2017 ONSC 1475
Ontario Superior Court of Justice [Commercial List]

National Telecommunications Inc., Re

2017 CarswellOnt 3184, 2017 ONSC 1475, 277 A.C.W.S. (3d) 247, 45 C.B.R. (6th) 181

IN THE MATTER OF THE BANKRUPTCY OF NATIONAL TELECOMMUNICATIONS INC. OF THE TOWN OF VAUGHAN, IN THE PROVINCE OF ONTARIO

F.L. Myers J.

Heard: February 21, 2017
Judgment: March 3, 2017
Docket: 31-2014067

Counsel: James Clark, for Deloitte Restructuring Inc., trustee in bankruptcy of the estate of National Telecommunications Inc., a bankrupt
Bryan C. McPhadden, for 1219172 Ontario Inc. and Brian Coones

Subject: Civil Practice and Procedure; Evidence; Insolvency; Property

Related Abridgment Classifications

Bankruptcy and insolvency
XI Avoidance of transactions prior to bankruptcy
XI.6 Recovery of proceeds or property

Headnote

Bankruptcy and insolvency --- Avoidance of transactions prior to bankruptcy — Recovery of proceeds or property
Bankrupt re-sold telephone equipment — In May 2012, bankrupt began paying consultant, C, and C's company $10,000 per month — In November 2013, bankrupt began receiving loans from new lender it reported as revenue — In March 2015, bankrupt's old lender brought application for bankrupt's receivership — In April 2015, receiver and manager were appointed — In July 2015, bankrupt was assigned into bankruptcy — At October 2015 examination under s. 163 of BIA, C testified he had no contact with and could not name any of bankrupt's customers or suppliers — Trustee in bankruptcy brought motion for order requiring C and C's company to repay $159,330 transferred during year prior to March 2014 (relevant period) to estate of bankrupt under s. 96 of Bankruptcy and Insolvency Act (BIA) — Motion granted; C and C's company ordered to pay estate $159,330 — Payments to numbered company during relevant period fell within s. 96(1)(b)(i) of BIA — Although applications were generally to be brought as motions, judge had discretion to order trial or use summary process if it would yield fair result — No trial was necessary as issue was narrow, parties' complete evidence was before court, protagonists had been cross-examined, and there was relatively small amount of money in issue — Section 96 did not require trustee to prove bankrupt was engaged in scheme to defeat its creditors generally or as group — C's affidavit evidence from his knowledge of bankrupt's customers to how he brought bankrupt millions of dollars in sales was contradictory — Value of consideration C and C's company gave to bankrupt were presumptively what trustee opined, which was zero — There was no legal or persuasive burden on C or C's company but, in absence of credible evidence to contrary, trustee proved on balance of probabilities that C and C's company provided no services of any value to bankrupt during relevant period and that all payments bankrupt made to C or C's company from that date were "payments at undervalue" — It was clear and undisputed that during relevant period, bankrupt was engaged in effort to defraud and delay bank from learning it was insolvent and borrowing from different lender — Three badges of fraud were found and gave rise to presumption that bankrupt intended to defraud, defeat, or delay old lender — There was no evidence of bona fide value flowing from C or C's company to bankrupt even before relevant period — While solvent company was entitled to make payments for non-commercial or uneconomic motivations, insolvent company

making such payments for no consideration while actively defrauding its principal lender could not be said to be acting in ordinary course of business.

Table of Authorities

Cases considered by *F.L. Myers J.*:

Hryniak v. Mauldin (2014), 2014 CarswellOnt 640, 2014 CarswellOnt 641, 37 R.P.R. (5th) 1, 46 C.P.C. (7th) 217, 27 C.L.R. (4th) 1, (sub nom. *Hryniak v. Mauldin*) 366 D.L.R. (4th) 641, 2014 CSC 7, 453 N.R. 51, 12 C.C.E.L. (4th) 1, 314 O.A.C. 1, 95 E.T.R. (3d) 1, 21 B.L.R. (5th) 248, [2014] 1 S.C.R. 87, 2014 SCC 7 (S.C.C.) — followed

Juhasz (Trustee of) v. Cordeiro (2015), 2015 ONSC 1781, 2015 CarswellOnt 4744, 24 C.B.R. (6th) 69 (Ont. S.C.J.) — considered

Lee, Re (2017), 2017 ONSC 388, 2017 CarswellOnt 463, 44 C.B.R. (6th) 68 (Ont. S.C.J.) — considered

McLarty v. R. (2008), 2008 SCC 26, 2008 CarswellNat 1380, 2008 CarswellNat 1381, (sub nom. *R. v. McLarty*) 2008 D.T.C. 6354 (Eng.), (sub nom. *R. v. McLarty*) 2008 D.T.C. 6366 (Fr.), [2008] 4 C.T.C. 221, (sub nom. *McLarty v. Minister of National Revenue*) 374 N.R. 311, (sub nom. *McLarty v. Canada*) 293 D.L.R. (4th) 659, 46 B.L.R. (4th) 1, (sub nom. *Canada v. McLarty*) [2008] 2 S.C.R. 79 (S.C.C.) — followed

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

Purcaru v. Seliverstova (2016), 2016 ONCA 610, 2016 CarswellOnt 12336, 39 C.B.R. (6th) 15, 80 R.F.L. (7th) 28 (Ont. C.A.) — considered

Statutes considered:

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

Generally — referred to

s. 2 "date of the initial bankruptcy event" — considered

s. 2 "transfer at undervalue" — considered

s. 4(4) — considered

s. 96 — considered

s. 96(1) — considered

s. 96(1)(b)(i) — considered

s. 96(2) — considered

s. 96(3) — considered

s. 163 — considered

Rules considered:

Bankruptcy and Insolvency General Rules, C.R.C. 1978, c. 368

R. 3 — considered

R. 11 — considered

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

R. 20.04(2.1) [en. O. Reg. 438/08] — considered

R. 39.02(2) — considered

MOTION by trustee in bankruptcy for order requiring repayment of funds bankrupt paid to consultant prior to bankruptcy.

***F.L. Myers J.*:**

The Motion

1 The trustee in bankruptcy of the estate of National Telecommunications Inc. moves for an order requiring Brian Coones and his company, 1219172 Ontario Inc., to pay $159,330 to the estate under s. 96 of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3. The trustee alleges that while insolvent, the bankrupt paid this amount to Mr. Coones' company and received no value in return.

2 For the reasons set out below, the order sought is granted.

Transfer at Undervalue

3 The phrase "transfer at undervalue" is defined in s. 2 of the *BIA* as follows:

> *transfer at undervalue* means a disposition of property or provision of services for which no consideration is received by the debtor or for which the consideration received by the debtor is conspicuously less than the fair market value of the consideration given by the debtor;

4 It is apparent from this definition that the topic concerns transactions prior to bankruptcy in which a bankrupt depleted its assets to the prejudice of its creditors. Parliament has determined that in such cases, the trustee, on behalf of the creditors, may move to declare the transfers void so as to make the transferred assets and/or the value differential between the assets transferred and consideration received exigible by the trustee. There is a very broad range of pre-bankruptcy transfers of assets that may later be said to have depleted an estate. Some definitional meat is required to narrow the range so as to determine which transactions will be actionable by a trustee on behalf of an estate. Section 96 of the *BIA* provides the required definitions.

> **Transfer at undervalue**
>
> 96 (1) On application by the trustee, a court may declare that a transfer at undervalue is void as against, or, in Quebec, may not be set up against, the trustee — or order that a party to the transfer or any other person who is privy to the transfer, or all of those persons, pay to the estate the difference between the value of the consideration received by the debtor and the value of the consideration given by the debtor — if
>
> (a) the party was dealing at arm's length with the debtor and
>
> (i) the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and that ends on the date of the bankruptcy,
>
> (ii) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, and
>
> (iii) the debtor intended to defraud, defeat or delay a creditor; or
>
> (b) the party was not dealing at arm's length with the debtor and
>
> (i) the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and ends on the date of the bankruptcy, or
>
> (ii) the transfer occurred during the period that begins on the day that is five years before the date of the initial bankruptcy event and ends on the day before the day on which the period referred to in subparagraph
>
> (i) begins and
>
> (A) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, or

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

Establishing values

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

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

5 Section 96 identifies three different sets of transactions for which a trustee can seek a remedy. First, if the bankrupt and the recipient of its assets were dealing at arm's length, then the trustee can seek a remedy if the transfer at undervalue occurred up to one year prior to the initial bankruptcy event, the bankrupt was insolvent or rendered insolvent at the time, and in making the transfer at undervalue, the bankrupt intended to defraud, defeat, or delay a creditor.

6 Where the bankrupt and the recipient of its assets were not dealing at arm's length then the rules differ depending on when the transaction occurred. The second set of transactions that a trustee can attack under s. 96 involves cases where the parties to the transfer at undervalue were not dealing at arm's length and the transfer occurred within one year of the initial bankruptcy event. In that case, the transfer can be impugned without any further proof. In my view, it is Parliament's intention that relief should be available nearly automatically on proof of those facts. *Lee, Re*, 2017 ONSC 388 (Ont. S.C.J.) (CanLII) at para. 16.

7 The third situation that a trustee can be attack under s. 96 involves cases where the parties to the transfer at undervalue were not dealing at arm's length but the transfer at undervalue occurred more than one year before the initial bankruptcy event but no more than five years before that event. In this third situation, Parliament has re-asserted the same requirements that apply to a transfer at undervalue to an arm's length party. That is, to obtain relief in the third case, a trustee needs to prove that the bankrupt was insolvent or rendered insolvent at the time of the transfer at undervalue and that in making the transfer at undervalue, the bankrupt intended to defraud, defeat, or delay a creditor.

8 The court is asked to determine therefore, first, whether the bankrupt transferred property to Mr. Coones and his company for no consideration or for conspicuously less consideration than the fair market value of the transferred property. If a transfer at undervalue occurred, then the next issue is whether the bankrupt and Mr. Coones and his company were dealing at arm's length. If they were not at arm's length, then the timing of the transaction(s) will dictate whether any further proof is required by the trustee in order to succeed. If the parties were operating at arm's length or, if they were not at arm's length and the transaction occurred more than one year but less than five years prior to the initial bankruptcy event, then the trustee must prove two further facts (insolvency and intention) in order to be entitled to relief under s. 96.

Mr. Coones was Privy to the Transfers to his Corporation

9 It is not disputed that Mr. Coones is the sole owner of 1219172 Ontario Inc. It is his corporate vehicle through which he ran a consulting business. Mr. Coones and his corporation fall squarely within the definition of privity in s. 96 (3) set out above. That is, they do not deal with each other at arm's length and Mr. Coones conceded on his s. 163 examination that he received personally the benefit of the funds paid by the bankrupt to his corporation. While this may be quite ordinary tax planning and, without more, would not likely invite piercing of the corporate veil at common law, s. 96 (1) provides that those who are privy to a transfer at undervalue are as liable as the recipient. Subsection. 96 (3) provides a statutory piercing of the corporate veil to recover transfers at undervalue from the real party in interest who received the value that ought to be available to the bankrupt's estate and creditors.

The Facts

10 On April 9, 2015, the court appointed Deloitte Restructuring Inc. to be the receiver and manager of the bankrupt. The receivership application was brought by HSBC Bank Canada as the principal lender and secured creditor of the bankrupt. The Receiver assigned the bankrupt into bankruptcy on July 10, 2015. Under s. 2 of the *BIA*, the date of the initial bankruptcy event is the date on which the application for the receivership was brought by HSBC. [1] Counsel for the trustee advises that the date of issuance of the notice of application in the receivership proceeding was March 26, 2015.

11 The bankrupt was a re-seller of telephone equipment. The owner of the bankrupt is Nelson Guyatt. He too is now bankrupt.

12 Mr. Coones and Mr. Guyatt became friends while working together for a different company around the turn of the century. They socialized with their families about once a year. Mr. Coones became employed by the bankrupt in 2008. He was paid a salary plus bonus. By 2011 Mr. Coones' total remuneration from the bankrupt was over $100,000. In 2012, Mr. Coones and Mr. Guyatt agreed to switch Mr. Coones from an employee to a consultant through his corporation. Thereafter, the bankrupt paid Mr. Coones' corporation $10,000 per month. There is nothing remarkable in the change of Mr. Coones' employment status from a bankruptcy perspective.

13 Mr. Coones had background in telephone system architecture and sales engineering. He testified that during his time with the bankrupt, he performed technical design, installation, and programming services before and after becoming a consultant. He conceded that his services decreased after he became a consultant as he wanted to branch out into other business ventures.

14 Mr. Coones was not represented by counsel when he was first examined under s. 163 of the *BIA* in October, 2015. His counsel submits that Mr. Coones' initial testimony should be discounted because he did not have the opportunity to prepare with counsel. I decline to find that fundamental changes in Mr. Coones' testimony can be attributed to counsel becoming available to him.

15 In his s. 163 examination, Mr. Coones testified that in his position with the bankrupt, he had no contact with its customers. He could not name any of the major customers or suppliers of the bankrupt. In fact, he could not name any customers for whom he performed design, installation, or programming. He undertook to provide copies of his emails to substantiate his activities for the bankrupt. However he failed to produce any emails. If he was programming and installing telephone systems for fees of $120,000 per year, it is not credible that he does not recall which supplier's telephones he was programming and installing. It is not credible that he never went to see clients. It is not credible that he could not remember any of the major clients whose systems he programmed.

16 Mr. Guyatt was equally elusive in describing Mr. Coones' services. He said that Mr. Coones helped him start and grow the business. When pressed he said (at q. 531 of his examination):

> Q. You mentioned that when you started the business —
>
> A. Yeah. So, it is only fair, if the company is making money and doing well, it is only fair to cut him in. Whenever I needed him to come in and do some networking stuff, he did. He was on call for me. And the customers were making money, so I was taking care of him, right?

17 Mr. Guyatt could give no greater specificity as to what Mr. Coones did for the business. Mr. Coones came in to the bankrupt's office as needed which was once a month or so. Yet at $10,000 per month, Mr. Guyatt confirmed that Mr. Coones was making more than Mr. Guyatt was making from his own business.

18 Mr. Coones and the bankrupt formalized Mr. Coones' consulting relationship with a written agreement dated April 1, 2012. It is apparent on the face of the document that it was a pre-printed form agreement that was obtained

by the parties in 2013. The back-dating itself is not of particular relevancy as it was explained by Mr. Coones in a later cross-examination. However, in his initial testimony under s. 163 of the *BIA*, he was expressly asked and swore that he signed the agreement on the date of the agreement at a meeting with Mr. Guyatt at the bankrupt's office. That testimony was plainly untrue.

19 Late in his s. 163 examination, Mr. Coones testified that he was being paid commissions on clients for whom he had provided leads to the bankrupt. He said that he gave the bankrupt lists of leads. In response to an undertaking he produced a meaningless list of more than 225 businesses including American Express, Rogers Cable, The Bank of Nova Scotia, and Coca Cola that he had apparently provided to the bankrupt. Mr. Coones testified that his commissions were not based on sales made to his leads. Instead, he says that the bankrupt paid him $10,000 a month for a list of leads like those.

20 After cross-examining the trustee's representative on his affidavit, Mr. Coones delivered several further affidavits without seeking or obtaining leave of the court under Rule 39.02 (2) of the *Rules of Civil Procedure*, RRO 1990, Reg. 194 and Rule 3 of the *Bankruptcy and Insolvency General Rules*, CRC, c 368. In his further testimony, Mr. Coones swore that he provided web development for customers of the bankrupt. Moreover, he named several customers whom he said he introduced to the bankrupt and whose sales he helped increase substantially.

21 Mr. Coone's evidence changed substantially with each new affidavit. At first, he could not remember any customers. This evidence evolved to remembering that he brought in millions of dollars in sales from several customers whom he introduced to the bankrupt due to his personal connections. In the case of each customer whom Mr. Coone's swore he introduced to the bankrupt, the trustee was able to show from the bankrupt's records that it made sales to the customers *before* Mr. Coones was employed by the bankrupt. In response, Mr. Coones' story evolved again as he swore that he informally helped the bankrupt before even becoming employed by it and he grew the bankrupt's business with those customers. In doing so, he implicitly accepted that his initial affidavit of September 7, 2016, stating that he "rarely had direct contact with customers or potential customers" must have been untrue. Comparing Mr. Coones' inability to name any customers in his s. 163 examination, to the sentence just quoted from his September 7, 2016 affidavit, to his testimony in his affidavit sworn November 10, 2016 that, "I played a decidedly direct role in attracting Telquest and Norstar as customers to [the bankrupt]," to his having just helped increase the sales to existing customers rather than actually introducing the customers as previously sworn (see paras. 12 and 13 of his January 5, 2017 affidavit) leaves no room to treat Mr. Coones' testimony as credible.

22 It is true that the bankrupt's sales revenues greatly increased after Mr. Coones became employed in 2008. However, there is no tangible evidence that Mr. Coones did anything at all to contribute to those results.

23 The trustee was able to locate one email from Mr. Coones to Mr. Guyatt dated April 20, 2015. In it, Mr. Coones wrote:

> Let me know when I can see Anthony this week for 10. Would like to do one this week and the first week of May if possible. I can talk to him to see if he can do more ongoing but that would give me some time to prepare.

24 On its plain words, Mr. Coones was asking Mr. Guyatt to arrange an appointment with someone named Anthony to arrange to "do one" this week and another in ten days. This sounds like Mr. Coones was moving some goods for Anthony to whom Mr. Guyatt controlled access. On cross-examination, Mr. Coones could not explain the email. He denied selling any goods and claimed that his desire to "see Anthony this week for 10" had to do with his $10,000 salary from the bankrupt rather than having a 10 minute appointment with Anthony or obtaining a quantity of 10 items from him.

25 Just prior to the hearing of the motion, Mr. Coones delivered an affidavit of Bruno Bressi sworn February 16, 2017. Mr. Bressi says that he is the principal of a customer of the bankrupt. Mr. Bressi says that Mr. Coones introduced him to Mr. Guyatt in 2001 or 2002 and coordinated efforts directed at developing business between the customer and the bankrupt. Once again the evidence as to what Mr. Coones actually did is conclusory and entirely bald. There is no

explanation as to how this arrangement worked from 2001 to 2008 before Mr. Coones was even an employee of the bankrupt. Mr. Bressi simply recites information from Mr. Coones that he was paid for "supplier advice and technical assistance in addition to his sales knowledge."

26 When asked specifically about Mr. Bressi in his s. 163 examination (after already being unable to remember the names of any customers of the bankrupt), Mr. Coones testified that he knew Mr. Bressi's because he worked at the same location as the bankrupt. He made no mention of introducing him to the bankrupt or knowing him prior to his employment with the bankrupt. Moreover, when the trustee's counsel asked Mr. Coones if he knew what Mr. Bressi's job was, Mr. Coones said he was not sure. When asked if it had something to do with the bankrupt, Mr. Coones said he thought so. I would have expected different answers if Mr. Coones had introduced Mr. Bressi to the bankrupt and had been singularly responsible for a massive growth in multi-million dollar sales by the bankrupt to Mr. Bressi's business. He might have remembered that Mr. Bressi was a customer and had some idea what he did for a living for example.

27 The trustee's unchallenged evidence is that the bankrupt was insolvent by November 18, 2013. At that time it started receiving loans from a new lender that it booked falsely as revenue. It appears that the bankrupt embarked on a scheme of hiding its insolvency from its lender HSBC by reporting fictitious sales and revenues. There is no suggestion that Mr. Coones was party to any of this. The trustee simply marked the date of the bankrupt's insolvency in case it is required to prove that fact under s. 96 of the *BIA* as discussed above.

28 At para. 30 of his affidavit, the trustee's representative swears:

> In the Trustee's opinion, [the bankrupt] received no value for payments made to [Mr. Coone's corporation]. Both Coones and Guyatt have been examined and no concrete evidence of [the corporation] or Coones providing any services to [the bankrupt] has been shown, and nothing that can be quantified. Additionally, Coones left the employment of [the bankrupt] as he wanted to pursue other things. Guyatt felt "So it is only fair, if the company is making money and doing well, it is only fair to cut him in." The reason provided by Guyatt for why Coones via [his corporation] was receiving payments is because Guyatt felt it was only fair to pay Coones for helping [the bankrupt] get started. The value of the services provided to [the bankrupt], in respect of the payments since May 2012 [when Coones became a consultant through his corporation], in the opinion of the Trustee, is nil.

29 The bankrupt paid Mr. Coones' corporation $338,830 after May, 2012. It paid $159,330 from the date of its insolvency November 18, 2013.

Analysis

(a) Transfer at Undervalue

30 As set out at the outset, the first question for resolution is whether the bankrupt disposed of property for no consideration or for conspicuously less than the fair market value of the property. This process for assessing this question is guided by s. 96 (2). It requires the trustee to provide its opinion of the fair market value of the property transferred by the bankrupt and as to the actual consideration given to or received by the bankrupt. Here, the value of the property that the bankrupt gave to Mr. Coones' corporation is simply the amount of money paid over the time period that is determined to be relevant. The trustee has opined that the value of the services provided by Mr. Coones over that same time period is zero.

31 Subsection 96 (2) provides further that "the values on which the court makes any finding under this section are, in the absence of evidence to the contrary, the values stated by the trustee."

32 I am dubious that the evidence provided by Mr. Coones, as bald, contradictory, and incredible as it was, amounts to any evidence to the contrary. As such, the statutory presumption could apply. However, without deciding the degree to which evidence must be believed to amount to some evidence to the contrary, I am prepared to view Mr. Coones' and Mr. Bressi's evidence as meeting that standard. As such, the statutory presumption falls away. In that case, in my view, the

burden is on the trustee to prove the values that it propounds under s. 96 (1). The trustee's counsel accepted this burden as he noted that it is open to the court to find a value for Mr. Coone's services that differs from the trustee's opinion.

33 In light of the credibility issues in this application, I raised with counsel the question of whether a trial of an issue is required. While the trustee's counsel was prepared to go to trial if necessary, neither counsel argued that a trial is required. Rule 11 of the *Bankruptcy and Insolvency General Rules* provides, "[s]ubject to these Rules, every application to the court must be made by motion unless the court orders otherwise". It is trite law that the *BIA* is a businessperson's statute. Its aim is particularly focused on efficiency and affordability.

34 Were this a motion for summary judgment in a civil case, I likely would find that I could not decide the case on the written record alone. However, I would feel very comfortable weighing the evidence and drawing inferences under Rule 20.04 (2.1) of the *Rules of Civil Procedure*.

35 In para 66 of *Hryniak v. Mauldin*, 2014 SCC 7 (S.C.C.), the Supreme Court of Canada discussed when a judge should make use of the powers to weigh evidence and draw inferences on a summary judgment motion as follows:

> If there appears to be a genuine issue requiring a trial, she should then determine if the need for a trial can be avoided by using the new powers under Rules 20.04(2.1) and (2.2). She may, at her discretion, use those powers, provided that their use is not against the interest of justice. Their use will not be against the interest of justice if they will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole.

36 At para. 59 of the *Hryniak* decision, the Court gave further guidance as to the nature of the inquiry to be undertaken by a judge to decide if she or he might resolve a matter summarily as follows:

> It is logical that, when the use of the new powers would enable a judge to fairly and justly adjudicate a claim, it will generally not be against the interest of justice to do so. What is fair and just turns on the nature of the issues, the nature and strength of the evidence and what is the proportional procedure.

37 I am not to be taken as finding that *Hryniak* applies to a decision by the court under s. 96 of the *BIA*. Rather, I am cognizant that Rule 11 of the *Bankruptcy and Insolvency General Rules* provides that while the general rule is that applications are to be brought as motions, the judge has discretion to order a trial where appropriate. In my view, *Hryniak* provides an analogous circumstance where the court is directed to consider whether the use of a summary process will yield a fair result that serves the goals of timeliness, affordability, and proportionality and is therefore in the interest of justice. The goals identified in *Hryniak* are equally the goals of the bankruptcy process.

38 In my view a trial is not required to determine the issues in this application. The parties' complete evidence is before the court. There is no indication that there is any further evidence to be presented by any of the parties were a trial to be held. I have not excluded any evidence despite the procedural issues raised by the timing of the delivery of affidavits by both sides. There have been thorough cross-examinations of the protagonists. The credibility issues for Mr. Coones are patent on the faces of his own affidavits and the transcripts in light of the clear changes in his testimony and the inability of any witness to provide evidence of what Mr. Coones actually did for the bankrupt.

39 In my view, in light of the narrow definition of the issue, the breadth and clarity of the evidence on credibility, and especially, proportionality given the relatively small amount of money in issue, I should decline to exercise the jurisdiction under Rule 11 to order a trial of an issue. A trial is not needed to illuminate the issues or to assess the credibility and reliability of Mr. Coones' testimony.

40 Mr. Coones argues that his services were worth enough to the bankrupt for it to agree to pay him and to continue to pay him until it ran out of money in January, 2015. However, the subjective view of the debtor is not the issue. Once a debtor is insolvent, in particular, the issue requires an objective comparison of value given for value received. It is significant that s. 96 (2) directs the court to consider the "actual consideration" given or received. The question is not

hypothetical or theoretical. The test is what was paid and what was actually given or done in return. In my view, through the testimony of Mr. Guyatt and Mr. Coones, the trustee proved its case on the balance of probabilities. Mr. Coones' had every opportunity in his multiple affidavits and cross-examinations to put forward a coherent set of facts to show what he actually did to provide value to the bankrupt, supported by documentation (as he undertook). It is clear that he did nothing of value for the bankrupt after becoming a consultant in May, 2012. If the consulting fees were intended as ongoing payments for prior services rendered, once again, apart from providing a meaningless list of business names, there is no credible basis to find that Mr. Coones provided services of enduring value to the bankrupt. Instead, Mr. Coones put forward a mass of conflicting evidence that changed each time the trustee answered his last version and yet always remained conclusory and essentially bald. There was no legal or persuasive burden on Mr. Coones or his corporation. However, in the absence of any credible evidence to the contrary, I find that the trustee has proven that Mr. Coones and his corporation provided no services of any actual value to the bankrupt from May, 2012. As such all payments to him from that date satisfy the definition of payments at an undervalue.

(b) Were the Bankrupt and Mr. Coones (and his Corporation) Dealing at Arm's Length

41 Mr. Coones looks to income tax law to define an "arm's length" relationship. He points out that under s. 4 (4) of the BIA, the question of whether persons who are not related to each other were operating at arm's length is a question of fact for the court. It is agreed that Messrs. Guyatt and Coones are not relatives.

42 In *McLarty v. R.*, 2008 SCC 26 (S.C.C.) (CanLII) the Supreme Court of Canada determined that all relevant factors must be considered to determine if parties operate at arm's length. While there is no one factor that predominates, the Court accepted that one should consider whether the parties were operating with a common mind. Did one control the other for example? Were they propounding or representing separate legal or economic interests? Again, the answers to these questions should take into account the entirety of the relationship.

43 In *Juhasz (Trustee of) v. Cordeiro*, 2015 ONSC 1781 (Ont. S.C.J.) (CanLII) Wilton-Siegel J. refined the issue for s. 96 of the *BIA* in particular. At para. 41 of the decision, Wilton-Siegel J. encapsulated the analysis as follows:

> Section 96 is directed at transfers by insolvent persons for a consideration that is materially or significantly less than the fair market value of the property. In this context, the concept of a non-arm's length relationship is one in which there is no incentive for the transferor to maximize the consideration for the property being transferred in negotiations with the transferee. It addresses situations in which the economic self-interest of the transferor is, or is likely to be, displaced by other non-economic considerations that result in the consideration for the transfer failing to reflect the fair market value of the transferred property.

44 I wholly agree with and adopt Mr. Justice Wilton-Siegel's approach.

45 I cannot find that the bankrupt controlled Mr. Coones or *vice versa*. Neither can I find that they operated with a common mind. Mr. Guyatt's explanation of the reason for paying Mr. Coones confirmed that the bankrupt did not approach the relationship with Mr. Coones to advance the bankrupt's self-interest in maximizing its value. The best he was willing to say was that he was operating on some notion of fairness that led him to pay Mr. Coones more than he was making himself. Mr. Coones' counsel submitted that this is not uncommon when a business is failing. Employees get paid before equity holders. That is generally true but only if the employees are necessary to generate revenue. If a business is failing, one expects it to cut costs that do not contribute to its ability to produce new revenue to survive. This is all hypothetical as there was no evidence on this point.

46 I do not know if Mr. Guyatt or Mr. Coones did a deal because they were friends or if something else was afoot. I do not believe that either Mr. Guyatt or Mr. Coones chose to favour the court with the details of their actual relationship. Apart from reliance on their friendship, the trustee's arguments to support the finding of a non-arm's length relationship essentially turn on the same facts that underlie the finding that the agreement between the parties was a transfer at undervalue. Among other things, the trustee relies on the lack of evidence that Mr. Coones actually did anything of

value; that he was paid more than Mr. Guyatt; and that payments continued while the bankrupt was already insolvent, to support a finding that they dealt on a non-arm's length basis.

47 The *BIA* allows for the possibility that transfers at undervalue can occur between parties who deal at arm's length. If a finding that parties are not at arm's length is be made based upon the same facts that supported the finding of a transfer at undervalue, there is a risk of depriving the concept of arm's length dealings of any independent content. The finding of a transfer at undervalue would answer both questions.

48 However, in this case, the finding of a transfer at undervalue is essentially an inference drawn from the surrounding facts. There was no valuation exercise as one might normally expect. Many of the same facts that led me to infer that there was no value provided by Mr. Coones or his corporation prevent me from concluding that the bankrupt entered into its agreement with the corporation while acting under normal commercial incentives. I do not think that I am creating a circularity by finding that some of the same facts can lead to two different inferences. Nor am I depriving the arm's length relationship issue of content. I am not finding that there was a non-arm's length relationship because the parties entered into a transfer at undervalue. Rather, with full focus on each question independently, looking at the totality of the evidence concerning the relationship, I cannot find that a company that agrees to pay someone more than it pays its owner, for doing nothing, and keeps paying that person until it is in the very last throes of a fatal insolvency was dealing with that person at arm's length. While the court does not know the full facts of the relationship between the bankrupt and Mr. Coones and never will, it is clear that there were other incentives at play that deprived their relationship of normal commercial imperatives like maximizing one's own value and even preserving one's own going concern. As such, I find that they were not dealing at arm's length.

49 On these findings alone, all payments made by the bankrupt to Mr. Coones' company for the one year prior to the date of the initial bankruptcy event, that is, from and after March 27, 2014, fall within s. 96 (1)(b)(i) of the *BIA*.

(c) Payments Made from November 18, 2013 to March 26, 2014.

50 As discussed at the outset, the trustee can look back for up to five years prior to the date of the initial bankruptcy event if it proves that the bankrupt was or became insolvent at the time that the transfers at undervalue were made and that the transfers were made with the intention to defraud, defeat, or delay a creditor.

51 The trustee does not seek to go back beyond November 18, 2013 as the earliest date that it asserts the bankrupt was insolvent as I have accepted above. That leaves the issue of the bankrupt's intention. In *Juhasz*, at para. 54 of his decision, Wilton-Siegel J. found that the section requires the trustee to prove that the prohibited intention was among the bankrupt's intentions. Section 96 does not require the trustee to prove that the bankrupt's only or even that its primary intention was to defraud, defeat, or delay its creditors. To that I would add that the section speaks to the intent to defraud, defeat, or delay "a creditor." It is not necessary for the trustee to prove that the bankrupt was engaged in a scheme to defeat its creditors generally or as a group.

52 Here it is clear and undisputed that after November 18, 2013, the bankrupt was engaged in an effort to defraud and delay HSBC from learning that the bankrupt was insolvent and borrowing from a different lender. The question then is whether the payments to Mr. Coones' corporation that were made while the bankrupt was actively trying to defraud and delay HSBC, can be said to have been made with the same intention.

53 The law recognizes that it is nearly impossible to prove another person's actual subjective intention. The trustee therefore relies on an analysis of the traditional "badges of fraud" that, at common law, can be accessed to establish a presumption of intention.

54 In *Purcaru v. Seliverstova*, 2016 ONCA 610 (Ont. C.A.) (CanLII), at para. 5, Miller J.A. wrote for the Court of Appeal:

> If a challenger raises evidence of one or more 'badges of fraud' that can give rise to an inference of an intent to defraud, the evidential burden then falls on those defending the transaction to adduce evidence showing the absence of fraudulent intent.

55 In *Montor Business Corp. (Trustee of) v. Goldfinger*, 2013 ONSC 6635 (Ont. S.C.J. [Commercial List]), Brown J.A. listed the following as among the badges of fraud that can be accessed for these purposes:

> i. The transfer was made to a non-arm's length person;
>
> ii. The transferor was insolvent at the time of the transfer; and
>
> iii. The consideration for the transfer was grossly inadequate.

56 The trustee relies on additional facts whose adequacy as badges of fraud are challenged by Mr. Coones. However, it does not need to go beyond the foregoing three badges of fraud which I have already found as facts above.

57 Upon the trustee proving that the payments made to Mr. Coones' corporation were accompanied by badges of fraud, the court will presume that the bankrupt intended to defraud, defeat, or delay a creditor unless the responding party proves that the bankrupt did not have such intent. Mr. Coones submitted that the payments were made in the ordinary course as part of his consulting agreement to which the bankrupt had agreed in April, 2012, some 18 months before it became insolvent. Would that there was evidence of *bona fide* value flowing from Mr. Coones or his company to the bankrupt even at April, 2012, this argument might have had more weight. Having already found that the bankrupt was not operating with a commercial mind in dealing with Mr. Coones, continuing such operations when insolvent cannot be said to be payments in the ordinary course that might in other circumstances be sufficient to rebut a presumption of fraudulent intent. While a solvent company may be entitled to make payments for non-commercial or uneconomic motivations, making those payments when insolvent, for no consideration, and while actively defrauding one's principal lender, cannot be seen to be acts in the ordinary course of business. The responding parties have not rebutted the presumption of fraudulent intent.

Outcome

58 As a result of the foregoing, the court orders 1219172 Ontario Inc. and its privy Brian Coones to pay to the estate of the bankrupt $159,330 under s. 96 (1) of the BIA.

59 The trustee may deliver up to five pages of costs submissions by March 17, 2017. The respondents may deliver up to five pages in response by March 31, 2017. Both shall include costs outlines no matter what position they take. Both may also include any relevant offers to settle. All documents shall be delivered in searchable PDF attachments to an email to my Assistant. No cases or statutory materials are to be provided. References to cases and statutory material, if any, shall be by hyperlink to CanLII or another online service embedded in the submissions.

Motion granted.

Footnotes

1 Under clause (e) of the definition of *Initial Bankruptcy Event* in s. 2 of the BIA, the receivership was "the application in respect of which a bankruptcy order is made" and a receivership is not an application of the type to which clause (d) of the definition apples.

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