CITATION: Ernst & Young Inc. v. Aquino, 2021 ONSC 527
COURT FILE NOs.: CV-19-630908-00CL
CV-20-00636754-00CL
DATE: 20210319

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
ERNST & YOUNG INC., in its capacity as Court-Appointed Monitor of Bondfield Construction Company Limited Applicant	*Alan Merskey* and *Evan Cobb*, for the Applicant
– and –	
JOHN AQUINO, MARCO CARUSO, GIUSEPPE ANASTASIO a.k.a. JOE ANA, LUCIA COCCIA a.k.a. LUCIA CANDERLE, THE ESTATE OF MICHAEL SOLANO, GIOVANNI ANTHONY SIRACUSA a.k.a. JOHN SIRACUSA, 2483251 ONTARIO CORP. a.k.a. CLEARWAY HAULAGE, 2420595 ONTARIO LTD. a.k.a. STRADA HAULAGE, 2304288 ONTARIO INC., 2466601 ONTARIO INC. a.k.a. MMC CONTRACTING, 2420570 ONTARIO LTD. a.k.a. MTEC CONSTRUCTION, TIME PASSION, INC. and RCO GENERAL CONTRACTING LTD. Respondents	*Michael Citak* and *Chris Junior*, for the Respondents John Aquino and 2304288 Ontario Inc. *George Corsianos*, for the Respondent Marco Caruso *Terry Corsianos*, for the Respondents Giuseppe Anastasio, a.k.a. Joe Ana and Lucia Coccia, a.k.a. Lucia Canderle
AND BETWEEN:	
KSV KOFMAN INC. in its capacity as Trustee-in-Bankruptcy of 1033803 ONTARIO INC. and 1087507 ONTARIO LIMITED Applicant	*Scott A. Bomhof, Jeremy Opolsky, Craig Gilchrist*, for the Applicant
– and –	

JOHN AQUINO, MARCO CARUSO, GIUSEPPE ANASTASIO a.k.a. JOE ANA, THE ESTATE OF MICHAEL SOLANO, LUCIA COCCIA a.k.a. LUCIA CANDERLE, ~~DOMINIC DIPEDE,~~ 2483251 ONTARIO CORP. a.k.a. CLEARWAY HAULAGE, MMC GENERAL CONTRACTING, MTEC CONSTRUCTION, STRADA HAULAGE, 2104664 ONTARIO INC., and 2304288 ONTARIO INC. Respondents	)	*Michael Citak* and *Chris Junior*, for the Respondents John Aquino and 2304288 Ontario Inc. *George Corsianos*, for the Respondent Marco Caruso *Terry Corsianos*, for the Respondents Giuseppe Anastasio, a.k.a. Joe Ana and Lucia Coccia, a.k.a. Lucia Canderle *Brian Belmont*, for the Respondent 2104664 Ontario Inc. **HEARD:** September 14, 15, 16 and 22, 2020

REASONS FOR DECISION

DIETRICH J.

OVERVIEW

[1] Bondfield Construction Company Limited ("BCCL") was a family-owned construction company that took on large scale construction projects in the Greater Toronto Area and elsewhere, such as the expansion and redevelopment of St. Michael's Hospital.

[2] Its affiliate 1033803 Ontario Inc., commonly known as Forma-Con Construction ("Forma-Con"), was in the concrete forming business. BCCL and Forma-Con are part of the Bondfield Group of Companies.

[3] The Bondfield Group of Companies ("Bondfield Group") was a full-service group of construction companies operating in the Greater Toronto Area and Southern Ontario since the mid-1980's. Prior to its insolvency, the Bondfield Group was operated by the Aquino family. Ralph Aquino ("Ralph") founded the Bondfield Group and was joined in the family business first by his son John Aquino in 1994, and later by son Steven Aquino ("Steven") in 2000.

[4] By 2018, the Bondfield Group was in serious financial trouble. BCCL commenced *CCAA* proceedings on April 3, 2019 and this court appointed the applicant Ernst & Young Inc. ("EY") as Monitor of BCCL and certain of its affiliates. On December 19, 2019, this court appointed the applicant KSV Restructuring Inc. as the trustee in bankruptcy of Forma-Con (the "Trustee").

[5] Following their respective appointments, each of the Monitor and the Trustee discovered that BCCL and Forma-Con had illegitimately paid out tens of millions of dollars. These payments were made in false invoicing schemes over a number of years prior to BCCL commencing *CCAA* proceedings and prior to Forma-Con's bankruptcy.

[6] At BCCL, the Monitor also discovered what it describes as a "fund cycling scheme." In this alleged scheme, the respondent John Aquino, the then president of BCCL, would use his holding company to inject capital into BCCL. He would make these capital injections at the end of a year so that BCCL would appear to its stakeholders to be financially stronger than it was. He would then arrange for the injected capital to be returned to his holding company early in the following year. The Monitor asserts that the bulk of the funds comprising the capital injections were funds transferred from BCCL to John Aquino or his holding company at undervalue.

[7] The Monitor seeks a declaration that the transfers made out of BCCL as part of the false invoicing scheme and the fund cycling scheme, during the relevant period, were transfers at undervalue for which Bondfield received no consideration. It also seeks a declaration that those who benefited from the schemes are jointly and severally liable for the amounts transferred.

[8] The Trustee seeks a declaration that the transfers made out of Forma-Con as part of the false invoicing scheme were transfers at undervalue, for which Forma-Con received no consideration. It also seeks a declaration that those who benefited from the scheme are jointly and severally liable for the amounts transferred.

[9] Justice Hainey ordered that these two applications, being the Monitor's application (Court File No. 19-630908-00CL) (the "Bondfield Application") and the Trustee's application (Court File No. 20-00636754-00CL) ("Forma-Con Application") be heard at the same time and that the evidence adduced and admitted in one application, unless objected to by a party, would be deemed to be evidence in both applications. This hearing covers both applications.

[10] For the reasons that follow, I find that the payments by BCCL during the statutory review period as part of the false invoicing scheme were transfers at undervalue, for which the Monitor is entitled to compensation from those who benefited. I also find that the payments made by Forma-Con during the statutory review period as part of the false invoicing scheme were transfers at undervalue, for which the Trustee is entitled to compensation from those who benefited.

[11] I will now set out the background facts, the positions of the parties, and the evidence in respect of each of the Bondfield Application and the Forma-Con Application, followed by the issues to be determined. The law and analysis will follow as applied to both BCCL and Forma-Con in respect of the false invoicing scheme, and as applied to BCCL in respect of the fund cycling scheme.

A. The Bondfield Application

Background Facts

[12] Ralph is the controlling shareholder of the Bondfield Group. During the period when the alleged schemes were being carried out, John Aquino was BCCL's president and owned 33 percent of the non-voting shares of BCCL. At that time, he was also the principal with primary responsibility and control over BCCL's finances.

[13] As of March 2015, Ralph and Steven were also officers of BCCL. Ralph held the position of CEO and Steven held the position of vice president.

[14] The Bondfield Group began to experience liquidity issues in 2015 and 2016 when it expanded its operations by taking on a number of P3 projects. While the Bondfield Group was able to obtain short-term replacement financing to resolve certain of these issues, by 2018 the financial condition of the Bondfield Group had deteriorated. Many subcontractors and other vendors refused to continue to provide services or materials. Progress on several construction projects slowed considerably or came to a standstill. These construction delays exacerbated the Bondfield Group's financial situation as project owners began to withhold payment on the project receivables. BCCL's bonding company, Zurich Insurance Company Ltd. ("Zurich"), paid out on a number of claims resulting in some of the subcontractors resuming work and suppliers delivering materials again.

[15] In 2018, Zurich engaged EY to review the financial situation of the Bondfield Group. EY reported that the Bondfield Group had a cash flow concern. On June 18, 2018, Zurich advised that it would be winding down the Bondfield Group.

[16] In October 2018, BCCL's primary lender, Bridging Finance Inc. ("Bridging"), called in its $80,000,000 loan.

[17] John Aquino's employment with the Bondfield Group was terminated on October 15, 2018. Steven is now the president of the Bondfield Group.

[18] On April 3, 2019, this court granted BCCL's application under the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA"*).

[19] Following the Monitor's appointment on April 3, 2019, it commenced the Bondfield Application against the respondents therein (the "Bondfield Respondents"), who are alleged to have participated in and benefited from the false invoicing scheme. Insofar as the alleged fund cycling scheme is concerned, the Monitor conceded that the only Bondfield Respondent that benefited was John Aquino's personal holding company 2304288 Ontario Inc ("230").

[20] The Monitor proceeds pursuant to section 36.1 of the *CCAA* and section 96 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*"). The provisions of the *BIA* are modified in the *CCAA* context. The date of the commencement of the *CCAA* proceedings is the first date of the relevant review period (as opposed to the date of the initial bankruptcy event)

pursuant to s. 96. The *BIA* gives the Monitor the same impeachment powers that may be exercised by a trustee in bankruptcy.

[21] Following its appointment, the Monitor conducted a preliminary investigation and reported to this court that it appeared that BCCL had illegitimately transferred amounts to certain of the Bondfield Respondents in an aggregate amount of approximately 35,700,000 CAD and 35,030 USD between April 3, 2014 and April 3, 2019. This period is the five-year statutory period under the *BIA* during which the Monitor may review transfers at undervalue (the "Bondfield review period").

[22] The Monitor's report stated that the impugned transactions (the "Bondfield impugned transactions") occurred in one of two ways.

[23] One set of transactions involved a false invoicing scheme by which $21,807,693 was removed from BCCL during the Bondfield review period through false invoices submitted by Bondfield Respondents 2483251 Ontario Corp. a.k.a. Clearway Haulage ("Clearway"), 2420595 Ontario Ltd. a.k.a. Strada Haulage ("Strada"), 2466601 Ontario Inc. a.k.a. MMC Contracting ("MMC"), 2420570 Ontario Ltd. a.k.a. MTEC Construction ("MTEC"), Time Passion, Inc. ("Time Passion"), and RCO General Contracting Inc. ("RCO") (collectively, the "BCCL Supplier Respondents"). The Monitor alleged that the BCCL Supplier Respondents had submitted false invoices to BCCL that were improperly charged to and paid from various BCCL projects.

[24] Despite initial denials of any impropriety, eventually, under cross-examination, Bondfield Respondents Mario Caruso ("Caruso"), Giuseppe Anastasio ("Anastasio"), and Lucia Coccia (a.k.a. Lucia Canderle) ("Coccia"), each of whom was involved in operating the BCCL Supplier Respondents, admitted that they did not dispute the Monitor's contention that no value was provided by any of the suppliers identified by the Monitor for any of the transfers underlying these false invoices (not including 230). John Aquino made the same admission.

[25] However, the Bondfield Respondents, other than the Estate of Michael Solano (the "Solano Estate"), Anthony Siracusa ("Siracusa"), and Time Passion, Inc., which was operated by Siracusa, deny that there was any intent to defraud, defeat or delay creditors of BCCL. The Estate Trustee of the Solano Estate claims to have no knowledge of the BCCL impugned transactions, and Siracusa and Time Passion, Inc. did not respond to the Bondfield Application.

[26] The other set of transactions involved an alleged scheme by which funds in excess of $14,029,369 were transferred from BCCL to 230 for no value. From time to time during the Bondfield review period, at or close to year-end, 230 returned funds to BCCL, on a temporary basis, to create the impression of greater financial strength.

B. The Forma-Con Application

Background Facts

[27] John Aquino was at all material times the president and a shareholder of Forma-Con.

[28] At the time of Forma-Con's bankruptcy on December 19, 2019, the Trustee discovered that Forma-Con had $215,000,000 in liabilities, including millions owing to each of BCCL, Bridging, Canada Revenue Agency and the Workplace Safety & Insurance Board. BCCL's surety, Zurich, is a secured creditor of Forma-Con.

[29] Following the Monitor's delivery of its investigatory report on October 30, 2019, the Trustee undertook its own investigation. It concluded that between 2011 and 2017, Forma-Con had paid more than $34,000,000 to certain suppliers for no consideration, and that $11,366,890 of that amount (the "Forma-Con impugned transactions") was paid to six suppliers during the five years preceding the bankruptcy.

[30] The Trustee brings the Forma-Con Application against the respondents therein (the "Forma-Con Respondents"), which include the six suppliers, five of which are common to the Bondfield Application. They are also alleged to have participated in and benefited from a false invoicing scheme involving Forma-Con. The Trustee brings the Forma-Con application pursuant to s. 96 of *BIA*.

[31] The six suppliers are the corporate respondents Clearway, MMC, MTEC, Strada, 230 and 2104664 Ontario Inc. (the "Forma-Con Supplier Respondents"). The Trustee's investigation also implicated the individual Forma-Con Respondents. John Aquino was Forma-Con's president when the payments were made and signed the majority of the cheques making the payments. Anastasio sent invoices on behalf of MMC to Solano. Caruso sent cheques on behalf of three of the Forma-Con Supplier Respondents to Solano. Coccia is listed on the Corporation Profile Reports as a director of three Forma-Con Supplier Respondents, and is a signatory on the bank accounts of these companies. Solano emailed to Anastasio and Caruso the details to be included on the invoices and signed cheques associated with the impugned transactions.

[32] The Forma-Con Supplier Respondents are alleged to have participated in a transfer of an aggregate amount of $11,367,000 from Forma-Con between December 19, 2014 and December 19, 2019 (the "Forma-Con review period").

[33] The transfers at Forma-Con involved an alleged scheme by which funds were removed from Forma-Con, during the Forma-Con review period, through false invoices submitted by Forma-Con Supplier Respondents to, and paid from, various Forma-Con projects.

[34] The scheme generally followed a pattern whereby Solano would send an email to Caruso or Anastasio with instructions for a Forma-Con Supplier Respondent to invoice Forma-Con, including the amount to be invoiced, the project to be invoiced, and the description of work to be included. Shortly thereafter, Caruso or Anastasio would send an invoice matching those instructions to Solano, and within hours of sending the invoice, a cheque signed by John Aquino or Solano would be issued to pay the invoice. The invoices would purport to be in respect of ongoing Forma-Con projects. Some of the Forma-Con Supplier Respondents had names similar to legitimate suppliers to the Bondfield Group. Forma-Con's controls and standard payment practices were not followed in respect of the Forma-Con impugned transactions.

[35] Despite initial denials of any impropriety, eventually, under cross-examination, Forma-Con Respondents John Aquino, Caruso, Anastasio and Coccia admitted that he or she did not dispute the Trustee's contention that no value was provided by any of the suppliers identified by the Trustee with which they had some connection (not including 230). None of the purported services or materials set out in the false invoices relating to those suppliers were in fact provided to Forma-Con. Despite their admission, John Aquino, Caruso, Anastasio and Coccia deny that there was any intent to defraud, defeat or delay creditors of Forma-Con.

[36] 2104664 Ontario Inc. ("664 Ontario") did not make the same admission. 664 Ontario asserts that it provided value to Forma-Con for the amount it was paid based on the invoice it submitted during the Forma-Con review period.

[37] John Aquino personally received payments from 230. He identified 230 as his personal holding company, but offered no explanation or evidence to support his assertion that the payment made by Forma-Con to 230 was for valuable consideration.

[38] The Estate Trustee of the Solano Estate claims to have no knowledge of the Forma-Con impugned transactions.

POSITIONS OF THE PARTIES

The Monitor

[39] The Monitor asserts that the transfers made by BCCL to the BCCL Supplier Respondents through the false invoicing scheme and the transfers to 230 as part of the fund cycling scheme were transfers at undervalue made with the intent to defraud, defeat or delay Bondfield's creditors. These creditors now suffer tens of millions of dollars of loss as a consequence of these transfers, well in excess of the amount of the transfers that took place during the Bondfield review period.

[40] The Monitor further asserts that the Bondfield Respondents' argument that the transfers were not made with an intent to defraud, defeat or delay Bondfield creditors, and therefore are not transfers at undervalue, is untenable. The Monitor contends that their conduct not only put in excess of $35,000,000 in the hands of John Aquino for his personal benefit and the benefit of the participants in the scheme, but also misled BCCL's creditors as to the true financial status of BCCL.

[41] The Monitor also asserts that the funding for the transfers from BCCL to 230 made through the fund cycling scheme during the Bondfield review period had to have come from wrongful transfers from BCCL outside of the Bondfield review period. The Monitor is not aware of any other potential source of funding available to John Aquino or 230 to make these payments. Accordingly, John Aquino's capital injections via 230 were payments to BCCL using BCCL's own funds and BCCL's return of those funds to 230 was therefore a transfer for no consideration.

[42] The Monitor asserts that all the Bondfield Respondents are jointly and severally liable for the damages owing to BCCL in the false invoicing scheme, but only 230 is liable for damages in the fund cycling scheme.

The Trustee

[43] The Trustee asserts that the transfers made through the false invoicing scheme were transfers at undervalue made with the intent to defraud, defeat or delay Bondfield's creditors. It seeks to set those transactions aside and to recover $11,366,890 for the benefit of Forma-Con's creditors.

[44] The Trustee's opinion is that the fair market value of services and materials provided by the Forma-Con Supplier Respondents to Forma-Con is nil. John Aquino and the other individual Forma-Con Respondents have admitted that this is correct. The Trustee rejects the claim of 664 Ontario that it provided legitimate services. The Trustee asserts that it did not, and that 664 Ontario has not established that Forma-Con received any value for its alleged services. Further, the Trustee asserts that extensive refusals by 664's principal on cross-examination have made its evidence impossible to test, resulting in an adverse inference.

[45] The Trustee asserts that the false invoicing scheme was conducted in such a surreptitious and fraudulent manner that the only reasonable conclusion can be that the scheme was undertaken with the intent to defraud, defeat or delay creditors. Clandestinely taking money from Forma-Con would unavoidably affect the corporate stakeholders, including its creditors, when the scheme was discovered and there were insufficient funds to pay the creditors, who now suffer hundreds of millions of dollars of loss, well in excess of the amount of the transactions that occurred within the Forma-Con review period.

John Aquino

[46] John Aquino asserts that the Monitor and the Trustee are unable to meet their burden of proof under s. 96 of the *BIA*. He submits that neither of them can show that the impugned transactions, as part of the false invoicing schemes, fall within the scope of the section because the transactions were not made with an intention to defraud, defeat or delay creditors.

[47] Regarding the alleged fund cycling scheme, John Aquino asserts that the transfers from 230 into BCCL fully offset the transfers of funds from BCCL to 230 during the Bondfield review period and that the latter were therefore not transfers at undervalue. He asserts that, in fact, the financial records show that 230 is in a net positive position at the end of the period and that BCCL actually owes 230 $3,270,631.

[48] John Aquino further asserts that each of BCCL, Forma-Con and the Bondfield Group were in a strong financial position during the respective review periods and that at all relevant times they were able to satisfy their creditors. He states that it was the cash restraints that arose in 2017 and 2018, together with the harmful conduct of Zurich, among other causes, that jeopardized the business of the Bondfield Group. John Aquino also asserts that Zurich's damage to BCCL cannot be used to support the contention that the Bondfield impugned transactions that took place years earlier were intended to defraud, defeat or delay creditors.

[49] John Aquino submits that he was not the sole directing mind of BCCL and Forma-Con, and that he and the other directing minds, namely, Ralph and Steven, were paying BCCL's and

Forma-Con's creditors in a timely fashion. He also asserts that he was taking steps to save BCCL from its current financial predicament in late 2017 and early 2018 by borrowing money and injecting it into BCCL.

[50] John Aquino further contends that the Monitor and the Trustee have unfairly targeted him in these proceedings and made him the scapegoat for the plight of BCCL and Forma-Con, without challenging transactions that are similar to the impugned transactions and that were being made by Ralph and Steven or even questioning their involvement. He further contends that he has been deprived of information that could exonerate him.

[51] John Aquino also submits that all major decisions in the Bondfield Group were made by Ralph, Steven and him, and that at the highest level it was a three-man operation. He asserts that the accounting department, and the CFO, Dominic DiPede, as well as the Controller, Rocco Micciola, reported to all three on all aspects of the accounting department and financial affairs of the Bondfield Group. John Aquino further asserts that Ralph and Steven were fully aware of the alleged impugned transactions and had access to the financial status and affairs of the Bondfield Group.

Anastasio, Coccia and Caruso

[52] Anastasio, Coccia and Caruso support John Aquino's position that he did not have the requisite intent to defraud, defeat or delay creditors, and they rely on his affidavit of June 14, 2020 in support of their position. They also assert that even if it were found that John Aquino had the requisite intent, that intent could not be attributed to BCCL and Forma-Con because BCCL and Forma-Con did not benefit from the false invoicing schemes.

[53] Further, Anastasio, Coccia and Caruso assert that even if it were found that John Aquino had the requisite intent and it could be attributed to BCCL and Forma-Con, the court should exercise its discretion to decline to grant the relief sought by the Monitor and the Trustee in respect of the false invoicing schemes at BCCL and Forma-Con because the Monitor and the Trustee have unfairly taken the side of Ralph and Steven against John Aquino in a bitter family dispute.

[54] Anastasio asserts that if he is found to be liable, he should be entitled to a set off in the amount of 3,750,000 USD. He claims that he is due this amount as a fee for his services in effectuating the term sheet for a bank loan from Deutsche Bank to the Bondfield Group, even though the loan was never advanced.

[55] Coccia asserts that there is insufficient evidence to find that she was privy to the false invoicing schemes. Even if there were sufficient evidence, she asserts that court should decline to find her liable given her limited involvement in the false invoicing transactions.

The Solano Estate

[56] Luana Solano, as Estate Trustee of the Solano Estate, asserts that she had no knowledge of any involvement by Solano in directing the issuance of invoices or signing cheques as alleged

by the Monitor and the Trustee. She further asserts that she had no knowledge of Solano receiving any payments or funds through any scheme as alleged by the Monitor and the Trustee.

664 Ontario

[57] 664 Ontario submits that in 2014 it was consulted by the Bondfield Group to provide consulting services relating to its tender for the Hawkesbury Hospital project, and that it provided that service to Forma-Con, for which it was paid. Accordingly, that payment was not a transfer at undervalue and not part of a false invoicing scheme.

ISSUES

[58] The issues in the Bondfield Application are as follows:

1. Are the Bondfield impugned transactions relating to the false invoicing scheme transfers at undervalue under s. 96 of the *BIA*?

2. If yes, are the Bondfield Respondents liable for the transfers at undervalue relating to the false invoicing scheme?

3. Is the Monitor entitled to recover the entirety of the value of the Bondfield impugned transactions relating to the false invoicing scheme, totalling $21,807,693?

4. Are the Bondfield impugned transactions relating to the alleged fund cycling scheme transfers at undervalue under s. 96 of the *BIA*?

5. If yes, is 230 liable for the transfers at undervalue relating to the alleged fund cycling scheme?

6. Is the Monitor entitled to recover the entirety of the value of the Bondfield impugned transactions relating to the alleged fund cycling scheme, totalling 13,985,743 CAD and 35,030 USD?

[59] The issues in the Forma-Con Application are as follows:

1. Are the Forma-Con impugned transactions transfers at undervalue?

2. If yes, are the Forma-Con Respondents liable for the transfers at undervalue?

3. Is the Trustee entitled to recover the entirety of the value of the Forma-Con impugned transactions totalling $11,366,890?

The Monitor's Evidence

The False Invoicing Scheme

[60] The Monitor's reports detail the discovery of the false invoicing scheme and how it was carried out. Those details follow.

[61] For about seven years, from 2011 to 2018, purported suppliers to BCCL (the "Suppliers") delivered invoices to BCCL seeking payment for services or materials purportedly supplied to BCCL on various projects. No such services or materials were provided. These invoices were approved and paid out by BCCL under the supervision of John Aquino even though BCCL received no consideration.

[62] None of the Suppliers had any apparent business activity or business address, and many of them shared an address, phone number, and/or bank account. Payments made to five different Suppliers were all deposited into a single account at the Bank of Montreal.

[63] On review of BCCL's records, the Monitor did not locate any ordinary course correspondence between BCCL's operations teams and the Suppliers regarding the purported services or materials provided. The Monitor found no evidence in the Suppliers' bank accounts of the kinds of expenditures that would have been expected in connection with the supply of purported services or materials to BCCL.

[64] Steven confirmed to the Monitor that none of the Suppliers were legitimate suppliers of BCCL, though some had names substantially similar to legitimate suppliers. The services or materials referred to in the invoices from the Suppliers were not supplied by them, and BCCL's records showed no evidence of contracts, quotations or other relevant and customary documentation pertaining to legitimate suppliers in respect of the Suppliers.

[65] The BCCL Supplier Respondents represent a subset of the Suppliers involved in the invoicing scheme during the Bondfield review period. During that time, the BCCL Supplier Respondents received $21,807,693 from BCCL through their participation in the false invoicing scheme. There was an additional $20,451,749 in false invoices that fell outside of the Bondfield review period, which the Monitor asserts is relevant in determining whether John Aquino is entitled to any offset or credit for amounts he injected into BCCL.

[66] John Aquino and his cousin Solano operated the scheme inside Bondfield. They received, approved and made payment on the false invoices. On the outside, Caruso, Anastasio, Coccia and Siracusa (together with John Aquino and Solano, the "individual Bondfield Respondents") acted on behalf of the BCCL Supplier Respondents, being the shell companies that supplied the invoices.

[67] The Monitor has been unable to trace all of the proceeds of the false invoicing scheme, but it can demonstrate that the BCCL Supplier Respondents distributed proceeds from the scheme to individual Bondfield Respondents or the corporations they controlled.

[68] Under the scheme, John Aquino personally received and initialed a large number of the invoices from the BCCL Supplier Respondents. Approximately 130 invoices (in respect of both BCCL and Forma-Con) were found and approximately 50 appear to have been initialed by John Aquino. He also approved and/or signed cheques for a significant number of payments from BCCL to the BCCL Supplier Respondents. The Monitor sampled 150 cheques issued to BCCL Supplier Respondents and found that John Aquino had signed 100 percent of them. John Aquino has provided no explanation as to why he, as president, would be receiving and approving the invoices submitted by the BCCL Supplier Respondents.

[69] John Aquino also corresponded with the BCCL Supplier Respondents through Caruso, Anastasio and Siracusa, and received fictitious invoices from them by way of e-mail. This marked a departure from the typical practice at BCCL, by which suppliers would deliver both electronic and hard copy invoices to the accounting department at BCCL for processing.

[70] John Aquino benefitted personally from the scheme. His corporation, 230, received not less than $5,829,939 from the BCCL Supplier Respondents during the Bondfield review period. In turn, 230 paid John Aquino $5,184,346.

[71] Solano was BCCL's former head of Information Technology. He had no relevant experience or responsibilities for vendor or procurement matters, yet he sent over 100 emails to individuals, including Caruso and Anastasio, who were acting on behalf of BCCL Supplier Respondents. Solano instructed them on: (i) the amounts to be invoiced to BCCL for work or supplies supposedly provided by those Suppliers; (ii) the description that should be included in the invoices for that supposed work or supply, and (iii) the projects to be charged for the alleged work or supply. Solano was paid at least $507,000 directly by the BCCL Supplier Respondents.

[72] The chart below shows the breakdown of the funds received by each of the BCCL Supplier Respondents and 230 from BCCL during the Bondfield review period. The amount shown for 230 represents receipts that related to the fund cycling scheme and not the false invoicing scheme.

Corporate Supplier Respondent	**Reeipt from BCCL**
2466601 Ontario Inc./MMC General Contracting	$4,208,798
2483251 Ontario Corp./Clearway Haulage	$7,566,887
2420595 Ontario Ltd./Strada Haulage	$6,097,028
2420570 Ontario Ltd./MTEC Construction	$3,093,827
RCO General Contracting Inc.	$282,500
Time Passion, Inc.	$558,653

2304288 Ontario Inc.	$13,985,743 US$35,030
Total (after April 3, 2014)	35,793,436 CAD 35,030 USD

[73] Caruso, Anastasio, Siracusa and Coccia directed or acted on behalf of one or more of the BCCL Supplier Respondents.

[74] Caruso acted on behalf of Clearway, MTEC and Strada, which account for 54.22 percent of the value of payments made to the BCCL Supplier Respondents. Caruso submitted invoices directly to John Aquino and received at least $667,000 from the BCCL Supplier Respondents.

[75] Anastasio acted on behalf of MMC and RCO, which account for approximately 12.5 percent of the value of payments made to the BCCL Supplier Respondents. Anastasio also submitted invoices directly to John Aquino and received at least $1,892,672 from the BCCL Supplier Respondents.

[76] Coccia is a director listed on the corporate profiles of MTEC, Strada, and RCO and is a signatory on the bank accounts for these companies into which payments were made in respect of the fictitious invoices. She was paid $88,008 by BCCL Supplier Respondents.

[77] Siracusa submitted invoices on behalf of Time Passion, Inc. and corresponded directly with John Aquino in respect of these invoices.

The Scheme Involving 230

[78] The Monitor's reports detail the discovery of the fund cycling scheme and how it operated. Those details follow.

[79] The transfers from BCCL to 230 during the Bondfield review period do not appear to directly involve any of the Bondfield Respondents other than John Aquino and 230. The Monitor's reports show that this scheme resulted in about $14,029,369 in transfers from BCCL to 230 during the Bondfield review period. There were also transfers of about $9,507,544 from BCCL to 230 prior to the Bondfield review period. Having occurred prior to the Bondfield review period, the Monitor acknowledges that those transfers cannot be challenged as transfers at undervalue for the purposes of s. 96, but asserts that they are relevant in the context of John Aquino's claims for an offset or credit for the $17,300,000 of capital he alleges to have injected into BCCL during the Bondfield review period.

[80] This scheme involved John Aquino directing payments from 230 into BCCL during the Bondfield review period. John Aquino admits that he made these payments as capital injections.

The capital injections were made late in the year in anticipation of a year-end review of the financial status of the Bondfield Group by stakeholders to temporarily increase the cash and working capital for the purpose of increasing BCCL's borrowing and bonding capacity. The information would be used in a financial snapshot required by BCCL's lenders and Zurich, and would create a more favourable and positive outlook for the company. Following the review, BCCL would return the funds to 230.

[81] The Monitor and John Aquino agree that John Aquino, through 230, advanced $17,300,000 to BCCL during the review period. The Monitor alleges that BCCL illegitimately returned and/or paid $13,985,743 of those funds to 230. The Monitor asserts that these transfers are transfers at undervalue because the $17,300,000 supposedly injected or "lent" to BCCL through 230 must have originated from BCCL and been transferred to 230, for no consideration, through the false invoicing scheme or pre-review period gratuitous transfers from BCCL to 230.

[82] In its Seventh Supplement to the Phase II Investigation Report of the Monitor, the Monitor reports: "… the Monitor is unaware of any significant source of funds that John Aquino ultimately had outside of Bondfield. Moreover, John Aquino's own evidence on the Extended Mareva motion is that, since his departure from Bondfield he has insufficient assets to support his lifestyle of expenses of approximately $60,000 per month. Accordingly, it is probable based upon the information available to the Monitor that any funds flowing in from 230 to Bondfield originally arose from funds removed from Bondfield, whether through the Fund Cycling Scheme, the False Invoice Scheme, or otherwise." The Monitor further asserts that it has no information on other sources of income available to John Aquino and relies on evidence from Ralph that John Aquino had no source of income other than the Bondfield Group.

The Trustee's Evidence

[83] The chart below shows the breakdown of the funds received by each of the Forma-Con Supplier Respondents and 230 from Forma-Con during the Forma-Con review period.

$000s, unaudited	Payments Before 12/19/2014	Payments After 12/19/2014	Total Payments
Supplier Respondents			
Clearway Haulage	-	968	968
MMC General Contracting	-	2,795	2,795
MTEC Construction	3,859	5,260	9,119
Strada Haulage	109	1,711	1,820
2104664 Ontario Inc.	170	90	260
2304288 Ontario Inc.	565	543	1,108
	4,703	11,367	16,070
Other Suppliers of Interest			
2299726 Ontario Inc.	14,134	-	14,134
2104661 Ontario Inc.	1,516	-	1,516
B.I.C. Haulage	37	-	37
Terra Haulage	832	-	832
TP Inc	229	-	229
Vaughan Haulage	639	-	639
GGC Gem General Contracting	362	-	362
GH Gem Haulage	91	-	91
Gem Stone	249	-	249
ABC Masonry	58	-	58
	18,147	-	18,147
Total	22,850	11,367	34,217

[84] During the Forma-Con review period, the Forma-Con Respondents participated in a scheme that stripped $11,366,890 from Forma-Con while providing no value in return. The scheme involved Solano sending an email to a Forma-Con Supplier Respondent, which provided that Respondent with an amount to be invoiced and the relevant description of the services. The Respondent would then issue an invoice (often with a 10 percent mark-up), and Forma-Con would issue a cheque, often within a day, signed by John Aquino or Solano. Whereas Forma-Con typically paid its invoices within 30 to 90 days of receipt, the cheques payable to the Forma-Con Supplier Respondents were paid within 1.3 days.

[85] Also, unlike typical invoices, the invoices in respect of the impugned transactions were not accompanied by timesheets, contracts and other supporting documentation, and were not approved by a project manager.

[86] John Aquino was a shareholder of Forma-Con and its president at the relevant time. He approved most of the Forma-Con impugned transactions by signing the majority of the cheques associated with the Forma-Con impugned transactions and personally received payments from 230. John Aquino has provided no evidence in support of his assertion that the payment made by Forma-Con to 230 during the Forma-Con review period was made for valuable consideration.

[87] The transactions provided no value to Forma-Con. The Forma-Con Supplier Respondents did not carry on any active business in the purported nature of the Forma-Con impugned transactions. There were no supporting documents and the usual controls around invoicing were not followed. The false invoicing scheme is largely conceded, including by John Aquino.

John Aquino's Evidence

The Alleged Schemes

[88] John Aquino filed two affidavits, dated June 14, 2020 and July 27, 2020, respectively, upon which he relies in the both the Bondfield Application and the Forma-Con Application. In those affidavits, he does not offer any explanation for the Bondfield impugned transactions, the Forma-Con impugned transactions, the false invoices, or the emails underpinning the false invoicing scheme, and he does not explain why he, as president, approved many of the invoices and signed the cheques in payment of them.

[89] Regarding the transfers between 230 and BCCL, John Aquino disputes that these were transfers at undervalue and contends that during the Bondfield review period he advanced $17,300,000, through 230, to BCCL and that the $13,985,743 that the Monitor asserts was illegitimately returned to 230 was not illegitimately returned at all. Rather, it represents a legitimate payment of funds, including Christmas bonuses and salary correctly paid to him and shareholder loan repayments. He asserts that 230 is in a net positive position in the amount of $3,314,257 at the end of the Bondfield review period, which the Monitor does not dispute.

[90] John Aquino's evidence is that in December of each 2014, 2015 and 2016, he, like others in upper management in the Bondfield Group, received a single salary and Christmas bonus for his employment services to BCCL and Forma-Con and it was paid to his holding company. John Aquino's evidence is that HST was charged on the amount of the Christmas bonus because Christmas bonuses paid by the Bondfield Group were, at times, billed to a particular project. He further asserts that there was no financial disadvantage to BCCL in paying the HST because it would receive an input tax credit for it.

[91] John Aquino asserts that his capital injections into BCCL were similar to the capital injections being made by Ralph through a company known as Highbourne Estates, owned by Ralph and John Aquino jointly. He submits that the Bondfield Group accounting department approved all the capital injections, and that the transfers between 230 and BCCL were carried out by Mr. DiPede, who was hired in 2002 as the controller of the Bondfield Group and head of the accounting department.

[92] In addition, John Aquino asserts that he borrowed $7,500,000 from a third party in 2018, which is included in the $17,300,000 advanced from 230 to BCCL and was injected into BCCL in March 2018. Of this amount, John Aquino states that $2,000,000 was repaid to 230 on April 6, 2018 and the balance was recorded in his shareholder loan ledger. Accordingly, he asserts that the $2,000,000 repayment was not a transfer at undervalue as the Monitor suggests, but rather a shareholder loan repayment.

[93] John Aquino also asserts that he has a legitimate shareholder loan owing to him by the Bondfield Group in the amount of $11,922,811. He contends that this amount was confirmed in the report of Ross Hamilton of Cohen Hamilton Steger & Co. Inc., the forensic and investigative accounting experts that John Aquino retained to opine on the financial status of BCCL and the Bondfield Group during the relevant review periods (the "CHS Report"). John Aquino asserts that he should be entitled to a set off in this amount in respect of any liability found against him.

[94] John Aquino argues that there was no intent to defraud, defeat or delay creditors because the Christmas bonuses were legitimate remuneration earned in the ordinary course of business and the capital injections were also made in the ordinary course of business. In his affidavit, he states that he made the injections because "the perceived increase of capital was necessary to BCCL's ability to tender on large constructions projects, and approved by Steven, Ralph, and known to the company's auditors."

[95] John Aquino concludes that the total amount of the Bondfield impugned transactions as alleged by the Monitor ($35,837,062) must be reduced by the $17,300,000 that 230 contributed to BCCL during the Bondfield review period.

Injurious conduct of Zurich caused the financial problems in the Bondfield Group

[96] John Aquino submits that the Bondfield Group operated successfully in Ontario for over 45 years. However, in 2018, it experienced significant financial challenges owing to rapid expansion, collection issues on construction projects and conduct by Zurich that led to the application for *CCAA* protection.

[97] Prior to Zurich's *CCAA* application, in 2016, National Bank denied the Bondfield Group an increase in its credit facility from $60,000,000 to $120,000,000. Then, the Bondfield Group entered into an $80,000,000 loan facility with Bridging for one year at an interest rate of 13.5 percent calculated daily. In late 2017, the Bondfield Group negotiated long-term financing with Deutsche Bank, but it required an insurance policy for the construction holdbacks in which it would have priority. The insurance policy was obtained. However, a disagreement between Zurich and Deutsche Bank regarding the loan facility in relation to Zurich's bonds could not be resolved and the Deutsche Bank facility did not proceed. In addition, there were delays on the projects and the Bondfield Group was required to pay liquidated damages and high interest on its loan from Bridging. Litigation against the Bondfield Group was increasing. By March 2018, the cash crunch was critical, and Zurich declined to bond liens registered against the construction projects, to bond any new projects, to pay any claims owing under labour and material bonds, and to provide many pre-qualification letters or bid bonds for new projects. As a result of Zurich's failure to bond off

any liens, project owners were unable to advance any funds owing to the Bondfield Group for services rendered resulting in a liquidity crunch. The Bondfield Group had to act as its own surety and cover costs that ought to have been covered by Zurich.

The financial health of the Bondfield Group

i) The Deloitte Audits

[98] John Aquino submits that BCCL and the Bondfield Group retained Deloitte to audit their respective financial statements in the years 2013 and thereafter, and that the audits of those financial statements evidenced a strong financial position. Deloitte's audits for the years ending 2013, 2014, 2015 and 2016 showed that the companies were in a strong financial position. The BCCL audit for 2017 showed the same result. The Deloitte audits showed growth in contract revenue and retained earnings year over year from 2013 to 2017. Based on the Deloitte audits, John Aquino submits that there was no suggestion of any kind that the Bondfield Group was insolvent. He believed that the Bondfield Group had a positive financial outlook and was able to satisfy all of its creditors for the foreseeable future. John Aquino confirmed that he believed that for the entirety of the Bondfield review period, or at least a significant portion of it, all of the creditors, suppliers and subtrades of BCCL and the Bondfield Group were paid in full and on time, subject to normal course business disputes.

[99] John Aquino further submits that notwithstanding Zurich's challenge to Deloitte's audit in its claim against Deloitte, Deloitte has not withdrawn its audit and is defending the proceeding Zurich has brought against it.

[100] John Aquino's evidence is that it was the rapid expansion that the Bondfield Group embarked on in 2012 that ultimately led to its financial problems. It was selected as the successful bidder on a number of large-scale P3 projects from 2012 to 2015, which it was required to finance with its equity and special purpose vehicle financing while awaiting the release of payments and holdbacks, to continue its operations. Eventually, as referenced above, it sought to increase its lending facility with National Bank from $60,000,000 to $120,000,000. National Bank declined as did a number of other Canadian banks.

ii) The CHS Report

[101] John Aquino retained Mr. Hamilton and CHS in 2020 to a) conduct an analysis of the BCCL and Forma-Con accounting documentation and financial information for the years 2014 to 2017 (2017 being the most recent date for available data) and to quantify the total amount owing to BCCL's and Forma-Con's creditors; b) to determine if creditors were paid on a timely basis; and c) to review and summarize the shareholder loan account and loans relating to John Aquino and 230.

[102] CHS could not render an opinion up to December 2017 regarding BCCL's ability to pay its creditors due to data restrictions in the accounting software used by the Bondfield Group. CHS did render confirmatory findings as of December 2017 with respect to the Bondfield Group's ability to pay payroll liabilities, equipment financing, HST remittances and BCCL's net holdback

position, among others. CHS concluded that BCCL paid its creditors on a timely basis up to at least December 2016, BCCL had positive earnings each year, and its assets were consistently greater than its liabilities at each year end, evidencing a positive working capital position.

[103] Regarding Forma-Con, CHS concluded that Forma-Con paid its creditors on a timely basis up to at least December 2017, and found that its current assets were consistently greater than Forma-Con current liabilities evidencing a positive working capital position. It also found that accounts payable were paid promptly, as were payroll and HST remittances, among other expenses.

Evidence of Anastasio, Coccia, Caruso and the Solano Estate

[104] Anastasio, Coccia and Caruso filed affidavits on which they rely for both the Bondfield Application and the Forma-Con Application. In those affidavits, they do not offer any explanation for the Bondfield impugned transactions, the Forma-Con impugned transactions, the false invoices, or the emails underpinning the false invoicing scheme.

[105] Each of Anastasio, Coccia and Caruso stated that the Bondfield impugned transactions could not have been made with the intent to defraud, defeat or delay creditors because BCCL's financial position was sound during the Bondfield review period and the Forma-Con review period and each of these corporate debtors was then able to and was paying its debts. They rely on John Aquino's evidence respecting the financial health of BCCL and Forma-Con as set out in his affidavit sworn June 14, 2020.

[106] In addition to denying that the impugned transactions described by the Monitor in these proceedings were transfers at undervalue pursuant to s. 96 of the *BIA*, Anastasio submits that he has known John Aquino for nearly 20 years, he has assisted the Bondfield Group, including John Aquino and Steven, and he was remunerated for his services by the Bondfield Group. His services included dispute resolution and an introduction in 2017 to Deutsche Bank, which considered providing the Bondfield Group a credit facility of 150,000,000 USD for which Anastasio expected a fee of 3,750,000 USD. The facility was never arranged, and he was never paid any of that sum. He asserts that if he is found to be liable for any amount in the Bondfield Application, this amount owing to him by the Bondfield Group ought to be taken into account.

[107] Luana Solano, the spouse of Solano and the Estate Trustee of the Solano Estate, filed an affidavit in which she stated that she had no knowledge of any involvement by her late husband in directing the issuance of invoices or signing cheques while employed by the Bondfield Group as alleged by the Monitor. She further stated that she had no knowledge of Solano having received any payments or funds as alleged by the Monitor or the Trustee.

664 Ontario's Evidence

[108] On behalf of 664 Ontario, its principal Antonio Caranci ("Caranci") filed an affidavit in which he stated that 664 Ontario was retained by the Bondfield Group to consult on the Hawkesbury Hospital project. In particular, he advised on a repair to a slab on grade area of the hospital. He submits that he succeeded in this work, and as a result of his consultation, and the

input of another consultant that he engaged, the repair was done at a very competitive cost. The reduced cost resulted in considerable savings and allowed the Bondfield Group to credit the Hawkesbury Hospital project over $8,000,000. In turn, Forma-Con paid 664 Ontario $80,000, being approximately 1 percent of the credit, plus HST, for a total of $90,400. 664 Ontario asserts that the Trustee's allegations that its invoice for the consulting services it provided was not legitimate, not rendered at arm's length, and a transfer at undervalue, are speculative and without evidentiary support. It submits that it provided legitimate services and that the funds it received from Forma-Con in exchange for those services are therefore not a transfer at undervalue.

LAW

[109] A "transfer at undervalue" is defined in s. 2 of the *BIA* as follows:

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

[110] A "creditor" is defined in s. 2 of the *BIA* as follows:

> **creditor** means a person having a claim provable as a claim under this Act.

[111] The test for proving a transfer at undervalue and a person's liability in respect of the same is set out in subsection 96(1)(b) of the *BIA*. It provides, in part, as follows:

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

> (ii) the transfer occurred during the period that begins on the day that is five years before the date of the initial bankruptcy event and ends on the day before the day on which the period referred to in subparagraph (i) begins and
>
> > (A) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, or
> >
> > (B) the debtor intended to defraud, defeat or delay a creditor. (emphasis added)
>
> Establishing values
>
> (2) In making the application referred to in this section, the trustee shall state what, in the trustee's opinion, was the fair market value of the property or services and what, in the trustee's opinion, was the value of the actual consideration given or received by the debtor, and the values on which the court makes any finding under this section are, in the absence of evidence to the contrary, the values stated by the trustee.
>
> Meaning of person who is privy
>
> (3) In this section, a person who is privy means a person who is not dealing at arm's length with a party to a transfer and, by reason of the transfer, directly or indirectly, receives a benefit or causes a benefit to be received by another person.

ANALYSIS

Were the Bondfield impugned transactions and the Forma-Con impugned transactions transfers at undervalue?

[112] With the exception of a single payment of $2,000,000 made by BCCL to 230 within one year of BCCL's insolvency, the Monitor relies on s. 96(1)(b)(ii)(B) of the *BIA* to show that the Bondfield impugned transactions are all transfers at undervalue. With respect to the $2,000,000 payment, it is presumed to be a transfer at undervalue if the party receiving the payment was not dealing at arm's length with the debtor. In such a case, the Monitor does not need to show that the debtor was insolvent or that the debtor intended to defraud, defeat or delay the interests of a creditor.

[113] The Trustee also relies on s. 96(1)(b)(ii)(B) to show that the Forma-Con impugned transactions are transfers at undervalue.

[114] In relying on s. 96(1)(b)(ii)(B), the Monitor and the Trustee do not need to show that the corporate debtors BCCL and Forma-Con were insolvent, but must show that the corporate debtors intended to defraud, defeat or delay the interests of creditors.

[115] To order that a party to an impugned transaction or a privy to the transfer, or all of those persons, pay the difference between the value of the consideration received by the corporate debtors BCCL and Forma-Con and the value of the consideration given by BCCL and Forma-Con, respectively, I must find that a) the party was not dealing at arm's length with the debtor; b) the transfer occurred during the period that begins on the day that is five years before the date of the of commencement of *CCAA* proceedings or the initial bankruptcy event; and c) the debtor intended to defraud, defeat or delay a creditor.

[116] The Bondfield Respondents do not dispute that the Bondfield impugned transactions took place within the Bondfield review period; and the Forma-Con Respondents do not dispute that the Forma-Con impugned transactions took place within the Forma-Con review period.

The False Invoicing Schemes

a) Was value provided in the Bondfield impugned transactions and the Forma-Con impugned transactions relating to the false invoicing scheme?

[117] The Monitor and the Trustee assert that each of them discovered a false invoicing scheme in which invoices were created for services or materials that were never delivered to BCCL and Forma-Con, respectively. BCCL and Forma-Con received no consideration in respect of these invoices, yet money flowed to the Bondfield Respondents and the Forma-Con Respondents, respectively.

[118] In their respective reports, the Monitor stated its opinion that there was nil value to BCCL in respect of any of the Bondfield impugned transactions, and the Trustee stated its opinion that there was nil value to Forma-Con in respect of any of the Forma-Con impugned transactions. Under s. 96(2) of the *BIA*, in the absence of any evidence to the contrary, the value of the Bondfield impugned transactions is the value provided by the Monitor, and the value of the Forma-Con impugned transactions is the value provided by the Trustee.

[119] Four of the individual Bondfield Respondents and the same four individual Forma-Con Respondents, namely, John Aquino, Anastasio, Coccia and Caruso, have conceded that no value was provided by the BCCL Supplier Respondents and the Forma-Con Supplier Respondents for the Bondfield impugned transactions and the Forma-Con impugned transactions (not including 230). This result is supported by the lack of evidence uncovered in the Monitor's and the Trustee's investigations. I therefore find the value to BCCL of the Bondfield impugned transactions relating to the false invoicing scheme to be nil.

[120] Regarding the Forma-Con impugned transactions, John Aquino, the sole shareholder of 230, offered no evidence to show that 230 provided valuable consideration to Forma-Con during the Forma-Con review period for the payment it received. The Trustee did not locate any evidence in its investigation to support that result. Despite their exclusion of 230 from their concessions,

none of the individual Forma-Con Respondents adduced any evidence to show any valuable services or materials provided by 230 to Forma-Con during the Forma-Con review period. Accordingly, the presumption in s. 96(2) applies and the value of the consideration received by Forma-Con from 230 is the value stated by the Trustee. I find this value to be nil.

[121] The Trustee asserts that the payment made to Forma-Con Supplier 664 Ontario, which is captured in the Forma-Con review period, is a transfer at undervalue. 664 Ontario argues that it provided legitimate services to Forma-Con for the payment of $90,400, which was not a transfer at undervalue.

[122] The 664 Ontario invoice was issued at the request of Solano, and contained minimal description of the service: "Consulting." The invoice was paid by cheque on the same day. The Trustee has not been able to find any supporting accounting records or correspondence at Forma-Con to show that the work was done. John Aquino states in his affidavit sworn July 27, 2020 that the explanation provided by Mr. Caranci for the invoice relates to a Bondfield project and has no relation to Forma-Con or the alleged payment.

[123] In its evidence, 664 Ontario states that the consulting work was done on the Hawkesbury Hospital project, and that 664 Ontario entered into an agreement with Solano to provide consulting services. The Trustee has not been able to find, and 664 Ontario has not produced, any internal records to corroborate the work or the agreement. Despite the alleged value of the services provided, there are no email exchanges between Solano and 664 Ontario on the alleged $8,000,000 savings for which 664 Ontario takes credit. 664 Ontario asserts that the work it was asked to do required a "high degree of structural engineering experience." However, 664 Ontario has no expertise in structural engineering and Caranci confirmed under cross-examination that he was not qualified to read the report, which allegedly addressed the issues. The Trustee has not been able to confirm the report's existence or to assess the value of the report. A search of Solano's inbox turned up nothing to connect 664 Ontario to the Hawkesbury project. Caranci stated that he cannot find the report.

[124] The Trustee specifically asked 664 Ontario to provide any relevant documents or correspondence regarding the work allegedly performed for Forma-Con. It got no response initially, but at Caranci's cross-examination, Caranci produced scanned versions of email correspondence between Caranci and Rich Ramos, a principal of Canarch Consulting Services Inc. ("Canarch"), and an invoice from Canarch for work purportedly done on the Hawkesbury Hospital project at the request of 664 Ontario. The Trustee asked for the original correspondence in order to test the authenticity of the documents, but 664 Ontario refused to provide the original electronic versions for this purpose. 664 Ontario has provided no direct evidence and has refused to let the Trustee test the circumstantial evidence proffered by it in support of the payment.

[125] Further, Caranci refused to answer questions about the invoices that 664 Ontario and its affiliate 2104661 Ontario Inc., which was another supplier of interest to the Trustee, billed to Forma-Con in years prior to the Forma-Con review period. Caranci also refused to disclose the income of 664 Ontario in the year prior to the year in which the invoice for $90,400 was submitted to test whether it had a legitimate going concern business.

[126] The Trustee asserts that the method of invoicing used by 664 Ontario reflects substantially the same pattern as is evident in the false invoicing scheme in respect of which John Aquino and the other living individual Forma-Con Respondents conceded that no valuable services were provided.

[127] I find that the method of invoicing used by 664 Ontario is consistent with the false invoicing scheme relating to the other Forma-Con Supplier Respondents. Solano was at the centre of that scheme. Apart from Caranci, none of the Respondents in either the Bondfield Application or the Forma-Con Application has suggested that Solano, whose position was in IT, and who dealt with accounting for expenditures for the John Aquino family, had any role in managing or troubleshooting construction projects or hiring subcontractors or instructing structural engineers.

[128] In light of the concessions made regarding the existence of a false invoicing scheme at Forma-Con, the absence of records in support of 664 Ontario's work on Forma-Con's projects and the dubious explanation about Solano's role at Forma-Con, I am left with serious doubt about the legitimacy of 664 Ontario's explanation of the payment to it. On a balance of probabilities, in light of the pattern of the false invoicing scheme, I find that 664 Ontario's invoice, like many others produced as part of the false invoicing schemes, was a transaction in which no service was given for the value received. 664 Ontario has not met its burden to show that the invoice from 664 Ontario was something other than a false invoice, like the other invoices used in the false invoicing scheme. Further, I am prepared to draw an adverse inference against 664 Ontario based on its refusal to answer proper questions, which if answered honestly may have exposed facts unfavourable to 664 Ontario's position.

[129] Accordingly, I find the 664 Ontario transaction to be a transfer at undervalue, and the value of the services provided to Forma-Con by 664 Ontario in respect of this invoice to be nil.

[130] In its reports for February and May 2020, the Trustee stated its opinion that there was nil value for any of the Forma-Con impugned transactions. Under s. 96(2) of the *BIA*, in the absence of any evidence to the contrary, the value of the Forma-Con impugned transactions is the value provided by the Trustee. I find this value to be nil.

b) <u>Did the Bondfield impugned transactions and the Forma-Con impugned transactions take place on a non-arm's length basis?</u>

[131] Section 4 of the *BIA* provides that "related persons" are deemed to be acting on a non-arm's length basis. It is a question of fact whether persons not related to one another were, at a particular time, dealing with each other at arm's length.

[132] The Monitor and the Trustee assert that with respect to the impugned transactions relating to the false invoicing schemes, none of the BCCL Supplier Respondents or the Forma-Con Supplier Respondents or the parties billing for these transactions were dealing at arm's length. They further assert that the surrounding circumstances relating to the payments from BCCL to the BCCL Supplier Respondents, and from Forma-Con to the Forma-Con Supplier Respondents in respect of the false invoices underpinning the impugned transactions establish as a matter of fact that the transfers took place on a non-arm's length basis. I agree.

[133] Two persons deal on a non-arm's length basis if they are acting on "non-economic considerations" that result in the consideration for the transfer failing to reflect the fair market value of the transferred property, or if they are not acting towards each other on the basis of normal commercial imperatives: *National Telecommunications, Re*, 2017 ONSC 1475, 45 C.B.R. (6th) 181 at paras. 43 and 48 ("*National Telecommunications*").

[134] In *National Telecommunications*, Myers J. held that an arrangement where a transferor "agrees to pay someone … for doing nothing" can lead to the necessary conclusion that the persons, including both the corporation that received the payment and the individual benefiting from the payment, were not dealing at arm's length with the debtor: para. 48.

[135] With respect to Clearway, MMC, MTEC, and Strada, the concession that neither BCCL nor Forma-Con received any consideration for the payments made to them in respect of the false invoicing is conclusive of the non-arm's length nature of the transactions. The parties did not deal with each other at arm's length because they all collaborated in the false invoicing schemes. In *National Telecommunications v. Stalt*, 2018 ONSC 1101, 59 C.B.R. (6th) 263 at para. 41 ("*Stalt*"), Justice Pattillo stated that s. 4(4) of the *BIA* requires a determination, based on the totality of the evidence, of whether the transaction involves "generally-accepted commercial incentives such as bargaining and negotiation in an adversarial format and maximizing of a party's economic interest," and that "in the absence of any such indicia, the inference that arises is that the parties were not dealing at arm's length."

[136] John Aquino, Anastasio and Caruso effectively admitted their participation in the false invoicing schemes where there was an obvious absence of ordinary commercial incentives and dealings between the parties. The Bondfield Respondents (other than 230) were acting collaboratively to carry out the scheme, and BCCL and the BCCL Supplier Respondents acted in concert to effect the transfers for the benefit of the individual Bondfield Respondents.

[137] The Forma-Con Respondents (other than 664 Ontario) similarly were acting collaboratively to carry out the scheme, and Forma-Con and the Forma-Con Supplier Respondents (other than 230 and 664 Ontario) acted in concert to effect the transactions for the benefit of the individual Forma-Con Respondents.

[138] Anastasio, Coccia and Caruso acknowledged that, for the purposes of these Applications, the Bondfield impugned transactions and the Forma-Con impugned transactions, in respect of the false invoicing schemes with which they were involved, were all non-arm's length transactions.

[139] I find that 230 was not dealing with BCCL and Forma-Con at arm's length because it is a related person under s. 4 of the *BIA*. John Aquino identified 230 as his company and he controlled it in all material respects. The Monitor and the Trustee assert that John Aquino was the directing mind of BCCL and Forma-Con during the relevant periods, though John Aquino asserts that control of BCCL and Forma-Con was shared between Ralph, Steven and him. Ralph and Steven dispute that they were directing minds of BCCL or Forma-Con. I find that for the purposes of s. 4 of the *BIA*, and the false invoicing schemes, John Aquino controlled 230, BCCL and Forma-Con. Consequently, they are deemed not to deal with each other at arm's length.

[140] I find that 664 Ontario was also not acting at arm's length with Forma-Con. Its principal, Caranci did not provide any consideration for the payment made by Forma-Con to it. This lack of consideration is conclusive of its non-arm's length relationship with Forma-Con.

[141] In the case of each of BCCL and Forma-Con, there is no evidence that the transactions in issue between BCCL and the Bondfield Respondents, and between Forma-Con and the Forma-Con Respondents, displayed any of the generally accepted commercial incentives such as bargaining and negotiation with a view to maximizing a party's economic self-interest. Accordingly, I find that BCCL was not dealing at arm's length with the Bondfield Respondents, and Forma-Con was not dealing at arm's length with the Forma-Con Respondents.

c) Were the Bondfield impugned transactions and the Forma-Con transactions designed to, or made with an intent to, defraud, defeat or delay a creditor?

[142] The Monitor submits that the transfers of approximately $21,807,693 through the false invoicing scheme, which occurred within the 5-year period preceding BCCL's insolvency, were transfers at undervalue because they were made with an intent to defraud, defeat or delay creditors. The Monitor asserts that John Aquino, as the directing mind of BCCL, engaged in a clandestine scheme that would hide from BCCL's creditors the fact that tens of millions of dollars were paid out of BCCL under the guise of job costs, which were not job costs at all, but rather payments to John Aquino himself and others who assisted him in this deception.

[143] The Trustee submits that the transfers out of Forma-Con in the amount of $11,366,890 that occurred within the Forma-Con review period were transfers at undervalue because they were made with an intent to defraud, defeat or delay creditors. The Trustee asserts that the surreptitious and fraudulent manner in which the false invoicing scheme was undertaken leaves that intent as the only reasonable conclusion.

[144] The principal argument of both the defending Bondfield Respondents and the defending Forma-Con Respondents (other than 664 Ontario) is that there could be no intent on behalf of BCCL and Forma-Con to defraud, defeat or delay creditors because both BCCL and Forma-Con, throughout the respective review periods, were in strong financial positions and paying their respective debts until around late 2016 in the case of BCCL and late 2017 in the case of Forma-Con.

[145] While I accept that the financial health of the debtor may be considered in determining whether the debtor intended to defraud, defeat or delay creditors, this factor is not determinative. In this case, there are a number of badges of fraud that, in my view, provide a strong evidentiary basis on which to find that each of BCCL and Forma-Con, through the actions of its president John Aquino, intended to defraud, defeat or delay its creditors.

[146] Fraudulent intent under the *BIA* has not been widely considered by the courts. As such, much of the jurisprudence on fraudulent intent derives from cases involving Ontario's *Fraudulent Conveyances Act*, R.S.O. 1990, c. F.29 (the "*FCA*"). However, unlike the *FCA*, which specifically encompasses a "creditor or other", the *BIA* refers only to a "creditor" which would seem to

preclude a future creditor. See Roderick Wood, *Bankruptcy and Insolvency Law*, (Toronto: Irwin Law, 2005) at 228.

[147] Also, under the *FCA*, the knowledge or intent of the transferee is relevant because both the debtor and the transferee must be privy to the fraud. Under the *BIA*, the knowledge or intent of the transferee is not a consideration: see *Wood*, at 228. It is only necessary to establish fraudulent intent on behalf of the debtor. The courts require proof of a debtor's fraudulent intent.

[148] In *Jonas v. McConnell*, 2014 ONSC 6169, 35 B.L.R. (5th) 304 at para. 11 ("*McConnell*"), Justice Penny set out three requirements under the *FCA* to set aside a transaction. They are a) a conveyance of property; b) an intent to defeat; and c) a creditor or other towards whom the intent is directed. With the sole caveat that the *BIA* does not include "or other", in my view, the requirements identified by Justice Penny ought to apply under s. 96 of the *BIA* as well.

[149] The conveyances of property are not disputed. I will now address whether there was the requisite "intent to defeat" and a creditor (or creditors) towards whom that intent was directed.

Intent to defraud, defeat or delay creditors

[150] John Aquino has admitted that there was no consideration for the payments issued by BCCL and Forma-Con on the false invoices (excluding payments to 230). This admission by the president of BCCL and Forma-Con that tens of millions of dollars were paid out of the debtor companies for no services or materials could be construed as some evidence of a subjective intent to defeat the companies' creditors. However, it is generally accepted that proof of a person's subjective intent is nearly impossible: *National Telecommunications*: para. 53. John Aquino disputes that the payments were made to defeat creditors, and the onus to prove otherwise remains upon the Monitor and Trustee.

[151] Given the obvious limitations in proving a debtor's subjective state of mind, and whether a transaction as undertaken with fraudulent intent, the Monitor and the Trustee rely on the "badges of fraud" displayed in the impugned transactions relating to the false invoices to establish a presumption of intention.

[152] In *Montor Business Corp. (Trustee of) v. Goldfinger*, 2016 ONCA 406, 36 C.B.R. (6th) 169 ("*Montor Business Corp.*") at paras. 72-73, the Court of Appeal for Ontario identified a non-exhaustive list of "badges of fraud" and stated that an inference of intent to defraud, defeat or delay a creditor may arise from the existence of one or more badges of fraud; but whether the intent exists is a question of fact determined from all of the circumstances as they existed at the time of the conveyance. As stated by Justice Brown, as he then was, in *Montor Business Corp. (Trustee of) v. Goldfinger*, 2013 ONSC 6635, 37 C.B.R. (6th) 200 ("*Goldfinger*") at para. 6635, "A court must resist the temptation to inject back into the circumstances surrounding the impugned transaction knowledge about how events unfolded after that time. The focus must remain on the belief and intention of the debtor at the time, as well as the reasonableness of that belief in light of the circumstances then existing."

[153] Courts have identified several badges of fraud, including the following:

1. The conveyance was general (i.e., a transfer of substantially all of the transferor's property).
2. The transferor continued in possession and used the goods as the transferor's own, including selling them.
3. The conveyance was secret.
4. The conveyance was made in the face of an ongoing legal process.
5. The conveyance amounted to a trust of the goods.
6. The deed contained the self-serving and unusual provision "that the gift was made honestly, truly, and bona fide."
7. The deed gives the transferor a general power to revoke the conveyance.
8. The deed contains false statements as to the consideration.
9. The consideration is grossly inadequate.
10. There is unusual haste to make the conveyance.
11. Some benefit is retained under the settlement by the settlor.
12. Cash is taken in payment instead of a cheque.
13. A close relationship exists between the parties to the conveyance.

[154] These badges serve an evidentiary function. They can be viewed as "circumstantial evidence that may cause a court to draw an inference of intent.": Roderick Wood, "Transfers at Undervalue: new wine in old skins?" *Annual Review of Insolvency Law* (Toronto: Ontario: Thomson Reuters: 2017) Online: WestlawNext Canada.

[155] Where a transaction displays one of the badges of fraud, this will usually be enough to establish the debtor's illegal purpose unless the debtor can provide an innocent explanation: Anthony Duggan et al., *Canadian Bankruptcy and Insolvency Law*, 3rd ed. (Toronto: Emond Montgomery 2015) at 223.

[156] The Trustee asserts that all of the "badges of fraud" identified by the Court of Appeal for Ontario in *Montor Business Corp.* exist in this case: the consideration for the transaction was grossly inadequate; the transfer was made to a non-arm's length person; the transfer was secret; the transfer was effected with unusual haste; and the transferor was facing actual or potential liabilities, was insolvent, or about to enter a risky undertaking.

[157] Based on the evidentiary record, and as noted above, I find that both the Bondfield and the Forma-Con impugned transactions were conducted between non-arm's length parties. There was also a lack of consideration for the transfers. Inherent in the false invoicing schemes was a complete absence of value to BCCL and to Forma-Con. With the exception of transfers made to 230, John Aquino, Anastasio, Coccia and Caruso conceded this lack of value. The transactions were furthermore concealed through the creation and delivery of phony invoices, which purported to describe services that were never delivered. Both the Bondfield impugned transactions relating to the false invoicing scheme and the Forma-Con impugned transactions were generally conducted with unusual haste. Where the typical billing cycle was 30 to 90 days, payments made in association with these impugned transactions were on average made in a few days at most. Many

of the transactions were facilitated by Solano, who was understood by the Monitor and the Trustee to have worked in Bondfield's IT Department and accounting departments, but who was not engaged in vendor or procurement matters.

[158] The transferors, being the corporate debtors, also had actual and potential liabilities, or were about to enter risky undertakings. According to the reports of the Monitor and the Trustee, both BCCL and Forma-Con had significant long-term and off-balance sheet liabilities during the relevant review periods and were guarantors on BCCL's credit facility in respect of which there were contingent obligations in the tens of millions of dollars at the end of fiscal years 2014, 2015 and 2016. Ralph, Steven and John Aquino's sister Maria Bot, were all creditors of BCCL with substantial shareholder loan accounts. The Bondfield Group was facing actual and potential liabilities, and by John Aquino's own admission was embarking on a significant expansion in its construction activities at a time when its lender, National Bank, was not prepared to increase its lending. During the relevant period, John Aquino and Ralph were temporarily transferring funds to BCCL for the sole purpose of misleading BCCL's stakeholders, including its lenders, into believing that BCCL was in a stronger financial position than it was.

[159] I note that, in *Stalt*, at para. 57, the court held that a false invoicing scheme that had the effect of falsifying the debtor's receivables and payables established an intent to "defeat, defraud or delay" a creditor.

[160] In my view, the facts that the transfers were made by BCCL and Forma-Con, in secret, in haste, to non-arm's length persons, and that the consideration for the transfers, being no consideration, was grossly inadequate, are sufficient circumstantial evidence to find fraudulent intent. The record also shows that these transfers were being made at a time when the Bondfield Group was expanding its business without the support of its primary lender, the National Bank. National Bank had declined to increase its lending and had classified its existing loan as a "special loan", which would require closer monitoring. The totality of the evidence, in my view, provides a firm basis for finding that John Aquino, as principal and directing mind of BCCL and Forma-Con, had fraudulent intent – an intent to defraud, defeat or delay creditors. It was in no way reasonable for him to believe that, throughout the period of the impugned transactions, BCCL and Forma-Con did not have long-term creditors, like lenders, including Ralph, who would not be defeated or delayed by the draining of tens of millions of dollars from BCCL and Forma-Con through the false invoicing schemes.

[161] The existence of badges of fraud creates a rebuttable presumption of the intention to defraud, defeat or delay creditors. The onus then shifts to those defending the fraud to adduce evidence to show the absence of fraudulent intent: *Purcaru v. Seliverstova*, 2015 ONSC 6679, 69 R.F.L. (7th) 388 at para. 57.

[162] The onus is high for John Aquino. He was the insider at BCCL and Forma-Con, the president of the debtor companies, who knowingly approved invoices and signed cheques for an aggregate of tens of millions of dollars based on phony invoices in relation to services or materials that were never delivered. There is no innocent explanation for a false invoicing scheme.

[163] The defending Bondfield Respondents and Forma-Con Respondents (other than 664 Ontario) attempt to rebut the presumption by arguing that there could be no intention on the part of BCCL or Forma-Con at the time of the transfers to defraud, defeat or delay creditors because the financial condition of the Bondfield Group, BCCL, and Forma-Con at the time of the transfers was such that each was paying all of its debts as they came due, in full.

[164] For the reasons that follow, I find that the defending Bondfield Respondents and Forma-Con Respondents (other than 664 Ontario) have not rebutted the presumption of fraudulent intent by adducing evidence of the purported financial condition of the Bondfield Group.

[165] There is a divergence of opinion between the parties on the financial condition of the Bondfield Group during the Bondfield review period and the Forma-Con review period. John Aquino and, in turn, other Bondfield Respondents and Forma-Con Respondents (other than 664 Ontario), rely on the Bondfield Group's financial statements, as audited by Deloitte, in support of their view that BCCL and Forma-Con could not have had the intent to defraud, defeat or delay creditors. They assert that the financial statements show a prosperous and growing group of companies with a strong balance sheet during the relevant times, and show that the Bondfield Group could pay all of its creditors on time and in full at least until late 2017. As further evidence of the financial health of the Bondfield Group, John Aquino also relies on the CHS Report. The CHS Report shows that the Bondfield Group was in a strong financial position during the relevant review periods and was paying its current debts on time and in full until late 2017.

[166] John Aquino further submits that Mr. Hamilton's evidence regarding the ability of BCCL and Forma-Con to pay its creditors in full has not been challenged and that no countervailing expert report has been filed by the Monitor or the Trustee.

[167] Deloitte undertook an audit of the Bondfield Group, including BCCL, and Forma-Con, for the years 2013 to 2016 inclusive and prepared an audit in draft form for BCCL in 2017. In each of those years, Deloitte showed growth in contract revenue and retained earnings increasing year over year. John Aquino argues that the directing minds of the Bondfield Group therefore had no intention to defraud, defeat or delay creditors during those years. Rather, they believed that the companies comprising the Bondfield Group had healthy growth, and a strong financial outlook and would be able to satisfy all of its creditors for the foreseeable future.

[168] The Monitor raises concerns about the reliability of the financial statements on which Deloitte relied and asserts that the actual financial condition of BCCL contradicts the defending Bondfield Respondents' position that BCCL was financially healthy during the Bondfield review period. The Monitor's investigation found that a) BCCL's financial records, prepared under the supervision of John Aquino, vastly overstated the revenues and profitability of its projects in the relevant period, causing BCCL to have to book significant adjusting journal entries under the supervision of the Monitor; b) Zurich had encountered stated losses of over $300,000,000 to date in paying sub-trades and completing BCCL projects, which losses arose from projects and project activities started many years before the *CCAA* filing; c) BCCL's loan was placed in "special loans" by its prior lender, The National Bank, no later than the start of 2017; d) BCCL faced persistent liquidity challenges as evidenced in part by John Aquino's steps to inject cash into BCCL

temporarily at the beginning of 2014 through 2017 in order to improve the appearance of BCCL's liquidity for the purposes of its bonding and lending arrangements; and e) the Bondfield Group's auditors, Deloitte, are the subject of litigation by both BCCL and Zurich with respect to the accuracy of the financial statements that the defending Bondfield Respondents and Forma-Con Respondents rely upon.

[169] The Monitor submits that the information that CHS relied on was fundamentally inaccurate and unreliable. In its investigation, the Monitor found evidence that incorrect supplier invoice dates were entered into the accounting system and that BCCL had a practice of holding payment cheques while recording suppliers as having been paid. These practices extended use of BCCL's funds and kept supplier payments outstanding for longer periods of time than the periods reflected in the accounting system. For example, in June 2018, the Monitor discovered $23,214,486.95 of cheques written to suppliers but not released.

[170] According to the Monitor's reports, just as accounts payable were understated in BCCL's records, accounts receivable were overstated in a problematic fashion. While BCCL's contract revenues were going up, the collectability of those revenues was going down. Throughout the Bondfield review period, BCCL's accounts receivable collection was in continual decline.

[171] Shortly after the *CCAA* filing, BCCL began to recognize large reversals of previously recognized revenue and profits because it had been previously recognizing revenue and earnings aggressively and without taking into account known cost overruns and project delays. BCCL's accounting records were restated by a new CFO with the assistance of the Monitor. The Monitor reported that this restatement resulted in adjusted deferred revenue from $37,000,000 as of March 31, 2018 to approximately $107,000,000 as of June 30, 2018 and then to approximately $170,000,000 as of September 30, 2019. The Monitor asserts that these adjustments were necessary because BCCL overstated the level of completion of its projects during the Bondfield review period and recognized revenue early based on those overstatements. Given John Aquino's admitted knowledge of the state of BCCL's projects, including attendance at job sites, management of projects, suppliers and subcontractors, and job site meetings, it is notable that he permitted BCCL's financial statements to be prepared in reliance on inaccurate information regarding the state of completion of the projects in order to inflate BCCL's revenues.

[172] The Monitor reported that BCCL was reporting negative gross profit of $382,000,000 during the period from 2018 to 2020 and that a significant portion of those losses was actually incurred during the Bondfield review period.

[173] The Monitor also reported write-offs for accounts receivable amounts of $53,000,000 relating to the Bondfield review period in the fourth quarter of 2018.

[174] Thus, according to the Monitor's evidence, contrary to the position asserted by the defending Bondfield Respondents, BCCL's financial position during the Bondfield review period was that of a corporation in financial decline, which could ill afford the additional drain of the Bondfield impugned transactions.

[175] According to the Trustee reports, Forma-Con owed approximately $9,000,000 in 2014; $96,000,000 in 2015; and approximately $119,000,000 in 2016. Forma-Con was also a guarantor of BCCL's credit facility with National Bank with contingent obligations of $48,000,000, $55,000,000, and $56,000,000 at the end of fiscal 2014, 2015 and 2016, respectively. Further, Forma-Con became a guarantor of BCCL's $80,000,000 credit facility with Bridging Finance Inc. when the facility was entered into in July 2017.

[176] The Trustee asserts that the CHS report is flawed with respect to Forma-Con. The report concludes that Forma-Con paid its liabilities on a timely basis at least until December 31, 2017. Despite this conclusion, Mr. Hamilton agreed on cross-examination that he did not conduct a solvency analysis or consider Forma-Con's liabilities on a "balance-sheet test" and could not opine on Forma-Con's solvency during the review period. Mr. Hamilton also agreed that his analysis was limited to Forma-Con's short-term liabilities and that he did not consider any of the long-term, contingent or off-balance sheet liabilities of Forma-Con. Mr. Hamilton conceded that he was not aware that Forma-Con was a guarantor of BCCL's credit facilities with National Bank. He did not consider Forma-Con's ability to pay its related-party liabilities.

[177] Both the Monitor and the Trustee challenge the CHS Report because it focused on only one measure of corporate solvency, the cash flow test. When examined, Mr. Hamilton, admitted his lack of expertise in insolvency matters and conceded that he did not consider BCCL's ability to pay its long-term creditors and contingent creditors.

[178] John Aquino asserts that many of the issues raised by the Monitor and the Trustee have no impact on the fact that BCCL and Forma-Con were in strong financial positions and able to pay their respective creditors on a timely basis.

[179] Irrespective of the precise financial condition of the Bondfield Group, on which the parties do not agree, the Monitor and the Trustee assert that the test under the *BIA* is disjunctive: a monitor or trustee must show that the debtor was insolvent at the time of the impugned transaction *or* that the debtor intended to defeat, defraud or delay creditors. The Monitor argues that this choice is reflected in the fact that the statute contemplates recovery for transactions made with an intent to defeat, defraud or delay creditors up to five years prior to an insolvency event; therefore, it is no answer to assert that during this five-year period, the debtor may not have yet been insolvent.

[180] In response to the arguments of the Monitor and the Trustee on the financial condition of BCCL, Forma-Con and the Bondfield Group, the defending Bondfield Respondents submit that Mr. Hamilton adjusted his accounting in the CHS Report to take into account the $23,214,486.95, which had not been released to suppliers, and found that it had no impact on BCCL's ability to pay its bills on time and in full during the Bondfield review period.

[181] The defending Bondfield Respondents also submit that the Monitor is incorrectly using hindsight to determine John Aquino's intent and cannot consider all of the Bondfield impugned transactions cumulatively, but must put itself in John Aquino's shoes in each of the years covered by the Bondfield review period and determine his intent at that time. They submit that if the Bondfield impugned transactions are examined in each year, the results would show that the

amount paid out on false invoices was a relatively small fraction of the gross revenue for that year. They assert that it cannot be said that John Aquino could have had the intent to defeat creditors if he was only permitting BCCL to pay out about 1 percent of its gross revenue. They submit that this would have been the case in 2014 when the total of the false invoices paid was $5,749,917 as compared to gross revenue of $475,000,000, and that even with the payment on the false invoices, the net profit for that year was $17,400,000.

[182] I am not persuaded that the quantum of the amounts paid out on the false invoices as compared to the gross revenue or the net profit of BCCL in a given year absolves John Aquino of an intent to defeat creditors. The amounts, whatever the quantum, were paid out at a time when John Aquino was taking deliberate steps to mislead the stakeholders of BCCL with respect to its financial position and these payments bore a number of badges of fraud. Each of these payments reduced the funds available to pay long-term creditors and increased bank indebtedness as shown in the Monitor's reports.

[183] In further support of their position, the defending Bondfield Respondents and Forma-Con Respondents (other than 664 Ontario) rely on the *Goldfinger* case for the proposition that "[w]here a debtor remains in a position to pay off liabilities, an impugned transaction cannot have been made with an intent to defeat, defraud or delay a creditor." That case involved a trustee attacking a settlement reached between the debtor and a former investor (Dr. Goldfinger). The trustee sought to set aside a payment to Goldfinger as a transfer at undervalue under s. 96 of the *BIA*. The court found that, at the time of the transfer, the parties believed that the real properties held by the debtor possessed significant future value which would "prove sufficient to pay off those companies' liabilities and generate a profit for [the corporation's directing mind] and Goldfinger to share." (see para. 274). The court placed "significant weight" on this evidence in finding that, while the debtor may have been unreasonable in his belief as to the future value of the real property, the debtor did not intend to defraud or delay creditors. Notably, there were no badges of fraud present in that case. See paras. 275-280.

[184] The Bondfield and Forma-Con Respondents also rely on *Commerce Capital Mortgage Corp. v. Jemmet*, [1981] 37 C.B.R. (N.S.) 59 [Ont. Sup. Court] for the proposition that "where a conveyance occurred at a time where there was no evidence of the debtor experiencing financial difficulty, the plaintiff was unable to prove that the conveyance had the intent to defeat, hinder, delay or defraud creditors." In that case, the court considered the conveyance of a matrimonial residence from Mr. Jemmet to his wife. Mr. Jemmet made this conveyance one and a half years before he provided personal guarantees for loans made to his corporation, Jeroy Limited. The plaintiff creditor, seeking to recover under this guarantee, attacked the conveyance under the *FCA*. Importantly, the court noted, at para. 9, that there "was no evidence adduced by the plaintiff that at the time of the conveyance to Mrs. Jemmet there were any current and anticipated financial obligations or debts of Jeroy Limited." It held that there was no intention to defraud or delay creditors. I note that the court did not appear to identify any badges of fraud in this case. While the case does illustrate the importance of the debtor's financial position in assessing intent, I do not find this case to be analogous to the case at bar.

[185] The Respondents also rely on *Fleming v. Edwards*, [1896] 23 O.A.R. 718 (Ont. C.A.), as a case "where a debtor made a voluntary conveyance of property at a time when he was solvent and subsequent events impacted on his ability to pay his creditors in full, the voluntary conveyance did not meet the requisite intent to defeat, hinder, delay or defraud creditors." This case involved a fairly unique fact scenario. In this very old decision, the defendant made a conveyance of property to his wife prior to entering into a hotel business. He only became insolvent as a result of a fire that destroyed the premises. The court held that there was no intent to defraud creditors at the time the defendant made the transfer.

[186] As shown by these cases, the financial position of a debtor at the time of the impugned transactions can indeed be a relevant consideration in assessing whether the debtor had an intent to defraud, defeat or delay creditors. However, in my view, the relevance of that consideration should not be overstated. The debtor's financial position serves as additional circumstantial evidence of the debtor's intent that should be considered alongside the badges of fraud, if present, in determining whether the debtor had the requisite intent under s. 96. The debtor's financial position is but one factor for the court to consider in determining the debtor's intent. Like the badges of fraud, it is circumstantial evidence worthy of the Court's consideration. As noted by the Court of Appeal for Ontario in *Urbancorp Toronto Management Inc. (Re)*, 2019 ONCA 757, 74 C.B.R. (6th) 23 at para. 64: "there is no special rule that makes evidence of debtor's insolvency determinative as opposed to one factor to be considered. … Instead, the crucial question remains whether the applicant has proved the fraudulent intent of the debtor."

[187] The Trustee does not rely on the branch of s. 96 that requires a showing of insolvency. Further, the CHS report offers no opinion on the solvency of BCCL or Forma-Con. Their respective current liabilities are only part of their overall liabilities, and the payment of those liabilities is only part of the equation. As noted, to the extent that funds are withdrawn from the company, it becomes less able to meet its long-term or contingent liabilities, and the long-term creditors are affected by those withdrawals.

[188] I was not provided with any authority in support of the position that a company's financial health positively precludes a finding of fraudulent intent, and I do not find that it does. Even if BCCL and Forma-Con were paying their respective current suppliers for a period of time, this does not sanitize the fraud, which is supported by a number of badges of fraud.

[189] I accept that John Aquino may have had other motives, apart from defeating creditors, in paying out tens of millions of dollars from BCCL and Forma-Con. However, to meet its onus, the Monitor and the Trustee need only demonstrate that one of the debtor's motives or intentions was to defraud, defeat or delay a creditor: *Juhasz Estate v. Cordiero*, 2015 ONSC 1781, 24 C.B.R. (6th) 69 at para. 54.

[190] I find that the badges of fraud in this case establish John Aquino's intent to defraud, defeat or delay creditors. He was a directing mind of BCCL and Forma-Con and signed a number of the cheques associated with the impugned transactions. In cross-examination he stated that he would have been familiar with 100 percent of the suppliers and subtrades. He conceded that BCCL and Forma-Con received no value in the impugned transactions (not including 230).

[191] At the same time as he was authorizing payments on false invoices, he was injecting capital into BCCL from time to time in an attempt to disguise the true financial condition of BCCL. An intent to defraud, defeat or delay creditors, for the purposes of s. 96 of the *BIA* can be established through evidence of an explicit fraudulent act in the sense of evidence that a representation was made concerning the ownership of [the debtor's] assets to a creditor or potential creditor which was not true: *Incondo v. Sloan,* 2014 ONSC 4018, 16 C.B.R. (6th) 220 at para. 81, aff'd 2015 ONCA 752, 31 C.B.R. (6th) 110.

[192] It is reasonable to infer that John Aquino took these actions to avoid BCCL's and Forma-Con's obligations and defeat their creditors. Neither he nor any of the other Respondents has given evidence of an alternative explanation.

[193] The true financial condition of each of BCCL and Forma-Con at the time of each impugned transaction cannot be determined on the record before the court. Based on the evidence, there were a number of unusual accounting practices. These include John Aquino's admission that, during the Bondfield review period, he and Ralph routinely injected capital into BCCL to mislead BCCL's stakeholders into thinking that the Bondfield Group was financially stronger than it was; the fact that suppliers' cheques were withheld to give BCCL an opportunity to extend the time it could use the funds owing to suppliers; the fact that BCCL was entering a date later than the date shown on the supplier invoice into its accounting system, which allowed its payables to remain outstanding longer; the fact that significant adjusting journal entries had to be made regarding BCCL's revenue and profit once the Monitor was appointed; and the fact that a claim has been brought against Deloitte with respect to its audit of Bondfield Group financial statements (which it is defending). In light of these concerns, it is reasonable to infer that the financial records provided to Deloitte and to Mr. Hamilton were likely not reliable.

[194] The defending Bondfield Respondents and Forma-Con Respondents assert that Ralph and Steven were also directing minds of BCCL and Forma-Con and, therefore, an intent to defraud, delay or defeat creditors cannot be met without establishing their intent as well. In his affidavit, Anastasio attested that the Bondfield Group had three directing minds, Ralph, John Aquino and Steven, and that all three of them knew and approved at all times all of the impugned transactions underpinning the false invoicing scheme.

[195] I disagree that a finding of an intent to defraud, defeat or delay creditors requires a mutual intent among all of Ralph, John Aquino and Steven. First, Ralph and Steven have denied knowledge of the false invoicing scheme involving BCCL and Forma-Con and the alleged fund cycling scheme involving 230. John Aquino has adduced evidence of their alleged participation in other off-book transfers of values. Based on the record, I cannot conclude to what extent Ralph and Steven in fact engaged in other off-book transfers; however, I see no evidence of Ralph's or Steven's participation in the schemes under review in these matters to strip BCCL and Forma-Con of tens of millions of dollars and to disguise such stripping, in the case of BCCL, through attempts to represent an inaccurate financial picture of the companies for creditors and other stakeholders.

[196] In my view, whether Ralph and Steven did or did not participate is of no assistance to John Aquino. If they did participate, their participation would support the Monitor's and the

Trustee's position that the BCCL impugned transactions and the Forma-Con impugned transactions were entered into with an intent to defraud, defeat or delay creditors. If they did not participate and were not aware of the impugned transactions, this fact does not assist John Aquino, who has admitted that as president of each of BCCL and Forma-Con, he was one of its directing minds. As president, he was able to, and did take binding actions on behalf of BCCL and Forma-Con, not the least of which were the acts in issue in these Applications.

[197] The totality of the evidence demonstrates a pattern of an intent by John Aquino, on behalf of each of BCCL and Forma-Con to defraud, defeat or delay the creditors of BCCL and Forma-Con. The badges of fraud permit an inference of intent and evidence a presumption of intent that is not rebutted by the evidence that current liabilities were being paid in the ordinary course of business during the Bondfield review period and the Forma-Con review period.

Was there a creditor towards whom the intent was directed?

[198] As set out above, under the *FCA*, there must be a "creditor or other" towards whom the fraudulent intent was directed. Cases have held that the language "creditors and others" is "broad enough to contemplate a person that, while not a creditor at the time of the conveyance, may become one in the future": *Bearsfield Developments Inc v McNabb*, 2016 ONSC 6294, 41 C.B.R. (6th) 310 at para. 47. Future creditors are clearly contemplated by the *FCA*; however, as noted, the *BIA* does not contain this broad language and therefore arguably does not apply to future creditors.

[199] John Aquino asserts that neither the Monitor nor the Trustee can meet its onus to show that BCCL and Forma-Con, in participating in the impugned transactions, had the intent to defraud, defeat or delay creditors because both corporations were paying their debts as they came due and therefore had no "creditors", as that term is defined in the *BIA*, during the Bondfield review period or the Forma-Con review period. He further asserts that the Trustee's argument that the impugned scheme unavoidably affected Forma-Con's stakeholders "when the music stopped" inappropriately reads into s. 96(1)(b)(ii)(B) future or subsequent creditors. I disagree with this interpretation of the Trustee's argument.

[200] The definition of "creditors" in the *BIA* includes persons who are owed debts and those with unliquidated claims. As such, an intent to defeat either of these two types of claimants will suffice. However, as noted, "it is more doubtful whether the transfer at undervalue provisions encompass future creditors":

> the significance of the additional words "and others" after creditors is widely known and featured in every major work that studies fraudulent conveyance law. The choice not to include this wording should therefore be taken as an indication on the part of the drafters to limit the application of the section: Roderick Wood, "Transfers at Undervalue: new wine in old skins?" *Annual Review of Insolvency Law*.

[201] As set out in *McConnell*, the determination of whether a transaction should be set aside depends on an intent to defeat a creditor towards whom that intent is directed. If the debtor intended

to defeat, defraud or delay present creditors, then the transaction can be attacked under s. 96 of the *BIA*. However, if the debtor intended to defeat, defraud or delay future creditors, then the transaction cannot be attacked under s. 96 of the *BIA*. In *Re Silbernagel* 20 C.B.R. (5th) 155 (ONSC) at para. 7, the court found that a person who might become a creditor of a bankrupt at a future date is not a "creditor."

[202] While I accept that the *BIA* does not define "creditor" to include future creditors, John Aquino's submission seems to conflate the distinction between present and future creditors with the financial health of the Bondfield Group, stating that *Goldfinger* establishes that there can be no intent to defeat creditors where, at the time of the transfer, a debtor remains in a position to pay off current liabilities. I disagree that this conclusion follows from the analysis in that case. As noted, in my view, the corporation's financial position is only circumstantial evidence that may or may not support an inference that the corporation intended to defeat creditors. In *Goldfinger*, the court merely held there was an absence of evidence of fraudulent intent. Nowhere in that case did the court state that a healthy financial outlook precludes a finding of fraudulent intent. As a matter of logic, even if a corporation is meeting its current liabilities, transactions can nevertheless be undertaken to defeat current creditors at some unspecified future date.

[203] As such, in my view, if any debts owing at the time of the impugned transactions were indeed paid, then this may evince a lack of intent to defraud then-existing creditors and effectively bar the Monitor and Trustee from attacking the transfers. However, if there were debts owing at the time of the impugned transactions which were ultimately not paid, then it remains open to the Court to find that there was the requisite intent to defeat then-current creditors under s. 96.

[204] Given that the Bondfield Group had outstanding debts, including a substantial loan from its primary lender and shareholder loans, at the time of the transfers (even though monthly payments on the bank loan were being made), it follows that there was a creditor or creditors toward whom BCCL's and Forma-Con's intent to defraud, defeat or delay could be directed. The Court is, therefore, not precluded from finding that the transactions were intended to defeat creditors that existed at the time of the transfers. The fact that the Bondfield Group remained in a position to pay off current liabilities is only one piece of circumstantial evidence to consider. The fact that each of BCCL and Forma-Con were paying off current liabilities at the time of the impugned transactions does not *per se* mean that those transfers were never intended to defeat then-current creditors.

Can John Aquino's intent be imputed to BCCL and Forma-Con?

[205] In applying s. 96, for transactions in the year prior to the insolvency or the initial bankruptcy event, there is no need to show that the debtor was insolvent nor that the debtor intended to defeat the interests of creditors. However, for transactions between one and four years prior to the bankruptcy event, the Monitor and the Trustee must prove that the debtor intended to defeat the interests of creditors.

[206] As noted, it is the intention of the transferors (the *CCAA* debtor and the bankrupt) and not the transferees that matters under s. 96. As such, it is the intention of the corporate debtors, BCCL and Forma-Con that matters in this case.

[207] Anastasio, Coccia and Caruso argue that even if John Aquino acted fraudulently, his intention in effecting the schemes cannot be imputed to BCCL and Forma-Con because corporate intentionality has not been established. These Respondents also argue that John Aquino acted fraudulently in respect of BCCL and Forma-Con, and as such his actions cannot be imputed to Bondfield and Forma-Con.

[208] The Monitor and the Trustee dispute this formulation of corporate wrongdoing. They argue that the intent of John Aquino can and should be imputed to BCCL and Forma-Con.

[209] In an ordinary case, the intention of a corporation's "directing minds" can be imputed to the corporation itself through the corporate attribution doctrine. The corporate attribution doctrine derives from the Supreme Court of Canada decision in *Canadian Dredge & Dock Co. v. The Queen*, [1985] 1 S.C.R. 662. While that case dealt with criminal liability, the doctrine has been recognized in the civil context as well. See: *Golden Oaks Enterprises Inc. (trustee of) v. MRL Telecom Consulting Inc*, 2016 ONSC 5313, 33 O.R. (3d) 513 at para. 127.

[210] The corporate attribution doctrine has yet to be applied in the context of s. 96 of the *BIA*.

[211] Notably, the doctrine does not apply where the directing mind commits fraud on the corporation, as set out in *Canadian Dredge*, at para. 65:

> In my view, the outer limit of the delegation doctrine is reached and exceeded when the directing mind ceases completely to act, in fact or in substance, in the interests of the corporation. Where this entails fraudulent action, nothing is gained from speaking of fraud in whole or in part because fraud is fraud. What I take to be the distinction raised by the question is where all of the activities of the directing mind are directed against the interests of the corporation with a view to damaging that corporation, whether or not the result is beneficial economically to the directing mind, that may be said to be fraud on the corporation. (emphasis added)

[212] The modern test is described in the following paragraph from *Deloitte & Touche v. Livent Inc (Receiver of)*, 2017 SCC 63, 2 S.C.R. 855 at para. 100:

> The test for corporate attribution was set out by this Court in Canadian Dredge & Dock Co. v. The Queen, [1985] 1 S.C.R. 662. To attribute the fraudulent acts of an employee to its corporate employer, two conditions must be met: (1) the wrongdoer must be the directing mind of the corporation; and (2) the wrongful actions of the directing mind must have been done within the scope of his or her authority; that is, his or her actions must be performed within the

> sector of corporate operation assigned to him. For the purposes of this analysis, an individual will cease to be a directing mind unless the action (1) was not totally in fraud of the corporation; and (2) was by design or result partly for the benefit of the corporation (pp. 681-82 and 712-13).

[213] As stated by Van Rensberg J.A. in *DBDC Spadina Ltd. v. Walton*, 2018 ONCA 60, 419 D.L.R. (4th) 409 (at para. 233):

> *Canadian Dredge* instructs that where a corporation's alleged wrongdoing involves fraud by its directing mind, the court must be satisfied that (i) the directing mind was acting within her assigned field of operation, and that her actions (ii) were not totally in fraud of [the corporation], and (iii) were by design or result partly for the benefit of the corporation.

[214] Anastasio, Coccia and Caruso submit that the minimal criteria to satisfy corporate attribution cannot be satisfied. Specifically, they argue that the Monitor and the Trustee have not shown that John Aquino's actions were within the scope of his authority, nor that his actions were intended to benefit the corporate debtors or had the effect of doing so. Therefore, they argue, John Aquino's alleged fraudulent intentionality cannot be attributed to the corporate debtors.

[215] I disagree with the suggestion of these Respondents that, based on Steven's testimony, John Aquino did not have authority to enter into the transactions. Therefore, the specific impugned transactions were not authorized by BCCL and Forma-Con. In my view, the courts take a broader view of what constitutes corporate authority. Professor Anthony VanDuzer, in *The Law of Partnerships and Corporations*, 3rd ed. (Toronto: Irwin Law, 2009), at 201 states:

> The corporation is responsible for any act by a directing mind <u>in the general area of her responsibility, even if not specifically authorized by a corporate rule or policy.</u> Indeed, even if there is a corporate rule or policy prohibiting the action, that is no defence to corporate responsibility.…Liability may be imposed on corporations where, by virtue of the practice of the corporation, the person with the guilty mind exercised corporate authority in the area in which the offence was committed. (emphasis added)

[216] The question is not whether specific activity was authorized, but rather whether the specific activity fell within the individual's area of responsibility. John Aquino's areas of responsibility included engaging with suppliers and overseeing the provision of services and materials.

[217] The real issue in this matter relates to whether the actions were by design or result partly for the benefit of the corporations. I agree that the actions of John Aquino were not intended to benefit BCCL and Forma-Con and they did not so do. If the *Canadian Dredge* criteria were applied strictly, it would mean that John Aquino's intent could not be attributed to the debtor corporations.

[218] The Monitor and the Trustee argue that the formulation of corporate intent set out in *Canadian Dredge* should not be applied mechanically, and should not apply in this case. They submit that the *Canadian Dredge* formulation is incompatible with the very purpose of s. 96 of the *BIA*, which is aimed at restoring value for the benefit of the debtors' creditors.

[219] It has been repeatedly affirmed that the corporate identification doctrine is concerned with policy. As stated in *Deloitte & Touche*:

> 102... the policy factors identified therein which weigh in favour of imputing a corporation with the illegality or wrongdoing of its directing mind flow from the "social purpose" of holding a corporation responsible for the *criminal* acts of its employees where those acts are designed and carried out, at least in part, to benefit the corporation (Canadian Dredge, at p. 704).
>
> 103 However, as Estey J. himself recognized, the doctrine is only one of "judicial necessity" and where its application "would not provide protection of any interest in the community" or "would not advantage society by advancing law and order", the rationale for its application "fades away" (Canadian Dredge, at pp. 707-8 and 718-19).

[220] Notably, the Supreme Court held in *Christine DeJong Medical Corp v. DBDC Spadina Ltd.*, 2019 SCC 30 that policy considerations cannot relax the application of the *Canadian Dredge* criteria. On the contrary, it only provides a reason for courts to not apply the doctrine even where the *Canadian Dredge* criteria are met:

> What the Court directed in Livent, at para. 104, was that even where those criteria are satisfied, "courts retain the discretion to refrain from applying [corporate attribution] where, in the circumstances of the case, it would not be in the public interest to do so" (emphasis added). In other words, <u>while the presence of public interest concerns may heighten the burden on the party seeking to have the actions of a directing mind attributed to a corporation, Canadian Dredge states minimal criteria that must always be met.</u> The appeal is allowed, with costs throughout (emphasis added).

[221] The Supreme Court, in these brief reasons, adopted the dissent from Van Rensberg J.A in *DBDC Spadina Ltd. v. Walton*. That decision strongly affirmed that, even in civil cases, the criteria in *Canadian Dredge* is not relaxed (at para. 236):

> … When the *Canadian Dredge* criteria have been accepted and applied in civil cases, this has occurred without relaxing the criteria for finding a corporation is liable for a wrong, when its directing mind is acting fraudulently….

[222] All of this would suggest that the *Canadian Dredge* criteria is to be applied strictly in all civil cases, including, arguably, those arising under s. 96 of the *BIA*. However, it is worth noting that the dissent from Van Rensberg J.A. strongly underscored the seriousness of the allegations (which involved knowing assistance in the breach of a fiduciary duty) and the level of knowledge required:

> 237 I do not accept that the adoption of a less demanding standard is warranted here. As I see it, neither the civil burden of proof nor the nature and extent of the fraud would justify a less rigorous approach if the Listed Schedule C Companies are to be fixed with responsibility for the conduct of their director, Ms. Walton.[27] Knowing assistance in the breach of a fiduciary duty is a serious wrong that requires actual and not constructive knowledge by the participant. The investors in the Listed Schedule C Companies did not themselves know about or cause the companies to participate in Ms. Walton's breach of fiduciary duty. (emphasis added)

[223] The requirement for actual knowledge (as opposed to constructive knowledge) in establishing knowing assistance in the breach of fiduciary duty does not arise under s. 96 of the *BIA*. This was an important part of the court's reasoning in that decision. Elsewhere in the dissent, Van Rensberg J.A. underscored this point while also noting the fault-based nature of the wrongful act:

> 216 Liability for knowing assistance in a breach of fiduciary duty is fault-based. It requires an intentional wrongful act on the part of the "stranger" or accessory, to knowingly assist in the fraudulent and dishonest breach of fiduciary duty. Participation in a breach of fiduciary duty for the purpose of knowing assistance requires that the accessory "participated in or assisted the fiduciary's fraudulent and dishonest conduct."

[224] While it might be contended that s. 96 is similarly fault-based, in that it requires an "intentional wrongful act," I note that the *BIA* generally is remedial legislation and that s. 96 is directed towards recovering funds for creditors. This gives me some hesitancy about whether Van Rensberg J.A.'s reasoning ought to apply in the context of s. 96.

[225] I also note that in *Goldfinger*, Justice Myers did not seem to consider whether the *Canadian Dredge* criteria should apply under s. 96 and held (at para. 259) that "...the intention of [the corporate debtor] at the time should be determined by reference to the intention of Kimel, the person who directed the company's affairs." While there is little discussion of attributing intent in this decision, it does provide some basis for finding that courts should readily infer that the intent of the corporate debtor is that of the person directing the company's affairs without engaging in the *Canadian Dredge* analysis.

The effect of principles of statutory interpretation

[226] The Monitor and the Trustee submit that principles of statutory interpretation support their view that the *Canadian Dredge* formulation of attribution of intent should not apply in cases involving s. 96 of the *BIA*. They urge on this court a purposive interpretation that provides protection to the debtors' creditors as the section is intended to do.

[227] They submit that the rules of statutory interpretation favour a broad interpretation of s. 96, including the definition of debtor. The Supreme Court of Canada in *Royal Bank of Canada v. North American Life Assurance Co.*, [1996] 1 S.C.R. 325 indicated that fraudulent conveyance law should be interpreted liberally in favour of creditors:

> All the provincial fraud provisions are clearly remedial in nature, and their purpose is to ensure that creditors may set aside a broad range of transactions involving a broad range of property interests, where such transactions were effected for the purpose of defeating the legitimate claims of creditors. Therefore, the statutes should be given the fair, large and liberal construction and interpretation that best ensures the attainment of their objects, as required by provincial statutory interpretation legislation…

[228] I think that, additionally, there are sound policy considerations that support the interpretation advanced by the Trustee and the Monitor. Policy considerations are relevant to the proper interpretation of a statute. Ruth Sullivan, in her text *Statutory Interpretation* 2nd edition. Irwin Law: Toronto: 2007 at page 245, notes that courts have generally begun to accept that "direct appeal[s] to policies…are relevant to the text to be interpreted." Indeed, in the context of the *Bankruptcy Act*, Iaccobucci J. stated in *Marzetti v. Marzetti*, [1994] 2 S.C.R. 765:

> My opinion is, furthermore, fortified by public policy considerations... In s. 68 of the *Bankruptcy Act*, Parliament has indicated that, before wages become divisible among creditors, it is appropriate to have 'regard to the family responsibilities and personal situations of the bankrupt.' This demonstrates, to my mind, an overriding concern for the support of families.

[229] Given that the *BIA* is concerned with providing proper redress to creditors, the "intention of the debtor" in s. 96 should be interpreted liberally to include the intention of individuals in control of the corporation, regardless of whether those individuals had any intent to defraud the corporation itself.

[230] For these reasons, I find that the corporate attribution doctrine as set out in *Canadian Dredge* ought not to apply in these applications made pursuant to s. 96 of the *BIA*, and John Aquino's intent to defeat creditors ought to be attributed to BCCL and Forma-Con.

[231] As a directing mind and a shareholder of BCCL and Forma-Con, John Aquino exercised total control over the false invoicing schemes, in respect of which he tacitly acknowledged his

wrongdoing. He conceded that the corporate debtors received no consideration for the payments made in the false invoicing schemes (excluding 230). Ralph and Steven deny any knowledge of these schemes. This degree of control by John Aquino, in and of itself, militates in favour of imputing his intent to defeat creditors to BCCL and Forma-Con.

[232] The majority decision in *DBDC Spadina Ltd.* is instructive on the point. Although the case was overturned by the Supreme Court in *Christine DeJong*, in my view, the majority's reasoning applies aptly in the context of s. 96. The majority made special note of the relaxed burden of proof in civil cases:

> 70 …The case law has applied *Canadian Dredge* in the criminal and civil contexts without discrimination. In my view, it does not follow, however, that the criteria need be applied in a rigid, identical, fashion in all circumstances. The burden of proof is less onerous in civil cases. This particular civil case involves a complex multi-real estate transaction investment fraud, perpetrated over an extended period of time, and implicating numerous corporate actors (operating at the instance of the fraudster) and numerous victims. In these circumstances, it makes sense that, of the Canadian Dredge criteria, (b) and (c) at least may be approached in a less demanding fashion than would be the case were *mens rea* for purposes of establishing criminal responsibility in play.

[233] The Court of Appeal noted the impugned action in *Christine DeJong* (assisting in the breach of a fiduciary duty) was fault-based rather than receipt-based, which strengthened its view that the *Canadian Dredge* criteria should be applied less strictly:

> 71 Contrary to the view expressed by my colleague, I do not think it is the case in such circumstances that the claimant must necessarily show "evidence of each company's individual benefit from the scheme" (at para. 234). As noted earlier, and as I shall explain more fully below, liability for knowing assistance is fault-based rather than receipt-based and does not require the defendant to have obtained a benefit from the defaulting fiduciary's breach. To apply criterion (c) of Canadian Dredge — "by design or result partly for the benefit of the company" — too strictly therefore makes little sense, as it would risk muddying the distinction between the two categories of claim. (emphasis added)

[234] Finally, the majority noted that characterizing the corporations as victims of the fraud was artificial and seemed to undermine the policy reasons underlying the identification doctrine:

> 82 My colleague's approach is also influenced by her view that the Listed Schedule C Companies are, themselves, victims of the fraud. If that were the case, it may be a consideration in determining

> whether liability may be avoided on overall "equity" grounds, discussed further below. However, I do not think it has much bearing on the "directing and controlling mind" analysis or on the analysis of whether the Listed Schedule C Companies in fact assisted and participated in the fraudulent breach of fiduciary duty. In addition, as I shall explain later, I do not view the Listed Schedule C Companies as being "victims" of the fraud; rather, their investors are the victims of the fraud.

[235] While the Supreme Court rejected the majority's reasoning in that case, in my view, the approach has merit in the context of the objectives of s. 96. Many of the points made by the majority apply with equal force to the policy considerations underlying the *BIA*. Accordingly, I find that for the purposes of s. 96 of the *BIA*, John Aquino's intent may be attributed to each of BCCL and Forma-Con.

d) Were the Respondents parties or privies to the transactions?

[236] The Monitor submits that all of the Bondfield Respondents were parties or privies to the Bondfield impugned transactions relating to the false invoicing scheme. John Aquino, 230, the Solano Estate and all of the BCCL Supplier Respondents colluded in the drafting of phony invoices, the directing and receiving of payments for the purpose of stripping funds from BCCL, from which they benefited and caused others to benefit. The individual Bondfield Respondents benefited from the false invoicing scheme as well. They were also involved in the incorporation and/or management of the shell companies. The evidentiary record supports this finding.

[237] The Trustee asserts that John Aquino, the Solano Estate, and all of the Forma-Con Supplier Respondents were parties to the impugned transactions relating to the false invoicing scheme. They were involved in one or more of drafting phony invoices and directing or receiving of payments for the purposes of stripping funds from Forma-Con. They may also have caused others to benefit from the transactions and they received benefits themselves. I agree. The evidentiary record also supports this finding.

[238] The individual Forma-Con Respondents, as well as 230, were privies to the transactions because they had knowledge about the transfers, and were dealing with the parties to the transfers. They received benefits themselves. The individual Respondents (other than the Solano Estate and 230) also established and/or operated the shell companies. The evidentiary record supports this finding.

[239] In *Peoples Department Store Inc. (Trustee of) v. Wise*, 2004 SCC 68, [2004] 3 S.C.R. 461, the Supreme Court considered the purpose of s. 96 [then s. 100] of the *BIA* in considering the definition of "privy". The Supreme Court held:

> The primary purpose of [s. 96] of the *BIA* is to reverse the effects of a transaction that stripped value from the estate of a bankrupt person. It makes sense to adopt a more inclusive understanding of the word "privy" to prevent someone who might receive indirect benefits to

> the detriment of a bankrupt's unsatisfied creditors from frustrating the provision's remedial purpose. The word "privy" should be given a broad reading to include those who benefit directly or indirectly from and have knowledge of a transaction occurring for less than fair market value. In our opinion, this rationale is particularly apt when those who benefit are the controlling minds behind the transaction.

[240] The courts have interpreted the term "privy" to include those persons who have knowledge of a transaction for less than fair market value and benefit either directly or indirectly from it: *Bank of Montreal v. EL04 Inc.*, 2012 ONCA 90.

[241] Section 96 extends liability to privies, who can be held jointly and severally liable. The remedy extends not only to the parties to the transfers at issue, but also to any person who "directly or indirectly, receives a benefit or causes a benefit to be received by another person." Given the collaborative involvement of the Bondfield Respondents and the Forma-Con Respondents in the false invoicing schemes at BCCL and Forma-Con, respectively, and the expansive definition of a privy, all of the Bondfield Respondents and all of the Forma-Con Respondents may be held liable in respect of all of the impugned transactions underpinning these false invoicing schemes.

[242] The individual Bondfield Respondents, the individual Forma-Con Respondents, and 230 have provided no explanation for the impugned transactions related to the false invoicing schemes or the false invoices themselves. They do not deny their involvement in these impugned transactions and they do not deny that they personally benefited from these impugned transactions. None of them has provided any evidence to rebut the presumptions drawn from the badges of fraud outlined in the evidence of each of the Monitor and the Trustee.

[243] Coccia argues that she should be exempt from any liability because she was only provided with a chart showing what she was paid in the false invoicing scheme after she had filed her responding materials, and because she denies being a director of any BCCL or Forma-Con Supplier Respondent. She also submits that she was not provided with the bank documents allegedly signed by her on behalf of Supplier Respondents until her cross-examination. Further, she argues that if it is found she played a role, she should not be held liable because, in relation to the other Respondents, her role would be insignificant and inconsequential.

[244] I find that Coccia is liable for her involvement in the false invoicing schemes. She did not deny that she received money from the BCCL Supplier Respondents nor did she deny that she had signing authority on the bank accounts of Supplier Respondents. At her examination, she refused to answer any questions about the banking documents she was alleged to have signed.

[245] However, given the limited role that the evidence indicates Coccia played in the BCCL false invoicing scheme, I would limit her liability to the extent of the benefit she derived from her involvement, which I find to be $88,008. Given the limited role that the evidence indicates Coccia played in the Forma-Con false invoicing scheme, I would limit her liability with regard to that false invoicing scheme to the extent of the benefit she derived from her involvement, being the value of the cheques paid to her by the Forma-Con Supplier Respondents.

The Fund Cycling Scheme

[246] The Trustee makes no allegation of any fund cycling scheme involving Forma-Con.

[247] The Monitor conceded that it does not have information connecting Anastasio, Coccia and Caruso to the BCCL transfers to 230 as part of the alleged fund cycling scheme and it does not seek to hold them liable in respect of those transfers.

[248] The Monitor seeks to hold only John Aquino and 230 liable for the funds withdrawn from BCCL through the alleged fund cycling scheme.

[249] The Monitor submits that the transfers from BCCL directly to 230 during the Bondfield review period are part of John Aquino's overall pattern of improper removal of funds from BCCL. Specifically, the Monitor asserts that John Aquino removed significant sums from BCCL and placed them in 230. Then, he went further to deceive BCCL's creditors by disguising the payments that he received through the alleged fund cycling scheme. Specifically, he would create a false sense of corporate liquidity in BCCL for a period of time, at year end, when stakeholders were more likely to review its financial status. He did this by contributing money to BCCL late in the year, under the guise of capital injections, which he also characterizes as shareholder loans, and then, early in the following year, he would return the funds to 230 for his own benefit. The Monitor asserts that these steps were being taken during the same time period during which the false invoicing scheme was underway, and they helped to mask the impact of that scheme on Bondfield's liquidity and financial strength, and on Bondfield's creditors.

[250] This assertion is supported by John Aquino's own evidence. In his affidavit sworn June 14, 2020, John Aquino states: "capital injections were advanced to BCCL annually in or around … December on a temporary basis in order to increase the cash on hand and working capital of BCCL for the purposes of increasing the borrowing and bonding capacity of BCCL … I had understood that bonding companies required a financial snapshot of BCCL at the beginning of the fiscal year to assess the condition and financial security of the company. … Bondfield group would submit to lenders, amongst others, a financial snapshot as of the beginning of the year, which portrayed a more favourable and positive outlook as a result of the Capital Injections."

[251] The Monitor argues that any payment to BCCL by John Aquino, via 230, and then repaid to 230 by BCCL, was made with BCCL funds transferred to 230 at undervalue, both inside and outside of the Bondfield review period. According to the Monitor's reports, BCCL made transfers out to 230 totalling $14,029,369 that fell squarely within the Bondfield review period. However, the Monitor's reports show that there were additional transfers from BCCL to 230 totalling $9,507,544 made prior to the Bondfield review period. The Monitor does not claim any damages in respect of, or a return of, these pre-review period transfers, but asserts that they are relevant to John Aquino's claims for offsets for any amounts owing by him in respect of the transfers between 230 and BCCL during the Bondfield review period, and they are relevant to showing a pattern of illegitimate transfers from BCCL to 230.

[252] Of the $14,029,369 transferred from BCCL to 230 during the Bondfield review period, $2,000,000 was transferred within the first year of the commencement of the *CCAA* proceedings.

John Aquino signed a cheque for payment of $2,000,000 to 230 on April 6, 2018. Accordingly, it constitutes a transfer at undervalue regardless of the intent of the payment, if there was no consideration for the transfer.

[253] The Monitor asserts that the books and records for BCCL are not consistent with any alleged entitlement of John Aquino to the funds received from the false invoicing scheme or the alleged fund cycling scheme, with the possible exception of certain limited bonus payments or legitimate shareholder loan amounts. The Monitor further asserts that any compensation or shareholder loan amounts that John Aquino alleges were legitimately paid by BCCL to him via 230 are only a small portion of the overall funds the Monitor seeks to recover.

[254] The Monitor further asserts that the core of a transfer at undervalue claim is an absence or diminution in value, and that in the case of monetary transfers without consideration, the transfer at undervalue is equal to the amount of the funds removed. To the extent that John Aquino seeks to claim that "value" was provided to Bondfield as a result of the inflows from 230 to BCCL in the Bondfield review period, the Monitor contends that it is also relevant to consider the effect of transfers outside the Bondfield review period. It asserts that the cycle of outflows and inflows is all part of the same pattern or series of transactions. As such, the value provided to BCCL through any inflows from 230 during the Bondfield review period can only be assessed in light of their effects on the totality of the schemes.

[255] The outflows from BCCL to 230 within the Bondfield review period were $14,029,369. The inflows to BCCL from 230 within the Bondfield review period amount to $17,300,000. John Aquino claims to be entitled to a credit of $17,300,000 against outflows from BCCL during the Bondfield review period without any reference to the value in the transfers from BCCL to 230 prior to the Bondfield review period. He asserts that the $17,300,000 that 230 loaned to BCCL came from his own funds or funds that he borrowed specifically for the purposes of lending to BCCL to improve its financial situation. Within the Bondfield review period, accounting for all ins and outs, 230 is in a net positive position at the end of the period and appears to be owed $3,270,631. The Monitor does not dispute this point.

[256] The Monitor asserts, however, that because it has no knowledge of any significant source of funds that John Aquino had outside of Bondfield, it is probable, based on information available to it, that any funds flowing in from 230 to BCCL originated from funds removed from BCCL, whether through the alleged fund cycling scheme, the false invoicing scheme, or otherwise. Therefore, any alleged capital injection made by 230 to BCCL was made, at least in part, with funds transferred by BCCL to 230 for no consideration, and any return of those funds by BCCL to 230 would be a transfer at undervalue. The Monitor asserts that when the totality of the transfers from BCCL to 230 before and during the Bondfield review period is considered, it is apparent that the transfer of funds from BCCL to 230 far exceeds the transfers from 230 into BCCL, even if a part of those transfers includes John's own funds (e.g., Christmas bonuses and salary). The Monitor's report shows that the total funds transferred from BCCL to 230 between 2012 and 2018 is $23,493,287.

[257] In this regard, the Monitor also relies on Ralph's evidence that John Aquino's only source of income is the Bondfield Group. It also relies on John Aquino's evidence on a motion for a Mareva injunction in these proceedings, in which he stated that he had insufficient funds to support his lifestyle expenses of $60,000 per month.

[258] The Monitor's argument raises two issues. The first is whether it has met its onus to show that most of the transfers from BCCL to 230 within the Bondfield review period were transfers for which no consideration was provided. The second is whether the Monitor can review the transactions in the pre-Bondfield review period for the purpose of determining damages during the Bondfield review period.

a) Has the Monitor demonstrated that the transfers from BCCL to 230 during the Bondfield review period were transfers at undervalue?

[259] The Monitor asserts that it is "probable", based on information available to it, that any funds flowing in from 230 to BCCL between 2012 and 2018 originated from funds removed from BCCL, whether through the alleged fund cycling scheme, the false invoicing scheme, or otherwise.

[260] It asserts that the books and records of BCCL are not consistent with any alleged entitlement of John Aquino to the funds received through the alleged fund cycling scheme or the false invoicing scheme with the exception of certain limited bonus payments to John Aquino, and that any alleged employment compensation or shareholder loan amounts are only a small portion of the overall funds forming part of the fund cycling scheme.

[261] John Aquino asserts that the Monitor has not met its onus to show that the amounts transferred by BCCL to 230 during the Bondfield review period were transfers at undervalue.

[262] John Aquino asserts that the payments from BCCL to 230 during the Bondfield review period, in the total amount of $14,029,369, were not transfers at undervalue because they were payments made in the ordinary course of business. He asserts that these payments include Christmas bonuses of $678,000 on December 19, 2014, $734,500 on December 17, 2015, and $565,000 on December 21, 2016, for a total of $1,977,500. Further, he asserts that the payments also include repayments of loans temporarily made to BCCL in the form of capital injections.

[263] In his testimony, Mr. Micciola, a former Controller employed by BCCL, stated that the Christmas bonuses described by John Aquino in his testimony were in fact paid to John Aquino. Mr. Micciola provided documentary evidence in support of these payments in the form of copies of the cheques, one for each of the said Christmas bonuses paid. Also attached to Mr. Micciola's affidavit are records of deposit showing that the cheques were deposited into the bank account for 230.

[264] John Aquino, Mr. DiPede, and Mr. Micciola all gave evidence that Christmas bonuses were discussed between Steven, John Aquino and Mr. DiPede and paid in the ordinary course of business. Ralph, John Aquino and Steven would sign Christmas bonus cheques. They also testified that compensation payable to some employees of the Bondfield Group was paid to their holding companies as opposed to them directly.

[265] Mr. Micciola and John Aquino gave evidence that, like John Aquino, Steven was paid a Christmas bonus on or about the very same dates in 2014, 2015 and 2016, in the amounts of $350,000, $350,000 and $250,000, respectively, and that John Aquino and Steven discussed and approved the Christmas bonuses. Ralph deposed that he was not aware of the Christmas bonuses.

[266] John Aquino also asserts that he made loans to BCCL from time to time and BCCL repaid the loans. He states that these temporary loans were known to Ralph and Steven, as well as Mr. DiPede, who carried out the transfers of funds.

[267] For example, in his June 14, 2020 affidavit, he states that in March 2018 he borrowed $7,500,000, which he then lent to BCCL, via 230, and that $5,500,000 of that loan was recorded in his shareholder loan account with the Bondfield Group at that time. The bank statement for 230 shows funds of $12,744,239 being deposited into the account for 230 at that time. John Aquino says that these are funds loaned from Cameron Stevens Mortgage Capital to himself and a co-borrower. Subsequent withdrawals from 230 were made on each of March 10, 2018, March 17, 2018, and March 20, 2018, in the amounts of $4,000,000, $2,000,000 and $1,500,000, respectively, for a total amount of $7,500,000. John Aquino also produced copies of corresponding cheques from 230 to BCCL on the same dates in the same amounts. He asserts that these loans were part of the $17,300,000 advanced by 230 to BCCL during the Bondfield review period. He also points to the CHS Report for evidence that $5,500,000 was added to John Aquino's shareholder loan account in March 2018 in respect of the March 10, 2018 loan of $4,000,000 and the March 20, 2018 loan of $1,500,000. There is no evidence of the $2,000,000 loan having been recorded as a shareholder loan, but John Aquino's evidence is that it was repaid to 230 on April 6, 2018. That transfer is consistent with the Monitor's records. John Aquino asserts that this $2,000,000 payment from BCCL to 230 cannot be a transfer at undervalue as alleged by the Monitor because it was clearly a repayment of a loan by 230 to BCCL.

[268] John Aquino also submits that 230 made loans to BCCL in March 2016 and on June 22, 2017 in the amounts of $1,000,000 and $500,000, respectively, and that these loans are also recorded in his shareholder loan account as confirmed in the CHS Report. Accordingly, John Aquino asserts that the Monitor has not proven that the alleged Bondfield impugned transfers from BCCL to 230 as part of the alleged fund cycling scheme were transfers at undervalue because John Aquino can show that there was consideration for these transfers.

[269] I find that the Monitor has not adduced sufficient direct or circumstantial evidence to show that the amounts transferred to 230 by BCCL during the Bondfield review period were transfers at undervalue for which there was no consideration.

b) May the Monitor review transactions prior to the Bondfield review period?

[270] The Monitor only seeks to recover $14,029,369 (13,985,798 CAD + 35,030 USD), which represents the total transfers out of BCCL and into 230 during the Bondfield review period. The Monitor argues that the inflows from 230 to BCCL, which the Monitor and John Aquino agree total $17,300,000, are entirely offset by the absence of value in all pre-Bondfield review period outflows. In other words, even if some of the funds transferred by 230 to BCCL during the

Bondfield review period were legitimately owned by 230, the value of the funds transferred by BCCL to 230 at undervalue, over the entire period from 2012 to 2018, far exceeds any funds that 230 could claim as legitimately its own.

[271] Notwithstanding that courts tend to deal with timelines under the *BIA* in a strict fashion, the Monitor submits that taking into account the distribution of funds from BCCL to 230 prior to the Bondfield review period to determine whether value was provided is consistent with the ordinary treatment of the repayment of debts and the application of the "rule in Clayton's case … sometimes referred to as the 'first-in, first-out' rule. Under this rule, where a debtor borrows successive amounts of money, each repayment will apply against the oldest outstanding debt, unless the debtor specifies otherwise": *Dhawan v. Shails et al.*, 2018 ONSC 7116, 85 B.L.R. (5th) 294 (Div. Ct.) (para. 55).

[272] The *BIA* sets out a complete framework in ss. 95 and 96, which is aimed at ensuring fairness and predictability: Dr. Janis P. Sarra, The Honourable Geoffrey B. Morawetz, and The Honourable L.W. Houlden, *The 2019-2020 Annotated Bankruptcy and Insolvency Act* (Toronto: Thompson Reuters, 2019) at 610. Most cases that deal with the statutory review periods do so to determine whether a transfer occurred within that period. Courts deal with these timelines in a strict fashion; once a transfer is established to have occurred outside the review period, it is excluded from the analysis: *Montor Business Corp.*

[273] I have not been provided with any authority in support of a monitor's or a trustee's authority to review transactions outside of the five-year review period prescribed by the *BIA* for the purposes of establishing the source of funds allegedly transferred within the review period. I do not see a principled basis on which such a review should be permitted, especially in this case where I find that the Monitor has not proven that the transfers that occurred in the pre-Bondfield review period between BCCL and 230 were, in fact, transfers at undervalue for which there was no consideration.

[274] There is no evidence of tracing the payments from BCCL to 230 during the pre-Bondfield review period with any explanation of the purpose or lack of purpose or evidence of consideration or lack of consideration. The Monitor merely submits that "it is probable", based on information available to it, that the funds flowed into 230 from BCCL as part of the false invoicing scheme or the alleged fund cycling scheme. If indeed some of the funds originated from the Bondfield false invoicing scheme, it would appear that the Monitor is attempting a double recovery of those amounts.

DISPOSITION

A. The Bondfield Application

[275] In light of my finding that BCCL and the Bondfield Respondents were not acting at arm's length in respect of the Bondfield impugned transactions, s. 96(1)(b) of the *BIA* is engaged.

[276] Section 96(1)(b)(ii) of the *BIA* encompasses a transaction that occurred within five years prior to the date of the commencement of the *CCAA* proceedings, which I have found is April 3,

2019, if it intended to defraud, defeat or delay a creditor. The evidence establishes that all of the Bondfield impugned transactions undertaken as part of the false invoicing scheme were made with an intent to defraud, defeat or delay creditors and are therefore brought within s. 96(1)(b)(ii).

[277] Accordingly, pursuant to s. 96 of the *BIA*, the payments by BCCL made in respect of the false invoices during the Bondfield review period, which I find to be April 3, 2014 to April 3, 2019, in the total amount of $21,807,693, are transfers at undervalue. The Bondfield Respondents, each of which or whom was either a party or a privy to the transfers are ordered to pay, on a joint and several liability basis (excepting Coccia), to the Monitor $21,807,693. This amount is the difference between the monies paid by BCCL to the BCCL Supplier Respondents and the value of the services or materials provided by them to BCCL, which I found to be nil. As noted, Coccia's liability is limited to $88,008.

[278] The Monitor has not met its onus to show that any of the Bondfield impugned transactions as they relate to the alleged fund cycling scheme are transfers at undervalue within s. 96(1)(b)(ii). Accordingly, the Monitor is not entitled to recover 13,985,743 CAD and 35,030 USD allegedly transferred as part of a fund cycling scheme.

B. The Forma-Con Application

[279] In light of my finding that Forma-Con and the Forma-Con Respondents were not acting at arm's length in respect of the Forma-Con impugned transactions, s. 96(1)(b) of the *BIA* is engaged.

[280] Section 96(1)(b)(ii) of the *BIA* encompasses a transaction that occurred within five years prior to the date of the first bankruptcy event, which I have found is December 19, 2019, if it intended to defraud, defeat or delay a creditor. The evidence establishes that all of the Forma-Con impugned transactions undertaken as part of the false invoicing scheme were made with an intent to defraud, defeat or delay creditors and are therefore brought within s. 96(1)(b)(ii).

[281] Accordingly, pursuant to s. 96 of the *BIA*, the payments by Forma-Con made in respect of the false invoices during the Forma-Con review period, which I find to be December 19, 2014 to December 19, 2019, in the total amount of $11,366,890, are transfers at undervalue. The Forma-Con Respondents, each of which or whom was either a party or privy to the transfers, are ordered to pay, on a joint and several liability basis (excepting Coccia and 664 Ontario), to the Trustee $11,366,890. This amount is the difference between the monies paid by Forma-Con to the Forma-Con Supplier Respondents and the value of the services or materials provided by them to Forma-Con, which I found to be nil. As noted, Coccia's liability is limited to the value of the cheques paid to her by the Forma-Con Supplier Respondents.

[282] Because the evidence indicates that 664 Ontario was not involved in the false invoicing scheme during the Forma-Con review period to the same degree as the other Forma-Con Supplier Respondents, and it has not benefited to the same extent, its liability is limited to the benefit it derived from its involvement, which I find to be $90,400.

Set Off

[283] John Aquino submits that, based on the CHS Report, he has made shareholder loans in the amount of $11,900,000. He asserts that if he is found liable for any of the impugned transactions, he should be entitled to set off such damages against this shareholder loan amount. He has not provided evidence to establish an entitlement to legal or equitable set off in the context of these insolvency and bankruptcy proceedings. Such relief is denied.

[284] Although Anastasio claims that each of John Aquino, Ralph and Steven were aware of and agreed that he would be paid a fee of 3,750,000 USD for his services relating to the Deutsche Bank term sheet, he has provided no documentary or corroborating evidence in support of his alleged claim against the Bondfield Group in this amount. In John Aquino's affidavit sworn July 27, 2020, he states that Anastasio made an introduction at Deutsche Bank, but he makes no mention of any fee owing to Anastasio for his services. Anastasio has not established an entitlement to legal or equitable set off. Accordingly, I find that Anastasio has no right of set off in this amount as against his liability for the Bondfield impugned transactions and the Forma-Con impugned transactions.

Costs

[285] The parties are strongly encouraged to agree on the matter of costs. If they cannot, they may arrange a 9:30 am scheduling appointment before me to set a date for costs submissions.

Dietrich J.

Dietrich J.

Released: March 19, 2021

CITATION: Ernst & Young Inc. Inc. v. Aquino, 2021 ONSC 527
COURT FILE NOs.: CV-19-630908-00CL
CV-20-00636754-00CL
DATE: 20210319

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

ERNST & YOUNG INC., in its capacity as Court-Appointed Monitor of Bondfield Construction Company Limited

Moving Parties

– and –

JOHN AQUINO, MARCO CARUSO, GIUSEPPE ANASTASIO a.k.a. JOE ANA, LUCIA COCCIA a.k.a. LUCIA CANDERLE, THE ESTATE OF MICHAEL SOLANO, GIOVANNI ANTHONY SIRACUSA a.k.a. JOHN SIRACUSA, 2483251 ONTARIO CORP. a.k.a. CLEARWAY HAULAGE, 2420595 ONTARIO LTD. a.k.a. STRADA HAULAGE, 2304288 ONTARIO INC., 2466601 ONTARIO INC. a.k.a. MMC CONTRACTING, 2420570 ONTARIO LTD. a.k.a. MTEC CONSTRUCTION, TIME PASSION, INC. and RCO GENERAL CONTRACTING LTD.

Responding Parties

AND BETWEEN:

KSV KOFMAN INC. in its capacity as Trustee-in-Bankruptcy of 1033803 ONTARIO INC. and 1087507 ONTARIO LIMITED

Moving Parties

– and –

JOHN AQUINO, MARCO CARUSO, GIUSEPPE ANASTASIO a.k.a. JOE ANA, THE ESTATE OF MICHAEL SOLANO, LUCIA COCCIA a.k.a. LUCIA

CANDERLE, ~~DOMINIC DIPEDE~~, 2483251 ONTARIO CORP. a.k.a. CLEARWAY HAULAGE, MMC GENERAL CONTRACTING, MTEC CONSTRUCTION, STRADA HAULAGE, 2104664 ONTARIO INC., and 2304288 ONTARIO INC.

Responding Parties

REASONS FOR DECISION

Dietrich J.

Released: March 19, 2021