COURT FILE NO.	25-2831494
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE BANKRUPTCY OF RBEE AGGREGATE CONSULTING LTD.
APPLICANT	FTI CONSULTING CANADA INC., SOLELY IN ITS CAPACITY AS LICENSED INSOLVENCY TRUSTEE OF THE BANKRUPT ESTATE OF RBEE AGGREGATE CONSULTING LTD.
RESPONDENTS	A-1 QUALITY BELTING LTD. 1258311 ALBERTA LIMITED BERNIE REED JANET FISHER
DOCUMENT	**BRIEF OF THE RESPONDENTS**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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I. INTRODUCTION

1. The Trustee is pursuing claims on behalf of a secured creditor, Crown Capital Partner Funding, LP ("**Crown**"), some of which Crown has granted a release for. It was ultimately Crown – the largest creditor and 50% shareholder of Rbee Aggregate Consulting Ltd. ("**RBee**") – which controlled what amounts were paid to the Respondents, and when. Crown representatives directed the impugned payments, purchased the outstanding shares of RBee, granted and obtained releases from some of the Respondents, and then promptly moved RBee through receivership to bankruptcy to pursue the claims in this applcaition.

2. Crown seeks to reverse releases granted to Bernie Reed ("**Reed**") and A-1 Quality Belting Ltd. ("**A-1**"). Crown is using the Trustee as a foil in this litigation, to accomplish what it is barred from doing itself by reason of the releases granted to those Respondents.

3. The inspector in this bankruptcy – who authorized the Trustee's investigation and this application – is one of the individuals who approved the impugned payments, and was in control of whether those payments were made. He now apparently wishes to turn back the clock on his own actions.

4. Each impugned transaction should be examined closely. The Trustee wishes to paint all the Respondents and all the impugned transactions with the same brush: covering them with a sheen of back-room self-dealing. That is not what happened. The impugned transactions are diverse, and have varied explanations. However, all the transactions are defensible on the major grounds that the Respondents were dealing with RBee at arm's length, and that the payments were not made with the intention or view to giving a preference. Rather, the impugned transactions were made in the ordinary course of business, and with the view to maintaining RBee's business operations.

5. In addition, A-1 is the beneficial owner of certain funds which were held in trust by RBee, and being held in trust, those funds did not become part of RBee's estate. Those amounts are not within reach of the Trustee.

II. FACTS

6. The Respondents in this Application are Reed, his common law wife Janet Fisher ("**Fisher**"), A-1, and 1258311 Alberta Limited ("**125**"). Reed is the sole director and shareholder of A-1, and 50% shareholder and one director of 125. Fisher owns the other 50% stake in 125.[1]

7. Reed is 74 years old and has a grade 10 education. He has worked in the gravel and aggregate business for 42 years.[2]

A. Corporate context and financial control

8. The assets of RBee were purchased out of the receivership of Petrowest Corporation and other related entities (collectively "**Petrowest**").[3] Petrowest operated a division called RBee Crushing, and Reed was a partner in the enterprise. Crown (then called Crown Capital Fund IV, LP) was a major secured creditor of Petrowest, and was owed almost $28 million.[4]

9. Petrowest was placed into receivership in August 2017. Crown was interested in buying RBee Crushing, and approached Reed.[5]

10. In September 2017, Crown and Reed formed RBee. They signed a Unanimous Shareholders Agreement on September 13, 2017 (the "**USA**").[6] Along with the assets of RBee Crushing, RBee acquired real property and equipment leases, and assumed $17.255 million of Petrowest's debt.[7]

11. Reed, Chris Johnson, CEO of Crown ("**Johnson**"), and Tim Oldfield, CFO of Crown ("**Oldfield**"), were appointed directors of RBee. Crown and 2069328 Alberta Ltd. ("**206**")

[1] Affidavit of Bernie Reed, sworn April 4, 2025 [**Reed Affidavit**] at paras 2, 8; Questioning of Janet Fisher, March 18, 2024 [**Fisher Questioning**] at 15/21.
[2] Reed Affidavit at para 4.
[3] First Report of the Trustee, filed March 24, 2025 at Appendix "K" [PDF pg 469] [**First Report**].
[4] Affidavit of Tim Oldfield, filed May 2, 2022 [**Oldfield Bankruptcy Affidavit**], Exhibit "A" (which itself is an affidavit) at Exhibit "B" [PDF pg 24].
[5] Reed Affidavit at paras 4-5.
[6] Reed Affidavit at para 5, see Exhibit "A".
[7] Oldfield Bankruptcy Affidavit, Exhibit "A" (which itself is an affidavit) at para 6 [PDF pg 11].

were each 50% owners of RBee. Through his ownership of 206, Reed beneficially owned 50% of the shares in RBee.[8]

12. The duties between Reed, Oldfield, and Johnson were clearly delineated. Reed describes his role as operational: "[g]etting work for the company and overseeing the work getting done."[9] Reed managed the field operations and submitted bids for RBee's work. He negotiated crushing and washing contracts, and coordinated purchasing and maintaining the equipment RBee required for its gravel and aggregate operations.[10]

13. In contrast, Oldfield and Johnson were ultimately responsible for the financial management of RBee. RBee's controller, Ian Hogg ("**Hogg**"), dealt with Oldfield and Johnson in relation to RBee's accounting.[11] Reed did not authorize expenditures for RBee and was not involved in reviewing expenditures on a day-to-day or even month-to-month basis. That work was left to Johnson, Oldfield, and Hogg.[12]

14. Reed did not consider it within his expertise or duties to review financial statements or supervise Hogg's work. When asked who oversaw Hogg's work, Reed responded "I don't – I guess it would be – I'm trying to think how I would answer that because that was above my pay level to understand that. That's why I hired people 'cause I don't understand that…"[13]

15. Reed entrusted Johnson and Oldfield with financial oversight of RBee.[14] Although there could have been occasions where Reed saw financial statements for RBee, he did not take part in reviewing financial statements, audit reports and recommendations, or tax filings for RBee. The most formal financial reporting Reed received was a once-per-year in-person visit from Johnson and Oldfield, at which time they would provide Reed an oral update on the finances of RBee. Reed has no recollection of minutes being taken nor passing director's resolutions at those meetings.[15] Reed also had occasional oral

[8] Reed Affidavit at para 8.
[9] Reed Affidavit at para 8,14; Reed Questioning at 20/6-7.
[10] Reed Affidavit at para 9.
[11] Reed Affidavit at para 10; Reed Questioning at 19/18-20.
[12] Reed Questioning at 20/20 – 22/6; Reed Affidavit at paras 11-12.
[13] Reed Affidavit at para 14; Reed Questioning at 22/24-27.
[14] Reed Affidavit at para 14.
[15] Reed Affidavit at para 12; Reed Questioning at 21/16 – 22/10.

conversations with Hogg which would happen at the end of some months, although not every single month.[16]

16. In its brief, the Trustee asserts that "[d]uring Questioning, Reed refused to confirm whether he was aware of RBee's lack of profitability in 2020."[17] This attack on Reed's credibility is misleading. It is true that Reed did not directly answer the question the first time it was asked. However, the following then occurred:

> Q Mr. Reed, this is your examination, not mine.
>
> A Okay.
>
> Q Was RBee profitable in 2020?
>
> A I can't answer that other than what you're showing me there.
>
> R. RIMER: And that screen we're looking at [showing the RBee balance Sheet] doesn't say anything.
>
> Q So I'll repeat the question.
>
> A That would be a Jeff Johnson question because I do not know. I don't understand this stuff.[18]

Reed's answer to the question was clearly "I don't know." Getting off on a tangent during questioning does not make Reed evasive, nor mean that he was refusing to answer the question.

B. Division and bankruptcy

17. On February 23, 2022 Crown, Reed, A-1, 206, and David Howells ("**Howells**") entered into a series of agreements for the division of RBee (collectively, the "**Agreement for Division**"). The terms of the Agreement for Division included that:

a. Crown would become the sole shareholder of RBee;

b. A-1 would purchase certain equipment from RBee for $3,622,900 plus GST;

[16] Reed Affidavit at para 14.
[17] Brief of the Trustee, filed April 23, 2025 at para 23.
[18] Reed Questioning at 51.

c. the purchase price paid by A-1 would be used to reduce RBee's indebtedness to Canadian Western Bank ("**CWB**");

d. Reed and Howells would resign their positions with RBee;

e. RBee released and forever discharged Reed from all claims against him which RBee ever had or could have up to the date of Reed's resignation, arising from or in connection with Reed's relationship with RBee excepting out only fraud, willful misconduct, or criminal conduct committed by Reed;

f. Crown released and forever discharged Reed and A-1, among others, from all actions, claims, proceedings, demands, debts, expenses, interest, costs, and claims of any kind, which Crown ever had; and agreed to indemnify and hold harmless them from any expenses or legal fees incurred in responding to the commencement or continuation of such a claim; this indemnity was provided not only on behalf of Crown, but also on behalf of its agents and assigns;[19] and

g. Reed and 206 collectively, and Crown, would indemnify each other to equalize their recovery pursuant to their separate unsecured promissory notes from RBee.[20]

18. Reed entered the Agreement for Division with the understanding that it would represent a full and final settlement of the matters between himself, A-1, Crown, and RBee. The mutual releases provided for in the Business Division Agreement were a crucial aspect of the benefit he derived from that agreement, as this was meant to be a clean break.[21]

19. Approximately 20 days after the Agreement for Division was formalized, on March 11, 2022, Crown obtained an Order placing RBee into receivership. FTI Consulting Canada Inc. ("**FTI**") was appointed as the Receiver. On May 18, 2022, Crown obtained a Bankruptcy Order, and FTI became the Trustee.

20. Oldfield is the sole estate inspector of the Bankrupt Estate, and directed the Trustee to investigate the impugned transactions in this Application.[22]

[19] Reed Affidavit, Exhibit "M" [PDF pg 323].
[20] Reed Affidavit at para 47, Exhibit "M". [PDF pg 354].
[21] Reed Affidavit at para 48.
[22] First Report at para 4.

21. Although Reed understood that RBee was likely to be placed into receivership, he did not know – and Crown did not tell him – that it would eventually assign RBee into bankruptcy.[23]

C. Impugned transactions

i. Wembley and Gibbons Leases

22. During his time working with Petrowest, Reed and Fisher leased property to Petrowest which was approximately 16 acres of land, a shop, and offices (the "**Wembley Property**"). This lease to Petrowest started in or about August 2006. Base rent under that lease was $7,000 per month plus GST.[24]

23. Reed and Fisher continued to lease the Wembley Property to RBee at the same rate as they had given to Petrowest (the "**Wembley Lease**"). There was no signed lease agreement, but RBee continued to provide lease payments of $7,000 plus GST.[25]

24. On November 1, 2017, RBee and 125 entered into a lease (the "**Gibbons Lease**") for a shop and office space in Sturgeon County (the "**Gibbons Property**"). The Gibbons Lease was on the same terms as had been in place when Petrowest was leasing the Gibbons Property.[26] Base rent under that least was $80,000 per month plus GST.[27]

25. 125 had no active business except as a holding company. Collecting lease payments was the sole operation to be carried out, and that was done between 125's bookkeeper and accountant. Fisher would review the finances at the end of the year, but otherwise had no involvement in the business. Reed and Fisher were not monitoring which lease payments were made: "it just was paid when it was paid, and nobody chased it if it wasn't paid."[28]

26. For both the Wembley Lease and the Gibbons Lease, RBee would sometimes fail to make the lease payments on time (a fact that the Trustee appears to acknowledge[29]).

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[23] Reed Affidavit at paras 50-51.
[24] Reed Affidavit at paras 22-23, see Exhibit "F".
[25] Reed Affidavit at para 24.
[26] Reed Questioning at 123/24-25.
[27] Reed Affidavit at pars 28-31, Exhibit "G"; Reed Questioning at 120/9-17.
[28] Reed Questioning at 120/19 to 121/3 and 124/1-5; Fisher Questioning at 16/21 to 17/26; 24/12-20; and 28/12 to 29/7.
[29] Brief of the Trustee at paras 69(b), (c).

This created a situation where RBee would have to make additional catch-up payments.[30] None of the impugned catch-up payments made by RBee appear to have included interest.[31]

ii. Equipment Lease

27. RBee leased various equipment from A-1 (the "**Equipment Lease**"). This was a continuation of a prior equipment leasing agreement between Petrowest and A-1.[32] Additional equipment was sometimes leased by RBee on an as-needed basis. A-1 would issue invoices for this additional equipment. The lease rates for this equipment was at or below market value: $325,000 per month,[33] but the invoices were often issued individually.[34]

iii. Consulting services

28. Through A-1, Reed, provided consulting services to RBee, which were paid at $25,000 per month. This fee was paid by RBee in lieu of a salary. In addition to the fee of $25,000, the Consulting Agreement obligated RBee to cover Reed's reasonable out-of-pocket expenses.[35] This fee was agreed to between Reed and Oldfield.[36] The $25,000 fee, less benefits, and plus GST, came to $26,400 per month.[37] Reed was not involved in approving these payments.[38]

iv. Shareholder loans and other amounts owing

29. RBee owed $5,000,000 to 206 under a promissory note.[39] In addition to the promissory note, Reed, A-1, 125, and Fisher collectively wrote off $4,503,041.87 which was owing from RBee as of the date of bankruptcy.[40] This is confirmed by the Second Report of the Trustee.[41]

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[30] Reed Questioning at 121/5 to 122/1; Reed Affidavit at paras 25, 29.
[31] Reed Questioning, Exhibit "D" for Identification, found in First Report, Appendix "C" [PDG pg 247].
[32] Reed Affidavit at para 32, Exhibit "I".
[33] Reed Affidavit at para 35, Exhibit "I".
[34] See e.g. Reed Affidavit, Exhibit "K".
[35] Reed Affidavit at paras 37-38, Exhibits "J", "K".
[36] See Reed Affidavit, Exhibit "J" [PDF pg 189] where Oldfield signed the consulting contract.
[37] See invoices at Reed Affidavit, Exhibit "K" [PDF pgs 194, 212]
[38] See Reed Questioning at 86/8-21.
[39] Second Report of the Trustee, filed April 17, 2025 at para 20 [**Second Report**].
[40] Reed Affidavit at para 42.
[41] Second Report at para 13, although the amounts are not exactly the same.

30. Of the impugned transactions, $213,535.02 recorded as owing from RBee to A-1 stemmed from RBee having sold A-1's property:

a. $45,100 from the sale of two Dodge trucks which belonged to A-1;[42]

b. $64,941.63 from the sale of a rock truck which belonged to A-1;[43] and

c. $103,493.39, from the sale of a 2008 Volvo dump truck which belong to A-1.[44]

v. Readvancing Operational Loan from Reed

31. Reed extended a form of a readvancing line of credit to RBee. Employees of RBee were authorized to use visa cards in A-1's name. The employee's name would be on the card, and A-1 would also be jointly named. At the end of each month, Reed would personally pay the balances on the cards (thereby advancing credit to RBee indirectly). RBee would then replay Reed.[45]

32. Reed has produced the credit card statements for these advances from May 2021 to February 2022.[46]

III. ISSUES

33. The issues for decision by the Court are:

a. Whether the Respondents were operating at arm's length from RBee with respect to the impugned transactions. This determination will dictate the majority of the remaining issues.

b. If the Respondents were operating at arm's length in these transactions, the issues are whether:

i. the transfer or payment was made within three months prior to the bankruptcy;

ii. the transferor was insolvent;

[42] Reed Affidavit, Exhibit "C", "D" [PDF pgs 34-35].
[43] Reed Affidavit, Exhibit "B" [PDF pg 32].
[44] Reed Affidavit, Exhibit "C" [PDF pg 34].
[45] Reed Affidavit at paras 39-41.
[46] See Reed Affidavit, Exhibit "L".

iii. the transfer or payment was to a creditor; and whether

iv. the transfer was made with a view to giving the creditor a preference over other creditors.

If the Respondents were operating at non-arm's length in these transactions, the issues are whether:

i. the transfer or payment was made within one year prior to the bankruptcy;

ii. the transferor was insolvent;

iii. the transfer or payment was to a creditor; and whether

iv. the transfer had the effect of preferring the creditor over other creditors.

c. Further and alternatively, whether any transactions are void pursuant to the *The Fraudulent Conveyances Act 1571*,[47] or the *Fraudulent Preferences Act*;[48]

i. and if so, whether the releases and indemnities shield against that finding.

d. In any event, whether A-1 has a trust claim over some impugned payments such that they should not be declared void.

34. The Trustee has the overarching burden of proof on issues (a) and (b).

IV. LAW AND ARGUMENT

A. General

35. For arm's length transactions, the Trustee must show:

a. a transfer or payment was made within three months prior to the bankruptcy;

b. the transferor was insolvent;

c. the transfer was to a creditor; and

[47] 13 Eliz I, c 5 [***Statute of Elizabeth***].
[48] RSA 2000, c F-24.

d. the transfer was made with a view to giving the creditor a preference over other creditors.[49]

36. If the Trustee can show that the payment or transfer had the effect of giving the creditor a preference, there is a presumption that the payment or transfer was made with a view to giving the creditor a preference,[50] which can be rebutted on a balance of probabilities.[51] The presumption will be rebutted if "the totality of the evidence to the contrary at the end of the case is sufficient to show on the balance of probabilities that the debtor did not have the dominant intent to prefer the creditor over others when he made the impeached payment."[52]

37. For non-arm's length transactions, the Trustee must show:

a. the creditor was dealing with the payee on a non-arm's length basis;

b. a transfer or payment was made within one year prior to the bankruptcy;

c. the transferor was insolvent;

d. the transfer or payment was to a creditor; and

e. the transfer had the effect of preferring the creditor over other creditors.[53]

B. These were arm's length transactions

38. The Respondents were operating at arm's length, and therefore the only reviewable transactions are those taking place on or after February 18, 2022, which are listed in **Schedule A**.

39. It is common ground that for the purposes of calculating the lookback period, the initial bankruptcy event is the Bankruptcy Order, granted May 18, 2022.[54] The lookback period for parties dealing with RBee at arm's length is three months: February 18, 2022 to May

[49] BIA, s 95(1)(a).
[50] BIA, s 95(2).
[51] ***Norris, Re***, 1994 CanLII 5263 at para 6, 28 CBR (3d) 167 (ABQB).
[52] ***Canada (Attorney General) v Norris Estate***, 1996 ABCA 357 at para 15.
[53] BIA, s 95(1)(b).
[54] Brief of the Trustee at para 97. See BIA, s 2, "initial bankruptcy event."

18, 2022.[55] For non-arm's length parties, the lookback period is one year: May 18, 2021 to May 18, 2022.[56]

40. Whether two or more parties are acting on a non-arm's length basis is a question of fact.[57] Reed, Fisher, A-1, and 125 form a related group.[58] The only issue is whether that group dealt with RBee on an arm's length basis. The Trustee has the burden of establishing non-arm's length dealing. It is common ground that the only way to establish a non-arm's length relationship in this case would be to show that Reed was non-arm's length from RBee.

41. The Trustee has conceded that Reed did not fall into any of the presumptive categories of related parties set out in section 4(2) of the BIA. More specifically, as a shareholder, Reed lacked the *de jure* control of RBee, and is therefor not deemed to be dealing with RBee on a non-arm's length basis.[59]

42. That leaves the Court with the fact-driven question of whether Reed was exercising a level of control over RBee which would make him a non-arm's length party.

43. The Court must look at all the circumstances, and specifically, for indications that the parties either were or were not acting in concert: whether they had a common directed mind, a unity of interest, or whether one party is exercising *de facto* control over another party.[60] Rothstein J articulated the mischief in non-arm's length transactions is that "there is no assurance that the transaction 'will reflect ordinary commercial dealing between parties acting in their separate interests.'"[61]

44. There is no presumption that a director is non-arm's length.[62] Further, the amount of involvement a director has in the company is not determinative:

> All directors are required to devote their best efforts to the company's affairs, and every director can by the very nature of his or her

[55] BIA, s 95(1)(a).
[56] BIA, s 95(1)(b).
[57] BIA, s 4(4).
[58] See BIA, s 4(2), 4(5).
[59] See Brief of the Trustee at para 74.
[60] ***Scott v Golden Oaks Enterprises Inc***, 2024 SCC 32 at para 127.
[61] ***Canada v McLarty***, 2008 SCC 26 at para 43.
[62] ***Piikani Energy Corporation (Re)***, 2013 ABCA 293 at paras 32-33 [***Piikani***], citing ***Gestion Yvan Drouin Inc v The Queen***, 2000 CanLII 407, 55 DTC 72 (TCC) and ***Del Grande (E) v Canada***, 1982 CanLII 5563, 93 DTC 133 (TCC).

> office 'influence' those affairs.... This does not mean, without more, that each was able to control the company or that the company was dependent on him.[63]

45. The uncontroverted evidence is that Reed exercised extremely minimal financial oversight. His financial involvement did include bidding on contracts and buying equipment. None of these activities are in issue in this application. Reed's clear evidence is that he was not involved in deciding which debts would be paid.

46. Reed lacked the aptitude and educational background to manage RBee's finances. His unqualified evidence is that he left those aspects of the business to others. More specifically, he left those aspects to Oldfield and Johnson, and those working under them.

47. Not only was Reed not involved in directing RBee's payments, but he was uncertain about many aspects of the company's operations, including whether Hogg was an accountant,[64] whether the other directors had day-to-day involvement in the company,[65] how much contact Hogg and Oldfield had in discussing the finances,[66] whether Howells was a director,[67] and why administrative expenses increased more than $2 million in one year.[68]

48. If Reed had been involved in directing payments made by RBeee, that would likely fulfill the "common directing mind" inquiry, but this is simply not the case. The situation in this case is similar to ***Piikani***, and the pronouncements in that case deserve special attention. The appellants were respectively a consultant and an employee of Piikani. Just days before the first court application – and about two weeks before it was due, Piikani paid one appellant her annual consulting fee. It paid other appellant significant severance due under his employment contract.[69] The appellants were "key employees" and directors of Piikani. The unanimous Court wrote that it was "difficult to understand" how the Court below had concluded that the Appellants were non-arm's length:

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[63] ***Piikani*** at paras 34-36, quoting ***Galaxy Sports, Re***, 2004 BCCA 284 at para 56.
[64] Reed Questioning at 23/23.
[65] Reed Questioning at 20/9-15 and 30/15-19.
[66] Reed Questioning at 21/10-15.
[67] Reed Questioning at 18/7.
[68] Reed Questioning at 48/19-25.
[69] ***Piikani*** at paras 7-9.

> in the absence of evidence about Ho Lem's and McMullen's specific roles in making the impugned payments, particularly where Ho Lem and McMullen were only two of five directors and where another director signed McMullen's termination letter.[70]

The Court went on to note that there was no evidence of the appellant's involvement in the decision to pay her own annual fee early. Regarding the other appellant, the employment contract had been negotiated "well before the date on which his severance was contemplated and the severance payment was made."[71]

49. The Trustee implies that because Reed was in control of *some* financial transactions for RBee, he was in *de facto* control of RBee. That ignores that different people can have different roles in the company. It is irrelevant whether Reed directed the bargaining for the company's incoming contracts or directed the repairs to be done to equipment. The question is whether Reed was involved in paying RBee's creditors. In ***Piikani***, the Court distinguished a possible scenario where the appellants were involved in paying themselves, and where other directors caused those payments. That distinction is present here.

50. The Trustee alleges that Reed was the sole party negotiating the Gibbons Lease and Wembley Lease. It is notable first that these contracts pre-dated RBee's existence, and second that Crown obtained this division of Petrowest as a going concern. Further, during time of financial hardship, Reed was not receiving lease payments on time, and indeed had to extend further credit to RBee to keep operations running smoothly. If Reed was intent on extracting preferential payments from RBee, this was not the way to do it.

51. The Trustee has failed to point to evidence that rebuts or counter's Reed's description of his involvement in or knowledge of RBee's finances. He did not decide when he was paid, and indeed was obviously sometimes not paid. He was not in control of the payments flowing to himself, Fisher, A-1, and 125.

52. As these payments were made on an arm's length basis, the Trustee must establish the following four elements:

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[70] ***Piikani*** at para 39.
[71] ***Piikani*** at paras 40-41.

a. a transfer or payment was made within three months prior to the bankruptcy;

b. the transferee was insolvent;

c. the transfer was to a creditor; and

d. the transfer was made with a view to giving the creditor a preference over other creditors.[72]

C. There was no intent to prefer; Transactions were made in the ordinary course of business

53. This presumption of intent to prefer in section 95(2) of the BIA can be rebutted by establishing that the dominant intent of the debtor was not to prefer the creditor. The Court should look at all the circumstances, including determining whether "viewed objectively, solvent persons would, in the normal course of business, have acted the same way as the parties involved in the transaction" and whether "the payment was normal in the context of the business relations between the parties and was standard for their particular type of business."[73]

54. Even a payment *not* made in the ordinary course of business will not be a preference if the payment was made to obtain services which the bankrupt needed. As the Alberta Court of Appeal said in ***Orion Industries***:

> [P]ayments made to purchase goods or services required for the on-going conduct of the bankrupt's business have been found to be payments made in the ordinary course of business. Payments made to honor contractual obligations allowing the insolvent to carry on business have been found to be payments made in the ordinary course of business. And even a preferential payment made by an insolvent company at a time when its financial collapse is inevitable may be found to be legitimate if the payment was made with a view to generating income or liquidating assets to satisfy the insolvent's creditors.[74]

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[72] BIA, s 95(1)(a).
[73] ***Zeifman Partners Inc v Baldassare***, 2020 ONSC 3023 at paras 29-33, relying on ***Robitaille v American Biltrite (Canada)***, [1985] 1 SCR 290. See ***Orion Industries Ltd v Neil's General Contracting Ltd***, 2013 ABCA 330 at para 11 [***Orion Industries***].
[74] ***Orion Industries*** at para 12. See also ***Principal Group Ltd v Anderson***, 1994 CanLII 9253 at paras 53-54, 29 CBR (3d) 216 (ABQB) [***Principal Group***].

In ***Orion Industries***, the bankrupt's CFO believed a particular creditor could and would deny the company access to a piece of equipment that was to be sold. In order to ensure access to the equipment, the company paid that creditor.[75] The Court held that it was irrelevant whether there was a pending sale: it was enough that the payment increased the likelihood of a sale taking place, and was therefore not an objectively unreasonable step.[76]

55. The Wembley Lease, Gibbons Lease, and Equipment Lease payments were all made in the ordinary course of business. Not only had RBee been paying pursuant to those leases since 2017, but before that, Petrowest had been doing the same. These were not leases entered into in a context where Reed was negotiating with himself: Oldfield, Johnson, and Reed determined the amount to be paid.[77] That decision was evidently to adopt what Petrowest had paid prior to 2017. At least with respect to the Wembley Lease, the rent had not increase – not even for inflation – since 2006.[78]

56. It is trite law that landlords enjoy a preferred position over general creditor both inside[79] and outside bankruptcy proceedings.

57. As the Receiver, FTI continued to pay the Wembley Lease and Gibbons Lease rents, and only disclaimed them in August 2022.[80] There can be no clearer indication that RBee was making use of those properties as part of its business.

58. The consulting fees for Reed's personal services similarly made in the ordinary course of business. Reed's involvement was part of the business plan from the inception of RBee, and was approved by Oldfield. It is beyond question that Reed significantly contributed to the operations of RBee by performing the work he did.

59. Reed explains his advances to RBee through the Visa cards as follows:

> I'm familiar with all of [the Visa statements] because I pay them every month on a monthly basis 'cause we weren't – we weren't able to obtain credit at any of the places because there was nobody to personal guarantee [*sic*] the credit without being -- without having a public identity

[75] ***Orion Industries*** at para 14.
[76] ***Orion Industries*** at paras 23-25.
[77] Reed Questioning at 120/5-13.
[78] See 2006 Petrowest lease for the Wembley Property at Reed Affidavit, Exhibit "F" [PDF pg 68].
[79] BIA, s 136(1)(f).
[80] Second Report at para 11.

> in the ownership. … So that was the only way we could buy parts, rent equipment, rent anything, was if I did it on my -- 'cause I had to guarantee the credit cards personally.[81]

He went on to point out that the need for the credit cards was a "function of running the business without accounts set up at various vendors or hotels."[82]

60. Reed's description is borne out by the purchases made with the Visas. The transactions on the first statement, for Randy Hanson, are almost entirely made of automotive and other commercial suppliers.[83] The same month, the Jim Wall statement shows 22 entries linked to permit offices, registries, and municipal districts.[84] The same patterns repeat again and again: parts stores, stationary stores, provincial permits from BC and Saskatchewan, hotels, hardware stores, and others. These expenses were obviously vital to the continued business operations of RBee, and therefore generating income.

61. In the context of a readvancing line of credit, RBee certainly would have repaid Reed under normal circumstances. Reed was paying fairly significant credit card liabilities each month. As with any other line of credit, it only made sense for RBee to repay these amounts as they were due: what other choice would RBee have with respect to expenses incurred by its employees for its benefit? These transactions were the same as would have taken place for a company in a better financial position.

62. This credit was re-advancing. The Trustee is seeking to claw back payments made each month to Reed. However, that is inconsistent with what was actually happening, which was that Reed was re-advancing the same funds to RBee over and over. The maximum the Trustee should be permitted to claw back is the maximum amount advanced to RBee at any one time, as this was the amount that Reed and A-1 actually recuperated from RBee pursuant to the readvancing loans.

63. At this time, RBee was being cut off. CWB capped RBee's operating line, and Crown was unprepared to provide further financing.[85] Reed's extension of credit through the Visa cards was consistent with keeping RBee operating normally.

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[81] Reed Questioning at 88/27 to 89/9.
[82] Reed Questioning at 92/5-9.
[83] See May 27, 2021 statement for Randy Hanson, Reed Affidavit, Exhibit "L" [PDF pg 214].
[84] See Reed Affidavit, Exhibit "L" [PDF pg 215].
[85] See Application for the Appointment of a Receiver, filed March 7, 2022 at para 2(j), (k).

D. Was RBee insolvent

64. The BIA defines an "insolvent person" as a person who (a) is "unable to meet his obligations as they generally be-come due"; (b) has "ceased paying his current obligations in the ordinary course of business as they generally become due"; or (c) whose property is not sufficient, or would not be sufficient, to pay all their obligations, due and accruing due.[86]

65. The Trustee has the burden to show that RBee was insolvent at the time of making the impugned payments. The Trustee argues that RBee's insolvency is evidence from the fact that it was failing to make payments on the Webley Lease and Gibbons Lease. However, Reed's evidence is clear that Reed, A-1, 125, and Fisher were willing to wait for payment. Where creditors agree to wait for payment or understand that they will not be paid until some later date the debtor will not be insolvent.[87] The bankrupt company in ***Toyerama*** had a seasonal business cycle, and the creditors – or at least some of them – were understanding and willing to wait for payment. Even though the Court assumed that not all creditors had agreed to wait for payment, it held that the Trustee had not sufficiently shown the company was insolvent at the time.

66. The Trustee also relies on a technical reading of RBee's financial covenants to CWB, and takes the position that the CWB term loans had been triggered as due and owing, and therefore defines them as current liabilities. However, it is not clear that CWB had in fact taken steps to demand or collect on those loans, beyond capping the operating line.

67. The Court should recall the reason for RBee's ultimate bankruptcy: CWB and Crown stopped the flow of money. Reed and A-1 stepped in to allow RBee to continue to operate. The Trustee is not chasing the impugned payments for the benefit of general creditors, it is doing so Crown may be made more whole.

68. In the Trustee's analysis of RBee's debts leading up to the bankruptcy, Reed, A-1, 125, and Fisher were often collectively creditors with respect to 50% or more of RBee's

[86] BIA, s 2.
[87] ***Toyerama Ltd (Trustee of) v Fleishman***, [1983] OJ No 963 at para 21, 47 CBR (NS) 233 [***Toyerama***, **TAB 1**].

unsecured debts.[88] The Respondents were not pursuing payment: "it just was paid when it was paid, and nobody chased it if it wasn't paid."[89]

69. In terms of the debt to the CRA, on May 18, 2022, RBee showed $2.2 million owing to CRA. The Trustee points out that this number was out of date, since the CRA had demanded $2.4 million in March, 2022.[90] However, an increase of $200,000 is relatively mild, and is not evidence that RBee's liabilities were climbing throughout the lookback period. It was not until *after* the Bankruptcy Order, in August, 2022, the CRA submitted a proof of claim in the amount of $3 million,[91] and this should not be taken to mean that there was an increase in the amount owing *within* the lookback period.

E. Transactions are not voidable preferences

70. Payments made in order to keep the company in business are not preferences that may be attacked as 'fraudulent' because they are made to obtain service or product. In ***Coopers & Lybrand Ltd v Deloitte Haskins & Sells***, the bankrupt company needed its tax return prepared, and its new accountants refused to do it. In order to have it done on time, the bankrupt company paid its prior accountant. This payment had the effect of giving a preference, but the purpose of the payment was to obtain a service it needed:

> I agree that the payment in this case was not made in the ordinary course of business. It was made some two-and-one-half months after the account had been rendered and then only in order to have the 1981 income tax returns prepared. But, I think, nothing turns on this because, in my opinion, payment out of the ordinary course of business is only a factor to be taken into consideration in determining if there has been a fraudulent preference.[92]

71. Reed's evidence is clear that without the constant repayment of the credit card amounts, he would have been unwilling to continue to extend credit to RBee.[93] This is analogous to the cases in which a company makes payments to be able to continue its business. The RBee was repaying Reed and Reed was advancing credit for the express purpose of allowing RBee to continue operations. By this time, CWB had capped RBee's

[88] First Report at para 37.
[89] Reed Questioning at 120/19 to 121/3 and 124/1-5; Fisher Questioning at 16/21 to 17/26; 24/12-20; and 28/12 to 29/7.
[90] First Report at para 35(a).
[91] First Report at para 35(b).
[92] 1984 CanLII 3806, 31 Man R (2d) 131 at paras 5-8 (MBQB), aff'd 1985 CanLII 3774, 31 Man R (2d) 313, (MBCA).
[93] Reed Affidavit at para 40(d).

operating line and Crown was refusing to advance further funds.[94] With respect to the secured creditors, principal liability was frozen. Reed and A-1 took responsibility for ensuring that RBee had short-term credit so it could continue to operate.

72. In ***Kovalcik (Re)***, the Court refused to declare a payment void, even though it was within the lookback period, made to a creditor, and was effectively a preference in fact:

> In cross-examination the debtor confirmed that it was his hope that when he made the payment he would be able to struggle on and keep his business in operation. The defendant knew of the serious financial position of the debtor and it was not prepared to ship its material without receiving a substantial payment on account. It was to comply with this request that the debtor made the $3,600 payment to the defendant. I cannot find on the evidence that the necessary intent has been established to constitute the payment to the defendant a fraudulent preference.[95]

73. This thread has been present in the jurisprudence for decades. Security granted for a present advance has been continually held not to have been a preference:

a. In ***Re Aboud***, the Court refused to void security given by a husband to his wife: "she loaned but she did not intend to take any risk; she loaned only upon security and it was upon a security that she knew . . . was effective."[96]

b. In ***Goldstein (Re)***, the debtor had received $1200 and granted a second mortgage to the lender. The debtor was insolvent at the time, and immediately paid $1000 to the bank, which was pressing him for payment. On appeal, Fish J held that the mortgage was not a preference, noting that adequate consideration was provided and it was of no benefit for the lender to ensure that the bank was paid. "One might reasonably conclude that, as the appellant knew that $1,000

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[94] See Application for the Appointment of a Receiver, filed March 7, 2022 at para 2(j), (k).
[95] [1973] OJ No 1312 at paras 6-7, 45 CBR (NS) 290 [**TAB 2**]. See ***Davis v Ducan Industries Ltd,*** [1983] AJ No 1072 at para 15, 45 CBR (NS) 290 [**TAB 3**]: "The payments in question made to the defendant allowed the debtor to remain in business with the hope that after the bank was paid off it would be able to continue its business operations … [B]y completing and selling the vehicles the debtor was able to earn a substantial amount for creditors over and above the alternative of auctioning the vehicles in an unfinished condition." See also ***Reliable Gutter Shop On Wheels Ltd. (cob Reliable Exteriors) (Re)***, 1985 CanLII 276 at para 15, 58 CBR (NS) 156: "[T]o the extent that payments can be earmarked to invoices for current merchandise supplied during the period in question, those payments are not caught by s. 73 of the *Bankruptcy Act*, but those payments that apply to past indebtedness are."
[96] 1940 CanLII 568, [1941] 1 DLR 801 at 802 (ONSC), most recently followed in ***Levy-Russell Ltd v Shieldings Inc***, 2004 CanLII 66297 at para 99, 48 BLR (3d) 28 (ONSC). These early cases were decided before advancements in the common law clarified who's intention was relevant, and whether creditors were required to make reasonable inquiries.

was to be paid to the bank, this payment would enable the debtor to continue to carry on his business."[97]

74. After an extensive review of similar cases, Cairns J wrote "the 'golden thread' that runs through all of those cases is that… the payment is tied to the continuation of the business or a reasonably held hope or expectation of continuance."[98]

75. Specifically with respect to Reed's extension of credit to RBee through the Visa cards, the extension and repayment of that credit was tied to the continuation of RBee's business.

76. These payments to Reed were also transfers *concurrent* with receiving value. They are unlike situations in which security is given for a prior advance. Rather, the payments by RBee allowed RBee to re-access the credit being advanced by Reed. To echo ***Goldstein (Re)***, Reed had no interest in ensuring that credit card companies were paid. The only benefit Reed could obtain was the indirect benefit of allowing RBee to continue to operate. If Reed had not extended this credit, it would be the credit card companies listed as unpaid unsecured creditors in RBee's bankruptcy. This application seeks to make Reed the unpaid, unsecured creditor for these amounts.

77. Regarding the shareholder loan repayments made to A-1 and Reed, the release discussed above was given in the context of a complex transaction in which Crown itself would acquire all the shares of RBee. Crown had eyes wide open when they cause both themselves and RBee to release Reed and A-1 from any further liability, excepting out fraud. Crown was in the best position to do its own due diligence on this transaction. At this juncture, they remain the only party that stands to benefit from undoing those shareholder loan repayments. Reed bought and paid for the releases, and this litigation is the only way Crown can claw back the payments.

78. Regarding the rent payments within the three months prior to bankruptcy, they enjoy a preferred position and are not voidable as against the Trustee.[99]

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[97] [1923] OJ No 97 at paras 17-18, [1923] 1 DLR 864 [**TAB 4**], most recently cited with approval in ***Syndic de Mazzaferro***, 2019 QCCA 963 at para 34, Hamilton CJA [English summary available here], leave to appeal to SCC denied 16 January 2020 (38769).
[98] ***Principal Group*** at para 54.
[99] BIA, s 136(1)(f).

F. *Fraudulent Preferences Act* and *Statute of Elizabeth*

79. To obtain a remedy under the *Fraudulent Preferences Act*, the Trustee must establish:

    a. gift, conveyance, assignment, transfer or delivery to a creditor;

    b. intent to give a creditor a preference over other creditors; and

    c. at the time, the debtor was in insolvent circumstances.[100]

80. Section 6 of the *Fraudulent Preferences Act* says that the Act will not make void a *bona fide* payment made in the ordinary course of trade to innocent purchasers or parties, nor a *bona fide* payment that is made in consideration of a present actual *bona fide* advance.[101] This does did not require a "penny for penny match in value between what each party gives to the other," just a "reasonable fit" between them.[102]

81. Reed's extension of credit through the Visa cards falls precisely into this category: Reed was making present advances concurrently with RBee's reimbursement to him. These were *bona fide* transactions and made in the ordinary course of business.

82. Regarding the *Fraudulent Preferences Ac*t, for the reasons above, the Respondents submit that there was no intention to give a preference in this case.

83. To obtain a remedy under the *Statute of Elizabeth*, the Trustee must establish:

    a. a conveyance of real or personal property;

    b. for no or nominal consideration;

    c. with intent to defraud, delay, or hinder creditors;

    d. the party challenging the conveyance must be someone who was a creditor at the time of the conveyance or someone with a legal or equitable right to claim against the transferor; and

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[100] *Fraudulent Preferences Act*, s 2.
[101] *Fraudulent Preferences Act*, s 2.
[102] ***Shengli Oilfield Freet Petroleum Equipment Co v Ascension Virtual Group Ltd***, 2010 ABQB 597 at para 27, quoting ***Stihl Ltd v Motion Engine Services Ltd***, 1990 CanLII 5932 (ABQB).

e. the conveyance must have had the intended effect.[103]

84. Intent to defraud or delay is determined looking at all the circumstances, and specifically the "badges of fraud":

a. the consideration was grossly inadequate;

b. the transfer was accomplished quickly;

c. a close relationship exists between the parties to the conveyance;

d. the transfer was very general in nature in that it included virtually all of the assets of the transferor;

e. the transfer was made pending the creditor's efforts to obtain judgment;

f. the transfer documents contain false statements as to consideration;

g. the transaction was secret;

h. the transfer was made pending the writ;

i. the deed contained self serving provisions such as "the gift was made honestly, truthfully and bona fide"; and

j. the transferor continued in possession and used the goods as his or her own.[104]

85. Regarding the badges of fraud:

a. There is no indication that the consideration provided by the Respondents was inadequate in any respect. The property and equipment leases were in place for many years before RBee was assigned into bankruptcy. The Visa statements showing precisely what RBee got for the money it spent. The Trustee has not produced evidence indicating that RBee was not benefitting from the use of the equipment which it was renting from A-1.

[103] ***Palechuk v Fahrlander***, 2006 ABCA 242 at para 31, leave to appeal to SCC denied 1 March 2007 (31672).
[104] ***Builders' Floor Centre Ltd v Thiessen***, 2013 ABQB 23 at para 43, citations omitted.

b. As addressed above, Reed did not control when RBee made payments, so although the relationship one of director and company, it lacked the close ties of control that should cause a concern.

c. The payments to Reed, A-1, 125, and Fisher were not at all general in nature. In many cases, the precise amounts transferred can be linked to specific purchases or entries in the financial statements which explain the amount.

d. There is an absence of false documentation or self-serving documentation surrounding the payments.

e. The transactions were not secret, nor was it possible for them to be secret, given that Oldfield and Johnson were ultimately in control of the finances. The Trustee has presented no evidence that financial statements prepared by RBee were false and there is no evidence that there was an attempt to keep these impugned transfers a secret. The only reason the Trustee has been able to identify them is because there is a paper trail showing where the funds were sent.

86. The analysis under the *Statute of Elizabeth* is largely similar to the analysis to be undertaken above, and many of the same facts are relevant here. The distinction is that the Trustee need not prove insolvency under the *Statute of Elizabeth*. Regardless, the Trustee's argument must fail on this point. As discussed above, there is no failure of consideration in this case. The payments from RBee to the Respondents were made as part of *bona fide* commercial transactions.

G. Release and indemnity

87. The Trustee argues that is has jurisdiction to apply under the *Fraudulent Preferences Act* and the *Statute of Elizabeth* because "the rights of any creditor to bring [an action challenging fraudulent preferences] are ousted in favour of the trustee."[105]

88. As such, the Trustee is steeping to the shoes of the creditors for the purposes of these Acts. The Trustee can have no better claim than the creditor. The creditor here is Crown, and Crown released and forever discharged Reed and A-1 from all actions, claims, proceedings, demands, debts, expenses, interest, costs, and claims of any kind, which

[105] ***Schlumpf v Corey***, 1994 CanLII 8975 at para 12, 25 CBR (3d) 297 (ABQB).

Crown ever had; and agreed to indemnify and hold harmless the those parties from any expenses or legal fees incurred in responding to the commencement or continuation of such a claim.[106]

89. It is immaterial that the Trustee is the proper party to advance a claim under section 95 of the BIA. RBee has released Reed from all claims against him which RBee had up to the date of Reed's resignation, arising from or in connection with Reed's relationship with RBee. This release is subject only to exceptions for fraud, willful misconduct, or criminal conduct committed by Reed.[107] The Trustee arrives at this litigation with RBee's claims against Reed already released, and the Trustee's standing to make this application cannot resurrect those claims.

90. Any claims advanced by the Trustee on behalf of Crown or RBee are barred. Alternatively, Crown and has an immediate obligation to indemnify Reed and A-1 in return.

91. The more important point is this: Crown was ultimately in charge of who was paid by RBee: Oldfield and Johnson oversaw the financial aspects of the company.[108] Oldfield, in his capacity as inspector, now seeks to challenge those payments. This comes after Crown entered into a full and final settlement with Reed and A-1, and indemnified them for claims relating to those amounts. Allowing the Trustee's application permits Crown to use the bankruptcy process and remedies to avoid compliance with those obligations.

H. A-1's trust claim

92. The proceeds of the sale of A-1 vehicles were properly due from RBee, and A-1 must be permitted to retain those amounts. Having collected the proceeds from those vehicles, RBee was a constructive trustee with respect to those funds: RBee had been enriched, A-1 had suffered a corresponding deprivation, and there was no juristic reason for the transfer.[109]

93. Funds or property held by a bankrupt in trust for another are not part of bankrupt's estate. The BIA explicitly excludes property held in trust from distribution to creditors:

[106] Reed Affidavit, Exhibit "M" [PDF pg 323].
[107] Reed Affidavit at para 47, Exhibit "M" [PDF at pg 323].
[108] See Reed Affidavit at paras 9-12.
[109] ***Rawluk v Rawluk***, [1990] 1 SCR 70, [1990] SCJ No 4 at paras 26-27 (QL) [cited to QL].

"[t]he property of a bankrupt divisible among his creditors shall not comprise (a) property held by the bankrupt in trust for any other person."[110]

94. This section equally applies to property impressed with an express trust or a constructive trust:

> Property of the bankrupt divisible among creditors does not include property that the bankrupt holds in trust for any other person: [BIA, s 67(1)(a)]. It is well established that unjust enrichment, arising from certain types of debtor misconduct prior to bankruptcy, may impress funds with a constructive trust in favour of a third party and that the successful assertion of a constructive trust means that the property subject to it does not form part of the property of the bankrupt that vests in the trustee.[111]

95. The inclusion of the sale proceeds in the financial statements as debts owing to A-1 was a crude expression of this constructive trust.

96. Intermingling of the sale proceeds with RBee's other funds did not defeat the trust claim. Equitable tracing of trust funds is available whether or not the trust funds have been transferred or intermingled.[112]

97. The funds paid to A-1 within the lookback period never belonged to RBee, and are not subject to the claims of RBee's creditors. This Honourable Court should not reverse them. As a result of this trust, A-1 is entitled to retain $213,535.02 as a result of the sale of these vehicles.

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[110] BIA, s 67(1).
[111] ***Sirius Concrete Inc (Re)***, 2022 ONCA 524 at para 14.
[112] ***Citadel General Assurance Co v Lloyds Bank Canada***, [1997] 3 SCR 805 at para 57, quoting ***Agip (Africa) Ltd v Jackson***, [1990] 1 Ch 265, aff'd [1992] 4 All ER 451 (CA). Respecting a mixed fund, trustees are presumed to draw their own funds from the fund first: ***Easy Loan Corporation v Wiseman***, 2017 ABCA 58 at paras 28-31, 57-58.

V. CONCLUSION

98. After consideration of the entirety of the evidence, it is respectively submitted that the Trustee's Application should be dismissed in its entirety:

a. these parties were dealing with RBee at arm's length;

b. the impugned transactions were legitimate commercial transactions taking place in the ordinary course of business – especially regarding the property and equipment leases;

c. A-1 is entitled to retain rents for the three months prior to bankruptcy;

d. all impugned payments – including the repayments of shareholder loans – were released by Crown in circumstances where Crown knew or ought to have known what transactions had taken place between Reed and A-1; and

e. A-1 has a trust claim which is beyond the reach of the Trustee.

99. In all of the circumstances the case against the Respondents has not been met.

ALL OF WHICH IS RESPECTFULLY SUBMITTED
this 25th day of April 2025.

Darren Bieganek, KC,
Russell A. Rimer, & Gil Miciak
Counsel for the Respondents

TABLE OF AUTHORITIES

Schedule "A": Transactions within the three-month lookback

Payee	Date	Amount
Reed	February 22, 2022	$39,873.82
Reed	February 22, 2022	$2,586.00
Reed	February 22, 2022	$747.03
Reed	February 22, 2022	$3,536.65
Reed	February 22, 2022	$4,198.43
Reed	February 22, 2022	$427.34
Reed	February 22, 2022	($587.35)
Reed Total		**$50,781.92**

Payee	Date	Amount
A-1	February 18, 2022	$219,718.73
Less trust funds re vehicle proceeds		($213,535.02)
A-1 Total		**$6,183.71**

Payee	Date	Amount
125	February 22, 2022	$84,000.00
125	February 22, 2022	$84,000.00
125 Total		**$168,000.00**

TAB 1

Toyerama Ltd. (Trustee of) v. Fleishman

Ontario Judgments

Supreme Court of Ontario - High Court of Justice

In Bankruptcy

Saunders J.

Heard: April 26 and 27, 1983.

Judgment: September 15, 1983.

[1983] O.J. No. 963 | 47 C.B.R. (N.S.) 233 | 21 A.C.W.S. (2d) 438

IN THE MATTER OF the bankruptcy of Toyerama Limited, a company incorporated under the laws of the Province of Ontario and Province of Nova Scotia with its head office in the City of North York, in the Province of Ontario Between Thorne Riddell Inc. as trustee in bankruptcy of the estate of Toyerama Limited, a bankrupt, plaintiff, and Edith Fleishman, defendant

(19 pp.)

Counsel

Thomas R. Hawkins, for the plaintiff. F.M. Catzman, Q.C., for the defendant.

SAUNDERS J.

1 This is a trial of an issue ordered by Mr. Justice Hollingworth. The issues are whether a payment of $37,862.82 by the bankrupt, Toyerama Limited ("Toyerama"), to Edith Fleishman and the giving of a bearer debenture in the principal amount of $35,000 by Toyerama to her are fraudulent and void as against the trustee as preferences within the provisions of s. 73 of the Bankruptcy Act, R.S.C. 1970, c. B-3.

2 The business of Toyerama was the acquisition of toys from manufacturers. The acquisitions were usually of surplus stock which the manufacturers bad not disposed of in the previous season. The toys were acquired by Toyerama under many different arrangements in the spectrum from outright cash sales to pure consignments. The toys were sold either to retailers or to consumers through leased retail outlets of Toyerama.

3 The Christmas season plays a predominate part in the toy industry. December is the largest selling month and the period from October 1 to December 31 the largest selling quarter (61% of 1978 Toyerama sales). Toyerama would often accept delivery early in the year, and store the toys in its warehouse in anticipation of sale the following autumn. Manufacturers were anxious at the end of a season to deliver their surplus inventory to Toyerama, knowing that Toyerama would be unable to sell it until the next season. This, no doubt, was to make way for new products. A substantial number of manufacturers did

not expect to be paid by Toyerama until the next season was over in late December or the following January.

4 The 1978 season was not good for the toy industry and, accordingly, not good for Toyerama. In January, 1979, Toyerama had a large unsold inventory on hand and considerable indebtedness. Also, the manufacturers had larger than usual amounts of surplus stock available for disposal. Toyerama made an informal proposal to certain of its creditors in January, 1979, whereby the creditors were asked to postpone payment for one year until the end of the 1979 season. It would appear that creditors with an aggregate indebtedness of $190,000 accepted the proposal.

5 Unfortunately, the 1979 season was worse than 1978 and on January 25, 1980, Toyerama made an assignment in bankruptcy.

6 In these proceedings the trustee attacks two transactions between Toyerama and the defendant, Edith Fleishman. Edith Fleishman is the former wife of Marvin Fleishman, the president and principal shareholder of Toyerama. Their marriage took place in 1952, there were four children, the couple separated in the summer of 1977 and were divorced in 1982. Since the separation they have dealt with each other at arm's length, but, it would appear, with relatively little rancour. Their son Allan Fleishman is an officer and shareholder of Toyerama Limited and was employed by it. He appears to have been on good terms with both his mother and father.

7 Shortly after the separation in 1977, Edith Fleishman established a retail business under the name of "Toyaround" which was substantially the same business as Toyerama. Her business was not successful and closed down with considerable inventory on hand. Toyerama in November, 1973, agreed to buy the inventory from her for $37,862.82 which it was said was its retail value less 35%. Toyerama agreed to pay her for the inventory one year later and to pay monthly interest in the interim. Its obligation was evidenced by a promissory note which came due on November 9, 1979.

8 Mr. and Mrs. Fleishman had made a separation agreement in September, 1977, shortly after their separation, but that agreement was replaced by a second agreement dated November 20, 1978. While the second agreement does not say so, both Edith Fleishman and Marvin Fleishman testified that the purchase of the inventory by Toyerama was a condition precedent to Edith Fleishman entering it.

9 The second agreement obliged Marvin Fleishman to make certain lump sum payments to his wife. It was agreed that he would cause Toyerama to execute a second floating charge in favour of his wife whereby amounts owing by him to her and certain amounts owing to her by Toyerama and others would be secured. She, in turn, agreed to provide a mortgage on the former matrimonial home as collateral security for part of the bank indebtedness of Toyerama. By debenture dated January 12, 1979, Toyerama agreed to pay Edith Fleishman the sum of $274,596.81 with interest at 10% on January 31, 1980. The debenture contained a second floating charge on all its assets subject to a first charge in favour of the Royal Bank of Canada. In paragraph 14 of the debenture, Edith Fleishman (who did not execute the debenture in her personal capacity but only as secretary-treasurer of Toyerama) acknowledged that she was the beneficiary of the principal amount of the indebtedness to the extent of $42,191.54 and that the beneficiaries of the remainder were certain trusts bearing the name of members of the Fleishman family.

10 Shortly before November 9, 1979, Marvin Fleishman says he received an "amusing" card from his wife reminding him of the due date for payment of the inventory. Toyerama Limited made the payment by cheque dated on the due date and its bank account was debited with the amount paid on the following

November 13th. The payment to Edith Fleishman for the inventory is the first transaction attacked by the trustee in these proceedings.

11 By agreement dated September 20, 1979, Toyerama purchased all the shares and shareholder loans of Yogi Yogurt Limited for an aggregate purchase price of $28,640. Marvin Fleishman testified that he considered the purchase a good investment for Toyerama because Yogi Yogurt had the benefit of certain contracts as well as some assets which would be available for disposal. He felt that the purchase was a normal business transaction even though at that time Toyerama was not doing very well. While this transaction is not attacked by the trustee in these proceedings, it is noted that both Marvin Fleishman and his son Allan Fleishman were shareholders in Yogi Yogurt Limited and received from the purchase $6,970 in the aggregate. The records of Toyerama indicate that approximately $97,000 was advanced by Toyerama to Yogi Yogurt Limited between October 1 and December 31, 1979.

12 Edith Fleishman was asked to loan $35,000 to Toyerama to assist it in the Yogi Yogurt purchase. Marvin Fleishman said that while that was the expressed reason for the request, he was more concerned that she did not deal with the inventory payment in an improvident fashion. Allan Fleishman seems to have had the same opinion and to have also felt that better to obtain the funds from his mother than from the bank. In what can be assumed to be a simultaneous transaction with the inventory payment, Edith Fleishman, by cheque dated November 9, 1979, advance $35,000 to Toyerama. The cheque was credited to the Toyerama bank account on November 13, 1979, the same day as the inventory payment was debited. In return Toyerama gave Edith Fleishman a demand promissory note dated November 10, 1979, for $35,000 bearing interest at 17 1/2 % per annum. Subsequently, by demand debenture dated November 29, 1979, Toyerama agreed to pay Edith Fleishman $35,000 with interest at 15%. The debenture contained a fixed and floating charge on its assets. Allan Fleishman said he discussed providing this security with his mother when she was considering making the loan. Marvin Fleishman says that the debenture was given at the insistence of her lawyers and that he was prepared to accede to their request. It is to be recalled that Edith Fleishman had received a floating charge debenture the previous January for the indebtedness to the trusts and to her under the separation agreement. The giving of the $35,000 debenture is the second transaction attacked by the trustee.

13 Section 73 of the Bankruptcy Act provides as lows:

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

14 The two impugned transactions fall within those described in s. 73 and took place within three months

of the bankruptcy. At the time they were made, there were unpaid creditors of the bankrupt and it is not disputed that the transaction had the effect of giving Edith Fleishman a preference over those creditors. There are therefore two issues to be decided:

(1) Was Toyerama an insolvent person at the time the transactions were entered into. The onus of establishing that Toyerama was insolvent is on the trustee and if it is unable to satisfy that onus its claim must be dismissed.

(2) If Toyerama was an insolvent person, were the impugned transactions entered into with a view of giving Edith Fleishman a preference over the other creditors. Because of the provisions of s. 73(2) the onus here is on Edith Fleishman to show that the transactions were not entered into with such a view.

15 On both issues it is important to consider the circumstances and general activity of Toyerama. There had been a bad season in 1978 which necessitated the informal proposal to creditors made in January, 1979. The 1979 season was worse. The October sales were off by 16% from the previous year. It was to get much worse. December sales dropped by 42% and Marvin Fleishman described this a a disaster. The trustee is understandably concerned about the pattern of payments made by Toyerama in the months preceding its bankruptcy. There were relatively few payments to trade creditors, but Edith Fleishman received payment for her inventory in November, 1979, and her loan 000 and the January, 1979 debenture in her favour were paid off in January, 1980. The indebtedness to the bank which was guaranteed to a limited extent by both Marvin Fleishman and Allan Fleishman was reduced and available credit from that source not fully utilized. Such a pattern is consistent with an intention to reduce the potential personal loss to members of the Fleishman family at the expense of creditors in the event of a bankruptcy. On the other hand, there is an explanation for the pattern. Because of the nature of the business, a number of trade creditors had formally postPoned their claims and others were not expecting payment until January, 1979. Marvin Fleishman made a strenuous effort in December to persuade Edith Fleishman to postpone the payment of the 1979 debenture and to continue her agreement to guarantee a portion of the bank indebtedness. She refused to do so on the advice of her solicitors and believing her security to be in jeopardy issued a writ with respect to the $35,000 loan on January 21, 1979. Toyerama was legally obliged to make the payments due to her and other members of the family in January, 1980. The reduction of the bank loan out of cash flow reduced interest cost. It should also be noted that in December, 1979, Toyerama made a substantial investment in Yogi Yogurt and also entered into a new warehouse lease.

16 The situation of Toyerama at the beginning of 1979 was not good but had not yet reached a disastrous state. It is my conclusion on the basis of the evidence that when Edith Fleishman was paid for the inventory and given security for the $35,000 loan that Toyerama then intended to continue to carry on business for an indefinite period and was not contemplating either ceasing such business or making an assignment in bankruptcy.

17 Section 2 of the Bankruptcy Act defines "insolvent person"' as follows:

> In this Act ... 'insolvent person' means a person who is not bankrupt and who resides or carries a business in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and
>
> (a) who is for any reason unable to meet his obligations as they generally become due, or
>
> (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

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

18 Evidence was given about the books and records of Toyerama by Mr. Leyshon-Hughes, vice-president of the trustee, and by Miss E. Bentley, one of its estates officers. In the opinion of Leyshon-Hughes the books of Toyerama were current and had been adequately maintained. Either or both of Mr. Leyshon-Hughes and Miss Bentley had reviewed the invoices, files and other documents available to them. From these sources several tables were prepared which were put in evidence concerning the financial situation of Toyerama. In addition, there were unaudited financial statements prepared by a chartered accountant as at September 30, 1979 (the Toyerama year end) which showed an excess of liabilities over assets and a substantial operating loss for the period covered by the statements. The evidence indicated that there were a number of unpaid creditors. Some had agreed in writing to defer payment until January, 1980 or to some other date. Some had stipulated payment terms on their invoices which had not been met while others showed no payment terms but had rendered bills prior to November 9, 1979. Marvin Fleishman testified that any of the creditors whose invoices indicated that their account was overdue did not expect payment until after the 1979 season or bad verbally agreed to defer payment. Mr. Leyshon-Hughes said that the trustee did not inquire into these circumstances. No unpaid creditors were called by the trustee and the evidence of Marvin Fleishman on the arrangements he had made, although somewhat vague, stands uncontradicted.

19 The onus is on the trustee to establish on the balance of probabilities that Toyerama Limited was insolvent when it made the payment for the inventory and agreed to give the debenture for $35,000 to Edith Fleishman. To satisfy this onus, it must meet the test in one of paragraphs (a), (b) and (c) in the statutory definition of insolvency.

20 In dealing with paragraph (a), the evidence is that Toyerama in the last calendar quarter of 1979 had funds in its bank account and further bank credit available. Counsel for the trustee argued that it was a management decision not to pay the trade creditors and that Toyerama having been prevented by its management from making the payments was "unable" to do so. I do not agree with that submission. I agree with counsel for Mrs. Fleishman that "unable" does not mean "unwilling". If a person has ample funds to meet obligations and chooses not to do so, he, in my opinion, is not insolvent by reason of paragraph (a) of the definition. The unpaid creditors may enforce their claims if they choose to do so. In the context of the definition I see no difference between a person who has the funds and a person who has thc funds available to him if he chooses. The trustee has not satisfied me on the balance of probabilities that in November, 1979 Toyerama Limited was unable to meet its obligations as they generally became due.

21 The issue raised by paragraph (b) is more difficult. There were unpaid creditors in substantial amounts. Marvin Fleishman said that some amounts were disputed and that many creditors had either agreed to wait or understood that they would not be paid until the end of the 1979 season. This was because of the nature of the business where most of the sales were made in the last quarter of the year. No doubt there were some creditors who had not agreed or who had not accepted the understanding that payment would be late. No inquiry was made by the trustee as to these arrangements. Some trade creditors were paid in November and December, 1979, and of these some may have been dealing with Toyerama on a C.O.D. basis. The problem is that there is no direct evidence from any of the unpaid creditors which might affirm or deny the arrangements Marvin Fleishman says were made. Leyshon-Hughes on cross-examination said he could not say either way whether the bankrupt was meeting its

current obligations. I am unable to find, on the evidence, that in November, 1979, Toyerama Limited had ceased to pay its current obligations in the ordinary course of business as they generally became due.

22 Finally, with respect to paragraph (c), the unaudited balance sheet of Toyerama as at September 30, 1979, showed an excess of liabilities over assets. It would be a fair inference that the situation did not improve in October or November, 1979. The principal property of Toyerama was its accounts receivable and inventory. Its fixed assets were shown on the financial statement at a cost of approximately $57,000. There was no evidence of the fair valuation of the assets and as previously indicated the amount of obligations due and accruing due is uncertain. There is no basis for finding Toyerama insolvent because of (c) of the definition.

23 I conclude that the trustee has not satisfied the onus on it to show on the balance of probabilities that Toyerama was an insolvent person in November, 1979. The claim by the trustee must therefore be dismissed.

24 The second issue should, nevertheless, be considered in the event that I am wrong in my conclusion on insolvency. On this issue, Edith Fleishman has the onus of establishing that the transactions were not entered into with a view to giving her a preference over other creditors. In several cases, it has been said that if a creditor can show on the balance of probabilities that the dominant intent of the debtor was not to prefer the creditor but was some other purpose, the onus has been satisfied (see Re MacHall Contracting Limited (1971), 14 C.B.R. (N.S.) 52; and Re Van der Liek (1971), 14 C.B.R. (N.S.) 229). The test is an objective one and in Re Holt Motors Limited (1966), 92 C.B.R. 92, Mr. Justice Bastin said at p. 93:

> In order to meet the presumption created by s. 64 [now s. 73] the respondent must show that the purpose of creating the securities was not to place the respondent in a preferred position over the other creditors. In light of all the circumstances existing on 23rd July 1965, it is for me to determine what was the intention. This must be a matter of inference. The test which I consider should be applied is an objective and not subjective one; that is to say, the intention which should be attributed to the parties will always be that which their conduct bears a reasonably construed and not that which, long after the event, they claim they believe was present in their minds.

25 As previously stated, I have found that there was no intention on the part of the Toyerama management in November, 1979, to cease carrying on business. The relationships amongst Toyerama, Edith Fleishman, Marvin Fleishman and Allan Fleishman were complex. Edith Fleishman and Marvin Fleishman dealt with each other at arm's length. Allan Fleishman worked with his father, but appeared to have a good relationship with his mother. They owned a joint bank account and he was in the habit of giving her financial advice. There was a firm obligation bay her for the inventory and Edith Fleishman was insisting in November, 1979, that it be paid for on time, likewise in the following December she refused to extend the payment date for the debenture given the previous January. In November, 1979, Allan Fleishman says there was no discussion as to whether or not to pay his mother and she was paid promptly on the due date. There were other creditors at that time, but the arrangements with them are uncertain. Marvin Fleishman says he proposed the loan of $35,000 because he was apprehensive as to what Edith Fleishman might do with the inventory payment. He says that he wanted to protect her. He had more than an altruistic interest in doing so because of his continuing support obligations to her. He agreed to give her security for the loan because she and her solicitor asked for it and this was consistent with the arrangement that had been made with respect to the indebtedness covered by the January, 1979 debenture. It seems to me that the purpose of the transactions with Edith Fleishman was to preserve the delicate relationship between her and her former husband and was not to prefer her over other creditors. There was no intention that I can infer from the evidence of an intention not to pay the

other creditors in due course. Mrs. Fleishman has therefore satisfied me on the balance of probabilities that Toyerama did not enter the impugned transactions with a view of giving Edith Fleishman a preference over other creditors.

26 In the result, the claim is dismissed. Both the trustee and Edith Fleishman should have their costs out of the estate.

SAUNDERS J.

TAB 2

Kovalcik (Re)

Ontario Judgments

Ontario Supreme Court - High Court of Justice

In Bankruptcy

Houlden J.

Oral judgment: April 4, 1973.

[1973] O.J. No. 1312 | 18 C.B.R. (N.S.) 69

(8 paras.)

Counsel

J.D. Hudson, Q.C., for the plaintiff. P.F. Schindler, for the defendant.

HOULDEN J. (orally)

1 This is the trial of an issue directed by me to determine if the payment of $3,600 to the defendant, Nicolet Industries Incorporated, by the bankrupt is null and void against the trustee as a fraudulent preference.

2 The debtor carried on the business of asbestos cutting and fabricating for the manufacture of heat resistant table tops at the Town of Burlington, Ontario. He purchased material for his business operations from the defendant. A large part of the finished product was sold to a company in Dundas, Ontario, known as Valley City Manufacturing Company Ltd.

3 On or about 17th March 1971 the debtor sent to the defendant and to Valley City a copy of his financial statement for the period ending 31st January 1971. The financial statement was not a good one, and it indicated that the debtor was in serious financial difficulties. At this time, the debtor owed the defendant $4,868.70.

4 In April 1971, the debtor obtained a substantial order from Valley City for some $10,000 of manufactured goods. To fill the order, the defendant had to obtain the raw material from Nicolet. The defendant agreed to ship part of the material on the condition that the debtor would use the money that he received from Valley City to pay the account of Nicolet. About the middle of May 1971, goods to the value of $7,350.37 were shipped by Nicolet to the debtor.

5 Before it would ship any further material to the debtor, the defendant insisted on receiving a payment on account. The debtor went to Valley City and obtained two cheques totalling $3,673.65. On Friday, 28th May 1971 the cheques were taken by the debtor to Valley City's bank in Dundas and deposited; on

the same day the debtor cabled $3,600 to the defendant. On Tuesday, 1st June 1971 the debtor made an assignment in bankruptcy. The defendant did not ship any further material to the debtor after the receipt of the $3,600; indeed, there was hardly time enough to do so.

6 On these facts there is no doubt that (a) the payment of $3,600 occurred within three months of the bankruptcy, (b) the debtor was insolvent at the time, and (c) the effect of the payment was to give the defendant a preference over the other creditors. The trustee has therefore met the primary burden resting upon him, and there is a prima facie presumption that the payment was made with a view to giving the defendant a preference over other creditors.

7 In order for me to set aside the transaction as a fraudulent preference, I must be satisfied on all the evidence that the payment was made by the debtor with the intent of giving the creditor a preference over other creditors. It appears from the evidence that the dominant intent of the debtor in making the payment was not to prefer the defendant, but to obtain further material in order to complete the order for Valley City. In examination-in-chief the debtor, who gave evidence on behalf of the plaintiff, was asked, "Why did you make the payment to Nicolet"? and he answered, "To get more material". In cross-examination the debtor confirmed that it was his hope that when he made the payment he would be able to struggle on and keep his business in operation. The defendant knew of the serious financial position of the debtor and it was not prepared to ship its material without receiving a substantial payment on account. It was to comply with this request that the debtor made the $3,600 payment to the defendant. I cannot find on the evidence that the necessary intent has been established to constitute the payment to the defendant a fraudulent preference.

8 The application will therefore be dismissed. The payment having been made right on the eve of bankruptcy, I think the trustee was justified in submitting the matter to the Court. As counsel for the trustee has pointed out, the defendant was most fortunate in receiving this payment without the goods having been shipped. In the circumstances there will be no order as to costs, save and except that the trustee may have his costs out of the bankrupt estate.

TAB 3

Davis v. Ducan Industries Ltd.

Alberta Judgments

Alberta Queen's Bench

H.J. MacDonald J.

Judgment: February 14, 1983

Calgary No. BKY 6479

[1983] A.J. No. 1072 | 45 C.B.R. (N.S.) 290

(17 paras.)

Case Summary

Bankruptcy and insolvency law — Proceedings — Practice and procedure — Setting aside transactions prior to bankruptcy — Fraudulent preferences, conveyances or transactions — Presumptions — Motion by the trustee to set aside certain payments made by the bankrupt debtor to the defendant as a fraudulent preference dismissed — The debtor sold customized vans — The defendant supplied materials on credit for furnishing the vehicles, and was repaid upon sale — When the debtor hit financial difficulties, it purchased supplies to complete its vehicles from the defendant on a cash on delivery basis — The court found that the dominant intent of the payments was to complete the manufacture of vehicles, rather than to prefer a creditor — Bankruptcy Act, s. 73.

Statutes, Regulations and Rules Cited:

Bank Act, R.S.C. 1970, c. B-1, s. 88

Bankruptcy Act, R.S.C. 1970, c. B-3, s. 73

Counsel

F.M. Pritchard, Q.C., for trustee.

R.D. Wilde, for defendant.

14th February 1983. H.J. MacDONALD J.

1 14th February 1983. The plaintiff brought action to set aside as fraudulent under s. 73 of the Bankruptcy Act, R.S.C. 1970, c. B-3, certain payments made by the debtor to the defendant. The debtor, Diplomat Industries Ltd., made an assignment in bankruptcy on 29th September 1980.

2 The debtor was in the business of selling, through dealers, leisure vehicles which were manufactured by it by constructing and furnishing van bodies on motorized chassis. The debtor was financed mainly by bank credit secured by an assignment under s. 88 [now s. 178] of the Bank Act, R.S.C. 1970, c. B-1 [since repealed and substituted by 1980-81-82-83 (Can.), c. 40], covering all inventories, an assignment of accounts receivable, an assignment of fire insurance on inventories and a postponement of claim on amounts due to affiliated companies and directors. The bank held a demand debenture with a first floating charge over all company assets to secure indebtedness to the bank up to a maximum of $3,000,000.

3 In addition to financing by way of bank credit, the debtor relied on credit granted by its suppliers. The accounts of suppliers of chassis were payable when the completed units were sold to dealers.

4 The defendant company was in the business of supplying materials and products for the furnishing of recreational vehicles. Each year the debtor, as a designer or manufacturer of recreational vehicles, put together a decor package of materials and products it required of the defendant and contracted for these on a yearly basis. The supply required by the debtor was largely only obtainable from the defendant. The completed vehicles would be marketed mainly in the spring and summer. The manufacturing and equipping of the vehicles would take place during the fall and winter. In the result, the debtor carried a high inventory through the winter resulting in high credit by the spring of the year. The terms of payment to the defendant were net 30 days with a discount for early payment. In 1979 the debtor lived within these terms of payment as far as the defendant was concerned.

5 In the spring of 1979 the debtor had a high credit with the defendant and had carried a high inventory through the winter. This same situation prevailed in the spring of 1980. As a result, the debtor and the defendant negotiated a reduction programme of its account payable to the defendant which programme was related to sales of the bankrupt. In May 1980 reduction had not materialized and the defendant advised it could not continue as a supplier without substantial reductions. The bankrupt at that time had about 80 unfinished units which, when completed, would be worth about $2,000,000.

6 In May of 1980 the bank of the debtor entered into arrangements for the bank financing. This entailed reducing the bank loan as the van units were completed and sold and reducing the bank advances for completion of the units as the number of uncompleted units declined. The object was to liquidate the indebtedness to the bank by 31st August 1980.

7 The reduction programme of the defendant with the debtor operated from about 1st June 1980. In order to get necessary supplies from the defendant, the debtor had to purchase by C.O.D. and make payments to the defendant on its reduction programme. Between 2nd July 1980 and 18th July 1980 six payments under the reduction programme were made to the defendant totalling $65,195.17. This total sum was paid after 2nd July 1980 but in respect of purchases prior to 28th June 1980.

8 The vehicle units were completed between 31st May 1980 and 5th August 1980 and sold in due course.

9 The trustee challenges the payment of $65,195.17 to the defendant entirely on the presumption created by s. 73 of the Bankruptcy Act under which a payment made within three months of bankruptcy is deemed fraudulent if made "with a view" to giving the creditor a preference over other creditors, and if the payment has the effect of giving such a preference it is presumed "*prima facie* to have been made, incurred, taken, paid or suffered with a view to giving such creditor a preference over other creditors,

whether or not it was made voluntarily or under pressure and evidence of pressure shall not be receivable or avail to support such transaction".

10 Since the assignment in bankruptcy occurred on 29th September 1980, s. 73 affects payments made after 38th June 1980.

11 The burden of proof is on the party opposing the presumption:

> Once the trustee establishes the basic requirements of a fraudulent preference, the creditor to rebut the presumption need only show that the debtor did not intent to give a preference. He need not also establish that the creditor had no intention of receiving a preference ...: Houlden and Morawetz, Bankruptcy Law of Canada, Current Service, p. 4-102, referring to *Re Pac. Belting Co.* (1971), 14 C.B.R. (N.S.) 233 (B.C.S.C.).
>
> The phrases "with a view to" and "with intent" are synonymous. It is well-established law that the intention or "view" must lie with the debtor, not with the creditor ...: Houlden and Morawetz, p. 4-103, referring to *Re Alger S. Pollard Const. Ltd.* (1977), 24 C.B.R. (N.S.) 271, 17 Nfld. & P.E.I.R. 269, 46 A.P.R. 269 (P.E.I.S.C).

12 If the dominant intent of the debtor in making a payment shortly before bankruptcy was not to prefer a creditor but to obtain further merchandise to complete an order, the presumption created by s. 73 will be rebutted: *Re Kovalcik* (1973), 18 C.B.R. (N.S.) 69 (Ont. S.C.).

13 From all the facts of the case, I am satisfied that the dominant intent of the debtor was to obtain supplies and equipment from the defendant to complete the manufacture of the vehicles in question. The debtor could only do this by getting the supplies from the defendant and by living up to the arrangements made with the defendant in about May 1980. This arrangement was in the interests of the estate of the bankrupt in that it was part of the means whereby the vehicles could be finished for sale to eventually liquidate the fully secured debt to the bank and give hope that some surplus would be available for other creditors.

14 Since the payments in question were made to the defendant within three months of the date of bankruptcy, the presumption under s. 73 is raised and the defendant to rebut the presumption must show that the dominant purpose of the payments was not to grant a preference to the defendant.

15 The payments in question made to the defendant allowed the debtor to remain in business with the hope that after the bank was paid off it would be able to continue its business operations on a retrenched scale. It would appear that by completing and selling the vehicles the debtor was able to earn a substantial amount for creditors over and above the alternative of auctioning the vehicles in an unfinished condition. It appears to me that the dominant purpose of the debtor was to stay in business and to maximize the recovery available for its creditors.

16 I find that the presumption has been met and that the payments in question made by the debtor to the defendant were not made with a view or the intent of giving a preference over other creditors.

17 The motion to set aside the payments contended to be fraudulent is dismissed with costs to the defendant which may be fixed on application.

TAB 4

Goldstein (Re)

Ontario Judgments

Ontario Supreme Court - Appellate Division

In Bankruptcy

Meredith C.J.O., Magee, Hodgins and Ferguson JJ.A.

January 11, 1923

[1923] O.J. No. 97 | 53 O.L.R. 60 | [1923] 1 D.L.R. 864 | 3 C.B.R. 404

Case Summary

Bankruptcy — Assignment by Insolvent Debtor — Mortgage Made before Assignment — Preference — Bonâ Fides — Intention to Prefer Absence of Knowledge by Mortgagee of Available Act of Bankruptcy — Bankruptcy Act, secs. 31, 32, Amending Act, 10 & 11 Geo. V. ch. 34, sec. 8 — Validity of Mortgage to Extent of Amount actually Advanced — Bonus.

Where there is no evidence of an intention to prefer on the part of a debtor, and no concurrent intent on the part of-the creditor, the transaction is not fraudulent within the meaning of sec. 31 of the Bankruptcy Act.

A debtor, who was unable to pay a certain creditor the amount of his Indebtedness to her, obtained from her a further loan of $1,200, the repayment of which was secured by a mortgage for $1,500-$300 being retained as a bonus. Shortly after giving this mortgage, the debtor made an authorised assignment, and the trustee applied to have the mortgage set aside, an the ground that It gave the mortgagee a preference over the other creditors. The original debt was not included in the mortgage, and at the time the mortgage was given the creditor was not aware of any available act of bankruptcy on the part of the debtor:

Held, that there was no intention to prefer: the creditor might reasonably conclude that the loan would enable the debtor to carry on his business; and the mortgage was declared valid.

Bankruptcy Act, secs. 31, 32, and amending Act 10 & 11 Geo. V. ch. 34, sec. 8, and Burns v. Royal Bank of Canada (1922), 51 O.L.R. 584, 2 Can. Bkcy. R. 241, Re Webb (1921), 51 O.L.R. 5, 2 Can. Bkcy. R. 18, and other cases, referred to.

On appeal, the judgment of the Judge in Bankruptcy was varied by disallowing the $300 retained as a bonus.

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1 APPLICATION by the trustee in bankruptcy of the estate of David Goldstein to set aside a mortgage of lands made by the debtor to his sister-in-law, Annie Needle.

2 The application was heard by George S. Holmested, K.C., Registrar in Bankruptcy.

September 29. THE REGISTRAR

3 The trustee applies to set aside a mortgage of lands made by the debtor to his sister-in-law, Annie Needle, in the following circumstances.

4 The debtor carried on business in Hamilton from the year 1914.

5 He commenced with the small capital of about $300, and, on the strength of that, he managed to secure considerable credit--but during the years 1920 and 1921 he carried on his business at a loss. During the course of that business he contracted a debt to the amount of $995.80 to Mrs. Needle. This debt, although she from time to time asked for payment, he did not pay, and told her that he could not pay it, excusing himself on the ground of the had state of his business. About the 1st February, 1922, Goldstein informed her that the bank was pressing him and he was in need of money and asked a further loan of $1,200. This sum she agreed to advance him on the security of a second mortgage, being that now in question. The mortgage is made to secure $1,500-$1,200 being actually advanced and $300 being retained by the mortgagee by way of bonus. Of the sum actually received by the debtor, $1,000 was paid to the Bank of Hamilton and $200 was given by the debtor to his wife to defray medical and other expenses attending her confinement. On the 28th February, 1922, the debtor made an authorised assignment under the Act.

6 It was argued on behalf of the mortgagee that this was not a transaction within sec. 31 of the Bankruptcy Act as enacted by (1920) 10 & 11 Geo. V. ch. 34, sec. 8; and I was at first inclined to adopt that view; but, on further consideration, I am of the opinion that it is untenable. It was argued that quoad this mortgage it was not taken by the mortgagee to secure any pre-existing debt, but to secure a present advance; and, therefore, it was not made to her as a creditor or to give her any preference as a creditor. It appears to me that that argument is fallacious, as by the very fact of making the loan she became a creditor, and the mortgage was in substance taken. and received by her, to secure her for that debt, and in respect of that debt she now in fact claims to be a secured creditor of the debtor. I therefore hold, in the first place, that this was a transaction in favour of a creditor within sec. 31: that it did, without doubt, give her a preference over other creditors, and is prima facie null and void under sec. 31(2) as amended.

7 The question remains, has it been validated under sec. 32? And I am of opinion that it has not. The first ingredient necessary for a valid transaction must be that it was made in good faith--and the moment it is established that the mortgagee knew or had reasonable means of knowing that the debtor was "insolvent," as that term is defined by the Act, sec. 2(t), at the time the transaction took place, it is impossible to say that the mortgage was made or received "in good faith." The consideration may be valuable and adequate; but, if the element of good faith is lacking, the transaction cannot stand.

8 Here, beyond question, the debtor was not able to pay the debt he already owed and had owed her for some time; she knew also that he was owing the bank and could not pay it. She therefore, in my opinion, knew that the debtor was "insolvent" within the meaning of the Bankruptcy Act. That Act prohibits insolvent debtors giving their creditors undue preferences. What they cannot do directly they cannot do indirectly, and any person who assists an insolvent debtor to realise his assets to enable him to make such payments commits a fraud on the Act. I therefore hold that the mortgage is invalid, and I set it aside, with costs to be paid by Mrs. Needle to the trustee.

9 I may say that I have referred to the cases cited by the learned counsel for the mortgagee, and am unable to see that they necessitate any different construction of the Act than that at which I have arrived, namely, that knowledge on the part of the mortgagee of the insolvency of the debtor absolutely precludes her from maintaining that her mortgage was taken "in good faith."

10 Annie Needle appealed from the Registrar's order.

11 The appeal was heard by FISHER J., in Chambers.

October 17. Fisher J.

12 The mortgage is dated the 1st February, 1922, and was registered on the 4th February, 1922, and is a second mortgage against the lands described therein. The mortgaged property is valued at about $4,500. There is due on the first mortgage registered against the land $3,000 for principal.

13 The learned Registrar took vivâ voce evidence, and it appears from that evidence and material filed that the debtor admitted that he had been in insolvent circumstances for many years prior to the date of the giving of the mortgage. He started in a boot and shoe business in Hamilton about 8 years ago, having a capital of about $300, and at that time was indebted in the sum of $1,000 to several creditors. The debts were incurred in a confectionery business carried on by him for some years prior to his entering into the boot and shoe business. These creditors were not pressing him; and, obtaining credit in his boot and shoe business, he was enabled to carry on until he made an authorised assignment on the 28th February, 1922, to F.H. Lamb, an authorised trustee. At the time of the authorised assignment, the debtor was doing his banking business with the Bank of Hamilton. The appellant is a sister-in-law of the debtor, and at different times, since 1914, he had borrowed sums of money from her, amounting in all at the date of the mortgage in question to $995.85.

14 The debtor had been asked on several occasions for payment of this money by the appellant; she was put off, and the money was not paid. She thought his business would improve and some time she would get her money. In July, 1921, the debtor became ill and had to go to Chicago for treatment. He had an equity of redemption in certain other lands in Hamilton, which he sold to the appellant for $750. This money was used to defray his expenses and cost of living during the period he was ill.

15 In the latter part of January, 1922, he again requested a further loan of money from the appellant, and she refused, because of his existing indebtedness to her, to lend him any more without security, and it was arranged that if he would give her a second mortgage (the one attacked in this case) for $1,500 she would advance him $1,200, and this was done. The $300 was to be a bonus for making the loan. She thought she was entitled to this, as she had never received any interest on the moneys the debtor already owed to her. At the time he requested the loan of $1,200, he informed the appellant that his bank was pressing him for money, and he must have $1,000 to pay to the bank. The $200 he wanted to defray expenses in connection with his wife's confinement. There is no evidence before the Court that the appellant, at the time this mortgage was given, knew anything of the financial condition of the debtor other than that he owed her $995.85, and that he required $1,000 to pay to his bankers. She thought he was in a good business and that his business would "pick up." The debtor swore that he did not tell her he was insolvent when he applied to her for the loan of $1,200, and that, so far as he knew, she had no knowledge that he was insolvent. She knew, however, that he was not able to pay her the $995.85. He was her brother-in-law, and was not pressing him for this. Within a month--on the 28th February, 1922--after the mortgage in question was given, the debtor assigned.

16 The question for determination is--was this mortgage given "with a view" and has it "the effect" of giving to the appellant a preference over the other creditors of the debtor? If so, it is clearly within sec. 31 of the Bankruptcy Act and void as against the present trustee, unless the appellant can show that the mortgage was made in good faith and that she had no knowledge of any act of bankruptcy committed by

the debtor before that time. It is not disputed that the appellant did advance the $1,200 at the time the mortgage was given, and that the debtor immediately paid $1,000 to the bank. There was in this transaction an adequate valuable consideration given at the time the mortgage was taken, and the real question for the Court to decide is--did the mortgagee, at the time she took the mortgage and paid over the $1,200, have notice of any act of bankruptcy of the debtor? The onus is on the appellant, under sec. 32(1)(ii) of the Act. Has she satisfied this onus? If she has not, as I have stated, this transaction comes within the meaning of sec. 31 of the Act and is invalid.

17 There is no question that the debtor was, at the time of the giving of the mortgage, an insolvent person within sec. 31. The definition of those words is found in papa. (t) of sec. 2. There is no question, too, that he had been unable to meet his obligation as they became due, but I think I am right in concluding that the appellant was not aware of any available act of bankruptcy of the debtor at the time she took the mortgage. There is no evidence that she had any object in assisting the bank in obtaining $1,000 from the debtor. It was no advantage to her. There was no attempt on her part to include in the mortgage the $995.85 he already owed her, and I can find no element of bad faith on the part of the mortgagee --she gave adequate valuable consideration. One might reasonably conclude that, as the appellant knew that $1,000 was to be paid to the bank, this payment would enable the debtor to continue to carry on his business, and that there was no intention to prefer. See Burns v. Royal Bank of Canada (1922); 51 O.L.R. 564, 2 Can. Bkey. R. 241.

18 The learned Registrar came to the conclusion that, in consequence of the debtor not being able to pay his debts, the appellant must be taken to have been aware of his insolvency, and that the result of the loan by the appellant to the debtor was to make her a secured creditor, contrary to sec. 31 of the Act, and her mortgage primâ facie null and void under sec. 32, as she knew or should have known, that the debtor was insolvent, and the element of good faith was lacking. If that were so, it would be impossible for any one finding himself in need of ready money to mortgage his property to relieve a pressing claim. I do not think the Act contemplated that construction. The mortgage does make her a secured creditor, but the cash she advanced was paid to the bank, and the debtor's liabilities were reduced, to the advantage of the creditors. In my view of the facts, I am of opinion that the debtor's dominant motive in securing this loan and giving the mortgage was to obtain money to pay the bank, and thus relieve the pressure from that source. Section 31 of the Bankruptcy Act prohibits a fraudulent preference, but when there is no evidence of an intention to prefer on the part of the debtor, and no concurrent intent on the part of the creditor, the transaction is not fraudulent within the meaning of sec. 31. This was held by Mr. Justice Orde in Re Webb (1921), 51 O.L.R. 5, 2 Can. Bkcy. R. 16, wherein he decided that there must be a common or concurrent view or intent on the part of a debtor and also on the part of the creditor to create a preference before sec. 31 of the Bankruptcy Act applies, following Benallack v. Bank of British North America (1905), 36 Can. S.C.R. 120; Molsons Bank v. Halter (1890), 18 Can. S.C.R. 88; Gibbons v. McDonald (1892), 20 Can. S.C.R. 587; and a long line of cases upon the Assignments and Preferences Act.

19 I must therefore hold that the security attacked in this case is not void.

20 The appeal is allowed with costs; the trustee to have his costs out of the estate.

21 The trustee appealed from the order of FISHER J.

22 January 11, 1923. The appeal was heard by MEREDITH C.J.O., MAGEE, HODGINS, and FERGUSON JJ.A.

23 At the close of the argument the judgment of the Court was delivered by MEREDITH C.J.O.:-- The respondent made an advance to the debtor of $1,200, and took a mortgage as security. It is now sought to have the mortgage set aside as being void against creditors. The transaction cannot be said to be a fraudulent preference within the meaning of sec. 31 of the Bankruptcy Act. There was no evidence of intent to prefer on the part of the debtor nor of concurrent intent on the part of the creditor, and the presumption which that section makes is rebutted. The security was given for a present loan, and not for an existing debt, and sec. 31 has, therefore, no application.

24 This does not apply to the bonus of $300 which the debtor allowed to the respondent, and to that extent the transaction must be set aside; but in other respects the judgment appealed from should be affirmed, with costs of the appeal to the respondent, to be paid out of the estate.

25 Judgment below varied.
J. A. Soule, for the trustee before the Registrar.

A. M. Lewis, K.C., for Annie Needle before the Registrar.

Lewis, K.C., for the appellant before Fisher J.

Soule, for the trustee, respondent before Fisher J.

Soule, for the appellant.

Lewis, K.C., for the respondent.
