Court of King's Bench of Alberta

Citation: Brokop v 1378882 Alberta Ltd, 2023 ABKB 650

2023 ABKB 650 (CanLII)

Date: 20231117
Docket: 1801 16539
Registry: Calgary

Between:

Erwin Brokop and 866565 Alberta Ltd.

Plaintiffs

\- and -

1378882 Alberta Ltd., William Harris, Luba Harris, Samuel Harris. John Doe and ABC Corporation

Defendants

Reasons for Decision
of the
Honourable Justice B.E. Romaine

I. Introduction

[1] The Plaintiffs are judgement creditors of 1378882 Alberta Ltd. in the amount of $2,242,750. 137 was a company owned and controlled by Jon Harris. It no longer exists, having been struck from the corporate registry in 2021. Jon Harris declared bankruptcy and has received a conditional discharge.

[2] The Plaintiffs in this complex and unfortunate series of events seek to recover a portion of their award of damages from the estate of Jon Harris' father, Willam Harris, his ex-wife Luba Okun-Harris and Jon Harris' son Samuel Harris.

[3] Ms. Okun-Harris and Samuel Harris seek to vacate default judgements obtained by the Plaintiffs against them. By way of summary judgement, the Plaintiffs seek a declaration that a conveyance of funds from 137 to an account in the name of William Harris be declared void, an order that William Harris (now his estate) return the funds, or in the alternative, judgement

against William Harris. The estate of William Harris (hereafter referred to as William Harris) seeks summary dismissal of the Plaintiffs' claim.

II. Issues

a) Should the default judgements against Ms. Okun- Harris and Samuel Harris be vacated?

b) Was the $2 million transferred by 137 to a bank account in the name of William Harris a fraudulent conveyance?

c) Are the Plaintiffs entitled to summary judgement against the Defendant William Harris?

d) Do the Plaintiffs have leave to amend their pleadings to allege conspiracy?

e) Is William Harris entitled to summary dismissal of the claims made against him by the Plaintiffs?

2023 ABKB 650 (CanLII)

III. Relevant Facts

[4] On March 16, 2009, a partnership interest in a development known as "the River" was transferred by the holder Edgewood Properties Ltd., a company controlled by Jon Harris, to 137.

[5] On May 18, 2011, 137 sold the partnership interest and $2,242,750 was deposited into its account.

[6] On July 5, 2017, Horner, J, as case management Justice in related litigation, issued an order that provided that:

a) the transfer by Edgewood of its partnership interest to 137 was declared void as against the Plaintiffs in that action (being the same Plaintiffs as in this action) on the basis of the *Statute of Elizabeth*, 1571 (UK) 13 Eliz, c.5;

b) the Plaintiffs shall recover from 137 for the benefit of the creditors of Edgewood judgement in the amount of $2,242,750;

c) notwithstanding this judgement, the Plaintiffs have leave to seek further declarations that "such" transfers were void or voidable on the basis of fraudulent conveyances or fraudulent preferences within the meaning of the *Fraudulent Preferences Act (Alberta)*, RSA 2000 Chapter F-24, or the *Statute of Elizabeth*; and

d) the Plaintiffs were granted a tracing order.

[7] Jon Harris made a voluntary assignment into bankruptcy on August 22, 2017. He applied for an absolute discharge on April 8, 2021.

[8] In their brief in opposition to Jon Harris' discharge from bankruptcy, the Plaintiffs asserted, among other things, that Jon Harris had complete control over 137. Their submissions were supported by an affidavit and attached report ("the Jiminez Report") that analyzes how Jon Harris exercised that control to convey 137's assets:

a) On May 30, 2011, approximately $2 million of the sale proceeds were deposited by way of bank draft from 137 into an account in the name of William Harris. Both Jon Harris and William Harris had signing authority on the account; and

b) The $2 million in funds were returned from this account to 137 over the following two years.

[9] The Plaintiffs' brief also asserted that:

a) Jon Harris' own testimony on questioning confirmed that his father did not write cheques;

b) Jon Harris treated the property of 137 as his own, retained personal control over the property and hid the existence of the scheme from creditors; and

c) Jon Harris "used his aging father, who lacked capacity, as an account holder for the fraudulent conveyance".

[10] The Defendants do not contest these assertions.

[11] The discharge application was heard by Registrar Farrington, who issued oral reasons for his decision on June 6, 2022: ***Harris (Re)***, 2022 ABQB 381.

[12] Registrar Farrington found that:

a) "this [was] not a "do-over" of the prior litigation" between Erwin Brokop and Jon Harris; the relationship between Erwin Brokop and Jon Harris went back to at least 2006; some of the key events happened in 2009; and security enforcement and demands commenced in approximately 2010;

b) for the purposes of the discharge application, he would focus on a critical series of transactions that happened in May 2011:

> "Of the money received, Mr. [Jon] Harris arranged for payment of $2 million to his father [William Harris]. I really cannot think of a different description of the transaction than to describe it as "parking" funds with his father. I use that term because ultimately, almost all of the money flowed back to Mr. [Jon] Harris."

c) "The area that I focus on most for the purposes of this discharge application is the deposit of funds with Mr. [Jon] Harris' father. Those funds flowed back to either Mr. [Jon] Harris or his business ventures";

d) "I do not think that this is an appropriate case for a significant monetary conditional discharge order that Mr. [Jon] Harris cannot meet"; and

e) "In my view, an appropriate manner of balancing the relevant principles is to grant a discharge, but to suspend the discharge of Mr. [Jon] Harris for two years, which is commensurate with the length of time during which the funds were used to furnish an enhanced lifestyle when the profitability of the various developments had clearly ended."

[13] Thus, the effective date of Jon Harris's discharge from bankruptcy will be June 6, 2024.

2023 ABKB 650 (CanLII)

[14] Many of the particulars of the relationship between the Plaintiffs and Jon Harris are not relevant to these applications. What is relevant is as follows:

a) the transfer of the partnership interest and the deposit of funds in the account of 137 took place while security enforcement and litigation were underway between Mr. Brokop and Jon Harris and his companies;

b) the funds arising from what Horner, J declared in July 2017 was a void transaction between Edgewood and 137 in 2009 were in May 2011 conveyed by 137 to a bank account in the name of William Harris; and

c) the funds were returned from this bank account to 137 within the next two years, thus by sometime in 2013.

2023 ABKB 650 (CanLII)

[15] Ms. Okun-Harris and Jon Harris separated in 2013. Her uncontested evidence is that she has had little contact with him since then. Ms. Okun-Harris indicates in her affidavits that she has had persistent health problems since about 2008/2009 that have affected her memory and cognition. Samuel Harris was diagnosed with cancer in 2011, the year before he is alleged to have received money from Jon Harris. He is currently cancer-free but has had several periods of time during which his cancer and resulting mental health issues left him disabled and unable to work.

IV. Application to Vacate Default Judgements

[16] The first application to be heard was the application of Ms. Okun-Harris and Samuel Harris to vacate the default judgements entered against them.

[17] This action was commenced in November 2018. On August 19, 2020, Samuel Harris was noted in default. On November 3, 2020, Ms. Okun-Harris was noted in default. They were represented by previous counsel, and it appears that this counsel had made attempts to have the claims against them dismissed but had not filed Statements of Defence on their behalf.

[18] Unbeknownst to either of them, the Plaintiffs took steps to obtain default judgement against them on June 2, 2022, which was served on them between June 7 and 9, 2022, after their previous counsel ceased to act on their behalf.

[19] Ms. Okun-Harris took immediate steps to apply to vacate the default judgement. Samuel Harris, through his new counsel, advised of his intention to apply to vacate the default judgement, but his application to do so was not filed until March 2023.

[20] The parties have agreed that Ms. Okun-Harris and Samuel Harris have met some of the criteria of the oft-cited 3 part test to determine whether it is fair to set aside a default judgement, endorsed by the Court of Appeal in ***Fort McKay Metis Community Association v Morin***, 2020 ABCA 311. However, the Plaintiffs submit that neither Defendant has “an arguable defence” and that Samuel Harris has not met the requirement of prompt action to reopen the judgement.

[21] The governing consideration of applications to set aside a judgement under Rule 9.15(3) is what is fair in the circumstances. As noted in ***Fort McKay***, the Rule allows some discretion, as the Court can set aside a judgement “on any terms the Court considers just”.

[22] Greckol, J, as she then was, noted in ***3S Resources Inc v Improvisions Inc***, 2014 ABQB at para 49, a case similar to this in that it involved a solicitor’s negligence:

> The ***Gottlieb*** decision is compelling authority in favour of the Defendants' application. So too is the decision in ***Halton Community Credit Union***, a case where the Court set aside default judgment on the basis that a client not be placed irrevocably in jeopardy by the neglect or inattention of the solicitor, if relief can be granted on terms that protect the thrown away costs and the security of the adversary's legal position. This sentiment was echoed in ***Vandersloot***, where the Court ultimately ruled that the interests of justice favoured the Defendant having her day in Court. This decision of the Ontario Court of Appeal endorses the view that such matters be approached liberally because it is in the public interest that, whatever the outcome, a litigant should perceive that she had her day in Court and a fair chance to make out her case. (underline added, bold in original):

2023 ABKB 650 (CanLII)

[23] With respect to the requirement of an arguable defence, a defendant need not prove that the defence will be successful, only that it is arguable. However, some credible evidence must be adduced to demonstrate a viable defence: ***Fort McKay*** at para 13.

[24] Both of these Defendants deny any improper receipt of money from Jon Harris, and given the passage of time, say that they do not have any specific or direct information or records about the various payments alleged to have been paid to them. They submit that they cannot independently recall the alleged transactions. Both indicate that only Jon Harris would have that information, and both indicate that they no longer have any money that they may have received. Neither feels that they can obtain truthful information from Jon Harris without compulsion in litigation. This belief is supported by the history of the Plaintiffs' attempts to question Jon Harris.

[25] The Plaintiffs submit that Ms. Okun-Harris and Samuel Harris have shown no defence other than a bare denial, or a submission that they cannot recall the circumstances under which they may have received payments from 137.

[26] This is not correct. The Plaintiffs rely on the Jiminez Report, which suggests that between May 18, 2011 and October 7, 2014, Ms. Okun-Harris received payments from 137 over 3 ½ years (15 payments) totalling about $88,000, and that her family law counsel received about $5000.

[27] However, Ms. Okun-Harris, relying on the same Jiminez Report, notes that about 94% of the funds alleged to have been received by her were applied to a line of credit that may have only been in Jon Harris' name or in their joint names and a VISA card that, again, may have been in his name or in their names jointly. She says that both she and Jon Harris had VISA credit cards and the bulk of the purchases appear to have been made on his account. The Jiminez Report describes the line of credit and VISA cards as the "Jonathan Harris TD line of credit and TD VISA" and notes that the payments alleged to have gone to Ms. Okun-Harris "appear to go to the TD line of credit and VISA card also paid by Johnathan Harris."

[28] The Plaintiffs submit that Ms. Okun-Harris must have been privy to the fraud on the basis of "badges of fraud"; specifically, that Ms. Okun-Harris was Jon Harris' wife, that she received a benefit, that Jon Harris was insolvent at the time and that the payments were made in suspicious circumstances.

[29] Indicia or "badges" of fraud have been recognized by the Courts in a number of cases, including in ***Ernst & Young Inc v Aquino***, 2021 ONSC 527 at para 153. An inference of intent

to defraud, defeat or delay a creditor may arise from the existence of one or more of these badges: "but whether the intent exists is a question of fact determined from all of the circumstances as they existed at the time of the conveyance... The focus must remain on the belief and intention of the debtors at the time, as well the reasonableness of that belief in light of the circumstances then existing.": para 152 of ***Ernst & Young***, citing ***Montor Business Corp. (Trustee of) v Goldfinger***, 2013 ONSC 6635.

2023 ABKB 650 (CanLII)

[30] The existence of a badge of fraud may be enough to establish a defendant's illegal purpose, unless he or she can provide an innocent explanation. It creates a rebuttable presumption of the intention to defraud, defeat or delay creditors with the result that the onus is then shifted to the defendant to adduce evidence to show the absence of fraudulent intent: ***Ernst & Young*** at para 155-160.

[31] Ms. Okun-Harris provides uncontradicted evidence of her circumstances, including that the parties separated during the years the payments were alleged to have been made, that they were having marital difficulties before the separation, and that Jon Harris handled all financial matters.

[32] With respect to the latter circumstance, the Plaintiffs in their opposition to Jon Harris' discharge application submitted that Jon Harris treated the $2 million as his own and retained personal control over the property.

[33] The Jiminez Report also indicates that between May 2011 and December 2015, $4,745,484 was deposited into the 137 account, including the roughly $2 million at issue.

[34] It appears funds from other sources were deposited into the account from time to time, leading to questions about the source of the funds that were allegedly paid to the Defendants.

[35] The Plaintiffs seek to attack Ms. Okun-Harris' credibility by comparing her evidence in her first affidavit to that in her second affidavit. This however is explained by the fact the Ms. Okun-Harris had not had access to the Jiminez Report when she filed her first affidavit and responded to the report in her second.

[36] While it may be true that all defendants in the position of Ms. Okun-Harris and Samuel Harris will deny involvement in a fraudulent transaction, some of these denials may be true.

[37] Ms. Okun-Harris raises triable issues of fact, together with defences based on the question of liability of innocent family members implicated in a fraud. Both she and Samuel Harris submit that they have limitations of actions defences to the claims and that they may have an indemnification claim against Jon Harris. As noted later in this decision, issues have been raised about limited nature of remedies available under the *Fraudulent Preferences Act* and the *Statute of Elizabeth*.

[38] Therefore, Ms. Okun-Harris has an arguable defence to the claims, including with respect to the amount of damages claimed, and the default judgement against her must be set aside.

[39] The Jiminez Report indicates that between June 19, 2021 and April 29, 2013, Samuel Harris received about $37,000 in 14 payments over 10 months, although the default judgement against him is in the amount of $46,000. The Plaintiffs concede that judgement for $46,000 rather than $37,000 is incorrect.

[40] Jon Harris in his brief filed in the bankruptcy discharge application stated that he made payments to Samuel Harris for his medical expenses and living expenses while his son was suffering from cancer and mental health issues arising from his health difficulties.

[41] Samuel Harris' uncontradicted evidence is that he was in his early 20s at the time he received the alleged payments, and that they were made shortly after his recovery from cancer and chemotherapy, at a time when his mental health had deteriorated significantly and he was unable to work. He required very expensive medications. He says he didn't know what entities the payments were coming from and had no reason to suspect anything untoward about the source of the funds.

[42] The Plaintiffs submit that Samuel Harris must have been be implicated in Jon Harris' fraudulent conduct by reason, again, of the "badges of fraud"; that he is Jon Harris' son, and that he must have found the circumstances of the payments suspicious.

[43] However, Samuel Harris' evidence of the circumstances surrounding the receipt of alleged payment discounts the persuasiveness of these badges of fraud.

[44] At the least, Samuel Harris has raised triable issues of fact with respect to how much money he may have received and whether he was an innocent party to his father's fraudulent conduct.

[45] I find that Samuel Harris has established an arguable defence to the claims.

[46] With respect to whether he moved quickly enough to apply to set aside the default judgement, I note that he indicated his intention to do so promptly after he had found new counsel. I accept that the failure to file a formal application until later was due to the fact that the parties understood that all of these applications would be heard together.

[47] In conclusion, I grant an order setting aside the August 19, 2020 and November default notices and the June 1, 2022 default judgement and allow Ms. Okun-Harris and Samuel Harris leave to defend. Their Statements of Defence must be filed within 30 days of the later of the filing of an Order arising from this decision or the filing and serving of an Amended Statement of Claim.

V. Summary Judgement Application against William Harris

[48] The Plaintiffs submit that the $2 million that was transferred by 137 to the bank account in the name of William Harris was a fraudulent conveyance, and that they are entitled to judgement or, in the alternative, damages as against Willian Harris in the amount of $2 million.

[49] In ***Weir-Jones Technical Services Incorporated v Purolator Courier Ltd***, 2019 ABCA 49 at para 47, the Alberta Court of Appeal identified key considerations to guide courts in determining the merits of a summary judgment application:

> a) Having regard to the state of the record and the issues, is it possible to fairly resolve the dispute on a summary basis, or do uncertainties in the facts, the record or the law reveal a genuine issue requiring a trial?
>
> b) Has the moving party met the burden on it to show that there is either "no merit" or "no defence" and that there is no genuine issue requiring a trial? At a threshold level the facts of the case must be proven on a balance of probabilities

2023 ABKB 650 (CanLII)

or the application will fail, but mere establishment of the facts to that standard is not a proxy for summary adjudication.

c) If the moving party has met its burden, the resisting party must put its best foot forward and demonstrate from the record that there is a genuine issue requiring a trial. This can occur by challenging the moving party's case, by identifying a positive defence, by showing that a fair and just summary disposition is not realistic, or by otherwise demonstrating that there is a genuine issue requiring a trial. If there is a genuine issue requiring a trial, summary disposition is not available.

d) In any event, the presiding judge must be left with sufficient confidence in the state of the record such that she is prepared to exercise the judicial discretion to summarily resolve the dispute.

2023 ABKB 650 (CanLII)

[50] The Plaintiffs' claim is founded in the *Fraudulent Preferences Act* and the *Statute of Elizabeth*.

[51] The Plaintiffs rely on section 11 of the *Fraudulent Preferences Act*, which provides as follows:

> **11(1)** If a gift, conveyance, assignment or transfer of any property, real or personal, that in law is invalid against creditors, was made to a person, and that person has sold or disposed of, realized or collected the property or a part of it, the money or other proceeds or that amount, whether further disposed of or not, may be seized or recovered in an action by a person who would be entitled to seize and recover the property if it had remained in the possession or control of the debtor or of the person to whom the gift, conveyance, assignment, transfer, delivery or payment was made.
>
> **...**
>
> **(4)** Whether the proceeds are or are not of such a character as to be seizable under writ proceedings, an action may be brought for them or to recover the amount of them by a creditor, whether a judgment creditor or not, on behalf of that creditor and all other creditors, or any other proceedings may be taken that are necessary to render the proceeds or the amount of them available for the general benefit of the creditors.
>
> **(5)** This section does not apply as against innocent purchasers of any of the property.

[52] The rights set out in section 11 exist in favour of all creditors of the debtor, and any proceeds resulting from a seizure under writ must be distributed among creditors under the *Civil Enforcement Act*.

[53] William Harris submits that there is no merit to the Plaintiffs' current claims against him as:

a) all of the $2 million transferred by 137 into the bank account held in William Harris' name has been traced back to 137 and Jon Harris, either directly or by way of payments made on their behalf;

b) William Harris received no benefit from the $2 million;

c) William Harris had no involvement in the bank account other than it being held in his name;

d) all of the transactions into and out of the bank account were made by Jon Harris, and William Harris was not privy to any of them;

e) Registrar Farrington found in his decision in the Jon Harris discharge application that;

   (i) the $2 million deposit was a "parking of funds by Jon Harris"; and

   (ii) the money "flowed back either to [Jon] Harris or his business ventures"; and

f) the transfer of the $2,000,000 at issue from the bank account in the name of William Harris back to 137 and Jon Harris all took place on or before December 2014. This was more than two and half years before the Plaintiffs became judgement creditors of 137 and Jon Harris, and nearly four years before the Plaintiffs commenced this action by way of the Statement of Claim filed November 21, 2018.

[54] It is noteworthy that, in their brief in opposition to the discharge from bankruptcy of Jon Harris, the Plaintiffs asserted the following:

a) the sole shareholder of 137 was the "Harris Family Trust";

b) Jon Harris had complete control and autonomy over 137, which control could not be changed or removed by any of the shareholders;

c) the Jiminez Report notes that the $2 million deposited into the bank account in the name of William Harris was returned from that account to 137 over the following two years;

d) Ms. Jiminez concludes in her report that "a significant portion of the funds disbursed are for the benefit of Mr. Jon Harris and his family";

e) Jon Harris along with "members of his family, <u>excluding his father</u>, received a total of $1,328,627 from 137";

f) although Jon Harris asserted otherwise in questioning, "the statement that [Jon Harris] didn't write the cheques that diverted payment from the William Harris Account is without merit. [Jon Harris] own testimony confirms the father didn't write cheques. [Jon Harris] has never provided an explanation as to how the payments went back and forth between [the William Harris account] and accounts belonging to 137;

g) the Harris Family Trust and 137 were "shams", and Jon Harris maintained exclusive control over the corporation and the dissipation of its assets; and

h) "[Jon Harris] used his aging father, who lacked capacity, as an account holder for the fraudulent conveyances and to dissipate the trust's assets."

2023 ABKB 650 (CanLII)

[55] An affidavit in response to written interrogatories sworn by Peter Farkas, the litigation representative of William Harris, and a redacted version of a transcript of oral questioning of Peter Farkas indicate the following:

- William Harris passed away on March 20, 2022 at the age of 101. All questioning for the purposes of discovery of the Litigation Representative of the Defendant, William Harris had been conducted and concluded prior to William Harris' death;
- William Harris made no use of the bank account in his name;
- William Harris had no knowledge or understanding of any of the transactions that took place regarding the bank account;
- Willian Harris was in his early nineties in May 2011 when the $2,000,000 was transferred from 137's bank account into the bank account in his name; and
- The Plaintiffs' have previously submitted to the Court that the Defendant, William Harris "lacked capacity, as an account holder" of the account in his name

2023 ABKB 650 (CanLII)

[56] A capacity assessment performed on November 17, 2020 concluded that William Harris lacked capacity from sometime prior to November 17, 2020.

[57] The Farkas affidavit asserts that, prior to William Harris' death, Mr. Farkas spoke to him, and that William Harris advised that:

a) he never had an involvement with 137, nor any of Jon Harris' other companies; and

b) he received no benefit from, nor kept any money, transferred into the account in his name.

[58] The affidavit also asserts that, to Mr. Farkas' best knowledge:

a) Jon Harris was the only person (other than William Harris) to have signing authority on the William Harris account and the ability to use the William Harris account;

b) all transactions concerning the William Harris account were transacted by Jon Harris

[59] The Jiminez Report makes the following assertions:

> Approximately, one month after receipt of the $2,000,000 from 137882 Alberta Ltd., <u>$1,500,000 is invested with the Bank of Montreal</u>. These funds are subsequently cashed out of investments and re-invested over the next two years. <u>A total of $22,016 is earned on these investments and deposited</u> <u>back into the account of Mr. William Harris.</u> An additional $3,026 is deposited in US funds from an unknown source, This brings the total deposits into this account to $2,025,042. These funds are <u>distributed as follows</u>:

Recipient	**Amount ($)**
Related Parties	
1378882 Alberta Ltd.	1,149,600
Parkbench Holdings Ltd.	2,450
	1,152,050
Mr. Jonathon Harris and Family	
Jonathan Harris	628,400
Bill Payment (Shaw Cable)	273
	628,673
Legal Matters	
Shea Nerland Colnan (Peoples Trust Settlement)	230,000
	230,000
Unknown	
Unknown Payments (amount from $1000 to $8,113)	
	14,319
	14,319

No supporting documentation was provided for the investments made from the account of Mr. William Harris. Investment information including earnings has been assumed based on deposits back into bank account from investment accounts. ***It appears that all funds returned back into the account of William Harris from these investments are paid directly to Mr. Jonathan Harris, as noted at 2.2.1 above.*** (Emphasis added, bold in original)

[60] As indicated in the evidence provided by both William Harris and the Plaintiffs:

a) William Harris had no knowledge or understanding of any of the transactions that took place regarding the bank account;

b) William Harris had no involvement with the bank account other than that such bank account was opened in his name;

c) Jon Harris had signing authority on the bank account and the ability to use it;

d) all transactions concerning the bank account were transacted by Jon Harris;

e) Jon Harris "had complete control over 137" and "maintained exclusive control over the corporation and the dissipation of its assets";

f) Jon Harris wrote cheques on the bank account;

g) William Harris (Jon Harris' father) "didn't write cheques";

2023 ABKB 650 (CanLII)

h) Jon Harris treated the $2,000,000 "as his own" and "retained" personal control over the property; and

i) most significantly, the Plaintiffs have previously submitted to this Court that William Harris "lacked capacity" and that Jon Harris "used his aging father, **who lacked capacity**, as an **account holder** for the fraudulent conveyances".

2023 ABKB 650 (CanLII)

[61] Thus, it appears even from the evidence of the Plaintiffs that William Harris had no involvement in the deposit and return of the $2,000,000 at issue to and from the bank account in his name.

[62] The Plaintiffs have thus been unable to establish that William Harris was "a person [who] has sold or disposed of, realized or collected..." the $2,000,000, or any part of it, other than the fact that the funds were parked temporarily in the account in his name. It is clear from the evidence that Jon Harris deposited the funds and was then responsible for their return to 137 or himself.

[63] The funds are no longer in the bank account in the name of Willam Harris. Section 11 of the *Fraudulent Preference Act* is not a strict liability provision. William Harris did not sell, dispose of, realize or collect the funds. The money cannot be seized from William Harris, who no longer has it in his bank account. Section 11 states that the money "may be seized and recovered", but it is no longer there.

[64] Nor was it disposed of by William Harris such that it can be traced to further funds or assets belonging to him.

[65] The Plaintiff submit that William Harris "knowingly assisted" the fraud in that he allowed his account to be used to "park" the funds.

[66] However, no evidence exists as to why the account was created. An absence of evidence does not justify to the conclusion that William Harris opened the bank account with the intention of assisting his son in evading creditors. The evidence does not support the implication that the Plaintiffs seek to draw.

[67] Most importantly, the Plaintiffs' arguments fail to recognize that the subject funds were returned to 137 or Jon Harris. If the funds had remained in the account in the name of William Harris, if there had been any evidence that William Harris used or disposed of the funds, a case for seizure of the funds from the bank account or whenever William Harris had disposed of the funds may have merit but that is not the case.

[68] In the circumstances, no liability can be attached to William Harris under section 11 of the *Fraudulent Preference Act*.

[69] The Plaintiffs also rely on the *Statute of Elizabeth*.

[70] In ***Palechuk v. Fahrlander***, 2006 ABCA 242 at paras 31-32, the Alberta Court of Appeal noted that to obtain a remedy under the ***Statute of Elizabeth***, the plaintiff must establish the following:

(1) there must be a conveyance of real or personal property;

(2) for no or nominal consideration;

(3) with intent to defraud, delay, or hinder creditors;

(4) the party challenging the conveyance must be someone who was a creditor at the time of the conveyance or someone with a legal or equitable right to claim against the transferor; and

(5) the conveyance must have had the intended effect.

[71] While the Plaintiffs may have grounds to establish that Jon Harris had the "intent to defraud, delay or hinder creditors", the same cannot be said of William Harris.

[72] At any rate, in ***Milavsky v. Milavsky***, 2011 ABCA 231 at para 34, the Alberta Court of Appeal cited with approval the comments of Sharpe, J.A. in ***Perry, Farley & Onyschuk v Outerbridge Management Ltd***., 2001, 199 DLR (4th) 279 at para 30, where he noted that the Ontario Fraudulent Conveyances Act "traces its roots back to the Statute of Elizabeth":

> This provision neither creates a right of action that sounds in damages, nor does it create a legal duty, the breach of which gives rise to a cause of action. The plaintiff in a fraudulent conveyance action does not assert the breach of a legal duty, but rather asserts that the debtor has improperly placed assets beyond the reach of ordinary legal process. Any entitlement to the payment of money or damages in favour of [the] plaintiff exists independently and apart from the action to set aside the fraudulent conveyance. The Act gives no right of damages nor compensation for loss. It provides for a declaratory type proceeding that has the effect of nullifying transfers and conveyances of the debtor's property so as to make possible execution of the creditor's debt. (emphasis added)

[73] As noted in ***Anderson (Re)***, 2013 BCSC 317, the purpose of reviewable transaction legislation is to bring the debtor's property back to the debtor for the benefit of creditors, not to punish innocent parties. The facts in ***Anderson*** are similar to this case, although it involved an application by a trustee under section 96 of the *Bankruptcy and Insolvency Act*, RSC, c-B-3. The application was for judgement against a bankrupt's son in respect to a transaction with respect to the transfer of the bankrupt's shares in a company and a shareholder's loan for no consideration.

[74] The trustee in bankruptcy also took issue with monies held in, and transactions undertaken through, a joint bank account held in the name of the son, Jarret, and the father, Glenn. Jarrett claimed that he was nothing more than a "straw man", that he played no role in the management of the subject company, received no benefit from the transfer of the shares or the shareholder's loan, had transferred the shares back to Glenn at his request, and that he took no role in disbursing funds from the subject jointly held bank account. The Court noted that the bank records concerning the joint account confirmed that Jarrett took "no role whatsoever in disburse funds from the account, that the "joint account" was under Glenn's sole control", and that the records were "consistent with Glenn Anderson carrying on with his management of the account as his own."

[75] The Court stated that "s. 96 of the BIA was not intended simply to punish a participant in a transfer at undervalue in circumstances such as in this case but **was intended to bring the real value of assets transferred at undervalue back into the bankrupt's estate for the benefit of creditors."** (emphasis added) The Court found that subject assets were within the control of the

2023 ABKB 650 (CanLII)

bankrupt, and the Court declined the trustee's application for monetary judgement against Jarrett, noting "**the dearth of any evidence** that Jarrett received any assets, money, remuneration or benefit as a result of the challenged transfers." (emphasis added)

[76] In ***Re: WF Canada***, 2017 ONSC 3074, a trustee in bankruptcy applied for a section 96 order requiring a husband and wife to pay funds into the bankrupt estate on the basis of an alleged transfer at undervalue. Funds had been paid into a bank account jointly held by the husband and wife. The evidence is that the wife did not use the account. Nevertheless, the trustee submitted that because the bank account was joint, the wife was either a party to the transfer, or privy to the transfer, and thus liable. The wife submitted that she was "an innocent good faith party with no knowledge of the payments in issue", had no involvement in the transactions undertaken by her husband, and "received no benefit from any of the payments deposited into the Joint Account, nor did she have any involvement in the operation of the Joint Account".

[77] The Court noted that the only evidence the trustee offered in support of its submission was that the wife was a joint owner of the account. While the trustee had established a *prima facie* case on that basis, the Court accepted the wife's testimony that she "was not involved in operating the Joint Account and received no benefit from the monies received from WF", that this evidence was corroborated, and that the Court did not consider her "failure to produce detailed records of the Joint Account to be fatal to her position that she received no direct benefit from nor was she privy to the transfer". The Court found that the wife was therefore not liable to the estate pursuant to section 96 of the *BIA*.

[78] While it is true that these cases involved the BIA, section 12 of the *Fraudulent Preference Act* states that the *Act* shall be read and construed subject to the *BIA*.

[79] The facts of these cases are similar to the circumstances of this case, in that William Harris has submitted that he was not involved in the operation of the bank account and received no benefit from the transactions. In this case, William Harris has provided detailed records of the subject bank account which corroborate the evidence provided on his behalf: that he was not involved in the operation of the bank account other than that the account was held in his name, and that he received no benefit from any of the $2 million as returned to the debtors 137 and Jon Harris, either directly or by way of payments made on their behalf. Similar to the trustee in *WF Canada*, the Plaintiffs have not produced any evidence to show that William Harris had any involvement in the operation of the subject bank account or that he was privy or a party to the transfer of the $2 million into the account or to any of the transactions concerning that $2 million once those funds were in the bank account, other than the account was held in his name. This is insufficient to show that the Plaintiffs' claims against William Harris have merit. Even if it can be said that the transfer of the $2 million by 137 into the bank account in May 2011 was a fraudulent conveyance under the *Fraudulent Preference Act* or the *Statute of Elizabeth*, there is no evidence that William Harris was a party to or privy to that conveyance and accordingly he has no liability.

[80] Plaintiffs submit that William Harris cannot say that he received no benefit from the transaction because the Jiminez Report indicated that of money that flowed from 137, $567,966 is still unaccounted for. This submission fails because it is clear that all of the $2 million paid into their bank account in the name of William Harris flowed back to 137, and there is no evidence that William Harris or his estate received any subsequent payments from 137.

2023 ABKB 650 (CanLII)

[81] Although the Plaintiffs seek as a remedy in their application a declaration that certain transactions are void, they submit that since Horner, J, declared that the funds transferred from Edgewood to 137 were a fraudulent conveyance, they need not prove that the transaction from 137 to William Harris was a fraudulent conveyance. They say that they have already done so because they are the same funds.

[82] Whether or not it is appropriate or necessary to declare that the transaction between 137 and the account in the name of William Harris is void under the *Statute of Elizabeth*, the fact remains that the statute does not create a right of action that sounds in damages, and the transaction has already been reversed, with the funds returned to 137 and Jon Harris, directly or indirectly. Such a declaration therefore would serve no purpose with respect to the issue of whether William Harris should be liable for damages.

[83] In summary, given that the Plaintiffs have not met the burden of showing that there is no merit to nor any defence to their claim against William Harris, their application for summary judgement must fail.

VI. Proposed Amendments

[84] The Plaintiffs proposed that, if they were not successful in their summary judgement application, they have leave to amend their claim to add an allegation that the Defendants conspired together and/or with Jon Harris.

[85] Amendments are generally permitted, subject to several exceptions: ***Carbone v Burnett***, 2019 ABQB 98 at para 35. The issues in this case are whether:

a) the prosed amendments would cause serious prejudice, not compensable in costs;

b) the proposed amendments are hopeless; or

c) the proposed amendments are sought after the expiry of the applicable limitation period.

[86] With respect to William Harris, there is no merit to the proposed amendments, and they are hopeless. As noted with respect to the claims of summary judgement and counter- application for summary dismissal, there is no evidence that would support an agreement between William Harris and any of the other defendants, or between William Harris and Jon Harris, or any actual or constructive intent to injure the Plaintiffs, as would be required to support a claim of conspiracy. The evidence is to the contrary: that William Harris had no intentional participation in any of the transactions conducted through the account in his name. Therefore, the fact that the account was opened in his name is not sufficient evidence of any agreement, or concerted action or an actual or constructive intent to injure the Plaintiffs. As the Plaintiffs themselves allege, Jon Harris used his elderly father who lacked capacity to park the funds temporarily, and there is no evidence that Mr. William Harris obtained any benefit from the scheme or had any knowledge of it.

[87] In addition, allowing the proposed amendments with respect to William Harris would cause significant prejudice. Mr. Harris is no longer available to give evidence with respect an allegation of conspiracy.

2023 ABKB 650 (CanLII)

[88] While Mr. Harris provided evidence through his litigation representative by way of written interrogatory and examination of his litigation representative, the Plaintiffs took no steps whatsoever to give notice to, or make the Defendant, William Harris, or any of his representatives or his legal counsel aware of the Plaintiffs' claim of conspiracy against William Harris until July 25, 2023, which is more than 6 and a half years from the date when the Plaintiffs became aware of the events that give rise to their proposed claim of conspiracy, despite the fact that the Plaintiffs have amended their application for summary judgement twice.

[89] In addition, William Harris has brought an application for summary dismissal, and is entitled to rely on the state of the evidence and the pleadings to date to support this application.

[90] The Plaintiffs in bringing this application to amend their pleadings have failed to abide by the terms of the Consent Procedural Order granted by Marion, J on March 3, 2023. Paragraph 4 of the Consent Procedural Order provides that the Plaintiffs shall file any evidence in support of the summary judgement application by March 31, 2023. Paragraph 9 of the Consent Procedural order provides that the parties may vary any of the timelines in the Order without further Order of the Court.

[91] It is clear that the purpose of the Consent Procedural Order was to set out a procedure to ensure that the applications, which include the Plaintiffs' summary judgement application, could be adjudicated in a timely fashion and that the parties would know what relief was being sought by one another and what evidence was being relied upon by one another. Despite the March 31, 2023 filing deadline, and without seeking or obtaining the consent of the other parties to vary that deadline, the Plaintiffs filed two amended summary judgment applications after the deadline, first on April 4, 2023, and secondly on July 27, 2023. In each case the amended applications seek additional relief.

[92] The unauthorized last minute filings are prejudicial to the Defendants, particularly to William Harris' application for summary dismissal.

[93] I therefore, decline to approve the proposed amendments with respect to William Harris.

[94] With respect to Luba Okun-Harris and Samuel Harris, there is less prejudice since they will have the opportunity to address the claims through their Statement of Defence, including a claim on conspiracy.

[95] While there is some prejudice, it can be compensated with a costs order. While Luba Okun-Harris and Samuel Harris have provided evidence that raises the issue of whether the proposed amendments are hopeless, and whether they have been sought after the expiry of the applicable limitation period, these issues can be dealt with in their Statement of Defence.

[96] I therefore allow the proposed amendments with respect to Luba Okun-Harris and Samuel Harris.

VII. Application for Summary Dismissal

[97] William Harris submits that there is no merit to the claims of the Plaintiffs against him, and seeks summary dismissal of them.

[98] As noted by the Alberta Court of Appeal in ***Eberle v Terroco Drilling Ltd***, 2022 ABCA 8, at para 10:

2023 ABKB 650 (CanLII)

> Summary dismissal is appropriate where the record is sufficiently certain to resolve the dispute on a summary basis, or, in other words, there is no genuine issue requiring a trial. The moving party must establish on a balance of probabilities that there is “no merit” to the claim; the resisting party must put its best foot forward and demonstrate a genuine issue requiring a trial. In the end, the presiding judge must be left with sufficient confidence that the state of the record permits a fair summary disposition.

[99] The facts of the case have been referred to at length previously in this decision.

[100] The banking records concerning the account in the name of William Harris, transactions conducted through that bank account, together with the review of such banking and transaction records as reported by Ms. Jiminez, a forensic account on behalf of the Plaintiffs provide a sufficiently clear record for this Court to summarily dispose of the Plaintiffs’ claims as against William Harris. Such records show that the $2,000,000 that was placed into the bank account in the name of William Harris in May 2011 by 137 has been traced back to 137 and Jon Harris, either directly by way of transfers to them, or by way of payments made on their behalf. There is no evidence that William Harris received any benefit from any portion of such $2,000,000.

[101] There is no evidence before this Court that William Harris had any knowledge of any transaction that was conducted through the account in his name. There is a complete lack of evidence that William Harris had any knowledge of the $2 million deposit by 137 in the bank account that occurred in May 2011. There is a complete lack of evidence that William Harris had any knowledge of the subsequent transactions concerning the said $2 million that resulted in such monies being returned to 137 and Jon Harris, either directly or by way of payments made on their behalf.

[102] All of this evidence, much from the Plaintiffs’ submissions in the Jon Harris bankruptcy discharge hearing, must lead to the conclusion that William Harris did not knowingly assist his son in the alleged fraudulently transaction, that he did not “knowingly” permit his son to park funds in the bank account.

[103] As noted previously, William Harris has meritorious defences against the claims under *Fraudulent Preference Act* and the *Statute of Elizabeth*, and the Plaintiffs have failed to demonstrate that there is any genuine issue requiring a trial.

[104] I therefore find that summary dismissal is appropriate, that the record before me is sufficiently certain to resolve the dispute on a summary basis, and that there is no merit to the claim against Willian Harris. The application for summary dismissal is granted, and all claims of the Plaintiffs against the Defendant, William Harris, the estate of William Harris, and the Litigation Representative of the estate of Willam Harris are dismissed.

VIII. Conclusion

[105] Given my decision with respect to these applications I have not considered whether the Plaintiffs are in compliance with the requirements of Rule 7.3 of the *Alberta Rules of Court*. Nor have I considered the report of Ms. Dang attached to Mr. Farkas’ affidavit, which the Plaintiffs object to on the basis of hearsay, even though the Plaintiffs rely on an affidavit of Sara Jiminez that was prepared for and filed in another action. At any rate, it was not necessary that I consider the Dang Report.

2023 ABKB 650 (CanLII)

[106] The default proceedings against Luba Okun-Harris and Samuel Harris are set aside, and Luba Okun-Harris and Samuel Harris have leave to issue Statements of Defence in the action against them. These Statement of Defence must be filed and served within 30 days of the later of the filing of the Order arising from this decision and the filing of an Amended Statement of Claim.

[107] The application by the Plaintiffs for summary judgement against the estate of William Harris is dismissed.

[108] The application by the Plaintiffs to amend their Statement of Claim is dismissed with respect to the estate of William Harris. The Plaintiffs' application to amend their Statement of Claim with respect to the Defendants Luba Okun-Harris and Samuel Harris is allowed.

[109] The application by the estate of William Harris for summary dismissal is allowed and all claims by the Plaintiffs against the Defendant William Harris, the Estate of William Harris and the Litigation Representative of the Estate of William Harris are dismissed.

[110] If the parties are unable to agree on costs, they may make short written submissions on the issue.

Dated at the City of Calgary, Alberta this 17th day of November, 2023.

B.E. Romaine
J.C.K.B.A.

Appearances:

Richard E. Harrison
for the Erwin Brokop and 866565 Alberta Ltd.

Dean A. Hutchison
for the Estate of William Harris

Ravi Jadusingh
for Luba Okun-Harris and Samuel Harris

2023 ABKB 650 (CanLII)