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Docket: CI 18-01-17130
(Winnipeg Centre)
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Cited as: 2020 MBQB 142

COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

DSTB Inc.,	)	Counsel:
	)	
plaintiff,	)	PAUL D. EDWARDS and
	)	TASHIA L. DREGER
- and -	)	for the plaintiff
	)	
McGREGOR LANDSCAPING & DESIGN INC. and	)	NO ONE APPEARING
TAVIS McGREGOR,	)	for the defendants
	)	
defendants.	)	SARAH R. McEACHERN and
	)	JAMES (JESSE) ROCK
	)	for the moving party
	)	7081040 Manitoba Ltd.
	)	
	)	JUDGMENT DELIVERED:
	)	OCTOBER 8, 2020

GRAMMOND J.

INTRODUCTION

[1] The plaintiff claims from the defendants repayment of a series of loans in the aggregate amount of $146,857.96 (the "Loans").

[2] On October 25, 2018, the plaintiff obtained an order for garnishment before judgment, without notice, naming a number of garnishees (the "Order"). Notices of

garnishment before judgment issued on November 1, 2018, and thereafter the sum of $113,350.90 was attached (the "Funds"), representing eight accounts receivable (the "Receivables") issued by the corporate defendant to Bituminex Paving Ltd. ("Bituminex") and Maple Leaf Construction Ltd. ("Maple Leaf") between September 17 and October 31, 2018.

[3] 7081040 Manitoba Ltd. carrying on business as Jackie Challoner Financial Services ("JCFS") seeks a declaration that it purchased the Receivables pursuant to a series of valid and enforceable assignment agreements, such that the Order should be rescinded against Bituminex and Maple Leaf, and the Funds paid out to JCFS.

BACKGROUND

[4] In late 2015 and early 2016 the plaintiff provided business consulting, accounting and administrative services to the corporate defendant. The plaintiff was familiar with the defendants' financial position and made the Loans after it "became clear that the defendants required an outside source of funding".

[5] JCFS began providing accounting services to the corporate defendant in January 2018. It became apparent to JCFS that the corporate defendant was "in debt and experiencing cash flow issues" and was "experiencing difficulty in managing its accounts".

[6] Between June and November 2018 the defendants and JCFS executed eight documents entitled "Agreement of Assignment of Part of Receivables and their Administration" (collectively the "Agreements"). Five of the Agreements relate to the Receivables at issue on this motion.

[7] On March 26, 2019, the individual defendant filed for bankruptcy. His trustee did not take a position on this motion.

POSITION OF THE PARTIES

JCFS

[8] JCFS submitted that pursuant to the Agreements it took absolute assignments of the Receivables, such that the corporate defendant no longer had either an interest in them or a creditor/debtor relationship with Bituminex or Maple Leaf. Accordingly, when the Order was obtained, the Funds were not owing to the corporate defendant and could not be garnished.

The plaintiff

[9] The plaintiff argued that the Agreements documented a series of loans made by JCFS to the defendants, and that:

a) the June 7, 2018 Agreement ("Agreement #1") caused the subsequent Agreements to be void;

b) the Agreements are unenforceable pursuant to s. 347 of the ***Criminal Code***, R.S.C. 1985, c. C-46 (the "***Code***");

c) the Agreements are void pursuant to s. 2 of ***The Fraudulent Conveyances Act***, C.C.S.M. c. F160 (the "***FCA***");

d) the Agreements should be set aside under ***The Unconscionable Transactions Relief Act,*** C.C.S.M. c. U20 (the "***UTRA***");

e) the October 29, 2018 and November 2, 2018 Agreements ("Agreements #7 and #8 respectively) post-date the Order and cannot supersede it; and

f) JCFS did not register the Agreements in the Personal Property Registry (the "PPR") until 2019 and did not otherwise give notice of the Agreements, to the plaintiff's prejudice.

RELEVANT LEGAL PRINCIPLES

[10] JCFS pointed to s. 4(1)(a) of ***The Garnishment Act***, C.C.S.M. c. G20, which provides:

> **Debts bound**
> 4(1) Subject to this Act, service of a garnishment order on a garnishee binds
>
> (a) any debt due or accruing due at the time of service from the garnishee to the defendant or judgment debtor, other than wages;
>
> . . .

[11] Section 61 of ***The Court of Queen's Bench Act***, C.C.S.M. c. C280, however, provides as follows:

> **Garnishment before judgment**
> 61 In an action in which the plaintiff claims the payment of a debt or liquidated demand, the court may, on motion and in accordance with *The Garnishment Act*, order garnishment before judgment of a debt due and payable by a third party to a defendant.

[12] In ***Best Brand Meats Ltd. v. Forgan (Jack) Meat Ltd.***, 1998 CanLII 28078 (MBQB), Master Lee, as he then was, considered a motion to revoke an order for garnishment before judgment. He stated:

> [5] The **Garnishment Act** does not specifically address the matter of garnishment before judgment. A garnishment before judgment is an extraordinary remedy which is provided for pursuant to the **Court of Queen's Bench Act** and the court rules. …
>
> . . .

> [8] … Section 4(1) of the **Garnishment Act** provides that service of a notice of garnishment binds
>
> (a) Any debt due or accruing due at the time of service ...
>
> [9] However, I am persuaded that this is a general provision relating to garnishment after judgment and that s. 61 of the **Court of Queen's Bench Act** restricts a plaintiff to garnishing only "a debt due and payable". I am satisfied that the specific wording "due and payable" is more restrictive than the wording "due or accruing due". …
>
> [10] For a debt to be garnisheed before judgment it must be both due and payable at the time of service of the notice of garnishment. …

[13] I agree with Master Lee's analysis. Section 61 of ***The Court of Queen's Bench Act*** applies to this motion, and the broad issue to be determined is whether all or part of the Funds were a "debt due and payable" by Bituminex and/or Maple Leaf to the corporate defendant at the time the notices of garnishment were served. In other words, did the Agreements extinguish the corporate defendant's interest in the Receivables, such that the Funds were unavailable for garnishment by the plaintiff, or did the corporate defendant grant to JCFS a security interest in the Receivables in exchange for a series of loans?

[14] In ***Evans Coleman v. R. A. Nelson Construction Limited***, 1958 CanLII 226 (BCCA), the court considered the competing interests of a garnishing order and a general assignment of book debts. The court stated (at pages 125-26):

> As between the assignor and the appellant (assignee) the assignment, which is an equitable assignment, is absolute and complete without notice having been given to the debtors. The respondent stands in the same position as the assignor. Its right depends upon the debt belonging to the assignor when the garnishing order was issued and the assignor (defendant) having already parted with the debt under an assignment, good as between it and the appellant (assignee), the garnishing order could not attach it.

[15] In ***Alberta (Treasury Branches) v. M.N.R.; Toronto-Dominion Bank v. M.N.R.***, [1996] 1 S.C.R. 963, the court commented upon the nature of an absolute assignment, as compared with a security interest. It stated:

> 22 … the same instrument cannot be both a "security interest" and an "absolute assignment". If an instrument is an absolute assignment, then since it is complete and perfect in itself, there cannot be a residual right remaining with the debtor to recover the assets. By definition, a complete and perfect assignment cannot recognize the concept of an equity of redemption. An absolute assignment cannot function as a means of "securing" the payment of a debt since there would be no basis for the debtor to recover that which has been absolutely assigned. An absolute assignment is irrevocable. …
>
> [Emphasis in original.]
>
> . . .
>
> 30 … In an absolute assignment, all interests are transferred and no property remains in the hands of the assignor. It is, simply, a sale of the book debts of the company. This is the basis of the business of factoring. Factoring is described in R. Burgess, *Corporate Finance Law* (2nd ed. 1992), at p. 100, in this manner:
>
> > Factoring is a legal relationship between a financial institution (the factor) and a business concern (the client) selling goods or providing services to trade customers (the customers) whereby the factor purchases the client's book debts either with or without recourse to the client and administers the client's sales ledger.
>
> . . .
>
> 31 A factoring of accounts receivable is based upon an absolute assignment of them. It is in effect a sale by a company of its accounts receivable at a discounted value to the factoring company for immediate consideration. …

[16] ***Alberta (Treasury Branches)*** was cited in ***Winnipeg Enterprises Corp. v. 4133854 Manitoba Ltd.***, 2008 MBCA 23 (CanLII), where the court considered whether a contract created an absolute assignment or a security interest. MacInnes J.A. stated:

> 17 To discern the contractual intention of the parties at the time of the creation of the document, one must consider the language of the document itself and, as well, the evidence of the parties as to the surrounding circumstances existing at the time of the document's creation; in other words, the overall factual matrix or context at the relevant time.

. . .

> [30] Every absolute assignment is irrevocable because it must be in order to be absolute. The essence of an absolute assignment is that once the assignment has been granted, the subject matter is gone. Thus, an absolute assignment cannot be revoked.
>
> [31] On the other hand, the subject matter of an assignment that is not absolute is given on terms, the terms of the assignment document itself, and may revert to the assignor.

[17] In ***Sattva Capital Corp. v. Creston Moly Corp.***, 2014 SCC 53 (CanLII), the court stated:

> [57] While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement (*Hayes Forest Services*, at para. 14; and Hall, at p. 30). The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract (Hall, at pp. 15 and 30-32). While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement (*Glaswegian Enterprises Inc. v. B.C. Tel Mobility Cellular Inc.* (1997), 1997 CanLII 4085 (BC CA), 101 B.C.A.C. 62).
>
> [58] The nature of the evidence that can be relied upon under the rubric of "surrounding circumstances" will necessarily vary from case to case. It does, however, have its limits. It should consist only of objective evidence of the background facts at the time of the execution of the contract (*King*, at paras. 66 and 70), that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting. Subject to these requirements and the parol evidence rule discussed below, this includes, in the words of Lord Hoffmann, "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man" (*Investors Compensation Scheme*, at p. 114). Whether something was or reasonably ought to have been within the common knowledge of the parties at the time of execution of the contract is a question of fact.

[18] I note also the recent decision in ***5009678 Ontario Inc. v. Rock Developments Inc.***, 2020 ONSC 630 (CanLII), where the court commented:

> [59] Commercial contracts must be interpreted in a manner that accords with sound commercial principles and good business sense; and avoids a commercial absurdity: see *Bell Canada v. The Plan Group*, 2009 ONCA 548, 96 O.R. (3d) 81 at paras. 37-38.
>
> [60] … Knowledge of the relevant background information or "*what the parties knew*" may assist the court in understanding vague or obscure references in the contract's terms. An understanding of the context in which a contract was conducted enables the court to give the written text "*the most appropriate meaning which the words can properly bear*": see *Orbus Pharma Inc. v. Kung Man Lee Properties Inc.*, 2008 ABQB 754, 463 A.R. 351 at para. 28. …
>
> . . .
>
> [62] Finally, in order to resolve an ambiguity, the court may consider the doctrine of *contra proferentem*, pursuant to which an ambiguity in a contract's terms is interpreted against its drafter … However, the principle of *contra preferentem* ought to be invoked as a last resort, when all other principles of construction have failed to ascertain the correct meaning of the contract in question …

ANALYSIS

[19] I note at the outset of this analysis that JCFS is not a party to this action, and filed its motion pursuant to Court of Queen's Bench Rule 37.11(1), which provides:

> **Motion to rescind or vary**
> 37.11(1) A person affected by an order made without notice … may, by notice of motion filed, served and made returnable promptly after the order first came to the person's notice, move to rescind or vary the order.

[20] The plaintiff did not contest the motion pursuant to any aspect of this rule, and I am satisfied on the evidence that JCFS had proper standing to bring the motion.

[21] It is also important to note that there is no evidence before me from either of the defendants. In other words, the only evidence relative to the surrounding circumstances and context in which the Agreements were signed is that of JCFS. The plaintiff has admitted that it had no direct knowledge of the business relationship between the

defendants and JCFS, and that its only source of knowledge of their intentions is the evidence filed by JCFS.

[22] JCFS's evidence reflects that in early 2018, it discussed with the defendants financial strategies to increase their cash flow and "bridge" the corporate defendant from the winter months to the landscaping season. These strategies included both a loan arrangement and an invoice purchase arrangement. In mid-February 2018, JCFS loaned to the corporate defendant the sum of $16,800, secured by a promissory note.

[23] In addition, JCFS assisted the corporate defendant with the formulation of repayment plans to be put forward to its creditors, including the plaintiff, that reconciled 2017 liabilities with the corporate defendant's projected cash flow in the 2018 landscaping season.

[24] JCFS's evidence reflects that while the plaintiff rejected the payment plan proposed to it on February 28, 2018, nine of the corporate defendant's other creditors accepted proposals, and arrears were paid. By November 30, 2018, six creditors were paid in full and the remaining three creditors were paid in part.

[25] In June 2018, the defendants approached JCFS for a second loan, and there was another discussion about the purchase of accounts receivable, to which the corporate defendant agreed. This approach would increase its cash flow and "allow a third party to manage credit control". On cross-examination, the JCFS representative defined the management of credit control as keeping the corporate defendant "in line financially with obligations" and "not going … to a bank to get a loan, to get credit … without discussing

it". JCFS and the corporate defendant also agreed that JCFS would "expressly select receivables to purchase".

[26] I will now comment upon the Agreements, which, speaking generally, were not well drafted. On cross-examination, the JCFS representative, a non-lawyer, testified that she obtained a form of assignment from the internet and then modified it for each usage in this case. The defendants reviewed each of the Agreements before execution, and had the opportunity to obtain legal advice, but did not propose changes to the language of the Agreements.

[27] I will comment briefly upon Agreement #1, which differed from the other Agreements. I do so only because the plaintiff argued that the language of Agreement #1 caused the balance of the Agreements to be void. Otherwise, the language of Agreement #1 is irrelevant to this motion, because JCFS does not rely upon it, having recouped the purchase price and fee set out in Agreement #1.[1]

[28] Agreement #1 is unique because, as written, it applied to accounts receivable owing to the corporate defendant by Maple Leaf from June 6, 2018 to December 31, 2018, whereas most of the subsequent Agreements included reference to specific invoice numbers and amounts. Since Agreement #1 was signed on June 7, 2018, the time frame to which it pertained was mainly prospective, and as the plaintiff argued, if it was valid the Receivables were not available to be assigned pursuant to the subsequent Agreements. JCFS gave evidence that Agreement #1 related to two invoices issued on

[1] The same is true for Agreements #2 and #3, entered into on August 3, 2018 and August 24, 2018, respectively.

June 6, 2018 in the amounts of $23,887.07 and $2,312.69, but that evidence is inconsistent with its clear language.

[29] Having considered the whole of Agreement #1, together with sound commercial principles, I have concluded that, objectively, the parties did not intend that the corporate defendant would assign to JCFS approximately seven months of future Maple Leaf accounts receivable, in exchange for payment of a fixed price of $15,000. Such an agreement would result in a commercial absurdity, and may be void for uncertainty. For these reasons, I reject the plaintiff's submission that the scope of Agreement #1 caused the balance of the Agreements to be void. To be clear, I make no finding as to the overall validity of Agreement #1, because I need not do so to decide this motion.[2]

[30] The details of the Agreements at issue on this motion are:

Agreement #	Date	Invoice Number(s)	Invoice Amount(s)	Debtor
4	September 20, 2018	188	$19,477.50	Bituminex
5	October 12, 2018	193, 195	$25,101.30	Maple Leaf
6	October 19, 2018	196	$4,410.00	Maple Leaf
7	October 29, 2018	199, 200, 202	$30,967.90	Maple Leaf
8	November 1, 2018	203	$33,394.20	Maple Leaf

[2] Another potential issue arising from Agreement #1 is the provision that once JCFS received payment of $17,250 ($15,000 purchase price and $2,250 fee), any additional payments would be applied first to the $16,800 loan referenced above, and then to any accounting fees owing to JCFS, with any further amounts paid to the defendants. This language detracts from the nature of an absolute assignment. None of the subsequent Agreements contained this provision.

[31] The salient provisions of the Agreements read as follows (note that "a)", "b)" and "c)" do not form part of the Agreements and have been inserted for subsequent reference only):

> a) Based on this Agreement, the Assignor [the defendants] assigns a part of receivables further specified in the Appendix No. 1 of this Agreement (hereinafter referred to as the "**Receivables"**) to the Assignee [JCFS] in exchange for a Price, the specific amount of which is also specified in Appendix No. 1 of this agreement; and the Assignee accepts this part of group Receivables in exchange for remuneration which is specified in Article II. of this Agreement and under the conditions specified in the General Terms and Conditions.[3]
>
> b) Once payment … has been received by the Assignee [JCFS] from [Bituminex or Maple Leaf], the balance of this assignment will be considered paid in full.
>
> c) This Agreement enters into force at the moment of its conclusion and becomes effective at the moment of payment of the Price for the assignment from the Assignee [JCFS] according to article II of this Agreement; i.e. when the Assignor's [the defendants'] bank account is credited with the amount of the appropriate Price, whilst the details are governed by the General Business Terms and Conditions.

[32] As provided in ***Winnipeg Enterprises Corp.***, ***Sattva Capital Corp.*** and ***5009678 Ontario Inc.***, I have considered both the language of the Agreements and the context underlying their creation, so as to accord with sound commercial principles and good business sense.

[33] The context in which the Agreements were signed is as follows:

a) the corporate defendant had been experiencing ongoing financial difficulties for years;

b) the corporate defendant needed cash flow to meet, among other things, its obligations to nine creditors pursuant to a series of payment plans;

[3] One of the flaws in the Agreements is that no General Terms and Conditions exist.

c) JCFS was inexperienced in this type of transaction but was willing to assist the corporate defendant with funding; and

d) the language of the Agreements evolved after the execution of Agreement #1.

[34] The subject of Agreements #4 through #8 was clear as between the parties, with reference to a specific invoice number(s) and invoice amount(s) issued by the corporate defendant. In addition, each Agreement specified a fixed purchase price but did not contain language consistent with a loan arrangement, such as reference to an interest charge, an interest calculation mechanism or a repayment requirement. Instead, the Agreements listed a flat fee to be charged by JCFS.

[35] While the language of the provision reflected at paragraph 31(a) above is clumsy, I have taken into account the parties' intentions and the factual matrix, and I am satisfied that this language is unconditional and is sufficient to convey an absolute assignment of the Receivables from the corporate defendant to JCFS.

[36] The plaintiff argued that the provision set out at paragraph 31(b) above is consistent with a loan agreement and should be construed against JCFS as the drafter of the Agreements pursuant to the principle of *contra proferentem*. I agree that the reference to "the balance of this assignment" is troubling, because that concept is more consistent with an ongoing liability to JCFS than with an absolute assignment of the Receivables. In other words, if JCFS purchased the Receivables outright, it would have assumed a risk that it would not be paid if, for example, either Bituminex or Maple Leaf encountered financial difficulties or raised an issue with the work performed by the

corporate defendant. In an absolute assignment there would be no "balance" of the Agreement to be addressed, because payment "in full" would occur when JCFS paid the purchase price to the corporate defendant, and payment to JCFS by the debtor would be irrelevant. Having considered this provision in light of the entire contract, however, together with the surrounding circumstances and objective intentions of the parties, I have concluded that it does not derogate from the assignment clause set out at paragraph 31(a) above. In other words, I have concluded that Agreements #4 to #8 constituted absolute assignments of the Receivables, and not loan arrangements secured by the Receivables.

[37] Although the provision referenced at paragraph 31(c) above is also worded poorly, I am satisfied that the parties intended for the Agreements to take effect when JCFS paid the purchase price to the corporate defendant. The documentary evidence of payments made by JCFS is detailed and was not contested. I have concluded, therefore, that JCFS paid to the corporate defendant the purchase price specified in each of the Agreements, and that the effective date of each Agreement can be discerned from the evidence before me.

[38] I will now consider each of the plaintiff's remaining arguments.

The *Code*

[39] Section 347(1) of the ***Code*** provides that "every one who enters into an agreement or arrangement to receive interest at a criminal rate, or receives a payment or partial payment of interest at a criminal rate" is guilty of an offence.

[40] Section 374(2) of the ***Code*** reflects the following definitions:

> ***interest*** means the aggregate of all charges and expenses, whether in the form of a fee … or other similar charge or expense or in any other form, paid or payable for the advancing of credit under an agreement or arrangement, by … the person to whom the credit is … advanced …;
>
> ***criminal rate*** means an effective annual rate of interest calculated in accordance with generally accept actuarial practices and principles that exceeds sixty per cent on the credit advanced under an agreement or arrangement;
>
> ***credit advanced*** means the aggregate of the money … advanced … under an agreement or arrangement minus the aggregate of any … fee … directly or indirectly incurred under the … agreement or arrangement;

[41] In ***Garland v. Consumers' Gas Co.***, 1998 CanLII 766 (SCC), the court found that a 5% late payment penalty was a breach of the ***Code***, because the annual rate charged was over 60% for a period of time. The court stated that s. 347 imposes a "generally applicable ceiling on all types of credit arrangements without regard to the sophistication of the parties or the amount in issue" (para. 23), and that it "applies to a very broad range of commercial and consumer transactions involving the advancement of credit, including secured and unsecured loans, mortgages and commercial financing agreements" (para. 25). In other words, I must consider whether the percentage-based fee charged by JCFS offends the ***Code***.

[42] The court in ***Garland*** also stated:

> [30] … not every charge or expense will be subject to the criminal interest rate provision. In order to constitute "interest" under s. 347, a charge -- whatever its form -- must be "paid or payable for the advancing of credit under an agreement or arrangement" (emphasis added) … The issue is whether [the] penalty constitutes, in substance, a cost incurred by customers to receive credit under an arrangement with Consumers' Gas.
>
> . . .
>
> [37] … If every sale, performance of services or conveyance of benefits were understood to be and advance of "credit", there would be virtually no limit to the application of s. 347. That section, despite its broad scope, is essentially

> concerned with regulating the relationship between creditors and debtors, not the relationship between commercial actors in the ordinary course of business.

[43] The plaintiff argued that the purpose of the Agreements in this case was to get money into the hands of the defendants, and for JCFS to make a profit. The plaintiff provided a chart reflecting its calculations of the "interest rate" charged by JCFS pursuant to the Agreements, ranging from 63.12% to 338.7%, depending upon the number of days each "loan" was outstanding.

[44] The law is clear that s. 347 applies to transactions in which credit is advanced. The court in ***Garland*** considered the notion of "credit advanced" as including loans of money and deferrals of payment. The court stated specifically that no credit is advanced where a purchase price is due on the date specified in a purchase agreement. In this case, the Agreements took effect when JCFS paid the purchase price to the corporate defendant.

[45] The plaintiff pointed to the case of ***TCE Capital Corp. v. Lainas***, [1999] O.J. No. 1963 (QL), where the court considered a factoring transaction involving the payment of a flat administrative fee, a discount calculated as a flat daily fee for 30 days, and a holdback to be paid to the assignor if and when the assignee was paid by the debtors. The court characterized the transaction as a loan, and concluded that the annual effective interest rate was between 77.4% and 80.37%.

[46] ***TCE Capital Corp.*** is distinguishable from this case on its facts because the "factoring" arrangement was for a specified term, and included a holdback. Both of those aspects of the transaction are very different than in this case. Moreover, in ***TCE Capital***

Corp. the assignee sued the assignor on the debts, which is incongruous with an absolute assignment.

[47] I cannot conclude on the facts of this case that JCFS either advanced credit to the defendants, or charged them interest as defined in the ***Code***. The Agreements simply do not bear out that interpretation of the transactions. Rather, JCFS purchased the Receivables outright and in doing so charged the corporate defendant a fee.

[48] For all of these reasons, s. 347 of the ***Code*** does not apply in this case.

The *FCA*

[49] Section 2 of the ***FCA*** provides:

> **When conveyances declared void as against creditors**
> 2 Every conveyance of … personal property … at any time … made, or at any time hereafter to be … made, with intent to defeat, hinder, delay or defraud creditors or others of their just and lawful actions, suits, debts, accounts, damages, penalties, or forfeitures is void as against such persons and their assigns.

[50] In ***Royal Bank of Canada v. Thiessen***, [1981] M.J. No. 45 (QL), 12 Man.R. (2d) 260, the court stated, with respect to the ***FCA***:

> 11 The main question to be determined is that of intent which is the most important aspect of the relevant sections of the Act. Mr. Thiessen testified that the conveyance was made on the advice of the company's and his accountant for tax planning purposes. …
>
> 12 Planning by individuals or companies to lawfully avoid taxes is not fraud nor is it evidence of intention to defeat creditors. The intention necessary under the Fraudulent Conveyances Act must be established with some certainty. …

[51] In ***Bank of Nova Scotia v. Bass***, [1983] M.J. No. 52 (QL), 22 Man.R. (2d) 153, the court stated:

> 7 If a conveyance is made for good consideration which defeats or delays creditors, the plaintiff must show the fraudulent intent of both the grantor and the

grantee. If, however, the conveyance is voluntary, it is only necessary to show the fraudulent intent of the grantor.

[52] In ***Royal Bank v. O'Brien***, 1997 CanLII 22778 (MBQB), the court stated:

> 16 Courts and writers have identified typical and suspicious fact situations which are often described as "badges" or "inferences" of fraud. These situations, taken separately, or combined, may (but not necessarily will) result in a finding of fraud, if proven. The following list (and it is not intended to be comprehensive) of "badges" or "inferences" of fraud is summarized from Springman, Stewart and MacNaughton's text, *Fraudulent Conveyances and Preferences* (1994 ed.) and are found at pp. 13-11 to 13-14:
>
> 1) the gift was of most, if not all, of the property owned by a debtor;
>
> 2) the debtor continued in possession and used or benefitted from the property after the conveyance;
>
> 3) the consideration is grossly inadequate;
>
> 4) there is unusual haste to make the transfer;
>
> 5) a close relationship exists between the parties to the conveyance;
>
> 6) the property is transferred to a grantee without his or her knowledge;
>
> 7) the transfer of property creates a trust and trusts are used to conceal or cover a fraud;
>
> To this list I would add the following:
>
> 8) a debtor continues to represent to a lender that the property, or the equity in the property, remains part of the net worth of the debtor for purposes of obtaining financing or further financing (at a point in time after title to the property has been conveyed and without disclosing to the lender that title was transferred).

[53] The plaintiff relied upon these badges of fraud in support of its argument that the Agreements were part of a scheme to defeat, hinder and/or delay (but not to defraud) creditors, of which JCFS was the architect and in which JCFS advised or encouraged the

defendants to participate "at a time when the corporate defendant was exposed to numerous litigants". The plaintiff contended that the effect of the scheme was to:

a) make the Receivables unavailable to the defendants' creditors, including the plaintiff, and to preserve those funds for JCFS and the defendants; and

b) provide cash to the defendants earlier than would have been the case otherwise, to reduce the risk of the Receivables being executed upon by other creditors.

[54] The plaintiff alleged that the individual defendant entered into the Agreements on behalf of the corporate defendant because JCFS told him to do so, he was desperate financially, he had no bargaining power and he wanted to continue his salary from the corporate defendant.

[55] The plaintiff also alleged that on November 8, 2018 the individual defendant's wife incorporated ML Design & Contracting Inc. ("ML Design"), to which the corporate defendant's insurance policies were transferred and accounts payable were directed.

[56] JCFS denied both that the Agreements were entered into with any fraudulent intent and that there is any evidence of such an intent. JCFS emphasized that it paid for the Receivables and is out-of-pocket the sum of $96,348.27, for which it received no benefit outside the terms of the Agreements.

[57] I have already accepted that JCFS paid the purchase price provided in each of the Agreements, of 85% of the Receivables, which was good consideration. I also accept that the effect of the Agreements, if this motion is granted, may be to defeat, delay and/or hinder the plaintiff's claim, to the extent that it cannot otherwise collect on the

Loans, if liability is established. As set out in ***Bank of Nova Scotia*** however, where a conveyance is made for good consideration which defeats or delays creditors, the plaintiff must show the fraudulent intent of both the corporate defendant and JCFS. In assessing the parties' intentions, I must look at the surrounding circumstances including the parties' financial affairs and their relationship, and I must scrutinize their testimony with care and suspicion.[4]

[58] The plaintiff tendered evidence regarding a number of claims filed against the defendants, or one of them, including:

a) five claims that were discontinued on or before November 30, 2017. Since those resolutions pre-date the events material to this motion, they are not relevant to the issues before me;

b) three claims filed against the individual defendant, but not the corporate defendant, that were pending as a claim or judgment at the time of his bankruptcy in March 2019. Since the individual defendant was not truly a party to the assignments[5] these claims are also irrelevant to this motion; and

c) one claim filed against both defendants by Isaku Construction, and discontinued on March 1, 2018. This plaintiff was one of the nine creditors with which payment plans were agreed upon, as set out in paragraph 24 above.

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[4] ***India Films Overseas Ltd. v. Keefer Investments Inc.***, 1984 CanLII 464 (BCSC), at para. 11.

[5] Another flaw in the Agreements is that the individual defendant is named in the recitals as one of the "Contractual Parties". There was no reason for the individual defendant to be so named, because the corporate defendant was the owner and seller of the Receivables.

[59] In my view, the existence of these claims does not support the plaintiff's argument pursuant to the ***FCA***. Rather, the claims confirm the defendants' financial difficulties, and their success in addressing some of their debts.

[60] Similarly, there is no evidence to support the plaintiff's allegations of why the individual defendant entered into the Agreements, or that the Agreements were related to his personal bankruptcy. Those suggestions are speculative.

[61] I have also considered the plaintiff's allegations regarding the incorporation of ML Design. The only evidence before me is the plaintiff's belief that the individual defendant and his wife took that step to avoid creditors. There is no evidence that JCFS had any involvement in or knowledge of the incorporation.

[62] The plaintiff's evidence regarding the insurance and accounts payable of the corporate defendant is also problematic, because as filed it is hearsay. The plaintiff's representative has no direct knowledge of the events at issue, and has purported to rely upon what others told him to establish the truth of the statements made.

[63] Section 2 of the ***FCA*** requires the establishment of an intent to defeat, hinder or delay creditors, which is more than knowledge that certain actions may have that effect. In this case, it is clear that:

a) the corporate defendant was experiencing financial difficulties for years before the Agreements were signed;

b) the defendants and JCFS knew that the plaintiff was one the defendants' largest creditors; and

c) JCFS, and presumably the defendants, knew that the plaintiff could file a claim in court.

[64] These facts are insufficient to establish the existence of any "scheme" pursuant to the ***FCA***. Rather, I am satisfied that the corporate defendant, with the assistance of JCFS, attempted to make arrangements with various creditors, including the plaintiff, and that it had the right to sell off its assets, including the Receivables, to improve its cash flow, subject to the provisions of the ***FCA***. As set out in ***Royal Bank v. Thiessen***, planning does not necessarily constitute fraud. The Agreements documented a mechanism by which the corporate defendant could receive immediate cash flow, and the evidence reflects that payments to creditors were ongoing through the fall of 2018. In fact, JCFS sent part of the purchase price paid under Agreement #7 directly to one of the corporate defendant's creditors.

[65] The evidence in this case does not establish an intention to defeat, hinder or delay creditors, or any of the badges of fraud. The JCFS representative acknowledged on cross-examination that the Receivables may have constituted all of the corporate defendant's unencumbered assets, but she was unclear on the details of its assets, and testified that it may have owned equipment. There is no other evidence before me of what other assets, if any, the corporate defendant had, including the details of any other accounts receivable.

[66] I accept that while JCFS had, in a sense, a "close relationship" with the defendants because it provided professional services by which it had knowledge of their finances, it was by all accounts an arms length relationship. The JCFS representative testified on

cross-examination that the Receivables were chosen for purchase because Bituminex and Maple Leaf are very large companies representing a "pretty good" risk, and JCFS had discussed with them where the payments would be made. These motives do not, in my view, reflect an intent that violates the ***FCA***.

[67] I understand the plaintiff's desire to preserve the Funds for application to the Loans, but the plaintiff's allegations that JCFS and the defendants concocted a "scheme" are speculative. The fact is that some of the defendants' creditors were repaid in full or in part, both before and after the defendants retained JCFS to assist them. In my view, the circumstances of this case are not unusual, in that a business struggled for years before ceasing operations, leaving multiple creditors to attempt to collect from a limited pool of assets.

[68] In conclusion, I am not satisfied that the defendants and JCFS had a fraudulent intent to defeat, hinder or delay creditors by entering into the Agreements.

The *UTRA*

[69] Section 2 of the ***UTRA*** provides that where, in respect of money lent, the court finds that the cost of a loan is excessive, or a transaction is harsh or unconscionable, it may grant a variety of items of relief.

[70] Section 1 of the ***UTRA*** defines "money lent" as "money advanced on account of any person in any transaction that, whatever its form may be, is substantially one of money lending or securing the repayment of money so advanced …".

[71] The plaintiff argued that factoring is a form of lending, and pointed to s. 3(c) of the ***UTRA***, which provides that the powers of the court set out in s. 2 may be exercised

where "… the amount due … in respect of money lent is in question". The plaintiff asked that the Agreements be set aside in their entirety.

[72] I cannot conclude that the payments made by JCFS constituted "money lent" for the same reasons that I determined Agreements #4 through #8 reflected absolute assignments, and not loan agreements under which credit was advanced. Accordingly, s. 2 of the ***UTRA*** does not apply in this case.

[73] If, however, I am wrong, I note that in ***Quick Auto Lease Inc. v. Nordin***, 2014 MBCA 32 (CanLII), at paragraph 14, the court stated, with respect to the ***UTRA***, that "[t]he debtor[6] must demonstrate both the inequality of the parties and the improvidence of the bargain …"[7]

[74] I reject the plaintiff's submission that there was an inequality of bargaining power in this case, because there is no evidence of the relative knowledge and experience levels of the defendants and JCFS. JCFS was a service provider of the corporate defendant and willing to purchase the Receivables and the defendants had financial difficulties, but that combination does not necessarily equate to either an inequality of bargaining power or an improvident bargain.

[75] For all of these reasons, I cannot conclude that Agreements #4 through #8 were either harsh or unconscionable.

[76] Similarly, while JCFS admitted that the fees charged pursuant to the Agreements (15%) was a "good rate", I am not satisfied that it is excessive in all of the circumstances.

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[6] JCFS argued that the plaintiff has no standing to rely upon the ***UTRA*** because it is not a party to the Agreements. I need not consider this argument to make my decision in this matter.

[7] These requirements were established in ***Bomek v. Bomek***, 1983 CanLII 2966 (MBCA), at para. 25, and relate to a determination of whether the ***UTRA*** applies in a given case.

JCFS was entitled to charge a fee on account of the risk associated with the Receivables, once assigned, and its administration costs.

Agreements #7 and #8 post-date the Order

[77] The plaintiff relied upon ***Royal Bank of Canada v. Kenward***, 1925 CanLII 344 (MBCA), in support of the argument that Agreements #7 and #8 post-date, and therefore cannot supersede the Order. In that case, the debtor purported to assign funds to his lawyer approximately four months after garnishment by a judgment creditor. The court held that "… the assignment was subsequent to the garnishment and cannot prevail for that reason" (p. 307).

[78] JCFS pointed to ***Lane v. Merchants Consolidated Ltd.***, 1990 CanLII 7991 (MBQB), at para. 15, where the court characterized garnished funds as "simply moneys of the defendant over which the court had taken temporary control" (para. 15). JCFS argued that the plaintiff, as a creditor, has no greater right to the Funds than the corporate defendant itself. While I do not disagree with these comments, I accept, as set out in ***Royal Bank v. Kenward***, that garnished funds cannot be assigned by the debtor.

[79] I also accept, as stated in ***Best Brand Meats Ltd.***, at para. 10, that "[f]or a debt to be garnisheed before judgment it must be both due and payable at the time of service of the notice of garnishment." [Emphasis added.] In other words, a garnishing order attaches funds at the time of service upon the garnishee. This approach makes good sense, because a garnishment order that is granted but not yet served upon a garnishee cannot and should not attach funds.

[80] In this case, the Order issued on October 25, 2018, and notices of garnishment issued on the afternoon of November 1, 2018. There is no evidence before me of when the notices of garnishment were served upon Bituminex and Maple Leaf. At the cross-examination of the plaintiff's representative an undertaking was given to advise of when the notices of garnishment were served, but the undertaking was not answered.

[81] As set out at paragraph 37 above, I have determined that the parties intended for the Agreements to take effect when JCFS paid the purchase price to the corporate defendant. The evidence reflects that the effective date of Agreement #7 is October 30, 2018,[8] and the effective date of Agreement #8 is November 2, 2018.

[82] Since Agreement #7 took effect before the notices of garnishment were issued and served, the Receivables purchased by JCFS pursuant to that Agreement were not available for attachment by the plaintiff pursuant to the Order.

[83] The sequence of events with respect to Agreement #8 is unclear. The notices of garnishment could have been served on November 1 or 2, 2018, prior to it taking effect. Accordingly, I have concluded that JCFS, as the moving party, failed to meet its evidentiary burden with respect to Agreement #8.

No Notice of the Agreements

[84] The plaintiff argued that it was prejudiced significantly by JCFS's failure to register its security interest, or otherwise give notice of the Agreements.

[8] The purchase price of Agreement #7 was paid in part on each of October 29 and 30, 2018. Since October 30, 2018 is the date on which the purchase price was paid in full, I have determined that the Agreement took effect on that date.

[85] JCFS argued that the PPR and perfection are irrelevant to this matter, and in the alternative that it is a perfected, secured creditor with priority to the Funds.

[86] In ***Couiyk v. Couiyk***, 1999 CanLII 5066 (BCSC), the court considered whether an assignment of funds was unperfected because no financing statement was filed in the PPR. The court found that once an interest in funds is assigned, there is no longer an interest to be charged. The court also stated:

> [9] … The fact that the assignee has not perfected his interest by registration is relevant only to priorities established in that event by the PPSA. It does not invalidate the interest.

[87] I am satisfied, therefore, that a PPR registration in this case would be relevant only to a priorities dispute pursuant to ***The Personal Property Security Act***, C.C.S.M. c. P35. Since neither the plaintiff nor JCFS had a registered security interest in 2018, no such dispute arose in this case.

[88] I acknowledge that JCFS filed PPR registrations in June 2019, and I assume that it did so to enhance its alternative position on this issue. In my view, however, these registrations are irrelevant to my decision because they post-date the time at which the parties' respective interests crystallized.

[89] I have also considered whether JCFS should have notified the plaintiff (or any other creditor of the defendants) of the Agreements in some other way. I have been provided with no authority to suggest that JCFS was so obligated, and I have noted the comments of the court in ***Evans Coleman*** as set out above. I have concluded, therefore, that no notice was required.

The Builders' Liens Act

[90] After the hearing in this matter, I asked counsel for additional submissions on the question of whether, given the nature of the corporate defendant's business, s. 6(2) of ***The Builders' Liens Act***, C.C.S.M. c. B91 (the "***BL Act***") applies in this case. The relevant sections of the ***BL Act*** provide as follows:

> **Receipts of sub-contractor constitute trust fund**
> 4(2) All sums … received by a sub-contractor on account of a contract price in the sub-contract, constitute a trust fund for the benefit of
>
> (a) sub-contractors who have sub-contract with the sub-contractor and other persons who have supplied materials or provided services to the sub-contractor for the purpose of performing the sub-contract;
>
> (b) the Workers' Compensation Board;
>
> (c) workers who have been employed by the sub-contractor for the purpose of performing the sub-contract; and
>
> (d) the contractor or any sub-contractor for any set-off or counterclaim relating to the performance of the sub-contract.
>
> . . .
>
> **Duties of sub-contractor re trust**
> 4(4) A sub-contractor receiving a sum mentioned in subsection (2) is the trustee of the trust fund and he shall not appropriate or convert any part of the trust fund to or for his own use or to or for any use not authorized by the trust until
>
> (a) all sub-contractors who have sub-contracted with him and all persons who have supplied materials or provided services for the purpose of performing the sub-contract have been paid all amounts then owing to them out of the sum received;
>
> (b) the Workers' Compensation Board has been paid all assessments which the sub-contractor could reasonably anticipate as arising out of work done by workers employed by him in performing the sub-contract to the extent for which the sum was received;
>
> (c) all workers who have been employed by him for the purpose of performing the sub-contract have been paid all amounts then owing to them out of the sum received for work done in performing the sub-contract; and

> (d) provision has been made for the payment of other affected beneficiaries of the trust to whom amounts are then owing out of the sum received.
>
> . . .
>
> **Certain moneys not subject to garnishment**
> 6(2) Where money owing to a contractor or sub-contractor in respect of the contract price under a contract or sub-contract would, if paid to the contractor or sub-contractor, be subject to a trust under section 4, the money is not subject to garnishment under *The Garnishment Act*.

[91] The issue, then, is whether the Funds, if paid to the corporate defendant by Bituminex and/or Maple Leaf would have been subject to a trust under s. 4 of the ***BL Act***.

[92] JCFS submitted that the corporate defendant is a commercial and residential landscaper and that the Receivables reflect both a general description of the work performed and, in most instances, the location at which it was performed. Accordingly, it can be inferred that the corporate defendant was a sub-contractor of Bituminex and Maple Leaf for the purposes of the ***BL Act***. JCFS also submitted that there is no evidence of what portion of the Funds were impressed with a trust, such that the Order should not have issued, particularly on a without notice basis, and should be set aside.

[93] The plaintiff submitted that there is no evidence before the court that anyone was even potentially entitled to the benefit of the protection of s. 4, and accordingly there is no evidence upon which to find that any part of the Funds were trust funds. JCFS bore the onus of establishing a trust, and it has not done so. In addition, the plaintiff submitted that the purpose of the trust provisions is the protection of the parties identified in s. 4(2), which do not include an assignee of receivables.

[94] There is very little jurisprudence regarding s. 6(2) of the ***BL Act***, but in ***Glenko Enterprises Ltd. v. Keller***, 2000 MBCA 7 (CanLII) the court stated:

> 37 Section 6(2) indicates that when the contractor receives funds from the owner, those funds which are subject to the statutory trust are exempt from garnishment proceedings against the contractor because, of course, those funds do not belong to the contractor in equity. …

[95] Both parties pointed to ***Aebig v. Miller Contracting Ltd.***, 1993 CanLII 1168 (BCSC), where the court considered the validity of a garnishing order pursuant to the ***Builders Lien Act*** of British Columbia, R.S.B.C. 1979, c. 40, which contains trust fund provisions similar to the ***BL Act***. The court held that any portion of trust funds that could properly be paid to the contractor itself on the date of a garnishing order could be garnished. This approach is consistent, in my view, with both the duties reflected in s. 4(4) of the ***BL Act*** and the comments in ***Glenko*** that trust funds that do not belong to a contractor in equity cannot be garnished.

[96] As I have stated, there is no evidence before me from either of the defendants. I am prepared to infer from JCFS's evidence and the information reflected in the Receivables that the corporate defendant was a sub-contractor for the purposes of the ***BL Act***. Having said that, I have no evidence of whether any of the potential beneficiaries listed in s. 4(2) of the ***BL Act*** existed on any of the projects giving rise to the Receivables, and, if so, whether the corporate defendant fulfilled its duties to those beneficiaries as contemplated in s. 4(4).

[97] Accordingly, there is no basis upon which I can conclude that the Funds would have been subject to a trust under s. 4 of the ***BL Act***, and I am not satisfied that s. 6(2) of the ***BL Act*** applies to the Receivables.

CONCLUSION

[98] JCFS validly purchased receivables pursuant to Agreements #4 through #7 prior to issuance of the notices of garnishment. Accordingly, the Order is rescinded as against Bituminex and Maple Leaf with respect to invoices 188, 193, 195, 196, 199, 200 and 202, and the funds paid in with respect to those receivables will be paid out to JCFS. The Order will stand with respect to invoice 203.

[99] If costs cannot be agreed upon, I will hear submissions.

_____ J.