

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Forjay Management Ltd. v. 0981478 B.C. Ltd.*,
2023 BCSC 1368

Date: 20230809
Docket: H170498
Registry: Vancouver

Between:

Forjay Management Ltd.

Petitioner

And

0981478 B.C. Ltd., Mark Chandler, Canadian Western Trust Company in trust, HMF Home Mortgage Fund Corporation, 625536 B.C. Ltd., James Mercier, Morris Kadylo, Urszula Piaseczna, U.S. Bank National Association, Baramundi Investments Ltd., Charanjit Kaur, Simrat Virdi, Mukhtiar Singh Nijjar, Mohan Vilkh, Jaspreet Singh Khatra, Amandeep Singh Dhaliwal, Nirmal Singh Chohan, Sajal Jain, Suparna Jain, Babal Rani Bansal, Satpal Bansal, Parminder K. Mann, Leena Jain, Vasant Patel, 1074936 B.C. Ltd., 1084165 B.C. Ltd., 1084164 B.C. Ltd., 1084322 B.C. Ltd., Surjit Kaur Parmar, Harbhajan Singh Parmar, Daljeet Kaur Gill, Bhasham Kaur Gill, 812 Capital Holdings Ltd., Catalyst Assets Corp., 0951019 B.C. Ltd., Wonder Marble & Stone Inc., Intech Pay Ltd., 1086286 B.C. Ltd., 1085537 B.C. Ltd., 1083516 B.C. Ltd. and Reliable Mortgages Investment Corp.

Respondents

Before: The Honourable Justice Fitzpatrick

Reasons for Judgment (re *FPA / FCA Claim*)

Counsel for the petitioner, Forjay Management Ltd., and the respondent, Reliable Mortgages Investment Corp.:

G. Nesbitt

No appearance on behalf of the respondent, 625536 B.C. Ltd.

Counsel for 1052387 B.C. Ltd.:

A. Oberoi
V. Sidhu

Place and Dates of Hearing:

Vancouver, B.C.
April 25–26, 2023

Place and Date of Judgment:

Vancouver, B.C.
August 9, 2023

INTRODUCTION

[1] This is a show cause hearing brought by the petitioner, Forjay Management Ltd., and the respondent, Reliable Mortgages Investment Corp. (“RMIC”), pursuant to the *Fraudulent Preference Act*, R.S.B.C. 1996, c. 164 [FPA] and the *Fraudulent Conveyance Act*, R.S.B.C. 1996, c. 163 [FCA].

[2] Both applicant companies advance the same allegations; therefore, for ease of reference I will refer to them collectively as “Forjay”.

[3] Forjay’s application is against the respondent, 625536 B.C. Ltd. (“625”) and a related company, 1052387 B.C. Ltd. (“105”).

[4] The allegations arise from an August 2022 judgment that Forjay obtained against 625 in this proceeding arising from a costs award. In the course of seeking recovery from 625 under that judgment, Forjay discovered that 625’s only asset (a commercial strata property in Surrey, BC) had been mortgaged in favour of and then transferred to 105 in October 2021.

[5] Forjay takes the position that the mortgage and transfer to 105 took place just days after 625 received formal notice that Forjay was seeking costs against it. Forjay takes the position that the mortgage and transfer are void as against them, on the basis that 625 entered into those transactions to delay, defeat and hinder Forjay’s remedy to recover the amount owing under the judgment.

[6] 105 responded to the application and disputed Forjay’s claims on the instructions of its principal, Mohinder Gosal. Mr. Gosal is also a principal of 625 and he was the controlling mind of 625 during the course of its disputes with Forjay in this foreclosure proceeding from 2021–2022 that led to the granting of the costs judgment against 625.

[7] 625 has not responded to this application and was not represented at the hearing, either with counsel or by its principals. Mr. Gosal’s evidence has been given on behalf of 105, but not 625.

PROCEDURAL HISTORY

[8] On December 5, 2022, Forjay filed this show cause application.

[9] On December 13, 2022, the Canada Revenue Agency (the “CRA”) filed an application response consenting to the relief sought in the show cause application. The CRA indicated that they would not be attending the show cause hearing.

[10] On January 17, 2023, 105 filed its application response dated January 16, 2023 and the Affidavit #1 of Mohinder Gosal affirmed January 16, 2023 (“Gosal #1”).

[11] On February 10, 2023, 105 filed the Affidavit of Alistair Campbell sworn January 23, 2023.

[12] On February 28, 2023, 105 filed an amended application response dated February 27, 2023.

[13] On April 6, 2023, Mr. Gosal was cross-examined on Gosal #1 by Forjay’s counsel. The transcript of that cross-examination is in evidence before me.

[14] On April 14, 2023, 105 filed the Affidavit of Maurice Bouchard affirmed April 12, 2023.

[15] On or about April 20, 2023, 105 filed the Affidavit #2 of Mr. Gosal affirmed April 19, 2023 (“Gosal #2”) which, among other things, tendered evidence to supplement responses given by him at the cross-examination on Gosal #1.

[16] 625 did not file any Application Response; nor did Mr. Gosal file any affidavit on behalf of 625.

RELEVANT BACKGROUND FACTS

[17] There are two main factual narratives that are relevant: firstly, those events that took place between Forjay and 625; and secondly, those events that took place between 625 and 105.

[18] I find the following facts.

The Forjay / 625 Events

[19] The dispute arose from foreclosure proceedings when a development project in Langley, BC failed. Forjay held first and second mortgages against the lands along with other co-lenders. 625 held a third ranking mortgage.

[20] In July 2017, certain lenders commenced foreclosure proceedings in BCSC Action No. H170343. In August 2017, Forjay Management Ltd. commenced these foreclosure proceedings.

[21] All of the lenders were named in this foreclosure proceeding. The proceedings were very contentious. In part, that contentiousness arose from 625's challenge to the amounts claimed by Forjay under their mortgages and the priority of Forjay's secured claims.

[22] A summary of the details of the later steps in the foreclosure to determine those issues are set out in paras. 12–40 of my reasons at *Forjay Management Ltd. v. 0981478 B.C. Ltd.*, 2022 BCSC 1314 [*Costs RFJ*]. By April 2020, all of the mortgage related issues between Forjay and 625 had been decided in this proceeding, subject to an appeal that did not proceed.

[23] 625 was wholly unsuccessful in its arguments against Forjay, both in this Court and on appeal: *Costs RFJ* at para. 40. My dismissal of 625's two main arguments during the summary trial, indexed at *Forjay Management Ltd. v. 0981478 B.C. Ltd.*, 2020 BCSC 637, indicated that the parties were at liberty to speak to the matter of costs (para. 212).

[24] The evidence at the various hearings indicated that Mr. Gosal was the person at 625 who dealt with the debtor, 0981478 B.C. Ltd. ("098") and 098's principal, Mark Chandler, in arranging the 625 loans and security. Mr. Gosal also dealt from time to time with the other lenders, including Forjay.

[25] Throughout the course of the foreclosure between 2017–2021, Mr. Gosal was the person at 625 directing 625's position and activities in the litigation. Mr. Gosal

was also the person who filed various affidavits in support of 625's various positions, describing himself as 625's "managing director". Finally, Mr. Gosal was the person instructing 625's legal counsel, Jeremy Shragge, who acted throughout.

[26] As of May 2004, 625 was the registered owner of a commercial strata property in Surrey (the "Property").

[27] As of July 2019, when 625's disputes with Forjay were being litigated (and after 625's first loss to Forjay in the foreclosure), the Property was unencumbered, save for a judgment registered by Her Majesty the Queen in Right of Canada for \$544,296.63 (the "CRA Judgment"). The CRA Judgment was registered to the Federal Court on May 15, 2019, and to the Land Title Office ("LTO") on July 8, 2019.

[28] In March 2021, during the foreclosure proceedings, Forjay obtained a costs award against 625 for \$1,000 arising from its failed attempt to appeal to the Supreme Court of Canada. On April 1, 2021, that costs award was registered against the Property (the "Small Costs Judgment").

[29] On June 8, 2021, Forjay's counsel conducted a LTO search of the Property, which showed only the CRA Judgment and the Small Costs Judgment.

[30] On June 15, 2021, Forjay's counsel sent Mr. Shragge an email, advising that they were contemplating a costs application.

[31] On September 22, 2021, Forjay's counsel delivered unfiled copies of application materials to Mr. Shragge by which Forjay was seeking costs against 625 for various aspects of the dispute. The amount claimed in those materials was significant, being \$513,137.22. Forjay's counsel asked about Mr. Shragge's availability for a later hearing.

[32] The facts relating to when 625 received notice of Forjay's application materials are contested.

[33] In any event, 625 formally responded to the costs application via its new lawyer, Wes McMillan, who was appointed in early November 2021. Forjay later

amended its application to refine their arguments as to what costs were being sought. A later hearing was held on May 19–20, 2022 to determine the costs issues; however, by that time, Mr. McMillan had also withdrawn as counsel. Mr. Gosal attended only the first day of the hearing and did not attend the substance of the hearing.

[34] On August 4, 2022, I awarded Forjay special costs against 625: *Costs RFJ* at paras. 120–121. On August 15, 2022, I granted an order fixing those costs at \$187,326.49 for Forjay Management Ltd. and \$83,162.27 for RMIC (the “Costs Award”).

[35] Also on August 4, 2022, with the *Costs RFJ* in hand, Forjay’s counsel then performed a new LTO search of the Property. They discovered a number of transactions in late October 2021 between 625 and 105, that give rise to this hearing, which are now described below.

625 / 105 Events

[36] 625 is a BC company whose directors, as of November 2022, were Mr. Gosal and his wife, Harbhajan Kaur Gosal. Ms. Gosal is the sole shareholder of 625.

[37] In May 2014, 625 advanced its loan to 098 and obtained a mortgage against 098’s development lands.

[38] In October 2015, 105 was incorporated. Mr. Gosal was the sole director and shareholder. In late 2016, Ms. Gosal also became a director. Mr. Gosal was the sole officer or CEO.

[39] I accept that, at all material times, Mr. Gosal was the controlling mind of both 625 and 105.

[40] The evidence does not reveal the nature of 105’s business activities. It is known that, as of 2016, 105 was registered to pay its income tax and GST remittances with CRA.

[41] Since May 2022, when Mr. McMillan withdrew, Forjay’s counsel has been dealing with Mr. Gosal directly regarding the costs application.

[42] In August 2022, after the *Costs RFJ* and *Costs Award* were received, when Forjay’s counsel again searched the Property at the LTO toward collecting the *Costs Award*, they discovered that:

- a) On October 22, 2021, 625 had granted a mortgage to 105 which was registered against the Property (the “105 Mortgage”); and
- b) On October 28, 2021, 625 transferred title to the Property to 105 (the “105 Transfer”) which was registered the next day on October 29, 2021.

(collectively, the “Transactions”)

[43] After Forjay learned of the Transactions, Forjay’s counsel enquired as to particulars from Mr. Gosal. At Mr. Gosal’s invitation, Forjay’s counsel made enquires of 625’s accountant, Maurice Bouchard of Bouchard & Company Chartered Professional Accountants. On August 29, 2022, Mr. Bouchard replied to Forjay’s counsel by attaching a “draft financial review” and supporting documents from the CRA and he advised:

- a) 625 owed \$661,000 to the CRA arising from certain debts in the 2013–2015 and 2018 timeframes;
- b) 105 advanced loans in excess of \$1.1 million to 625 for legal fees incurred in the foreclosure proceedings. This loan was repayable on demand with 10% annual interest;
- c) The assessed value of the Property transferred to 105 was \$458,000;
- d) The “[b]alance of legal fees still owing by [625]” was \$55,000 (Forjay’s counsel understood this to refer to the amount still owing to Mr. Shragge or Mr. McMillan); and

- e) 625 still owes 105 the amount of \$652,000 which is secured by a mortgage against certain property (Forjay’s counsel understood this to refer to the Property and that the amount was intended to be \$642,000, being the difference between the \$1.1 million loan and the \$458,000 assessed value of the Property).

[44] In fact, the Assessment Roll in relation to the Property indicated that the \$458,000 assessed value was as of July 2020, over one year before the Transactions, not in July 2021, just before the Transactions.

[45] As of July 2021, the assessed value of the Property was \$771,000 (and gave rise to a reassessment of the transfer tax owing). This accords with a retrospective appraisal obtained by Mr. Gosal in February 2023 indicating a value of \$740,000.

[46] As of July 2022, the assessed value of the Property was \$1,060,000.

[47] Mr. Gosal’s evidence as to the Transactions is as follows.

[48] He says that on May 1, 2017, he caused 105 and 625 to enter into a loan agreement (the “Loan Agreement”) which he says arose as a result of the “impending foreclosure litigation”. The Loan Agreement provides:

May 1/2017

Loan Agreement between 1052387 B.C. Ltd. & 625536 B.C. Ltd regarding legal for Mark Chandler project in Langley BC

625536 B.C. Ltd further agreed to pay back all the legal paid by 1052387 B.C Ltd to defend the foreclosure case at Murrey ville with twelve percent interest per annum further 625536 B.C Ltd understand and agreed that in the event there is not enough equity in that project owned by 0981478 B.C Ltd then 625536 B.C Ltd will transfer unit number 205 12888 80 Ave equal to the outstanding loan given to for legal fees to defend 625536 B.C Ltd including interest at twelve percent plus interest occurred such legal fees will be paid by 1052387 B.C Ltd directly to Jermeý Shragge (lawyer) to defend the foreclosure case between Forjay management Ltd and 0981478 B.C Ltd [sic]

1052387 B.C Ltd per M.S Gosal (president)

[signature]

625536 B.C Ltd per M.S. Gosal (manager)

[signature]

May 1/2017

[49] The Loan Agreement is signed by Mr. Gosal on behalf of both 105 and 625. Mr. Gosal was not able to produce any paper copy for inspection, let alone an original. He was only able to produce a photograph of the Loan Agreement that he says he took on December 27, 2022. He believes the actual document was shredded in 2021.

[50] Mr. Gosal also states that, on October 22, 2022, on behalf of 105, he retained a solicitor, Ajaypal Singh Dhaliwal, to register the 105 Mortgage against title to the Property. I assume that he meant to refer to October 22, 2021, not 2022, given the date of registration of the 105 Mortgage on October 22, 2021.

[51] The 105 Mortgage is in the principal amount of \$1.1 million and indicates that it is payable on demand. However, the interest rate shown on the 105 Mortgage itself is 5%, not 10% per Mr. Bouchard and not 12% per the Loan Agreement.

[52] The details of the 105 Transfer are also confusing.

[53] Mr. Gosal states in Gosal #1 that the Property was transferred under the 105 Transfer for a value of \$1.1 million. However, the transfer document indicated a “market value” of \$458,000 and the stated consideration was initially \$1.00 but later amended to \$458,000.

[54] Mr. Gosal provided a “Buyer Statement of Adjustments” prepared by Mr. Dhaliwal’s offices which provides for more and differing values and information. It refers to a price of \$1,110,000. Leaving aside some adjustments, this amount is credited as:

- a) \$458,000 for “[t]ransfer of property in lieu of mortgage secured against the property by [105]”; and
- b) \$652,000 for “[b]alance to be secured as loan against the Seller [625] by the Buyer [105]”.

[55] The Buyer Statement of Adjustments indicated a balance to complete owing by 105 of \$23,605.72, made up principally of property transfer tax and amounts owing to the strata plan. These were required payments to third parties arising from the 105 Transfer and are not relevant.

[56] Mr. Gosal states that from early 2017 to mid-2021, 105 paid 625's legal fees. He has produced a January 4, 2017 letter to Mr. Shragge by which 105 deposited a \$25,000 retainer at the firm. Although the retainer was allocated to other litigation matters involving 625 and Mr. Gosal personally, Mr. Shragge indicated that he reserved the right to apply those funds to the "Murrayville matter", which was 098's development project. In addition, Mr. Gosal produced some accounting information indicating amounts charged by Mr. Shragge on the various legal matters. Mr. Gosal states that some of the legal fees set out in this documentation was for the foreclosure, but there were certainly unrelated legal matters for both 625 and Mr. Gosal personally.

[57] Mr. Campbell is 625's legal counsel dealing with 625's debt to the CRA for income tax and GST. Mr. Campbell states that the CRA Judgment arose from a 2018 audit by the CRA that resulted in reassessments in 2019. 625 objected to those reassessments and that appeal process was still underway as of January 2023.

[58] Mr. Bouchard states that he is the corporate accountant for both 625 and 105. Mr. Bouchard states that he was told by Mr. Gosal that 625 was involved in the foreclosure and that 105 intended to pay 625's legal fees for that proceeding. He further states that around 2017, he advised that if 105 was going to spend monies for 625, there should be a written instrument prepared to reflect that agreement with respect to repayment and property security. He stated that he understands that a loan agreement was entered into and that he saw the Loan Agreement "in or around June 2017".

[59] As part of his evidence, Mr. Bouchard attaches a ledger that he says reflects funds paid by 105 on 625's behalf for "legal fees and for related and other purposes"

(the “Ledger”). The Ledger is on his firm’s letterhead and indicates that it is for the period ending March 7, 2023. Mr. Gosal says that Mr. Bouchard prepared the Ledger as of March 2023. The Ledger shows amounts from August 29, 2017– November 12, 2020 totalling \$851,728 which, after 12% interest, totals \$1,363,884. There is no breakdown of amounts said to have been paid for 625’s legal fees in the foreclosure.

[60] Mr. Bouchard does not explain his understanding of how or when these funds were paid. He refers to ledgers showing “debits and credits for all payments made between the Companies” but he does not attach any ledger for 625.

[61] Mr. Bouchard makes various statements; that he was aware that 625 owned the Property; that 625 transferred the Property to 105; that at the time, 625 owed 105 “in excess of \$740,000”; that 625 was not generating any income at this time; and that 625 remains in debt to 105. He does not refer to the source of this information. He recalls advising 105 for years to act on its “security” given that 625 would be unable to repay its debt, although it is unclear what he means by “security”.

[62] In Gosal #2, Mr. Gosal addresses the service issue that I will discuss below. In addition, Mr. Gosal provides further details surrounding the circumstances of the execution of the Loan Agreement and 105’s loans to 625. Finally, Mr. Gosal provides further details surrounding the 105 Mortgage and the 105 Transfer. He states that 625’s only repayment of the amounts loaned by 105 was by a transfer of the Property. Mr. Gosal confirms that, as of October 2021, the Property was 625’s only asset.

[63] Mr. Gosal refers to acting on Mr. Bouchard’s advice to transfer 105’s “security” in respect of the Property. Mr. Gosal does not address why the transfer took place in late October 2021, when the last advance to 625, as set out in the Ledger, occurred in November 2020. Mr. Gosal says that 105 “took” the Property to obtain repayment, but he does not address why the 105 Mortgage was granted only some 11 months later; nor does he address why the 105 Transfer followed only one week later.

STATUTORY FRAMEWORK

[64] Section 9 of the *FPA* governs the procedures for show cause hearings. It provides that:

- a) As a judgment creditor of 625, Forjay is entitled to apply to have a conveyance or disposition void, as being made to defeat, hinder, delay, prejudice and defraud it (ss. 1 and 9(1));
- b) Forjay may file an application to this Court calling on 625 and 105 to show cause why the Property should not be sold to realize the Costs Award or why the disposition or conveyance should not be set aside (s. 9(2)); and
- c) Forjay may claim to be entitled to register the Costs Award against the Property, or 625 or 105's interest in the Property (s. 9(3)).

[65] Subsection 10(2) of the *FPA* provides that on Forjay's application, the court may order that Forjay is entitled to register the Costs Award against the Property.

The provisions under the *FCA* are extremely brief:

- 1 If made to delay, hinder or defraud creditors and others of their just and lawful remedies
 - (a) a disposition of property, by writing or otherwise,
 - ...
 - is void and of no effect against a person ... whose rights and obligations are or might be disturbed, hindered, delayed or defrauded, despite a pretence or other matter to the contrary.
- 2 This Act does not apply to a disposition of property for good consideration and in good faith lawfully transferred to a person who, at the time of the transfer, has no notice or knowledge of collusion or fraud.

[Emphasis added.]

[66] Under s. 1 of the *FPA*, there is essentially a “two-pronged test”, namely whether (a) there was a disposition of property; and (b) whether the transferor intended to delay, hinder or defraud creditors and others of their remedies: *Wu v. Gu*, 2020 BCSC 396 at para. 79.

Intent of the Transferor

[67] The transferor's intent is a state of mind and question of fact: *Abakhan & Associates Inc. v. Braydon Investments Ltd.*, 2009 BCCA 521 (sub nom. *Botham Holdings Ltd. (Trustee of) v. Braydon Investments Ltd.*) [2009] B.C.J. No. 2315 [*Abakhan*] at para. 74, leave to appeal to SCC ref'd, 33545 (24 June 2010). The *only* intent required under the *FCA* is to put assets out of reach of creditors. No dishonest or morally blameworthy intent is required: *Wu* at paras. 81-82, citing *Abakhan* at para. 73.

[68] Further, fraudulent intent can exist concurrently alongside *bona fide* motives for the transfer, including legitimate business objectives. In other words, while the transferor may validly claim a business purpose for the transfer, so long as *a reason* for the transfer was to put assets out of reach of creditors, fraudulent intent is made out: *Wu* at para. 85; citing *Cabaniss v. Cabaniss*, 2009 BCSC 1478 at para. 56; *Abakhan* at paras. 84–85.

[69] As stated in *Abakhan* at para. 76, citing *Ocean Construction Supplies Ltd. v. Creative Prosperity Capital Corp.* (1995), 34 C.B.R. (3d) 241 (B.C.S.C.), proof of intent can be, and usually is, drawn from inferences of the surrounding circumstances. See also *Balfour v. Tarasenko*, 2019 BCSC 2212 at paras. 59–60.

[70] In *Wu*, Justice MacNaughton stated that intent is often inferred from the “badges of fraud”:

[84] The intent to put assets out of the reach of creditors must often be inferred from the “badges of fraud”. The cases repeatedly consider the following indicia or badges of fraud:

- (a) the state of the debtor's financial affairs;
- (b) the relationship between the parties to the transfer;
- (c) whether the disposition effectively divests the debtor of assets;
- (d) evidence of haste in making the disposition;
- € timing of the transfer relative to notice of the debts;
- (f) the presence of valuable consideration; and
- (g) whether the transferor continued in possession after the transfer.

See, for example, *Cabaniss* at paras. 49-51; *B. (L.A.) v. M. (L.)*, 2004 BCSC 512 at para. 19; and *Pacific Wagondepot Ltd. v. Hudson West Development Ltd.*, 2019 BCSC 909 at para. 15

[71] The “badges of fraud” are merely guidelines and are not intended to be an exhaustive list of circumstances that may be relevant to the issue as to the transferor’s intent, which is a question of fact: *Global Pacific Financial Services Ltd. v. Canlas*, 2021 BCSC 2419 at para. 70; *aff’d Canlas v. Global Pacific Financial Services Ltd.*, 2022 BCCA 438.

[72] The effect of the transfer is a key factor toward determining intention. In other words, where the effect was to hinder or delay or defeat a creditor, the court will presume the intention and attribute it to the transferor: *Wu* at para. 83, citing *Abakhan* at paras. 74-75. The court is not required to infer intent in all cases. A presumption of fraud arises when the transfer has the effect of hindering, delaying or defeating creditors and, in the absence of credible evidence to the contrary, the requisite intent under the *FCA* may be made out: *Trustees of the IWA - Forest Industry Pension Plan v. Leroy*, 2017 BCSC 158 [*Leroy*] at para. 20, citing *Mawdsley v. Meshen*, 2012 BCCA 91 at para. 71, leave to appeal to SCC ref’d, 34798 (30 August 2012).

[73] In *Wu*, MacNaughton J. stated that, where a suspicious transaction occurs between related parties, the burden of establishing the *bona fides* of the transaction shifts from the claimant to the parties to the transaction:

[80] With respect to the burden of proving the requisite intent in the *FCA* analysis, in *Jennings v. Chow*, 2008 BCSC 110 at para. 18, Justice Bernard said:

[18] The circumstances in this case raise a question as to whether the transfer was made in good faith. In relation to who bears the onus of proof that the transfer was done in good faith, I refer to *CIBC Mortgage Corp. v. Pender*, 1999 CanLII 2616, in which Sinclair-Prowse J, adopts the following passage from *Frimer v. Lercher*, [1984] B.C.J. No. 728 (B.C.S.C.):

[13] It is established that where suspicion touches a transaction made between near relatives, the burden of establishing the *bona fides* of the transaction shifts from the plaintiff to the parties to the transaction. Furthermore, in these

circumstances the testimony of the parties must be scrutinized with care and suspicion; it is seldom that such evidence can safely be acted upon without corroboration. These rules, which are rules of practice rather than of absolute law, are well established. [Citations omitted.]

See also *Leroy* at para. 149.

Intent of the Transferee

[74] Section 2 of the *FCA* provides a defence aimed at protecting a *bona fide* purchaser for value without notice. In order to make out such a defence, a transferee must prove all three elements, including that the transfer was made: (a) for good consideration; (b) in good faith; and (c) to a transferee who had no notice or knowledge of the fraud.

[75] In the usual case, if the consideration given by the transferee is inadequate or nominal, a claimant need only show that the transferor intended to defraud creditors; whereas where the transferee has given good consideration, the claimant must also show that the transferee participated in the fraud: *Wu* at para. 87, citing *Chan v. Stanwood*, 2002 BCCA 474 at para. 20.

[76] However, where both transferor and transferee are companies governed by the same controlling mind, the controlling mind's intent to defraud must be imputed to both companies: *Abakhan* at para. 90; *Leroy* at para. 157. As such, if the transferor had the requisite fraudulent intent, this is imputed to the transferee and the transferee is unable to establish a defence under s. 2 of the *FPA* even if adequate consideration is paid. Further, even if there is adequate consideration, that does not necessarily establish the *bona fides* of the transaction for the purposes of s. 2 of the *FPA*.

[77] I accept Forjay's summary of the appropriate analysis under the *FCA* that applies here, therefore, I would restate as follows:

- a) 625 and 105 are controlled by one person, Mr. Gosal;

- b) The effect of the 105 Mortgage and 105 Transfer was to put 625's assets out of reach of Forjay in collecting the Costs Award;
- c) Accordingly, a presumption of fraud is available here, subject to 625 and 105 establishing the *bona fides* of the Transactions;
- d) the required intent is only that the controlling mind (Mr. Gosal) intended to put assets out of reach of 625's creditors, and such intent can exist alongside a valid business purpose for the transfer;
- e) the requisite fraudulent intent—to put assets out of the reach of creditors—can be inferred from any “badges of fraud”;
- f) if no good consideration was given for the Transactions, the sole focus will be on whether 625's fraudulent intent has been established. One of the “badges of fraud” includes the lack of consideration; and
- g) if good consideration was given for the Transactions, Mr. Gosal must still prove that he lacked the requisite fraudulent intent, having regard to the “badges of fraud”.

SUMMARY PROCESS / CREDIBILITY

[78] This hearing was convened as a summary hearing. Numerous affidavits were presented on both sides and were supplemented by document discovery and cross-examination.

[79] Section 10(1) of the *FPA* provides that a show cause hearing may be brought on a summary basis or by a trial of the issue. That section provides:

On an application under section 9, the proceedings may be brought either in a summary way or by the trial of an issue, or by inquiry before an officer of the court, or by an action or otherwise, as the court believes necessary or convenient, for the purpose of ascertaining the truth of the matters in question, and whether the land, or the debtor or other person's interest in it, is liable for the satisfaction of the judgment.

[80] It would have been apparent to Mr. Gosal and his counsel from the outset of this application that Forjay raises significant credibility issues in respect of Mr. Gosal's evidence, given the allegations of fraud.

[81] In *Wu*, MacNaughton J. commented on the issue of credibility in the context of fraudulent conveyances and preferences, emphasizing that corroboration of a parties' testimony, particularly where the parties are related, will often be required:

[99] Special emphasis is placed on the assessment of credibility in the context of the *FCA* and the *FPA*. The cases repeatedly stress the need for extra care in scrutinizing the testimony of the parties to a *prima facie* fraudulent transaction. For example:

- (a) In *Cabaniss*, Justice Masuhara noted that, "care in scrutinizing the testimony of the parties to the transaction is required" (para. 52);
- (b) In *Jennings*, Justice Bernard, again citing *CIBC Mortgage Corp.*, emphasized that, "the testimony of the parties must be scrutinized with care and suspicion; it is seldom that such evidence can be safely acted upon without corroboration" (para. 18);
- (c) In *B. (L.A.)*, Justice Holmes cited case law affirming that, "where there is a conveyance between close relatives, under suspicious circumstances, the plaintiff has established a *prima facie* case of fraud. It is then up to the defendants to produce credible evidence to substantiate the transaction. Some corroborative evidence of the *bona fides* of the transaction should be given" (para. 18); and
- (d) In *Pacific Wagondepot*, a case involving promissory notes between related corporations, Justice Macintosh held that, "there is a need for caution, and even suspicion, in receiving the uncorroborated evidence of related defendant parties" (para. 19).

[82] At the start of this hearing, both counsel indicated that they were satisfied that the issues could be decided on a summary basis. As the course of the hearing evolved, and the inevitable credibility issues arose in relation to Mr. Gosal's evidence, 105's counsel then took the position that there were triable issues and the matter should be referred to the trial list for determination, but *only* if the Court found Mr. Gosal's evidence as lacking credibility.

[83] For obvious reasons, the position of 105's counsel that the matter should be determined at a trial only in those circumstances—that his client's evidence is found wanting—is highly questionable. 105's counsel was well aware that Mr. Gosal faced credibility issues in advance of the hearing. At the outset of the hearing, counsel did not seek to have the matter referred to the trial list.

[84] I have approached a determination of the issues, including credibility, in the same manner as I would have in relation to summary trials, consistent with the Court's approach to summary trials under the *Supreme Court Civil Rules*, R. 9-7(15). I conclude that I am able, on the entire evidentiary record here, to find the facts necessary to decide the issues, so as to discern the truth of the matters and to determine whether the Property is liable to satisfy the Costs Award: *FPA*, s. 10(1). I further conclude that it is not unjust to proceed to decide the issues at this hearing.

[85] At this stage of the reasons, it is sufficient to indicate my conclusion that Mr. Gosal's evidence is highly questionable and, for the most part, self-serving and lacking credibility. In coming to that conclusion, I am mindful of the approach to deciding issues of credibility as set out in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) and applied in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, aff'd 2012 BCCA 296, leave to appeal to SCC ref'd 35006 (7 March 2013), which were also referred to and applied in *Wu* at paras. 100–101.

ISSUES

[86] The issues that arise are:

- a) Has Forjay established a *prima facie* case of 625's fraudulent intent under s. 1 of the *FCA*?
- b) Has 105 established any *FPA* s. 2 defence, considering:
 - i. notice or knowledge of the fraudulent intent of 625;
 - ii. good faith; and

- iii. consideration.
- c) Has 105 established that it otherwise had an interest in the Property save for the Transactions?

DISCUSSION

Has a *prima facie* case been established?

[87] I will first consider the “badges of fraud” in terms of whether Forjay has established a *prima facie* case in respect of 625’s fraudulent intent under s. 1 of the *FCA*.

(i) *Relationship between the parties*

[88] There is no question that Mr. Gosal is intimately involved in both 625 and 105, either as a shareholder, director or officer, or either or both.

[89] Mr. and Ms. Gosal are the sole directors of 625 and 105. Mr. Gosal is the CEO of 105 and he owns 100% of the shares of 105. Ms. Gosal (to whom he is married) owns 100% of the shares of 625. In addition, I have found that Mr. Gosal is the controlling mind of both 625 and 105.

[90] Mr. Gosal indirectly benefitted from the Transactions by protecting the debtor company (625) from any creditor action by Forjay.

(ii) *State of 625’s financial affairs*

[91] Mr. Gosal’s evidence is that 625 carried on business as a lender and that, at the time of the Transactions, it was inactive, had no loans outstanding, no bank account and owned no real property apart from the Property.

[92] Further, at the time of the Transactions, 625 owed the CRA approximately \$650,000, an amount consistent with the CRA Judgment registered against the Property with the LTO on July 8, 2019. 625 also owed Forjay \$1,000 for the Small Costs Judgment.

(iii) Effect of the Transactions

[93] As mentioned above, the effect of the Transactions was to encumber the Property in favour of 105 by the 105 Mortgage and then, within about a week, to transfer the equity of redemption in the Property to 105 (by the 105 Transfer).

[94] The effect of the Transactions was to completely dispose of 625's only asset, at a time when it owed substantial monies and when it was facing a further and contingent liability in respect of Forjay's impending application for an award of special costs against it.

(iv) Timing of / haste in completing the Transactions

[95] The Transactions were effected within about a month after Mr. Shragge received copies of Forjay's unfiled application materials.

[96] On the face of this evidence, I conclude that the timing is very much suspicious and questionable. The 105 Mortgage and 105 Transfer occurred, respectively: (a) 30 and 36 days after unfiled copies of the application materials were provided to Mr. Shragge; and (b) 10 and 16 days after formal service of the application materials on 625.

[97] I agree with Forjay that this evidence of haste in effecting the Transactions gives rise to a strong inference that at least one of the reasons for the Transactions was to avoid the consequences of any award of costs in favour of Forjay as against 625.

[98] Mr. Gosal raises various issues toward blunting such an inference. Firstly, he denies that he received notice of the unfiled or filed application materials prior to the Transactions. Second, Mr. Gosal asserts that the Transactions were made pursuant to the Loan Agreement. I will discuss those issues below in terms of whether they are credible arguments.

[99] At this stage, it is sufficient to note that Mr. Gosal has not provided any explanation as to why the Transactions occurred in October 2021. To the extent that

he relies on the Loan Agreement, and assuming it is a valid agreement that anticipated a transfer of the Property to 105 toward repayment of the loans, it is apparent that the conditions that would have triggered the transfer were satisfied long before October 2021. The last steps in the foreclosure were in April 2020, the Supreme Court of Canada's dismissal for leave to appeal was in October 2020 (*625536 B.C. Ltd. v. Forjay Management Ltd., et al.*, 39164 (1 October 2020)), and the last payment of legal fees on Mr. Bouchard's Ledger was November 2020. By that time at least, it would have more than apparent that 625 would not recover anything under its third mortgage from 098's development property.

[100] I conclude that Mr. Gosal has not provided any explanation, let alone a reasonable one, as to why the Transactions occurred in late 2021. The situation in late 2020 was such that it was clear that 625 would not recover any amounts as a result of the foreclosure. The only further step that occurred between late 2020 and October 2021 (when the Transactions occurred) was the service of Forjay's application materials seeking recovery of costs. The clear inference is that the Transactions were in furtherance of putting the Property beyond Forjay's reach in the event that Forjay was successful in obtaining a costs award.

(v) Consideration

[101] It is apparent that, assuming that valid consideration was paid by 105, that it was past consideration only, in that 105 paid 625's legal fees. I will address the matter of consideration more fully when I discuss 105's consideration defence under s. 2 of the *FPA*.

(vi) Whether 625 continued in possession

[102] Although there is a dearth of evidence on the point, it appears that Mr. Gosal continued to operate the businesses of 625 and 105 on the Property, just as he had done before.

(vii) Conclusion

[103] I have no difficulty concluding that Forjay has established a *prima facie* case that 625 had a fraudulent intent to transfer the Property to delay, defeat and hinder any execution proceedings that might have been taken by it if the costs application was successful, pursuant to s. 1 of the *FCA*.

[104] 625 does not dispute that it had the requisite fraudulent intention to defeat Forjay's claims by execution of the 105 Mortgage and 105 Transfer.

[105] As such, 105 now bears the onus of establishing that it is a *bona fide* transferee who paid valuable consideration and had no notice of such intent, pursuant to s. 2 of the *FCA*.

[106] In the following section, I will consider the defences raised by 105, respecting notice and the *bona fide* nature of the Loan Agreement. If I reject these defences, then an even stronger inference of fraudulent intent will arise.

Has 105 established any s. 2 *FCA* defence?

[107] 105's position is that it has made out all of the s. 2 *FCA* defence requirements. It says that:

- a) the Transactions were based on the "pre-existing litigation loan" from 105 to 625 and, pursuant to the Loan Agreement, 105 was granted an "interest" in the Property;
- b) the Transactions were made toward repayment of 105's "loan" to 625 and amounted to valuable consideration, given the value of the Property in October 2021; and
- c) the Transactions were made in good faith, for good consideration, and without notice of knowledge of fraud because Mr. Gosal had no notice that Forjay was bringing its costs application at the time of the Transactions.

(i) Knowledge / notice of Mr. Gosal

[108] As stated above, Mr. Gosal disputes that he had any knowledge of Forjay's application to seek costs against 625 prior to the transactions that involved the 105 Mortgage and the 105 Transfer. Forjay asserts the opposite.

[109] The chronology of events arising from the evidence is that:

- a) On June 15, 2021, Forjay's counsel emailed Mr. Shragge to advise:

I think the only remaining issue for my client in all of this is costs. They do want to pursue yours for a significant amount of costs. I expect we will have materials ready to deliver to you next week, but wanted to check to see about reserving a day before Justice Fitzpatrick. ...
- b) On September 22, 2021, Mr. Shragge received copies of the unfiled application materials via email. Within less than an hour, Mr. Shragge replied that he would not be speaking to the matter and that he expected 625 to obtain new counsel. Mr. Shragge stated that he would "advise 625 of the situation" and have their new counsel contact Forjay's counsel. This was the first time that Forjay's counsel was advised that Mr. Shragge was intending to withdraw as 625's counsel;
- c) In the morning of September 23, 2021, Mr. Shragge faxed the unfiled application materials to 625 / Mr. Gosal's office at the Property;
- d) On October 6, 2021, Forjay's counsel emailed Mr. Shragge to confirm that the materials had been filed and also confirmed that a November 12, 2021 hearing date was tentatively scheduled;
- e) On October 7, 2021, Mr. Shragge wrote 625 a further letter which was faxed and couriered to 625 at its registered and records office, and not delivered to the Property. He referred to his letter dated September 23, 2021, which he enclosed again. He advised Mr. Gosal of the hearing date that had been reserved. Finally, Mr. Shragge enclosed an unfiled

Notice of Intention to Withdraw as Lawyer dated October 7, 2021 and asked Mr. Gosal to have 625's new counsel contact him;

- f) On October 12, 2021, Forjay's counsel served Mr. Shragge with filed copies of the materials. Earlier that day, Mr. Shragge had asked Forjay's counsel to also provide him with hard copies to send along to Mr. Gosal. Mr. Shragge also attached an unfiled Notice of Intention to Withdraw as Lawyer dated October 7, 2021, in his communications to Forjay;
- g) On October 18, 2021, Mr. Shragge delivered yet another letter to 625 but this time, at the Property, enclosing filed copies of the application materials; and
- h) By late October 2021, Forjay's counsel was still dealing with Mr. Shragge. On October 28, 2021, Forjay's counsel followed up with Mr. Shragge to confirm whether he was still acting for 625. Mr. Shragge indicated that he was going to be filing a notice of withdrawal on November 1, 2021.

[110] At his cross-examination, Mr. Gosal asserted that the last time he had spoken to Mr. Shragge was in May or June 2021, when Mr. Shragge's retainer was terminated. Mr. Gosal denied that he had received any correspondence from Mr. Shragge after that time. He denies receiving the various faxes and letters from Mr. Shragge providing notice of the application materials. Mr. Gosal insisted that he did not receive the faxes at his office at the Property because his fax machine did not have paper in it, and suggested that counsel should ask Mr. Shragge to produce proof of courier delivery.

[111] In Gosal #2, Mr. Gosal denied that he received any notice from Mr. Shragge concerning the application materials or that, more generally, that Forjay was bringing a costs application. In Gosal #2, he states that he terminated Mr. Shragge's retainer in summer 2021.

[112] Mr. Shragge has not filed any affidavit to corroborate Mr. Gosal's evidence. 105's counsel has suggested that Forjay could have contacted Mr. Shragge for his evidence. Such an approach would undoubtedly have been met with a claim of solicitor-client privilege. If anyone was going to seek Mr. Shragge's evidence, the most likely person was Mr. Gosal, who would presumably expect to be supported in his own evidence.

[113] I agree that the above chronology supports that Mr. Gosal's denial that he received notice of Forjay's application is not credible.

[114] I accept that Mr. Shragge's steps as 625's counsel were consistent with his retainer being very much extant throughout October 2021.

[115] Mr. Shragge was continuing to deal with Mr. Gosal as his client, as well as with opposing counsel on behalf of Mr. Gosal. There is nothing to suggest that he made any effort to commence getting off the record until September 22, 2021, after he received the unfiled application materials. Specifically, as noted by Forjay's counsel, he changed 625's address in the Notice of Intention to Withdraw as Lawyer from 625's registered and records office to the Property, for the purpose of the notice of withdrawal. The inference arises that Mr. Shragge would have done so on Mr. Gosal's explicit instructions.

[116] Here, there is nothing to suggest that Mr. Shragge failed in his professional obligations to notify 625 of Forjay's impending application set for November 12, 2021. Mr. Shragge would have been well aware of that obligation and, by all accounts, he made substantial efforts to email, fax and courier the materials to 625. I find it highly unlikely that Mr. Shragge would have not made further efforts to at least speak to Mr. Gosal given the upcoming application date if, as Mr. Gosal asserts, he did not respond by email, fax or letter back to Mr. Shragge.

[117] In Gosal #2, Mr. Gosal denies having received the application materials by email, fax or courier from Mr. Shragge's office between September 22, 2021–November 3, 2021. He states that he does not recall any telephone discussions with

Mr. Shragge in September/October 2021. He claims to not have attended the Property in September/October 2021 because he stayed home often due to poor health and the pandemic. He alleges that Mr. Shragge's September 23, 2021 fax to the office would not have printed since there was no paper in the machine.

Mr. Gosal alleges that he first found out about the costs application when Kibben Jackson, Forjay's counsel, phoned him on November 1, 2021 (discussed below).

[118] However, Mr. Gosal's focus on his ability to receive materials at the Property does not answer the question as to why he would not have received the October 7, 2021 courier to the registered and records office of 625, which 105's counsel confirmed was Mr. Gosal's residence.

[119] In my view, Mr. Gosal's evidence is not credible and not corroborated at all. The clear inference is that he did receive the communications from Mr. Shragge in September/early October 2021 and prior to the Transactions.

[120] The events of November 1, 2021 further and independently support my conclusion in terms of the inference drawn as to notice and my findings on Mr. Gosal's credibility. Those events are recorded in numerous emails between Mr. Jackson, Mr. Shragge and Mr. Gosal.

[121] The November 1, 2021 events are:

- a) 10:03 a.m.: Mr. Gosal sent an email to Forjay's counsel providing his phone number. Mr. Gosal stated:

Mr. Jackson, it came to attention that you are bringing application for costs. As you are fully aware of that Mr. Shragge has been Terminated almost end of July/21.

This is to inform you that, you must serve your material to [625] care of [the Property].

Further, we like to advise to you that as of today,s Date we have not received any material, from your office or from Mr. Shragge's office.
... [sic]

- b) 10:40 a.m.: Mr. Shragge advised Mr. Jackson that the Notice of Withdrawal had been sent for filing and that he should correspond with

Mr. Gosal directly. He provided 625's fax number (although not for service purposes);

- c) 10:42 a.m.: Mr. Jackson replied asking Mr. Shragge if he had forwarded the materials to Mr. Gosal/625;
- d) 10:45 a.m.: Mr. Shragge replied to Forjay's counsel indicating that the address for service on the Notice of Withdrawal had been changed to the Property. He added:

Without saying more than I should, I certainly would not discourage you from sending a copy of the materials to 625. I believe there would be utility in doing so.

- e) 11:35 a.m.: Mr. Jackson emailed a response to Mr. Gosal's email earlier that morning, confirming service of the unfiled application materials on 625's counsel, Mr. Shragge, on September 22, 2021. As a courtesy, he offered to deliver the application materials directly to 625 at the Property;
- f) 12:03 p.m.: Mr. Gosal emailed Mr. Jackson and confirmed that the Property was the correct address. Mr. Gosal stated that he could not retain any counsel until he had the application materials in hand. Mr. Gosal further stated that Mr. Shragge had advised him that Mr. Jackson was aware that Mr. Shragge was not acting for 625 anymore; and
- g) 12:24 p.m.: Mr. Jackson emailed Mr. Gosal and informed him that he was not informed of Mr. Shragge's termination as counsel until after the application materials were properly served on Mr. Shragge as 625's counsel.

[122] On November 2, 2021, Mr. Shragge emailed Mr. Jackson with his filed Notice of Withdrawal as Lawyer, at which point he advised Forjay's counsel that his involvement in the matter had concluded.

[123] On November 8, 2021, Forjay’s counsel received by email a Notice of Change of Lawyer of that same date from Mr. McMillan who, as before, was the lawyer who acted for 625 in formally responding to Forjay’s costs application.

[124] This further evidence—particularly Mr. Gosal’s own email to Mr. Jackson in the morning of November 1, 2021 confirming his knowledge of the application—supports the finding that Mr. Gosal’s evidence is not credible. Mr. Gosal’s evidence is not internally consistent; nor is it consistent with other evidence regarding notice.

[125] Mr. Gosal now attempts to explain the inconsistency within his assertions in Gosal #2. He says that his email of November 1, 2021 to Mr. Jackson arose from a phone call from Mr. Jackson to him, which probably occurred that same day. Mr. Gosal recounts a discussion whereby Mr. Jackson is said to have advised that he would deliver the application materials to him and Mr. Gosal said that was fine. Mr. Gosal did not have any notes of this discussion.

[126] Mr. Jackson has no recollection of any such discussion with Mr. Gosal before he received Mr. Gosal’s email at 10:03 a.m. on November 1, 2021. Mr. Jackson states that email was the first contact he had with Mr. Gosal and that he did not have Mr. Gosal’s telephone number prior to receiving the email. In addition, Mr. Jackson states that, prior to 10:40 a.m., he did not have permission from Mr. Shragge to speak directly to Mr. Gosal and he would not have contacted Mr. Gosal directly without his counsel’s permission, as he understood that it would have been improper to do so.

[127] The only conceivable conclusion to draw, contrary to Mr. Gosal’s strident assertion that he had no contact with Mr. Shragge regarding Forjay’s application, was that Mr. Gosal knew of the application well in advance of November 1, 2021, and that was the reason he initiated contact with Mr. Jackson that day. I find as a fact that Mr. Gosal did not speak on the phone with Mr. Jackson before his November 1, 2021 email to Mr. Jackson, confirming that he was aware of the costs application.

[128] I reluctantly conclude that Mr. Gosal is deliberately attempting to mislead the Court on the issue of notice. I also conclude that his denials of having receiving any notice were initially in aid of evading service of the application materials. However, this quickly evolved into his convoluted story toward alleging that he had not received any notice, in an attempt to take steps to complete the Transactions before he acknowledged that notice.

[129] My findings as to Mr. Gosal’s credibility on the notice issue stands as a further “badge of fraud” that supports the conclusion that 625 had fraudulent intent to defeat Forjay’s potential costs award. It further supports the conclusion that Mr. Gosal, in his capacity as 105’s controlling mind, was well aware of such fraudulent intentions. Accordingly, this finding necessarily leads to the conclusion that Mr. Gosal and 105 are unable to advance any s. 2 defence under the *FCA*.

(ii) Good faith

[130] The other major plank of 105’s defence is that the Loan Agreement was the basis upon which it acted in obtaining the 105 Mortgage and 105 Transfer. 105 submits that the Transactions were toward repayment of the amounts 105 loaned to 625 over the course of the foreclosure, if not before.

[131] Forjay takes the position that the Loan Agreement—said to have been created and executed in May 2017—is a fiction and was only recently manufactured by Mr. Gosal in response to this show cause hearing.

[132] Indeed, there are many issues arising from the Loan Agreement.

[133] For example, on April 6, 2023, Mr. Gosal was cross-examined on Gosal #1. During that cross-examination, it became apparent that there was what Forjay’s describes as an “anachronism” in the Loan Agreement, in that it makes specific mention of a foreclosure; yet, as of May 2017, no foreclosure proceedings had been commenced.

[134] At the cross-examination, Mr. Gosal attempted to explain why the Loan Agreement referred to 625 committing to “pay back” advances (as opposed to possibly being paid) by 105 to 625 for legal expenses relating to a foreclosure, even before the foreclosure proceedings began. When this inconsistency arose, Mr. Gosal then stated that he had legal expenses prior to the foreclosure arising from the fact that it was clear that a foreclosure would happen, that disputes would occur and that counsel would have to be retained.

[135] To bolster his remarks, Mr. Gosal filed Gosal #2. Further inconsistencies arose even from this evidence. Mr. Gosal stated that there were ongoing discussions between 098, 625 and Forjay regarding the development project. Mr. Gosal states that he was personally involved in these discussions and, as a result, he expected that significant court action would soon commence at the behest of Forjay.

[136] Yet, the evidence of James Mercier, the principal of Forjay, states that from the time of the priority agreement between 625 and Forjay (January 2015), he had no contact with Mr. Gosal in late August 2017, shortly after Forjay Management Ltd. commenced its foreclosure action. Further, Mr. Mercier states that the first time he heard from anyone at 625 that there were concerns regarding the amounts advanced under Forjay’s mortgage was August 22, 2017.

[137] Mr. Gosal does describe his thinking in terms of what disputes he predicted and with which party. However, even if he had accurately predicted that a foreclosure would occur four months later, there is no basis upon which he could have predicted that Forjay would be the petitioner, given that various stakeholders could have initiated foreclosure proceedings. The Loan Agreement is consistent with the status of matters as at late 2020 when the foreclosure dust had settled.

[138] In addition, issues arise from the unusual fact that Mr. Gosal is unable to produce any written evidence of the Loan Agreement. There is no other document that even mentions the Loan Agreement to provide corroboration of its existence and Mr. Gosal’s February 2021 document confirming the shredding of “materials” does not establish that the Loan Agreement was among them.

[139] The only corroborating evidence concerning the Loan Agreement arises from Mr. Bouchard's evidence where he states that, in June 2017, he "saw" the Loan Agreement.

[140] A question arises in respect of Mr. Bouchard's evidence. Why, in August 2022, would Mr. Bouchard, an accountant, refer to the \$1.1 million loan from 105 as having a 10% interest rate in his draft financial review, when he later attached the Ledger in his April 2023 affidavit referring to the interest as being 12%, per the Loan Agreement that he "saw" years before?

[141] With respect, I find Mr. Bouchard's evidence vague and unhelpful and I placed no weight on it. He does not provide any context as to how he saw the Loan Agreement and in which form. Nor does he state how he recalls "seeing" something almost five years earlier and the circumstances which led to him recalling that occasion.

[142] As Forjay's counsel notes, in the past, when 625 borrowed monies, it was documented by a director's resolution and placed in the Minute Book. 625's Minute Book is in evidence before me and does not contain any record of the amounts purportedly borrowed under the Loan Agreement.

[143] I find as a fact that the clear inference that arises is that Mr. Gosal created and executed the Loan Agreement in response to this show cause hearing in late 2022 while preparing his defence of this application, and for the purpose of asserting that it supported that the Transactions were done in good faith and for valuable consideration.

[144] In that regard, Mr. Gosal's efforts to mislead the Court in that respect stand as a further "badge of fraud" in attempting to conceal his fraudulent intention behind the Transactions.

[145] Further, Mr. Gosal relies on the Loan Agreement as providing some basis for the Transactions, in that it purported to transfer the Property to 105 if there was insufficient equity in 098's development property to pay 625's third mortgage.

[146] Numerous questions arise from this assertion—for which no answer is forthcoming. For example, why would repayment of the legal fees be tied to recovery of the principal and interest under the third mortgage, rather than repayment of the legal fees by 098 as mortgagor? Also, why would legal fees not be repayable in any event?

[147] Further, the financial details of the Transactions themselves is a confusing and confused set of numbers. This confusion is only exaggerated by Mr. Bouchard's evidence and the varying interest rates, being 5% (as stated in the 105 Mortgage), 10% (per Mr. Bouchard's draft financial review) or 12% (under the Loan Agreement and the Ledger).

[148] Mr. Dhaliwal's involvement in the 105 Transfer also gives rise to more questions than answers. Mr. Dhaliwal has not provided any evidence as to his involvement. By all accounts, Mr. Gosal contacted him on October 22, 2021 and Mr. Dhaliwal arranged for the 105 Mortgage to be executed that same day, again indicating haste. The Buyer Statement of Adjustments is a curious document, indicating that 625 was "credited" for the purchase price with the mortgage amount. Inexplicably, the "balance" due to 625 was then stated to be "secured as loan against 625" which seems to imply that 625 still owed the difference. However, that was the case even before the transfer, and also arose from the 105 Mortgage.

[149] Many questions arise. Why was the 105 Mortgage at a 5% interest rate, when the Loan Agreement says 12%? Further, what was the point of transferring the Property to 105 under the 105 Transfer if the 105 Mortgage was already in place only about a week earlier? Mr. Gosal states that he thought the Property was valued at \$458,000, the previous years' assessed value. If so, this was less than what was owed to the CRA, so recovery under the 105 Mortgage would already have been questionable, let alone the value of any equity of redemption held then by 625.

[150] One explanation that arises from the evidence is that the 105 Mortgage was done in haste and without due regard to the details and that, shortly after, Mr. Gosal re-conceived how he could protect the Property by hastily arranging the

105 Transfer, again with murky financial details. I infer from the evidence that this is what occurred here.

[151] I conclude that 105 and Mr. Gosal have failed to meet their onuses of showing that they acted in good faith in respect of the Transactions. Consequently, no s. 2 defence can arise under the *FCA*.

(iii) Consideration

[152] There is also the matter of consideration from 105 for the transfer.

[153] 105's position is that it gave good consideration for the grant of the 105 Mortgage and the 105 Transfer.

[154] 625 transferred the legal estate in the Property to 105 under the 105 Mortgage in consideration for the funds allegedly advanced under the principal amount of \$1.1 million. Per the Ledger created in early 2023, the first advance was said to have been made on August 29, 2017 and the last advance on November 12, 2020. Mr. Gosal's evidence is that at no point has 625 ever made a payment to 105 on account of the loans advanced. There is also no evidence that 105 ever demanded payment of those loans.

[155] Under the 105 Transfer and the Buyer Statement of Adjustments, 625 transferred the Property to 105 in exchange for 105's payment of the \$1,110,000 purchase price by way of: (a) forgiveness of (or "in lieu of") the 105 Mortgage; and (b) a balance of \$652,000 owed by 625.

[156] As above, the structure of the Transactions and their effect is extremely confusing as to what was intended from Mr. Gosal's point of view. By all accounts, what was achieved was a complete transfer of whatever equity (the existence of which is questionable) was held by 625 in the Property to 105, either by the 105 Mortgage or the 105 Transfer. Depending on how much value is ascribed to that equity (if any), and assuming it is less than \$1.1 million, some amount would be still

be owed by 625, although Mr. Gosal clearly had no expectations of further repayment.

[157] Forjay does not deny that 105 paid for 625's legal fees during the foreclosure. I agree that the evidence from Mr. Shragge's office as to who paid for his legal bills supports that these funds came from 105.

[158] However, Forjay's position is that 105 gave only past consideration and therefore no consideration for the 105 Mortgage. Further, following the Court's rejection of the Loan Agreement as a fiction, Forjay confirms its position that the 105 only gave past consideration.

[159] It is generally accepted that past consideration is no consideration: *Western Prosperity Investment Holdings Ltd. v. Good Star Enterprises Ltd. et al.*, 2000 BCSC 1663 [*Good Star*] at para. 34. However, it has also been held that a conveyance to secure an existing debt may be a conveyance for good consideration where there is an "aspect of forbearance in suing on the debt" or the circumstances are such that forbearance may be implied: *Good Star* at paras. 34-36, citing *First Royal Enterprises Ltd. v. Armadillo's Restaurant Ltd.*, [1994] B.C.J. No. 1766 (S.C.) [*Armadillo*] at para. 23, rev'd on other grounds (1995), 15 B.C.L.R. (3d) 254 (C.A.), and *Glegg v. Bromley*, [1912] 3 K.B. 474 (Eng. C.A.). In such cases, forbearance comprises an "additional benefit accruing to the grantor at the time of disposition": *Armadillo* at para. 23. See also *College Park Projects Inc. v. 430872 B.C. Ltd. et al.*, 2004 BCSC 955 at paras. 82-86.

[160] The above cases, which all also involve mortgages granted to non-arm's length parties, can be distinguished on two points. After the grant of the impugned mortgages: (a) the transferee-mortgagee provided to the transferor-mortgagor further and additional time to allow for payment of the underlying debt (i.e. a forbearance period); and (b) during the forbearance period, the mortgagor advanced further monies to the transferor-mortgagor thereby increasing the underlying debt. Such elements show a *bona fide* intention by the transferor-mortgagor *at the time of*

the impugned conveyance to both delay enforcement (i.e. forbear) and continue the financially supportive relationship (i.e. the *status quo*).

[161] Here, 105 made no further advances to 625 after the grant of the 105 Mortgage, nor did it extend to 625 a forbearance period. In fact, the evidence demonstrates that 105 had no intention of enforcing its loans in the first place. The 105 Transfer was completed only a week after the 105 Mortgage. At the time of the Transactions, since 625 had no ongoing business or assets apart from the Property, the dispositions had the effect of being a complete and final enforcement by 105 to collect the loans.

[162] 105 argues that 625 received a benefit from the Transactions because the CRA debt was taken on by 105. However, there is no evidence that there was a novation of the debt owing by 625 such that it was assumed by 105. Even after the 105 Transfer, 625 was and remains fully responsible for the CRA debt.

[163] Even assuming that 105 paid some consideration in the form a reduction of the amount owed under the loans, this would not save the Transactions as such consideration was inadequate.

[164] 105's own evidence is that the market value of the Property at the time of the Transfer was \$740,000, now confirmed by the retrospective appraisal obtained by Mr. Gosal. By comparison, the Buyer Statement of Adjustments indicates that only true consideration paid was \$458,000 (in lieu of the 105 Mortgage) and that the \$652,000 remained owing. The difference between \$740,000 and \$458,000 is \$282,000. I agree with Forjay that, even accepting that some consideration was paid by 105, it was not in the range of fair market value, neither is it a "fair price", and therefore the credited amount for the 105 Mortgage does not constitute adequate or "good" consideration under s. 2 of the *FCA*. "Good consideration" means valuable consideration or more than nominal consideration: *Boale, Wood & Company Ltd. v. Whitmore*, 2017 BCSC 1917 at para. 58, citing *Chan v. Stanwood*, 2002 BCCA 474 at para. 19.

[165] Having found that 105 did not pay adequate or “good” consideration for the Transactions, 105 is unable to mount any defence under s. 2 of the *FCA*.

[166] In the alternative, even if I had considered that 105 had paid good consideration for the Transactions, that is not sufficient in light of my findings of a lack of *bona fides* as to the Transactions themselves and as to Mr. Gosal’s actions in relation to this show cause hearing itself.

Did 105 have an interest in the Property otherwise?

[167] 105’s initial position is that, by the Loan Agreement, 625 granted to 105 an “interest” in the Property or in the alternative, an equitable mortgage. I have already rejected the Loan Agreement as a valid document.

[168] In any event, I would note that the Loan Agreement does not grant 105 a security or other interest in the Property. It does not require 625 to grant a mortgage in favour of 105, such as the 105 Mortgage. The document does refer to a “transfer”—however, as 105 well knew, after the 105 Mortgage was granted, 625 no longer held legal title to the Property—only the equity of redemption.

[169] During 105’s counsel’s submissions, he confirmed that this argument was not really intended to prove any “interest” in the Property *per se*; rather, this was more in the nature of background toward the issue as to whether there was a fraudulent intent in effecting the Transactions.

[170] I have already addressed the issues of fraudulent intent in my discussions above and therefore, no further discussion of this aspect of 105’s argument need be addressed.

CONCLUSION / ORDERS GRANTED

[171] I conclude that the “badges of fraud” establish a *prima facie* intention on the part of 625 to delay and defeat Forjay’s claim, given that 625 had notice of the costs application when the application materials were delivered in September 2021. As

stated, 625 does not assert any evidence or position in opposition to that presumption.

[172] I also conclude that 105 has not met its onus of establishing any defence under s. 2 of the *FCA*. Specifically, I have found that the Transactions were not made in good faith to 105, they did not constitute adequate consideration and/or Mr. Gosal, as 105's representative, had full notice of 625's presumed intention to effect the Transactions as a response to avoid any judgement that Forjay might obtain for costs.

[173] In these circumstances, 105 has not rebutted the presumption of fraud.

[174] I grant the order sought by Forjay.

[175] In addition, I am satisfied that Forjay should be granted their special costs of and in relation to this show cause application. Special costs are generally awarded only when there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties; however, the term "reprehensible" has been observed to also capture "milder forms of misconduct deserving of rebuke": *Westsea Construction Ltd. v. 0759553 B.C. Ltd.*, 2013 BCSC 1352 at paras. 28-31.

[176] Special costs may be justified where a party relies on misleading or false evidence or testimony that is contrived to deceive the court: *Neural Capital GP, LLC v. 1156062 B.C. Ltd.*, 2022 BCSC 1800 at para. 14(b). Here, I have found that Mr. Gosal has put forward false or contrived evidence that I consider is reprehensible conduct deserving of rebuke.

[177] The order granted is summarized as follows:

- a) The 105 Mortgage and 105 Transfer are declared to be fraudulent within the meaning of the *FCA* and *FPA* and are of no force and affect as against Forjay, including in respect of the Costs Award;
- b) Upon presentation of the Costs Award for registration at the LTO:

- i. the Costs Award shall be registered against the Property; and
 - ii. the 105 Mortgage shall be expunged from the Property;
- c) Forjay is entitled to pursue their just and lawful remedies against 625 as if 625 were still the legal and beneficial owner of the Property to the same extent as before the Transactions;
- d) 625 and 105 are restrained from disposing of, encumbering, or dealing with the Property;
- e) The Property shall be sold to realize and pay the Costs Award, subject to the CRA Judgment. Forjay shall have conduct of the sale of the Property, which shall be on the usual terms as to listing, commissions and access. Any proposed sale shall be subject to court approval, unless otherwise agreed by Forjay, 625, 105 and the CRA;
- f) Forjay has liberty to apply to the Court for further directions as may be necessary; and
- g) Forjay shall have their special costs from the date of the Costs Award, to be added to the Costs Award. Forjay is at liberty to apply to fix those special costs.

“Fitzpatrick J.”