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2015 ONSC 1781

Ontario Superior Court of Justice

Juhasz (Trustee of) v. Cordeiro

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

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

H. Wilton-Siegel J.

Heard: November 25, 2014

Judgment: March 18, 2015

Docket: CV-14-10692-00CL

Counsel: Michael Hackl for Applicant

Sean N. Zeitz for Respondent, Rui Cordeiro

Subject: Civil Practice and Procedure; Insolvency; Property

Related Abridgment Classifications

Bankruptcy and insolvency

[XI](#) Avoidance of transactions prior to bankruptcy

[XI.7](#) Fraudulent and illegal transactions

[XI.7.a](#) Reviewable transactions under Act

Civil practice and procedure

[XVIII](#) Summary judgment

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Civil practice and procedure

[XVIII](#) Summary judgment

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[XVIII.10.a](#) General principles

Headnote

Civil practice and procedure --- Summary judgment — General principles

Bankrupt and C purchased property and adjacent property as equal tenants in common with plans to renovate and resell them — In summer 2012, Canada Revenue Agency assessed bankrupt for \$2.7 million in unpaid income taxes — Bankrupt and C elected to concentrate on renovating adjacent property, which they sold in January 2013 for \$2 million — In March 2013, bankrupt transferred 50 per cent interest in property to C — Consideration reflected in deed of transfer was \$368,942, which represented one-half of amount outstanding under two mortgages on property — In 2014, bankrupt was adjudged bankrupt, and trustee was appointed executor of her estate — Trustee brought application for summary judgment seeking declaration that transfer of bankrupt's interest in property was transaction at undervalue, and therefore void — Reports submitted by parties concerning value of property at time of transfer were either outdated or flawed — Summary trial was ordered, limited to determination of value of property at date of transfer — Summary judgment application was appropriate apart from issue of value of property — While court was required to make certain findings of fact that were central to issues on application, parties sought determination rather than expense of trial, and had already made full disclosure and conducted extensive discoveries — That said, evidence from each party was insufficient to establish fair market value of property at date of transfer.

Civil practice and procedure --- Summary judgment — Evidence on application — General principles

Bankrupt and C purchased property and adjacent property as equal tenants in common with plans to renovate and resell them — In summer 2012, Canada Revenue Agency assessed bankrupt for \$2.7 million in unpaid income taxes — Bankrupt and C elected to concentrate on renovating adjacent property, which they sold in January 2013 for \$2 million — In March 2013, bankrupt transferred 50 per cent interest in property to C — Consideration reflected in deed of transfer was \$368,942, which represented one-half of amount outstanding under two mortgages on property — In 2014, bankrupt was adjudged bankrupt, and trustee was appointed executor of her estate — Trustee brought application for summary judgment seeking declaration that transfer of bankrupt's interest in property was transaction at undervalue, and therefore void — Reports submitted by parties concerning value of property at time of transfer were either outdated or flawed — Summary trial was ordered, limited to determination of value of property at date of transfer — Summary judgment application was appropriate apart from issue of value of property — While court was required to make certain findings of fact that were central to issues on application, parties sought determination rather than expense of trial, and had already made full disclosure and conducted extensive discoveries — That said, evidence from each party was insufficient to establish fair market value of property at date of transfer.

Bankruptcy and insolvency --- Avoidance of transactions prior to bankruptcy — Fraudulent and illegal transactions — Reviewable transactions under Act

Bankrupt and C purchased property and adjacent property as equal tenants in common with plans to renovate and resell them — In summer 2012, Canada Revenue Agency assessed bankrupt for \$2.7 million in unpaid income taxes — Bankrupt and C elected to concentrate on renovating adjacent property, which they sold in January 2013 for \$2 million — In March 2013, bankrupt transferred 50 per cent interest in property to C — Consideration reflected in deed of transfer was \$368,942, which represented one-half of amount outstanding under two mortgages on property — This consideration implied property value of \$737,885 — In 2014, bankrupt was adjudged bankrupt, and trustee was appointed executor of her estate — Trustee brought application for summary judgment seeking declaration that transfer of bankrupt's interest in property was void under s. 96 of Bankruptcy and Insolvency Act — Summary trial was ordered, limited to determination of value of property at date of transfer — Bankrupt and C were experienced business people who either believed or were wilfully blind to possibility that property had value in excess of amount reflected in transfer — Bankrupt and C were not acting at arm's length in respect of transfer given nature of their business relationship, absence of any economic interest of bankrupt, and evidence that bankrupt had accommodated C's wish not to have to deal with third party creditors through trustee — However, evidence from each party was insufficient to establish fair market value of property at time of transfer in order to determine whether transfer constituted transaction at undervalue.

Table of Authorities

Cases considered by *H. Wilton-Siegel J.*:

Hryniak v. Mauldin (2014), 2014 CarswellOnt 640, 2014 CarswellOnt 641, 2014 SCC 7, 95 E.T.R. (3d) 1, (sub nom. *Hryniak v. Mauldin*) [2014] 1 S.C.R. 87, 27 C.L.R. (4th) 1, 37 R.P.R. (5th) 1, 46 C.P.C. (7th) 217, 2014 CSC 7, (sub nom. *Hryniak v. Mauldin*) 314 O.A.C. 1, (sub nom. *Hryniak v. Mauldin*) 453 N.R. 51, 12 C.C.E.L. (4th) 1, (sub nom. *Hryniak v. Mauldin*) 366 D.L.R. (4th) 641, 21 B.L.R. (5th) 248 (S.C.C.) — followed
McLarty v. R. (2008), [2008] 4 C.T.C. 221, (sub nom. *McLarty v. Minister of National Revenue*) 374 N.R. 311, (sub nom. *Canada v. McLarty*) [2008] 2 S.C.R. 79, 46 B.L.R. (4th) 1, (sub nom. *McLarty v. Canada*) 293 D.L.R. (4th) 659, 2008 CarswellNat 1380, 2008 CarswellNat 1381, 2008 SCC 26, (sub nom. *R. v. McLarty*) 2008 D.T.C. 6366 (Fr.), (sub nom. *R. v. McLarty*) 2008 D.T.C. 6354 (Eng.) (S.C.C.) — followed

Statutes considered:

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

Generally — referred to

s. 2 "transfer at undervalue" — considered

s. 4(2)(a) — considered

s. 4(4) — considered

s. 4(5) — considered

s. 96 — considered

s. 96(1) — considered

s. 96(1)(a) — considered

s. 96(1)(a)(i) — considered

s. 96(1)(b) — considered

s. 96(1)(b)(i) — considered

s. 96(2) — considered

Rules considered:

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

R. 20 — considered

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

H. Wilton-Siegel J.:

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

Procedural Matter

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

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

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

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

Background

6 Cordeiro and Juhasz were business partners who acquired two properties for renovation, development and resale in 2010 and 2011, having had a business relationship for several years. Juhasz was a real estate agent who sourced the

properties and attended to the financial administration of the properties. Cordeiro was a contractor who was responsible for the work done on the properties.

The Property and the Adjacent Property

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

8 For a number of years, however, Juhasz had failed to report substantial business income for income tax purposes, which was derived from buying and selling real estate with Cordeiro. The Canada Revenue Agency ("CRA") advised Juhasz in the spring of 2011 that it was conducting an audit of her income. Subsequently, in 2012, the CRA assessed Juhasz for over \$2.7 million in unpaid income tax, interest and penalties.

9 In the summer of 2012, Juhasz advised Cordeiro that she was having financial difficulties. At that time, she proposed to transfer her interest in the Property to her two sons. For this purpose, Juhasz engaged an appraiser, Ian G. McLean ("McLean"), to conduct appraisals of the Property and the Adjacent Property. McLean provided a report dated August 10, 2012 (the "McLean Report"), which is described below.

10 While the McLean Report was being prepared, Cordeiro advised Juhasz that he was not agreeable to the transfer of Juhasz's interest in the Property to her sons as they were no more able to bear Juhasz's share of the renovation and financing expenses than Juhasz. He proposed that she could take over the project failing which he would do so. However, they took no further action with respect to the Property at that time. Instead, they concentrated on completing the renovations of the Adjacent Property.

11 In November 2012, Juhasz and Cordeiro listed the Adjacent Property for sale at \$2.3 million. In January 2013, they entered into an agreement to sell the Adjacent Property for \$2,025,000, which transaction closed on May 5, 2013.

12 On or about March 6, 2013, Juhasz and Cordeiro attended at the office of a lawyer and executed separate documentation authorizing and directing the lawyer to register a transfer of Juhasz's 50% interest in the Property to Cordeiro.

13 A deed of transfer transferring Juhasz's undivided 50% interest in the Property to Cordeiro was registered by the lawyer on March 6, 2014 (the "Transfer"). The consideration reflected in the deed of transfer was \$368,942.74, which it is agreed represents one-half of the amount outstanding at that time under two mortgages on the Property for which both Juhasz and Cordeiro were jointly and severally liable. Cordeiro and Juhasz say that Cordeiro assumed Juhasz's obligations in respect of these mortgages effective as of the Transfer. This alleged consideration implies a value of the Property of \$737,885.48

14 Cordeiro explains the six-month delay in effecting the Transfer after obtaining the McLean Report as reflecting their joint concentration on the completion of the renovations of the Adjacent Property and its re-sale, together with a lack of appreciation of the significance of delaying the Transfer.

15 Subsequently, Cordeiro renovated the Property after obtaining possession of the occupied units and a minor variance to legalize the basement unit. The renovations were commenced in April 2013. It is not clear whether the renovations have now been completed.

16 Cordeiro produced an unaudited statement reflecting renovation costs totalling \$508,261.71 plus related professional fees of \$7,784.58. However, he can only produce invoices for \$212,561.71 of the construction work, of

which approximately one-half represents his own invoice, without any supporting documentation, for the value that he estimates for his own work on the Property. He also says \$295,000 was paid to sub-contractors and trades in cash and there are therefore no invoices available to evidence these payments.

17 During his cross-examination in July 2014, Cordeiro testified that he had entered into an agreement for the sale of the Property for \$1.8 million. However, it appears this transaction did not close. While Cordeiro suggests that the transaction failed to complete as a result of the commencement of these proceedings, this explanation cannot be verified on the record before the Court.

The Bankruptcy Proceedings of Juhasz

18 Earlier, on January 23, 2013, the National Bank of Canada ("NBC") issued a statement of claim seeking payment of approximately \$49,000, being the amount owing under a line of credit that it had extended to Juhasz which went into default in August 2012. Juhasz was aware of the NBC action from mid-February 2013. The statement of claim was served on Juhasz during March 2013, apparently shortly after the Transfer. Juhasz filed a statement of defence in the NBC action in April 2013. NBC subsequently obtained summary judgment against Juhasz on October 1, 2013.

19 On February 27, 2014, NBC commenced an application for bankruptcy order against Juhasz. On April 1, 2014, Juhasz was adjudged bankrupt and the Trustee was appointed the executor of her estate.

Evidence Regarding the Value of the Property

20 The McLean Report appraised the Property and the Adjacent Property as of July 27, 2012. The McLean Report appraised the Adjacent Property on an "as is" basis at \$950,000, based primarily on a capitalization of income approach. The Adjacent Property was undergoing a total renovation and was unoccupied at the time of the appraisal. In reaching that conclusion, the McLean Report concluded that the value of the Adjacent Property on a completed basis was \$1,183,000, based on a capitalization of income approach.

21 The McLean Report appraised the Property at \$720,000, based on a direct comparison approach, for which McLean considered the Adjacent Property to be the best comparator. No renovations had been commenced on the Property, which was described as being in a state of disrepair, and was appraised as a shell. At that time, three units of the Property had been gutted by the previous owner and Juhasz and Cordeiro were seeking to evict a tenant from one of the two remaining units. To obtain a value for the Property, the McLean Report adjusted the value of the Adjacent Property downward to reflect vacant possession and a superior location of the Adjacent Property. The McLean Report also looked at the previous arm's length sale price of the Property, as increased by the average price increase of 10.67% in the greater Toronto area since the date of such sale.

22 In support of its position, the Trustee obtained a "consulting report" of Lebow Hicks Appraisal Inc. dated September 26, 2014 (the "Consulting Report"). The Consulting Report is expressly stated not to be an appraisal of the Property. The Consulting Report addressed only the estimated change in the value of the Property between November 5, 2010, when Juhasz and Cordeiro purchased the Property, and March 6, 2013, the date of the Transfer. The Consulting Report estimated the change in value based on two factors: (1) changes to typical rental income levels and expected capitalization rates during the relevant period; and (2) changes to the risk profile of the Property. The Consulting Report concluded that these factors yielded an increase in the value of the Property from \$670,000 to \$900,000 as of the date of the Transfer.

23 In a review report dated October 30, 2014 (the "Review Report"), McLean criticized the Consulting Report for its assumptions that the Property was an investment property and that the estimated change should therefore be derived based on a rental income model. The Review Report instead proceeded on the basis of the average increase in the price of single family dwellings over the relevant period as calculated according to two separate indices. When averaged, this price change yielded an increase in the value of the Property to \$790,935.

Applicable Law

24 This application seeks a declaration under s. 96 of the BIA which reads as follows:

(1) On application by the trustee, a court may declare that a transfer at undervalue is void as against, or, in Quebec, may not be set up against, the trustee — or order that a party to the transfer or any other person who is privy to the transfer, or all of those persons, pay to the estate the difference between the value of the consideration received by the debtor and the value of the consideration given by the debtor — if

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

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

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

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

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

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

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

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

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

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

25 For this purpose, the following provisions of s. 4 of the BIA address the requirements for establishing an arm's length relationship:

(2) For the purposes of this Act, persons are related to each other and are "related persons" if they are

(a) individuals connected by blood relationship, marriage, common-law partnership or adoption; ...

(4) It is a question of fact whether persons not related to one another were at a particular time dealing with each other at arm's length.

26 In addition, the following definition of "transfer at undervalue" in s. 2 of the BIA is relevant for present purposes:

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

Issues on the Application

27 It is not disputed that the initial bankruptcy event occurred on February 27, 2014, when NBC filed its application to petition Juhasz into bankruptcy, and that she was adjudged bankrupt on April 1, 2014. Accordingly, the Transfer,

which occurred on March 6, 2013, falls within the period contemplated by paragraphs 96(1)(a)(i) and 96(1)(b)(i), which runs from February 27, 2013 to April 1, 2014.

28 Cordeiro acknowledges, and in any event, it is clear that Juhasz was insolvent on March 6, 2013. Juhasz acknowledges that her liabilities to CRA alone amounted to over \$2.7 million at that date and that her liabilities exceeded her assets.

29 I propose therefore to consider the following remaining issues pertaining to the application of s. 96 to the Transfer in the following manner. First, I will address a preliminary issue — whether Juhasz and Cordeiro believed, or were willfully blind to the possibility, that the Property had a value in excess of the amount reflected in the Transfer. I will then address the following requirements of a claim under s. 96 of the BIA in order:

1. Were Juhasz and Cordeiro dealing at arm's length at the time of the Transfer?
2. Did Juhasz intend to defraud, defeat or delay a creditor in effecting the Transfer? and
3. Was the Transfer a "transfer at undervalue"?

Preliminary Determination

30 A central issue in this proceeding is whether Juhasz and Cordeiro considered that there was any equity in the Property i.e. any value over and above the outstanding amount under the mortgages against the Property totalling \$737,885.48 at the time of the Transfer. I find that they knew that there was a reasonable likelihood, or were willfully blind to the likelihood that, there was such value for the following reasons.

31 Juhasz and Cordeiro were experienced business people. As such, they would have been keenly aware of the value of the Property as renovated. In particular, they would have been aware that the implied value of the Property had increased substantially over the appraised value in the McLean Report as a result of the sale of the Adjacent Property. I note that McLean expressed the same opinion on his cross-examination.

32 The McLean Report appraised the Adjacent Property, which was in the course of renovation, at \$950,000 on an "as is" basis and at \$1,183,000 on a completed basis. It sold six months later for \$2,025,000. Even taking into consideration the remaining costs of the renovation, this sale transaction necessarily implied a substantially higher value for the Property both as a renovation property and in a completed state than would have been assumed in July 2012. Juhasz and Cordeiro would also have been aware that this increase in the value of the Adjacent Property over its appraised value was due to their ability to rent the renovated units at rates that exceeded the rental rates provided by Juhasz to McLean and assumed in the McLean Report.

33 In addition, as Juhasz was insolvent and therefore incapable of satisfying her one-half of the mortgage obligations, Cordeiro would have known that he would be fully liable for any deficiency in the value of the Property. He would not have assumed this additional risk unless he was satisfied that renovation of the Property was financeable and would result in a value that exceeded the aggregate of the mortgage financing and the renovation financing required to renovate the Property. Such a scenario implies that the value of the Property at the date of the Transfer at least equalled the outstanding amount under the mortgages.

34 However, Cordeiro would not have taken sole ownership of the Property by the Transfer if he did not also believe that there was a reasonable profit to be made from renovation of the Property. By definition, there must therefore have been sufficient value in the development potential, i.e. the right to renovate the Property, that Cordeiro was prepared to take an assignment of Juhasz's interest and spend his time renovating it. If he had believed there was no such value, or even negligible value, the opportunity would not have justified his time and the risk associated with any renovation in a potentially volatile market. His best course of action would have been to cut his losses by selling the Property with Juhasz, which he chose not to do.

35 While Juhasz did not take advantage of Cordeiro's offer to let her purchase his half-interest, the evidence indicates this was because she lacked the funds, not that she believed there was no development potential in the Property. Given her financial position, there would have been no reason to contemplate assigning the Property to her sons if she did not believe that she had any equity in the Property. In other words, the evidence suggests that Juhasz shared the same view of the value of the Property as Cordeiro.

36 Lastly, I am not persuaded that Cordeiro and Juhasz failed to obtain a new appraisal because they believed that the appraisal in the McLean Report remained valid. For the reasons stated above, they would have known that there was a real likelihood that the Property was worth more than McLean's appraisal of \$720,000. They could have updated the McLean Report. However, that would have delayed the Transfer at a time when the parties appear to have wanted to move quickly in response to NBC's actions in attempting to serve its statement of claim in its action against Juhasz. Critically, they did ask McLean to do an update but he wasn't able to do it "because of time restriction". Given the sale price of the Adjacent Property, I think they also knew that an updated appraisal would have increased the valuation and, therefore, among other things, the land transfer tax payable on the Transfer, which Cordeiro was to bear. Because these considerations are at least as likely explanations for their failure to obtain a new valuation, I do not think that the failure of Juhasz and Cordeiro to obtain an updated appraisal in March 2013 is evidence of an honest belief on their part that the value of the Property had not risen since July 2012.

37 In short, I conclude on the evidence that Juhasz and Cordeiro knew that there was a reasonable likelihood that, or were wilfully blind to the likelihood that, the value of the Property exceeded the amount of the consideration for the Transfer expressed in the deed of transfer. They chose not to obtain an updated appraisal from McLean because they considered that it was a higher priority to effect the Transfer. Accordingly, they were prepared to take the risk that the Transfer might be challenged at some time in the future in order to complete the Transfer as quickly as possible in view of the likelihood of bankruptcy proceedings involving Juhasz given the NBC action as well as the CRA reassessment.

Were the Parties at Arm's Length?

38 The Trustee concedes that Juhasz and Cordeiro are not "related" for purposes of the presumption of a non-arm's length relationship in s. 4(5) of the BIA. In particular, there is no evidence that Juhasz and Cordeiro were in a common-law partnership. Accordingly, s. 4(4) of the BIA governs the issue of whether the parties dealt at arm's length on the date of the Transfer. It is therefore a question of fact whether or not these parties were at arm's length at the time of the Transfer.

39 The Trustee submits that Juhasz and Cordeiro were not acting at arm's length based on a number of factors, including that they were effectively partners dealing with partnership property and that they used the same lawyer for the Transfer. The Trustee also says that the parties intended that Juhasz would continue to provide the financial administration for the Property while under renovation, although there is no evidence that she actually did so. Cordeiro submits that the mere existence of a business relationship is not sufficient to establish a non-arm's length relationship.

40 There is little guidance in the BIA regarding the factors to be considered in addressing whether, as a matter of fact, parties were or were not at arm's length at the date of a transfer of property. The Trustee suggests that the Court should have regard to certain criteria identified by Rothstein J. in *McLarty v. R.*, [2008] 2 S.C.R. 79 (S.C.C.) at para. 62 in the context of income tax legislation, as well as to statements in Income Tax Folio S1-F5-C1 (the "IT Folio"). The latter refers, in particular, to the "common mind" principle, in which parties act in concert in respect of a transaction of material interest, and the absence of separate economic interests in respect of parties acting in their separate interests. It also refers to a key factor being "whether there are separate economic interests which reflect ordinary commercial dealing between parties acting in their separate interests".

41 Section 96 is directed at transfers by insolvent persons for a consideration that is materially or significantly less than the fair market value of the property. In this context, the concept of a non-arm's length relationship is one in which there

is no incentive for the transferor to maximize the consideration for the property being transferred in negotiations with the transferee. It addresses situations in 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.

42 While I do not think that the existence of a partnership or joint venture relationship is sufficient on its own to establish a non-arm's length status, I consider that the absence of any economic interest of a transferor at the point of termination of a business relationship, together with evidence of accommodation of the wishes of the transferee, can support a finding that there was a non-arm's length relationship.

43 In the present circumstances, Juhasz accommodated Cordeiro's wish not to have to deal with third party creditors through a trustee in bankruptcy, i.e. to have a trustee in bankruptcy become his "partner" with respect to the Property. For her part, given the extent of her liabilities, any economic interest in the Property resided, in substance, with Juhasz's creditors. These circumstances appear to fall squarely within the circumstances envisaged in the IT Folio. Juhasz was in a position to accommodate Cordeiro's wishes with respect to the Property because she did not have a sufficient separate economic interest in the Transfer to engage in ordinary commercial dealings in the form of a negotiation with Cordeiro in which each party acted in his or her separate economic interest. Rather, the parties appear to have acted in concert to ensure control in Cordeiro's hands without separate economic interests coming into play.

44 I think the presence of these factors is sufficient, on a balance of probabilities, to establish that parties were not acting at arm's length in respect of the Transfer.

Did Juhasz Intend to Defraud, Defeat or Delay a Creditor?

45 Given the foregoing determination, it is not necessary to address whether Juhasz intended to defraud, defeat or delay a creditor as the circumstances in this proceeding are described by the provisions of paragraph (b) of s. 96(1) of the BIA. I have addressed this issue, however, in case I have erred in reaching the conclusion that Juhasz and Cordeiro were not dealing at arm's length.

46 The effect of the Transfer was to put any equity in Juhasz's interest in the Property beyond the reach of her creditors who, according to the record before the Court were primarily NBC and the CRA (disregarding a third creditor whose debt is secured against Juhasz's former residence but may not be fully secured). As such, the effect of the Transfer was clearly to defeat her creditors. The issue is whether Juhasz intended this effect.

47 The Trustee points to the following "badges of fraud" in the present circumstances: (1) Juhasz had few remaining assets after the Transfer; (2) Juhasz and Cordeiro were business partners; (3) Juhasz had significant liabilities and was being pursued by NBC which was trying to serve its statement of claim on her; (4) Juhasz knew she was insolvent at the time of the Transfer; (5) Juhasz and Cordeiro relied on an appraised value in the McLean Report, which they knew was outdated; (6) Juhasz received no consideration for the Transfer beyond Cordeiro's assumption of her share of the mortgage liabilities; and (7) Juhasz admitted subsequently transferring her residence into the name of her son in order to try to defeat her creditors.

48 The Trustee says that these considerations establish an intent to defeat Juhasz's creditors. Alternatively, the Trustee argues that such evidence raises a presumption of such intent that places the onus on Cordeiro to explain away the circumstantial evidence of fraudulent intent, which the Trustee argues Cordeiro has failed to do.

49 Cordeiro says that the evidence indicates that he and Juhasz intended to effect the Transfer properly rather than defeat Juhasz's creditors. He points to the use of the McLean Report appraisal of the Property, the declaration and payment of land transfer tax on the Transfer, the use of a lawyer, the presence of consideration for the Transfer, and the absence of any concealment. Cordeiro's explanation for the delay in effecting the Transfer from July 2012 to March 2013 has been set out above.

50 Juhasz denies any intention to defeat her creditors in effecting the Transfer. However there are a number of difficulties with Juhasz's credibility. First, Juhasz appears to have had an initial intention of "bankruptcy-proofing" her interest in the Property by transferring her interest to her sons. Second, Juhasz subsequently transferred her interest in her Clarksburg farm residence to her son for the same purpose. Third, Juhasz concealed substantial business income from the CRA, which ultimately resulted in a very large reassessment against her. In these circumstances, I do not think the Court can give any credence to Juhasz's expression of her intention in transferring the Property.

51 Juhasz originally intended to transfer her interest in the Property to her sons with a view to retaining her equity in the Property beyond the reach of her creditors. However, ultimately, Juhasz transferred her interest in the Property to Cordeiro who was not one of her creditors. In this regard, I acknowledge that Cordeiro could be regarded as a contingent creditor by virtue of their joint and several liability on the mortgages. However, it follows from their own position — that the consideration for the Transfer was the assumption of that liability — that the Property had a value at least equal to the amount secured by the mortgages and, therefore, that there was no significant possibility of a deficiency claim by Cordeiro against Juhasz in respect of such liability. While it is possible that there was an understanding between Juhasz and Cordeiro regarding an entitlement of Juhasz to a portion of any profits realized, there is no evidence of any such agreement before the Court. Accordingly, Juhasz's intention must be analyzed in the context of an absolute transfer of her interest to a third party. In this context, the following considerations are relevant.

52 First, Cordeiro testified that his reason for requiring a transfer was that he was concerned that a trustee in bankruptcy would not be prepared to finance Juhasz's share of the financing and renovation expenses of the Property. While his concern may have been well-founded, Cordeiro would have been able to acquire the Trustee's interest in the Property at fair market value. In any event, the issue for the Court is not Cordeiro's intention but Juhasz's intention.

53 Second, Juhasz's original intention was clearly to defeat her creditors by transferring her interest in the Property to her sons. For the reasons set out above, I have concluded that Juhasz believed there was a reasonable likelihood that, or was wilfully blind to the likelihood that, there was equity in the Property even taking into account the amount outstanding under the mortgages securing the Property. As mentioned, her intention to transfer her interest in the Property to her sons makes no sense unless she believed that there was equity in her interest in the Property. The issue becomes, therefore, whether her intention changed in agreeing to transfer her interest to Cordeiro.

54 Third, the relevant wording in s. 96 is to the effect that "the debtor intended to defraud, defeat or delay a creditor." Of significance, it is not that "the intention of the debtor was to defraud, defeat or delay a creditor." If it were the latter, I think an applicant would be required to establish that the principal intention of the debtor was to defeat his or her creditors. However, the wording of s. 96 does not require such a determination. Instead, I think it requires only that an applicant establish that one of the debtor's motives or intentions was to defraud, defeat or delay a creditor.

55 Fourth, it is probable that the timing of the Transfer was prompted by Juhasz's impending bankruptcy proceedings, given NBC's concurrent actions in issuing and attempting to serve the statement of claim in its action on top of the on-going audit of the CRA. In addition to the timing of the Transfer relative to these events, the perception of an urgent need to address the Transfer is also evidenced by the decision of Juhasz and Cordeiro to effect the Transfer without obtaining an updated appraisal from McLean, who apparently required more time than was acceptable to Juhasz and Cordeiro.

56 Fifth, Juhasz was well aware at the time of her Transfer that she was insolvent and that bankruptcy proceedings were likely, as she had very substantial liabilities and no assets. She had two principal creditors — NBC and the CRA, setting aside a third creditor who was at least partially secured against her residence. There is no evidence that she ever sought to reach an accommodation with these creditors by making available the assets that she had at her disposal or to make a proposal to her creditors generally using her remaining assets including the proceeds of sale of her interest in the Property. Instead, the proceeds of the sale of her interest in the Adjacent Property were applied to repay loans to family members. Subsequently, she also attempted to transfer her Clarksburg residence to her son. These factors suggest

a consistent course of action directed toward preventing her assets from being used to satisfy her obligations to the CRA and NBC, to the extent possible, in a bankruptcy proceeding or otherwise.

57 Sixth, it is important to note that there was no formal agreement between Cordeiro and Juhasz regarding the Property and, in particular, no obligation on the part of Juhasz to transfer her interest in the Property to Cordeiro if she became financially unable to bear her share of the renovation expenses. She was free to retain her interest in the Property for the benefit of her creditors.

58 Lastly, given the determination that Juhasz had knowledge that there was a reasonable likelihood that there was equity in her interest in the Property, she would also have been aware that any such value would be assigned to her trustee in bankruptcy in the eventual bankruptcy proceedings. She therefore had a choice between giving such equity to Cordeiro or retaining it for the benefit of all of her creditors in the bankruptcy. Alternatively, if she had intended to ensure that her creditors received the value of her interest in the Property, she could have ensured that result by basing the consideration for the Transfer on an updated appraisal from McLean. As mentioned, the reason for not doing so — a need for haste in view of NBC's actions — suggests that her priority was to complete the Transfer as quickly as possible rather than to effect a Transfer that preserved value for her creditors.

59 Given the foregoing, I think the Court can infer that one of Juhasz's intentions in agreeing to the Transfer was to defeat her principal creditors. She chose to transfer the equity in the Property to Cordeiro rather than retain it for the benefit of all creditors in the bankruptcy proceedings that she knew were inevitable. She also chose not to establish a current fair market value for the Property, and therefore for her interest in the Property, in order to have proceeds to pay her principal creditors. In short, the evidence indicates that Juhasz decided that, to the extent there was any equity in the Property, she preferred to have Cordeiro take the benefit of that equity by virtue of their business partnership rather than to have that equity remain available for her creditors.

Was the Transfer a "transfer at undervalue"?

60 Based on the foregoing determinations, the Trustee has satisfied the requirements of both paragraphs 96(1)(a) and 96(1)(b). Accordingly, the issue arises as to whether the Transfer was a "transfer at undervalue"? For this purpose, it is necessary to address both: (1) the difference between the value of the consideration received by Juhasz and the value of the consideration given by her on the Transfer; and (2) whether the difference in (1) qualifies the Transfer as a "transaction at undervalue". I will address each issue in turn.

The Difference Between the Value of the Consideration Received by Juhasz and the Value of the Consideration Given by Juhasz on the Transfer

61 Section 96 requires a determination by the Court of the difference between the value of the consideration received by Juhasz and the value of the consideration given by her. In this case, the two are intimately related.

62 The Trustee submits that the value of the consideration given by Cordeiro was nil, given Juhasz's insolvency and the amount of her liabilities. The Trustee also bases his submission on the fact that the parties were jointly and severally liable on the mortgages secured against the Property, that the mortgagees did not release Juhasz from her liability, and that Cordeiro did not execute an assumption agreement in favour of Juhasz.

63 Cordeiro argues that the Property remained charged in favour of the mortgagees who were entitled to be satisfied out of the proceeds of sale of the Property. He also says that, notwithstanding the absence of an executed assumption agreement, he agreed to exchange his right of contribution and indemnity against Juhasz for a transfer to him of her interest in the Property.

64 The evidence demonstrates that, even if there was no formal assumption agreement executed by Cordeiro in favour of Juhasz, both of these parties proceeded on the basis that Cordeiro assumed Juhasz's obligation regarding the mortgages on the Transfer. Cordeiro serviced the mortgages after the Transfer until the date of discharge and has paid all

other Property-related expenses since the date of the Transfer. In particular, he has paid all of the renovation expenses. He has also discharged the two mortgages on the Property at the time of the Transfer in favour of alternate financing for which he is solely liable.

65 In analyzing this issue, I accept that, as an unsecured claim, the value of Cordeiro's right of contribution and indemnity was effectively nil, given Juhasz's insolvency and the amount of her liabilities. As such, it is arguable that Cordeiro gave nil consideration for Juhasz's interest in the Property. On the other hand, the determination of the Court regarding the value of the Property weighs in favour of Cordeiro's position that he provided consideration in an amount equal to one-half of the outstanding mortgage obligations at the date of the Transfer.

66 In this case, the issues of the value received by Juhasz and the value given by Juhasz cannot be separated in the manner suggested by the Trustee. Put another way, there must be consistent treatment of Juhasz's share of the mortgage liabilities. Accordingly, the issues of value can be addressed in one of two ways with equal merit: (1) on the basis that Cordeiro gave no consideration and Juhasz assigned her equity in the Property; or (2) on the basis that Cordeiro gave consideration equal to the share of Juhasz's mortgage obligations assumed on the Transfer and Juhasz assigned her gross interest in the Property without taking into consideration her share of the mortgage liabilities.

67 Although the result is the same in either case, I think the second approach is the analytically correct approach, given the determination that the value of the Property exceeded the outstanding mortgage liabilities on the date of the Transfer. On that basis, Juhasz and Cordeiro were each effectively severally liable in respect of 50% of the mortgage liabilities, as each would be entitled to recover any amount paid in excess of such amount by way of a subrogation claim against the other's interest in the Property. Accordingly, the Transfer should be analyzed as a two-part transaction: (1) the assumption by Cordeiro of Juhasz's mortgage liabilities totaling \$368,942.74; and (2) immediately thereafter, a transfer by Juhasz of her interest in the Property at its gross value, that is without any related mortgage liabilities, on the basis that such liabilities were effectively discharged by Cordeiro's agreement to assume them.

Was the Transfer a "Transaction At Undervalue"?

68 As set out above, as applied to the present circumstances, a "transfer at undervalue" means a disposition of property for which the consideration received by the debtor is conspicuously less than the fair market value of the consideration given by the debtor. In the present circumstances, based on the analysis in the preceding section, the consideration received by Juhasz has been established to be \$368,942.74. The consideration given by Juhasz is the value of her 50% undivided interest in the Property. Accordingly, the critical question for determining whether the Transfer was a "transaction at undervalue" is the value of the Property at the date of the Transfer.

69 Pursuant to s. 96(2), in making this application, the Trustee is required to state the Trustee's opinion of the fair market value of the Property at the date of the Transfer. The Trustee originally valued the Property at \$1.8 million based on Cordeiro's testimony on cross-examination that he had entered into an agreement for the sale of the Property at that price and his failure to produce evidence of renovation expenses. Clearly, however, extensive renovation of the Property had to have occurred to achieve a sale price of \$1.8 million. As a result of the materials provided by Cordeiro in his responding motion record described above, the Trustee took the position at the hearing that the value of the Property was \$1.4-\$1.5 million. This would imply a value for Juhasz's 50% interest in the Property of \$700 - \$750,000.

70 Cordeiro argues that the Trustee had the onus of proving its estimate of the value of the Property at the date of the Transfer. He says that the Trustee has failed to satisfy this onus and, on this basis, the Court should find the value of the Property to be the amount of the outstanding mortgages. I do not agree that s. 96(2) imposes an onus of proof on the Trustee. Instead, the purpose of s.96(2) is, absent evidence to the contrary, to make a trustee's opinion of value available to a court for purposes of a proceeding under that provision. However, in the present circumstances, I think the evidence from each party is insufficient to establish the value of the Property at the time of the Transfer.

71 Cordeiro relies on the McLean Report. However, it is clearly outdated given the sale price of the Adjacent Property in January 2013. McLean testified in his cross-examination that the sale price of the Adjacent Property would have had a significant impact on the value of the Property even as a shell building.

72 On the other hand, the Trustee's current proposed fair market value of \$1.4-1.5 million is derived by the deduction of estimated renovation costs from a contract selling price of \$1.8 million. This is not a viable method of determining the fair market value of an unrenovated rental property insofar as it totally excludes any consideration of development risks and corresponding profit.

73 Further, the Consulting Report does not provide a basis for a determination of value by the Court. The Trustee did not rely on the Consulting Report in making its submissions at the hearing of this application. In any event, the Consulting Report was not an appraisal of the fair market value of the Property at the date of the Transfer. The Review Report similarly does not address the fair market value of the Property. It is also suspect insofar as it proposes a methodology based on the average increase in single-family residential dwellings, which the Property is not.

74 Although it appears likely that the value of the Property at the date of the Transfer exceeded the value of the outstanding mortgages secured against the Property, the Court is not in a position to make a determination as to the fair market value of the Property at such date based on the evidence before it. It therefore cannot determine by how much the consideration that Juhasz gave on the Transfer exceeded the consideration received by her. It is therefore also not possible on the evidence before it for the Court to determine whether the Transfer constituted a "transaction at undervalue". These are also not issues which the Court can resolve on the basis of an onus of proof.

75 In these circumstances, I think that the philosophy in *Hryniak* requires that the Court order a trial of the issue of the value of the Property at the date of the Transfer.

76 Accordingly, it is ordered that a summary trial be conducted limited to a determination of the value of the Property at the date of the Transfer. After the Court has made such determination, the Court would be in a position to address the issue of whether the Transfer constituted a "transfer at undervalue" and the appropriate remedy, if any, in favour of the Trustee.

Summary trial ordered, limited to determination of value of property at date of transfer.