Court of King’s Bench of Alberta

Citation: Koldijk v Oliver Forest & Carrington Ltd, 2025 ABKB 27

Date: 20250116
Docket: 1701 02210
Registry: Calgary

2025 ABKB 27 (CanLII)

Between:

MICHAEL KOLDIJK, MARTIJN KOLDIJK and 973632 ALBERTA LTD.

Plaintiffs

- and -

OLIVER FOREST & CARRINGTON LTD., KAREN GRACE, 961945 ALBERTA LTD., KUNAI K. NAND, SARAH THOMSPON and CHOMICKI BARIL MAH LLP

Defendants

Reasons for Decision
of the
Honourable Justice J.T. Eamon

Introduction

[1] The Plaintiffs applied in morning civil chambers to lift the stay of this action imposed by s 69.3 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (“***BIA***”) in the bankruptcy of the Defendant Karen Grace (“***Grace***”) to continue their claims against her.

[2] Ms Grace’s bankruptcy trustee was served notice of the application, takes no position, and did not appear on the application.

[3] The Plaintiffs claim to be a secured creditor of the Defendant Oliver, Forest & Carrington Ltd ("***OFC***"). They claim that OFC received funds from the Clerk of this Court to which the Plaintiffs were entitled as secured creditors and that Ms Grace received and fraudulently used the funds to pay expenses of OFC or to pay herself, "with knowledge that neither she nor OFC had any entitlement to said funds". Consequently, the Plaintiffs "have surpassed the requisite threshold of establishing a case of fraud to be met, thereby justifying lifting the stay of proceedings."

[4] The Plaintiffs further assert:

> 24. Likewise, the Applicants would be materially prejudiced if the automatic stay of proceedings persists, as by virtue of the section 178 of the *BIA*, Grace would not be afforded protection of the *BIA* upon discharge from a claim of fraud.

[5] The Plaintiffs rely on the provisions of the *BIA* that except from the release of claims provable in bankruptcy, liabilities "arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity" (*BIA*, s 178(1)(d)) or "resulting from obtaining property or services by false pretences or fraudulent misrepresentation" (*BIA*, s 178(1)(e)). Therefore, they submit, the stay of their claim should be lifted pursuant to s 69.4 of the *BIA*.

Claim against Ms Grace

[6] The allegations in the statement of claim against Ms Grace are that she was the sole director of OFC; she wrongfully and in breach of her fiduciary obligations caused all or part of the funds received from the Clerk of the Court to be paid from OFC to Grace personally; she fraudulently concealed the receipt and use of the funds from the shareholders of OFC; the transfer was a breach of fiduciary duty by Grace, who is liable as a constructive trustee to account for the funds to the Plaintiffs, liable to a tracing order, and liable to make restitution of the funds.

[7] The pleadings do not name the shareholders of OFC, nor do any of the Plaintiffs plead that they are shareholders of OFC. The Plaintiffs asserted in their claim that Grace was never a shareholder of OFC, but Grace did not admit that allegation in her defence. She pled she was the last remaining shareholder.

Evidence

[8] The Plaintiffs provided an affidavit of Michael Koldijk ("**Koldijk**"), exhibiting previous affidavits in this action and an affidavit of Ms Grace filed in another action (with exhibits excluded). Ms Grace's affidavit generally describes her involvement in the receipt and use of the funds. It appears to have been tendered by the Plaintiffs as Grace's admission of receipt and use of the funds. It includes detail of assistance she obtained in dealing with the funds, and indicates she had legal and accounting assistance. The details add context to her admissions and form part of them. Consequently I have considered the entirety of her affidavit including the explanations and details that may tend to exonerate her.

[9] Ms Grace did not file an affidavit in opposition to the motion but appeared, self represented, on the application and asked that the Court dismiss the application observing this dispute has been going on for years.

2025 ABKB 27 (CanLII)

[10] The events arise from the business and affairs of OFC.

[11] Mr Koldijk deposed that OFC was indebted to the Plaintiffs under a second mortgage on certain lands of which OFC was registered owner.

[12] The exhibits indicate that this mortgage was originally granted by 881885 Alberta Ltd to the mortgagee 843538 Alberta Ltd on December 18, 2000, to secure an advance of $600,000 and interest thereon at 17%, all due and owing on the stated maturity date of December 1, 2001. There is no evidence whether or not the time for payment was extended over the years.

[13] The exhibits indicate that 843538 Alberta Ltd "in trust" transferred the mortgage to the Plaintiff 973632 Alberta Ltd "in trust" on December 11, 2003. Anthony Watts was the transferor's signing officer in that transaction, and swore an affidavit appended to the transfer that he was an officer or director of 843538 Alberta Ltd.

[14] In turn, 973632 Alberta Ltd executed transfers of partial interests in this mortgage to the individual plaintiffs.

[15] The manner in which OFC became registered owner of the lands is not apparent from the record.

[16] The first mortgagee of the subject lands commenced foreclosure proceedings in 2011 in action no 1103-06790 ("**Foreclosure Action**").

[17] The lands were sold on September 25, 2012, pursuant to an Order of this Court in the Foreclosure Action. Following payment to the first mortgagee, the amount of $536,448.28 was paid into Court in the Foreclosure Action in December 2012. Mr Koldijk stated in his affidavit that the payment into Court was "to the benefit of subsequent encumbrancers in order of their registered priority".

[18] Mr Koldijk sometimes expressed opinions and beliefs about matters in his affidavits, such as speculation about the knowledge or intentions of other people or the import of documents that are not before the Court, rather than confining his evidence to facts as he ought to do, so it is difficult to know if he is quoting from the order or providing his opinion of how the distribution of funds would generally progress in a foreclosure action.

[19] I was not provided a copy of the relevant Court Orders. Alberta foreclosure orders generally provide for the surplus to be held by the Clerk and usually do not direct who shall receive the funds nor make findings that registered subsequent encumbrances are valid. Those issues are usually determined in later applications for payment out.

[20] Mr Koldijk deposed that in mid-2014 he applied in the Foreclosure Action, on behalf of the within Plaintiffs, for payment out of the funds in Court. Another creditor challenged his application. In the course of that dispute, Mr Koldijk learned in late November or early December 2015 through an action search that no funds were held in Court to the credit of the Foreclosure Action.

[21] Mr Koldijk deposed that upon further investigation, he learned that an execution creditor, 961945 Alberta Ltd ("961 Alberta"), had applied to the Court in the spring 2014 for payment out of a writ of enforcement and as a result, the Court granted an order on April 29, 2014, directing payout of $178,560.51 to 961945 Alberta and $366, 060.76 to OFC.

2025 ABKB 27 (CanLII)

[22] Mr Koldijk's characterization of the April 29, 2014 Order is not entirely accurate. The formal Order directed a distribution of the funds to 961 Alberta "and any other interested party in accordance with Part 11 of the *Civil Enforcement Act*, RSA 2000, c C-15" (the "***CEA***"). The Order does not specifically name OFC as a recipient of funds. It is notable that the Order did not direct a distribution to subsequent encumbrancers who (as described below) are not necessarily going to be identified by the Clerk of the Court when conducting a Part 11 distribution.

[23] 961 Alberta was represented by lawyers in the application leading up to the April 29, 2014, Order.

[24] Mr Koldijk deposed that the lawyers fraudulently or negligently represented to the Court in their application that all other parties who may have been entitled to the funds had been paid out. Further, the lawyers failed to serve the other encumbrancers with notice of the application, which he said was "either grossly negligent or was intentional and intended to prevent any opposition" to their application. He further stated that 961 Alberta's affidavit in support of the application wrongfully "implied" the creditors on the land title had been paid out and that the lawyers knew the financial encumbrancers on title had claims to the funds.

[25] Mr Koldijk's allegations in his affidavits that the law firm or its lawyers or its client acted fraudulently or negligently are inadmissible opinion and argument and I have ignored them. Moreover, as explained below the allegations of fraud against the lawyers are factually groundless on the record provided in the present application.

[26] I have also ignored Mr Koldijk's opinion that the lawyers prepared and submitted on behalf of 961 Alberta an affidavit that "implied" that the creditors on title had been paid. It is up to the Court to decide what was implied, from the words and context of the affidavit. The witness' opinion about the meaning and implications of the affidavit are inadmissible and irrelevant. The Plaintiffs did not provide a copy of this affidavit on the present application.

[27] I have relied on the certified transcript of proceedings before Applications Judge Smart on April 29, 2014, to ascertain what 961 Alberta's lawyers represented to Applications Judge Smart and how the funds came to be paid out to OFC.

[28] According to the transcript of the April 29, 2014 application, 961 Alberta was not related to OFC. It was a company that provided services to the lands, obtained a default judgment against OFC, and filed the necessary documents including in the personal property registry to maintain its status as an execution creditor.

[29] Counsel for 961 Alberta informed Applications Judge Smart that OFC and another company, Watts Shewchuk and Associates Ltd ("Watts Shewchuk"), were both struck from the corporate register, and that the Applicant served Ms Grace as a director of OFC and another individual identified as Glen Watts as a director of Watts Shewchuk. No one other than counsel for the execution creditor appeared at the application. It is apparent from the transcript that none of the registered financial encumbrancers were served.

[30] Counsel informed Applications Judge Smart that the proceeds of the foreclosure sale had been in Court since late 2012 and no one had applied for payment out. Counsel advised the Applications Judge that there were no current registrations in the personal property registry other than her client's registration, that there were registrations of encumbrances against title to the property before it was sold in the Foreclosure Action, and that she understood the registrations on title (apart from her client's writ) had been paid out. But as is apparent from the transcript of

2025 ABKB 27 (CanLII)

the application, Applications Judge Smart questioned counsel's understanding and counsel quickly clarified that she did not know if the subsequent encumbrancers had been paid out.

[31] I firmly reject the Plaintiffs' characterization of counsel's conduct as fraudulent. In fact, counsel for 961 Alberta was clear to the Applications Judge that she did not know if the subsequent encumbrancers had been paid. I also note that counsel for 961 Alberta did not suggest the Court should direct a distribution of remaining funds under Part 11 of the *CEA*. The Court decided to do so on its own motion.

[32] The considerations that led to the April 29, 2014 Order for distribution of the funds are best illustrated by quoting directly from the transcript of the hearing before Applications Judge Smart:

> MASTER SMART: Were their [sic] other registrations on title at the time of foreclosure?
>
> MS THOMPSON: My understanding is that all of those other registrations were paid out. The purchase price was about $1.2 million for the property. So, the mortgages, encumbrances, everything else. I mean if you take a quick look at --
>
> MASTER SMART: M-hm.
>
> MS THOMPSON: -- Exhibit D to our affidavit you'll see a laundry list of other people that are named as plaintiffs in this action against Oliver Forest and Carrington.
>
> MASTER SMART: Okay. So --
>
> MS THOMPSON: So based on what I have been able to piece together, all of those other parties are paid out. I did run a title search on the property. It's now in the name of a different party.
>
> MASTER SMART: Well of course it would be --
>
> MS THOMPSON: So.
>
> MASTER SMART: -- because everyone was foreclosed off.
>
> MS THOMPSON: Exactly.
>
> MASTER SMART: So, that is my question. Everyone was foreclosed off was - was it on the basis that they were to be paid or were they paid in fact?
>
> MS THOMPSON: I don't have confirmation of that, Sir.
>
> MASTER SMART: Okay.
>
> MS THOMPSON: My understand [sic] though would have been that if they had - if there were debts owed by these companies they should of showed up on a personal property registry search,
>
> MASTER SMART: Well, they would have. But often what happens is the mortgagee does not want to get involved.
>
> MS. THOMPSON: M-hm.

2025 ABKB 27 (CanLII)

MASTER SMART: And they say, well after we are done we will put the money in Court and whoever is entitled to the money can - they can fight over it. There could be second mortgages, there can be writs, there can be limitation issues.

MS THOMPSON: Right.

MASTER SMART: There can be all sorts of things. So - so it is conceivable that the half million was paid in and no one's bothered to come around to ask for it. Now, are you telling me that there are - you are - you are the only current execution creditor?

MS THOMPSON: Yes.

MASTER SMART: So when you searched today, you were the only one?

MS THOMPSON: Yes. We were the only one when we filed our writ of enforcement back in March of 2012. And we recently renew that writ in February 2014 and there was --

MASTER SMART: I am sorry and when was this foreclosed? And the money paid in?

MS THOMPSON: Well, the action number is the 2011 action number, Sir. So I am not particularly certain. We had just been able to obtain information about the money that was actually paid into Court but I don't have a copy of the foreclosure documents with me.

MASTER SMART: So, we do not know what the state of the title was immediately prior?

MS THOMPSON: No. And, the funds haven't been touched for the last almost 2 years now.

MASTER SMART: Is it the same amount of money in Court or is there something more?

MS THOMPSON: No. The same amount is still there.

MASTER SMART: I wonder if they accounted for the $10,000 hold back. But you do not care about that do you?

MS THOMPSON: Not really, no Sir.

MASTER SMART: Okay. That was December 28th, 2012 it was paid into Court. That is the date of the stamp. So it is not quite 2 years. All right. Well, if they have not maintained their registrations, I guess that is their concern. But what I am going to direct is that the clerk do a distribution.

MS THOMPSON: Ok

MASTER SMART: As though it were a distribution under the *Civil Enforcement Act*.

MS THOMPSON: Okay.

MASTER SMART: Okay. And you, of course, will be entitled - well I - there is more than enough money to pay you, correct?

2025 ABKB 27 (CanLII)

MS THOMPSON: That is right.

MASTER SMART: However, in the event there are other registrations somehow that the clerk's aware of that you do not know about or perhaps a bankruptcy.

MS THOMPSON: Right.

MASTER SMART: Because she will check that as well.

MS. THOMPSON: Okay.

MASTER SMART: What I will provide for is is [sic] that you are entitled to the - is it $2,000 priority being the first creditor and you are entitled to your costs of this application again in priority to the other execution creditors, the first creditor to take proceedings.

... But in any event that is - that is how we will do it. We will distribute it on that basis.

(Underlining added)

[33] Ms Grace stated in an affidavit sworn March 21, 2019 (appended to the Applicants' supporting affidavit), that the Government of Alberta issued a cheque in the amount of $366,060.76 to OFC, which was deposited in OFC's bank account on January 26, 2015.

[34] It therefore appears that after the payment to 961 Alberta, the Clerk of the Court paid the remainder of the proceeds to OFC under Part 11 of the *CEA*.

[35] In practice, the Clerks check for registrations in the Personal Property Registry ("**PPR**") before distributing the funds under Part 11 but do not do title searches, nor does Part 11 contemplate their doing so (*CEA*, ss 96(3), (4), 102). Unless a mortgagee has registered in the PPR (e.g. to protect a charge over chattels that might be in their mortgage) the Clerks may not be aware of land encumbrances. A Part 11 distribution contemplates any surplus will be paid to the debtor (*CEA*, s 100) and that is obviously what occurred in the present case.

[36] The Plaintiffs asserted in their statement of claim in the present action that OFC was struck by the Registrar of Corporations on October 10, 2011. Ms Grace admitted in her statement of defence filed March 17, 2017, that she was a former director of OFC from July 31, 2009, until it was struck on October 10, 2011, and that she revived OFC on January 22, 2015.

[37] In Alberta, striking from the register means the corporation ceases to exist, but it may be revived in certain cases and existing actions may continue against it. Ms Grace appears from the evidence to have had control of OFC's bank account and the ability to instruct accountants for the company upon its revival.

[38] Upon receiving the cheque, Ms Grace caused OFC to be revived, to make voluntary disclosure to Canada Revenue Agency, and file tax returns.

[39] Ms Grace further deposed that the funds were disbursed to taxation authorities on account of OFC's taxes, OFC's lawyers, OFC's accountants, and Grace (or Canada Revenue Agency to the credit of Grace). Ms Grace's payments included reimbursement of wages for work performed several years previously for which she was never paid and, on the advice of the accountants, a dividend.

2025 ABKB 27 (CanLII)

[40] As to the funds paid to Ms Grace by OFC, the amount of $140,000 appears to have been applied to the purchase of her home and the balance was disbursed and no longer in her hands.

[41] By May 2016, the funds were completely disbursed from OFC, at which time its bank account was closed.

[42] On October 3, 2017, on the application of a group known as Gaastra (and no one appearing for the within Plaintiffs), Applications Judge Smart set aside the April 29, 2014, Order and referred the issue of whether monies should be paid back into Court to special chambers.

[43] The evidence provided on the present application does not indicate whether the special application was ever heard or decided.

[44] The within action was commenced on February 3, 2017. Ms Grace assigned herself into bankruptcy on May 9, 2023. The Plaintiffs had over 6 years in this action to obtain all relevant records in Ms Grace's control and to question her for discovery. Whether they exercised those rights is not apparent from the present record.

[45] The Applicant did not place before the Court any corporate or other searches or evidence indicating:

(a) Who were the shareholders of OFC.

(b) Whether there were director(s) of OFC in addition to Ms Grace during any relevant period.

(c) Whether Ms Grace was an officer of the company.

(d) Who were the other officers of the company if any.

[46] There is no evidence whether Ms Grace took an active role in management of OFC before it received payment out of Court or was previously a directing mind of the company or a managing director or involved in defending or managing litigation against OFC including the Foreclosure Action.

[47] There is no evidence whether Ms Grace was aware of appraised values of the properties in foreclosure, the amount of equity in them, or the state of the Plaintiffs' second mortgage claims when the funds were paid from Court or at any other time.

[48] The transcript of proceedings before Applications Judge Smart indicates that Ms Grace was not present at the application by 961 Alberta. There is no evidence of the content of 961 Alberta's application documents (application form and supporting evidence), whether Ms Grace read them when she received them, or whether she was served with or aware of Applications Judge Smart's April 29, 2014 Order.

[49] The within action against the lawyer defendants was summarily dismissed by an Applications Judge. The Plaintiffs appealed but the hearing appears not to have proceeded. According to the Plaintiff's Application, the claims against these parties, and against 961 Alberta, have been settled.

[50] The Plaintiffs filed an application for summary judgment against Ms Grace which was scheduled to be heard May 12, 2023. According to the Plaintiffs' Application, the hearing was cancelled because Ms Grace assigned herself into bankruptcy.

2025 ABKB 27 (CanLII)

[51] After a delay of almost 18 months, the Plaintiffs now apply to continue this action against Ms Grace.

Analysis

Evidentiary standard

[52] The Court may declare that the automatic stay provisions under the *BIA* no longer apply where it is satisfied that the creditor is likely to be materially prejudiced by the continued operation of the automatic stay provisions, or that it is equitable on other grounds to make such a declaration (*BIA* s 69.4).

[53] In ***Henderson v Peerani***, 2024 ABCA 370 the Alberta Court of Appeal described the standards that apply in such an application:

> [76] The applicant bears the onus but need not establish a *prima facie* case. The Court's role is to ensure that there are "sound reasons, consistent with the scheme of the [*BIA*]" to relieve against the automatic stay. While a *prima facie* case is not required, "consideration of the merits of the proposed action [is] relevant to the issue of whether there are 'sound reasons' for lifting the stay... [I]f it were apparent that the proposed action had little prospect of success, it would be difficult to find there were sound reasons for lifting the stay": ***Ma v Toronto-Dominion Bank***, 2001 CanLII 24076 (ON CA) at paras 2-3, citing ***Re Francisco*** (1995), 1995 CanLII 7371 (ON SC) at 29-30, 32 CBR (3d) 29, affirmed 1996 CanLII 10233 (ON CA), 40 CBR (3d) 77.
>
> [77] As this Court found in [***Gaastra v Watts***, 2012 ABCA 262] at paragraph 2, while "some evidence must be produced to demonstrate that there is some substance to the allegations of fraud ... [t]he threshold of evidence required to prove fraud at this stage of the proceedings is low". Further, it is "not necessary that the fraud be the only way of interpreting the available evidence, nor is the possibility of a defence decisive". In that case, the chambers judge's decision to lift the stay was upheld because the alleged fraud claims, "if proven, would not be extinguished by the bankruptcy": ***Gaastra*** at para 1.

[54] One circumstance where the Court ought to lift the stay is where the claims, if proven, would not be extinguished by operation of the exceptions to claims released set out in s 178 of the *BIA*. The Plaintiffs say the claims against Ms Grace fall in this category.

BIA Section 178(1)(d)

[55] Section 178(1)(d) of the *BIA* provides that a discharge does not release the bankrupt from "any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity or, in the Province of Quebec, as a trustee or administrator of the property of others".

[56] The exceptions in s 178 must be interpreted narrowly and applied only in clear cases, because Courts have no discretion respecting their application and "the more claims that survive bankruptcy, the more difficult it becomes for a debtor to rehabilitate" (***Poonian v British Columbia (Securities Commission)***, 2024 SCC 28 at paras 26 - 27).

2025 ABKB 27 (CanLII)

[57] The Plaintiffs' case was focussed on showing sufficient evidence of fraud. I pointed out to counsel during the hearing that fraud or other misconduct is not the sole element of the exception created by s 178(1)(d). There are two elements: (1) the debt must be linked to the fraud, embezzlement, misappropriation or defalcation; and (2) the fraud, embezzlement, misappropriation or defalcation must occur in the context of a fiduciary relationship (***McAteer v Billes***, 2007 ABCA 137 at para 22, leave to app. to SCC refused 2007 CanLII 66750).

[58] The fiduciary duty must be owed to the creditor, not a third party (***Saskatchewan Wheat Pool v Ewing Lake Farms Ltd***, 1998 ABQB 172 at para 42; ***Korea Data Systems (USA), Inc v Aamazing Technologies Inc (Ajay Amazing Technologies Inc)***, 2012 ONSC 3922 at paras 121 – 123, aff'd 2015 ONCA 465 at paras 49 – 51).

[59] As to the element of misconduct, there appears to be some debate in Alberta case law whether the misconduct contemplated by s 178(1)(d) should be construed widely or relatively narrowly (see ***Hillsboro Ventures Inc v Ceana Development Sunridge Inc***, 2024 ABKB 658 at paras 119 – 120). The wider conception would include most, perhaps all, types of breaches of fiduciary obligation. The narrower approach requires some element of dishonesty, wrongdoing, or misconduct as opposed to inadvertence or incompetence (***Simone v Daley***, 1999 CanLII 3208 (ON CA)). I prefer the narrower view. It is consistent with the observation in ***McAteer*** that the exception is narrow, "applying only when there has been a finding of fraud, misrepresentation or other reprehensible conduct that is clearly linked to a bankrupt's debt" (***McAteer*** at para 28), and with the general approach to the interpretation of the exceptions described in ***Poonian*** at paras 26 - 27.

[60] Ms Grace's evidence made clear she intended to handle the funds as a representative of OFC upon its revival. She probably owed a duty to OFC. However, the evidence does not satisfy me that there is a genuine issue or case to be met that Ms Grace owed fiduciary duties to the Plaintiffs as secured creditors or sound reasons to lift the stay in such circumstances. Generally, a director owes any fiduciary duties to the company they serve, not the shareholders or creditors (***BCE Inc v 1976 Debentureholder***s, 2008 SCC 69 at paras 37, 41, 44, 66; ***Peoples Department Stores Inc (Trustee of) v Wise***, 2004 SCC 68 at paras 43, 46). The Plaintiffs have not provided any evidence that the circumstances could be otherwise in the present case.

[61] Given the absence of merit to any case that Ms Grace owed fiduciary duties to the Plaintiffs, the application to lift the stay on the ground there is a sufficient case or sound reasons under s 178(1)(d) must fail.

***BIA* Section 178(1)(e)**

[62] In response to my observation to the Applicant's counsel during the hearing that s 178(1)(d) applies only where a fiduciary duty is owed to the creditor seeking to lift the stay, counsel invoked s 178(1)(e) of the *BIA*.

[63] Section 178(1)(e) provides that a discharge does not release the bankrupt from "any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation, other than a debt or liability that arises from an equity claim".

[64] For a debt or liability to survive bankruptcy pursuant to s 178(1)(e), the creditor must establish three elements: (1) false pretences or fraudulent misrepresentation; (2) a passing of property or provision of services; and (3) a link between the debt or liability and the fraud (***Poonian*** at para 54).

2025 ABKB 27 (CanLII)

[65] As to the first element of the test, ***Poonian*** at para 61 states:

> The terms "false pretences" and "fraudulent misrepresentation" are not defined in the *BIA*, but the case law has been unanimous in finding that deceitful statements are at the core of both… For both concepts, the "essential test . . . is that the property was obtained by 'deceit', whether by positive act or failure to disclose material facts" ...

[66] The causation requirement of the test is strict (***Poonian*** at para 75). The claimant must establish a "direct link" and "a deceitful statement by which the debtor obtained property or services, causing the debt or liability of the creditor to arise" (***Poonian*** at paras 75 - 78). The deceitful statement need not be made to the victimized creditor, but it must be made by the bankrupt (***Poonian*** at paras 58, 66, 74, 86, 94).

[67] The exceptions are focussed on the bankrupt's alleged conduct. It is not enough to allege fraud against other actors, such as the allegations of fraud on the part of 961 Alberta and its lawyers that have been asserted in the present case. It is important to remain focussed on the allegations against Ms Grace, not others, and to assess whether there is sufficient evidence and sound reasons to justify lifting the stay. While the evidentiary standard is low, it is not non-existent.

[68] The only fraud pled against Ms Grace in the statement of claim is that she fraudulently concealed receipt of the funds from the shareholders of OFC. The Plaintiffs did not plead that she made representations to or had dealings with shareholders or created a false pretense in dealing with shareholders. In my view, a fraudulent scheme to conceal (where the necessary element of a fiduciary relationship exists) would be covered by s 178(1)(d), not s 178(1)(e). The core of the misconduct captured by s 178(1)(e) is a deceitful statement including failing to disclose material information (***Poonian*** at para 61).

[69] In addition to the absence of pleading facts that would fit within s 178(1)(e), there is a complete absence of evidence that provides any air of reality to the matter. There is no evidence of the identity of the shareholders in OFC. There is no evidence that Ms Grace made any representations to, or had dealings with, shareholders (assuming for the sake of argument they were persons other than Ms Grace). Ms Grace's affidavit indicates she dealt with lawyers, accountants and Canada Revenue Agency and says nothing about other dealings.

[70] Therefore, it is sheer speculation to think she obtained the monies through false pretences or fraudulent misrepresentations upon OFC shareholders, assuming for the sake of argument they were persons other than Ms Grace.

[71] I also considered the various allegations in the Applicants' supporting affidavit and attachments thereto although not pled in the statement of claim as misconduct on the part of Ms Grace. I do not discern a sound reason to lift the stay in reliance on s 178(1)(e) as explained in the following paragraphs.

[72] There is no genuine or legitimate case that Ms Grace made any dishonest representation, whether by positive representation or failure to disclose material facts, to anyone that led to the release of funds from the Court to OFC.

[73] Ms Grace was not present at the application before Applications Judge Smart. Counsel for 961 Alberta did not purport to act or make representations on behalf of OFC or Grace. The alleged misrepresentations by the lawyers to Applications Judge Smart cannot possibly qualify as misrepresentations by Ms Grace.

2025 ABKB 27 (CanLII)

[74] I considered whether there is a case that Ms Grace acted under or created false pretenses or fraudulent misrepresentations in her dealings with the accountants or the lawyers in respect of reviving OFC, making filings with Canada Revenue Agency, and disbursing the funds, and thereby obtained the benefits of payment for services and a dividend on dissolution to the alleged prejudice of the Plaintiffs.

[75] There is a paucity of contextual information that would assist the Court in assessing whether there is a legitimate case of such deceitful conduct by Ms Grace. That case against her is based in speculation not evidence.

[76] The funds were paid under Court order. Orders of this Court are binding unless and until set aside or reversed. Although the Order did not absolve OFC of responsibility to pay its creditors, it was made in a foreclosure action. The fact of a distribution by Court order from such an action would suggest to those who did not have knowledge of the details of the Foreclosure Action that the relevant secured or registered claims to the funds were resolved, rejected or otherwise provided for.

[77] I recognize that the April 29, 2014, Order was deficient. The Applications Judge ought to have required notice to the potential secured creditors on the cancelled land title and should not have authorized a distribution under Part 11 of the *CEA* without notice. As mentioned earlier (para 35 above), the effect of directing a Part 11 distribution was that the Clerks would pay out the funds without inquiring into claims by subsequent encumbrancers in the Foreclosure Action unless they happened to have registered in the PPR.

[78] However, there is no evidence or reason to suspect that Ms Grace knew about the error in the process underlying the April 29, 2014 Order.

[79] The funds might have been recoverable on the basis of unjust enrichment, but that is not the test for lifting the stay over the present action. Lifting the stay would require the Court to speculate that Ms Grace believed OFC was not entitled to funds paid by the Clerk of the Court, that she knew of the second mortgage and that it was still payable, and that she knowingly and intentionally misled (whether by false statement or failing to disclose material information) lawyers or accountants of the existence of ongoing liabilities in OFC or her entitlement to receive the remaining funds in OFC.

[80] It is "not necessary that the fraud be the only way of interpreting the available evidence, nor is the possibility of a defence decisive" (***Gaastra v Watts***, 2012 ABCA 262 at para 2; ***Henderson*** at para 77), but the speculation required in the present case demonstrates the paucity of evidence of a case to meet that Ms Grace dishonestly acted under false representations or created a false pretense that OFC was entitled to the funds and that they were available for distribution to Ms Grace.

[81] Therefore, the application to lift the stay on the ground there is a sufficient case or sound reasons to lift the stay under s 178(1)(e) must fail.

[82] I see no other reason why the stay over the action should be lifted. Any appropriate steps for recoveries that might be available can be adequately addressed in the bankruptcy proceedings and I make no comments or findings about those matters as they are not before me.

2025 ABKB 27 (CanLII)

Conclusion

[83] The application is dismissed. The Applicants must prepare and submit the formal order in Word format, within 14 days. Rule 9.4(2)(c) is invoked such that the formal order need not be approved by Ms Grace. The Court will review it and make any corrections to ensure it reflects the Court's determinations. The Applicants are responsible to provide a filed copy to Grace and the bankruptcy trustee in due course.

Heard on the 18th day of December, 2024.
Dated at the City of Calgary, Alberta this 16th day of January, 2025.

J.T. Eamon
J.C.K.B.A.

Appearances:

Daniel Gryba
For the Plaintiffs (Applicants)

Karen Grace
Self-represented (Respondent)

2025 ABKB 27 (CanLII)