Court of Appeal File No. C69263

**COURT OF APPEAL FOR ONTARIO**

**B E T W E E N:**

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

Applicant (Respondent in appeal)

- 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 (Appellants in appeal)

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**FACTUM OF GIUSEPPE ANASTASIO AND LUCIA COCCIA-CANDERLE**

Consolidated appeals made returnable on September 1, 2021 before a three-member panel of the Court of Appeal.

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May 27, 2021

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## PART I – INTRODUCTION AND SUMMARY

1. On November 12, 2019, Ernst & Young Inc. ("Monitor"), in its capacity as court-appointed monitor of Bondfield Construction Company Limited ("Bondfield"), commenced an application bearing court file no. CV-19-00630908-00CL ("Monitor's Application") as against a number of individual and corporate respondents, including Giuseppe Anastasio and Lucia Coccia-Canderle (collectively, "Anastasio respondents"). *Inter alia*, the Monitor sought a declaration that the transfer of funds from Bondfield to the corporate respondents for the period covering April 3, 2014 to April 3, 2019 ("Monitor's Impugned Transactions") were transfers at undervalue for the purposes of section 96 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "*BIA*"), as incorporated into the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "*CCAA*"), by section 36.1 thereof. The aggregate monetary value of these Impugned Transactions was stated as being approximately $33 million, of which the Monitor sought to hold each of the named respondents "jointly and severally" responsible for.

2. On February 21, 2020, KSV Kofman Inc. ("Trustee"), in its capacity as Trustee-in-Bankruptcy of 1033803 Ontario Inc. and 1087507 Ontario Limited ("Forma-Con"), commenced an application bearing court file number CV-20-00636754-00CL ("Trustee's Application") against a number of corporate and individual respondents, including the Anastasio respondents. The Trustee, *inter alia*,

also sought a declaration that the transfer of funds from Forma-Con to the corporate respondents for the period covering December 19, 2014 to December 19, 2019 ("Trustee's Impugned Transactions") were transfers at undervalue for the purposes of section 96 of the *BIA*. The aggregate monetary value that the Trustee sought to challenge amounted to approximately $11 million, of which it sought to hold each respondent liable on a "joint and several" basis.

3. Though the Anastasio respondents, joined by two other sets of respondents, initially sought to convert these applications into actions, such efforts were unsuccessful in the court below. Though an appeal was taken from this dismissal, the appeal was eventually settled on the basis that these appellants could, in any future appeal, seek to re-argue for the conversion of these applications into actions. In the applications themselves, the Anastasio respondents disavowed any liability on the main premise that the corporate debtors (*i.e.*, Bondfield and Forma-Con), both in fact and in law, did <u>not</u> have the requisite intent to "defraud, defeat or delay" any of their creditors. In addition, Mr. Anastasio claimed a set-off of US$3.75 million on account of unpaid fees from the Bondfield Group stemming from his role in effectuating the Deutsche Bank term sheet agreement.

4. In response to a series of written questions submitted by the respondents to the Monitor[1], the Monitor bifurcated its claim for monetary damages into two distinct categories, one of which it styled the "False Invoicing Scheme" and the other the

1 These written questions were submitted directly to the Monitor's counsel as a substitute for any oral cross-examinations of the Monitor, which is the usual course of conduct when dealing with court-appointed officers, such as monitors or receivers.

"Fund Cycling Scheme". It was now only under the False Invoicing Scheme, with an aggregate value of approximately $21.8 million, that the Anastasio respondents were to be held jointly and severally liable for. However, under the Fund Cycling Scheme, which had an aggregate value of approximately $14 million, only John Aquino and his company 2304288 Ontario Inc. ("230") were implicated. This was highly significant for two reasons: *First*, it reduced the potential liability of the Anastasio respondents by nearly $8 million. *Second*, this bifurcation meant that all of the Monitor's Impugned Transactions under the False Invoicing Scheme exceeded the one-year statutory review period from the date of the initial bankruptcy event (*i.e.*, April 3, 2019), which as we will see below had important implications in the case at bar.

5. Both the Monitor's Application and the Trustee's Application were heard together by Justice Dietrich in September of 2020, which hearing consisted of four full days of oral argument by six different sets of lawyers representing the various parties. At the conclusion of argument, the learned applications judge took the matters under reserve. Thereafter, after nearly a six-month reserve, Justice Dietrich rendered her Reasons for Decision on March 19, 2021 ("Dietrich Decision"). In relevant part, the learned applications judge (i) granted judgment in favour of the Monitor in the approximate amount of $21.8 million for the False Invoicing Scheme; (ii) dismissed in its entirety the Fund Cycling Scheme; (iii) limited Ms. Coccia-Canderle's liability for both the Monitor's Application and the Trustee's Application to the amounts that she personally received (*i.e.*, $88,008); (iv) granted judgment in favour of the Trustee in the

approximate amount of $11.4 million; and (v) limited 2104664 Ontario Inc.'s liability in the Trustee's Application to the amounts it received, namely $90,400.

6. Timely appeals followed for the following sets of appellants: (i) the Anastasio respondents in both the Monitor's and Trustee's Applications; (ii) Marco Caruso in both the Monitor's and Trustee's Applications; (iii) John Aquino and 230 in both the Monitor's and Trustee's Applications; and (iv) 2104664 Ontario Inc. in the Trustee's Application, for a total of seven appeals all stemming from the Dietrich Decision. On account of these appeals, motions were brought by both the appellants and the Monitor for various relief, which motions came on for adjudication before Justice Nordheimer, sitting as a single Judge of the Court of Appeal. Justice Nordheimer ruled that all seven appeals are to be heard together, but with only one Appeal Book and Compendium being required. Though provision was made for each of the appellants to file separate factums, the length of these factums was limited to the normal 30-page limit, with only John Aquino/230 being given leave to file a lengthier factum of 40 pages. In relevant part, Justice Nordheimer ruled as follows:

> However, I do not see a reasonable basis for permitting the other appellants to file lengthier facta. With the lead appellants [*i.e.*, John Aquino and 230] taking on the main task of setting out the facts, the other appellants can devote most of their facta to the legal issues raised. Further, I would expect that the appellants would, to the degree possible, divide up their submissions on the issues raised to avoid duplication. I fail to see why the other appellants cannot, therefore, make their submissions within the normal 30 page limit.

7. Accordingly, in compliance with Justice Nordheimer's ruling, the Anastasio respondents will forego any further exposition of the facts at bar, and thus limit the balance of their factum to legal argument only, with the assumption that the reader herein has had the benefit of first reading the factum of John Aquino/230, with its more fulsome and detailed factual exposition.

## PART II – LAW AND ANALYSIS

### A. *Standard of Review*

8. Pursuant to the seminal decision of the Supreme Court of Canada in *Housen* v. *Nikolaisen*, 2002 SCC 33 (per Iacobucci and Major, JJ., for the majority), the Supreme Court ruled in relevant part as follows:

> 8. On a pure question of law, the basic rule with respect to the review of a trial judge's findings is that an appellate court is free to replace the opinion of the trial judge with its own. Thus the standard of review on a question of law is that of correctness.
>
> […]
>
> 10. The standard of review for findings of fact is that such findings are not to be reversed unless it can be established that the trial judge made a "palpable and overriding error":

9. The "question of law" versus "findings of fact" dichotomy when applying the proper standard of review in the bankruptcy context was explicitly acknowledged and accepted by the recent Court of Appeal for Ontario decision in *Urbancorp Toronto*

*Management Inc. (Re)*, 2019 OBCA 757 (per van Rensburg, J.A.). In relevant part, the Court of Appeal ruled as follows:

> 37. The motion judge's conclusion that Speedy and KRI were acting at arm's length in respect of the transaction is a finding of fact under s. 4(4) of the BIA, which is subject to a palpable and overriding error standard of review[.]
>
> [...]
>
> 56. The Monitor accepts that the failure to consider a particular badge of fraud is not, in itself, a legal error justifying review on a correctness standard.

10. As we shall see herein, it is respectfully submitted that the learned applications judge made numerous errors of law, which errors are subject to review on a correctness standard. These errors, when considered either individually or collectively, are more than sufficient to justify appellate intervention in the case at bar.

**B.** *Corporate Identification Doctrine*[2] *in the context of Section 96 of the BIA*

11. At para. 210 of the Dietrich Decision, Justice Dietrich stated as follows: "The corporate attribution doctrine has yet to be applied in the context of s. 96 of the *BIA*." In other words, we are dealing with a novel issue of law with potentially far-reaching implications throughout Canada. Accordingly, when faced with such a novel issue of law, the learned applications judge should have declined to render judgment based only on the documentary record before her, and instead should have ordered a trial with the

2 The terms "corporate identification doctrine" and "corporate attribution doctrine" are used interchangeably and refer to the exact same concept.

benefit of *viva voce* evidence. In *General Electric Company* v. *CSX Transportation Inc.*, 2011 ONSC 7167, Justice Roberts (as she then was) ruled in relevant part as follows:

> [24] Novel, unsettled areas of the law should not be decided on a motion for summary judgment but only after trial on a full record.
>
> [25] In cases involving the meaning of statutory provisions, where the ultimate interpretation of those provisions could have a broad impact, before deciding the issue, the Court would also benefit from a fuller argument of the issue on the basis of a complete evidentiary record.
>
> [26] In consequence, I conclude that the issue of the correct interpretation of section 137(1) of the *Canada Transportation Act* should be determined at trial on a full record.

[Internal footnotes omitted.]

12. If the foregoing argument is ultimately accepted by this Court, it will of course be dispositive of this appeal, with the only real issue then remaining being the terms of reference for the conduct of the trial in the court below. However, for the sake of completeness in the event that the foregoing argument is not accepted, we will now consider this doctrine on its merits.

13. In the seminal decision of *Canadian Dredge & Dock Co.* v. *The Queen*, [1985] 1 S.C.R. (per Estey, J., for the unanimous Court), the Supreme Court ruled in relevant part as follows (at pages 712-714 therein):

> 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 the

> directing mind conceives and designs a plan and then executes it whereby the corporation is intentionally defrauded, and when this is the substantial part of the regular activities of the directing mind in his office, then it is unrealistic in the extreme to consider that the manager is the directing mind of the corporation. When he crosses that line he ceases to be the directing mind and the doctrine of identification ceases to operate. The same reasoning and terminology can be applied to the concept of benefits.
>
> [...] Whether this is so or not, in my view the identification doctrine only operates where the Crown demonstrates that the action taken by the directing mind (a) was within the field of operation assigned to him; (b) was not totally in fraud of the corporation; and (c) was by design or result partly for the benefit of the company.

(Emphasis added.)

14. In *Deloitte & Touche* v. *Livent Inc (Receiver of)*, 2017 SCC 63 (per Gascon and Brown, JJ., for the majority), the Supreme Court (at para. 100 therein) ruled as follows:

> 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).

(Emphasis added.)

15. The significance of *Deloitte & Touche*, *supra*, to the case at bar is two-fold: *First*, the Supreme Court confirmed that the teachings of *Canadian Dredge*, *supra*, remain in full force and effect. *Second*, the Supreme Court confirmed that these teachings also apply in the civil context, and not just in the criminal one.

16. In *Christine DeJong Medicine Professional Corporation* v. *DBDC Spadina Ltd. et al.*, 2019 SCC 30, Justice Brown (for the unanimous Court) ruled in relevant part as follows:

> In view of the statement of the majority at the Court of Appeal that this Court's decision in *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63, [2017] 2 S.C.R. 855, invited a "flexible" application of the criteria stated in *Canadian Dredge & Dock Co. v. The Queen*, [1985] 1 S.C.R. 662 for attributing individual wrongdoing to a corporation, we respectfully add this. 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, 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. The appeal is allowed, with costs throughout.

(Emphasis added.)

17. The significance of *Christine DeJong Medicine Professional Corporation, supra*, to the case at bar cannot be overstated. In particular, the Supreme Court made clear and unequivocal that, notwithstanding any policy concerns, the minimal criteria set out in *Canadian Dredge, supra*, "must always be met". Justice Dietrich, at para. 220 of the Dietrich Decision, explicitly acknowledged this salient fact when she stated, in relevant part, the following: "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".

18. Finally, in *NEP Canada ULC* v *MEC OP LLC*, 2021 ABQB 180, Justice Nixon ruled in relevant part as follows:

> [984] The next judicial development to the Corporate Identification Doctrine was in 2018. In that year the Ontario Court of Appeal injected confusion into the *Deloitte/Canadian Dredge* Elements by turning ***Deloitte*** on its head. The Court of Appeal held that ***Deloitte*** meant that the Corporate Identification Doctrine could be applied in a "less demanding fashion". That was interpreted to mean that the knowledge of a directing mind could be attributed to a corporation, even if the *Deloitte/Canadian Dredge* Elements were not met.
>
> [985] This introduced uncertainty into the *Deloitte/Canadian Dredge* Elements. What exactly it meant to apply the *Deloitte/Canadian Dredge* Elements in a "less demanding fashion" remained nebulous.
>
> [986] One of the consequential concerns was the prospect of a significant increase in corporate liability for the misdeeds of individual employees. That would impose costs on innocent shareholders and other stakeholders.
>
> [987] The next judicial development to the Corporate Identification Doctrine was in 2019: ***Christine DeJong Medicine Professional Corporation v DBDC Spadina Ltd***, 2019 SCC 30 [***DBDC Spadina SCC***]. In that year, the Supreme Court of Canada confirmed that the *Deloitte/Canadian Dredge* Elements established the minimum requirements for the Corporate Identification Doctrine to apply. The ***DBDC Spadina SCC*** decision restored certainty to the *Deloitte/Canadian Dredge* Elements, and placed appropriate limits on the Corporate Identification Doctrine.

19. Having set out the jurisprudence concerning the corporate identification doctrine as established by the Supreme Court of Canada, we can now turn our attention to applying this doctrine to the case at bar. When so doing, it is clear that, at

least under the common law, John Aquino's intentionality cannot, as a matter of law, be attributed to either of the corporate debtors, Bondfield or Forma-Con. This conclusion (if unmodified by Section 96 of the *BIA*) is dispositive of these applications in their entirety.

20. To fully understand what is at play here, we need to understand the sole cause of action that both the Monitor and the Trustee had pursued in their respective applications. This cause of action is of course section 96 of the *BIA*. For ease of reference, this section is reproduced in its entirety at Schedule B herein.

21. For the purposes of this appeal, we assume in *arguendo* that both the Monitor's and Trustee's Impugned Transactions were not at arm's length. Accordingly, this takes us to s. 96(1)(b). Since none of the Trustee's Impugned Transactions occurred within one year of the date of the initial bankruptcy event of Forma-Con (*i.e.*, December 19, 2019), and since the only transaction that occurred within one year of Bondfield's initial bankruptcy event of April 3, 2019 falls within the Fund Cycling Scheme and thus does not implicate the Anastasio respondents, only s. 96(1)(b)(ii) is at play. Finally, since both the Monitor and the Trustee expressly disavowed any reliance on s. 96(1)(b)(ii)(A) of the *BIA* (*i.e.*, the paragraph that deals with the debtor's insolvency), the entirety of the Monitor's and Trustee's claims rested on s. 96(1)(b)(ii)(B) of the *BIA*. In other words, in order to succeed on their respective claims, the Monitor and the Trustee had the legal burden to establish, on a balance of probabilities, that the corporate debtors (*i.e.*, Bondfield and Forma-Con, respectively) subjectively intended to

"defraud, defeat or delay a creditor". Since no other cause of action was pursued by either the Monitor or the Trustee, the failure to establish the constituent elements within this particular paragraph of the *BIA* would be fatal to the entirety of their claims as against the Anastasio respondents. In other words, their claim for damages as against these respondents would be reduced to nil.

22. To establish corporate intentionality, both the Monitor and the Trustee relied exclusively on John Aquino, who was the President of both Bondfield and Forma-Con at the relevant times. However, on account of the allegations that the Monitor and the Trustee had leveled as against John Aquino – namely that he had conspired, together with his co-conspirators, to defraud Bondfield and Forma-Con out of millions of dollars through these False Invoicing Schemes – the common law corporate identification doctrine was put in play.

23. At para. 217 of the Dietrich Decision, the learned applications judge stated as follows:

> 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 [*i.e.*, Bondfield] 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 to attributed to the debtor corporations.

24. Accordingly, if the common law corporate attribution doctrine applies to the facts at bar, Justice Dietrich's ruling that "the actions of John Aquino were not intended to benefit [the corporate debtors] and they did not so do" preempts, as a

matter of law, attributing John Aquino's intentionality to the corporate debtors. In other words, the claims of both the Monitor and the Trustee collapse in total failure.

25. The only "saving grace" left for the Monitor and the Trustee is whether section 96 of the *BIA* somehow alters or ousts the common law corporate attribution doctrine. It is respectfully submitted that it does not.

26. In *Heritage Capital Corp.* v. *Equitable Trust Co.*, 2016 SCC 19 (per Gascon and Côté, JJ., for the unanimous Court), the Supreme Court ruled in relevant part as follows:

> [29] In addition, where the legislature expressly creates a statutory exception to a common law principle, that exception should be narrowly construed, as the legislature is assumed not to have intended to change the common law unless it has done so clearly and unambiguously. In *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42, [2003] 2 S.C.R. 157, at para. 39, Iacobucci J., writing for the majority, stated:
>
> > To begin with, I think it useful to stress the presumption that the legislature does not intend to change existing law or to depart from established principles, policies or practices. In *Goodyear Tire & Rubber Co. of Canada v. T. Eaton Co.*, [1956] S.C.R. 610, at p. 614, for example, Fauteux J. (as he then was) wrote that "a Legislature is not presumed to depart from the general system of the law without expressing its intentions to do so with irresistible clearness, failing which the law remains undisturbed". In *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at p. 1077, Lamer J. (as he then was) wrote that "in the absence of a clear provision to the contrary, the legislator should not be assumed to have intended to alter the pre-existing ordinary rules of common law".

(Emphasis added.)

27. In *Owners, Strata Plan LMS 3905* v. *Crystal Square Parking Corp.*, 2020 SCC 29 (per Côté, J., for the majority), the Supreme Court ruled in relevant part as follows:

> [39] The common law forms part of the context in which a legislature enacts statutes, and the legislature is presumed not to have intended to alter or extinguish common law rules in doing so: *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42, [2003] 2 S.C.R. 157, at para. 39. In addition, when the legislature uses a term that has an established legal meaning, it is presumed to have given the term that meaning in the statute in question: *R. v. D.L.W.*, 2016 SCC 22, [2016] 1 S.C.R. 402, at para. 20. In the *SPA*, the legislature has granted a strata corporation the power and capacity of a "natural person": s. 2(2). At common law, a natural person is capable of entering into a contract by way of objective conduct which signifies the person's assent to be bound by an agreement. Thus, the legislature is presumed to have intended to grant a strata corporation the power of a "natural person" to contract by way of conduct, and is also presumed not to have intended to alter or extinguish the common law rule in this respect.
>
> (Emphasis added.)

28. Accordingly, based on the foregoing authorities, can it be stated that Parliament, through "clear and unambiguous" language, intended to "alter or extinguish" the common law corporate attribution doctrine within the context of s. 96 of the *BIA*? The answer to that question, it is respectfully submitted, is clearly "no". There is simply nothing within the text of s. 96 that indicates any legislative intent, let alone one that is "clear and unambiguous", to alter or extinguish this particular doctrine. In point of fact, the use of the word "intended" in s. 96(1)(b)(ii)(B) of the *BIA*, as a term with an "established legal meaning" owing to *Canadian Dredge* and its

progeny, militates strongly in favour that the presumption of common law applicability would apply with full force.

29. At para. 222 of the Dietrich Decision, Justice Dietrich stated as follows: "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*." It is respectfully submitted that this should have been the end of Justice Dietrich's inquiry, with the final result being a complete dismissal of the applications. However, Justice Dietrich proceeded to consider the principles of statutory interpretation and policy considerations, and thus came to the following erroneous legal conclusion:

> [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.

30. When it comes to statutory interpretation within the context of the *BIA* in general and s. 96 in particular, we have the forceful (and controlling) teachings of the Court of Ontario in *Urbancorp*, *supra*. In particular, the Court of Appeal ruled in relevant part as follows:

> [40] I agree with Speedy. While s. 96 [of the *BIA*] no doubt is a tool to address "asset stripping" by a debtor, as the Monitor contends, a bankruptcy trustee or CCAA monitor that seeks to impugn a transfer under that provision must nevertheless meet the requirements of the section to establish that the transfer in question is void. The point of departure is to consider the specific words used in this section of the *BIA*.

> […]
>
> [48] In conclusion, s. 96 is a remedy to reverse an improvident transfer that strips value from the debtor's estate, where its conditions are met. The interpretation of the section must be considered in relation to the remedy that is sought. The remedy in this case is to prevent Speedy from enforcing its secured guarantee against KRI. While the reason KRI provided the guarantee was to accommodate its related party Edge, this does not transform the transfer sought to be impugned – the secured guarantee – into a transfer between non-arm's length parties. The focus of the motion judge was properly on the relationship between KRI and Speedy, not between KRI and the beneficiary of the transaction, its related party Edge. As such, I would dismiss this ground of appeal.

(Emphasis added.)

31. In the case of s. 96, the specific word that is in issue is "intended". Since this word is not defined anywhere in the *BIA*, we must necessarily look to the common law to find this answer. In so doing, we of course encounter the common law corporate attribution doctrine, which supplies us with the requisite meaning that we are looking for.

32. With regards to policy considerations, as already mentioned, the Supreme Court in *Christine DeJong, supra,* made clear that, notwithstanding any policy concerns, there are minimal criteria "that must always be met."

33. *En passant*, a final point to discuss prior to concluding this section of our analysis is to address the "absurdity" argument that was made by both the Monitor and the Trustee. In particular, the Monitor and the Trustee argued that applying the corporate attribution doctrine to the facts at bar would lead to an "absurdity" in that

alleged fraudsters would be allowed to escape any liability on account of the schemes that they implemented, which schemes resulted in millions of dollars being siphoned out of the corporate debtors, all to the detriment of their creditors. With all due respect, though the results of applying the corporate attribution doctrine to the facts at bar are certainly catastrophic from the perspective of the Monitor and the Trustee, the results are certainly not absurd. Rather, they are the natural and logical results of applying a well-established doctrine to s. 96 of the *BIA*.

34. The problem here is that the Monitor and the Trustee[3], for whatever reason, relied solely on one (and only one) cause of action. In other words, they put all of their proverbial "eggs" in one very small basket. Had they, for example, sought leave of the court to pursue the respondents in the name of and on behalf of the corporate debtors through a derivative action, the corporate attribution doctrine would not apply. By way of an analogy, assume that an individual has been accidentally struck by another individual driving a motor vehicle, and has sustained injuries as a result thereof. If the injured party were to sue the individual who caused the injury for breach of contract, instead of negligence, in the absence of any contractual relationship between the two, this lawsuit would be doomed to fail. In other words, though the results would certainly be catastrophic from the perspective of the individual who had been injured, they certainly would not be "absurd". The Monitor and the Trustee took a gamble by hedging all their bets on one cause of action. They

3 We can take judicial notice of the fact that both the Monitor and the Trustee are highly sophisticated parties (*i.e.*, institutional players), with vast expertise in the bankruptcy and insolvency arenas.

cannot now argue "absurdity" if things do not turn out the way they had intended them to do so.

### C. *"Badges of Fraud" and the requisite intentionality*

35. If the Court ultimately agrees with the position taken by the Anastasio respondents concerning the applicability of the corporate identification doctrine to Section 96 of the *BIA*, then the appeal must be allowed and the applications dismissed. However, in the event that the Court disagrees, we need to address the issue of whether John Aquino, as a matter of fact, subjectively intended to "defraud, defeat or delay" Bondfield's or Forma-Con's creditors.

36. This is a fact-intensive inquiry which, as already mentioned, will not be addressed in this factum. Rather, the Anastasio respondents will merely adopt the submissions made by John Aquino/230 in this regard as their own.

37. Rather, the focus here will be on one particular legal conclusion made by Justice Dietrich. In particular, at para. 145 of the Dietrich Decision, the following was stated therein: "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." With all due respect, this factor, under the right circumstances, <u>can</u> be determinative. Accordingly, Justice Dietrich erred in law in this regard.

38. At para. 188 of the Dietrich Decision, the following was stated therein: "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."

39. With regards to Justice Dietrich's assertion that she was "not provided with any authority", in point of fact, she was indeed provided with such authority. In particular, in *A. Farber & Partners Inc.* v. *Goldfinger*, 2013 ONSC 6635, Justice D. M. Brown (as he then was) ruled in relevant part as follows:

> [272] When inquiring into the intention of a debtor for the purposes of *BIA* s. 96(1)(a)(iii) – and the provincial preferences statutes for that matter – a court must ascertain the intention at the time of the transfer or transaction in light of the information known at that time. A court must resist the temptation to inject back into the circumstances surrounding the impugned transaction knowledge about how events unfolded after that time. <u>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.</u>

(Emphasis added.) It is respectfully submitted that Justice Brown's formulation of the proper test to be employed in determining whether the requisite intentionality has been established is the correct one. Since 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", this <u>necessarily</u> implies that economic factors alone can be determinative.

40. Let us consider the following hypothetical to illustrate the above point. Assume that a husband and his wife own a residential home as joint tenants (*i.e.*, equally). On day 1, the husband is sued by a creditor in the amount of $100,000. On day 2, the husband transfers his 50% ownership in the residential home to his wife for nominal consideration (*i.e.*, "natural love and affection"). Ordinarily, under the "badges of fraud" rubric as historically understood and applied, this transfer would qualify as one that can be set aside since it has the following badges of fraud: (i) non-arm's length transaction; (ii) quick turn-around; (iii) nominal consideration; and (iv) presence of a creditor. However, in our hypothetical, let us further assume that the husband had a net worth (excluding the house) of $10 million. In such a situation, this fact alone would completely nullify any inference of a fraudulent conveyance. In other words, the husband's subjective belief that he did not intend to defraud his creditor would be eminently reasonable under those circumstances.

41. It appears that Justice Dietrich conflated two separate concepts when she mentioned that, in relation to the fact that Bondfield's and Forma-Con's creditors were being paid in full and on time, that fact "did not sanitize the fraud". One could intend to defraud the corporate debtor itself without intending to defraud the creditors of the corporate debtor. Section 96 of the *BIA* is only concerned with the creditors of the debtors, and not the debtors themselves.

42. Another decision which demonstrates that economic factors alone can be determinative is the decision of Justice Penny in *Indcondo* v. *Sloan*, 2014 ONSC 4018. In relevant part, Justice Penny ruled as follows:

> [85] The critical issue, in my view, relates to whether there were "creditors or others" toward which a fraudulent intent to defeat was directed. That there were creditors or others in 1987 is, I think, beyond doubt. The real question in analyzing the inference the plaintiff seeks to draw is whether Sloan had any reason to think that, as a result of this impugned transaction, <u>his potential future liabilities would probably exceed his ability to pay.</u> That requires an analysis of Sloan's assets and liabilities, or potential liabilities, at the end of 1987 in the context of what he would reasonably have believed were his prospects at the time.
>
> [...]
>
> [90] I find that in December 1987, Sloan's existing creditors were well secured. <u>I do not think that Sloan reasonably believed, or ought reasonably to have believed, that giving title to the Bowes property to his wife's corporation would result in his inability to make good on his existing, or contemplated, financial obligations.</u> I am therefore unable, on this evidence, to infer that the conveyance of the Bowes property was made with the intent to defeat Sloan's "creditors or others."

(Emphasis added.)

43. As evident from the foregoing, Justice Penny's analysis was purely economic-based.

44. This now takes us to an important finding of fact made by the learned applications judge. In particular, at para. 193 of the Dietrich Decision, the following was stated therein: "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." As a finding of fact, in the absence of "palpable and overriding error", this determination must be accepted.

45. Since as we have seen the "true financial condition" of the corporate debtors is a factor that alone can be determinative in deciding whether the requisite fraudulent intent of John Aquino existed at the relevant times, Justice Dietrich's finding essentially mandates that these applications be remitted back to the court below for a full trial.

46. In conclusion, the Anastasio respondents argued in the court below, and fully maintain in this Court, that John Aquino, as a matter of fact, did not intend to "defraud, defeat or delay" any of the creditors of Bondfield or Forma-Con. This argument was supported by clear and cogent evidence to that effect (*e.g.*, financial statements, expert's record etc.). Accordingly, it is respectfully submitted that this Court should so find. In the alternative, based on Justice Dietrich's finding of fact that the record before her was insufficient to make conclusive findings as to the financial strength of the corporate debtors at the relevant times, then this matter should be remitted back to the court below for a full trial.

**D.** *Entitlement to Set-Off*

47. Finally, we arrive at the issue as to whether Justice Dietrich erred in law by declining to allow for any set-off to Mr. Anastasio in the event of any judgment as

against himself. It is respectfully submitted that the learned applications judge so erred.

48. In the Affidavit of Giuseppe Anastasio, sworn June 19, 2020, in relevant part, the deponent therein stated as follows:

> 8. The Term Sheet between the Bondfield group of companies and the Deutsche Bank was duly executed at the beginning of December, 2017 at the bank's North American headquarters in New York City. Having successfully engineered this deal, my job was done. For having completed this task, I was to be remunerated by the Bondfield group of companies. All three directing minds of the Bondfield group knew and agreed to my compensation.
>
> 9. I was to be compensated in the amount of 2.5% of the value of the credit facility. Accordingly, based on the credit facility of USD $150 million that the bank agreed to offer to Bondfield group, I was required to be paid by Bondfield the sum of USD$3.75 million. Unfortunately, I was not paid any of this money.

49. Even though the Monitor and the Trustee are metaphorically referred to as the "eyes and ears of the Court", they both neglected to ask Mr. Anastasio any questions in regards to his claim for set-off. This is significant since Mr. Anastasio was made available and did in fact attend to be cross-examined on his affidavits.

50. At para. 284 of the Dietrich Decision, the learned applications judge stated, in relevant part, that "he has provided no documentary or corroborating evidence in support of his alleged claim against the Bondfield Group in this amount." The problem, however, is that Justice Dietrich assumed that there should have been "documentary or corroborating evidence" in this regard. With all due respect, this was

an assumption that she was not entitled to make. After all, if the agreement was oral in nature (as alleged), then there would be no such "documentary or corroborating" evidence.

## PART III – CONCLUSION AND RELIEF SOUGHT

51. The Anastasio respondents, together with a number of other respondents, were sued in both the Monitor's Application and the Trustee's Application on the claimed basis that they were privies to a number of Impugned Transactions that totaled in the tens of millions of dollars. The sole cause of action advanced by both the Monitor and the Trustee was Section 96 of the *BIA*. These claims, however, were fundamentally flawed from their very inception. In particular, on account of the assertion that John Aquino, as the claimed directing mind of the corporate debtors, masterminded a scheme (*i.e.*, the "False Invoicing Scheme") which resulting in tens of millions of dollars being siphoned out of the corporate treasuries for his own personal benefit and that of his alleged co-conspirators, the corporate identification doctrine was implicated. This doctrine, which applies with full force in the context of section 96 of the *BIA*, as a matter of law, forecloses any possibility that John Aquino's intentionality can be imputed onto the corporate debtors. This is dispositive of the entirety of the claims as against the Anastasio respondents. In the alternative, as a matter of fact, John Aquino did not have the requisite intent to "defraud, defeat or delay" any of the creditors of Bondfield or Forma-Con at the relevant times. The companies were in far too strong a financial position at the relevant times, and the amounts involved far too little relative to the volume of business being generated by the Bondfield group of

companies, to challenge the reasonableness of John Aquino's subjective state of mind. Finally, in the further alternative, Mr. Anastasio should be entitled to set-off any monetary judgment in the amount of his unpaid fees stemming from the Deutsche Bank term sheet agreement.

52. The Anastasio respondents respectfully seek an order for the following relief:

(i) An order that both the Monitor's Application and the Trustee's Application be dismissed in their entirety as against themselves;

(ii) In the alternative, an order that these applications be remitted back to Justice Dietrich, with instructions that she conduct a trial with the full benefit of *viva voce* evidence; and

(iii) Costs of this appeal and for the applications below on a substantial indemnity basis.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS** 27th day of May 2021

Terry Corsianos

Terry Corsianos

Counsel for Giuseppe Anastasio and Lucia Coccia-Canderle

**CERTIFICATE OF THE APPELLANTS**

**GIUSEPPE ANASTASIO AND LUCIA COCCIA-CANDERLE**

(i) An order under subrule 61.09(2) (original record and exhibits) is not required; and

(ii) The undersigned, being the lawyer for these appellants, estimates that one (1) hour will be required for his oral argument, not including reply.

Terry Corsianos

Terry Corsianos

Counsel for the Anastasio respondents

## SCHEDULE A – LIST OF AUTHORITIES

1. *Housen* v. *Nikolaisen*, 2002 SCC 33.

2. *Urbancorp Toronto Management Inc. (Re)*, 2019 OBCA 757.

3. *General Electric Company* v. *CSX Transportation Inc.*, 2011 ONSC 7167.

4. *Canadian Dredge & Dock Co.* v. *The Queen*, [1985] 1 S.C.R.

5. *Deloitte & Touche* v. *Livent Inc (Receiver of)*, 2017 SCC 63.

6. Christine DeJong Medicine Professional Corporation v. DBDC Spadina Ltd. et al., 2019 SCC 30.

7. *NEP Canada ULC* v *MEC OP LLC*, 2021 ABQB 180.

8. *Heritage Capital Corp.* v. *Equitable Trust Co.*, 2016 SCC 19.

9. *Owners, Strata Plan LMS 3905* v. *Crystal Square Parking Corp.*, 2020 SCC 29.

10. *A. Farber & Partners Inc.* v. *Goldfinger*, 2013 ONSC 6635.

11. *Indcondo* v. *Sloan*, 2014 ONSC 4018.

## SCHEDULE B – STATUTES, REGULATIONS AND BY-LAWS

Transfer at undervalue

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

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

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

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

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

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

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

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

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

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

Marginal note: 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.

**ERNST & YOUNG INC.,** in its capacity as Court-Appointed Monitor of Bondfield Construction Company Limited
Applicant (Respondent in Appeal)

- and -

**JOHN AQUINO** et al.
Respondents (Appellants in Appeal)

Court of Appeal File No. C69263

**COURT OF APPEAL FOR ONTARIO**

Proceeding commenced at Toronto

# FACTUM OF GIUSEPPE ANASTASIO AND LUCIA COCCIA-CANDERLE

(Consolidated appeals returnable on September 1, 2021)


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