

8 In *Re C.I.B.C. and Ash* (1964), 7 C.B.R. (N.S.) 154, 47 D.L.R. (2d) 620 (B.C.S.C.), Aikins J. (as he then was) had before him an application by the bank to set aside a conveyance from a husband to a wife of certain real property. The application was, as this one is, brought under s. 7 of the Fraudulent Preferences Act, R.S.B.C. 1960, c. 156. In that case the learned judge in dealing with s. 3 said this at p. 622:

It seems to me apparent that under s. 3(1) of the *Fraudulent Preferences Act*, the Bank, in order to be entitled to succeed, must prove: first, the gift by way of conveyance; secondly, either, that at the time of the gift the donor was in insolvent circumstances, or that the donor was unable to pay his debts in full, or that the donor knew that he was on the eve of insolvency; and, thirdly, that the donor made the gift with intent to defeat, hinder, delay or prejudice his creditors or any one or more of them.

(The latter requirement is not necessarily here since s. 4, the presumption operates.)

9 A number of authorities were cited relative to the meaning to be attached to the words in "insolvent circumstances" or "unable to pay his debts in full". These authorities hold that there is no real distinction between "being in insolvent circumstances" and in being "unable to pay his debts in full".

10 It comes down to being unable to pay debts in the ordinary course of business assuming liquidation of property or assets at forced sale, or at a sale when the seller cannot await his opportunities but must sell.

11 In the present case, the applicant has shown no more than that Huber was indebted to the applicant and Camco at the relevant time. As to the applicant's debt, given the lawsuit then pending, it could well be said that the facts are equally consistent with an unwillingness to pay as with inability to do so. That being the case, insolvency is not established: see *Clarke v. Sutherland*, [1917] 3 W.W.R. 624, 13 Alta. L.R. 132, 37 D.L.R. 368 (C.A.).

12 In my opinion, the applicant has not established that Huber was in insolvent circumstances and therefore is not entitled to succeed. The respondent Camco will have its costs of this application.

Application dismissed.

Tab 16

1993 CarswellAlta 338
Alberta Court of Queen's Bench

Alberta (Attorney General) v. Samuel Doz Professional Corp.

1993 CarswellAlta 338, [1993] 6 W.W.R. 260, [1993] A.W.L.D. 405, [1993] A.J. No.
257, 139 A.R. 198, 31 R.P.R. (2d) 161, 39 A.C.W.S. (3d) 803, 9 Alta. L.R. (3d) 201

ALBERTA ATTORNEY GENERAL v. SAMUEL DOZ PROFESSIONAL CORPORATION and EILEEN CRANE PROFESSIONAL CORPORATION

Ritter J.

Judgment: April 13, 1993
Docket: Docs. Edmonton 8903-14537, 8903-12435

Proceedings: reversed *Alberta (Attorney General) v. Samuel Doz Professional Corp.* ((1992)), 1992 CarswellAlta 375, 29 R.P.R. (2d) 95, 136 A.R. 376 ((Alta. Master))

Counsel: *K.A. Rowan*, for plaintiff.
Samuel Doz and *Eileen Crane* for themselves.

Subject: Property; Contracts; Corporate and Commercial; Insolvency; Torts

Headnote

Contracts --- Parties to contract — Privity — General

Contracts --- Construction and interpretation — Words and phrases — General

Fraud and Misrepresentation --- Fraudulent preferences — Determining insolvency

Fraud and Misrepresentation --- Fraudulent preferences — Intention to prefer

Landlord and Tenant --- Nature and elements of lease — General

Landlord and Tenant --- Nature and elements of lease — Covenants — Miscellaneous covenants

Mortgages --- Priorities — Between types of creditors — Mortgagee and lessee

Fraudulent conveyances and preferences — Elements — Lease of commercial premises between related law practices set aside as fraudulent conveyance prejudicing mortgagees — Principal of lessor facing 30-month jail term at time of lease and being heavily in debt to Revenue Canada — Premises worth \$200,000 being leased for \$100 per month for up to 15 years — Insolvency and intent to prejudice creditors established — Subordination clause in lease also enforceable by mortgagee pursuant to British Real Property Act, 1845, s. 5 and Land Titles Act, R.S.A. 1980, s. 113(1) and Sched. B, para. 5.

Fraudulent conveyances and preferences — Legislation — Application — Lease of commercial premises between related law practices set aside as fraudulent conveyance prejudicing mortgagees — Principal of lessor facing 30-month jail term at time of lease and being heavily in debt to Revenue Canada — Premises worth \$200,000 being leased for \$100 per month for up to 15 years — Insolvency and intent to prejudice creditors established — Subordination clause in lease also enforceable by mortgagee pursuant to British Real Property Act, 1845, s. 5 and Land Titles Act, R.S.A. 1980, s. 113(1) and Sched. B, para. 5.

Contracts — Parties — Privity — Lease of commercial premises between related law practices set aside as fraudulent conveyance prejudicing mortgagees — Principal of lessor facing 30-month jail term at time of lease and being heavily in debt to Revenue Canada — Premises worth \$200,000 being leased for \$100 per month for up to 15 years — Insolvency and intent to prejudice creditors established — Subordination clause in lease also enforceable by mortgagee pursuant to British Real Property Act, 1845, s. 5 and Land Titles Act, R.S.A. 1980, s. 113(1) and Sched. B, para. 5.

Landlord and tenant — Leases and tenancy agreements — Parties — Lease of commercial premises between related law practices set aside as fraudulent conveyance prejudicing mortgagees — Principal of lessor facing 30-month jail term

at time of lease and being heavily in debt to Revenue Canada — Premises worth \$200,000 being leased for \$100 per month for up to 15 years — Insolvency and intent to prejudice creditors established — Subordination clause in lease also enforceable by mortgagee pursuant to British Real Property Act, 1845, s. 5 and Land Titles Act, R.S.A. 1980, s. 113(1) and Sched. B, para. 5.

Landlord and tenant — Termination of tenancies — Termination under lease — Lease of commercial premises between related law practices set aside as fraudulent conveyance prejudicing mortgagees — Principal of lessor facing 30-month jail term at time of lease and being heavily in debt to Revenue Canada — Premises worth \$200,000 being leased for \$100 per month for up to 15 years — Insolvency and intent to prejudice creditors established — Subordination clause in lease also enforceable by mortgagee pursuant to British Real Property Act, 1845, s. 5 and Land Titles Act, R.S.A. 1980, s. 113(1) and Sched. B, para. 5.

Mortgages Mortgage contracts — Interpretation — Lease of commercial premises between related law practices set aside as fraudulent conveyance prejudicing mortgagees — Principal of lessor facing 30-month jail term at time of lease and being heavily in debt to Revenue Canada — Premises worth \$200,000 being leased for \$100 per month for up to 15 years — Insolvency and intent to prejudice creditors established — Subordination clause in lease also enforceable by mortgagee pursuant to British Real Property Act, 1845, s. 5 and Land Titles Act, R.S.A. 1980, s. 113(1) and Sched. B, para. 5.

Mortgages — Priorities — Subordination — Lease of commercial premises between related law practices set aside as fraudulent conveyance prejudicing mortgagees — Principal of lessor facing 30-month jail term at time of lease and being heavily in debt to Revenue Canada — Premises worth \$200,000 being leased for \$100 per month for up to 15 years — Insolvency and intent to prejudice creditors established — Subordination clause in lease also enforceable by mortgagee pursuant to British Real Property Act, 1845, s. 5 and Land Titles Act, R.S.A. 1980, s. 113(1) and Sched. B, para. 5.

Real property — Legislation — Application — Lease of commercial premises between related law practices set aside as fraudulent conveyance prejudicing mortgagees — Principal of lessor facing 30-month jail term at time of lease and being heavily in debt to Revenue Canada — Premises worth \$200,000 being leased for \$100 per month for up to 15 years — Insolvency and intent to prejudice creditors established — Subordination clause in lease also enforceable by mortgagee pursuant to British Real Property Act, 1845, s. 5 and Land Titles Act, R.S.A. 1980, s. 113(1) and Sched. B, para. 5.

Shortly after being disbarred and while facing a 30-month jail term, the principal of the defendant professional corporation leased premises owned by the professional corporation to the defendant lessee. The lessee was also a professional corporation, whose principal had practised law with the lessor's principal. The lease provided that the lessee pay \$100 per month triple net for the premises, which consisted of a condominium valued at \$200,000. The lease was for a term of five years and was renewable for an additional two terms of five years. It contained a subordination clause stating that the lease was subordinate to all mortgages then or thereafter coming into existence and that the subordination clause was "self-operative". When the lease was entered into the lessor owed Revenue Canada \$164,000 and also was in debt to the plaintiff. The lessor's financial statements from that time indicated it had a value of \$500,000, \$100,000 of which was a debt owing to it by its principal. Revenue Canada and the plaintiff took mortgages on the leased premises from the lessor. The plaintiff's mortgage contained a "further assurances" clause. No payments had been made on the mortgages in the nine years they had been in existence. The mortgagees sued to enforce their mortgages. The court directed a trial of the issues of whether the lease was valid and, if it were, whether the subordination clause permitted the plaintiff to take possession of the premises before the expiration of the lease, should the plaintiff take title to the leased premises. A Master determined that the lease was valid and that the plaintiff could not take possession before the expiration of the lease. The plaintiff appealed.

Held:

Appeal allowed.

The lease was void as against the plaintiff as it breached s. 1 of the *Fraudulent Preferences Act* and was not saved by s. 6 of that Act. Under s. 1 a transfer by an insolvent person made with intent to defeat, hinder, delay, or prejudice his or her creditors is void against any creditor who suffers prejudice. Section 6 saves such a transfer if it is made bona fide for fair and reasonable consideration.

The person attacking a conveyance must establish a prima facie case that the transferor was either insolvent, unable to pay its debts in full or was on the eve of insolvency at the time of making the conveyance. Given the debt of \$164,000 to Revenue Canada, the lessor's principal's impending incarceration, and the fact no payments had been made in some

nine years, the lessor was unable to pay its debts. Those three factors also reflected on the lessor's intent. In addition, the conveyance was between related parties, was very general and accomplished quickly, and the consideration was grossly inadequate. The lease generated merely \$100 per month or a real return of .6 per cent relative to the value of the property. That was unreasonable. The urgency of winding up the lessor's practice did not justify a 15-year lease at a low rent. The lease would hinder both mortgagees if they foreclosed and obtained title as the value of commercial property is directly affected by the rate of return from it. Consequently, intent to cause prejudice was established, and given the inadequacy of the consideration, the transaction could not be saved by s. 6 of the Act. In addition, the transaction was void under the *Statute of Elizabeth* for essentially the same reasons.

The subordination clause also operated in the plaintiff's favour. There is no such thing as a self-operative contractual clause because for contractual clauses to become operative someone has to enforce them. Under the general rule of privity of contract only the parties can enforce the contract and neither party here wanted to enforce the subordination clause to give the plaintiff's mortgage precedence. Exceptions to the rule exist, but none applied here. The lessor was not a trustee with respect to enforcement of the subordination clause. A trust is not created if the parties to the contract can change the terms without reference to the alleged cestui que trust; and the lessor and lessee could amend the lease without the plaintiff's consent. Furthermore, the subordination clause was not a covenant that ran with the land capable of enforcement by the plaintiff. However, s. 5 of the British *Real Property Act*, 1845, is in force in Alberta and allowed the plaintiff to enforce the subordination clause. That section enables a third party beneficiary of a clause in a lease to enforce that clause.

Finally, s. 113(1) and para. 5 of Sched. B to the *Land Titles Act* also applied to allow the plaintiff to enforce the subordination clause. The plaintiff's mortgage required the lessor to "execute such further assurances of the land as may be requisite." Section 113(1) of the Act provides that those words in fact stand for the much broader wording contained in col. 2 of para. 5 of Sched. B. Under the broader wording of the schedule, the plaintiff could compel the lessor to enforce the subordination clause against the defendant lessee.

Table of Authorities**Cases considered:**

Barnett, Re (1983), 46 C.B.R. (N.S.) 211, 43 A.R. 215 (Q.B.) — considered

Canada Trust Co. v. Queensland Management Services Ltd. (1980), 13 R.P.R. 156 (Ont. H.C.) — considered

Greenwood Shopping Plaza Ltd. v. Beattie, [1980] 2 S.C.R. 228, 10 B.L.R. 234, 111 D.L.R. (3d) 257, 39 N.S.R. (2d) 119, 71 A.P.R. 119, [1980] I.L.R. 1-1243, 32 N.R. 163 — considered

Statutes considered:

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

s. 69 *referred to*

Fraudulent Conveyances Act, 1571 (U.K.), 13 Eliz. 1, c. 5

s. 5(1) *considered*

Fraudulent Preferences Act, R.S.A. 1980, c. F-18

s. 1 *considered*

s. 6 *considered*

Land Titles Act, R.S.A. 1980, c. L-5

s. 113 *considered*

Sched. B, para. 5 *considered*

Law of Property Act, 1925 (U.K.), 15 & 16 Geo. 5, c. 20 *referred to*

Legal Profession Act, R.S.A. 1980, c. L-9 — *referred to*

Real Property Act, 1845 (U.K.), 8 & 9 Vict., c. 106

s. 5*considered*

Words and phrases considered:

SELF-OPERATIVE

A provision in the lease that a subordination clause is "self-operative" does not in itself have the effect of subordinating the lease to a mortgage. There is no such thing as a self-operative contractual clause. In order for contracts to become operative, someone has to enforce them. Subject to certain exceptions, the rule of privity states that only parties to a contract can enforce it.

Appeal from Master's decision (1992), 29 R.P.R. (2d) 95, holding lease not to be fraudulent preference and subordination clause in lease not enforceable by mortgagee.

Ritter J.:

I. Introduction

1 This application comes before me as a hearing de novo of the order of Master Breitkreuz whose Reasons for Decision were filed on the 15th of December, 1992 [29 R.P.R. (2d) 95]. The order was granted pursuant to a direction contained in the order of Miller A.C.J.Q.B. (as he then was) of March 6, 1992. That direction is as follows:

1. That the application of Eileen Crane Professional Corporation scheduled to be heard before the presiding Master in Chambers on March 20, 1992 and adjourned by consent to March 24, 1992 shall be directed initially to determine the following issues:

i) is the agreement entered into between Eileen Crane Professional Corporation and Samuel Doz Professional Corporation on January 1, 1984 a valid lease; and

ii) if the lease is determined to be valid and subsisting does clause 5 of that lease, permit the plaintiff to take possession of the premises prior to the expiration of the term thereof, should the plaintiff obtain title to the lands and premises.

2 The context of the order of Miller A.C.J.Q.B. (as he then was) was that it stemmed from an application by Eileen Crane Professional Corporation, to have the statement of claim issued by the Attorney General for Canada, as it related to Eileen Crane Professional Corporation, struck out. The purpose of the application before the Master in accordance with the direction of Miller A.C.J.Q.B. was based on the apparent view of the parties that if the lease was determined to be a valid and subsisting lease then it was appropriate that Eileen Crane not be a party to the action in question. It is within this context that I am basing my decision, and I note, that having regard to the results of my decision, neither Eileen Crane Professional Corporation nor Samuel Doz Professional Corporation are precluded from adducing additional evidence over and above what was before me to the Court that ultimately hears this matter.

3 The learned Master in his decision answered the first question "yes" and the second question "no". I have come to the opposite conclusion.

4 The matters argued include:

5 1. The *Fraudulent Preferences Act*, R.S.A. 1980, c. F-18;

6 2. The *Statute of Elizabeth*;

7 3. The effect of para. 5 of the lease entered into between the Respondents on the 1st of January, 1984;

8 4. Privity of contract and the application of agency and trust exceptions to the general rule;

9 5. The *Real Property Act* of 1845;

10 6. Section 113 and para. 5 of Sched. B to the *Land Titles Act*, R.S.A. 1980, c. L-5.

11 In arriving at my decision I have completed the following analysis.

II. Facts

12 On December 23, 1983 Samuel Doz was informed by the Law Society of Alberta that he was to cease the practice of law immediately. Pursuant to a Court order, made under the provisions of the *Legal Profession Act*, R.S.A. 1980, c. L-9, Eileen Crane was appointed custodian of the law practice of Samuel Doz.

13 On January 1, 1984, Samuel Doz Professional Corporation leased to Eileen Crane Professional Corporation condominium premises it owned, together with books, desks and other law practice accessories. The term of the lease was five years, renewable for two further five-year terms. The monthly rent was set at \$100 per month. The lease was registered against the titles of Samuel Doz Professional Corporation by Eileen Crane Professional Corporation on the 8th of February, 1984.

14 At this time Samuel Doz Professional Corporation was indebted to Revenue Canada for in excess of \$164,000. Samuel Doz Professional Corporation granted a mortgage to Revenue Canada on the 4th of April, 1984 in the sum of \$160,959.49. On the 19th of March, 1986 the initial mortgage given by Samuel Doz Professional Corporation was replaced with a new mortgage, this time in the principal amount of \$195,040.49. The initial mortgage granted by Samuel Doz Professional Corporation to Revenue Canada was then discharged.

15 Eileen Crane Professional Corporation has elected to renew her lease, and one can assume, will continue with this process until the full 15-year term expires.

III. Fraudulent Preferences Act

16 The Appellant relies on the provisions of s. 1 of the *Fraudulent Preferences Act* which states:

1 Subject to sections 6 to 9, every gift, conveyance, assignment, transfer, delivery over or payment of goods, chattels or effects or of bills, bonds, notes or securities or of shares, dividends, premiums or bonus in any bank, company or corporation, or of any other property, real or personal, made

(a) by a person at a time when he is in insolvent circumstances or is unable to pay his debts in full or knows that he is on the eve of insolvency, and

(b) with intent to defeat, hinder, delay or prejudice his creditors or any one or more of them,

is void as against any creditor or creditors injured, delayed or prejudiced.

17 In response to the Appellant's position that the lease was a fraudulent conveyance within the meaning of this section, the Respondents argue that:

18 1. Rent of \$100 per month is consideration, and in matters of contract, adequacy of consideration is irrelevant;

19 2. The consideration of \$100 is only part of the picture as there are other obligations to be performed by the lessee;

20 3. There were surrounding circumstances, including urgency, that should be considered.

21 The answer to the first position taken by the Respondents is found in s. 6 of the *Fraudulent Preferences Act* which states:

6 Nothing in sections 1 to 5 applies to

(a) a bona fide sale or payment made in the ordinary course of trade or calling to innocent purchasers or parties, or

(b) a payment of money to a creditor, or a bona fide conveyance, assignment, transfer or delivery over of any goods, securities or property, of any kind as above mentioned, that is made in consideration of a present actual bona fide sale or delivery of goods or other property or of a present actual bona fide payment in money, or by way of security for a present actual bona fide advance of money,

if the money paid or the goods or other property sold or delivered bear a *fair and reasonable relative value* to the consideration therefor. (emphasis added)

22 This section makes adequacy of consideration relevant to an application under the *Fraudulent Preferences Act*.

23 If the assumption is made that s. 1 has been breached, s. 6 could have the effect of saving the Respondents from reversal of the conveyance but only if the conveyance was made bona fide and if the consideration bears a fair and reasonable relative value to the property being conveyed. My findings with respect to the question of reasonable and relative value will become clear during the course of these reasons.

24 With respect to the second objection, the learned Master based his decision on an assumed value of \$200,000. There was no objection to that value by any of the parties before me and consequently I am to determine whether monthly rental of \$100 coupled with an obligation to pay triple net costs by the lessee, bears a fair and reasonable return relative to a \$200,000 property.

25 There is no evidence before me of what a reasonable return is, but I am prepared to take judicial notice that \$100 per month rent on a \$200,000 property is not a fair and reasonable return. I say this whether or not there are triple net costs associated with the property being leased, as such costs are relatively standard in relation to commercial property. I find a real return of .6 percent not to be reasonable now, and given interest rate histories, to have been even less reasonable in January of 1984.

26 The third argument advanced by the Respondents was to the effect that there were circumstances surrounding the lease which were of great urgency and that these circumstances created an intangible that elevates the true rental being paid. The Respondent, Doz, advances the position that to truly appreciate this argument, viva voce evidence should be heard, as there are gaps in what is before the Court.

27 This proposition might have some validity except for the fact that the lease has an effective life of 15 years at a rental that I consider to be inadequate. I cannot imagine any evidence which could explain, on the basis of immediately urgent circumstances, the granting of an effective term of 15 years.

28 Section 1 of the *Fraudulent Preferences Act* states that a conveyance is void only if the person making the conveyance does so at a time when he is in insolvent circumstances or is unable to pay his debts in full or knows that he is on the eve of insolvency. The relevant time is the time of the conveyance. It is therefore incumbent upon the Appellant to show that the Respondent, Samuel Doz Professional Corporation, was either insolvent, unable to pay its debts in full or was on the eve of insolvency. The Appellant need not establish all three of these elements or any combination of them but must set forth a prima facie case of at least one.

29 The proof advanced by the Appellant includes:

30 1. At the time of the imputed conveyance the Defendant, Samuel Doz Professional Corporation, owed Revenue Canada in excess of \$160,000. The financial statement for Samuel Doz Professional Corporation for 1984, included in the materials before the Court, shows a value of Samuel Doz Professional Corporation of greater than \$500,000. Of that amount, more than \$100,000 consists of a debt owing by Samuel Doz to his Professional Corporation;

31 2. At the time of the imputed conveyance, Samuel Doz was disbarred and was facing a 30-month jail term. The ability to meet obligations of his Professional Corporation was accordingly reduced;

32 3. Nothing has been paid on the mortgage or subsequent writ held by Revenue Canada since 1984. If Samuel Doz Professional Corporation was able to pay its debts in 1984 surely it would have done so by now.

33 There has been no answer advanced to any of these allegations by either of the Respondents. It is my finding that Samuel Doz Professional Corporation was unable to pay its debt at the time of the imputed conveyance.

34 Section 1 of the *Fraudulent Preferences Act* requires that there be an intent on the part of the *donor* to defeat, hinder, delay or prejudice its creditors or any one or more of them. This intent is difficult to prove on the basis of direct evidence. It would be a rare occasion where a debtor would make a public admission of such an intent. Consequently, the intent must be implied from the circumstances surrounding the imputed transaction.

35 In this case these circumstances include the three factors enumerated above in relation to the ability of Samuel Doz Professional Corporation to discharge its debts. They also include several elements which, in decisions relating to the *Statute of Elizabeth*, have been classed as "badges of fraud". These "badges of fraud" include:

36 1. The consideration was grossly inadequate;

37 2. The conveyance was accomplished quickly;

38 3. The parties to the transaction were related, at least in a business sense, as at all material times Samuel Doz Professional Corporation and Eileen Crane Professional Corporation carried out business from the same premises and just prior to the conveyance Eileen Crane was appointed custodian of the practice of Samuel Doz;

39 4. The conveyance was very general in nature in that it included virtually all of the physical assets of Samuel Doz Professional Corporation. From the financial statements of Samuel Doz Professional Corporation other assets of Samuel Doz Professional Corporation were exclusively of a paper nature.

40 The position of the Respondents is to again suggest that they were dealing with urgent circumstances and that this urgency was the sole motivation of Samuel Doz Professional Corporation and Eileen Crane Professional Corporation creating the imputed lease. They also take the position that the lease did not defeat, hinder, delay or prejudice the Appellant. They suggest that the Appellant is in a position to foreclose or realize on its mortgage if it follows the ordinary procedures in doing so.

41 These positions are without merit. If the sole motivation was to deal with urgent circumstances of custodianship of a law practice such circumstances could easily have been dealt with by a lease with an effective term very substantially shorter than 15 years. It is accepted that the value of commercial property is substantially affected by the revenue it generates. In this instance the commercial property generates revenue of \$100 per month. The generation of this small amount of a revenue is the result of the imputed lease. This low rate of return greatly reduces the market value of the property. Such reduction of market value does hinder, delay and may potentially defeat the Appellant as there are substantial arrears of taxes owing and a prior mortgage to that of the Appellant on the title.

42 Inadequate consideration goes to the intention of the parties. This matter was specifically dealt with by Hope J. in *Re Barnett* (1983), 43 A.R. 215 (Q.B.); a case dealing with s. 69 of the *Bankruptcy Act*, R.S.C. 1970, c. B-3. Section

69 provides that a trustee can set aside a transfer made within one year prior to bankruptcy except to a purchaser or encumbrancer acting in good faith and for valuable consideration. At p. 219 Justice Hope states:

In respect to the question of "valuable consideration", it is not the court's function to decide the adequacy of consideration. However, having decided MacDonald was not acting in good faith, it matters not whether the sale was for adequate valuable consideration and, in any event, I have found the market value of the property at the time of the sale to be almost double that consideration actually given. I would not consider that to be adequate consideration and, in any event, I am of the opinion that the inadequate consideration is another piece of evidence supporting my view that the purchaser, MacDonald, was not acting in good faith. Having come to the conclusion that I have in respect to the questions of good faith, the applicants must succeed under s. 69(1) of the *Act*.

43 It is therefore my conclusion that the Appellant has met the onus of it pursuant to s. 1 of the *Fraudulent Preferences Act*. The lease dated January 1, 1984 entered into between Samuel Doz Professional Corporation and Eileen Crane Professional Corporation is therefore, for the purposes of this application, void as against the Appellant.

IV. Statute of Elizabeth

44 As I have determined the lease to be, for the purposes of this application, void pursuant to the provisions of the *Fraudulent Preferences Act*, it is unnecessary to consider other grounds or matters argued before me.

45 But even if I had found that s. 1 of the *Fraudulent Preferences Act* was not effective to render the lease void, I would have applied the *Statute of Elizabeth* to do so.

46 Stripped to its essentials, the *Statute of Elizabeth* provides a mechanism whereby creditors and others can attack conveyances and other transactions made by persons with the intent to delay, hinder, or defraud creditors or others. The intent required, as with the *Fraudulent Preferences Act*, is that of the donor although s. 5(1) makes the intent or knowledge of the donee a relevant and crucial consideration. I have already dealt with the intention of the parties to this lease.

47 I have also determined the consideration for this lease to be inadequate. Consequently, s. 5(1) of the *Statute of Elizabeth* does not assist the donee.

V. The Effect of Paragraph 5 of the Lease

48 Paragraph 5 of the imputed lease states:

5. This lease is subject and subordinate to all ground or underlying leases and to all mortgages which may now or hereafter affect the real property of which demised premises form a part, and to all renewals, modifications, consolidations, replacements and extensions thereof. This clause shall be self-operative and no further instrument of subordination shall be required by any mortgagee. In confirmation of such subordination, Lessee shall execute promptly any certificate that Lessor may request. Lessee hereby constitutes and appoints Lessor the Lessee's attorney-in-fact to execute any such certificate or certificates for and on behalf of Lessee.

49 The Appellant argues that this paragraph is self-operative as it states that it is self-operative. The Appellant further argues that it has the effect of subordinating the Lessee, Eileen Crane Professional Corporation, to the Appellant by virtue of its mortgage. It is my view that there is no such thing as a self-operative contractual clause. In order for clauses in contracts to become operative someone has to enforce them. The question then becomes whether the Appellant is in a position to enforce this clause.

50 The rule of privity of contract states that only parties to a contract can enforce the contract. Here the parties to the lease are Samuel Doz Professional Corporation and Eileen Crane Professional Corporation and neither is interested in enforcing para. 5 of the lease.

51 There are a number of exceptions to the rule relating to privity and the Appellant suggests that it falls within several of those exceptions. The first exception suggested by the Appellant is that of trust. It is argued that the Respondent, Doz, was a trustee for the Appellant with respect to the enforcement of para. 5 of the lease. In *Greenwood Shopping Plaza Ltd. v. Beattie* (1980), 10 B.L.R. 234, McIntyre J., speaking for the Supreme Court of Canada, accepted the availability of trust as an exception to the privity rule in limited circumstances. At p. 248 he sets forth the test to be applied:

A common test applied to determine whether a trust has been created has been to pose the question whether the parties to the contract could change the contractual terms without reference to the alleged cestui que trust. If the answer is yes, no trust has been created.

52 The Respondents were in a position to amend the release without the consent of the Appellants and therefore the Appellant does not fit itself within the trust exception.

53 The Appellant also argued that para. 5 is a covenant which runs with the land. In *Canada Trust Co. v. Queensland Management Services Ltd.* (1980), 13 R.P.R. 156 (Ont. H.C.), Eberle J. states at p. 159:

There are cases in which it has been held that a covenant to provide a discharge of a mortgage runs with the land and may be taken advantage of by a successor. But it is argued that principle does not apply to the case of a postponement of mortgage. In *Falconbridge on Mortgages* (4th ed., 1977), at p. 297 it is said:

The purchaser of the equity of redemption is, in general, entitled to the benefit of covenants made by the mortgagee with the mortgagor.

The argument is made that does not apply to a covenant for a postponement of the mortgage. I must say that I am unable to see any distinction between the case of a postponement of a mortgage and a discharge of a mortgage. Both of them focus on the matter of security and I can see no reason for distinction in principle between the one situation and the other. In my view, accordingly, the applicant Canada Trust is entitled to take advantage of the postponement clause in accordance with the principle referred to.

54 I decline to extend this decision to the circumstances involving leases. It is my view that the purchaser of the equity of redemption takes the position of a party to the agreement in question, and can enforce covenants within that agreement. I do not believe that the quote from *Falconbridge* found in *Canada Trust Co. v. Queensland Management Services*, says anything more than that. To be a covenant that runs with the land, the covenant must touch or affect the land. Alternatively, it must be the type of covenant that equity will enforce, being a negative covenant, like a restrictive covenant.

55 This covenant is neither and accordingly does not run with the land.

56 It was also argued by the Appellant that s. 5 of the *Real Property Act*, 1845, an Act of the British Parliament, remained in force in Britain until amended by the *Law of Property Act* of 1925. It accordingly was law in force in Britain in 1905 and therefore is law in Alberta by virtue of the adoption of existing British law by the statute creating the Province of Alberta.

57 In *Côté, An Introduction to the Law of Contract*, at p. 166, the learned author recognizes that this law is probably in force in Alberta. The learned author also recognizes this law as a part of the general laws of Alberta in his article entitled "The Introduction of English Law into Alberta" (1964), 3 Alta. L. Rev. 262.

58 Section 5 of the *Real Property Act* provides:

V. That, under an Indenture, executed after the First Day of *October* One thousand eight hundred and forty-five, an immediate Estate or Interest, in any Tenements or Hereditaments, and the Benefit of a Condition or Covenant,

respecting any Tenements or Hereditaments, may be taken, although the Taker thereof be not named a Party to the same Indenture ...

59 The effect of this provision is to enable a third party beneficiary of a clause in a lease to enforce that clause. The British texts dealing with this section and its successor support this interpretation. An example of a discussion supporting this interpretation may be found in the *Law of Real Property*, 5th ed., by Megarry and Wade, at pp. 762 and 763.

60 It is therefore my view that this law was adopted by Alberta in accordance with the process set forth in the article, "The Introduction of English Law into Alberta".

61 Section 5 of the *Real Property Act*, 1845, is effective to enable the Appellant to enforce para. 5 of the lease.

VI. The Effect of Section 113 of the Land Titles Act in Paragraph 5 of Schedule B to the Land Titles Act

62 During the course of argument I asked all the parties to consider the effect of s. 113(1) and para. 5 of Sched. B to the *Land Titles Act*, R.S.A. 1980, c. L-5. I asked for, and received, written argument from all parties with respect to this section. I noted that the mortgage held by the Appellant included in paragraph number 6(d) the following provision:

6. THE MORTGAGER covenants with the Mortgagee that:

(d) the Mortgagor will execute such further assurances of the said lands as may be requisite.

63 Section 113(1) of the *Land Titles Act* provides:

113(1) When in a mortgage made under this Act the forms of words in column 1 of Schedule B and distinguished by any number therein are used, the mortgage shall be taken to have the same effect and be construed as if the words used had been those contained in column 2 of Schedule B and distinguished by the same number.

64 Section 5 of Sched. B provides:

5. Will execute such further assurances of the land as may be requisite.

5. And also, that from and after default shall happen to be made of or in the payment of the said sum of money in the said covenant mentioned or the interest thereof, or any part of such money or interest or of or in the doing, observing, performing, fulfilling or keeping of some one or more of the covenants in this mortgage, particularly set forth, contrary to the true intent and meaning of these presents and of the said covenants then and in every such case the said mortgagor, his heirs and assigns, and all and every other person or persons whosoever having, or lawfully claiming, or who shall or may have or lawfully claim any estate, right, title, interest or trust of, in, to or out of the land, tenements, hereditaments and premises hereby mortgaged, or mentioned, or intended so to be, with the appurtenances or any part thereof, by, from, under or in trust for him the said mortgagor, shall and will, from time to time, and at all times thereafter, at the proper costs and charges of the said mortgagee, his heirs, executors, administrators and assigns make, do, suffer and execute, or cause or procure to be made, done, suffered and executed, all and every such further and other reasonable act or acts, deed or deeds, devices, conveyances and assurances in the law for the further, better and more perfectly and absolutely conveying the said land, tenements, hereditaments and premises, with the appurtenances unto the said mortgagee, his heirs, executors, administrators and assigns, as by the said mortgagee, his heirs, executors or his or their counsel learned in the law, shall or may be lawfully and reasonably devised, advised or required, so as no person who shall be required to make or execute such assurances shall be compelled, for the making or executing thereof, to go or travel from his usual place of abode. (emphasis added)

65 Section 113 provides for a mechanism whereby a mortgagee can incorporate wording, which in turn results in much more substantial wording being read into the mortgage.

66 The long form of para. 5 in Sched. B permits the Appellant to make requests of the Respondent, Samuel Doz Professional Corporation, which are lawfully and reasonably devised, advised or required, and compels Samuel Doz Professional Corporation to comply with such requests. Here the request is for Samuel Doz Professional Corporation to enforce para. 5 of the lease. The request is lawful, and it is, in the circumstances, reasonable as it clearly has the effect of "more perfectly and absolutely conveying the said land ...".

67 There need be no special communication of the Appellant's requirements, only that these requirements be made known to the mortgagor, Samuel Doz Professional Corporation. In consequence, Samuel Doz Professional Corporation is compelled to enforce para. 5 of the lease on behalf of the Appellant.

VII. Conclusion

68 The response to the two questions posed by Miller A.C.J.Q.B. in his order of March 6, 1992 are as follows:

69 1. Is the agreement entered into between Eileen Crane Professional Corporation and Samuel Doz Professional Corporation on January 1, 1984 a valid lease? Answer: No.

70 2. If the lease is determined to be a valid and subsisting lease, does cl. 5 of that lease, permit the Plaintiff to take possession of the premises prior to the expiration of the term thereof, should the Plaintiff obtain the lands and premises? Answer: Not necessary to answer in view of answer to question 1 above but answered Yes.

Appeal allowed.

Tab 17

2013 ABQB 420
Alberta Court of Queen's Bench

1007374 Alberta Ltd. v. Ruggieri

2013 CarswellAlta 1423, 2013 ABQB 420, [2013] A.W.L.D. 4639, [2013]
A.W.L.D. 4722, 1 Alta. L.R. (6th) 343, 231 A.C.W.S. (3d) 632, 565 A.R. 329

**1007374 Alberta Ltd, Plaintiff and Antonio Ruggieri, A.
Ruggieri Engineering Ltd, 857508 Alberta Ltd, Alberta
Engineering Ltd, and GMR Management Corp, Defendants**

K.D. Yamauchi J.

Heard: July 17, 2013
Judgment: July 23, 2013
Docket: Calgary 1201-15655

Counsel: Michael D. Mysak, Sheena L. Owens for Plaintiff
C. Michael Smith for Defendants, Antonio Ruggieri and A Ruggieri Engineering Ltd
Joseph G. Oppenheim for Defendants, Alberta Engineering Ltd and GMR Management Corp

Subject: Civil Practice and Procedure; Corporate and Commercial; Torts

Headnote

Remedies --- Injunctions — Rules governing injunctions — Mareva injunctions — Miscellaneous

Plaintiff alleged that E Ltd. committed fraudulent conveyance of its business by shifting its business to A Ltd. — R was sole director of E Ltd. and A Ltd. — E Ltd. received no consideration for conveyance — Plaintiff had judgment against E Ltd. — Plaintiff was granted attachment order/Mareva injunction on interim interlocutory basis — Plaintiff claimed that GSAs E Ltd. granted to R and GMR converted their unsecured claims into secured claims which would take priority over plaintiff's claim — Plaintiff brought application to extend order until conclusion of action within which order was granted — Defendants brought application for security for costs — Applications granted — Attachment order/Mareva injunction was to attach to amount of judgment plus interest — Attachment order/Mareva injunction was to extend to completion of action by way of judgment or discontinuance or 60th day from day of entry of judgment in favour of plaintiff — Plaintiff met test for attachment order and Mareva injunction as against E Ltd. and A Ltd. — Order maintained status quo pending trial of action — A Ltd. was now benefiting from E Ltd.'s business — E Ltd. and A Ltd. were not dealing at arm's length — There was unusual haste in making transfer, which occurred after completion of first trial but before judge rendered reasons for decision — There was prima facie case that E Ltd. had fraudulent intent to protect assets from possible or probable claims of future creditors — Plaintiff presented prima facie evidence that GSAs gave preferential treatment to GMR and R — Plaintiffs were to post \$60,000 as security for costs.

Civil practice and procedure --- Costs — Security for costs — Grounds for requiring security — Miscellaneous

Plaintiff alleged that E Ltd. committed fraudulent conveyance of its business by shifting its business to A Ltd. — R was sole director of E Ltd. and A Ltd. — E Ltd. received no consideration for conveyance — Plaintiff had judgment against E Ltd. — Plaintiff was granted attachment order/Mareva injunction on interim interlocutory basis — Plaintiff claimed that GSAs E Ltd. granted to R and GMR converted their unsecured claims into secured claims which would take priority over plaintiff's claim — Plaintiff brought application to extend order until conclusion of action within which order was granted — Defendants brought application for security for costs — Applications granted — Attachment order/Mareva injunction was to attach to amount of judgment plus interest — Attachment order/Mareva injunction was to extend to completion of action by way of judgment or discontinuance or 60th day from day of entry of judgment in favour of plaintiff — Plaintiff met test for attachment order and Mareva injunction as against E Ltd. and A Ltd. — Order maintained status quo pending trial of action — A Ltd. was now benefiting from E Ltd.'s business — E Ltd. and A Ltd.

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s. 2(b) — considered

s. 17(2) — considered

s. 17(2)(a) — considered

s. 17(3) — considered

s. 17(4) — considered

s. 17(5) — considered

s. 17(6) — considered

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s. 4 — considered

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s. 11(2) — considered

s. 11(3) — considered

s. 11(4) — considered

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R. 4.22 — considered

APPLICATION by plaintiff to extend interim interlocutory attachment order/Mareva injunction; APPLICATION by defendants for security for costs.

K.D. Yamauchi J.:

Introduction

1 On May 6, 2013, Hawco J provided the parties with the reasons for his decision to grant the application of the Plaintiff 1007374 Alberta Ltd ("1007 Alberta") for an attachment order/*Mareva* injunction on an interim interlocutory basis. Hawco J's reasons for his decision can be found at [2013 ABQB 278](#) (Alta. Q.B.) (the "Hawco Reasons"). The order that arose from those reasons (the "Hawco Order") state that the relief he granted would remain in effect until 5:00 p.m. on July 17, 2013, unless extended by further court order. The application before this Court is to extend the Hawco Order until the conclusion of the action within which the Hawco Order was granted.

2 This Court heard this matter on July 17, 2013. It reserved its decision, so it extended the Hawco Order until it delivered its decision. As with many matters that appear before the court during the court's commercial duty weeks, the parties requested this Court to render its decision promptly. This Court has used its best efforts to accommodate the parties' request.

3 The Defendants collectively make an application for security for costs, which this Court will address at the end of these reasons.

Background

4 Inasmuch as the Hawco Reasons provide a detailed background of the history of this matter, this Court does not intend to provide a long recitation of the facts. However, a bit of background is necessary.

5 James Mossman, the principal of 1007 Alberta, reached an agreement with the Defendant Antonio Ruggieri, the principal and director of the Defendant corporations, to refer and transition 1007 Alberta's clients to A Ruggieri Engineering Ltd ("Engineering"). 1007 Alberta was to receive quarterly payments of up to \$80,000 per annum.

6 1007 Alberta did not receive those payments so in 2004, it commenced a lawsuit against Engineering (the "First Action"). Following a trial in the First Action, 1007 Alberta obtained a judgment against Engineering for just over \$475,000 inclusive of costs and interest (the "Judgment"). The trial judge, Bensler J, in the reasons for her decision that are reported as *1007374 Alberta Ltd. v. A. Ruggieri Engineering Ltd.* [2011 ABQB 804 (Alta. Q.B.)] said at para 141:

The Plaintiff is entitled to damages for the 25 percent fee for the transition of his clients. The invoices reviewed by the paralegal and submitted by Mr. Mossman indicate that he was eligible to receive the maximum amount for five years which was \$80,000. In total he received \$40,297 for the first year and a further \$22,573. He should have received \$400,000. Therefore his total damages are \$337,130.

[Emphasis added].

7 The order that resulted from the Judgment says, among other things:

The Plaintiff (Defendant by Counterclaim) is entitled to compensatory damages for the loss of the 25 percent fee for the transition of the Plaintiff's clients to the Defendant in the amount of \$337,130.00 plus \$56,956.87 in pre-judgment interest. There will be no award of restitutionary or exemplary damages.

8 Engineering has not paid the amount of the Judgment. When 1007 Alberta tried to enforce the Judgment, it learned that 3 days before the First Trial commenced, Engineering changed its name to 857508 Alberta Ltd (this Court will continue to refer to Engineering, with its name changed, as "Engineering"). The trial in the First Action concluded on May 16, 2011. On May 31, 2011, Engineering granted general security agreements each securing \$500,000 (the "GSAs") in favour of Mr Ruggieri and the Defendant GMR Management Corp ("GMR"). On June 1, 2011, Engineering issued promissory notes in favour of Mr Ruggieri and GMR for \$100,000 and \$198,046.16, respectively.

9 1007 Alberta argues that while the First Action was proceeding Mr Ruggieri was in the process of conveying the assets of Engineering (which apparently consisted only of its client list) to a new corporation, the Defendant Alberta Engineering Ltd ("Alberta Engineering"), for no consideration. Alberta Engineering now carries on the business of Engineering.

10 From 2009 to 2012, the gross revenues of each of Engineering and Alberta Engineering were as follows:

Year	Engineering	Alberta Engineering	Total
2009	\$2,136,634	\$0.00	\$2,136,634
2010	\$2,150,959	\$47,355	\$2,198,314
2011	\$458,032	\$1,317,017	\$1,777,409
2012	unknown	\$1,585,806	\$1,585,806

11 Equally interesting is the number of clients each had during the same period, and the average revenue that each client generated. Those statistics are as follows:

Year	Engineering	Alberta Engineering	Total "Unique" Clients	Revenue per Client
2009	277	none	277	\$7,713
2010	244	22	257	\$8,554
2011	68	220	248	\$7,159

2012	5	198	201	\$7,890
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It should be noted that many of the clients were clients of both Engineering and Alberta Engineering. The clients served by both are counted only once. In 2010, 9 of the twenty-two Alberta Engineering clients were clients of both. In 2011, forty of sixty-eight of Engineering's clients were clients of both. In 2012, 3 of Engineering's 5 clients were clients of both.

12 Mr Ruggieri during his June 20, 2012 questioning, testified that Engineering was essentially not doing any business.

13 On the other hand, Alberta Engineering continues to carry on business, with its client list being comprised of, among others, former Engineering clients. As well, many of Alberta Engineering's clients were those that 1007 Alberta "transitioned" to Engineering.

14 In March 2013, 1007 Alberta commenced the within action alleging, among other things, that there was a fraudulent conveyance of Engineering's assets to Alberta Engineering, orchestrated by Mr Ruggieri and the other corporate Defendants. To avoid a similar result in the within action, 1007 Alberta sought an interlocutory attachment order/*Mareva* injunction to secure the amount of the Judgment plus the anticipated costs of this action. Hawco J granted those forms of relief, as more particularly set forth in the Hawco Reasons.

15 Hawco J found at para 20 of the Hawco Reasons:

... In my view, there has been a deliberate attempt by Mr. Ruggieri to render his former company judgment proof and to render himself and his associated companies either judgment proof or simply trying to hide the assets through his actions. The granting of the general security agreement purporting to encumber whatever assets Ruggieri Engineering had was, with respect, a clumsy attempt to protect those assets. The granting of two promissory notes with the aggregated value of some \$300,000 is yet another clumsy attempt to protect whatever assets may have been available to the Plaintiff. ...

16 As a result, Hawco J held at para 14 of the Hawco Reasons:

I am satisfied that there is a reasonable likelihood that the Plaintiff's claim against the Defendants will be established and that there are reasonable grounds for believing that the Defendants have been dealing with their exigible property in a manner otherwise than for the purpose meeting the Defendants' reasonable and ordinary business and in a manner that is likely to seriously hinder the Plaintiff in enforcement of this judgment against the Defendants.

Discussion

17 There are two applications before this Court. 1007 Alberta asks this Court to continue Hawco J's attachment order/*Mareva* injunction. The Defendants ask this Court to order that 1007 Alberta post security for costs. This Court will deal with each application separately.

Attachment Order/Mareva Injunction

18 Before Hawco J, the Defendants argued that the attachment order/*Mareva* injunction could only attach the property of the debtor. That is true. However, if the debtor has dissipated its property and a creditor can trace, or at least make an argument that it can trace, those assets into the hands of another, those assets may similarly be "caged." 1007 Alberta seeks to trace the amounts received and disbursed. This is an action in money had and received. It would, if successful, result in the plaintiff obtaining a judgment, not for specific money, but a judgment for an equivalent value: Peter D Maddaugh & John D McCamus, *The Law of Restitution*, loose-leaf (consulted on 16 July 2013), (Toronto: Thomson Reuters, 2013), vol I, at 6-16 — 6-17. See also *Two-Tyme Recycling Inc. v. Woods*, 2010 ONSC 5672 (Ont. S.C.J.) at paras 45-46.

19 The Defendant also argue that 1007 Alberta is asking this Court to "lift the corporate veil" to find Alberta Engineering, GMR and Mr Ruggieri liable. However, that is not what 1007 Alberta seeks. It alleges that those Defendants are the recipients of the dissipated property, so they are directly liable for the traced funds, or to re-convey the property to Engineering.

20 As well, the Defendants argue that the GSAs and promissory notes that Engineering granted and issued in favour of other Defendants are not captured by the attachment order/*Mareva* injunction. This Court disagrees with that analysis. Any assets that Engineering uses to repay the amounts owing under those instruments are traceable, so those monies can themselves be "caged." The instruments themselves could be attached, inasmuch as they are, or could be, negotiable instruments. But their worth depends on their validity. If they were not validly granted, then it matters not whether they are property *per se* or money's worth. They have no value.

21 What the Hawco Order did was to maintain a *status quo* pending the trial of this action. If Engineering wrongfully transferred assets to the other Defendants, the court must be in a position to attach those assets pending a full hearing of the matter. This, Hawco J intended to do.

22 1007 Alberta has asked this Court for 2 remedies; the *Mareva* injunction and the attachment order. The attachment order arises from the *Civil Enforcement Act*, RSA 2000 c C-15 (*CEA*). *CEA* s 17, in part, reads:

17(2) On hearing an application for an attachment order, the Court may, subject to subsection (4), grant the order if the Court is satisfied that

(a) there is a reasonable likelihood that the claimant's claim against the defendant will be established, and

(b) there are reasonable grounds for believing that the defendant is dealing with the defendant's exigible property, or is likely to deal with that property,

(i) otherwise than for the purpose of meeting the defendant's reasonable and ordinary business or living expenses, and

(ii) in a manner that would be likely to seriously hinder the claimant in the enforcement of a judgment against the defendant.

23 A *Mareva* injunction derives from the Court's equitable jurisdiction to grant injunctive relief, more specifically set forth in the *Judicature Act*, RSA 2000, c J-2, s 13(2), which provides:

13(2) An order in the nature of ... injunction may be granted ... by an interlocutory order of the Court in all cases in which it appears to the Court to be just or convenient that the order should be made, and the order may be made either unconditionally or on any terms and conditions the Court thinks just.

24 The Institute of Law Research and Reform (now the Alberta Law Reform Institute) recommended the elimination of *Mareva* injunctions and other forms of prejudgment relief. Those remedies would be replaced with attachment orders: Alberta, Institute of Law Research and Reform, *Prejudgment Remedies for Unsecured Claimants, Report No 50* (Edmonton: ALRI, 1988) at 245. However, Alberta courts still grant *Mareva* injunctions: see e.g. *Boczkiwicz v. Creative Capital Connection Inc.*, 2006 ABQB 732 (Alta. Q.B.) [*Boczkiwicz*]. This Court has no intention of weighing into any debate as to whether this is the proper approach. Rather, it will examine whether 1007 Alberta has met the tests for granting either, or both.

25 In *Cho v. Twin Cities Power-Canada U.L.C.*, 2012 ABCA 47, 522 A.R. 154 (Alta. C.A.) [*Cho*], the court said at para 5:

On the merits, the plaintiff must show a strong *prima facie* case for his suit, and also that there is a real risk that the respondent will remove assets from the jurisdiction, or dissipate them, in order to avoid execution (enforcement) under a judgment.

See also *SLMsoft.com Inc. v. Rampart Securities Inc. (Trustee of)* (2004), 4 C.B.R. (5th) 105 (Ont. S.C.J.) at para 14, quoting *Aetna Financial Services Ltd. v. Feigelman* (1985), 15 D.L.R. (4th) 161 (S.C.C.).

26 The CEA provides us with the factors that 1007 Alberta must show to obtain an attachment order. CEA s 17(2)(a) requires that a plaintiff must show a "reasonable likelihood of success at trial." That standard falls somewhere between a strong *prima facie* case and the "genuine issue to be tried" requirement that a party must show to defeat a summary judgment motion: *Boczkievich* at para 13; *Osman Auction Inc. v. Belland*, 1998 ABQB 964 (Alta. Q.B.) at para 39 [*Osman*]; *Lyons v. Creason*, 2008 ABQB 550 (Alta. Q.B.) at paras 8-10 [*Lyons*].

27 Like a *Mareva* injunction, for the plaintiff to obtain an attachment order, it must show some risk of dissipation of assets. In *Cho*, the Alberta Court of Appeal said that this must be a *real* risk. CEA s 2(b) says that the plaintiff must show reasonable grounds to believe that the defendant is dealing with, or is likely to deal with, his or her assets outside the ordinary course and in a manner that will have the effect of seriously hindering the plaintiff in recovering on a judgment. However, courts must not be too anxious to find such "reasonable grounds." Burrows J said in *Osman Auction Inc.* at para 44:

In my view, even though the applicant need show only a reasonable likelihood of establishing its claim, that onus is not satisfied by a suspicion. Where circumstances which raised a suspicion at the time of the *ex parte* application have been plausibly explained, and where the applicant has not consulted other sources of evidence readily available to confirm or refute the suspicion (or has not informed the Court of the result of such consultation), in my view it cannot be said the applicant has satisfied the onus. A distinction exists between a suspicion and a reasonable likelihood of establishing a claim.

28 Where the court finds that allegations of fraud, conversion or breach of trust have a reasonable foundation, it is not necessary for the plaintiff specifically to prove that actual dissipation of assets has occurred. Dissipation, in such a case, will be presumed to satisfy the first part of the test: *Cho* at para 10; *Lyons* at para 41; *Bank of Montreal v. Cochrane*, 2010 ABQB 476 (Alta. Q.B.) at para 8. In a later decision involving the same parties, where the plaintiff tendered new evidence, Burrows J said in *Osman Auction Inc. v. Belland*, 1998 ABQB 1095 (Alta. Q.B.) at paras 28-30:

I am satisfied that where the cause of action is in fraud and the plaintiff has shown a reasonable likelihood that the cause of action will be established, the court may conclude, on that basis alone, that there are reasonable grounds for believing the defendant is likely to deal with his exigible property to the plaintiff's prejudice.

I recognize that in some of the cases referred to above, the likelihood that fraud would be established was of a higher degree than in the case before me. They were all *Mareva* injunction cases where the requirement was that a strong *prima facie* case be shown. The first test for a prejudgment attachment order under the *Civil Enforcement Act* is not as strict. The requirement in respect of the second aspect of the test is only that there be grounds for a reasonable belief. In my view, it does not take a strong *prima facie* case of fraud to provide reasonable grounds for believing that a person who is reasonably likely to be shown to be have been fraudulent is likely to deal with his assets to avoid his creditor.

Accordingly, I find that the new material satisfies the second requirement for a prejudgment attachment.

29 1007 Alberta alleges that Engineering committed a fraudulent conveyance of its business by shifting its business to Alberta Engineering. It does so pursuant to so-called *Fraudulent Conveyances Act*, 1571 (13 Eliz. 1), c 5 [FCA]. Clackson J in *Proulx v. Proulx*, 2002 ABQB 151, 25 R.F.L. (5th) 370 (Alta. Q.B.) [*Proulx*] summarized the principles that apply when a court is attempting to determine whether a debtor has committed an act under the FCA when he said at para 14:

It seems to me that the basic principles defining the remedy in 13 Elizabeth c.5 are now well settled.

1. There must be a conveyance of either real or personal property;
2. The transaction must have been for no or nominal consideration;
3. It must have been the intent of the settlor to defraud, hinder or delay his creditors;
4. The intent of the settlor may be inferred from his circumstances and the circumstances of the settlement or may be the result of direct evidence;
5. The fact that there was no consideration or voluntary consideration will in most cases justify the inference of the necessary intent absent evidence rebutting that inference;
6. Inference of intent will be strong if the settlor was insolvent at the time of settlement or the settlement effectively denuded him of assets sufficient to cover existing obligations;
7. The party challenging the conveyance must be a creditor or someone with a legal or equitable right to claim against the settlor;
8. The conveyance must have had the intended effect.

See also *Taylor & Associates Ltd. v. Louis Bull Tribe No. 439*, 2011 ABQB 213 (Alta. Q.B.) at para 16, quoting *Palechuk v. Fahrlander*, 2006 ABCA 242 (Alta. C.A.) at para 31, 273 D.L.R. (4th) 332 (Alta. C.A.), leave denied, (2007), [2006] S.C.C.A. No. 405 (S.C.C.).

30 How does a court determine whether a party has perpetrated a fraud against its creditors? Without the party's admission that it has conveyed its assets, or preferred one creditor over another, a court must try to glean the party's intent from its actions. In the old case of *Freeman v. Pope* (1870), 5 Ch. App. 538 (Eng. Ch. Div.) (*Freeman*), Lord Hatherley LC said at 540-41:

The principle on which the statute of 13 Eliz. c. 5 proceeds is this, that persons must be just before they are generous, and that debts must be paid before gifts can be made.

... if a person owing debts makes a settlement which subtracts from the property which is the proper fund for the payment of those debts, an amount without which the debts cannot be paid, then, since it is the necessary consequence of the settlement (supposing it effectual) that some creditors must remain unpaid, one must infer the intent of the settlor to have been to defeat or delay his creditor, and that the case is within the statute.

31 In *Freeman*, Sir GM Giffard LJ said at 545:

... [W]here the settlement is voluntary, then the intent may be inferred in a variety of ways. For instance, if after deducting the property which is the subject of the voluntary settlement, sufficient available assets are not left for the payment of the settler's debts, then the law infers intent.

... Again, if at the date of the settlement the person making the settlement was not in a position actually to pay his creditors, the law would infer that he intended, by making the voluntary settlement, to defeat and delay them.

32 Of course, the debtor could put before the court cogent evidence that it did not intend to defeat its creditors. In such a case, the court might not infer such intent. See e.g. *Mercer, Ex parte* (1886), 17 Q.B.D. 290 (Eng. C.A.). As such, the principle in *Freeman* is made a rebuttable presumption. In *Moody v. Ashton*, 2004 SKQB 488, 6 C.B.R. (5th) 219 (Sask. Q.B.) [*Moody*], Baynton J said at paras 39-40:

...A civil court should not hesitate to conclude, on a balance of probabilities, that fraudulent intent has been proved in circumstances where there is no credible and cogent evidence to counter the strong inferences of fraudulent intent that are raised by the factual circumstances of the case. Sometimes there is direct evidence of intent, but most often there is only indirect or circumstantial evidence of intent. The intent or motive of a person usually has to be inferred from the time-tested common sense presumption that he or she intended the natural consequences of his or her actions considered in the light of the circumstances of the particular case before the court.

...Once the creditor establishes a factual basis to demonstrate that the necessary consequence of the voluntary conveyance in the circumstances of the case was to defeat creditors, the fraudulent intent to defeat creditors on the part of the transferor is presumed and the creditor has established a *prima facie* case. Absent cogent and credible evidence from the transferor or from any other source tending to show that the conveyance was bona fide and not indicative of a fraudulent intent, the *prima facie* case becomes proof that the conveyance constitutes a fraudulent conveyance that is void pursuant to the *Statute of Elizabeth*.

See also *Titan Investments Ltd. Partnership, Re*, 2005 ABQB 637 (Alta. Q.B.) at para 33, (2005), 383 A.R. 323 (Alta. Q.B.) [Titan].

33 The indirect or circumstantial evidence that raises the strong inferences of fraudulent intent are often called "badges of fraud." In *Moody* at para 142, Baynton J said that one badge of fraud is where the parties did not deal at arm's length. See also *Krumm v. McKay*, 2003 ABQB 437, 342 A.R. 169 (Alta. Q.B.). Baynton J went on to say at para 143:

In [*Dondee Stock Farms Ltd (Trustee of) v Giesbrecht* (1993), 117 Sask R 1 (Q.B.)] at pp. 10-11, I enumerated the badges of fraud as follows:

[42]... The badges of fraud, as are set out in *Dunlop Creditor-Debtor Law in Canada*, p. 526, and in *Dougmoor Realty Holdings Ltd., Re* (1967), 10 C.B.R. (N.S.) 141 (Ont. H.C.), vary from case to case and writer to writer, and the ones applicable to this case include:

1. the transfer was made pending the writ;
2. secrecy respecting the transaction;
3. the retention by the grantor of some benefit in the property;
4. the consideration was grossly inadequate;
5. the grantor continued in possession following the conveyance;
6. the transfer amounted to a trust of the property;
7. the deed contained false statements as to the consideration;
8. unusual haste to make the transfer.

[43] Other similar factors might include:

- (a) showing the property after the transfer as an asset of the grantor,
- (b) the transfer substantially reduces the property of the grantor that would, but for the transfer, be available to his creditors,
- (c) the effect of the transfers to delay and defeat creditors.

See also *Dwyer v. Fox* (1996), 43 Alta. L.R. (3d) 63 (Alta. Q.B.) at paras 24, 26, (1996), 190 A.R. 114 (Alta. Q.B.). Baynton J also said, "The more badges of fraud that are proven, the stronger the *prima facie* case of fraudulent intent will be": *ibid*.

34 Much was made in the case at bar that Engineering was not insolvent at the time it allegedly conveyed its business to Alberta Engineering. As well, the Defendants argue that the Bensler J held that 1007 Alberta was entitled to damages (and not a debt) and that damages were not assessed until December 21, 2011, when she rendered her decision. By that time, the impugned conveyances had already taken place.

35 The first thing to note is that pursuant to the *FCA*, a creditor need not show that the debtor was insolvent at the time it made the conveyance: *Ramgotra (Trustee of) v. North American Life Assurance Co.*, [1996] 1 S.C.R. 325 (S.C.C.), at 367; *Titan Investments Ltd. Partnership, Re* at para 34, *Don Forsey & Blackfalds Investments Ltd. v. Hydro Kleen Systems Inc.*, 2011 ABQB 14 (Alta. Q.B.) at para 99; *Nicholson v. Milne* (1989), 74 C.B.R. (N.S.) 263 (Alta. Q.B.) at para 7, (1989), 96 A.R. 114 (Alta. Q.B.). Thus, even if this Court were to find that at the time of Engineering's impugned actions, 1007 Alberta was not one of Engineering's creditors, the fact that Engineering might not have been insolvent might not save the actions. This is reinforced by Baynton J's comment in *Moody* when he said at para 147:

Even if a transferor has no existing creditors, conveyances effected with the fraudulent intent to protect the assets of the transferor from the possible or probable claims of future creditors, constitutes a fraudulent conveyance under the *Statute of Elizabeth*.

36 In MA Springman et al, *Frauds on Creditors: Fraudulent Conveyances and Preferences*, loose-leaf (consulted on 20 July 2013), Toronto, Ont: Thomson Reuters, 2009) at 12-18, 12-19, the authors fortify Baynton J's finding by saying:

Indeed, it has been held, with clear justification, that a conveyance made in order to evade future creditors in general or a specific future creditor is fraudulent and void, whether the debtor is indebted at the time or not. Even where it is not altogether unreasonable for a debtor to anticipate that he or she will have sufficient assets to pay all future liabilities, if the object in conveying property to another party is to provide for the contingency that the debtor might not have sufficient assets, the courts may well infer a fraudulent intent and void the conveyance. [Citations excluded].

37 1007 Alberta also challenges Engineering's alleged conveyance of its business to Alberta Engineering pursuant to the *Fraudulent Preferences Act*, RSA 2000, c F-24 [FPA], section 1 of which provides as follows:

1 Subject to sections 6 to 9, every gift, conveyance, assignment, transfer, delivery over or payment of goods, chattels or effects or of bills, bonds, notes or securities or of shares, dividends, premiums or bonus in any bank, company or corporation, or of any other property, real or personal, made

(a) by a person at a time when the person is in insolvent circumstances or is unable to pay the person's debts in full or knows that the person is on the eve of insolvency, and

(b) with intent to defeat, hinder, delay or prejudice the person's creditors or any one or more of them,

is void as against any creditor or creditors injured, delayed or prejudiced.

38 As can be seen, for 1007 Alberta to be able to rely on this section, it must show that Engineering was in "insolvent circumstances" or it knew that it was "on the eve of insolvency." The Defendants make the same argument that Engineering was not insolvent or on the eve of insolvency, as there was no debt owing to Engineering at the time of the impugned conveyance, and that the debt did not arise until Bensler J awarded damages against it. In other words, although Bensler J based her calculation of the damages on the amount that Engineering was to pay 1007 Alberta for the transition of clients, her award was for "compensatory damages" and not for the debt. Even if this Court were to accept that argument (and it is not ruling on it), Sigurdson J said in *Kostiuk, Re* (1998), 6 C.B.R. (4th) 46 (B.C. S.C.) at paras 71-73 [*Kostiuk*]:

The authorities indicate that contingent claims must be valued fairly in light of all the circumstances, including the probability of the contingency materializing and the possible quantum if the case proceeds. ...

The settlor's debts for this purpose must also include a potential claim for damages, even if an action had not been brought at the time of the transfers ...

Volume 2 of Halsbury's *Laws of England, Bankruptcy and Insolvency*, 1st edition, current when our *Bankruptcy Act* was introduced in 1919, contained the following passage (in paragraph 460) which remains in the fourth edition today:

In inquiring into the settlor's ability to pay all his debts at the date of the settlement without resorting to the settled property, it is necessary to take into account all his liabilities, whether present or contingent, and place a reasonable estimate upon them ... Damages awarded against the settlor for misrepresentation made before the settlement must be included among the settlor's liabilities although the action in which they were awarded was not commenced until after the execution of the settlement.

[Citations excluded, emphasis added].

39 This Court recognizes that *Kostiuk, Re* was a bankruptcy case, where the court was trying to determine whether a creditor may make a claim for a contingent liability. This Court finds, however, at the very least, that it must undertake such an analysis, as this factor might constitute another badge of fraud, depending on the circumstances.

40 This Court has provided the foregoing recitation of the law in this area, as it is not worthwhile to examine each particular argument that the Defendants provide to this Court without looking at the matrix of factors that a court must examine when attempting to determine whether the 1007 Alberta has met its onus. It also important to note that any prejudgment relief is an extraordinary remedy. We must remember that the plaintiff is seeking to secure the defendant's assets before it has even obtained a judgment. As the British Columbia Court of Appeal said in *Silver Standard Resources Inc. v. Joint Stock Co. Geolog* (1998), [1999] 7 W.W.R. 289 (B.C. C.A.) at para 21, (1998), 59 B.C.L.R. (3d) 196 (B.C. C.A.):

...[I]t is clear that in most cases, it will not be just or convenient to tie up a defendant's assets or funds simply to give the plaintiff security for a judgment he may never obtain. Courts will be reluctant to interfere with the parties' normal business arrangements, and affect the rights of other creditors, merely on the speculation that the plaintiff will ultimately succeed in its claim and have difficulty collecting on its judgment if the injunction is not granted.

41 However, if the plaintiff meets the test for prejudgment relief, the court must take steps to restrain the defendant's dissipation of assets to secure the plaintiff's claims: *Hamza v. Hamza*, [1997] 9 W.W.R. 592 (Alta. C.A.) at para 23, (1997), 53 Alta. L.R. (3d) 80 (Alta. C.A.); *Boczkievich* at para 17.

42 The Defendants argue that there is no conveyance, fraudulent or otherwise, because client lists are not "property." That may be so, but the business and income that arise from the client lists are property that has value. Otherwise, why would we have a line of cases that prohibit directors, officers and key employees from being prohibited from appropriating corporate opportunities? See e.g. *Canadian Aero Service Ltd. v. O'Malley* (1973), [1974] S.C.R. 592, 40 D.L.R. (3d) 371, 11 C.P.R. (2d) 206 (S.C.C.); *Anderson, Smyth & Kelly Customs Brokers Ltd. v. World Wide Customs Brokers Ltd.* (1996), 39 Alta. L.R. (3d) 411, 184 A.R. 81 (Alta. C.A.). From what 1007 Alberta has presented to this Court in terms of the statistics that show an increase in Alberta Engineering revenues, and a corresponding decrease in Engineering revenues, along with the relatively constant amount of the total revenues, Alberta Engineering is now benefitting from Engineering's business. This fact is reinforced by the fact that the number of clients, and their per-client revenues has remained relatively constant from the time of the impugned "shifting of business." Whether that benefit is the result of 1007 Alberta's former clients matters not. 1007 Alberta has a judgment against Engineering and any dissipation of its assets serves to "delay, hinder or defraud" 1007 Alberta of the amount of its judgment: *FCA* ss I and II.

43 Engineering's conveyance of its business to Alberta Engineering was voluntary, as the Defendants concede that Engineering received no consideration for the conveyance. Did Engineering have the necessary intent to undertake this voluntary conveyance? In *Proulx*, Clackson J said that a voluntary conveyance "will in most cases justify the inference of the necessary intent" and that the "inference of intent will be strong if ... the settlement denuded [the settlor] of assets sufficient to cover existing obligations." The Defendants concede also that Engineering is no longer operating as an engineering business. Nor could it because Engineering no longer employs a professional engineer registered as a member of the Association of Professional Engineers and Geoscientists of Alberta and the *Engineering and Geoscience Professions Act*, RSA 2000, c E-11, s 3 prohibits Engineering from carrying on an engineering business. But that does not address the issue. Could Engineering not retain its business and the employ of Mr Ruggieri to service Engineering's clients? Instead of doing this, it chose to transfer or convey Engineering's business (and its employee, Mr Ruggieri) to Alberta Engineering. These two factors alone provide this Court with the strong inference of intent. By providing this Court with that argument, the Defendants have not rebutted the inference of intent.

44 But there is more. Mr Ruggieri is the sole director of each of Engineering and Alberta Engineering. They are not dealing at arm's length. Furthermore, there was unusual haste in making the transfer. It occurred after completion of the First Trial, but before Bensler J rendered the reasons for her decision. The transfer "substantially reduces the property of the grantor that would, but for the transfer, be available to his creditors" and "the effect of the transfers [was to] ... delay and defeat creditors": *Moody* at para 143. Again, as Baynton J said, "the more badges of fraud that are proven, the stronger the *prima facie* case of fraudulent intent will be."

45 Although it is arguable that Engineering owed no debt to 1007 Alberta at the time of the impugned conveyance, this Court finds that there is a *prima facie* case that Engineering had the fraudulent intent "to protect the assets ... from the possible or probable claims of future creditors," viz, 1007 Alberta: *Moody* at para 147.

46 Thus, this Court finds that 1007 has met the tests for this Court to grant an attachment order and a *Mareva* injunction as against Engineering and Alberta Engineering. We must remember that this Court is granting this order, not in respect of the First Action, but in respect of the action for fraudulent conveyance and tracing. Not only has 1007 established a strong *prima facie* case, but it is clear that there are reasonable grounds for believing that Engineering has dealt with its exigible property otherwise than for the purpose of meeting its reasonable and ordinary business expenses, and in a manner that has seriously hindered 1007 Alberta in the enforcement of the Judgment. Alberta Engineering, shares the same principal as Engineering, and is carrying on Engineering's business. In *Amhil Enterprises Ltd. v. Select Inc.*, 2005 CarswellOnt 195 (Ont. S.C.J. [Commercial List]), Farley J was dealing with a similar situation. He summarized the facts and his ruling at paras 4-5, which say:

Twelve days after the Court of Appeal dismissed Select's appeal, Select sent out a letter of April 16, 2002 to its customers indicating that THC was taking over its business. ... Gibson, the president of Select was examined on June 5, 2003 and confirmed that Select was now a shell, not carrying on business and with no assets; he indicated that it just had a name. It is implicit that Select transferred its business to THC (now run ostensibly by Gibson's family members but as to which it appears that it is business as usual including Gibson and Scicluna) for no consideration. Thus it appears to me that this transaction was a sham to prevent the plaintiff from collecting on its judgment debt.

I would therefore conclude that the plaintiff has a strong *prima facie* case on the merits; that Select as a defendant has already demonstrated by the sham transaction to THC that it is attempting to hide or otherwise dissipate its assets. The balance of convenience is certainly in favour of the plaintiff as the draft *Mareva* order requested does not interfere with THC's continuing to carry on business in the ordinary course.

See also *Equustek Solutions Inc. v. Jack*, 2012 BCSC 1490 (B.C. S.C. [In Chambers]).

47 1007 Alberta's primary complaint in respect of the alleged fraudulent preferences is that the GSAs that Engineering granted to Mr Ruggieri and GMR essentially converted their unsecured claims into secured claims which would take

priority over 1007 Alberta's unsecured claim. Concurrently, it states that any payments that Engineering has made pursuant to the GSAs are fraudulent preferences. It relies on *FPA* ss 2, 4, and 11 which provide:

2 Subject to sections 6 to 9, every gift, conveyance, assignment, transfer, delivery over or payment of goods, chattels or effects or of bills, bonds, notes or securities or of shares, dividends, premiums or bonus in any bank, company or corporation, or of any other property, real or personal, made

(a) by a person at a time when the person is in insolvent circumstances or is unable to pay the person's debts in full or knows that the person is on the eve of insolvency, and

(b) to or for a creditor with intent to give that creditor preference over the other creditors of the debtor or over any one or more of them,

is void as against the creditor or creditors injured, delayed, prejudiced or postponed.

4(1) A transaction is deemed to be one that has the effect of giving a creditor a preference over other creditors, within the meaning of section 3, if by the transaction a creditor is given or realizes or is placed in a position to realize payment, satisfaction or security for the debtor's indebtedness to that creditor or a portion of it greater proportionately than could be realized by or for the unsecured creditors generally of the debtor or for the unsecured portion of that creditor's liabilities out of the assets of the debtor left available and subject to judgment, writ proceedings, attachment or other process.

(2) Independently of the intent with which the transaction was entered into or of whether it was entered into voluntarily or under pressure, the preferential effect or result of the impeached transaction governs, and no pressure by a creditor or want of notice to the creditor alleged to have been so preferred of the debtor's circumstances, inability or knowledge as aforesaid, or of the effect of the transaction, avails to protect the transaction except as provided by sections 6 and 9.

11(1) If a gift, conveyance, assignment or transfer of any property, real or personal, that in law is invalid against creditors, was made to a person, and that person has sold or disposed of, realized or collected the property or a part of it, the money or other proceeds or that amount, whether further disposed of or not, may be seized or recovered in an action by a person who would be entitled to seize and recover the property if it had remained in the possession or control of the debtor or of the person to whom the gift, conveyance, assignment, transfer, delivery or payment was made.

(2) The right of seizure and recovery exists in favour of all creditors of the debtor.

(3) When the proceeds are of such a character as to be seizable under writ proceedings, they may be seized under the writ of any creditor and shall be distributed among creditors under the Civil Enforcement Act.

(4) Whether the proceeds are or are not of such a character as to be seizable under writ proceedings, an action may be brought for them or to recover the amount of them by a creditor, whether a judgment creditor or not, on behalf of that creditor and all other creditors, or any other proceedings may be taken that are necessary to render the proceeds or the amount of them available for the general benefit of the creditors.

48 GMR states in its written brief that "The unchallenged evidence of GMR is that this security agreement was made as a means of dealing with past loans — a legitimate business purpose." If this is indeed the case, the effect was to give GMR a preference over other creditors. Again, *Moody, Kostiuk* and Springman speak to this. As well, in *Grep Properties (II) Ltd. v. 371154 Alberta Inc.* (1995), 175 A.R. 361 (Alta. Q.B.) at para 12, McIntyre J said that there must be contemporaneity to the advance. Furthermore, it is not entirely clear if and when Engineering made any payments pursuant to the GSA it granted to GMR, but any payments it made to GMR pursuant to the GSA or before Engineering granted the GSA could be fraudulent preferences.

49 If Mr Ruggieri paid money into Engineering concurrently with his obtaining his GSA, this might protect his GSA pursuant to *FPA*. In that case, his GSA would not be a fraudulent preference. However, if Engineering granted the GSA to him for past indebtedness, the GSA would be a fraudulent preference for the same reasons that the GSA Engineering granted to GMA would be a fraudulent preference.

50 This Court is satisfied that 1007 Alberta has presented it with *prima facie* evidence that the GSAs give preferential treatment to GMA and Mr Ruggieri. Of course, during the trial of this matter, GMA and Mr Ruggieri might provide cogent evidence that rebuts this finding. However, they did not do so before this Court.

51 What, then, is the remedy that this Court may grant? *CEA* s 17 reads, in part, as follows:

17(3) In granting an attachment order, the Court may do one or more of the following:

(a) direct that the order applies

(i) to all or specific exigible property of the defendant, or

(ii) to any exigible property to be subsequently identified in writing by a bailiff;

(b) prohibit any dealing with exigible property of the defendant;

(c) impose conditions or restrictions on any dealings with exigible property of the defendant;

(d) require the defendant or a person who has possession or control of exigible property of the defendant to deliver up the property to a person identified in the order;

(e) authorize the clerk to issue a garnishee summons;

(f) appoint a receiver;

(g) include in the order any term, condition or ancillary provision that the Court considers necessary or desirable.

(4) The Court shall not grant an attachment order unless the claimant undertakes to pay any damages or indemnity that the Court may subsequently decide should be paid to the defendant or a third person and where the Court grants an attachment order, the Court may require the claimant

(a) to give any additional undertaking that the Court considers appropriate, and

(b) to provide security in respect of any undertaking.

(5) When an attachment order is granted, it should be granted in such a manner that it causes as little inconvenience to the defendant as is consistent with achieving the purposes for which the order is granted.

(6) An attachment order shall not attach property that exceeds an amount or a value that appears to the Court to be necessary to meet the claimant's claim, including interest and costs, and any related writs, unless the Court is of the view that such a limitation would make the operation of the order unworkable or ineffective.

52 The Hawco Order is not entirely clear. It says:

1. Other than in the normal and ordinary course of business and for ordinary personal outlays or dispositions, Antonio Ruggieri and Alberta Engineering Ltd. are prohibited from dealing with any exigible property that they own or that is held by any of the other Defendants.

2. Pending further Order of this Court, other than in the normal and ordinary course of business and for personal outlays or dispositions, Antonio Ruggieri and Alberta Engineering Ltd. are prohibited from dealing with or using in any manner any secured credit, including any credit card, loan or line of credit, for which payment is secured against any personal or real property in which the Defendants have any interest.

53 Hawco Order para 2 is reasonable, as it is intended to prevent Mr Ruggieri and Alberta Engineering from granting any credit that might have the effect of diminishing the value of 1007 Alberta's unsecured claim. This Court confirms that portion of the Hawco Order.

54 Hawco Order para 1 is overly broad, and perhaps vague, as it is not clear what "normal and ordinary course of business" and "ordinary personal outlays or dispositions" mean. 1007 Alberta submitted to this Court that it had no intention of putting Ruggieri or Alberta Engineering out of business. That is not surprising inasmuch as those two Defendants, along with GMR, are the ones from whom 1007 Alberta expects to collect the amount of its judgment if it ultimately succeeds. Thus, 1007 Alberta submits that it would be pointless for this Court to paralyze economically the Defendants.

55 This Court agrees. It has no intention of so paralyzing the Defendants. Of course, the Defendants could choose to provide security, such as in the form of a bond or a letter of credit, for the amount of the judgment, plus costs and interest. As the Defendants argue, however, to obtain such security the institution that provides the bond or letter of credit might require some security itself, such as deposited cash or some other type of negotiable instrument. This Court does not know the respective situations of the Defendants, so it cannot comment on whether this alternative is feasible. The only point that this Court is making is that if the Defendants are in a position to provide security, they may do so.

56 Another alternative is for the Defendants to provide 1007 Alberta on or before August 15, 2013, with detailed financial statements under oath, showing their assets and liabilities. Thereafter, they will maintain detailed accounts of their business operations and will provide 1007 Alberta with those detailed accounts every 3 months, on the 15th day of the month. They will not make any capital expenditures or distributions of their current assets, other than in the ordinary course of business. By ordinary course of business, this Court means the day to day operations of the business and, in the case of Mr Ruggieri his reasonable and ordinary living expenses. Any extraordinary expense or distribution will require 1007 Alberta's consent or an order of the court.

57 1007 Alberta seeks to have this Court increase the amount for which the attachment order/*Mareva* injunction attaches from \$525,000 to \$575,000, given the potential for increased costs. This Court will address the costs aspect in a moment, along with the undertaking that 1007 Alberta must provide. The attachment order/*Mareva* injunction will attach to the amount of the Judgment, plus interest. As well, 1007 Alberta seeks to have the attachment order/*Mareva* injunction extend to the completion of this action by way of judgment or discontinuance, or the 60th day from the day of entry of judgment in favour of the Plaintiff. This Court agrees with that suggestion, and so orders.

Security for Costs

58 Finally, it is necessary for this Court to address the issue of the Defendants' security for costs application. This application ties into 1007 Alberta's application for an increase in the amount for which the attachment order/*Mareva* injunction attaches. The *Alberta Rules of Court*, Alta Reg 124/2010, r 4.22 provides:

4.22 The Court may order a party to provide security for payment of a costs award if the Court considers it just and reasonable to do so, taking into account all of the following:

- (a) whether it is likely the applicant for the order will be able to enforce an order or judgment against assets in Alberta;
- (b) the ability of the respondent to the application to pay the costs award;

- (c) the merits of the action in which the application is filed;
- (d) whether an order to give security for payment of a costs award would unduly prejudice the respondent's ability to continue the action;
- (e) any other matter the Court considers appropriate.

59 In *Toronto Dominion Bank v. Suitel Canada Executive Suites Corp.*, 2011 ABQB 519, 2011 CarswellAlta 2250 (Alta. Q.B.), this Court explained that in the first instance the applicant, in this case, the Defendants, must satisfy the onus to bring itself within the Rule. Once they satisfy that onus, the evidentiary burden shifts the respondent, in this case 1007 Alberta, to show why an order ought not to be made against it. This Court went on to say at para 31:

TD Bank has satisfied the onus on it to bring itself within Alberta Rules of Court r. 4.22. Thus, the evidentiary burden shifts to Valerio to show that this Court should not post security for costs. Why this shift? Valerio is the only person who knows whether there is any reason why this Court should not order him to post security for costs

60 In this case, Mr Ruggieri deposed in the Affidavit that he swore on June 17, 2013, that 1007 Alberta had been struck from the Corporate Registry (but had been revived), and that its directors are individuals resident in British Columbia. Mr Ruggieri is unaware of any assets that 1007 Alberta or its directors have in Alberta. 1007 Alberta's financial statements show retained earnings, but there is no evidence to show whether these are cash or "paper earnings." 1007 Alberta has filed no affidavit to challenge Mr Ruggieri's sworn statement. As Wittmann CJ said in *Attila Dogan Construction & Installation Co. v. AMEC Americas Ltd.*, 2011 ABQB 175, 2011 CarswellAlta 407 (Alta. Q.B.) at para 13:

There is no evidence with respect to the financial condition of AD at all. It seems to me that, where a plaintiff advances a claim of this magnitude, and does not dispute that it has no assets in this jurisdiction, that plaintiff risks having this factor weigh against it if it declines to bring any evidence with regard to its ability to satisfy an award of costs.

See also *Autoweld Systems Ltd. v. CRC-Evans Pipeline International Inc.*, 2011 ABQB 265 (Alta. Q.B.) at para 21 2011 CarswellAlta 679 (Alta. Q.B.); leave to appeal refused 2011 CarswellAlta 1355 (Alta. C.A.); *Calmont Leasing Ltd. v. 32262 B.C. Ltd.* (2002), 317 A.R. 331 (Alta. C.A.), at 332.

61 Rule 4.22 also requires this Court to look at the merits of the action. In *Attila Dogan Construction & Installation Co.*, Wittmann CJ said at para 17:

What Rule 4.22 requires is an inquiry into the merits. In my view, this suggests that a reasonably meritorious defence, when considered together with the other factors set out in Rule 4.22, is sufficient to weigh in favour of granting security for costs. It is neither possible, nor desirable, for the Court at this stage to determine which party's case is stronger.

62 This Court has already commented on the merits of 1007 Alberta's case when it discussed the attachment order/*Mareva* injunction. It did not, however, comment on the Defendant's defense to that action. This Court's review of the evidence did not have to satisfy it that 1007 Alberta would definitely be successful. Instead, it considered whether it had a strong *prima facie* case in the case of the *Mareva* injunction or a reasonable likelihood that it would succeed in the case of the attachment order. That, however, does not take away from the fact that the Defendants could have a defense to the action.

63 This is not a summary judgment application. The evidence that the parties produce during the trial will be critical. This Court cannot say at this stage that the Defendants' defense is "reasonably meritorious" as it has not seen enough evidence, and the evidence it has seen is vague. Suffice it to say that the Defendants have put forth a defense, which, if accepted by the trial judge, might be a full answer to the claims that 1007 Alberta alleges. However, this Court cannot say, at this stage, that the defense is strong. At best, this factor is of neutral effect.

64 Because 1007 Alberta did not provide any evidence to challenge the Defendants' assertions, this Court cannot rule as to whether an order to give security for payment of a costs award would unduly prejudice the respondent's ability to continue the action. However, it is worth noting that 1007 Alberta's only asset is the amount of the Judgment. There are a number of Alberta cases that say that if the defendant's alleged conduct resulted in the plaintiff's impecuniosity, this is "a significant circumstance to consider in either reducing the amount of security or denying an application entirely": *Spectrum Centre for Physical Therapy & Athletic Rehabilitation Ltd. v. Filipenko*, 2011 ABQB 340 (Alta. Master) at para 31.

65 If 1007 Alberta does not have the financial wherewithal to provide security for costs, it also cannot provide a meaningful undertaking as to damages to support the attachment order/*Mareva* injunction. However, it has advised that its principal, Mr Mossman will provide the required undertaking and security for costs, if this Court were to grant the Defendants' application. The required undertaking is to cover damages that the Defendants might suffer as a result of this court's order to grant the attachment order/*Mareva* injunction. Given the way that this Court has framed the attachment order/*Mareva* injunction, the damages should not be substantial. If the Defendants provide security, the damages would be the cost of that security. If the Defendants choose to deposit cash, that cash would be invested in an interest-bearing account with interest to follow principal. If the Defendants choose the continual accounting option, there would be no damages.

66 It should also be noted that Mr Mossman provided this Court with his affidavit that he swore on July 4, 2013, in which he states that he and his wife have certain monetary assets. That does not respond to whether *he* has assets to support the undertaking as to damages and security for costs.

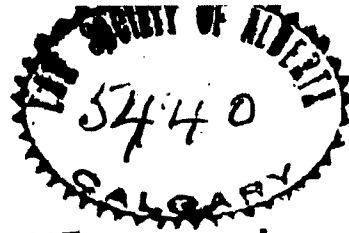
67 Balancing the factors set forth in Rule 4.22, this Court finds that it would be just and reasonable to grant the Defendants' application for security for costs. It should be noted that any such security will be for party-party costs, and no more: *Attila Dogan Construction & Installation Co.* at para 26. Furthermore, this is not a complex case that should take a considerable amount of court time, or, for that matter, counsel preparation time. Of course, if the litigation were to drag on, with various interlocutory applications, the amount might have to be adjusted: *Autoweld Systems Ltd.* at para 26.

68 The Defendants' counsel has provided this Court with a draft bill of costs. That draft overestimates the costs. Mr Ruggieri states that the "estimated costs of this Claim are in the range of \$60,000 to \$100,000." The security for costs will be in the amount of \$60,000. The undertaking as to damages will be in the amount of \$15,000. 1007 Alberta or its principal, Mr Mossman, may either post this amount by paying it into court or providing a bond in that amount. The Hawco Reasons and Hawco Order take into account \$50,000 in costs. Accordingly, the amount of the anticipated costs will be increased by \$10,000.

69 This Court orders that the Defendants will also be required to either post \$60,000 as its security for costs by paying it into court or providing a bond in that amount. s

70 Inasmuch as each party succeeded on their applications, the parties will bear their own costs of these applications.
Applications granted.

Tab 18



THE
Statutes at Large,

FROM THE
First Year of Queen MARY,
TO THE
Thirty-fifth Year of Queen ELIZABETH, inclusive.

To which is prefixed,
A TABLE containing the TITLES of all the STATUTES
during that Period.

VOL. VI.

By DANBY PICKERING, of Gray's-Inn, Esq;
Reader of the Law Lecture to that Honourable Society.

CAMBRIDGE,
Printed by JOSEPH BENTHAM, Printer to the UNIVERSITY;
for CHARLES BATHURST, at the Cross-Keys, opposite St. Dunstan's
Church in Fleet-Street, London. 1763.

CUM PRIVILEGIO.

CAP. V.

An act against fraudulent deeds, alienations, &c.

Fraudulent
deeds made to
avoid the debts
of others shall
be void, and
the penalties
of the parties
to such frau-
dulent assu-
rances.
2 Bulstr. 218.

FOR the avoiding and abolishing of feigned, covinous and fraudulent feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments and executions, as well of lands and tenements as of goods and chattels, more commonly used and practised in these days than hath been seen or heard of heretofore: (2) which feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments and executions, have been and are devised and contrived of malice, fraud, covin, collusion or guile, to the end, purpose and intent, to delay, hinder or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries and reliefs, not only to the let or hinderance of the due course and execution of law and justice, but also to the overthrow of all true and plain dealing, bargaining and chevisance between man and man, without the which no commonwealth or civil society can be maintained or continued:

All fraudulent
conveyances
made to avoid
the debt or
duty of others
shall be void.
Rast. 207.
27 Eliz. c. 4.
2 Leon. 9. 223.
1 Roll. 493.
Litch 222.
Dyer 295, 351.
3 Co. 80, 81.
5 Co. 60.
8 Co. 171.
9 Co. 108.
10 Co. 56.
Co. Lit. 76. a.
1 Leon. 47,
308.
Hob. 72.

II. Be it therefore declared, ordained and enacted by the authority of this present parliament, That all and every feoffment, gift, grant, alienation, bargain and conveyance of lands, tenements, hereditaments, goods and chattels, or of any of them, or of any lease, rent, common or other profit or charge out of the same lands, tenements, hereditaments, goods and chattels, or any of them, by writing or otherwise, (2) and all and every bond, suit, judgment and execution, at any time had or made sithence the beginning of the Queen's majesty's reign that now is, or at any time hereafter to be had or made, (3) to or for any intent or purpose before declared and expressed, shall be from henceforth deemed and taken (only as against that person or persons, his or their heirs, successors, executors, administrators and assigns, and every of them, whose actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries and reliefs, by such guileful, covinous or fraudulent devices and practices, as is aforesaid, are, shall or might be in any wise disturbed, hindered, delayed or defrauded) to be clearly and utterly void, frustrate and of none effect; any pretence, colour, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding.

The forfeiture
of the parties
to fraudulent
deeds. Co.
pla. 162. Hob.
166.
Dyer 351.
Cro. El. 645.
Cro. Jac. 270.

III. And be it further enacted by the authority aforesaid, That all and every the parties to such feigned, covinous or fraudulent feoffment, gift, grant, alienation, bargain, conveyance, bonds, suits, judgments, executions and other things before expressed, and being privy and knowing of the same, or any of them; (2) which at any time after the tenth day of June next coming shall wittingly and willingly put in ure, avow, maintain, justify or defend the same, or any of them, as true, simple, and done, had or made *bona fide* and upon good consideration; (3) or shall alien or assign any the lands, tenements, goods, leases or other things before-mentioned, to him or them conveyed as is aforesaid, or any part thereof; (4) shall incur the penalty and forfei-
ture

ture of one year's value of the said lands, tenements and hereditaments, leases, rents, commons or other profits, of or out of the same; (5) and the whole value of the said goods and chattels; (6) and also so much money as are or shall be contained in any such covinous and feigned bond; (7) the one moiety whereof to be to the Queen's majesty, her heirs and successors, and the other moiety to the party or parties grieved by such feigned and fraudulent feoffment, gift, grant, alienation, bargain, conveyance, bonds, suits, judgments, executions, leases, rents, commons, profits, charges and other things aforesaid, to be recovered in any of the Queen's courts of record by action of debt, bill, plaint or information, wherein no essoin, protection or wager of law shall be admitted for the defendant or defendants; (8) and also being thereof lawfully convicted, shall suffer imprisonment for one half year without bail or mainprise.

Who shall have the forfeiture, and by what means.

IV. Provided always, and be it further enacted by the authority aforesaid, That whereas sundry common recoveries of lands, tenements and hereditaments have heretofore been had, and hereafter may be had against tenant in tail, or other tenant of the freehold, the reversion or remainder, or the right of reversion or remainder, then being in any other person or persons; (2) that every such common recovery heretofore had, and hereafter to be had, of any lands, tenements or hereditaments, shall as touching such person and persons which then had any remainder or reversion, or right of remainder or reversion, and against the heirs of every of them, stand, remain and be of such like force and effect, and of none other, as the same should have been if this act had never been had ne made.

Common recoveries against the tenants of freehold.

V. Provided always, and be it further enacted by the authority aforesaid, That this act, or any thing therein contained, shall not extend to make void any estate or conveyance, by reason whereof any person or persons shall use any voucher in any writ of *Formedon*, now depending or hereafter to be depending, but that all and every such vouchers in any writ of *Formedon* shall stand and be in like force and effect, as if this act had never been had ne made; any thing before in this act contained to the contrary notwithstanding.

Making an estate whereby a voucher may be used in a formedon.

VI. Provided also, and be it enacted by the authority aforesaid, That this act, or any thing therein contained, shall not extend to any estate or interest in lands, tenements, hereditaments, leases, rents, commons, profits, goods or chattels, had, made, conveyed or assured, or hereafter to be had, made, conveyed or assured, which estate or interest is or shall be upon good consideration and *bona fide* lawfully conveyed or assured to any person or persons, or bodies politick or corporate, not having at the time of such conveyance or assurance to them made, any manner of notice or knowledge of such covin, fraud or collusion as is aforesaid; any thing before mentioned to the contrary hereof notwithstanding.

Estates made upon good consideration, and *bona fide*.

VII. This act to endure unto the end of the first session of the next parliament. 50 Ed. 3. c. 6. 2 R. 2. stat. 2. c. 3. 3 H. 7. c. 4. made perpetual by 29 Eliz. c. 5. See 27 Eliz. c. 4.

Tab 19



Wickstrom v. Wetter, [2008] A.J. No. 435

Alberta Judgments

Alberta Court of Queen's Bench

Judicial District of Edmonton

R.A. Graesser J.

Heard: December 13, 2007.

Judgment: February 4, 2008.

Released: February 6, 2008.

Docket: 0603 08789

Registry: Edmonton

[2008] A.J. No. 435 | 2008 ABQB 83

Between Shirley Wickstrom, Beatrice Steinke, Ruth Thorvaldson, Darlene Steinke, Audrey Housestol and Delwayne Steinke, Plaintiffs, and Douglas David Wetter, Jaylene Gail Wetter, Randal Niel Wetter, Barrington Petroleum Ltd. and Computershare Trust Company, Defendants And between Douglas David Wetter, Jaylene Gail Wetter, and Randal Niel Wetter, Plaintiffs by Counterclaim, and Shirley Wickstrom, Beatrice Steinke, Ruth Thorvaldson, Darlene Steinke, Audrey Housestol and Delwayne Steinke and Computershare Trust Company of Canada, Defendants by Counterclaim

(114 paras.)

Case Summary

Civil litigation — Civil procedure — Judgments and orders — Summary judgments — To dismiss action — Application for summary judgment to dismiss claim for rectification of trust dismissed — Plaintiff unit holders of trust satisfied low threshold to show there was some evidence in support of claim to rectify trust based on intentions of original parties to make trust last forever — Applications judge not to engage in weighing of evidence — Alberta Rules of Court, Rule 159.

Civil litigation — Civil evidence — Burden and standard of proof — On plaintiff — Application for summary judgment to dismiss claim for rectification of trust dismissed — Plaintiff unit holders of trust satisfied low threshold to show there was some evidence in support of claim to rectify trust based on intentions of original parties to make trust last forever — Applications judge not to engage in weighing of evidence.

Contracts — Formation — Intention — Application for summary judgment to dismiss claim for rectification of trust dismissed — Plaintiff unit holders of trust satisfied low threshold to show there was some evidence in support of claim to rectify trust based on intentions of original parties to make trust last forever — Applications judge not to engage in weighing of evidence.

Natural resources law — Oil and gas — Contracts — Terms and conditions — Application for summary judgment to dismiss claim for rectification of trust dismissed — Plaintiff unit holders of trust satisfied low threshold to show there was some evidence in support of claim to rectify trust based on intentions of original parties to make trust last forever — Court already found trust terminated when oil and gas lease in

place when trust created was discharged — Plaintiffs able to point to some evidence parties intended trust to continue.

Natural resources law — Mines and minerals — Contracts — Terms and conditions — Application for summary judgment to dismiss claim for rectification of trust dismissed — Plaintiff unit holders of trust satisfied low threshold to show there was some evidence in support of claim to rectify trust based on intentions of original parties to make trust last forever — Court already found trust terminated when oil and gas lease in place when trust created was discharged — Plaintiffs able to point to some evidence parties intended trust to continue.

Wills, estates and trusts law — Trusts — Variation of — Grounds — Application for summary judgment to dismiss claim for rectification of trust dismissed — Plaintiff unit holders of trust satisfied low threshold to show there was some evidence in support of claim to rectify trust based on intentions of original parties to make trust last forever — Applications judge not to engage in weighing of evidence.

Application by the defendants to an action seeking rectification of the terms of a trust agreement for summary dismissal of the plaintiff unit holders' claims. The trust was created in 1951 by the original owners of the mines, minerals and lands, the Wetters. The Wetters acquired units in the trust which they transferred to their daughters, two of the plaintiff unit holders. The defendants were the current mineral title owners, who obtained their interests through the Wetters' son. At the time the trust was created, the oil and gas interests had been leased to Imperial Oil. Imperial discharged its lease in 1967, and the mines and minerals remained unleased until 1994, when the defendants leased the petroleum, natural gas and related hydrocarbons to Barrington. The essence of the dispute was whether the original parties to the trust intended that it apply to mineral leases subsequent to the lease that was in effect when the trust agreement was executed. The Wetters were no longer alive. The plaintiffs conceded that the courts had concluded trusts such as this were terminated when the existing leases terminated, so they sought to rectify the terms of the trust to accord with what they proposed were the Wetters' intentions. They put forth evidence purporting to show the Wetters wanted the trust to last forever so their descendants could obtain the benefit of the units allotted to them in the trust. Correspondence between the trustee and members of the Wetter family over the years also showed they were conducting themselves as though the trust continued after Imperial discharged its lease.

HELD: Application dismissed.

To resist the application, the plaintiffs had to show they had a reasonable chance of proving the parties to the trust intended that it survive the discharge of Imperial's lease. In the opinion of the applications judge, none of the evidence submitted by the plaintiffs clearly established the trust was intended to last forever. The actions of the parties after the lease was discharged might show reliance on the continued existence of the trust, but was not relevant to the original parties' intentions. However, the applications judge was not entitled to weigh the evidence in coming to his decision on the summary judgment application. It did not matter whether or not the evidence submitted by the plaintiffs was sufficient to meet the burden of proof on them to make out their case for rectification. The plaintiffs met the low threshold of establishing there was some evidence capable of supporting their claim.

Statutes, Regulations and Rules Cited:

Alberta Rules of Court, Rule 159, Rule 159(2), Rule 159(3)

Counsel

Christopher J. Lane: for the Plaintiffs.

Michael B. Niven, Q.C.: for the Defendants.

Reasons for Judgment

R.A. GRAESSER J.

INTRODUCTION

1 This is an application by the Defendants for summary dismissal of the Plaintiffs' claim against them for rectification of the terms of the Wetter Gross Royalty Trust Agreement, entered into between August and Ernestina Wetter and Prudential Trust Company Limited in 1950. The Plaintiffs are unit holders in the Trust, and the Defendants are the current mineral title owners.

2 The essence of this dispute is whether or not the original parties to the Trust intended that it apply to mineral leases subsequent to the lease that was in effect when the Agreement was executed.

3 The Defendants bring this application under Rule 159(2) and (3):

159(2) a defendant may, after delivering a statement of defence, on the ground that there is no merit to a claim or part of a claim or that the only genuine issue is as to amount, apply to the court for a judgment on an affidavit sworn by him or some other person who can swear positively to the facts, stating that there is no merit to the whole or part of the claim or that the only genuine issue is as to amount and that the deponent knows of o facts that would substantiate the claim or any part of it.

159(3) On hearing the motion, if the court is satisfied that there is no genuine issue for trial with respect to any claim, the court may give summary judgment against the plaintiff or a defendant.

BACKGROUND

4 This application is part of the aftermath of Alberta's rush to convert the oil boom of the 1950's into marketable interests - the Gross Royalty Trust.

5 The Defendants Douglas David Wetter, Jaylene Gail Wetter and Randall Niel Wetter are the current owners of the mines and minerals except coal within, upon or under NE-5-49-25-W4. They apparently acquired their interest through H. W. Wetter, the son of August and Ernestina Wetter.

6 August and Ernestina were the previous owners of the mines and minerals as well as the lands. On August 21, 1951, they entered into a Gross Royalty Trust Agreement with Prudential Trust (now Computershare Trust Company). Prudential, as Trustee under the Gross Royalty Trust, filed a caveat against the mines and minerals to protect the Trust's interests under the Gross Royalty Trust Agreement.

7 August and Ernestina acquired units in the Wetter Leduc Gross Royalty Trust and ultimately transferred their units to their daughters, including the Plaintiffs Beatrice Steinke and Ruth Thorvaldson. The other Plaintiffs are or claim to be unit owners in the Trust.

8 At the time the Trust was created, the oil and gas interests had been leased to Imperial Oil under a 10 year lease dated February 13, 1947. The lease continued so long as there was production of oil or gas, but by 1967 production had stopped and Imperial Oil discharged its lease on February 13, 1969.

9 The mines and minerals remained unleased until 1994, when the individual Defendants leased the petroleum, natural gas and related hydrocarbons to Barrington Petroleum Ltd.

10 August and Ernestina both died after the Imperial Oil Lease was discharged in 1969 and before the Barrington Lease was entered into in 1994. There was apparently no production of any leased substances between those dates.

11 The Alberta Court of Appeal's decision in *Guaranty Trust Co. of Alberta v. Hetherington*, [1989] A.J. No. 472 interpreted the Gross Royalty Trust Agreement in that case (which is identical to the form used by Prudential and August and Ernestina) as attaching only to the royalties payable under the oil and gas lease in effect at the time the Gross Royalty Trust Agreement was entered into.

12 Because of that decision, the form of agreement involved in the Wetter Leduc Gross Royalty Trust, and the fact that the original Imperial Oil lease had expired on its own terms and by virtue of the cessation of production and the effluxion of time, Computershare Trust and the individual Defendants applied for an order declaring that the Wetter Leduc Gross Royalty Trust Agreement had expired. The individual Defendants also applied for an order discharging the Trust's caveat from their mineral title. Mason, J. granted such an Order on January 18, 2006.

13 The Order allowed any unit holder to apply to set aside the Order within 45 days from service. This action was commenced by the Plaintiffs for declaratory relief including:

- (a) A declaration that the Agreement is still in force and effect and applies to a 12 1/2% gross royalty share of production under the Present Lease and any other leases of the Lands which may be granted hereafter by the Wetters;
- (b) An order rectifying the Agreement and any subsidiary collateral documents thereto so as to provide that the transfer and assignment of the 12 1/2% landowner's gross royalty share and share of production referred to therein relate not only to the 12 1/2% gross royalty reserved under the Original Lease but also to a 12 1/2% gross royalty under the Present Lease and any subsequent leases of the Lands;
- (c) A declaration that the Agreement conveyed an interest in the lands to the Trustee; and
- (d) A Declaration that the Caveat filed in respect of the Agreement is valid and subsisting.

14 This action is being treated as an application to set aside Mason, J.'s order of January 18, 2006 and was commenced within the time provided by Mason, J.

15 The central issue between the parties is whether or not the Gross Royalty Trust Agreement expired when the Imperial Oil Lease expired in 1967 or 1969, or whether it continues as an interest in the mines and minerals and attaches to royalties from subsequent leases, like the lease to Barrington in 1994.

LEGAL BACKGROUND

16 The operative clauses in the Agreement are clauses 2 and 25, which provide:

ASSIGNMENT OF ROYALTY

- 2. The Owner herein, doth hereby grant, bargain, sell, assign, transfer and set over unto the Trustee, its successors, and assigns forever all the estate, right, title, interest, claim and demand whatsoever, both