudulent conveyance. It is saved under ss.3 and 7(2) of the statute. However, the drawing of $325,000 from the CIBC line of credit and the alleged loan to Dan Purcaru's brother in direct defiance of the orders of Herman and Belobaba JJ. was a fraudulent conveyance by Dan Purcaru and hence is void as against his creditors. I do not accept his evidence that he loaned the money to his brother. It was a non-arm's length transfer with no consideration, secrecy, haste and in knowing breach of orders of the court. I draw an adverse inference against the brother who declined to appear in this proceeding to try to establish the *bona fides* of the transaction. I infer and find that it was not a *bona fide* loan made on good consideration.

[104] In closing argument, the applicant sought an order that Marina Seliverstova ought to be liable for the $325,000 fraudulent by Day conveyed by Purcaru. This was not pleaded. No law was submitted in support of a claim for a monetary remedy under the statute. However, counsel agreed with a suggestion by the court that it is well established that everyone is liable for the torts that they cause, commit, induce, and procure. So too with statutory causes of action. *Mentore Manufacturing Co., Ltd. et al. v. National Merchandise Manufacturing Co. Inc. et al.* (1978), 89 D.L.R. (Fed. C.A.), *ScotiaMcLeod Inc. v. Peoples Jewellers Ltd.*, 1995 CanLII 1301 (ON CA), and *ADGA Systems International Ltd. v. Valcom Ltd.*, 1999 CanLII 1527 (ON CA).

[105] Marina Seliverstova argues that she was duped by Dan Purcaru. She thought he needed $500,000 to repay her $165,000 so she could buy unit 1809, to pay his lawyer $100,000, and to settle with the applicant. I have already rejected her argument concerning the purchase of unit 1809. She did not explain why a second mortgage had to be taken out for Dan Purcaru to make an offer to settle to the applicant. Dan Purcaru said that he thought that showing cash-in-hand would add credibility to his offer. Were that remotely true would have required Dan Purcaru to disclose the second mortgage to the applicant and Goodman J. But disclosing the mortgage would have exposed his overt breach of the order made by Herman J. As noted above, Dan Purcaru says he actually left court on June 3, 2008 to go and sign the bank documents and then he returned to make his offer. Yet somehow, disclosing where he had just gone to provide "extra credibility" to the offer he just made eluded him. They just pile lie on lie. This mortgage is actually an excellent example of the badge of fraud of haste. They needed to get the equity out of 37 Gloucester Street before the trial concluded. Hence the rush to interrupt the settlement conference for Dan Purcaru to get up to the bank and back.

[106] If Marina Seliverstova initially really had an interest in 37 Gloucester Street and then was bought out, she had many months to get her name off title. She did not do so. She also did not need to stay on title and take on $500,000 in personal liability to help Dan Purcaru obtain a mortgage that she knew violated the order(s) obtained by the applicant to limit Dan Purcaru's entitlement to deal with his properties. She did not need to make misrepresentations to the CIBC

or take on liability to the bank with Dan Purcaru over a year after she allegedly broke up with him. She said that she assumed that the property value would cover the second mortgage. Yet she did not know the amount outstanding on the first mortgage to let her calculate the value remaining available in the property to cover a second charge.

[107] As I said above, the second mortgage was designed to deplete the equity from 37 Gloucester Street. It mattered not a whit to Marina Seliverstova if the money was drawn and sent to Romania or put elsewhere by Dan Purcaru. She was knowingly functioning as a conduit through which he was seeking to hide his assets from his wife. She actively and knowingly helped him in this wrongdoing and she ought therefore to be equally liable with him.

[108] However, Mr. Joseph argued that the law does not allow for a remedy in damages under the *Fraudulent Conveyances Act*. The cases that he argued refer to authority emanating from the Supreme Court of Canada that has been consistently applied and indeed says that damages are not available for breach of the statute. *Taylor et al. v. Cummings et al* (1897), 27 S.C.R. 589. In *Waxman v. Philip Environmental Inc.*, 1994 CarswellOnt 4666 (Ont. Ct. Gen. Div.) Mr. Justice Lane came to the same conclusion. The statute provides for a declaration that transactions are void and that is all.

[109] In considering whether the statute allows monetary relief, Lane J. wrote, "[t]here is no language of prohibition nor of duty to give rise to a duty of care to anyone." I am not sure that I would go that far. The statute voids fraudulent conveyances. They are illegal and voidable at the instance of creditors. It is illegal to convey assets in the circumstance set out in s.2 of the statute. Lawyers understand that they are duty-bound not to help clients fraudulently convey assets. In my view, there is an implicit prohibition by necessary intendment. There are cases in western Canada in which creative remedies have been adopted in order to give effect to a declaration under the statute. They rely on *Taylor* to find that the proper order under the statute is not just that the transaction is void but that the transferee "... do all things necessary to make the property ... available for satisfying the claims of the creditors ...." See for example, *HXP Debenture Trust v Guillaume*, 2015 SKQB 225 (CanLII).

[110] In Ontario, *the Assignments and Preferences Act* gives remedies to the creditors where the transferee disposes of the property transferred. But Marina Seliverstova was not a transferee. She was one of the transferors. Even if I to order the transferee Mircea Purcaru to do all things necessary to make the $325,000 available for satisfying claims of creditors of Dan Purcaru, I do not see how that can include ordering Marina Seliverstova to pay damages despite her acting in concert with Dan Purcaru as discussed above. Dan Purcaru himself is not liable for damages under the *Fraudulent Conveyances Act*. His liability stems for the divorce, corollary relief, and costs orders made against him.

[111] Mr. Justice Lane noted in Waxman that parties are free to join claims for damages with claims under the *Fraudulent Conveyances Act*. But the applicant did not claim in tort against Marina Seliverstova in respect of the mortgage and Dan Purcaru sending $325,000 drawn on the secured debt facility to his brother.

[112] If the court is to order a monetary remedy against Marina Seliverstova for her knowing participation in the fraudulent conveyance, it seems to me that *Taylor* will have to be reconsidered. I am also loathe to depart from the decision of Lane J. of this court without pleading, full briefing, and argument of this issue. The current state of the law that precludes a monetary remedy strikes me as flowing from a highly technical rather than a purposive reading of the statute. The rules of statutory interpretation have evolved since the late 1800s to be sure. But that is the state of the law pending a determination to the contrary by a higher court or at least a pleading and briefing that allows the court to deal with the issue on its merits.

[113] Judgment will issue voiding the transfers of funds from Dan Purcaru to Marina Seliverstova for the purchase of units 1710 and 1809 of 30 Gloucester Street. That means that if the funds were still in the hands of Marina Seliverstova, they would be treated as if they are still Dan Purcaru's funds. They could be seized from Marina Seliverstova and distributed to all of Dan Purcaru's creditors under the *Creditors' Relief Act, 2010*, S.O. 2010, c 16, Sch 4. But the funds are no longer in Marina Seliverstova's hands. She invested them in the two units at 30 Goucester Street. The applicant asked for an order vesting title in units 1710 and 1809 in her name. A vesting order was granted in *Shoukralla v. Shoukralla*, 2014 ONSC 4205. In my view however, granting a vesting order in favour of a solitary applicant risks ignoring the interests of any other creditors of the debtor.

[114] Dunphy J. described the remedy available in a fraudulent conveyance action as follows at para. 29 pf *Conde v Ripley et al.*, 2015 ONSC 3342 (CanLII):

> In many ways, an FCA action can be likened to a class proceeding. The outcome of such an action is neither a conveyance of the subject land to the plaintiff nor even a money judgment against the transferee in favour of the plaintiff. Rather, the conveyance is deemed void as against "creditors or others" with the result that whatever remedies that the creditor may have exercised as against the transferor's property may similarly be asserted against the subject property as if the transfer had never occurred because – as against "creditors or others" least – the transfer is void.

[115] But, as noted above, under s.12(1) of the *Assignments and Preferences Act,* if the fraudulently conveyed property has been disposed of by the transferee, then the "the money or other proceeds" in the transferee's hands may be seized and recovered in an action "and such right to seize and recover belongs ... to all creditors of the debtor." The proceeds of disposition of Dan Purcaru's fraudulently conveyed cash are the titles to units 1710 and 1809, 30 Gloucester Street that are now in the hands of Marina and Anna Silerverstova. Therefore judgment will issue binding Marina and Anna Seliverstova's interests in the title to units 1710 and 1809, 30 Gloucester Street and authorizing the sheriff to take possession and sell the units to realize and pay to the creditors of Dan Purcaru the sums that he fraudulently conveyed on each unit plus interest and any costs as may be ordered against Dan Purcaru, Marina Seliverstova, or Anna Seliverstova.

[116] The court therefore makes the following orders:

a. Dan Purcaru's transfer of $165,000 to Marina Seliverstova to enable her to acquire unit 1710, 30 Gloucester St., Toronto is declared to be void as against Dan Purcaru's creditors;

b. Dan Purcaru's transfer of $165,000 to Marina Seliverstova to enable her to acquire unit 1809, 30 Gloucester St., Toronto, in the name of her daughter, Anna Seliverstova, is declared to be void as against Dan Purcaru's creditors;

c. The court declares that Anna Seliverstova holds only bare legal title to unit 1809, 30 Gloucester Street. Beneficial title to the unit is owned by Marina Seliverstova;

d. Dan Purcaru's transfer of $325,000 to Mircea Purcaru is declared to be void as against Dan Purcaru's creditors. Mircea Purcaru shall pay the sum of $325,000 to the applicant who shall forthwith provide such funds or any portion thereof received to the sheriff on behalf of all creditors of Dan Purcaru. All funds realized by or provided to the sheriff shall be distributed in accordance with the *Creditors' Relief Act*, 2010;

e. The amounts set out in paras (a) and (b) above plus prejudgment interest and any costs that may be ordered against Dan Purcaru, Marina Seliverstova, or Anna Seliverstova may be recovered on behalf of all creditors of Dan Purcaru from a seizure and sale under writs of execution of the interests of Marina Seliverstova and Anna Seliverstova in the properties known municipally as units 1710 and 1809, 30 Gloucester Street, Toronto. The sheriff shall issue writs of execution binding the interests of Marina Seliverstova and Anna Seliverstova on requisition of the applicant. All proceeds of sale realized by the sheriff shall be distributed in accordance with the *Creditors' Relief Act*, 2010;

f. Marina Seliverstova and Anna Seliverstova, anyone acting of their behalves, and anyone with notice of this order, are enjoined and prohibited from selling assigning, transferring, or encumbering in any way any part of their title to units 1710 and 1809, 30 Gloucester Street, Toronto. If mortgages or other encumbrances already exist against either property, Marina Seliverstova and Anna Seliverstova are enjoined and prohibited from drawing any funds against

any debt facilities secured by any such mortgages or encumbrances and are prohibited from increasing in any way their respective liabilities under any such mortgages or other encumbrances; and

g. The applicant is entitled to prejudgment interest pursuant to section 128 of the *Courts of Justice Act*, R.S.O. 1990, c.C-43 on all of the foregoing amounts in each case from the date of the corresponding transfer that has been declared void by this judgment;

[117] The issue of costs is reserved. The applicant may submit a Costs Outline and no more than five pages of written submissions on costs to me on or before November 13, 2015. Dan Purcaru, Mircea Purcaru, Marina Seliverstova, and Anna Seliverstova may each submit no more than five pages of written submissions on costs by November 27, 2015. Marina Seliverstova shall include her own Costs Outline for comparison in addition to her submissions. If there are outstanding offers to settle upon which any party wishes to rely, they should be filed with their submissions and will not count toward the page limit. Costs submissions by counsel shall be delivered in searchable PDF format attached to an email to my assistant. No PDFs of case law shall be provided. Rather, references to case law, if any, shall be made by hyperlinks to CanLII or another online reporting service in counsels' submissions. Any party who is not represented by counsel and who wishes to deliver costs submissions, shall deliver them in hard copy to be filed at the court office in the usual manner.

F.L. Myers, J.

DATE: October , 2015

CITATION: Purcaru v. Seliverstova et al., 2015 ONSC 6679
COURT FILE NO. FS-10-16657-00
DATE: 20151029

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

FELICIA PURCARU

Applicant

- and -

ANNA SELIVERSTOVA, MARINA SELIVERSTOVA, MIRCEA PURCARU, REDINA INC., DARIBO CONSULTING INC., and DAN PURCARU

Respondents

REASONS FOR DECISION

F.L. MYERS J.

Released: October 29, 2015

Tab 8

CITATION: Indcondo v. Sloan, 2014 ONSC 4018
COURT FILE NO.: CV-08-7587-00CL
DATE: 20140731

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
Indcondo Building Corporation	)	*Trung Nguyen and P. James Zibarras*, for the Plaintiff
Plaintiff	)	
	)	
– and –	)	
	)	
Valerie Frances Sloan, David Robin Sloan and Cave Hill Properties Ltd.	)	*Philip P. Healey*, for the Defendants
	)	
Defendants	)	
	)	
	)	**HEARD:** May 26 – 30 and June 2 – 3, 2014

PENNY J.

Overview

[1] This is an action to set aside certain transfers of property on the basis that they were undertaken with the intent to defeat, hinder, delay or defraud creditors. The litigation began in 1992 with Indcondo's claim for damages for breach of a contract to purchase its shares in a real estate development company. John Di Paola is the sole shareholder of Indcondo. A judgment was obtained by the plaintiff at an undefended trial against the defendant, Robin Sloan, in 2001. A fraudulent preference action was commenced by the plaintiff in 2002 seeking to set aside the 1992 transfer of Sloan's half interest in his matrimonial home to his wife, Valerie Sloan. In the course of that action, the plaintiff became aware of other transfers of property from Sloan dating back to 1987 and 1988.

[2] Sloan declared bankruptcy in 2004 and the plaintiff's fraudulent conveyance action was stayed. The plaintiff filed a proof of claim in Sloan's bankruptcy. Sloan received an absolute discharge in 2005. In April 2006, the plaintiff obtained an *ex parte* order under s. 38 of *The Bankruptcy and Insolvency Act* authorizing it to proceed in its own name with an action to set aside the impugned transfers of property. This action was not commenced until June 2008.

[3] The action was dismissed by order of Morawetz J. on a limitations issue. The Court of Appeal reversed Morawetz J.'s order. The action was again dismissed as an abuse of process, on grounds of issue estoppel, by Mesbur J. That order too was reversed by the Court of Appeal.

The matter was case managed to trial by D. Brown J. Thus, after 23 years of litigation, a seven-day trial was finally conducted in this matter from May 26 to June 3, 2014.

[4] There are four transfers of property by Sloan which are challenged:

(1) transactions involving the 1987 transfer of property referred to as the "Bowes property" to Cave Hill Properties Limited, a company owned by Valerie;

(2) transactions involving the transfer of the "Hill 'N' Dale" farm property to Cave Hill in1987 and 1988;

(3) transactions involving the transfer of the matrimonial home, 42 Riverside Boulevard to Valerie in 1992; and

(4) a transaction involving the transfer of a Florida condominium to Valerie in 1993.

[5] The plaintiff also seeks to pierce the corporate veil in connection with assets owned by Cave Hill. These assets include the properties listed above (apart from 42 Riverside), or proceeds from the sale of these properties, as well as other assets alleged to have originated with Sloan but later been transferred to Cave Hill.

[6] Valerie suffered a serious stroke in 1996 and lives in a long-term care facility. Her affairs are managed by Sloan, who holds her power of attorney, and a long-time friend and former colleague of Sloan's, Bruce Pender. Valerie gave brief evidence by affidavit but was not cross-examined at trial.

[7] Before turning to the specific transactions in issue, it is necessary to set out, in some detail, the background and circumstances giving rise to these transactions and the litigation.

Background

[8] In 1967, Sloan started a business with Frank Stronach called Unimade Industries Limited. In 1974, Unimade was acquired by Magna for Magna shares and Sloan went to work for Magna.

[9] From 1974 to 1986, Sloan was a vice president at Magna. During part of this time, he headed up MI Developments, Magna's real estate acquisition arm. While doing so, he came to know Bruce Pender, an accountant who was a fellow Magna employee, and Doug Ford, an in-house lawyer employed by Magna.

[10] In 1985, Sloan, Di Paola and several other businessmen formed a private real estate development company called Steeles-Jane Properties Inc. It is common ground that this was a period when the Toronto real estate market was booming. The company was set up as a vehicle to buy property, develop it, and either resell at a profit or lease and refinance, using the proceeds to invest in additional properties.

[11] The principals, who were all involved in construction or real estate development in some way, each invested in Steeles-Jane through holding companies. The plaintiff is Di Paola's company. Sloan's company was called Ascania Investments Inc.

[12] The shareholders and interests in Steeles-Jane were as follows:

Shareholder	Principal	Number of Shares	%	Date of Share Issuance
Indcondo	John Di Paola	100	10%	June 17, 1985
Rocar Construction Limited	Carlo Rotundo	200	20%	June 17, 1985
Lostrock Corporation	Anton Czapka	200	20%	June 17, 1985
CIFU Safe Investments Limited	Carmen Alfano	150	15%	June 17, 1985
Conleo Holdings Limited	Leo Rinomato	150	15%	June 17, 1985
623742 Ontario Inc. / Ascania Investments Inc.	David Robin Sloan	200	20%	June 17, 1985

[13] Carlo Rotundo acted as President and was the most active of the principals in the operations and affairs of the company. Unlike the other shareholders, Di Poala/Indcondo did not invest any money in Steeles-Jane. Di Poala "earned" his shares by providing real estate agent services without commission.

[14] The parties entered into a shareholders' agreement in 1985. That agreement restricted the sale of shares by the shareholders. As between shareholders, the shareholders agreement contained a buy/sell, or "shotgun," clause which permitted any shareholder to make an offer to acquire another shareholder's shares. The offeree had the option to accept that offer or acquire the offeror's shares at the offered price.

[15] Paragraph 4.03 of the shareholders' agreement dealt with purported transfers of shares to persons who were not existing shareholders. In that case, any purported transfer was deemed to be a grant by the shareholder involved of an option to Steeles-Jane to purchase the shares at a value of 80% of the original purchase price.

[16] The shareholders agreement was amended in 1987 to provide that paragraph 4.03 would not apply to any transfer by any of the parties to the agreement if the "purported sale occurred within a period of 90 days after the fifth anniversary date of this agreement and/or every fifth anniversary thereafter." Thus, by June 1990, any Steeles-Jane shareholder had a 90 day window during which it would be entitled to sell its shares to a third-party without penalty under paragraph 4.03.

[17] The financial statements of Steeles-Jane show that by the year ended May 31, 1988, Steeles-Jane had accumulated total assets of $35 million (based on acquisition and carrying costs). Steeles-Jane also had liabilities of $34 million, largely from mortgages and bank indebtedness. Retained earnings for that year were a little over $700,000.

[18] The Steeles-Jane financial statements show that by the year ended, May 31, 1989, the total assets of Steeles-Jane (again based on acquisition and carrying costs) had grown to over $70 million and liabilities, again largely in the form of mortgages and banking indebtedness, had grown to over $66 million, producing retained earnings of some $3.8 million in that year.

[19] It is not contested that the principals of the shareholders were required to give the bank and mortgage lenders personal guarantees as security for the financing of Steeles-Jane's acquisitions and operations.

[20] Di Paola's evidence was that from 1987 on he raised with the other principals including Sloan concerns about the direction Steeles-Jane was taking. He was concerned, he said, about the highly leveraged nature of the Steeles-Jane balance sheet and that, if the market turned, they would lose everything. Di Paola said that by the fall of 1988, he advised the other principals that he wanted out and would be exercising his right to sell on the first five-year anniversary.

[21] There is little objective support for Di Paola's evidence that he was sounding the alarm as early as 1987. First, Di Paola produced no documentary evidence reflecting or demonstrating his concerns. There is no evidence that he had any discussions with any of the other shareholders about using the buy/sell provisions to buy him out. He called no corroborative evidence from other principals or witnesses. There is no evidence that in 1987 the real estate market was entering a downturn. Sloan does not support the contention that Di Paola raised concerns about the viability of Steeles-Jane at this stage.

[22] Apart from the fact that the shareholders' agreement was amended to permit the sale (without penalty) of shares on the fifth anniversary of the formation of Steeles-Jane, there is no evidence of financial concerns being expressed about Steeles-Jane in 1987 or 1988, apart from Di Paola's uncorroborated evidence, which I find is tainted by both his self-interest in placing the date that concerns about Steeles-Jane's financial viability were raised as early as possible and the enormous passage of time since the relevant events.

[23] I do, however, accept that by September 1989, the five-year anniversary was on the horizon. The minutes of the shareholders' meeting from that month reflect the fact that Rotundo

reminded the shareholders that the corporation's fifth year anniversary would be on May 30, 1990, that any of the shareholders had the right to dispose of their shares without penalty at that time and that, if any shareholder intended to exercise this right, he should make his intentions known so as to provide ample time to perform any necessary valuations. I find that, in or around this period, Di Poala voiced his desire to sell Indcondo's Steeles-Jane shares. Sloan agreed on discovery that, in the period leading up to Di Paola's notice of his desire to sell, he and Di Paolo had "many discussions" about it.

[24] A reporting package to shareholders of October 25, 1989 shows established equity in Steeles-Jane at that time of almost $48 million. No evidence was presented about the basis or background of the calculations shown in this shareholder package. The significant difference from the May 1989 financial statements appears to derive from the use of market values for the properties owned rather than their acquisition cost.

[25] The evidence discloses that by April 23, 1990, Di Paola had negotiate a "put/call" agreement providing for the potential buyout of all of Indcondo's Steeles-Jane shares over time at a price of $50,000 per share (Indcondo held, following a stock split, 100 shares such that the purchase price, if Indcondo chose to exercise all of its put rights, was $5 million). Based on the schedule agreed to, if Di Paola exercised all of Indcondo's puts under the agreement, the last tranche would be acquired by October 1994.

[26] The put/call agreement was between Indconco and Steeles-Jane. It provided, however, in paragraph 3.03, that if Steeles-Jane defaulted by failing to purchase any of its shares from Indcondo when required to do so, the principals of the other shareholders, including Sloan, "shall be jointly and severally obligated to purchase such shares from Indcondo for the [agreed] option price per share" on the closing dates specified in the agreement.

[27] At the end of April 1990, Steeles-Jane's rights to purchase the first tranche of Indcondo's Steeles-Jane shares were assigned to CIFU (Alfano) and Conleo (Rimomato). In this way, Alfano and Rinomato would each increase their shareholdings in Steeles-Jane by 5%, such that the remaining five shareholders would each hold 20%.

[28] In October 1990, Indcondo gave notice to Steeles-Jane of its intention to exercise its option to sell 10 more shares under the schedule of put options. These shares were also purchased by CIFU and Conleo in November 1990 and January 1991.

[29] In March 1991, CIFU (Alfano) and Conleo (Rinomato) provided indemnities to Sloan (and, according to Sloan, the other remaining shareholders), in which they indemnified Sloan against any claims as a result of CIFU and Conleo's agreement to purchase Indcondo's Steeles-Jane shares.

[30] In April 1991, Indcondo again gave notice to Steeles-Jane of its intention to exercise its put option to sell 10 more of its shares. CIFU and Conleo failed to purchase Indcondo's shares.

[31] According to Di Paola, the reason Steeles-Jane was unable to purchase the shares was that the Toronto property market bubble had burst and that prices had started to drop. The failure of CIFU and Conleo, or Steeles-Jane, to acquire the April, 1991 tranche of Indcondo's shares gave rise to negotiated amendments to the put/call agreement.

[32] The First Amendment, dated May 28, 1991, provided that Steeles-Jane or its assignees would acquire one of Indcondo's Steeles-Jane shares per month, commencing May 15, 1991, for the following 10 months. The agreement reiterated that if Steeles-Jane or its assignees failed to close any of the transactions in the First Amendment, that failure would be subject to the joint and several liability of the other principals under paragraph 3.03 of the put/call agreement. The first five shares were purchased from Indcondo by CIFU and Conleo in accordance with the First Amendment. However, on October 15, 1991, Steeles-Jane breached the First Amendment when CIFU and/or Conleo failed to purchase the share designated for purchase on that date.

[33] Further, on October 16, 1991, Indcondo gave a third notice to Steeles-Jane of its intention to exercise its put option under the put/call agreement for the sale of the next tranche of its Steeles-Jane shares. Steeles-Jane/CIFU/Conleo failed to purchase Indcondo's 10 shares by the end of October 1991 in breach of the put/call agreement.

[34] As result, the parties discussed a second amended agreement. The Second Amendment provided that:

(a) the five shares that were the subject of the First Amendment would be purchased on certain specified dates;

(b) the 10 shares that were the subject of Indcondo's October 1991 notice would be purchased on March 14, 1992; and

(c) if Steeles-Jane, Conleo or CIFU failed to purchase the shares on the prescribed dates, the principals would be required to do so in accordance with paragraph 3.03 of the put/call agreement.

Although the Second Amendment was never signed, it appears that three of the five shares outstanding were purchased in October, November and December 1991 but that, in January 1992, Conleo and CIFU failed to purchase the common share designated for that date, in breach of the Second Amendment, and failed to purchase any additional shares, in further breach of the put/call agreement and the Second Amendment.

[35] Di Paola gave evidence that there were further verbal agreements, tied to pending sales of specific properties, under which Indcondo agreed to forbear from enforcement of its rights in exchange for the promise of payment once the pending property sales closed. These agreements were not fulfilled and so, in March 1992, Indcondo finally gave notice to the principals that it required the principals to purchase Indcondo's shares under paragraph 3.03. At that point, the principals were jointly and severally liable to purchase from Indcondo its remaining 69.5

common shares at a price of $65,847 (the amounts included accumulated interest) per share for a total amount owing of $4,576,366.50.

[36] The principals failed to acquire Indcondo's shares in accordance with paragraph 3.03 of the put/call agreement. Accordingly, on May 21 1992, Indcondo issued a statement of claim against Steeles-Jane and the principals to recover the $4,476,366.50 of indebtedness.

[37] From 1992 to 1996, Di Paola says he was unable to afford counsel and the action languished. In August 1996, however, he was able to retain counsel and the action continued. In September 2001, Indcondo obtained a trial date to commence in December 2001. On the eve of trial, Sloan's lawyer advised that he would not be attending as he had not been retained for the trial. The trial proceeded on an undefended basis against Sloan. Molloy J. granted judgment in the amount of $8,010,575.30 plus interest at 15% (apparently based on the interest rate payable on amounts due and owing to Indcondo under the put/call agreement).

[38] That judgment has never been set aside or appealed from.

[39] In the course of seeking to enforce its judgment, Indcondo discovered that Sloan had transferred his half interest in the matrimonial home, 42 Riverside, to Valerie after he had been served with Indcondo's statement of claim. Indcondo commenced an action in August 2002 to set aside the conveyance of Sloan's 50% interest in 42 Riverside as being contrary to the *Fraudulent Conveyances Act*. Apparently, sometime during the course of that proceeding, Indcondo became aware of other alleged transfers of property by Sloan to a corporation owned and controlled by Valerie.

[40] What happened next was comprehensively summarized by Mesbur J. in her Endorsement on a motion to dismiss this action, dated August 30, 2011. I cannot do better than simply repeat her words:

> [4] In January 2004, Mr. Sloan declared personal bankruptcy. As a result of the bankruptcy the First Fraudulent Conveyances Action was stayed. Mr. Sloan listed only two creditors: Indcondo in the amount of $8.7 million and the Royal Bank of Canada for about $12 million. Indcondo proved its claim in the bankruptcy. Its principal, Mr. DiPaola, was active in the bankruptcy proceedings, and urged the Trustee to follow up on trying to get the matrimonial home and other properties back into the estate.
>
> [5] Mr. DiPaola requested a meeting of creditors, which was held on March 26, 2004. At the meeting, Mr. DiPaola questioned the bankrupt regarding a number of financial issues, and asked the Trustee what he would be doing about pursuing some of the transactions. Many of the transactions related to events that occurred in the years 1993 to 1996. The Trustee advised that the items raised were "outside the timeframes for challenging transactions pursuant to the *Bankruptcy*

and Insolvency Act. More importantly, any action to be pursued by the estate would have to be funded by the creditors as the estate is impecunious."

[6] Mr. DiPaola then advised the meeting he would be requesting an examination of the bankrupt pursuant to Section 161 of the *Bankruptcy and Insolvency Act*. The minutes of the meeting record that Mr. DiPaola was made aware of his rights under section 38 of the *Bankruptcy and Insolvency Act* to pursue any action not taken up by the estate.

[7] Mr. DiPaola's next action was to write to the office of the Superintendent of bankruptcy, seeking the OSB's cooperation in investigating this file. Although Mr. DiPaola knew of Indcondo's rights under section 38 in March of 2004, he did not take any steps at that time to obtain a section 38 order. He waited until 2006 to do so, and then waited another two years before actually commencing the section 38 Fraudulent Conveyances action itself.

[8] Because Mr. Sloan was a first time bankrupt, he came up for discharge in 2005. The Royal Bank of Canada did not oppose the discharge, but Mr. DiPaola did so on Indcondo's behalf. His notice of intended opposition set out alleged offences under Section 173 of the *Bankruptcy and Insolvency Act*, as well as section 195. The notice goes on to say "The creditor wishes to conduct Section 163 examinations of the following after it had received Section 161, Official Receiver's Report on September 24, 2004."

[9] Mr. Sloan's initial discharge hearing was set for April 5, 2005. Indcondo sought an adjournment in order to examine the bankrupt. Although the discharge hearing was adjourned for that purpose, Indcondo's counsel never conducted an examination. I have no evidence as to why not. The Trustee's report on Mr. Sloan's application for discharge showed nothing improper in the bankrupt's conduct. The Trustee did not oppose the bankrupt's discharge, but noted that a creditor had opposed the discharge. Mr. DiPaola's opposition on Indcondo's behalf was attached to the Trustee's report.

[10] Mr. DiPaola then wrote to the Trustee, and attached to his letter a resolution of the inspector (namely Mr. DiPaola) disapproving the Trustee's report.

[11] The discharge hearing was rescheduled for August 19, 2005. Counsel for the bankrupt sent a letter to Indcondo's counsel by fax and mail a month before the new date. In the letter, she advised Indcondo's counsel of the date and time for the new discharge hearing. Indcondo did not attend, nor did any other opposing creditor. The Registrar granted an absolute discharge. The discharge order recites that no one appeared for the opposing creditor, Indcondo, although properly served. It goes on to recite that "No proof has been made of any facts under Section 173 of the *Bankruptcy and Insolvency Act*."

[12] Mr. Sloan's lawyer then send a copy of the discharge order to Indcondo's lawyer, Mr. Chapman. In the letter, he says:

> As a result of the discharge order, the action [i.e. the First Fraudulent Conveyances Action] should be dismissed. My proposal is that it be dismissed on a without costs basis... If I do not hear from you by the above noted diary date [October 3, 2005] I will presume that you will not consent and proceed to bring a motion... If I am forced to bring such a motion, I will be seeking costs of the action.

[13] Mr. Chapman did not respond. On October 17, 2005 Mr. Sloan's lawyer wrote to him again, and asked for the courtesy of a reply. He suggested Mr. Chapman simply obtain ups instructions to consent.

[14] About 10 days later Mr. Chapman responded, saying "I have asked my client for instructions." He did not, however, ever advise whether he received any instructions, or what those instructions were. As a result, Mr. Sloan's counsel proceeded to schedule a motion to dismiss the First Fraudulent Conveyances Action. Mr. Sloan's lawyer wrote to Mr. Chapman on January 5, 2006 to advise him that since Mr. Chapman had not responded regarding his client's position, a motion to dismiss was scheduled for April 5, 2006.Mr. Chapman was served with the motion materials, but did not appear on the motion, and did not deliver any responding materials to it.

[15] On April 5, 2006 Belobaba J made the requested order. Indcondo did not attend that motion, but the following day counsel for Indcondo attended *ex parte* before the Registrar and obtained an order under Section 38 of the *Bankruptcy and Insolvency Act* to take proceedings to set aside certain reviewable transactions by the bankrupt. Having shown it was a creditor, had requested the Trustee to act in terms of setting aside fraudulent conveyances, and the Trustee having refused to do so, the court made the order. Although Indcondo obtained the s. 38 order in 2006, it did not begin its action pursuant to the order until 2008. These new proceedings became the Section 38 Fraudulent Conveyances Action, namely, this action.

[16] Some nine months after Belobaba J had dismissed the First Fraudulent Conveyances Action, Indcondo suggested its failure to attend the motion before Belobaba J was due to inadvertence. It sought to set aside the dismissal order on that basis. The motion came on before Low J on October 20, 2006. She dismissed the motion with costs against Indcondo of $2,500. She found first, there was no inadvertence; Indcondo simply failed to provide its counsel with instructions. Second, Low J held Indcondo had failed to explain its delay in moving to set the order side.

> [17] Once Low J made her order, the First Fraudulent Conveyances Action was definitively dismissed. Indcondo did not appeal Low J's order.
>
> [18] Even though it obtained the Section 38 order, Indcondo waited two years to commence the Section 38 Fraudulent Conveyances Action. In it, it makes identical claims as it had in the First Fraudulent Conveyances Action against the bankrupt, his wife and Cave Hill, the successor to the numbered company which had been the corporate defendant in the First Fraudulent Conveyances Action.

[41] As noted above, motions to dismiss this action on limitations grounds, initially granted by Morawetz J., and as an abuse of process, initially granted by Mesbur J., were overturned by the Court of Appeal for Ontario.

[42] With that background to set the context, I will now turn to the major issues in dispute.

The Impugned Transactions

1. The Law of Fraudulent Conveyances

[43] The *Fraudulent Conveyances Act,* R.S.O. 1990, c. F-29, provides, in s. 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 other persons and their assigns.

[44] Thus, in order for this section to apply so as to void a transaction, there must be:

(a) a "conveyance" of property;

(b) an "intent" to defeat; and

(c) a "creditor or other" towards whom that intent is directed,

see *Bank of Nova Scotia v. Holland*, [1979] O.J. 1190 at para. 12.

[45] The courts have interpreted the words "or others" broadly to include potential beneficiaries under a guarantee (where demand has not been made) and subsequent creditors. Indeed, courts have found that, in some circumstances, it is not necessary for there to be any creditors at all at the time of a transaction in order to conclude that it was done with the intent to defeat creditors.

[46] Galligan J. held in *Bank of Nova Scotia, supra,* that, although the holder of a guarantee upon which no demand has been made may not be a "creditor," the beneficiary of a guarantee is

an "other" within the meaning of s. 2 and entitled to the protection of the *Act*. He cited May's *Laws of Fraudulent and Voluntary Conveyances*, 3rd ed. at p.2:

> The words "creditors and others" are wide enough to include any person who has a legal or equitable right or claim against the grantor or settler by virtue of which he is, or may become, entitled to rank as a creditor of the latter.

[47] Is also not necessary for a party, in attempting to impeach a conveyance, to demonstrate that it had an actual debt owing to it at the time of the conveyance. In *Benyon v. Beynon*, [2001] O.J. 3653, the court noted that "creditors and others" is broad enough to contemplate a person who, while not a creditor at the time of the conveyance, may become one in the future.

[48] If there was an intention to defeat creditors, then it does not matter whether it was to defeat present or future creditors, see *CIBC v. Boukalis* 1987 CarswellBC 513 (B.C.C.A.). If an intent to defraud existed at the time of the conveyance, it does not matter that the person attacking it was not a creditor at the time, *Iamgold v. Rosenfeld*, [1998] O.J. 4690 (S.C.J.).

[49] The *Fraudulent Conveyances Act* was enacted to prevent fraud. It is remedial legislation and must be given as broad an interpretation as its language will reasonably bear. The purpose of the *Act* was expressed by Prof. Dunlop in *Creditor-Debtor Law in Canada*, 2nd ed. at p. 598:

> The purpose of the Statute of Elizabeth and of the Canadian Acts based on it, as interpreted by the courts, is to strike down all conveyances of property made with the intention of delaying, hindering, or defrauding creditors and others except for conveyances made for good consideration and bona fide to persons not having notice of such fraud. The legislation is couched in very general terms and should be interpreted liberally.

[50] Prof. Dunlop also considered the judicial difficulties in establishing fraud by ascertaining the state of mind of the debtor; that is, the dominant motive for effecting the impugned transaction. In the absence of direct evidence of intent, he said, "courts have been ready to rely on the surrounding circumstances as establishing *prima facie* the intent to defraud or delay... the so-called badges of fraud being nothing more than typical and suspicious fact situations which may be enough to enable the court to make a finding."

[51] In most cases, a finding concerning the necessary intention to defeat creditors cannot be made except by drawing an inference from the circumstances. If existing creditors are well secured, it may be that one is unlikely to infer that the conveyance was made in order to defeat them. Of course, the time for considering intent is the time of the conveyance, *CIBC V Boukalis, supra*, at p. 4.

[52] The badges of fraud derive from *Twyne's Case* (1601) 76 E.R. 809. As interpreted by modern courts, the badges of fraud include:

(d) the donor continued in possession and continued to use the property as his own;

(e) the transaction was secret;

(f) the transfer was made in the face of threatened legal proceedings;

(g) the transfer documents contained false statements as to consideration;

(h) the consideration is grossly inadequate;

(i) there is unusual haste in making the transfer;

(j) some benefit is retained under the settlement by the settlor;

(k) embarking on a hazardous venture; and

(l) a close relationship exists between parties to the conveyance.

[53] The badges of fraud represent evidentiary rules developed over time which, when considered in all the circumstances, may enable the court to make a finding unless the proponents of the transaction can explain away the suspicious circumstances. Is clear that the legal or persuasive burden to prove the case remains on the plaintiff throughout the trial. Nevertheless, the plaintiff may raise an inference of fraud sufficient to shift the *evidentiary* burden to the defendant if the plaintiff can establish that the transaction has characteristics which are typically associated with fraudulent intent. Proof of one or more of the badges of fraud will not compel a finding for the plaintiff but it may raise a *prima facie* evidentiary case which it would be prudent for the defendant to rebut.

[54] The leading articulation of this burden was set out in *Koop v. Smith* (1915), 51 S.C.R. 554, where Duff J. held:

> I think the true rule is that suspicious circumstances coupled with [a close] relationship make a case of *res ipsa loquitor* which the tribunal of fact may and will generally treat as a sufficient *prima facie* case, but that it is not strictly in law bound to do so; and that the question of the necessity of corroboration is strictly a question of fact.

[55] Kruzick J. put the matter succinctly when he said, in *Beynon, supra,* at paras. 49 and 52:

> I am mindful of the fact that I must be very careful to avoid using the badges of fraud doctrine mechanically... fraudulent assignment depends not so much on the tally of "badges" but upon the view of all the facts...
>
> Although the primary burden of proving the case remains with the plaintiff, the existence of one or more of the traditional "badges of fraud" may give rise to an inference of intent to defraud in the absence of an explanation from the defendant.

> In such circumstances, there is an [evidentiary] onus on the defence to adduce evidence showing an absence of fraudulent intent.

[56] The transfer of property to a person in a close relationship is, of course, itself a badge of fraud. In such cases the testimony of the parties as to their subjective intent must be scrutinized with care and suspicion; it is very seldom that such evidence can be safely acted upon as in itself sufficient. In cases involving a transfer to near relatives, as matter of prudence the court should most often require corroborative evidence of the bona fides of the transaction.

[57] At the end of the day, however, the court must act on such a preponderance of evidence as to show whether the conclusion the plaintiff seeks to establish is substantially the most probable of the possible views of the facts; mere suspicion is not sufficient, *Clarke v. The King* (1921), 61 S.C.R. 608 at 616.

[58] This raises the question of the standard of proof in fraudulent conveyance actions. Different submissions were made on this issue at the close of trial. The plaintiff says the standard of proof in a fraudulent conveyances action is, like any civil action, on a balance of probabilities. The defendants argue that a higher standard must be met in quasi-criminal cases where allegations of serious misconduct, like fraud, are alleged.

[59] The Supreme Court of Canada in *C. (R.) v. McDougall*, [2008] 3 S.C.R. 41 put this issue to rest. That case involved a civil action for damages for sexual assault. Although some cases involve more serious consequences by the nature of the allegations made in them, the seriousness of the allegations does not alter the standard of proof in civil cases. The majority held that there is only one standard of proof in all civil cases and that standard is 'proof on a balance of probabilities.'

[60] Finally, I should comment on the expert evidence. Both parties filed expert reports from accountants on the transactions in issue and the flow of funds associated with those transactions. Both sides objected to the other expert's evidence, essentially on the grounds that their opinions exceeded their area of expertise and extended into purporting to answer the very question for the court in this case – were these transactions done with fraudulent intent?

[61] I allowed the testimony of both experts into evidence, indicating that the objections could be revisited in argument and would go to weight. Both were cross-examined on their reports. In the end, little reference was made to the testimony of the experts in argument.

[62] I found the factual presentation and organization of both experts helpful but I also found they both were, in effect, trying to answer the very question that must be addressed by the court in this case. As such, in the end, while I found the methodology helpful in parsing the transactions, I gave their conclusions little if any weight.

2. *The Formation of Cave Hill Properties Limited*

[63] The evidence is somewhat vague on this issue but sometime in 1987, Sloan decided to cash in his Magna shares (issued at the time of the acquisition by Magna of Unimade), reacquire Unimade from Magna and leave his employment at Magna to run Unimade.

[64] Sloan used the proceeds of the sale of his Magna shares, and other funds he had accumulated to that point, to purchase Unimade and to acquire the Hill 'N' Dale property. The manner in which these transactions were structured is controversial. I will begin by explaining how Cave Hill Properties Limited came to be.

[65] Sloan incorporated 723938 Ontario Limited (938) in June, 1987. In December 1987, Sloan transferred his shares in 938 to Valerie Sloan and executed a declaration of trust in respect of those shares. Thus, from December 1987 forward, Valerie was the sole shareholder of 938.

[66] When Unimade was set up in 1966, it acquired property in Vaughan from which Unimade's business (the supply of structural steel) was run. This was known as the Bowes property. In 1974, Unimade, including the Bowes property, was acquired by Magna. In 1987, 938 acquired the Bowes property from Magna for about $1.4 million. A vendor takeback mortgage was granted by Magna to 938 for the full amount. The mortgage payments were made by 938 from the proceeds of rents charge to tenants of the Bowes property.

[67] 938 leased the Bowes property to Unimade at market rates until Unimade ceased operations following the recession in 1991/1992. After that, 938 leased the Bowes property to a third-party and eventually sold it, in 1999, to another third-party for $2.5 million.

[68] In the course of these activities, 938 changed its name to Cave Hill Properties Limited and later, in 1996, amalgamated with other companies owned by Valerie to form the current Cave Hill entity.

[69] David Ford was called to the Bar in 1981 and practised corporate commercial, real estate and tax law as an in-house lawyer with Magna throughout the 1980s. While at Magna, he worked closely with Sloan, Bruce Pender and other senior officers of Magna.

[70] Ford started providing tax consulting and estate planning advice to Sloan, Valerie and Mr. Pender in the early 1980s. He testified that in about 1987, Sloan told him that, since he accumulated considerable assets, Sloan wanted his family to have their own "nest egg" independent of his assets. Sloan told Ford that the Hill 'N' Dale property, which was acquired in December 1987, could serve the purpose of building that "nest egg." Ford told Sloan that he should enter into a nominee and trustee agreement to confirm that Sloan was holding title to Hill 'N' Dale as a nominee/bare trustee and that the beneficial owner should be a separate legal entity owned by Valerie so that all assets and liabilities would be contained in that entity.

[71] Ford testified that in 1988, he became aware of an opportunity to reduce future potential taxable gains on the Hill 'N' Dale property by creating an immediate gain in a tax efficient

manner, thereby increasing the cost base and reducing taxable gains from a future potential sale. The transaction required three clean shelf corporations which had been incorporated before Sloan became the registered owner of Hill 'N' Dale. Ford had incorporated three such shelf corporations for Magna on June 4, 1987 which, he knew, were surplus to Magna's needs. As a result, these were sold to Sloan for Magna's cost of incorporation. The companies were 721310 Ontario Inc. (310), 721311 Ontario Inc. (311) and 721312 Ontario Inc. (312). The shares of 311 were transferred to 310 and the shares of 312 were transferred to Valerie, all on the same day Sloan acquired these corporations in July 1988. The transfers were said to "have effect from" December 1987.

[72] Ford's evidence was that the shares of both 310 and 312 were transferred to Valerie. Sloan's evidence, however, was that only shares of 312 were transferred to Valerie. In any event, the only documentation relating to the transfer of shares to Valerie that was produced at trial related to 312, which transfer took place on July 8, 1988.

[73] Ford also gave evidence that, about the same time, Sloan entered into a nominee and trust agreement with 311 whereby Sloan remained the registered owner of Hill 'N' Dale as a nominee/bare trustee for 311. Sloan, he testified, could not have been the beneficial owner of Hill 'N' Dale, otherwise Valerie would not have been able to complete the tax transaction that ensued. No such nominee agreement, however, was available or produced at trial.

[74] In essence, the 1988 tax transaction involved 311 (as beneficial owner) selling Hill 'N' Dale to 312 at its then fair market value in consideration for a note receivable, thereby creating a gain on the sale. The shares of 311 were then sold by 310 to a British Columbia numbered company which had accumulated tax losses. The net effect was that the British Columbia numbered company amalgamated with 311, thereby acquiring 311's taxable gain from the sale of Hill 'N' Dale. The British Columbia numbered company was able to offset that gain against its accumulated tax losses. These transactions were negotiated and completed for valuable consideration with an arms' length third party represented by counsel at Smith Lyons who, Ford testified, conducted thorough due diligence, including confirming that 311 held *bona fide* beneficial ownership of Hill 'N' Dale when it was sold to 312.

[75] As a result of these transactions, 312 owed 310 approximately $5 million on the purchase of Hill 'N' Dale (represented by a note receivable) and 312's adjusted cost base of the Hill 'N' Dale property was now based on the 1988 purchase price at fair market value. In 1996, 310, 312 and Cave Hill amalgamated forming the "new" Cave Hill. This had the effect, among other things, of eliminating the note receivable owing from 312 to 310.

[76] Valerie has remained the sole shareholder of 312 and Cave Hill throughout. Mr. Pender is the manager of Cave Hill's assets and is paid a fee for his services in that regard. Sloan is an officer of Cave Hill but, since his bankruptcy in 2004, has not been a director. Cave Hill's assets are of considerable value and principally consist of an investment portfolio and the Hill 'N' Dale property, which has significant capital value and produces rental income. Distributions from

Cave Hill, authorized by Valerie as the sole shareholder, essentially finance Valerie's care and Sloan's personal living expenses, as he has no assets of his own or other means of support.

3. The Bowes Property

[77] The plaintiff attacks the transfer of the Bowes property on the following basis. Unimade was acquired from Magna with Sloan's assets. Sloan kept Unimade's shares in his name but put the Bowes property in the name of a holding company, 938, of which Sloan was the sole shareholder at the time. It was only a month later that Sloan transferred the shares of 938 to Valerie. Neither 938 nor Valerie paid any material consideration for the acquisition of the Bowes property.

[78] After transferring the Bowes property to 938 and the shares of 938 to his wife, Sloan continued to treat the Bowes property as his own by causing Cave Hill to rent it to Unimade for more than $10,000 per month. When Unimade went out of business in 1992, Sloan negotiated the rental of the Bowes property to a third-party commercial tenant. In 1999, Sloan negotiated the sale of the Bowes property by Cave Hill for $2.5 million. The sale proceeds of the Bowes property were used by Cave Hill to purchase securities that form part of Cave Hill's investment portfolio. Sloan continues to derive benefit from these assets through the "largesse" of Valerie.

[79] The plaintiff argues that this transfer exhibits several badges of fraud:

(a) it was made to a close relative;

(b) it was made without consideration;

(c) Sloan continue to use, or benefit from, the property post-transfer;

(d) Sloan had actual or potential liabilities on the date of the transfer; and

(e) the conveyance forms part of a pattern of conduct which resulted in essentially all of Sloan's assets being transferred to Valerie by the date of Indcondo's judgment for breach of the put/call agreement.

[80] The plaintiff argues that these suspicious circumstances raise a *prima facie* evidentiary basis for an inference that the transaction was done with the intent to defeat creditors which the defendants are bound to rebut. Indcondo says the defendants have failed to do so.

[81] As in so many cases involving alleged fraudulent conveyances, in this case a finding concerning the necessary intention to defeat creditors cannot be made except by drawing an inference from all of the surrounding circumstances. There is, for example, no explicit fraudulent act in the sense of evidence that a representation was made concerning the ownership of Sloan's assets to a creditor or potential creditor which was not true. As the cases make clear, I must be careful to avoid using the badges of fraud doctrine mechanically. A finding of fraudulent intent to defeat creditors depends not on a tally of "badges" - these are but part of the

factual matrix from which inferences may be drawn - but upon an assessment of all the facts bearing on the question of fraudulent intent.

[82] Taken alone, the mere fact that Sloan took title to this property in a company, the shares of which he transferred to his wife for no consideration, or even that Sloan now, with the benefit of hindsight, effectively controls the resulting asset due to his wife's stroke, would not be sufficient to conclude that the transfer was made with fraudulent intent.

[83] Sloan was a wealthy businessman in 1987. While at Magna, he was extremely well paid. Although the details of his profit on the sale of his Magna shares in 1987 are vague, it is nevertheless clear that he did very well indeed. As well, Sloan was about to fulfill a longtime dream of running his own business, a successful business with which he was already extremely familiar. He was also an investor in an apparently successful real estate development company along with a number of very wealthy friends and acquaintances. If he wanted to establish a nest egg for his wife and children, he was entitled to do so provided it was not with the intent of defeating creditors.

[84] Sloan and Valerie's protestations that, in transferring the property to 938 and 938's shares to Valerie, there was no thought of defeating creditors is, of course, of essentially no evidentiary value. This is a case where the testimony of the parties as to their subjective intent must be scrutinized with care and suspicion. As the authorities say, it is very seldom that such evidence can be safely acted upon as in itself sufficient. As matter of prudence, therefore, I should look for corroborative evidence of the *bona fides* of the transaction.

[85] The critical issue, in my view, relates to whether there were "creditors or others" toward which a fraudulent intent to defeat was directed. That there were creditors or others in 1987 is, I think, beyond doubt. The real question in analyzing the inference the plaintiff seeks to draw is whether Sloan had any reason to think that, as a result of this impugned transaction, his potential future liabilities would probably exceed his ability to pay. That requires an analysis of Sloan's assets and liabilities, or potential liabilities, at the end of 1987 in the context of what he would reasonably have believed were his prospects at the time.

[86] It is necessary to comment on the fact that a good deal of documentation that one would expect to have been produced in this litigation is not available. The plaintiff asks for adverse inferences to be drawn from Sloan's failure to produce, for example, more detailed evidence of his net worth, assets and liabilities, from the 1980s and early 1990s. Sloan's response to these allegations is simple: the plaintiff's claim was not instituted until four or five years after most of the relevant dates and, given the glacial pace of this litigation since 1992, documents have gone missing or were destroyed in the ordinary course.

[87] There is much to be said for the defendants' position. It is easy, with the benefit of hindsight, to say that this or that document ought to have been produced. However, the lethargy which seems to have infected the plaintiff's prosecution of its claims could easily have contributed to a false sense of security. The loss of documents is just as prejudicial to the

defendants as it is to the plaintiff. While it has made everyone's job more difficult in the context of this trial, I am not willing, in the circumstances of this case, to draw any adverse inferences from Sloan's inability to produce documents which, it is to be assumed, must have existed at the relevant time.

[88] While not dispositive, it is relevant that the plaintiff was not a "creditor or other" in December 1987. The put/call agreement did not even exist until April 1990. Sloan owned a successful business, Unimade. It is unknown precisely what its assets and liabilities were in 1987 (apart from the transfer of the Bowes property) but there is no suggestion that its prospects were anything but excellent. Sloan had just sold his Magna shares for a substantial profit. Sloan's investment in Steeles-Jane was doing well. While its acquisitions were almost fully financed, the real estate market was, I find, still booming in 1987.

[89] The plaintiff seeks to paint a picture of looming disaster in the 1987 to 1990 period - of a real estate market, and Steeles-Jane in particular, heading for a cliff. This, in my view, is an argument entirely constructed with the benefit of hindsight. While it is true that markets have cycles, downturns, like car accidents, cannot be foreseen. It seems obvious, after the fact, what happened but at the time, it is business as usual.

[90] I find that in December 1987, Sloan's existing creditors were well secured. I do not think that Sloan reasonably believed, or ought reasonably to have believed, that giving title to the Bowes property to his wife's corporation would result in his inability to make good on his existing, or contemplated, financial obligations. I am therefore unable, on this evidence, to infer that the conveyance of the Bowes property was made with the intent to defeat Sloan's "creditors or others."

4. The Hill 'N' Dale Property

[91] The Hill 'N' Dale property was acquired in December 1987 for $2.17 million. It was sold in April 1989 for $7.33 million (comprised of $3.6 million cash and a $3.73 million vendor takeback mortgage). The cash and mortgage were received by 312. The purchaser eventually defaulted on the mortgage. Cave Hill took foreclosure proceedings, as a result of which Cave Hill re-acquired the Hill 'N' Dale property in November 1994 and continues to own it today.

[92] The plaintiff argues that this transfer exhibits similar badges of fraud:

(a) it was made to a close relative;

(b) it was made without consideration;

(c) Sloan continue to use, or benefit from, the property post-transfer;

(d) Sloan had actual or potential liabilities on the date of the transfer;

(e) the destruction or disappearance of relevant documents concerning the transaction; and

(f) the conveyance formed part of a pattern of conduct.

[93] A great deal of time was spent at trial and in argument on the series of transactions which took place between December 1987 and the summer of 1988, all focusing on the question of whether Sloan held the Hill 'N' Dale property as bare trustee or not. As of April 1989, however, there is no question that the benefit of Hill 'N' Dale property ownership – that is, the proceeds of sale – was transferred to Cave Hill.

[94] What turns on all this is whether the gift of indirect beneficial ownership in the Hill 'N' Dale property to Valerie took place in December 1987 or April 1989. This seems to be viewed by the parties as important because it either places the transfer to Valerie earlier (and therefore further in time from the eventual falling out of the Steeles-Jane shareholders and the alleged real estate market reversal) or later (and, therefore, closer to those events).

[95] If, of course, the transfer of sale proceeds to Cave Hill in 1989 was not done with fraudulent intent, then what happened earlier does not matter. However, since this is a case where inferences must be drawn from the surrounding circumstances, I will address both scenarios.

[96] The plaintiff argues that the whole trust argument advanced by the defendants is a sham and an afterthought. The details of the trust agreement were not, it says, even pleaded and no mention of the trust's details surfaced until shortly before trial, in the pre-filed evidence of Mr. Ford.

[97] The plaintiff points to the lack of any nominee and trust agreement and to many of the "badges" described earlier – the fact that Sloan appears to have dealt with the property as if it were his own, etc.

[98] The plaintiff also attacks Mr. Ford's credibility, relying on his long relationship with Sloan, the alleged "back-dating" of documents, the fact that documents surfaced from Mr. Ford's basement at the last minute and his behavior at trial generally. This is a reference to the fact that, following the completion of his testimony at trial, where the lack of documentation was repeatedly pointed out during his cross-examination, Mr. Ford searched an old precedent file in a box in his basement and located some documents relating to the 1988 tax loss transaction described above. He called Mr. Healey and was told to attend in court the next day with the documents so that Mr. Healey could review them. What transpired was a bizarre incident in which Mr. Zibarras chased Mr. Ford, and the documents, to Mr. Ford's car parked on University Avenue in front of the court. At the lunch break, I was required to make a ruling on the street when the documents were being transferred from Mr. Ford's car to the courtroom where they were to be reviewed by both parties.

[99] While all of the details of the 1988 tax loss transaction were not pleaded, the essential fact, that Sloan acquired the Hill 'N' Dale property in trust for Valerie and that ownership ended up in 312, a company owned by Valeris, is pleaded. Mr. Ford is not a party and was not examined prior to trial. There is no doubt that documents one would expect to see, such as a nominee and trust agreement executed by Sloan, have not been produced. Mr. Ford testified that there would have been such a document and that it was essential to the transaction that neither Sloan nor Valerie personally held beneficial title to the Hill 'N' Dale property. While it is true that, for tax purposes, who beneficially owned the shares of 310 and 312 was not critical, Ford's evidence was that the fundamental intent in 1987/1988 was that Valerie, through 312/Cave Hill, would have beneficial title to Hill 'N' Dale; it was a secondary purpose to reduce future tax liabilities on a sale of Hill 'N' Dale through the tax loss transaction, the result of which was to boost the adjusted cost base of the Hill 'N' Dale property in Cave Hill's hands.

[100] While it is true that the two issues, whether Sloan held title in trust and the tax loss transaction, are not *necessarily* related I find, as a fact, that they *were* related in this case. In other words, the intent of the tax loss transaction was not only to achieve a desirable tax outcome regardless of who held the ultimate beneficial interest in Hill 'N' Dale but a tax benefit for 312, the shares of which were held by Valerie from the date of its acquisition.

[101] The plaintiff attacks the 1988 tax transaction on essentially two levels. First, it argues that the tax transaction did not, in fact, confer title on 312. Secondly, the plaintiff argues that even if the tax transaction settled beneficial title in Hill 'N' Dale on 312, it was a sham; that is, a transparent attempt to defeat creditors.

[102] I do not think the first argument can be sustained. The plaintiff's main argument on this issue rests on the fact that no nominee/bare trustee agreement has been produced and that 310 shares were not owned by Valerie at the time of the transaction. The agreement of purchase and sale and the bill of sale describe Sloan as the purchaser of Hill 'N' Dale "in trust." Registered title was taken in Sloan's name. The deed and land transfer tax affidavit do not mention any trust. However, within months of the acquisition, Sloan and Ford initiated the tax transaction, the ultimate result of which was to put beneficial ownership of Hill 'N' Dale into 312. Ford testified that there would have been a nominee and trust agreement. He said it was necessary for the deal that title be transferred to 312, not Sloan.

[103] The plaintiff argues that Mr. Ford is not credible. While I agree with the plaintiff's general observation that Mr. Ford is not independent and that he shaded his evidence in an effort to help his old friend, on this point I find Mr. Ford's evidence credible. I say this for several reasons.

[104] First, this was the type of deal Mr. Ford was used to doing at Magna. He had experience and expertise in this area. A nominee trust agreement was, he said, a typical and necessary feature of these types of deals. Second, and more importantly, the tax transaction involved a third-party, materially adverse in interest to Sloan and the 300-series companies. The B.C. tax loss corporation was independently represented by Smith Lyons, a law firm also experienced in

these types of deals. In order for everyone to get what they bargain for, Sloan could not have been the beneficial owner of Hill 'N' Dale. Is clear, therefore, that if legal title remained with Sloan, it was because beneficial ownership clearly and unambiguously rested first with 310/311 and, post-transaction, with 312.

[105] I do not think Mr. Ford intentionally sought to conceal relevant documents. Issues raised during his cross-examination prompted him to search an old precedent file in his basement. He found exhibits 11 and 12. He brought these to court to show Mr. Healey. During that process, plaintiff's counsel got wind of these new documents and aggressively sought access to them. I fault no one for this but Mr. Ford was "spooked" by plaintiff's counsel and took the documents back to his car. His stated purpose in doing so was to enable Mr. Healey to review them in private (and because he had to put more money in his parking meter). My ruling during the trial required the documents to be retrieved and brought into court, where they were reviewed by Mr. Healey and, ultimately, all provided to plaintiff's counsel. They were marked as exhibits in the trial and subject to subsequent cross-examination. The documents show the continuation of what we had seen earlier; Sloan signed documents on behalf of the companies, etc. The new documents, however, are not dispositive of any specific issue in dispute

[106] It is true that all of the documents were not perfectly organized or entirely consistent through the process of acquiring Hill 'N' Dale in 1987, transferring it to 312 in 1988 and selling it in 1989. However, as Hunt J. said in *Royal Bank of Canada v. Thiessen*, [1981] M.J. No. 45 at para. 12, "Financial arrangements between husband and wife are often not documented as thoroughly as they are between people acting at arms' length. This does not mean they are not real or that they should not be accepted as factual, or bona fides."

[107] In all of the circumstances, I find that Sloan held legal title to Hill 'N' Dale in trust for Valerie. He was not holding title in trust for himself and there was a known, intended beneficiary in his wife, Valerie. While the exact form of that trust was not determined until several months later, the intention was, I find, that Valerie was to hold the ultimate beneficial interest. The delay in implementing that intent was to enable Mr. Ford to structure the transaction in a way that would reduce exposure to tax on any future sale.

[108] The plaintiff's second argument rests on the proposition that, in the course of acquiring the Hill 'N' Dale property, Sloan converted his own asset, i.e. money, into an asset beneficially owned by Valerie, i.e., the Hill 'N' Dale property. This transaction was to a closely related party for no consideration. Sloan's subsequent dealings with the property, including to the present, is said to show that he continued to derive benefit from and, to some extent, control this property. These are suspicious circumstances which warrant careful scrutiny.

[109] In my view, as with the Bowes property, the issue of whether there was fraudulent intent to defeat creditors in December 1987 essentially turns on the question of whether Sloan ought reasonably to have understood that conveying Hill 'N' Dale beneficially to Valerie was likely to result in his inability to meet his obligations to others as they fell due.

[110] The analysis of this issue is similar to the analysis of the Bowes transaction. I am unable to conclude, on the evidence, that in buying the Hill 'N' Dale property for Valerie, Sloan intended, or reasonably ought to have been concerned, that in doing so he would defeat creditors.

[111] Indcondo was not a creditor in December 1987. The put/call agreement would not exist for several years into the future. The banks were clearly creditors of Steeles-Jane and Sloan was bound by personal guarantees to cover Steeles-Jane's indebtedness. However, in 1987 and 1988, there is no evidence that Steeles-Jane was in, or heading for, trouble. There is no evidence that the market was turning or that Sloan was embarking on a new, uniquely risky, venture. There is no evidence that any creditor relied on Hill 'N' Dale specifically as security for Sloan's current or possible future obligations.

[112] The plaintiff argues that when you take away the investment portfolio and the Hill'N'Dale property, there are no assets remaining to satisfy Sloan's creditors. On this basis, the plaintiff argues that Sloan must have intended that these transfers would leave his creditors with nothing. The flaw in this argument, however, is that it is based entirely on hindsight. In fact, in 1987/88 I find, these assets represented a relatively small proportion of what Sloan would reasonably have believed to be his net worth. To all intents and purposes, Sloan was flying high in 1987/88. He cashed in his Magna investment, acquired Unimade for his own and appeared to be heading for substantial profits arising out of Steeles-Jane's real estate development activities. The plaintiff's argument requires assuming that the failure of Steeles-Jane and Unimade were reasonably foreseeable by Sloan in 1987, 1988 and 1989. I do not think the evidence supports that assumption. The acquisition of the Hill 'N' Dale property beneficially for Valerie was, therefore, not done with intent to defeat Sloan's creditors.

[113] If I am wrong in the conclusion that Valerie beneficially owned Hill 'N' Dale and, in fact, Sloan remained the beneficial owner of Hill 'N' Dale until it was sold on April 6, 1989, there remains the question whether, when Hill 'N' Dale was sold, the transfer of the proceeds of that sale to 312 (both cash and vendor takeback mortgage) itself represents a fraudulent conveyance.

[114] There are three main factors said to have changed between December 1987 when the Hill 'N' Dale property was acquired and April 1989 when it was sold. First, by year-end May 1989, Steeles-Jane's balance sheet had changed. As of May 31, 1989, Steeles-Jane had assets of about $70 million, including over $40 million of property held for resale or future development. Steeles-Jane had liabilities of almost $67 million with retained earnings of some $3.8 million. The value of Sloan's stake in Steeles-Jane had grown but so had his potential liabilities. April 1989 is only about a year before the put/call agreement was reached, in the period of time Di Poala claims to have been giving dire warnings to the other shareholders of their possible exposure to a downturn and expressing his desire to be cashed out of Steeles-Jane. Finally, 1989 is when Di Poala says the market started to turn.

[115] In essence, the plaintiff argues that by April 1989, there were more warning signs and that the potential exposure under Sloan's personal guarantees to the CIBC and the percentage of raw land held by Steeles-Jane (and therefore the more risky part of its real estate portfolio) had

grown significantly. Thus, the plaintiff takes the position that by April 1989 Sloan could no longer reasonably have believed that giving his assets to Valerie would not adversely affect his ability to see that his creditors would be paid.

[116] As mentioned earlier, the parties take diametrically opposed views of when the market started to turn and when the collapse of the market was reasonably foreseen or foreseeable. The anecdotal evidence of the parties I find entirely unhelpful. Both sides have their self-interested reasons for placing the downturn earlier or later than the other. Neither party called any expert evidence on this issue. In my view, the best evidence of the buoyancy of the Toronto real estate market has to be taken from the objective evidence of third-party transactions involved in this case.

[117] The reporting package to shareholders of Steeles-Jane dated October 25, 1989 shows, as indicated earlier, established equity of almost $48 million, leaving aside budgeted gains on unserviced land. This approach appears to be consistent with the manner in which Indcondo's shares were valued for the purposes of the put/call agreement.

[118] In April 1990, a year after the sale of Hill 'N' Dale and the transfer of the proceeds to 312, Indcondo's 10% was agreed to be worth about $5 million, suggesting an underlying assumed net equity value of Steeles-Jane of $50 million. Indcondo is the only shareholder ever to receive a net equity return on its shares in Steeles-Jane. Had the business been in trouble, or on the known brink of trouble, as Di Poala alleges, it is inconceivable to me that all the other shareholders of Steeles-Jane would have agreed in April 1990 to a buy out for Di Poala at a price representing a *net equity value* of Steeles-Jane of $50 million.

[119] Further, this value suggests an assumed net equity value of Sloan's 20% interest in Steeles-Jane of $20 million. Thus, in April 1990, Sloan would reasonably have believed based on the market values of the underlying assets, that, after all Steeles-Jane's lenders had been paid, his interest in Steeles-Jane would still have had very substantial value indeed.

[120] In addition, in 1988, post-purchase of Hill 'N' Dale, Sloan and Ford thought it worth paying a substantial fee of some $133,000 to structure a transaction the entire purpose of which was to realize current gains against a future sale. This suggests an anticipation that the value would continue to grow. And, in fact, it did grow - the April 1989 sale of the Hill 'N' Dale property to HTB (an arms' length transaction) resulted in a gain of over $5 million over the 1987 purchase price.

[121] The put/call agreement was not signed until April 1990. The initial scheduled transaction posed no problem for Alfano and Rinomato, the intended purchasers of Indcondo's Steeles-Jane shares. Indcondo's October 1990 put also resulted in the scheduled purchases by Alfano and Rinomato, albeit some portion of payment for which was later than originally contemplated.

[122] It was not until November 1990 that Alfano and Rinomato gave indemnities to Sloan and not until April 1991 that Alfano and Rinomato defaulted on their scheduled purchases of

Indcondo's Steeles-Jane shares. It was not until March 1992 that Indcondo served notice of its intention to require Sloan to purchase all of Indcondo's Steeles-Jane shares and only in April 1992 that Indcondo commenced an action to enforce this obligation (an action in respect of which it did essentially nothing for four years).

[123] Another factor worthy of consideration in the analysis of this issue is the timing of Di Poala's release from his own personal guarantees of Steeles-Jane's indebtedness to its lenders. As noted in the put/call agreement, Indcondo and Di Poala had provided guarantees to various mortgagees in the amount of $22.8 million and to CIBC for $5.5 million (10% of $55 million). As of April 6, 1990, there was approximately $37.2 million of indebtedness owed to the CIBC (10% of which was $3.72 million).

[124] Under the put/call agreement, Steeles-Jane agreed to use its best efforts to obtain releases for Indcondo and Di Poala from their guarantees to the lenders and indemnified Indcondo and Di Poala in respect of all guarantees given by them.

[125] The evidence was that sometime after April 6, 1990, Di Paola and Indcondo were, in fact, released by the lenders from the obligations under their guarantees. There was no evidence provided about the specific timing or circumstances of obtaining these releases. However, it seems to me inconceivable that, if there had been any hint of Steeles-Jane's financial difficulty or possible inability to discharge its debts to the financial institutions, the release of Indcondo and Di Poala's guarantees could have been obtained in any circumstances.

[126] Accordingly, the only possible inference from the lender's conduct in agreeing to release Indcondo and Di Poala from their guarantees is that by, at least April 6, 1990, and most likely for some time after that, Steeles-Jane's creditors were satisfied with Steeles-Jane's balance sheet and unconcerned about the sufficiency of their security for Steeles-Jane's obligations.

[127] In my view, on the evidence, the earliest sign of market difficulty can be placed no earlier than November 1990, a year and a half after 312 received the benefit of the proceeds of sale of the Hill 'N' Dale property. At the time of that transfer in April 1989, therefore, Sloan had every reason to believe, reasonably, that the transfer of the benefit of the sale of Hill 'N' Dale to 312/Cave Hill would not impair his ability to make good on his other financial obligations.

[128] For these reasons and those previously stated, I do not think Sloan could be said to have had the required intent to defraud creditors in April 1989. I therefore find that, even if Sloan remained the owner of the Hill 'N' Dale property until it was sold in April 1989, the transfer of the proceeds of that sale to 312 was not done with the intent to defraud creditors.

5. *The Riverside Property*

[129] Sloan and Valerie purchased 42 Riverside as joint tenants in August 1989. Their prior home was also owned in joint tenancy. On July 8, 1992, Sloan conveyed his 50% interest in 42 Riverside to Valerie.

[130] The context for this transaction is materially different from those discussed above. By at least early 1991, Alfano and Rinomato defaulted on their obligation to purchase Indcondo's shares in Steeles-Jane. Indcondo served notice of its call on Sloan to acquire its shares in March 1992. When the shares were not purchased, Indcondo issued a statement of claim in May 1992. The details are vague but it is known as well that somewhere between 1990 and 1992, CIBC, the Royal Bank of Canada and the Bank of Nova Scotia began "putting pressure" on Sloan in respect of his personal guarantees. The Royal Bank sued Sloan and apparently obtained judgment for $12 million in 1993. I find that this "pressure" likely became manifest in late 1991.

[131] Sloan had initially transferred his interest in 42 Riverside to Valerie in 1990 for no consideration. He received advice later, however, that the transfer of this interest without consideration was liable to be set aside and so the transfer was reversed. By July 1992, the Bank of Nova Scotia was pressing Sloan for repayment of a $500,000 line of credit. Mr. Ford's evidence was that he discussed the matter with Sloan and Valerie. Valerie, he said, wanted to help Sloan was unwilling to mortgage 42 Riverside. Mr. Ford recommended pursuing a tax efficient transaction in which Valerie would acquire Sloan's interest in 42 Riverside in exchange for causing Cave Hill to pay off Sloan's Scotiabank indebtedness. Sloan and Valerie followed this advice.

[132] Sloan and Valerie obtained an appraisal of 42 Riverside, valuing the property at $1,050,000. Cave Hill raised $500,000 by agreeing with HTB, the purchaser of the Hill 'N' Dale property, in exchange for a reduction of its vendor takeback mortgage to HTB of $900,000, to a prepayment on the mortgage of $500,000. This money was used to pay off Sloan's obligation to Scotiabank. The remaining $25,000 was paid to Sloan in cash. Title to Sloan's interest in 42 Riverside, therefore, passed to Valerie in exchange for consideration of half the appraised value, $525,000.

[133] The plaintiff attacks the transfer of Sloan's interest in the matrimonial home on the basis that:

(a) the transfer was made to a non-arms' length person;

(b) consideration was inadequate or nonexistent;

(c) the debtor continued in possession of the property after the conveyance;

(d) there were actual and potential liabilities facing the transferor at the time of the transfer; and

(e) the transfer forms part of a pattern of conduct.

[134] The defendants seek to justify this transaction on the basis that the defendants had a continuing intention to transfer Sloan's interest to Valerie since 1990 (that is, from before the market collapse) and on the basis that the transaction was done for valuable consideration.

[135] I do not think the fact that an earlier attempt, perhaps in more favourable circumstances, to transfer Sloan's interest in 42 Riverside to Valerie can save the transaction from attack. The law is clear that the time for evaluating fraudulent intent is at the time of the impugned transaction. Thus, hindsight does enter into the analysis.

[136] Sloan knew by July 1992 that he was in significant financial jeopardy, not only to the Bank of Nova Scotia but to Steeles-Jane's lenders, Unimade's lenders and, potentially, to Indcondo as well. He also knew that at least some of his others assets had been given to Valerie. In the circumstances, I can come to no other conclusion but that Sloan knew, or ought to have known, that the transfer of his interest in 42 Riverside to Valerie in 1992 would be likely to have a material adverse impact on his ability to pay his creditors. Indeed, in the circumstances, I find that this was the very reason the transaction was done.

[137] This leaves the issue of consideration. The defendants say that Valerie, through her company, 312, paid valuable consideration to Sloan in the form of satisfaction of Sloan's obligation to the Bank of Nova Scotia. They argue that consideration cures all, rendering valid what would otherwise be an attack-able transaction. The plaintiff argues that there was no consideration at all or that, if there was any consideration, it was grossly inadequate. The plaintiff first argues that the assets of 312 were, in fact, Sloan's assets, such that Sloan simply paid himself funds for the reduction of the Scotiabank indebtedness. In the alternative, the plaintiff argues that, since 312 was itself on the hook to Scotiabank as guarantor of Sloan's indebtedness, the payment of $500,000 to the Bank of Nova Scotia was not consideration paid to Sloan for his half interest in 42 Riverside but, rather, a payment to reduce indebtedness of its own which 312 already had. The remaining consideration paid, $25,000 in cash, was grossly inadequate given the evidence of a valuation of the property at $1,050,000. Finally, the plaintiff argues that even with consideration, the 1992 transfer of Sloan's interest in 42 Riverside to Valerie constitutes, in the circumstances, a fraud on his creditors.

[138] I am not persuaded by the plaintiff's first argument. For the reasons outlined earlier, I find that Valerie was the sole owner of 312 and, therefore, had the ultimate financial benefit of 312's assets. If Valerie wanted to spend 312's money bailing out Sloan from his personal financial difficulties, that was her prerogative. I accept that, absent the issue of fraudulent intent to defeat creditors, the deal as proposed by Mr. Ford was a valid one.

[139] I agree, however, with the plaintiff's second and third arguments. On February 27, 1990, 312 executed an unlimited guarantee of Sloan's obligations to the Bank of Nova Scotia. The evidence is that Sloan was being pressed by the Bank of Nova Scotia in 1992 for payment of Sloan's obligations to the bank. While Valerie seeks to characterize 312's payment of $500,000 to the bank as consideration for Sloan's interest in the matrimonial home, in reality the payment was necessary to avoid 312's own liability under its guarantee. That payment, therefore, in the circumstances cannot be considered valid consideration for Sloan's half interest in 42 Riverside. The remaining aspect of the payment, $25,000, was grossly inadequate.

[140] Even if 312's payment in respect of Sloan's obligation to Scotiabank could have been considered valid consideration for the transfer of Sloan's interest in the matrimonial home, in the circumstances that existed by mid-1992, I would have found the transaction invalid in any event.

[141] This is because even where the court determines that there is good and valuable consideration, it may still find that the conveyance was fraudulent if:

(a) it was not done in good faith; and

(b) it was made to a person with knowledge of the debtor's intent to defraud.

[142] Section 3 of the *Fraudulent Conveyances Act* provides that good consideration is a defence to a fraudulent conveyance action *provided that* the conveyance was done "in good faith to persons not having at the time of the conveyance to the person notice or knowledge of" the fraudulent intent. Given the close relationship Sloan enjoyed with Valerie, emphasized repeatedly throughout his evidence, and the extent of the business dealings in which Valerie was already engaged with the family unit's assets, it is inconceivable that Valerie was not aware of Sloan's financial problems by July 1992. I find that Valerie must have known that the chief purpose of the transfer of Sloan's interest in 42 Riverside was to protect their home against execution by Sloan's creditors.

[143] For these reasons, I find that the transfer of Sloan's interest in 42 Riverside to Valerie in July 1992 was done with the intent to defeat Sloan's creditors and must, on this basis, be set aside.

6. The Florida Condominium

[144] Sloan purchased a Florida condominium in 1981 in his own name and using his own money. In 1993, Sloan conveyed 50% of his interest in this property to Valerie for no consideration. In April 1994, the condominium was sold for $275,000. The proceeds of sale went to Valerie personally or to Cave Hill. The explanation for this transfer at trial was simply that Valerie asked Sloan to do it this way.

[145] In my view, the same analysis applying to 42 Riverside applies to the Florida condominium. The condominium was clearly Sloan's asset. The transfer of a half interest to Valerie in 1993 and the transfer of the entire proceeds of sale to Cave Hill (or Valerie) in 1994 were done at time when Sloan had been sued, not only by the plaintiff but by the Royal Bank of Canada as well. The badges of fraud in this case overwhelming point to fraudulent intent. The defendants have not overcome their evidentiary, or tactical, burden of providing a plausible explanation justifying the validity of this transfer.

[146] For these reasons, the transfer of the proceeds of sale, in the amount of $275,000, to Cave Hill must be set aside. There being no evidence of the amount of any encumberance on this property, the full amount of the proceeds must be considered available for Sloan's creditors.

The Evidence of Tony Di Poala

[147] The plaintiff's only other witness besides John Di Poala was his brother, Tony Di Poala. Tony gave evidence about a conversation he had with Sloan in September 1991, in which the subject of the plaintiff's pending action came up. During the conversation, Sloan is alleged to have said that he was taking steps to make himself judgment-proof, as were the other shareholders, and that this was what businessmen do when faced with threatened litigation.

[148] I do not find this evidence to be especially probative or compelling. First, as John Di Poala's brother, Tony has an obvious "stake" in these proceedings; he is not an entirely independent witness. Second, this evidence involves events that happened 23 years ago. For this reason, I do not find either the specific content or the specific timing of the conversation particularly reliable. Most importantly, however, even if I were to accept Tony's evidence, it does little more than tend to corroborate conclusions I have already reached based on other, more objective evidence. The conversation, on Tony's own evidence, took place in the fall of 1991. The Bowes and Hill 'N' Dale property transactions had already taken place. At best, therefore, Tony's evidence is relevant to the transfers of 42 Riverside and the Florida condominium, which I have already found, on the basis of other evidence, were invalid as having been undertaken with the intent to defeat Sloan's creditors. For these reasons, I have placed little weight on Tony's evidence.

Piercing the Corporate Veil

[149] The plaintiff also argues that, in addition to the specific transactions attacked under s. 3 of the *Fraudulent Conveyances Act*, it is entitled to trace all of Sloan's assets to Cave Hill in order to satisfy its judgment. The plaintiff claims, in the circumstances of this case, that it is entitled to pierce the corporate veil.

[150] In essence, the plaintiff argues that Cave Hill has, since 1988, operated as little more that Sloan's personal bank account. Put simply, the plaintiff says that Sloan's name is all over Cave Hill's transactions since its formulation as 938 and 312. It was Sloan who, in reality, was the directing mind of Cave Hill's activities. All of Cave Hill's assets came from Sloan for no consideration. Yet now that Sloan is insolvent, these assets have been removed from the reach of Sloan's creditors. Even Sloan's consulting income in the 1990s was deposited into Cave Hill's account for no consideration. The assets of Cave Hill continue to provide the cash for money transfers to Sloan and Valerie's joint bank account, which funds all of not only Valerie's but Sloan's ongoing living expenses. Sloan does not even need, the plaintiff says, to go through the charade of having Valerie (as sole Cave Hill shareholder) authorize these transfers because, at least since Valerie's stroke, Sloan has held her power of attorney for property and Sloan's old friend, Mr. Pender, is the business manager of Cave Hill. Cave Hill is, argues the plaintiff, a flagrant abuse of the corporate form.

[151] I take the definitive, and most current, formulation of the principles underlying when the corporate veil may be pierced from the decision of Sharpe J. (as he then was) in *Transamerica*

Life Insurance Co. of Canada v. Canada Life Assurance Co. 1996 CarswellOnt 1699 at paras. 22 and 23:

> ...the courts will disregard the separate legal personality of a corporate entity where it is completely dominated and controlled and being used as a shield for fraudulent or improper conduct. The first element, "complete control", requires more than ownership. It must be shown that there is complete domination and that the subsidiary company does not, in fact, function independently...
>
> The second element relates to the nature of the conduct: is there "conduct akin to fraud that would otherwise unjustly deprive claimants of their rights?"

[152] Sharpe J. relied on the prior decision of the Ontario Court of Appeal in *Gregorio v. Intrans Corp.* (1994), 18 O.R. (3d) 527, a decision of Laskin J.A., at p. 536:

> Generally, a subsidiary, even a wholly-owned subsidiary, will not be found to be the alter ego of its parent unless the subsidiary is under the complete control of the parent and is nothing more than a conduit used by the parent to avoid liability. The alter ego principle is applied to prevent conduct akin to fraud that would otherwise unjustly deprive claimants of their rights.

[153] An appeal from the decision of Sharpe J. was dismissed by the Court of Appeal in a brief endorsement at 1997 CarswellOnt 3496. See also *Fleisher v. 642947 Ontario Limited*, [2001] O.J. No. 4771 at para. 68.

[154] In my view, the corporate veil argument adds nothing to the analysis of the situation here. The corporate veil argument cannot succeed separate and apart from the issue of fraudulent conveyances.

[155] I say this because, while I would be prepared to accept that Sloan sufficiently dominated the affairs of Cave Hill to meet the first part of the test, the basis for the alleged fraudulent conduct which has deprived the claimant of its rights under the second part of the test is the same conduct on which the plaintiff relies to set aside the impugned transfers as fraudulent conveyances of property dealt with earlier in these Reasons. Thus, the corporate veil argument adds nothing and has no effect apart from the specific transactions which are under attack and which have been dealt with on their own merits.

[156] For this reason, I dismiss the plaintiff's claims relating to piercing the corporate veil.

The Defence of Laches

[157] Laches is an equitable doctrine, akin to estoppel, founded on the principle that one is obliged to assert legal rights in a timely way or risk losing them. Laches is a form of equitable limitation period. Two factors dominate the consideration of this doctrine:

(1) delay and its circumstances; and

(2) prejudice resulting from that delay.

[158] In *Lindsay Petroleum Co. v. Hurd* (1874), L.R. 5 P.C. 221 at 239-240 the principle was stated as follows:

> ...[it] is not an arbitrary or technical doctrine... Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.

[159] The Supreme Court of Canada discussed these critical factors in *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6 at pp. 77-78:

> What is immediately obvious from all of the authorities is that mere delay is insufficient to trigger laches... Rather, the doctrine considers whether the delay of the plaintiff constitutes acquiescence or results in circumstances that make the prosecution of the action unreasonable. Ultimately, laches must be resolved as a matter of justice as between the parties, as is the case with any equitable doctrine.

[160] In this case, the defendants argue that the plaintiff's action should be dismissed on the basis of laches. The defendants argue that there has been inordinate delay (now 23 years) and prejudice resulting from that delay. The prejudice, it is said, is the presumed prejudice of fading memories over time and the loss or destruction of relevant documents.

[161] In respect of the delay, the defendants rely, among other things, on the conclusions of Mesbur J. in her ruling of August 30, 2011 in this case when she said:

> When I look at all the facts of this case and its tortured history, I can come to no other conclusion than that it is an abuse of the court's process. I cannot see how Indcondo can purport to pursue the identical claims yet again, particularly in light of its inordinate delay.

[162] I note, however, that central to Mesbur J.'s conclusion in this ruling was the finding that the plaintiff's action was an abuse process – a conclusion founded on the further conclusion that the plaintiff's claim was precluded by the principle of issue estoppel. That central finding on issue estoppel was, however, reversed by the Court of Appeal, which found that, because in *this* case the plaintiff stood in the shoes of the Trustee, it was not seeking to re-litigate earlier, dismissed claims which had been advanced by the plaintiff in its own capacity.

[163] Nevertheless, I would be prepared to conclude that the plaintiff has been guilty of inordinate delay in the prosecution of its claims, whether or not those claims are asserted on its own behalf or standing in the shoes of the Trustee. This finding alone, however, as noted above, is insufficient to support a claim of laches. The defendants must also prove circumstances, such

as irredeemable prejudice, which show that the continued prosecution of this action is unreasonable. The defendants have failed to do so in this case.

[164] In my view, the prejudice relied on – fading memories and loss of documents – lacks sufficient specificity. While the plaintiff is unquestionably guilty of delay, all parties must take some responsibility for aspects of the more than 23 years which has elapsed since the relevant events. More importantly, while Sloan makes the generic claim that documents were lost or destroyed in the usual and ordinary course of business, there is no evidence of specific documents being destroyed at specific stages of the proceeding as a result of the plaintiff's delay. The relevant property transfers took place between 1987 and 1989. Sloan was first notified of claims in early 1992. Sloan has failed to give any content to the generic complaint that documents that would have been helpful to him were lost or destroyed before that point in time. Since then, while there have been long periods of inactivity on the plaintiff's part, only a fool would have jettisoned important documents with litigation hanging over his head. The fact that Mr. Ford (while not a party nevertheless a friend of Sloan's) produced documents at the eleventh hour also casts some doubt on the rigor with which Sloan fulfilled his document production obligations. While I am sympathetic to the defendants' plea that adverse inferences ought not to be drawn from the loss or destruction of relevant document in the circumstances of this case, the evidence does not rise to the level of proof of acquiescence or actual, material prejudice sufficient to support a claim of laches. For these reasons, the defendants' argument for the dismissal of this action on the basis of laches is dismissed.

CPL Motion

[165] The defendants had a pending motion before this court to set aside an *ex parte* order for a certificate of pending litigation based on alleged incomplete disclosure by the plaintiff. This motion, it seems, was overtaken by other events including the two motions to dismiss the action, and the two trips to the Court of Appeal, and the case management order of D. Brown J., which suspended all motions and reserved this issue to trial.

[166] The *ex parte* motion was for an interlocutory order, the sole purpose of which was to prevent the dissipation of assets in dispute pending the trial of this action. There has now been, of course, a full hearing on the merits of the plaintiff's claims and, subject to rights of appeal, a final determination of those claims. In my view, therefore, the issue of the sufficiency of the evidence on the plaintiff's *ex parte* motion for a CPL is now moot. I therefore find it unnecessary to rule on the defendants' motion to set aside the CPLs. Any CPL affecting Hill 'N' Dale must and shall be discharged. Any CPL affecting 42 Riverside has been superceded by my judgment.

[167] Should there be an appeal, any further motions to preserve assets pending appeal will have to be brought on fresh evidence which would include the evidence adduced at trial.

Costs

[168] Any party seeking its costs shall do so by filing a written submission, not to exceed five typed, double-spaced pages, together with a Bill of Costs and supporting documents, within 21 days of the release of these Reasons. Anyone wishing to respond to such a request shall do so by filing a written response, subject to the same page limit, within a further 14 days.

Penny J.

Released: July 31, 2014

CITATION: Indcondo v. Sloan, 2014 ONSC 4018
COURT FILE NO.: CV-08-7587-00CL
DATE: 20140731

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Indcondo Building Corporation

Plaintiff

– and –

Valerie Frances Sloan, David Robin Sloan and Cave Hill Properties Ltd.

Defendant

REASONS FOR JUDGMENT

Penny J.

Released: July 31, 2014

Tab 9

Ontario Supreme Court
Dapper Apper Holdings Ltd. v. 895453 Ontario Ltd.
Date: 1996-02-05

Dapper Apper Holdings Limited

and

895453 Ontario Limited (c.o.b. Dunn's Famous Delicatessen), Ina Devine, and Fanny Dunn (née Fanny Dankovitch), Jason Nyman and Harold Struzer (executors and trustees under last will and testament of Myer Hyman Dunn)

Ontario Court of Justice (General Division) Sedgwick J.

Judgment – February 5, 1996.

Stephen P. Horwitz, for plaintiff.

Alan Riddell, for defendants.

(Doc. Ottawa 56148/91)

[1] February 5, 1996. SEDGWICK J.: – This action was commenced by the plaintiff Dapper Apper Holdings Ltd. ("Dapper Apper") against the defendant 895453 Ontario Limited c.o.b. as Dunn's Famous Delicatessen ("Dunn's Deli") by a statement of claim dated September 25, 1991, which was amended on December 24, 1992 to include claims against the defendants Ina Devine ("I. Devine") and her father Myer Dunn ("M. Dunn").

[2] The action was set down for trial by the plaintiff on June 8, 1993, and was tried on the Ottawa Civil Non-Jury List on July 5, 6, 7 and 12, 1995.

[3] M. Dunn died on September 30, 1993, and on June 28, 1995, an order was made by the Registrar to continue the action against the executors and trustees of his estate, Fanny Dunn née Fanny Dankovitch, Jason Nyman and Harold Struzer. This order is now reflected in the style of cause of this action.

[4] At the opening of trial on July 5, 1995, counsel informed me that Dunn's Deli had admitted the allegations in paragraphs 2-6, 8 and 9 of the amended statement of claim. Consequently, at the conclusion of trial on July 12, 1995, judgment was given against Dunn's Deli for

$100,000 and pre-judgment interest calculated in the amount of $34,604.93, in accordance with subparagraphs 1.I(a), (b) and (c) of the amended statement of claim.

[5] I reserved my decision as to the relief sought by Dapper Apper against the defendants I. Devine and M. Dunn in relation to a General Security Agreement between Dunn's Deli (as "debtor") and I. Devine and M. Dunn (as "secured party"), dated June 17, 1992.

[6] A stay was ordered pending my decision as to the validity of the General Security Agreement, both of execution of the judgment against Dunn's Deli given on July 12, 1995, and of any steps or proceedings by the defendants I. Devine and M. Dunn to enforce the General Security Agreement (Letter to counsel, dated July 13, 1995).

[7] As a result of the judgment given at the conclusion of trial on July 12, 1995, Dapper Apper is an unsecured judgment creditor of Dunn's Deli for $134,604.93 and post-judgment interest calculated in accordance with the *Courts of Justice Act.*

[8] The sole issue remaining for determination by the court is whether the General Security Agreement granted by Dunn's Deli to I. Devine and M. Dunn is void as against creditors as a fraudulent conveyance under the *Fraudulent Conveyances Act,* R.S.O. 1990, c. F.29 or as a fraudulent preference under the *Assignments and Preferences Act,* R.S.O. 1990, c. A.33.

Facts

[9] At trial, the Plaintiff's Book of Documents was entered as Exhibit 1 and the Plaintiff's Supplemental Book of Documents was entered as Exhibit 2. The Defendant's Book of Documents was entered as Exhibit 4. When referring in these reasons to a document in these Books of Documents, I shall refer to it by the tab number in the appropriate Book of Documents (Ex. 1, Ex. 2 or Ex. 4).

Business Relationships

[10] M. Dunn lived in Montreal. He was the founder of a well-known restaurant there known as "Dunn's Famous Delicatessen". His daughter I. Devine was associated with him in the restaurant business in Montreal. She continued to be associated with him in the Montreal restaurant business after her marriage to Stanley Devine ("S. Devine").

[11] According to the evidence, in the early summer of 1990, the defendant M. Dunn decided to open a similar restaurant in Ottawa, to be carried on under the same name, "Dunn's Famous Delicatessen". For that purpose, the corporate defendant Dunn's Deli was incorporated on July 4, 1990, with the defendant I. Devine as its sole officer, director and shareholder (Ex. 1, Tab 3). The restaurant opened for business in October 1990.

[12] S. Devine, the husband of I. Devine, was an employee of Dunn's Deli. He was also an authorized signing officer on the bank account of Dunn's Deli, with full power to act alone (Ex. 1, Tab 4). At the time of the events out of which this action arises, he was also an undischarged bankrupt, having made an assignment in bankruptcy on September 4, 1991.

[13] Of these three individuals, only I. Devine testified at trial. M. Dunn passed away on September 30, 1993. S. Devine did not testify. However, from the evidence of I. Devine at trial as to the business relationship with her father and husband, and from the evidence of the defendants' other witnesses bearing on the decision-making process in relation to Dunn's Deli and other related family business activities, these three individuals were the management team for Dunn's Deli.

[14] S. Devine was responsible to his father-in-law and wife for the daily operations of the restaurant and other business activities of Dunn's Deli. There is little doubt that he was allowed by them to represent himself as a proprietor in the business, both in its internal operations and in its external relations.

[15] The arbiter in the decision-making process was M. Dunn, in consultation with his daughter, I. Devine. It was he who decided to open the restaurant in Ottawa. Later, it was he who in July 1992, decided to expand and to open a similar restaurant under the same name in Toronto. It was he who was asked by the Devines to consider and decide on a proposal to go public and franchise "Dunn's Famous Delicatessen" restaurants in Canada and the United States. Dunn's Deli had a role to play in both the expansion to Toronto and the franchising proposal.

[16] From the evidence of I. Devine at trial, I am satisfied that her business relationship with her father was close and based on trust between them. I do not think it likely or probable that they withheld any significant information from each other which related to their mutual business interests. A businessman of M. Dunn's experience and success would have

recognized and not tolerated anything less than complete candour from his daughter and son-in-law. On the evidence, I am satisfied that this was the reality of how the business of Dunn's Deli was conducted.

Financial Records of Dunn's Deli

[17] I am also bound to say that the business of Dunn's Deli, and particularly its financial record-keeping, was conducted with scant regard for the niceties of corporate form and generally accepted accounting principles. Other family businesses may be as informally conducted. However, in this case, the uncertainty about trustworthy internal accounting records has made the task of determining the factual issues more difficult.

[18] The Ottawa business venture carried on by Dunn's Deli was not a financial success. In her evidence, I. Devine stated that Dunn's Deli has never earned a profit. To continue in its business, Dunn's Deli has, since the beginning, also required very large infusions of money from I. Devine and M. Dunn.

[19] According to her evidence, I. Devine has put $1,750,526 into Dunn's Deli since the beginning and her father M. Dunn put $499,922.75. These aggregate amounts are based on summary statements prepared by the defendants for purposes of trial and purportedly based on Dunn's Deli's accounting records (Ex. 4, Tabs 1, 10, 11, 12, 13 and 14).

The General Security Agreement ("GSA")

[20] For the purpose of this action, June 17, 1992 and June 29, 1992 are significant dates. The GSA, the validity of which is the subject of this action, is dated June 17, 1992 and was signed by I. Devine on behalf of Dunn's Deli on June 29, 1992 (Ex. 2, Tab 3). The GSA purports to secure all present and future debts and liabilities of Dunn's Deli to I. Devine and M. Dunn (the "Secured Party") by granting them a security interest in all present and future personal property of Dunn's Deli, tangible and intangible. The security interest created under the GSA (para. 1) was subsequently perfected by registration of a financing statement under the *Personal Property Security Act* (Ontario) on July 22, 1992 under No. 927221410-0028-4765.

[21] On June 29, 1992, I. Devine and M. Dunn signed a security sharing agreement under which they agreed to share all proceeds realized on enforcement of the GSA rateably between them (Ex. 2, Tab 3).

[22] In my view, the date at which the validity of the GSA must be determined is June 29, 1992, the date on which it was signed by I. Devine on behalf of Dunn's Deli.

Money Put into Dunn's Deli by I. Devine and M. Dunn

[23] Up to June 29, 1992, according to the summary statements prepared by the defendants (Ex. 4, Tabs 1, 10, 11 and 12), I. Devine had put $809,617 into Dunn's Deli and her father M. Dunn had put $250,000. No moneys were put into Dunn's Deli at the same time as the GSA was signed on June 29, 1992. Prior to that date, I. Devine last put money into Dunn's Deli on December 11, 1991; and after that date, she next put money in on August 19, 1992. Prior to June 29, 1992, M. Dunn last put money into Dunn's Deli on June 19, 1991; and after that date, M. Dunn next put money in on March 22, 1993.

[24] I would add that the summary statements from which these figures are derived were not the only calculations of the amounts put into Dunn's Deli by I. Devine and M. Dunn produced at trial. These statements were prepared and produced by the defendants on the eve of trial. The amounts are significantly greater than those set out in responses to undertakings given on the examinations for discovery of S. Devine on behalf of Dunn's Deli on July 7, 1992 (See Ex. 2, Tab 5, No. 4).

Was the Money Put into Dunn's Deli as Loans on Investments?

[25] The defendants say that all moneys put into Dunn's Deli by I. Devine or M. Dunn, either before or after June 29, 1992, were loans made by them to Dunn's Deli. They say, therefore, that they are creditors of Dunn's Deli for those amounts. I would, however, observe that in the response to undertakings given on behalf of Dunn's Deli (referred to in the preceding paragraph of these reasons), they were referred to as "investments".

[26] Dapper Apper says that these moneys were either put into Dunn's Deli as investments or, in the case of M. Dunn, possibly as a voluntary contribution to Dunn's Deli to assist his daughter and son-in-law in the business of the Ottawa restaurant or as a conduit to other

family business ventures, such as the Toronto restaurant (through a separate corporation) or the franchising proposal.

[27] In order to determine this issue, audited (or even unaudited) financial statements of Dunn's Deli prepared by an accountant would ordinarily have provided a useful starting point. However, in this case, the defendants have refused to produce any financial statements of Dunn's Deli prepared and signed by an accountant.

[28] In particular, they have refused to produce annual statements for the financial years ending May 31, 1991 and May 31, 1992. Their refusal to produce these statements, particularly for the 1992 financial year, which ended on May 31, 1992, less than one month before the GSA was signed, has deprived the court of evidence which would have been helpful in determining the characterization of the moneys put into Dunns Deli by I. Devine and M. Dunn as loans or otherwise; and also in determining whether Dunns Deli was insolvent on June 29, 1992. I draw adverse inferences against the defendants on both these factual issues, from their refusal to produce any financial statements of Dunn's Deli prepared and signed by its external auditor or accountant; as well as from their unexplained failure to call the external auditor or accountant of Dunn's Deli as a witness at trial.

[29] The only "financial statements" produced by Dunn's Deli at trial were draft unaudited financial statements for the period from July 4, 1990 to May 31, 1991 (Ex. 1, Tab 6), an unidentified balance sheet and statement of operations for the seven months ended December 31, 1991 (Ex. 1, Tab 6) and an internally produced computer printout of accounts payable and accrued liabilities at February 8, 1992 (Ex. 1, Tab 6). I shall comment later on the oral evidence of Gerald Thaw (Dunn's Deli's bookkeeper) which accompanied these "financial statements".

[30] The balance sheet included in the draft financial statements of Dunn's Deli as at May 31, 1991, contains an item for loans from shareholders and directors ($341,364); and the unidentified balance sheet as at December 31, 1991, contains a time for director loans ($553,737). The only director or shareholder of Dunn's Deli was I. Devine. Her father M. Dunn was neither a director nor a shareholder. Although there are specific items and notes in these documents which refer to Dunn's Deli's long-term debt and bank indebtedness (both current and long-term), there is no identifiable reference to any debt owing by Dunn's Deli to M. Dunn.

[31] As to documents supporting the assertion that all these moneys put into Dunn's Deli were loaned to Dunn's Deli by I. Devine or M. Dunn, there are none. There are no loan agreements. There are no promissory notes or other evidences of indebtedness. There is no documentary evidence of any obligation to repay these moneys (other than entries in the computer cheque registers internally prepared by G. Thaw on instructions from S. Devine, see para. 35). There is no documentary evidence as to the terms of the alleged loans including any obligation to pay (or not to pay) interest.

[32] The documentary evidence which was tendered by the defendants to support the assertion that all these moneys were loans to Dunn's Deli, is unsubstantial and inconclusive. Evidence of bank deposit books (Ex. 3) and cheques and monthly bank statements (Ex. 4) at most prove the deposit of the moneys into the bank account of Dunn's Deli. There is nothing in them which assists in the characterization of the deposits as loan proceeds or otherwise.

[33] The computer cheque registers of Dunn's Deli (Ex. 1, Tabs 8-10) tendered by the defendants, as explained at trial by G. Thaw, who as the bookkeeper of Dunn's Deli prepared them, are also unsatisfactory as evidence of the characterization of loan proceeds and loan "repayments" which they purport to contain. From G. Thaw's evidence, it is clear that he took his instructions from S. Devine as to what computer entries were to be designated as loan proceeds and repayments. He exercised no independent judgment on the matter throughout the period with which this action is concerned.

[34] Yet these registers were the basis for the summary statements (Ex. 4, Tabs 1, 10, 11, 12, 13 and 14) relied on by the defendants at trial as proof of loan advances and repayments.

Cheque Kiting Schemes

[35] G. Thaw did as he was told by S. Devine in making entries in the computer cheque registers. Indeed, he was told to record a significant number and amount of advances from S. Devine himself to Dunn's Deli. Under vigorous re-examination by his own counsel, G. Thaw recalled that these "advances" were not really advances by S. Devine at all. In preparing the computer cheque registers, he had used the "wrong terminology". They were actually related to several cheque kiting schemes involving S. Devine and others to which, he said, I. Devine was privy.

[36] It was explained that the purpose of these recurring cheque kiting schemes was to artificially inflate the balance in Dunn's Deli's bank account during periods when there were insufficient revenues coming in to pay its current debts. G. Thaw specifically identified May 1991, June-August 1991 (in excess of $100,000) and September-October 1992, as three periods when cheque kiting occurred.

[37] Kiting consists of knowingly writing cheques against a bank account where there are insufficient funds in the account to cover them, in the expectation that the necessary funds will be deposited before the kited cheques are presented to the bank for payment. The cheques are drawn against deposits that have not yet cleared through the banks involved. A kiting scheme takes advantage of the time which elapses between the deposit of a cheque in one bank and its collection at another. *Corp. Agencies Ltd. v. Home Bank of Canada* [1927] A.C. 318 (P.C.). In Canada, kiting is a criminal offence. *N. L'Heureux, Le droit bancaire,* 86.

Treatment in Dunn's Deli's Financial Records

[38] One of the reasons advanced by the defendants for characterizing the amounts put into Dunn's Deli by I. Devine and M. Dunn as loans (rather than investments) was that, in the accounting records of Dunn's Deli, some repayments of these moneys are recorded. However, in the summary statements (Ex. 4, Tabs 7, 10, 11, 12, 13 and 14) upon which the defendants rely, it is instructive to note that the specific repayment dates during successive periods are not stated, although specific dates are indicated for the advances. G. Thaw in his evidence said that there was "no particular reason "for the omission of specific repayment dates from these statements (referring in his evidence, specifically to Ex. 4, Tabs 10, 11).

[39] Although G. Thaw stated that the "advances" referred to in these statements were treated as loans by I. Devine and M. Dunn in the books of Dunn's Deli and were also treated as loans by its "auditors", the external auditor or accountant of Dunn's Deli was not called to testify at trial to confirm this assertion.

Other than Corporate Purposes

[40] There was also evidence that some of the money put into Dunn's Deli by I. Devine and M. Dunn was not used or intended to be used for the corporate purposes of Dunn's Deli at all, but was for other family projects such as the Toronto restaurant and the franchising proposal. For this money Dunn's Deli was merely a conduit.

[41] According to I. Devine, planning for the Toronto restaurant began in July 1992 and it was opened in December 1992. Ronald C. Shryvman, a former employee of Dunn's Deli in Ottawa, testified that he went to Toronto in November 1992 to manage the Toronto restaurant, which was operated through a separate corporation (1004213 Ontario Limited) but was treated by I. Devine and S. Devine as if it were part of Dunn's Deli for management and operational purposes. The shareholder of 1004213 Ontario Limited was Nonie Devine, the daughter of I. Devine and S. Devine.

[42] There is also evidence that on October 23, 1991, a cheque for $60,007.80 was drawn on the bank account of Dunn's Deli to pay for a U.S. dollar bank draft in favour of "Murray Baeal" (Ex. 1, Tab 10, p. 317). He was identified by G. Thaw as a "financier and stockbroker" advising M. Dunn, I. Devine and S. Devine about going public in connection with the franchising proposal which was under discussion in 1991 and 1992. G. Thaw was unable to recall the purpose of the specific payment to Murray Baeal on October 23, 1991. I. Devine testified that M. Dunn told S. Dunn to pay this amount out of the account of Dunn's Deli as "the franchising would come out of Ottawa".

[43] In the circumstances of this case, the defendants carry an evidentiary burden to show on a balance of probabilities that the moneys put into Dunn's Deli by I. Devine and M. Dunn were loans made by them to Dunn's Deli. In my view, they have not discharged this burden. I am not satisfied by the documentary and oral evidence tendered at trial on their behalf that it is more probable than not that the moneys were in fact loans made by I. Devine and M. Dunn to Dunn's Deli.

Intention of Parties to GSA

[44] The GSA was signed by I. Devine on behalf of Dunn's Deli on June 29, 1992. As I have stated, that is, in my view, the date at which its validity must be determined. That is the date at which the court must determine whether, as alleged by Dapper Apper, the GSA is void as against creditors of Dunn's Deli as a fraudulent conveyance under the *Fraudulent Conveyances Act* or as a fraudulent preference under the *Assignments and Preferences Act.*

[45] In that regard, the intention and knowledge of the parties to the GSA on June 29, 1992, and the solvency of Dunn's Deli on that date are relevant to one or other or both of the statutory remedies upon which Dapper Apper relies.

[46] As to the intention and knowledge of the parties to the GSA on June 29, 1992, the evidence of I. Devine upon which the defendants rely is that the intention of herself and her father M. Dunn as the recipients (or grantees) of the security interest created by Dunn's Deli (as grantor) under the GSA over all its present and future property and assets was solely to ensure that her loans and her father's loans were repaid. Their reason was to protect the loans "against any creditors". This candour was elicited on cross-examination. Although she says she was aware of the claim of Dapper Apper as a creditor, she denies that she had mentioned the claim to her father M. Dunn.

[47] In creating the security interest in favour of I. Devine and M. Dunn under the GSA, Dunn's Deli as debtor may, in my view, be presumed to have had the same intention as I. Devine, who as its sole officer and director (as well as its sole shareholder), signed the GSA on its behalf.

[48] In determining the intention and knowledge of the parties to the GSA on June 29, 1992, I have taken the following additional evidence into consideration:

(1) this action was commenced by Dapper Apper to enforce its $100,000 claim against Dunn's Deli on September 25, 1991. Service of the statement claim would have brought knowledge to Dunn's Deli and to I. Devine its sole officer, director and shareholder, if not to M. Dunn, who was only added as a defendant on December 24, 1992, as a consequence of the GSA.

(2) On May 15, 1992, six weeks before the GSA was signed, Dapper Apper had unsuccessfully moved for summary judgment against Dunn's Deli on the statement of claim.

(3) On June 2, 1992, four weeks before the GSA was signed, settlement discussions were held at the offices of the solicitors for Dunn's Deli regarding Dapper Apper's action and claim.

(4) After the settlement meeting had concluded, the CEO of Dapper Apper (Barry Appel) testified that the solicitor for Dunn's Deli said to him that if the proposed settlement was not agreed upon, Dunn's Deli would "slap on a GSA". This evidence was admitted, subject to my satisfaction as to its relevance. I am satisfied that it is relevant and confirm that in my view, the statement was not made in privileged circumstances.

(5) According to the evidence of I. Devine, her father M. Dunn's reaction to being informed of the proposal for Dunn's Deli to grant a general security interest under a GSA in favour of I. Devine and himself was to "take it out as fast as you can".

(6) Although examinations for discovery of S. Devine on behalf of Dunn's Deli were held about a week after the GSA was signed, and although S. Devine disclosed in response to a question that the GSA had been signed in favour of I. Devine and M. Dunn, his counsel refused to let him disclose the date on which the GSA had been signed (Transcript, pp. 83-5, Q 506-511).

In the circumstances of this case, I am satisfied that by granting a general security interest under the GSA to I. Devine and M. Dunn on June 29, 1992, Dunn's Deli intended, in my view, to put all its present and future property and assets out of reach of the lawful claims of its creditors (including Dapper Apper). I am also satisfied that I. Devine and M. Dunn, the grantees of the general security interest both knew and shared this intent. The primary objective of the parties to the GSA was, in my view, to shield the present and future property and assets of Dunn's Deli from its unsecured creditors (including Dapper Apper) by making them subject to a general security interest in favour of the investments of family members in Dunn's Deli. I have made a finding that these investments were not loans to Dunn's Deli (see para. 43). It follows from that finding that I. Devine and M. Dunn are not creditors of Dunn's Deli.

Solvency of Dunn's Deli

[49] The defendants maintain that Dunn's Deli was solvent at June 29, 1992. According to the evidence of I. Devine and G. Thaw, Dunn's Deli had a policy of not paying creditors when their debts were due. Debts were only paid under pressure from the creditors. Terms would be sought from the creditors and payment further delayed. Inevitably, some impatient creditors would take their claims to the courts and even obtain judgments against Dunn's Deli. During the course of their evidence, these witnesses recalled by name a significant number of these court proceedings by creditors but had great difficulty recalling when in the history of Dunn's Deli they had arisen or been settled or otherwise disposed. Apparently, they were treated as by Dunn's Deli as an incident of doing business with its creditors in this way.

[50] In summary, the defendants say that Dunn's Deli was not insolvent on June 29, 1992, because it would have been able to pay its debts "if we so.desired", and if its creditors were prepared to accept terms of 30, 60, 90 days or longer, even though it was admitted that there was no cash on hand in June 1992 (G. Thaw).

[51] In determining the solvency of Dunn's Deli at June 29, 1992, I have also taken the following evidence into consideration:

(1) the draft financial statements of Dunn's Deli for the period from July 4, 1990 to May 31, 1991 (Ex. 1, Tab 6) indicate an excess of liabilities over assets of $154,618; and the unidentified balance sheet as at December 31, 1991 (Ex. 1, Tab 6) indicates an excess of liabilities over assets of $219,989. The same documents indicate a loss (before income taxes) of $154,718 during the financial period ending May 31, 1991 and a loss of $72,456 during the seven month financial period ending December 31, 1991. I have expressed my concerns about the unsatisfactory nature of these documents elsewhere in these reasons (paras. 17, 27-29). I have also expressed my view about the refusal of the defendants to produce signed financial statements of Dunn's Deli, for these periods and for the financial year ended May 31, 1992, immediately before the granting of the GSA (paras. 27-29). In the absence of other evidence, however, I would infer from these financial statements that Dunn's Deli liabilities exceeded its assets at the dates of the two financial statements; that the gap was widening; and that there is no reason to believe that the financial condition of Dunn's Deli improved between December 31, 1991 and June 29, 1992.

(2) the cheque kiting schemes described elsewhere in these reasons (paras. 35-37), which were conducted through the Dunn's Deli bank account for the admitted purpose of giving the corporate defendant the appearance of solvency and ability to pay its creditors.

(3) as to the $100,000 claim of Dapper Apper specifically, the admission by G. Thaw that Dunn's Deli did not have the money to pay Dapper Apper's claim in June 1992.

(4) evidence of I. Devine that during the first two years of operation, the cash flow problem was "awful" and that in the spring of 1992 the "money was all going out", as well as her acknowledgment that in June 1992, Dunn's Deli could not have paid its creditors in full.

[52] On this evidence as to the financial condition of Dunn's Deli, I am satisfied that it is more probable than not that on June 29, 1992, Dunn's Deli was insolvent. There is no doubt that on

that date it was unable to pay its creditors (and specifically, the claim of Dapper Apper) in full within the meaning of the *Assignments and Preferences Act.*

Law

[53] Dapper Apper seeks a declaration on behalf of itself and other creditors of Dunn's Deli that the GSA granted by Dunn's Deli to I. Devine and M. Dunn on June 29, 1992, is void as against Dapper Apper and other creditors of Dunn's Deli.

[54] Dapper Apper says that the GSA is void because it is a fraudulent conveyance under the *Fraudulent Conveyances Act* or a fraudulent preference under the *Assignments and Preferences Act,* or both. These statutory remedies will be considered in turn.

Fraudulent Conveyances Act

[55] This Act applies to every "conveyance" (including a "charge") of real or personal property which is made "with intent to defeat, hinder, delay or defraud creditors and others". A conveyance made by the grantor with this intent is void as against the creditors and others (sec. 2).

[56] If, however, a conveyance is made with this intent on the part of the grantor "upon good consideration and in good faith" to a person not having at the time of the conveyance to that person "notice or knowledge" of the intent of the grantor (sec. 3), the "conveyance" is not void as against the creditors and others.

[57] If the court is satisfied that a conveyance is made with intent on the part of the grantor to defeat, hinder, delay or defraud creditors and others, the parties to the conveyance (the grantor and the grantees) must show that it was made for good consideration and good faith and to a person (or persons) who was (or were) without notice or knowledge of the grantor's fraudulent intent. *Bank of Montreal v. Jory* (1981), 39 C.B.R. (N.S.) 30 (B.C. S.C.). Otherwise, the conveyance is void against creditors of the grantor.

[58] I am satisfied that Dunn's Deli (the grantor) by signing the GSA and delivering it to I. Devine and M. Dunn (the grantees) on June 29, 1992, intended to "defeat, hinder, delay or defraud" creditors within the meaning of section 2 of the *Fraudulent Conveyances Act.* By the stroke of a pen wielded by I. Devine (one of the grantees), she and her father M. Dunn (the other grantee) were given the status of secured creditors in respect of their investments in

Dunn's Deli, while the property and assets of Dunn's Deli were shielded from the unsecured claims of Dapper Apper and other unpaid creditors of Dunn's Deli. That, in my view, indicates an intent to defeat, hinder, delay or defraud those unpaid unsecured creditors.

[59] In my view, the giving and taking of the GSA was motivated by the pending action of Dapper Apper against Dunn's Deli for $100,000, which was being vigorously prosecuted at the time and the inability or unwillingness of Dunn's Deli to settle the action on terms acceptable to Dapper Apper, as evidenced by the unsuccessful settlement discussions early in June 1992.

[60] The defendants say that the GSA was motivated by the need of I. Devine and M. Dunn to protect their investments in Dunn's Deli. However, the protection of investments and the defeating, hindering and delaying of the claims of other creditors are two sides of the same coin.

[61] Have the defendants discharged the evidentiary burden of showing, in the words of section 3 of the Act, that the GSA was given by Dunn's Deli in favour of I. Devine and M. Dunn:

(1) "upon good consideration"

(2) "and in good faith"

(3) "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 [2]".

In my view, they have not.

[62] Based on the findings of fact set out earlier in these reasons as to the failure of the defendants to discharge the evidentiary burden as to the characterization of the moneys put into Dunn's Deli by I. Devine and M. Dunn as loans (para. 43), and as to the intention of the parties to the GSA (para. 48), I am not satisfied by the evidence of the defendants that it is more probable than not that the GSA was made "upon good consideration and in good faith". Even if I had decided in favour of the defendants on this issue, I am not satisfied that it is more probable than not that I. Devine or M. Dunn were persons who on June 29, 1992 had no notice or knowledge of the intent of Dunn's Deli to defeat, hinder, delay or defraud its creditors.

[63] I. Devine signed the GSA on behalf of Dunn's Deli. She is clearly a person having notice or knowledge of the intent of Dunn's Deli of which she was the sole officer, director and shareholder. I am also satisfied that it is more probable than not that her father M. Dunn was also aware of the intent of Dunn's Deli. There was a close family and business relationship between father and daughter. He was kept closely informed by his daughter on business matters relating to Dunn's Deli and was well aware and concerned about its financial condition, as evidenced by his swift reaction to the suggestion that a GSA be obtained to protect his investment in Dunn's Deli.

Assignments and Preferences Act

[64] This Act applies to every "gift, conveyance, assignment or transfer..." of real or personal property which is made by a person when

(1) insolvent,

(2) unable to pay his debts in full, or

(3) he knows that he is on the eve of insolvency,

if the gift, conveyance, assignment or transfer is made "with intent to defeat, hinder, delay or prejudice" any one or more creditors of the person.

[65] If made with this intent, the gift, conveyance, assignment or transfer is void as against the creditor(s) "injured, delayed or prejudiced" (sub-section 4(1)).

[66] If, however, the gift, conveyance, assignment or transfer is made "in good faith" and "in consideration of a present actual payment in money" or "by way of security for a present actual advance of money" where the "money paid" bears "a fair and reasonable relative value to the consideration therefor", the "gift, conveyance, assignment or transfer is not void as against the creditor(s) (sub-section 5(1)).

[67] The Act further provides that nothing in the Act invalidates a security given to a creditor for a pre-existing debt, where because 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 its trade or business and to pay the debts of the debtor in full [subsection 5(5)(d)].

[68] The defendants I. Devine and M. Dunn rely on subsections 5(1) and 5(5)(d) of the Act as applying to the GSA. In my view, neither of these sub-sections applies to the GSA. Based on the finding of fact set out earlier in these reasons as to the failure of the defendants to discharge the evidentiary burden as to the characterization of the moneys put into Dunn's Deli by I. Devine and M. Dunn as loans (para. 43), the individual defendants are not creditors of Dunn's Deli but investors in Dunn's Deli (para. 48). Even if I had decided in favour of these defendants on this issue, no "present actual advance" [subsection 5(1)] or "an advance in money" [subsection 5(5)(d)] was made to Dunn's Deli by either of them at or about the same time as the GSA (June 29, 1992).

[69] As pointed out in para. 23 of these reasons, no moneys were put into Dunn's Deli I. Devine between December 11, 1991 and August 19, 1992. No moneys were put into Dunn's Deli by M. Dunn between June 19, 1991 and March 22, 1993. However these moneys put into Dunn's Deli by I. Devine and M. Dunn may be characterized, they are not present actual advances within the meaning of sub-section 5(1) of the Act. In my view, subsection 5(5)(d) of the Act relates only to a security given to secure past advances and advances made at the same time as the giving of the security.

[70] For the same reasons and based on the same evidence I have discussed in these reasons in relation to the *Fraudulent Conveyances Act,* I think that the GSA is a gift, conveyance, assignment or transfer which, within the meaning of the *Assignments and Preferences Act* was made by Dunn's Deli to I. Devine and M. Dunn with intent to defeat, hinder, delay or prejudice Dapper Apper and other creditors of Dunn's Deli.

[71] By giving I. Devine and M. Dunn the status of secured creditors of Dunn's Deli, the GSA clearly creates a preference in their favour over the claims of Dapper Apper and other unsecured creditors of Dunn's Deli.

[72] On June 29, 1992, was Dunn's Deli (1) insolvent, (2) unable to pay its debts in full or (3) did it know itself to be on "the eve of insolvency", within the meaning of the Act? I note that the Act sets out three alternative financial conditions of Dunn's Deli, to be considered by the court. *Robinson v. Countrywide Factors Ltd.* (1977), 23 C.B.R. (N.S.) 97 (S.C.C.). I take "insolvency" to be a state in which Dunn's Deli is unable for any reason to pay its debts in the ordinary course of business as they generally become due. *Robinson v. Countrywide Factors Ltd., supra.*

[73] On the evidence of the financial condition of Dunn's Deli reviewed earlier in these reasons and my finding of fact set out in para. 52, I have concluded that on June 29, 1992, Dunn's Deli was probably insolvent and was certainly unable to pay its creditors in full within the meaning of the Act.

[74] Accordingly, the GSA is, in my opinion, both a fraudulent conveyance within the meaning of the *Fraudulent Conveyances Act* and void as against Dapper Apper and other creditors of Dunn's Deli under that Act; and a fraudulent preference within the meaning of the *Assignments and Preferences Act* and void as against Dapper Apper and other creditors of Dunn's Deli. Dapper Apper is entitled to a declaration to that effect.

[75] Dapper Apper is also entitled to its costs of this action on a party and party scale.

Action allowed.

Tab 10

Publications and Research

The Bank in Brief
Press Releases
Notices and Announcements
Speeches
Periodicals
Research
Books and Monographs

PUBLICATIONS AND RESEARCH

A Primer on the Implementation of Monetary Policy in the LVTS Environment[1]

Introduction

The Bank of Canada's method for implementing monetary policy is closely linked to the system through which payments clear and settle daily. Coincident with the introduction by the Canadian Payments Association of an electronic system for the transfer of payments (the Large Value Transfer System, or LVTS), a new approach to the implementation of monetary policy was adopted on 4 February 1999.[2] This primer summarizes the objectives and the key elements of the framework that the Bank uses to implement its monetary policy. It also includes a table that lists the key features of the framework and how they function in the LVTS environment and a glossary of terms with respect to the Bank of Canada's monetary policy operations.

Policy overview

The Bank of Canada establishes a target for the overnight interest rate within an operating band in order to influence other short-term interest rates and the exchange rate (Thiessen 1995). The ability to influence other short-term rates partly reflects the fact that inventories of money market securities are generally financed with overnight funds. However, other factors, including changing market expectations and exchange rate developments, also affect how other interest rates, including those with relatively short terms to maturity, respond to changes in the target rate.

Changes in the Bank of Canada's target for the overnight interest rate are the first stage in the transmission mechanism through which the monetary policy actions taken by the Bank affect total spending in the economy and, ultimately, inflation. In addition, the Bank could change its target rate to help stabilize financial markets in certain circumstances.

Key features of the operating framework: The target for the overnight rate, the operating

Cash setting	Used to: • neutralize the impact of public sector flows to/from Bank's balance sheet (if the level of settlement balances is unchanged) and • to adjust the level of settlement balances.
	Effected through transfer of government balances from/to the Bank of Canada to/from the LVTS and other participants in government auctions.
	Transfer of government deposits effected through the twice-daily auctions of government balances on day T for value day T. The neutralization of public sector flows and any change in the level of excess settlement balances is effected by the difference between the amounts auctioned and the amounts maturing.

Glossary

ACSS

The ACSS (Automated Clearing Settlement System of the Canadian Payments Association) is the system through which paper-based and small-value electronic payment items, such as cheques, pre-authorized debits, and direct deposits are exchanged, and the amounts "due to" and "due from" are calculated. The final net clearing gain or loss is settled through the transfer of funds to or from the individual direct clearer's account on the books of the Bank of Canada at midday on a next-day basis. Before the LVTS was introduced, all payment items cleared through the ACSS.

Advances

An LVTS advance is a secured loan provided by the Bank of Canada to a participant in the LVTS to cover a deficit in its end-of-day LVTS cash position. The interest rate on the one-business-day loan is set at the upper limit of the operating band for the overnight interest rate (Bank Rate).

Bank Rate

The minimum rate at which the Bank of Canada extends short-term advances to members of the Canadian Payments Association (CPA). Effective 22

February 1996, the Bank Rate was set at the upper limit of the Bank's operating band for the overnight interest rate.

Overnight rate

The interest rate at which funds are borrowed or lent for a term of one business day. As a result of differences with respect to legal format, collateral arrangements, etc., interest rates on various overnight instruments may differ slightly. However, all principal overnight rates move closely together because of market arbitrage, and the modest differentials are not important from the viewpoint of monetary policy. Overnight funds are obtained through buybacks (repos), call loans, and swapped foreign exchange funds. As one measure of the overnight interest rate, the Bank of Canada compiles an estimate based on the weighted average cost of overnight financing for major dealers. The Canadian overnight repo rate (CORRA) is another measure. There is also an overnight market for wholesale and interbank deposits, which are not collateralized and are not included in either the Bank's measure or the CORRA measure.

Participants

Those members of the Canadian Payments Association that participate in the LVTS and settle directly on the books of the Bank of Canada. The direct clearer designation applies to CPA members that participate in the ACSS and maintain a settlement account at the Bank of Canada. All direct clearers are participants in the LVTS.

Primary dealers

The subset of government securities distributors that the Bank of Canada deals with when it conducts SPRAs and SRAs. Primary dealers have a number of responsibilities, which include maintaining a certain share of the Government of Canada securities markets and market-making in Government of Canada securities. The terms "government securities distributors" and "primary dealers" replaced the former classification of "primary distributors" and "jobbers", respectively. See also, revised rules pertaining to auctions of Government of Canada securities and the Bank of Canada's surveillance of the auction process 11 August 1998.

Sale and repurchase agreements (SRAs)

SRAs are reverse repo-type transactions in which the Bank of Canada offers to sell Government of Canada securities to designated counterparties with an agreement to buy them back at a predetermined

Tab 11

BANK RATE*
TAUX OFFICIEL D'ESCOMPTE*
(Per cent / en pourcentage)

Year / année	Jan / jan	Feb / fév	Mar / mar	Apr / avr	May / mai	Jun / jun	Jul / jul	Aug / aoû	Sep / sep	Oct / oct	Nov / nov	Dec / déc
2003	3.00	3.00	3.25	3.50	3.50	3.50	3.25	3.25	3.00	3.00	3.00	3.00
2004	2.75	2.75	2.50	2.25	2.25	2.25	2.25	2.25	2.50	2.75	2.75	2.75
2005	2.75	2.75	2.75	2.75	2.75	2.75	2.75	2.75	3.00	3.25	3.25	3.50
2006	3.75	3.75	4.00	4.25	4.50	4.50	4.50	4.50	4.50	4.50	4.50	4.50
2007	4.50	4.50	4.50	4.50	4.50	4.50	4.75	4.75	4.75	4.75	4.75	4.50
2008	4.25	4.25	3.75	3.25	3.25	3.25	3.25	3.25	3.25	2.50	2.50	1.75
2009	1.25	1.25	0.75	0.50	0.50	0.50	0.50	0.50	0.50	0.50	0.50	0.50
2010	0.50	0.50	0.50	0.50	0.50	0.75	1.00	1.00	1.25	1.25	1.25	1.25
2011	1.25	1.25	1.25	1.25	1.25	1.25	1.25	1.25	1.25	1.25	1.25	1.25
2012	1.25	1.25	1.25	1.25	1.25	1.25	1.25	1.25	1.25	1.25	1.25	1.25
2013	1.25	1.25	1.25	1.25	1.25	1.25	1.25	1.25	1.25	1.25	1.25	1.25
2014	1.25	1.25	1.25	1.25	1.25	1.25	1.25	1.25	1.25	1.25	1.25	1.25
2015	1.00	1.00	1.00	1.00	1.00	1.00	0.75	0.75	0.75	0.75	0.75	0.75

Source: Bank of Canada, Data and Statistics Office. / Banque du Canada, le bureau des données et statisiques.
* From November 1, 1956 to June 24, 1962 the Bank Rate was 1/4 of 1% above the weekly average tender rate of 91-day treasury bills. / Du 1er novembre 1956 au 24 juin 1962, le taux d'escompte a été fixé à 1/4 % au-dessus du taux de rendement moyen des bons du Trésor à 91 jours à la dernière adjudication hebdomadaire.
From March 13, 1980 to February 21, 1996 the Bank Rate was 1/4 of 1% above the weekly average tender of 91-day treasury bills. / Du 13 mars 1980 au 21 février 1996, le taux d'escompte a été fixé à 1/4 % au-dessus du taux de rendement moyen des bons du Trésor à 91 jours.
Since February 22, 1996, it is set at the upper limit of the Bank of Canada's operating band for the overnight financing rate. / Depuis le 22 février 1996, il correspond à la limite supérieure de la fourchette opérationnelle fixée par la Banque du Canada pour le taux du financement à un jour.

ROMSPEN INVESTMENT CORPORATION
Applicant

-and-

206 BLOOR STREET WEST LIMITED
Respondent

Court File No. CV-16-11529-00CL

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