COURT OF APPEAL FOR ONTARIO

CITATION: Bank of Montreal v. Iskenderov, 2023 ONCA 528
DATE: 20230804
DOCKET: C69885

Feldman, Lauwers, Huscroft, Roberts and Copeland JJ.A.

BETWEEN

Bank of Montreal

Plaintiff (Respondent)

and

Roufat Iskenderov also known as Iskenderov Roufat also known as Rodfat Iskenderov also known as Iskenderov Rodfat also known as Rufat Iskenderov also known as Iskenderov Rufat also known as Roufat Derov also known as Derov Roufat also known as Rodfat Derov also known as Derov Rodfat also known as Rufat Derov also known as Derov Rufat and Elena Lazareva

Defendants (Appellants)

Patrick Bakos, for the appellants

Joshua J. Siegel and Allyson Fox, for the respondent

Heard: January 18, 2023

On appeal from the order of Justice Marvin Kurz of the Superior Court of Justice, dated August 25, 2021, with reasons reported at 2021 ONSC 5723.

Feldman J.A.:

[1] The respondent bank, a creditor of Roufat Iskenderov, the appellant, sought to set aside as a fraudulent conveyance, Mr. Iskenderov's transfer of his residence to his wife, the appellant, Elena Lazareva. The action was commenced more than two years but less than ten years after the transfer. The appellants' position was

that the claim was statute barred under the *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B, but the motion judge found that the ten-year limitation period under s. 4 of the *Real Property Limitations Act*, R.S.O. 1990, c. L.15 ("*RPLA*"), applied, and that the claim was brought in time and could proceed.

[2] That finding followed this court's decision in *Anisman v. Drabinsky*, 2021 ONCA 120 ("*Anisman (ONCA)*"). On appeal, the appellants sought to argue that *Anisman (ONCA)* was not a binding authority of this court because full reasons were not given and it was wrong in law, and that this court should find that the two-year limitation period under the *Limitations Act, 2002* applied to the subject action. The court heard the appeal with a five-judge panel in order to be able to fully address the legal issue of which limitation statute and which limitation period applies to an action to set aside a fraudulent conveyance of real property (a "fraudulent conveyance action").

[3] For the reasons that follow, I would allow the appeal. *Anisman (ONCA)* was decided without the benefit of the relevant historical authority. The ten-year limitation period in s. 4 of the *RPLA* does not apply to an action to declare a fraudulent conveyance of real property void as against creditors under s. 2 of the *Fraudulent Conveyances Act*, R.S.O. 1990, c. F.29. Instead, the two-year limitation period from the date the claim was discovered under s. 4 of the *Limitations Act, 2002* applies.

Factual Background and Findings by the Motion Judge

[4] Pursuant to a separation agreement dated January 10, 2008, Mr. Iskenderov transferred his interest in their jointly held matrimonial home to Ms. Lazareva. On April 28, 2008, Mr. Iskenderov defaulted on a $400,000 line of credit to the Bank of Montreal (the "Bank"), which he had obtained fraudulently. After the Bank obtained judgment against Mr. Iskenderov for $483,449.89 on January 14, 2009, he made an assignment into bankruptcy on March 24, 2009. He was discharged on November 22, 2012, at which time the stay of proceedings resulting from the bankruptcy was lifted by court order to allow the Bank to proceed to enforce its judgment against him under s. 178 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*").

[5] The Bank commenced its action to declare the transfer of the home a fraudulent conveyance and to set it aside on June 18, 2013.

[6] On February 17, 2015, pursuant to an application under s. 38 of the *BIA*, the Bank acquired from the Trustee the right to commence this action and on March 4, 2015, the Bank obtained an Assignment of Claim from the Trustee.[1] The Bank obtained a certificate of pending litigation against the property on March 11, 2015.

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[1] No other claims such as under s. 96 of the *BIA* were assigned or pursued. The only claim is under s. 2 of the *Fraudulent Conveyances Act*. It is only the limitation period applicable to that claim that is the subject of this appeal.

The litigation “moved sluggishly along”, in the words of the motion judge, with delay by both parties.

[7] The motion by the appellants for summary judgment dismissing the action or, in the alternative, discharging the certificate of pending litigation was brought on November 30, 2017, revised on February 13, 2018, and heard on July 29, 2021. The respondent’s motion for a status hearing was heard at the same time. There were four issues addressed by the motion judge: 1) whether the motion judge was bound by this court’s decision in *Anisman (ONCA)* that found that the ten-year limitation period under s. 4 of the *RPLA* applies to an action to declare a fraudulent conveyance of real property void as against creditors; 2) if the two-year limitation period under the *Limitations Act, 2002* applies, whether there was a genuine issue for trial regarding when the Bank’s claim was discoverable; 3) whether the certificate of pending litigation should be discharged for delay; and 4) whether the action should be dismissed for delay under r. 48.14 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. He was not asked to determine whether the impugned transfer was a fraudulent conveyance. That issue was left for trial if the action was not dismissed as statute barred or for delay.

[8] On issue one, the motion judge reviewed the conflicting case law in the Ontario Superior Court of Justice on the issue of which limitation period applies to a claim to set aside a transfer of real property as a fraudulent conveyance, but rejected the submission that he was not bound by this court’s decision in

Anisman (ONCA) that the *RPLA* and not the *Limitations Act, 2002* applies. He therefore found that the ten-year limitation period in the *RPLA* applies and the action was commenced well within that time.

[9] On issue two, although unnecessary to do so because of his conclusion on the first issue, the motion judge addressed the discoverability of BMO's claim and found that if the two-year limitation period had applied, there was a triable issue regarding when BMO had the knowledge to give it the "plausible inference" of liability as per *Grant Thornton LLP v. New Brunswick*, 2021 SCC 31, 461 D.L.R. (4th) 613. Therefore summary judgment would not have been granted but the issue would have gone for trial.

[10] On issue three, whether to discharge the certificate of pending litigation for delay, the motion judge referred to *572383 Ontario Inc. v. Dhunna* (1987), 24 C.P.C. (2d) 287 (Ont. S.C.) where Master Donkin set out eight factors to weigh on a motion to discharge a certificate of pending litigation as well as a number of other authorities. The motion judge concluded that he would exercise his discretion not to lift the certificate of pending litigation for the following reasons. First, while Ms. Lazareva complained that she had not been free to deal with the property over an extended period, she offered no evidence that she had any thwarted intentions to do so. Second, the bulk of the delay was caused by the appellants, not the Bank. Third, the risk of prejudice to the Bank was real because the basis of the action was that the property had been fraudulently transferred once already. Fourth, no

security was offered to the Bank in place of the property. And fifth, the Bank was ready to list the matter for trial.

[11] On issue four, whether the action should be dismissed for delay, the balance of prejudice was to the Bank, not to the appellants, the appellants were more responsible than the Bank for the litigation delay, the matter was ready to be set down for trial, and there is potential merit to the action. For those reasons, the motion judge declined to dismiss the action for delay and granted the Bank's motion to extend the time to set the action down for trial.

Issues on Appeal

[12] The appellants raise three issues on the appeal: 1) Did the motion judge err in law by following *Anisman (ONCA)* for the principle that the *RPLA* ten-year limitation period rather than the *Limitations Act, 2002* two-year limitation period applies to an action to declare a fraudulent conveyance of real property void as against creditors? 2) If the two-year limitation period applies, did the motion judge err by finding a triable issue regarding when the respondent Bank discovered the claim? 3) Did the motion judge make palpable and overriding errors with respect to his findings of fact related to the delays in the action?

Discussion and Analysis

(1) What is the applicable statutory limitation period?

[13] Determining the limitation period applicable to fraudulent conveyance actions requires this court to consider three factors: 1) the historical approach to the limitation period for these actions, 2) the nature of relief sought in a fraudulent conveyance action, and 3) this court's approach to interpreting s. 4 of the *RPLA*. Each of these factors supports the same conclusion on this issue: the two-year period in the *Limitations Act, 2002*, not the ten-year period in the *RPLA*, applies to fraudulent conveyance actions under the *Fraudulent Conveyances Act*.

The limitation period for actions to "recover any land" did not apply to fraudulent conveyance actions historically

[14] The *Limitations Act, 2002* (the "new Act"), which came into force on January 1, 2004, introduced a new and comprehensive statutory structure for the limitation of actions in Ontario. The new Act applies to all claims pursued in a court proceeding except proceedings listed in s. 2(1). Section 2(1)(a) excepts proceedings to which the *RPLA* applies. The new Act also provides a list of proceedings for which no limitation period applies in ss. 16 and 17. Finally, s. 19 references a schedule to the new Act that lists other acts that contain their own effective limitation period for claims that would otherwise be covered by the new Act.

[15] The basic limitation period under s. 4 of the new Act is two years after the claim was discovered. “Claim” is defined in a comprehensive way in s. 1 to mean: “a claim to remedy an injury, loss or damage that occurred as a result of an act or omission”.

[16] Section 4 of the *RPLA* provides a ten-year limitation period for “an action to recover any land”. It reads:

> 4. No person shall make an entry or distress, or bring an action to recover any land or rent, but within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to some person through whom the person making or bringing it claims, or if the right did not accrue to any person through whom that person claims, then within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to the person making or bringing it.

[17] The current *RPLA* previously formed Part I of the *Limitations Act*, R.S.O. 1990, c. L.15 (the “old Act”). It has existed almost exactly in its current form since 1833 in England’s *Real Property Limitation Act, 1833*, 3 & 4 Will. 4, c. 27 (U.K.) and was incorporated into the Ontario statutes in 1834 through *An Act to amend the Law respecting Real Property, 1834*, (U.C.) 4 Will. IV, c. 1. The relevant wording of the limitation period for actions to “recover any land”, both in England and in Ontario, has remained unchanged throughout, although the length of the limitation period has changed over time. In Ontario in 1910, the provisions were moved from the *Real Property Limitation Act, 1833* to form Part I of the *Limitations*

Act, S.O. 1910, c. 34, where they remained until 2004. The new Act revoked Parts II and III of the old Act, leaving Part I, and renamed it as the *RPLA*.

[18] Based on this history, the limitation period for actions to "recover any land" currently enshrined in s. 4 of the *RPLA* has been in effect in England and in Ontario since the 19th century. However, before the new Act came into force, s. 4 of the *RPLA* had never been held to apply to a fraudulent conveyance action. Nor had any other section of the old Act been found to apply to a fraudulent conveyance action. Therefore, before the new Act came into force, there was no limitation period for bringing a fraudulent conveyance action.

[19] The historical case law on this issue is extremely limited. The only Canadian case I have found that addresses the interpretation issue directly is *Trites v. Humphreys* (1899), 2 N.B. Eq. 1, a decision of the New Brunswick Supreme Court in Equity. In that case, the plaintiff was owed money on a debt by the defendant, who, before he died, had transferred his real property to a third party, who conveyed it to the defendant's wife. The plaintiff brought a fraudulent conveyance action against the defendant's estate.

[20] One argument raised against the plaintiff was that the action failed for delay. That argument was, however, not available in view of the earlier English Court of Appeal decision in *Three Towns Banking Co. v. Maddever*, (1884) 27 Ch. D. 523 (U.K. C.A.) ("*Re Maddever*"), where the court held that a fraudulent conveyance

claim was a legal right that cannot be lost by mere delay, unless the underlying debt claim is barred by the statute of limitations.[2] The court in *Re Maddever* made no reference to any statutory limitation period being applicable, including s. 2 of the *Real Property Limitation Act, 1833*.[3]

[21] The court in *Trites* held that the *Statute of Limitations of Real Actions*, c. 84, C.S.N.B. 1877, the equivalent New Brunswick statute to the *RPLA*, did not apply to a fraudulent conveyance claim. It did so in response to an argument that s. 21 of the *Statute of Limitations of Real Actions*, which dealt with equitable claims, applied to the fraudulent conveyance claim in that case. Section 21 referred back to prior sections of the New Brunswick statute, including the twenty-year limitation period for "an action to recover land" in s. 3. The court explained why the words "bring an action to recover land" did not apply to a fraudulent conveyance action at para. 11:

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[2] In this case, the motion judge was asked to dismiss the action for delay and declined to do so based on equitable considerations. That finding was not appealed. However, had it been, the law is clear that if a claim for a legal remedy is brought within the applicable limitation period, it will not be dismissed for delay: *Trites*; *Re Maddever*, at p. 531; *Brown v. Weil* (1927), 61 O.L.R. 55, at p. 59.

[3] Section 2 of the *Real Property Limitation Act, 1833* contains similar language to s. 4 of the *RPLA*: "And be it further enacted, That after the Thirty-first Day of December One thousand eight hundred and thirty-three no Person shall make an Entry or Distress or bring an Action to recover any Land or Rent but within Twenty Years next after the Time at which the Right to make such Entry or Distress or to bring such Action shall have first accrued to some Person through whom he claims; or if such Right shall not have accrued to any Person through whom he claims, then within Twenty Years next after the Time at which the Right to make such Entry or Distress or to bring such Action shall have first accrued to the Person making or bringing the same."

> It was contended by the Attorney-General that s. 21 of c. 84, C.S.N.B., relating to limitations as to real actions applied to this case. I do not agree in this view. This is in no sense an action in which the plaintiff claims the land. He simply seeks a declaration that as to him and his co-creditors the conveyances in question are void; the effect of which is simply to put the title to the land conveyed by them in Humphreys, the debtor, as though the deeds had never been made, so that they can be made available for the payment of the debts. The section in question only applies to cases where an equitable title to the land is set up, which if it had been a legal title, would have been within the statute.

[22] In Ontario, a five-judge panel of this court in *Brown v. Weil* (1927), 61 O.L.R. 55, was asked to dismiss a fraudulent conveyance action for delay. The action was commenced more than ten years after the conveyance.

[23] Relying on *Re Maddever*, the court held that because the plaintiff was enforcing a legal rather than an equitable right, mere delay could not bar the claim. Importantly, the court did not discuss s. 5 of *An Act respecting the Limitation of Actions*, R.S.O. 1914, c. 75, now s. 4 of the *RPLA*, which provided a ten-year limitation period for actions to recover land. If that section had applied, the action would have been statute barred. I infer that it was because the section did not apply to bar the claim, that the argument based on laches was pursued, although unsuccessfully, as an alternative.

[24] Whether there was a limitation period for bringing a fraudulent conveyance action to set aside a transfer of chattels or personal property was decided by this court under the old Act in *Perry, Farley & Onyschuk v. Outerbridge Management*

Ltd. (2001), 54 O.R. (3d) 131 (C.A.). In that case, this court held that an action to declare a transfer of personal property void was not an action on a simple contract or an action on the case, and therefore the six-year limitation period did not apply. The court declined to decide if it was a specialty because the action was brought within twenty years of the transfer, so that it would have been within time.

[25] To summarize, prior to the enactment of the new Act, s. 4 of the *RPLA* or its equivalent provisions were never applied to an action for a fraudulent conveyance of land. Also, the six-year limitation period in the old Act did not apply to actions for the fraudulent conveyance of chattels or personal property. There was therefore no limitation period applicable to fraudulent conveyance actions.

[26] Following the introduction of the new Act, including the enactment of the *RPLA*, the Superior Court of Justice in *Conde v. Ripley*, 2015 ONSC 3342, 125 O.R. (3d) 689, applied the ten-year limitation period under the *RPLA* to a fraudulent conveyance action without considering the established jurisprudence set out above. In *Conde*, the fraudulent conveyance action was brought in 2012 to set aside a conveyance made in 2007. The defendant's position was that the basic two-year limitation period under the new Act applied and the claim was out of time. The motion judge in *Conde* rejected that position. He found that the applicable limitation period was ten years under s. 4 of the *RPLA*.

[27] In para. 41, he explained his analysis:

> An *FCA* claim, if successful, does no more or less than invalidate the impugned transfer as against "creditors or others" of whom the plaintiff is obviously an exemplar. Where the conveyance attacked is of real property, such an action is thus quite literally an "action to recover land" since the outcome of the action, if successful, is to "recover" the land to the estate of the transferor (in this case, Mr. Ripley) so that – once so recovered – it can respond to the claims of creditors or others as if it had never been transferred. The outcome of the plaintiff's claim against the transferor may well be a money judgment – the outcome of the claim against the transferee under the *FCA* is an order "to recover land" which is then available to satisfy that claim.

[28] The motion judge in *Conde* rejected the applicability of the reasoning in the decision of the Divisional Court in *Toronto Standard Condominium Corporation No. 1703 v. 1 King West Inc.*, 2010 ONSC 2129, 318 D.L.R. (4th) 378 (Div. Ct.), which upheld the finding by Master Glustein as he then was, that a claim by a creditor to set aside mortgages as fraudulent was not an action to recover land, and therefore s. 4 of the *Limitations Act, 2002* applied. The motion judge found that in distinction, the *Conde* case "involves an *actual* transfer of land", stating at para. 48:

> [T]he actual impact is not a money judgment in favour of the plaintiff. Rather, it is an order that the transaction is void as against the creditor or others similarly situate (including, potentially, a trustee in bankruptcy). This makes the property available for collection proceedings as a matter of practical reality, but in form and substance, it results in the recovery of property from one estate (the transferee) for the benefit of another (creditors and others with claims against the transferor). It is thus in every sense an action to recover property – that is both its object and the end result of any judgment that might be obtained. As such, it is an *FCA* action…to which the

> *RPLA* applies on its face in any instance where, as here, the conveyance impugned is a conveyance of real property.

[29] In his discussion, the motion judge noted that "*FCA* actions were once considered to be actions for which no limitation period specifically applied": *Conde*, at para. 44. However, he did not go on to address the significance of that history and the fact that although the provision he applied, s. 4 of the *RPLA*, had always existed, it had not been applied to fraudulent conveyance actions. In particular, the words "action to recover land" were never considered to be applicable to a fraudulent conveyance action.

[30] Prior to this court's decision in *Anisman (ONCA)* but after the new Act came into force, not all judges of the Superior Court agreed on which limitation period applied to a fraudulent conveyance action. For example, in *Wilfert v. McCallum*, 2017 ONSC 3853, 49 C.B.R. (6th) 272, Faieta J. found that a fraudulent conveyance action "is not an action to recover land": at para. 26. He stated at para. 25:

> In *Hartman Estate v. Hartfam Holdings Ltd.*, 2006 CanLII 266 at para. 57, [2006] O.J. No. 69, the Ontario Court of Appeal found that the word "recover" means to "obtain any land by judgment of the Court" and "… is not limited to obtaining possession of land nor does it mean to regain something that the plaintiff had and lost". This view, in relation to the predecessor of section 4 of the *RPLA*, was found to equally apply to section 4 of the *RPLA* by the Ontario Court of Appeal in *McConnell v. Huxtable*, 2014 ONCA 86 at para. 19.

> With the greatest of respect for the views expressed by my colleague in *Conde v. Ripley*, 2015 ONSC 3342 at para. 48, the prospect that a financial benefit may accrue to a plaintiff/judgment creditor resulting from a declaration to set aside the transfer of land under the *FCA* does not result in the plaintiff "obtaining land by judgment of the Court". Accordingly, an action to set aside a fraudulent conveyance of land is not an action to recover land.

[31] In addition, in *Indcondo Building Corporation v. Sloan*, 2010 ONCA 890, 329 D.L.R. (4th) 351, a creditor of a discharged bankrupt brought a fraudulent conveyance action under a s. 38 of the *BIA* order. This court accepted, without discussion or analysis, that the two-year limitation period under s. 4 of the new Act would apply to a fraudulent conveyance action. However, because of the application of the transition provisions of the new Act, the applicable limitation period in that case was the former one, i.e., no limitation period. See also *Pantziris v. 1529439 Ontario Limited*, 2021 ONCA 784, 96 C.B.R. (6th) 182 (decided after *Anisman (ONCA)*) where this court again accepted, without reference to the ten-year limitation period under the *RPLA* or other discussion, that the two-year limitation period in s. 4 of the new Act would apply to a fraudulent conveyance action.

[32] In *Anisman v. Drabinsky*, 2020 ONSC 1197, 76 C.B.R. (6th) 230 ("*Anisman (ONSC)*"), aff'd 2021 ONCA 120, Morgan J. followed *Conde* and found that s. 4 of the *RPLA* applied to a fraudulent conveyance action. He adopted the reasoning in *Conde* in para. 56:

> As Dunphy J. said in *Conde v. Ripley*, 2015 ONSC 3342, at para 2, "if a claim is brought under the *FCA* to set aside a conveyance of real property, such a claim is on its face a claim to 'recover any land' to which the *RPLA* applies a 10-year limitation period."

[33] At para. 61, Morgan J. stated: "In my view, it is the 10-year limitation period in the *RPLA* that applies to the present action. The Plaintiff commenced this action before the expiry of ten years from the date of the impugned transfer." Morgan J. went on to find that if his conclusion that the *RPLA* applied was wrong, based on when the claim was discovered, the action was nevertheless commenced within the two-year limitation period under the *Limitations Act, 2002*.

[34] That decision was upheld by this court "[f]or the reasons of Morgan J., with which we substantially agree": *Anisman (ONCA)*, at para. 1. Neither this court nor Morgan J. considered the relevant authority that pre-dated *Conde,* nor did it refer to the *Indcondo* case.

The relief in a fraudulent conveyance action under the *Fraudulent Conveyances Act* does not lead to "the recovery of any land"

[35] It is necessary to understand the nature of the relief that is obtained in a fraudulent conveyance action when determining if it is "an action to recover land". The action is brought under s. 2 of the *FCA* which states:

> 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.

[36] While some courts have ordered a reconveyance of the property that was the subject of the impugned transaction back to the transferor, in fact, the section does not afford that remedy. Because the fraudulent conveyance is void only "as against creditors or others", the case law has made it clear that the transaction remains valid as between the transferor and the transferee: *Elford v. Elford*, (1922) 64 S.C.R. 125, at p. 129; *Re Lawrason's Chemicals Ltd.* (1999), 127 O.A.C. 51 (C.A.), at para. 8.

[37] The purpose of declaring the conveyance void as against creditors or others is to allow them to execute against the property. But what are the mechanics? The case law speaks of "setting aside" the impugned transaction, but again, how is this accomplished?

[38] That issue was squarely faced recently by the Court of Appeal for British Columbia in *Guthrie v. Abakhan & Associates Inc.*, 2017 BCCA 102, 411 D.L.R. (4th) 639. In that case, Newbury J.A. refers to the 1988 *Report on Fraudulent Conveyances and Preferences* by the Law Reform Commission of British Columbia, which observed that neither the *Fraudulent Conveyance Act*, R.S.B.C. 1979, c. 142, nor the *Fraudulent Preference Act*, R.S.B.C. 1979, c. 143,

stated the effect of a fraudulent transfer as between the grantor and grantee, but only provided that such a transfer is void against the successful claimant.[4]

[39] However, case law such as the *Elford* decision, relying on English authority, makes it clear that the grant is "absolute" as between the parties: *Elford*, at p. 129. Therefore, if the grantee sells to a *bona fide* purchaser, that person gets good title, but the proceeds can stand in the stead of the property for the benefit of the creditors of the transferor.

[40] Newbury J.A. quoted with approval at para. 23 the following analysis from M.A. Springman, George R. Stewart, J.J. Morrison, Catherine Jenner, Stephanie Ben-Ishai, and Eric Gertner, *Frauds on Creditors: Fraudulent Conveyances and Preferences*, loose-leaf (Toronto: Thomson Reuters, 2023) at § 7:7:

> It would seem that, under existing fraudulent conveyance statutes, successful creditors do not need any such "return" of property (whether or not accompanied by a change in the title register) so long as the court has declared that the conveyance is "void as against" them. Presumably, the creditors would be entitled in any event to enforce any writ of seizure and sale against the property, despite the fact that the property is now registered in the name of the transferee, since that is the result under the legislation.[5].

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[4] The current versions of these statutes, the *Fraudulent Conveyance Act*, R.S.B.C. 1996, c. 163, and the *Fraudulent Preference Act*, R.S.B.C. 1996, c. 164, are also silent to the effect of a fraudulent transfer as between the grantor and grantee.

[5] Newbury J.A. relied on an earlier version of the *Frauds on Creditors* loose-leaf, but the excerpt she quotes remains unchanged in the most recent version cited and quoted here.

[41] Because the transfer remains valid as between the parties, Newbury J.A. concluded at para. 24 that:

> [T]he better view is that the [*Fraudulent Conveyance Act*] does *not* operate so as to "re-vest" the conveyed property in the grantor, nor to allow the grantor to set up his or her fraudulent act as a basis on which to re-claim it from the grantee. Rather, as stated by Anglin J. in *McGuire v. Ottawa Wine Vaults Co.* (1913) 48 S.C.R. 44, "…the relief granted is properly confined to setting aside the impeached conveyance, thus removing it as an obstacle to the creditor's recovery under executions against their [*sic*] debtor." (At 56.) It is then open to the creditor to pursue such additional remedies as may be necessary, including (as we have seen) the registration of a judgment against land, a declaration of trust, etc."

[42] I agree with the analysis and conclusion reached by Newbury J.A., that the effect of an order under the *Fraudulent Conveyances Act* declaring the fraudulent conveyance void against creditors is not that the property is transferred back to the transferor. Title does not change because of the declaration. But the creditors may treat the property registered in the name of the transferee as exigible for the debts owed to them by the transferor. Executions can be registered against it by those creditors and their debts have priority to the proceeds of the sale of the property.

[43] It is clear from this analysis that the creditor does not recover land, in the sense of obtaining any rights to the land, either to the title or to possession, because a fraudulent conveyance is declared void. Neither does the transferor recover land. No land is obtained by the judgment of the court: see *McConnell v. Huxtable*, 2014 ONCA 86, 118 O.R. (3d) 561, at para. 38.

[44] What occurs is what the statute intends: the creditors regain the ability to execute against the land for the payment of the debts owed to them by the transferor. The conveyance is set aside but only as against creditors or others.

This court's interpretation in other cases of "an action to recover any land" in s. 4 of the *RPLA* does not accord with the relief granted in fraudulent conveyance actions under the *Fraudulent Conveyances Act*

[45] This court has considered the applicability of s. 4 of the *RPLA* and the meaning of "an action to recover any land" in the context of actions other than fraudulent conveyance actions. This court has interpreted this statutory language to apply to actions where the judgment of a court grants a property right in land or in money that was paid for land. This does not align with the nature of the relief in a fraudulent conveyance action as described above.

[46] First, in *Equitable Trust Co. v. Marsig*, 2012 ONCA 235, 109 O.R. (3d) 561, at para. 30, this court stated that "the legislature intended that all limitation periods affecting land be governed by the [*RPLA*]." However, two years later in *Zabanah v. Capital Direct Lending Corp.*, 2014 ONCA 872, 123 O.R. (3d) 350, leave to appeal refused, [2015] S.C.C.A. No. 36, the court clarified that the application of the *RPLA* is more limited and that it does not automatically apply to any action that may involve a mortgage or real property.

[47] In *McConnell*, the issue was whether an equitable claim for a constructive trust based on unjust enrichment was an action to recover land, and therefore

whether the ten-year limitation period would apply. This court concluded that in seeking the remedy of a constructive trust over real property, "the respondent is making a claim for recovery of land in the sense that she seeks to obtain land by judgment of the court": *McConnell*, at para. 38.

[48] *McConnell* was followed in *Waterstone Properties Corporation v. Caledon (Town)*, 2017 ONCA 623, 80 R.P.R. (5th) 173, where Roberts J.A. summarized the interpretation and application of s. 4 of the *RPLA* at para. 32 as follows:

> The words "action to recover any land" in s. 4 of the *RPLA* are not limited to claims for possession of land or to regain something a plaintiff has lost.[6] Rather, "to recover any land" means simply "to obtain any land by judgment of the Court" and thus these words also encompass claims for a declaration in respect of land and claims to the ownership of land advanced by way of resulting or constructive trust: *Hartman Estate v. Hartfam Holdings Ltd.*, [2006] O.J. No. 69, at para. 56; *McConnell v. Huxtable*, 2014 ONCA 86, 118 O.R. (3d) 561, at paras. 38-9.

[49] In *Metropolitan Toronto Condominium Corporation No. 1067 v. L. Chung Development Co. Ltd.*, 2012 ONCA 845, this court held that an action for damages based on negligence, breach of contract, and breach of fiduciary duty in relation to the value of surface rights to a condominium parking lot was not an action to

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[6] This interpretation aligns with the understanding of Buckley L.J. with regards to the *Real Property Limitation Act, 1833* in *Williams v. Thomas*, [1909] 1 Ch. 713 (C.A.), at p. 730: "It has been argued, and, I think, successfully, that while on the one hand the expression "to recover any land" in s. 2 of the Act of 1833 does not mean regain something which the plaintiff previously had and has lost, but means "obtain any land by judgment of the Court," yet it is not limited to the meaning "obtain possession of any land by judgment of the Court."

recover land. Similarly in *Beniuk v. Leamington (Municipality)*, 2020 ONCA 238, 150 O.R. (3d) 129, van Rensburg J.A. explained that an action to recover land is one where there is a claim for a property interest and involves property rights; therefore a negligence and nuisance claim for damages to repair a home were damages claims that did not involve property rights and s. 4 of the *RPLA* did not apply.

[50] Where s. 4 of the *RPLA* has been held to apply in a number of cases is in actions that claim an interest in land or money that stands in the stead of land: *Harvey v. Talon International Inc.*, 2017 ONCA 267, 137 O.R. (3d) 184, at para. 55; *Scicluna v. Solstice Two Limited*, 2018 ONCA 176, 421 D.L.R. (4th) 675, at para. 25; *Bakhsh v. Merdad*, 2022 ONCA 130, at paras. 12 and 20; *Studley v. Studley*, 2022 ONCA 810, at paras. 30-34.

[51] In summary, this court's jurisprudence on the meaning of s. 4 of the *RPLA* when it considered actions in relation to real property that were not fraudulent conveyance claims is that "an action to recover any land", within the meaning of s. 4 of the *RPLA*, is one in which the judgment of the court grants a property right in land or in money that was paid for land.

Anisman (ONCA)* was wrongly decided: the *Limitations Act, 2002* and not the *RPLA* applies to fraudulent conveyance actions under the *Fraudulent Conveyances Act

[52] Three conclusions flow from the case law interpreting s. 4 of the *RPLA*, the *Limitations Act, 2002*, and s. 2 of the *FCA*: 1) Before the new *Limitations Act, 2002*, no court applied s. 4 of the old Act (now s. 4 of the *RPLA*) to an action to set aside a fraudulent conveyance of real property. Because no other section of the old Act applied, there was no limitation period for a fraudulent conveyance action. 2) An order declaring a conveyance of real property void as against creditors or others does not return the property to the transferor. The title to the property remains with the transferee but because the transfer is set aside as against creditors or others, they may execute against the property in the hands of the transferee. 3) In an action to "recover any land", within the meaning of s. 4 of the *RPLA*, the judgment of the court must grant a property right. It is not enough that the subject matter of the action is real property.

[53] These three propositions from the case law compel the conclusion that the ten-year limitation period under s. 4 of the *RPLA* does not apply to a fraudulent conveyance action under the *Fraudulent Conveyances Act*.

[54] First, that statutory provision, which has existed in Ontario since the 19th century, was never applied to a fraudulent conveyance action before *Conde*.

As a result, that decision was made without the benefit of the relevant, binding authority and was followed in *Anisman (ONSC)* and *Anisman (ONCA)*.

[55] Second, the jurisprudence of this court interpreting the meaning of "an action to recover any land" under s. 4 of the *RPLA* requires the action to result in a court order where the plaintiff obtains a proprietary interest in land by judgment of the court. That is not the result of a successful fraudulent conveyance action for a declaration that a transfer is void and an order setting it aside as against creditors or others under s. 2 of the *Fraudulent Conveyances Act*. In those circumstances, the plaintiff does not obtain any land nor is the land recovered by the transferor.

[56] As a result, I conclude that to the extent that this court's decision in *Anisman (ONCA)* confirmed the decision of the motion judge that the ten-year limitation period in s. 4 of the *RPLA* applied to the action to declare a fraudulent conveyance of real property void as against creditors, it was wrongly decided.

The two-year limitation period in the *Limitations Act, 2002* applies to this action

[57] There are two provisions of the new Act that could apply to a fraudulent conveyance action, s. 16(1)(a) where there is no limitation period, and s. 4 which provides the two-year limitation period subject to discoverability.

[58] Section 16(1)(a) provides:

> (1) There is no limitation period in respect of,

(a) a proceeding for a declaration if no consequential relief is sought;

[59] In paragraph 2 of the Statement of Claim, the respondent Bank asks for three orders: a declaration that the transfer of the subject property was a fraudulent conveyance, an order setting aside the conveyance and a certificate of pending litigation.

[60] In *Perry, Farley & Onyschuk*, this court stated that the *FCA* "provides for a declaratory type proceeding": at para. 30. However, the declaration is only part of the remedy the court orders. First, the court must determine whether the transfer was fraudulent, that is, made by the debtor-transferor with the intent to defraud its creditors by putting the property into another person's hands and beyond the creditors' reach. The finding of fraudulent intent is made on evidence after a trial. As Newbury J.A. stated in *Guthrie*, the impugned transfer is actually "voidable": at para. 19. It is declared void as against creditors based on findings of fact made by the court on disputed evidence. It is not a declaration of rights based on, for example, the meaning of words in a statute or bylaw.

[61] If the finding of fraud is made, the transfer becomes void and is so declared. Then there is an order to set aside the transfer as it affects creditors or others. As in this case, the declaration is just part of the required relief for the creditor to be able to obtain access to the property for execution purposes: see *McGuire v. Ottawa Wine Vaults Co.* (1913), 48 S.C.R. 44, at p. 56.

[62] In his text, *The Law of Declaratory Judgments*, 4th ed. (Toronto: Thomson Reuters, 2016), Professor Lazar Sarna explains the distinction between a remedial judgment and a declaration at p. 54:

> A distinction is made between a remedial judgment and a declaration. In those provinces where declaratory orders are excluded from limitations statutes or the purview of juries, the distinction is crucial. A remedial judgment carries within its own terms a solution for the cure of a dispute, be that an order to do or not to do, or more specifically, to pay, deliver over, seize, sell, dissolve, remove, or refrain. It is self-executing in the sense that the parties and the executing officer need no further direction or authorization that that contained in the judgment. A declaration confirms or denies the existence of a right, as if bearing witness to what has always been the legal relationship between the disputing parties. Put that way, it is an existential judgment that considers rights to be or not to be.

[63] A fraudulent conveyance judgment is remedial. While it includes a declaration that a transfer is void, it also includes the consequence of that declaration, the remedy of setting aside the transfer as against creditors. Because the Bank seeks consequential relief, s. 16(1)(a) is not applicable.[7]

[64] That leaves the general two-year limitation period in s. 4 to bring a proceeding in respect of a claim, which is defined in s. 1 as “a claim to remedy an

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[7] There is also s. 16(1)(b): “a proceeding to enforce an order of a court, or any other order that may be enforced in the same way as an order of a court.” The effect of this subsection is that a judgment of an Ontario court, once obtained, remains valid and effective until it is paid. This section does not apply to a fraudulent conveyance action which is not an action to enforce a judgment; it is an action that makes an asset available for execution and enforcement. Further, it is not limited to judgment creditors. A fraudulent conveyance action can be brought by a creditor without a judgment and by “others”.

injury, loss or damage that occurred as a result of an act or omission". Section 4 provides:

> Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.

[65] In a fraudulent conveyance action under the *Fraudulent Conveyances Act*, the loss is the loss of the property that was transferred as an exigible asset available to the creditor. The impugned act is the transfer with fraudulent intent. The remedy is the declaration that the transfer is void against creditors and the consequential setting aside of the conveyance as against the creditors.

[66] I conclude that the two-year limitation period applies, subject to discoverability.

Stare decisis: _Anisman (ONCA)_ was binding and precedential

[67] In this case, the argument to the motion judge suggested that there was an issue whether the *Anisman (ONCA)* decision constituted a decision of this court that was binding and precedential. Although the reasons of this court in *Anisman (ONCA)* were brief because they substantially adopted the reasons of the motion judge, the decision in that case constituted a binding decision of this court on the issues it decided. As a result, lower courts, including the motion judge in this case, and this court were obliged to follow it, subject to counsel seeking an appeal to a five-judge panel of this court to reconsider it: see *Duggan v. Durham*

Region Non-Profit Housing Corporation, 2020 ONCA 788, 153 O.R. (3d) 465, at paras. 51-63.

(2) Did the trial judge err in ordering a trial of the issue of discoverability?

[68] The appellants submit that the motion judge made factual errors in giving effect to the respondent's evidence that if the two-year limitation period applied, it did not have sufficient knowledge to commence the claim before it did, and that he should have rejected that evidence and found that the claim was statute barred under s. 4 of the new Act.

[69] I would not give effect to this submission. Findings of fact from the record are the province of the motion judge and are accorded deference by this court. In this case, the discoverability issue became moot once the motion judge determined that the claim was subject to a ten-year limitation period. The motion judge determined at para. 64 that had the two-year limitation period applied, he would have ordered a trial of the following issue:

> If the [*Limitations Act, 2002*] were to apply here, the question would be when BMO had a "plausible inference" of the Defendants' liability under the *FCA*. In that event, I would find that there is a triable issue as to whether BMO had that plausible inference of Roufat's liability when it cross-examined him in 2009 or whether waiting for him to fulfill his undertakings constituted due diligence.

(3) Did the motion judge make palpable and overriding errors with respect to his findings of fact related to the delays in the action?

[70] The appellants submit that the motion judge made factual errors in finding that the appellants made a concession with respect to the respondent's chronology of events in the action. The appellants ask this court to reverse this finding and to order the motions for a status hearing and the discharge of the certificate pending litigation to be reheard.

[71] I would not give effect to this submission. The appellants did not seek this relief in their Notice of Appeal and thus it is not properly before this court. Further, an order dismissing an application to discharge a certificate pending litigation is an interlocutory order that is within the jurisdiction of the Divisional Court: see e.g., *313473 Ontario Ltd. et al. v. Lornal Construction Ltd. et al.* (1976), 18 O.R. (2d) 374 (Div. Ct.).

[72] At the conclusion of the reasons, the motion judge dismissed the motion for summary judgment that the claim was statute barred and to discharge the certificate of pending litigation. He granted the respondent's motion to extend the time to set the action down for trial and ordered it to be set down within 30 days.

[73] In my view, the most expeditious disposition of this appeal is not to order a separate trial of the discoverability issue, but to order that that issue be decided at

the trial of the fraudulent conveyance claim. The action should proceed to trial without further delay.

Disposition

[74] For the above reasons, I would allow the appeal and make the following orders: 1) The applicable limitation period for the fraudulent conveyance action under the *Fraudulent Conveyances Act* is two years from the date of discovery of the claim by the respondent under s. 4 of the *Limitations Act, 2002*. 2) The discoverability issue shall be tried together with the fraudulent conveyance issue and set down for trial in accordance with the order of the motion judge. 3) Costs of the appeal to the appellants in the agreed amount of $7,500.00 inclusive of disbursements and HST.

Released: August 4, 2023 “K.F.”

“K. Feldman J.A.”
“I agree. P. Lauwers J.A.”
“I agree. Grant Huscroft J.A.”
“I agree. Roberts J.A.”
“I agree. J. Copeland J.A.”