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• CREDITORS MAY INVALIDATE DEBTOR FRAUDULENT TRANSFERS OCCURRING LONG BEFORE ANY DEBTOR-CREDITOR RELATIONSHIP ESTABLISHED •

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INTRODUCTION

The Ontario Court of Appeal (“ONCA”) in *Ontario (Securities Commission) v. Camerlengo Holdings Inc.*¹ has arguably expanded the scope of what may be a fraudulent conveyance under s. 2 of the *Fraudulent Conveyances Act* (“FCA”). The FCA gives a court the discretion to invalidate transfers of property carried out to avoid effective enforcement by creditors and contingent creditors. In its decision, the ONCA ruled that a creditor may still pursue the invalidation of a transaction as a fraudulent conveyance under the FCA even if the creditor had no commercial or contractual relationship with the debtor at the time that the debtor had effected a transfer to insulate their assets or property.

KEY TAKEAWAYS TO KNOW

- Business owners who begin a new endeavour and transfer assets or property to “creditor proof” themselves against possible future claims and reduce the burden of personal liability may in fact not be doing so — the transfer may still be attacked as a fraudulent conveyance;
- A lender can look back in time, including to before it had any agreement or relationship with the debtor, for potential fraudulent conveyances; and
- In order to attack a transfer as fraudulent under s. 2 of the FCA, it is sufficient that there be a general intent to defraud creditors in the future — a creditor does not need to establish a particular intent to defraud or defeat an ascertainable creditor to have the transfer undone.

FACTS

The respondents were spouses. They purchased a family home taking title as a joint tenancy in 1988. The husband was a retired electrician and the sole director of the respondent construction company (“Construction Co.”).

In 1996, the husband and his business partner conveyed their interests in their respective family homes to their spouses for no consideration, just four months after opening a new electrical services business.

The Ontario Securities Commission (“OSC”) alleged in a statement of claim that the respondents made the transfer of title with the intention to defeat existing and future creditors, one of which was the OSC. The OSC became a creditor when it obtained a garnishment order in 2018 on Construction Co. after discovering that it had received a loan from an unrelated company that the OSC successfully established was orchestrating a fraudulent investment scheme.

LOWER COURT RULING

Construction Co. had initially brought a successful motion to strike the OSC’s statement of claim for not articulating a reasonable cause of action.

The motion judge concluded that the OSC did not come within the class of persons typically contemplated by s. 2 of the FCA² as it was not a

creditor at the time the husband transferred his interest in the family home in 1996. Further, relying on previous Ontario appellate jurisprudence, the motion judge concluded the pleading was insufficiently particular to support a claim under the FCA as it had no specifics with respect to the names of creditors, the actual debts, or the precarious financial position of the debtor.

DECISION ON APPEAL

The ONCA held that the motion judge erred in interpreting s. 2 of the FCA. It concluded that where an intent to defraud has been manifested at the start of a new business endeavour, for the purposes of judgment proofing oneself, it is not necessary for a claimant in a fraudulent conveyance action to identify a specific creditor whom the debtor sought to defeat at the time of the conveyance:

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.³

Accordingly, the ONCA clarified that a subsequent creditor (who is not a creditor at the time of the alleged fraudulent conveyance) may attack the transfer if the intent of the transfer was to defraud creditors generally, even in the future.⁴

In light of the above, the ONCA concluded that the OSC had indeed pleaded facts, which if established, would provide some support that there was an intent to fraudulently defeat creditors. To support its case, the OSC pleaded, amongst other things:

- a. how the debtor transferred his interest in the family home to his spouse after 16 years of joint ownership;

- b. how no consideration was paid for the transfer;
- c. how the proximity of the transfer was close with the opening of the husband's new business (four months);
- d. that the couple were concerned with liability from the rapid expansion of the husband's new business and its risky projects;
- e. the fact that the husband paid all costs and expenses related to the property and gave personal guarantees for the mortgage obligations on the property; and
- f. that the husband continued to live in the property and treat it as his own.

CONCLUSION

The decision in *Camerlengo* provides a wider scope for creditors to undo a transaction as a fraudulent conveyance, and thus realize on an unpaid debt by a debtor. Properly pled, a creditor may still pursue recovery against assets or property transferred out of the debtor's hands long before the creditor had a commercial relationship with the debtor. In *Camerlengo*, the OSC became a creditor of the debtor 22 years after the alleged fraudulent conveyance.

Further, the alleged fraudulent conveyance in *Camerlengo* took place long before there was any evidence that the debtor was in a precarious financial position. The transfer occurred in 1996, but it was not until 2011 that the debtor had begun to face financial troubles. Accordingly, not only may a creditor look back far in time to undo a transaction, but it may undo a transaction that occurred before there was/or is evidence of the debtor facing financial difficulties.

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¹ [2023] O.J. No. 633, 2023 ONCA 93 [*Camerlengo*].

² Section 2 of the FCA 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."

³ *Camerlengo*, at para. 11.

⁴ *Ibid.*

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