

# COURT OF APPEAL FOR ONTARIO

CITATION: Ontario Securities Commission v. Camerlengo Holdings Inc., 2023  
ONCA 93  
DATE: 20230210  
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Huscroft, Miller and Nordheimer JJ.A.

BETWEEN

Ontario Securities Commission

Plaintiff (Appellant)

and

Camerlengo Holdings Inc., Alfred Camerlengo, also known as  
Fred Camerlengo and Mirella Camerlengo

Defendants (Respondents)

Allison Speigel and Dora Konomi, for the appellant

Michael Katzman, for the respondents Camerlengo Holdings Inc. and Alfred  
Camerlengo, also known as Fred Camerlengo

Gordon Vance, for the respondent Mirella Camerlengo

Heard: January 30, 2023

On appeal from the order of Justice Heather A. McGee of the Superior Court of  
Justice, dated June 23, 2022.

REASONS FOR DECISION

[1] The respondents were successful on a rule 21 motion striking the Ontario Securities Commission's ("OSC") claims of fraudulent conveyance on the basis that the facts pleaded in the statement of claim were not sufficient to establish standing to bring such a claim under s. 2 of the *Fraudulent Conveyance Act*, R.S.O. 1990, c. F.29 ("*FCA*"). For the reasons given below, we agree that the motion judge erred. The claims were pleaded with sufficient particularity, the OSC had standing to bring the claims, and we allow the appeal.

## **Background**

[2] The personal respondents are spouses. Fred Camerlengo is a retired electrician and is the sole director, officer, and shareholder of the corporate respondent, Camerlengo Holdings Inc. ("Holdco"). Mirella Camerlengo is a retired teacher. They purchased their family home in 1988, taking title in joint tenancy.

[3] The statement of claim alleges that Fred carried on an electrical contracting business with a partner, using various corporations. In February 1996, Fred and his partner incorporated Gridd Electrical Services Inc. ("Gridd"). Four months later, using the same lawyer and on the same day, Fred and his business partner each conveyed their interests in their respective family homes to their spouses for no consideration. Going forward, Fred continued to live in the family home and his wife intermittently mortgaged it to fund Fred's business activities.

[4] The OSC alleges in its statement of claim that at the time of the transfer Fred and Mirella were concerned about “Fred’s potential exposure to personal liability resulting from Fred’s rapidly expanding electrical contracting business that started bidding on, and working on, million dollar high risk projects”, and that the transfer was made with “the intent and purpose of defeating ... Fred’s existing and future creditors of their just and lawful actions, suits, debts, accounts and damages.”

[5] It is undisputed that by 2011, Fred was facing financial difficulties after a client failed to pay \$1.3 million in construction draws. Fred arranged for a loan from a business associate, who advanced \$200,000 to Holdco through Bluestream International Investments Inc. That loan remains outstanding.

[6] It subsequently came to light that the business associate had defrauded many of his clients – including the Camerlengos, who lost over \$600,000 – through a fraudulent investment scheme. In 2018 the OSC issued a disgorgement order against Bluestream and its affiliated entities to recover funds on behalf of the defrauded investors. As part of this effort, the OSC obtained a garnishment order against Holdco to recover the \$200,000 debt owed to Bluestream. The OSC brought the present action against Holdco and the Camerlengos, seeking a remedy for oppression and the imposition of a constructive and resulting trust. It also sought to set aside the 1996 transfer of the family home as well as various payments made by Holdco to Fred and Mirella from 2010-16 as fraudulent conveyances.

### **The motion to strike**

[7] Fred and Mirella brought a motion to strike the statement of claim on the basis that the OSC's pleadings did not disclose a reasonable cause of action. The motion judge dismissed the motion, except with respect to the claims of fraudulent conveyance.

[8] The motion judge considered s. 2 of the *FCA*, which provides:

Every conveyance of real property or personal property and every bond, suit, judgment and execution heretofore or hereafter 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 are void as against such persons and their assigns.

[9] The motion judge concluded that Bluestream, and therefore the appellant, did not come within the class of persons contemplated by this section, as they were not "creditors or others" at the time of the transfer of the family home in 1996. The statement of claim was judged insufficiently particular to support a claim under the *FCA*: "[i]t sets out no specifics with respect to the names of creditors, actual debts, or a precarious financial position. No creditors with a liquidated, or unliquidated debt at the time of the 1996 transfer are identified." The motion judge relied on *Wilfert v. McCallum*, 2017 ONCA 895, 54 C.B.R. (6th) 249 – a motion to stay the sale of property that was the subject of a fraudulent conveyance claim – for the proposition that a fraudulent conveyance pleading must contain particulars

such as the names of creditors at the time of the transfer or of an impending risky financial venture.

[10] The motion judge did not address the claim to set aside the payments made from Holdco to Fred and Mirella.

### **Analysis**

[11] We agree that the motion judge did not correctly interpret or apply s. 2 of the *FCA*. The case law interpreting s. 2 of the *FCA* is clear that a subsequent creditor – that is, a claimant who was not a creditor at the time of the transfer – can attack a transfer if the transfer was made with the intention to “defraud creditors generally, whether present or future.”: *IAMGOLD Ltd. v. Rosenfeld*, [1998] O.J. No. 4690, at para. 11; see also *McGuire v. Ottawa Wine Vaults Co.* (1913), 48 S.C.R. 44. An intent to defraud creditors generally can be made manifest by taking steps to judgment proof oneself in anticipation of starting a new business venture. To plead a fraudulent conveyance on this basis, it is not necessary that a claimant be able to identify a particular, ascertainable creditor that the debtor sought to defeat at the time of the conveyance. It is enough, on the case law, to plead facts that support the allegation that at the time of the conveyance the settlor perceived a risk of claims from a general class of future creditors and conveyed the property with the intention of defeating such creditors should they arise. The types of facts that can

support an inference of such an intention to convey property away from creditors – present or future – are often described as “badges of fraud”.

[12] A useful catalogue of badges of fraud identified in the case law is provided in Paul M. Perell, “A Pragmatic Approach to Fraudulent Conveyances”, (2005) 30:3 Advoc. Q. 373, at pp. 391-92:

- the debtor's financial state at the time of the transaction was precarious, including deficiencies in income, assets, solvency, and an inability to pay debts;
- the existence of a family or close relationship between the parties to the transaction;
- the transfer effectively divested the debtor of a substantial portion or all of his or her assets;
- the transfer had the effect of defeating, hindering, delaying, or defrauding creditors;
- there was evidence of haste in making the transaction;
- there was evidence of secrecy, fabrication, falsehood, destruction or loss of documents, or suspicious circumstances in the making of the transaction;
- the transaction occurred near in time to notice of debts or claims against the debtor;

- the consideration for the transfer did not correspond to the value of the property;
- the absence of a business purpose or other justification for the transaction;
- the transferor retained possession or use of the property;
- the transferor retained a benefit or an ownership interest in the property.

[13] As stated in *Cambone v. Okoakih*, 2016 ONSC 79, 67 R.P.R. (5th) 305, at para. 180, “[p]roof of one or more badges of fraud will not compel a finding for the plaintiff but it may raise a *prima facie* evidentiary case which it would be prudent for the defendant to rebut.” To support a claim that a transfer was made with the general intent to defeat future creditors, a subsequent creditor need only plead sufficient badges of fraud to raise a suspicion that needs to be answered. A pleadings motion is not a motion for summary judgment. Whether the badges of fraud are in fact sufficient to establish the fraudulent intent is a matter to be established on the evidence led at trial: *Lad v. Marcos*, 2020 ONSC 6215, at para. 93.

[14] In this case, the OSC pleaded the following facts which, if established on the evidence, would together provide some support for the allegation that the conveyance was made with the intention of fraudulently defeating future creditors:

- i) Fred conveyed the property to his wife;
- ii) No consideration was paid for the transfer;

- iii) The transfer was made after 16 years of joint ownership;
- iv) The transfer was made 4.5 months after Fred and his business partner incorporated Gridd;
- v) The transfer was made at the same time and using the same lawyer that Fred's business partner used to transfer his family home to his wife;
- vi) The transfer was made at a time when Fred and his wife were concerned about exposure to personal liability from Fred's "rapidly expanding electrical contracting business that started bidding on, and working on, million dollar high-risk projects".
- vii) Fred continued to treat the property as his own. He not only continued to live there, but caused his wife to mortgage the property multiple times for the benefit of his corporations. He paid all costs and expenses related to the property and gave personal guarantees for the mortgage obligations.

[15] The pleadings identify, with sufficient particularity, the facts that could support the inference of an intention to defraud future creditors, including the general class of creditors – creditors arising out of Fred's electrical contracting business, which was poised to bid on much larger contracts than had previously been the case. To the extent that the motion judge relied on *Wilfert* as holding to the contrary, the motion judge was in error. *Wilfert* is the decision of a chambers judge on a stay motion that simply re-iterates the well established rule that there must be sufficient particulars in a pleading of a fraudulent conveyance.



[16] On a rule 21.01(1) motion “a pleading will only be struck if it is ‘plain and obvious’ that the claim is certain to fail because it contains a radical defect. A claim must be permitted to proceed to trial if there is even a faint chance of success”: *Lad*, at para. 40. The pleaded facts recited above, which the court is required to accept as true, were sufficient to defeat the rule 21.01(1) motion, and the motion judge erred in striking the claim with respect to the conveyance of the property.

[17] At the oral hearing, counsel for the respondents, for the first time, raised an argument based on the expiration of a limitations period. As this was not argued in the court below, or even set out in the respondents’ factum, the appellant had no advance notice of it and we will accordingly not exercise our discretion to hear it.

[18] With respect to the allegations in the statement of claim related to the conveyance of payments from Holdco to the individual respondents, the motion judge struck these claims without providing any analysis of the rationale for doing so. In our view, there was no basis to strike these claims, on the same reasoning outlined above. Additionally, and unlike the fraudulent conveyance of property claim, at least some of the payments from Holdco were alleged to have been made at a time when Holdco was facing claims from a creditor – Bluestream – and it is alleged that the effect of the payments would be to render Holdco unable to satisfy its debt to Bluestream. This allegation would bring Bluestream under the first category of subsequent creditor as well – an unpaid creditor whose claim existed at the time of the conveyance.

**DISPOSITION**

[19] The appeal is allowed, the order below is vacated, and the motion below dismissed in its entirety. The appellant is awarded costs of the appeal in the amount of \$10,000 and costs of the motion below in the amount of \$15,000, both of which are inclusive of HST and disbursements.

“Grant Huscroft J.A.”

“B.W. Miller J.A.”

“I.V.B. Nordheimer J.A.”