

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**In Bankruptcy and Insolvency**

IN THE MATTER OF THE BANKRUPTCY OF GERALD MCGOEY

of the City of Toronto, in the Province of Ontario

APPLICATION UNDER SUBSECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C-43, AS AMENDED

**BEFORE:** Penny J.

**COUNSEL:** *James Renihan* and *Breanna Needham* for the Trustee in Bankruptcy, KSV Kofman Inc., Applicant

*Michael Kestenber*g and *Thomas Slahta* for Kathryn McGoey

*Gerald McGoey* on his own behalf

**HEARD:** November 5, 2018

[1] In this motion, the trustee of the bankrupt estate of Gerald McGoey seeks a declaration that Mr. McGoey's interest in two properties held in joint tenancy with his wife, Kathryn McGoey, are assets of the estate subject to realization for the benefit of creditors.

[2] Mr. and Mrs. McGoey take the position that they both held title to these properties in trust for their children such that Mr. McGoey's interest is excluded from the bankrupt estate by virtue of s. 67(1)(a) the *Bankruptcy and Insolvency Act* as property held in trust for any other person.

[3] The trustee attacks the validity of the alleged trusts on the basis that they are:

- (1) "sham" trusts; or
- (2) fraudulent preferences created for the purpose of defeating Mr. McGoey's creditors.

## **Background**

### ***The Properties***

[4] Mr. and Mrs. McGoey were married in 1994. They each have children from prior marriages.

[5] After their marriage, in September 1994, they purchased a cottage in Muskoka, which is referred to in this litigation as a Ledge Lodge. The purchase price was \$700,000. Title was taken in both their names as joint tenants. There was a vendor take back mortgage which was ultimately replaced by financing from the Bank of Montréal. In July 1998 a charge of \$1.12 million was granted to the Bank of Montréal. That charge remains on title.

[6] In May 2003, Mr. and Mrs. McGoey purchased a farm in Caledon. The farm is referred to in this litigation as Humber Station. The purchase price was \$635,000. Title was taken in their names as joint tenants. Again, various charges were placed on title to Humber Station in favour of the Bank of Montréal.

### ***Mr. McGoey***

[7] Mr. McGoey worked in the telecommunications industry. Between 1991 and 2010, he held a series of senior executive positions at BCE Inc., Bell Canada Inc., Unique Broadband Systems Inc. and Look Communications Inc. In 2003, while Mr. McGoey was the CEO of UBS, UBS acquired a 51.06% interest in Look. Mr. McGoey became Look's CEO in May 2004. Mr. McGoey was also vice chairman of the board of directors.

[8] Look began experiencing financial difficulty by 2008. Facing a restructuring due to possible insolvency, Look decided to proceed by way of a plan of arrangement. This plan consisted of a court supervised auction for the sale of all of Look's assets (92 MHz of licensed broadband spectrum). Look received only one bid of any substance. The offer was for \$80 million. Mr. McGoey and the board were disappointed but, given the lack of alternatives, decided to proceed with this transaction.

[9] In connection with the closing of this transaction, Look's board also approved compensation awards to the directors and officers of the company totaling some \$20 million. Mr. McGoey was awarded approximately \$5.6 million of the compensation package, which was paid to him in October and November 2009. Part of this package turned on a value attributed to the shares of Look of \$0.40 per share. This became the subject of subsequent litigation, as the market value of Look's shares at the time of the broadband sale was nowhere near, and never reached, \$0.40.

[10] Look publicly disclosed the compensation awards in December 2009 through a management information circular. There was immediate shareholder criticism. A proxy battle for control of the UBS board took place. Mr. McGoey and the other directors were removed from the UBS board in July 2010. Mr. McGoey also resigned as CEO. A few weeks later, Mr.

McGoey also resigned from his positions at Look. Thus, by early 2010, Mr. McGoey knew that he was facing possible litigation arising from the substantial Look payments received by him.

[11] In 2011, Look commenced an action against Mr. McGoey and other members of Look's board and senior management. This litigation alleged breach of fiduciary duties owed to Look and sought restitution of the entire compensation package paid to the defendants.

[12] Mr. McGoey applied to the Superior Court for an order compelling Look to indemnify him in advance against any expenses incurred to defend Look's claim. On September 28, 2012, Pattillo J. dismissed his application on the basis that Look had "established a strong *prima facie* case that the individual applicants [including Mr. McGoey]...acted *mala fides* in their own self interests."

[13] Following a trial, on June 1, 2017 Conway J. found Mr. McGoey liable to repay to Look the sum of \$5,565,696.

#### ***Mr. McGoey's Bankruptcy***

[14] On June 26, 2017, Mr. McGoey (jointly with his management company) filed a notice of intention to make a proposal under the BIA. At a meeting of creditors held on December 12, 2017, the creditors voted against acceptance of the proposal. Accordingly, Mr. McGoey was deemed to have made an assignment in bankruptcy on that day.

[15] The trustee of Mr. McGoey's bankrupt estate sought to realize on Mr. McGoey's assets for the benefit of his creditors. It is in this context that Mr. and Mrs. McGoey assert that Mr. McGoey's interest in Ledge Lodge and Humber Station are held in trust for their children.

[16] The McGoey's rely, for this assertion, on trust documents alleged to have been created in 1995 (for Ledge Lodge) and 2004 (for Humber Station). The Ledge Lodge document, dated January 4, 1995, states:

We agree that it is our understanding that Ledge Lodge:

1. is not a marital asset
2. will be classified as our principal residence
3. will be held in trust for my three children, Drew, Jordan and Linsey
4. we have the right of use
5. we are obliged to pay the operating costs

Mr. McGoey's evidence, and the inference of Mrs. McGoey's evidence, is that their signatures were placed on this document on January 4, 1995.

[17] The Humber Station document, dated March 4, 2004, states:

We agree 18097 Humber Station Road

1. Is not a marital asset
2. Will NOT be classified as our principle residence
3. Is financed by advances from Kathy McGoey as evidenced by a promissory note from Gerry McGoey
4. Will be held in trust for our five children, David, Jeffrey and Sean Lam – Jordan and Linsey McGoey.
5. We will have the right of use
6. we are obliged to pay the operating costs

Again, it is Mr. McGoey's evidence, and the inference of Mrs. McGoey's evidence, that this document was signed by them on March 4, 2004.

[18] Mr. McGoey testified that he created these documents on his own, without the benefit of accounting or legal advice of any kind.

### **Are the Trusts a Sham?**

[19] A sham is a transaction or instrument designed to give the appearance of creating legal rights or obligations that are different from what the party actually intended to create. In the context of a trust, a sham trust is usually created for a fraudulent, deceitful or illegal purpose, such as avoiding a creditor. However, deceit is not a necessary element of a sham trust. The trust need only be presented by the parties as being different from what they know it to be, *Sangha v. Reliance Investment Corp Ltd*, 2011 BCSC 1324 at paras 346 - 347.

[20] Whether a trust is invalid as the result of a sham depends on the intention that existed at the time that the alleged trust was made. Where the settlor did not in fact intend to part with the beneficial interest in trust property, but executed documents to that apparent effect, the trust is a sham. Absent clear and cogent evidence of an intention to create a valid trust, a trust may be set aside as a sham, *Sangha, supra* at para 350; *Antle v. R*, 2010 FCA 280 at para 20.

[21] Where a purported trust does not represent the settlor's true intent (which is simply to create the appearance of a disposition of assets) there is no true intention to create a trust and one of the three certainties (certainty of intention) is missing. As a result, the purported trust is void, *Duca Financial Services Credit Union Ltd v. Bozzo*, 2011 ONCA 455 at para 2.

[22] Whether a purported trust is sham must be assessed in all of the circumstances. Over many years, the common law has developed a non-exhaustive list of red flags (or what are sometimes called "badges of fraud") which may place upon the party asserting the trust an obligation to explain. These red flags include:

- (a) listing a trust property for sale without disclosing the existence of the trust;
- (b) failing to notify a bank or mortgagee as to the existence of the trust and its effect on title;
- (c) operating in a manner which disregards the proper operation of the trust;
- (d) treating the property as one's own and only invoking the alleged trust when convenient to do so;
- (e) using a property to secure financing (particularly where the trust is not disclosed);
- (f) the payment of all expenses for property by the settlor, while the alleged beneficiaries contribute nothing;
- (g) retaining personal control of an asset for one's own use;
- (h) encumbering an asset by using it as security for personal finances;
- (i) not registering a trust agreement on title; and
- (j) a general lack of documentation,

*Re Forsyth* 2010 BCSC 1720; *Bayerische Landesbank Girozentrale v. Sieber Estate (Trustee of)* 2015 ONSC 27. It is also well established that another red flag is transactions at less than market value, made in the face of a hazardous undertaking or clear financial jeopardy. Such transactions are also suspect and cry out for a valid explanation.

[23] The evidence in this case overwhelmingly supports the conclusion that the alleged trusts over Ledge Lodge and Humber Station are shams.

[24] The centrepiece of this conclusion arises from the expert report of Thomas W. Phinney of April 12, 2018. Mr. Phinney has a Master of Science in graphic arts from Rochester Institute of Technology School of Printing, specializing in design and typography. Mr. Phinney has over 20 years of experience in the font industry, including over a decade with Adobe Systems Inc., a large and diversified software company that both creates and uses fonts and typefaces. Mr. Phinney has personally been granted four patents related to the design or utility of fonts. He has been retained as an expert in fonts, in particular font identification cases involving allegedly forged documents. His clients have included the US Treasury Department, the Washington Post, BBC News, National Public Radio and Public Broadcasting Service. He has given expert testimony on matters of typeface identification, point size and printing technologies in the UK, Australia and five states of the United States. He has been recognized by courts in California, New York, Texas and the UK as an expert in these matters.

[25] Mr. Phinney has definitively identified the typeface used in the Ledge Lodge document, dated January 4, 1995, as set in a font called Cambria. As of January 4, 1995, however, the Cambria typeface had not yet been created. It was designed for Microsoft beginning in 2002 and

did not reach the general public until January 2007 when Microsoft released Windows Vista and Office 2007. Because Cambria typeface did not exist on January 4, 1995, the document set in the typeface Cambria, allegedly dated January 4, 1995, could not have been created or signed on that date.

[26] Similarly, the typeface used in the Humber Station document has been definitively identified as set in a font called Calibri. Like Cambria, Calibri is part of Microsoft's ClearType Font Collection, which was developed in 2002 but did not reach the general public until 2007.

[27] Mr. Phinney deposes that no one, other than a Microsoft employee, consultant or contract designer, could have created a document such as the Humber Station document using the Calibri typeface in March 2004. Even if they did, however, the Humber Station document uses Calibri's "tabular lining" numbers, which did not become the default Calibri numbers until after November 2005.

[28] Because the Humber Station document is set in Calibri using tabular lining numbers, it could not reasonably have been created or signed on March 4, 2004. In any event, it is extremely unlikely that anyone besides a Microsoft employee or a Microsoft consultant could have created a document such as the Humber Station document until more than a year after March 2004.

[29] The court must scrutinize expert evidence to ensure it meets the modern criteria for the admission of expert evidence originated in *R. v. Mohan*, [1994] 2 S.C.R. 9 and as further developed in subsequent jurisprudence. The criteria are:

- (i) a properly qualified expert;
- (ii) relevance;
- (iii) necessity;
- (iv) reliability;
- (v) prejudice/probative analysis; and
- (vi) the absence of an exclusionary rule.

[30] Here, there can be no doubt that Mr. Phinney is properly qualified. He has a graduate degree in the area of typology, many years of experience working in the font/typology field, has himself developed new fonts and has been recognized as an expert in font identification in cases similar to this one on many occasions.

[31] Given the heavy reliance placed by the McGoeyes on the Ledge Lodge and Humber Station trust documents, and the Trustee's argument that these trusts are shams, there can be no doubt Mr. Phinney's evidence is relevant to a material issue in this litigation.

[32] The identification of fonts and when fonts were first developed is a matter beyond common understanding. Thus, expertise is necessary to understand this issue.

[33] Given Mr. Phinney's academic training and lengthy service in the font development industry, as well as his prior experience and recognition giving expert evidence in both the US and the UK, and given that there is no opposing expert evidence and that Mr. Phinney was not cross-examined on his report, I am satisfied that his evidence is reliable.

[34] There is no suggestion that any prejudice to the McGoey's outweighs the probative value of Mr. Phinney's evidence.

[35] Finally, there is no applicable exclusionary rule.

[36] I therefore find Mr. Phinney's evidence admissible. As noted, there was no responding expert nor was Mr. Phinney cross-examined on his report. Accordingly, his evidence stands unchallenged.

[37] Mr. and Mrs. McGoey are simply unable, and make no attempt, to explain the discrepancy between their evidence and the factual conclusions demanded by Mr. Phinney's evidence. Their counsel, in argument, alluded to the possibility that the McGoey's are simply mistaken about the dates the documents were signed but that the trusts could nevertheless still be valid. I will return to this issue shortly but note that neither Mr. nor Mrs. McGoey remotely adopted that position in their written or *viva voce* evidence; they both steadfastly stood by their position that these documents were created and signed on the dates indicated.

[38] I therefore conclude that, contrary to Mr. McGoey's direct evidence (and the clear inference of Mrs. McGoey's evidence), the alleged trust documents did not exist on, and were not signed on, the dates indicated. At the earliest, I find, these documents could not have come into existence until 2007.

[39] This conclusion, while important, does not, on its own, resolve the question of whether the Ledge Lodge and Humber Station trusts are shams. This is in part because, given that Mr. McGoey's personal financial crisis was not apparent until 2010, he and his wife might still have legitimately created property trusts for their children between 2007 and 2010.

[40] Thus, it is necessary to review the other circumstances, or red flags, that occurred over the course of these events. While evidence contemporaneous with the alleged formation of the trust is relevant, conduct that post-dates the inception of the purported trust is also important to the analysis. For example, conduct that is at odds or inconsistent with the terms of the alleged trust is particularly pertinent. Actions inconsistent with the trust are evidence that is demonstrative of an intention not to create the legal rights and obligations which a trust document gives the appearance of creating.

[41] Important red flags surrounding the purchase, financing and use of Ledge Lodge include the following:

- (a) Mr. McGoey's previous cottage (which he also claims to have held in trust for his children) was sold without mention of any trust;

- (b) there is no registration of the purported trust on title;
- (c) there is no reference to or disclosure of a trust with respect to any of the charges registered by the Bank of Montréal;
- (d) Mr. and Mrs. McGoey had free reign to use the cottage as they wished, to the point of using it to secure financing which flowed into their personal accounts. Although Mrs. McGoey made much of her accounting regarding improvements to Ledge Lodge, I do not find this of any assistance on the question of whether the property was held in trust. I say this because, on their own account of the alleged trust, the McGoey's were responsible for the payment of all expenses and under no obligation to account to the purported beneficiaries (nor did they provide any such accounting) for the use of any financing secured by the property;
- (e) there is no evidence of Mr. or Mrs. McGoey mentioning the existence of the trust to anybody (other than Mr. McGoey's son, Jordan) until many years after it was allegedly created;
- (f) Mr. and Mrs. McGoey paid all operating expenses while Jordan and Linsey, the alleged beneficial owners, contributed nothing;
- (g) the monies advanced by the Bank of Montréal secured by a mortgage on Ledge Lodge were co-mingled with Mr. and Mrs. McGoey's personal funds and the account into which all of Mr. McGoey's employment income previously flowed;
- (h) the only document establishing the existence of the trust is a single page created by Mr. McGoey without any input from lawyers or accountants, even though he had regularly used legal and financial professionals, including for the creation of other trusts;
- (i) the trust indenture is backdated and Mr. and Mrs. McGoey, I find, have lied about the date of its creation. It is clear that among the factors the court, or a jury, may consider in making conclusions about the credibility of a witness's evidence on one matter is whether the witness has deliberately lied about another material matter, *Waxman v. Waxman*, (2004) BLR (3d) 165 (Ont. C.A.) at para 368. In the present circumstances, there is simply no basis upon which to conclude that, although the trust instrument may not have been created in 1995, it was in any event created prior to Mr. McGoey's emerging financial crisis which became apparent by early 2010. Indeed, I find, as a fact, that it was not;
- (j) Jordan (but not Linsey) was added to title to Ledge Lodge in 2012 (again, well after Mr. McGoey's emerging exposure in the Look litigation) but the land transfer tax statement for that transfer described Mr. and Mrs. McGoey as the beneficial owners, even though they had purportedly ceased to be beneficial owners over 17 years earlier;

- (k) the only accounting or tax related document relating to the Ledge Lodge trust was prepared in 2017, long after Mr. McGoey's financial troubles had crystallized. That T3 document was, in any event, based on a false premise that Jordan had ceased actively using Ledge Lodge in 2000;
- (l) there is a general dearth of documentation related to the purported trust. Mr. and Mrs. McGoey did not use their personal accountant or his firm to handle any documentation for this trust (until 2017), even though the firm handled all other financial matters for them; and
- (m) by early 2010, Mr. McGoey knew he was in serious financial jeopardy and thus had the motive and incentive to attempt to put his assets beyond the reach of creditors.

[42] Virtually all of the same factors are equally applicable to the Humber Station property. There are in addition, two other factors. First, it was Mrs. McGoey's evidence that the intention at the time of the acquisition of Humber Station was for her and Mr. McGoey to hold Humber Station in trust for *her* children. It was never explained why, in the event, the document actually signed purports to create a trust over Humber Station in favour of *all* of their children.

[43] Secondly, Mrs. McGoey admitted one of the reasons for this trust was to protect the asset from potential creditors.


[44] In all of the circumstances, the conclusion that the Ledge Lodge and Humber Station trusts are shams is unavoidable. Nothing distinguishes Mr. and Mrs. McGoey's use of the properties from that of an owner. They used the properties as they wished, encumbered them at will (without disclosure of the "true" owners) and describe themselves as the owners in legal documents. There is no restriction whatsoever on their use imposed as a result of the trusts. All the trusts appear to do is protect the assets from Mr. McGoey's creditors, creditors to which his exposure was known at least by early 2010.

### **Conclusion**

[45] For these reasons, I find that the purported Ledge Lodge and Humber Station trusts are void as being sham trusts. Had I not come to this conclusion, I would nevertheless have concluded, on the basis of the same evidence, that the purported trusts were fraudulent conveyances, done with the intention to defeat creditors. The declarations sought by the Trustee are granted.

**Costs**

[46] Costs were not addressed at the conclusion of the hearing in this matter. If costs are sought, a brief submission not to exceed two typed, double-spaced pages together with a bill of costs may be filed within seven days of the release of these reasons. Any responding submission shall be filed within a further seven days.

  
Penny J.

**Released:** January 4, 2018