
CANADA / JUDGMENT

0679372 B.C Ltd. v. The Winking Judge Pub Ltd.

2011 BCSC 50

COURT

Supreme Court of British Columbia

DECIDED

19 January 2011

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2011 BCSC 50 0679372 B.C Ltd. v. The Winking Judge Pub Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

0679372 B.C. Ltd. v. The Winking Judge Pub Ltd.,

2011 BCSC 50

Date: 20110119

Docket: S091193

Registry: Vancouver

Between:

0679372 B.C. Ltd.

Plaintiff

And

0826857 B.C. Ltd., 0832414 B.C. Ltd.

Simon Gould and The Winking Judge Pub Ltd.

Defendants

Before: The Honourable Madam Justice Lynn Smith

Reasons for Judgment

Counsel for Plaintiff:

S. May

Counsel for Defendants 0826857 B.C. Ltd., 0832414 B.C. Ltd. and Simon Gould

R.J. Baylis

Counsel for Defendant The Winking Judge Pub Ltd.

J.B. Carter

Place and Date of Trial:

Vancouver, B.C.

November 1-5, 2010

Place and Date of Judgment:

Vancouver, B.C.

January 19, 2011

INTRODUCTION

- [1] In this action, the plaintiff 0679372 B.C. Ltd. ("067 Ltd.") claims the balance of monies owing for the purchase price of a business that it sold to the defendant 0826857 B.C. Ltd. ("082 Ltd."). The debt to the plaintiff was secured by a promissory note and a general security agreement against the business assets, including a liquor licence.
- [2] The defendants 0832414 B.C. Ltd. ("083 Ltd.") and The Winking Judge Pub Ltd. ("WJP Ltd.") are companies to which the assets purchased by 082 Ltd. from the plaintiff were later transferred. The defendant Simon Gould was a director and manager of 082 Ltd. and was a principal and manager of 083 Ltd. WJP Ltd. is owned by Simon Gould's son, Michael Gould.
- [3] The plaintiff seeks judgment for the balance of the purchase price still owing from 082 Ltd., and declarations that will enable it to enforce its security against the assets held by the related companies 083 Ltd. and WJP Ltd.

FACTS

- [4] I have not included in this review of the facts the evidence bearing only on alleged contractual breaches of the sale and purchase agreement by the vendor, the plaintiff 067 Ltd., since the counterclaims of 082 Ltd., 083 Ltd. and Simon Gould against 067 Ltd. based on those alleged breaches are to be heard at a later stage in these proceedings. On October 28, 2010, Mr. Justice Cullen refused an application by the defendants for an adjournment of this trial (there had been multiple previous adjournments) but ordered that the defendants be permitted to reinstate their defence and counterclaim, to be heard at a later date.
- [5] The plaintiff company 067 Ltd. owned a business called the Khamoro Café, carried on in rented premises at 130-888 Burrard Street in Vancouver. Anna Litvinov is the principal of 067 Ltd.

- [6] On March 14, 2008, the plaintiff obtained a Liquor Primary Licence (the "Liquor Licence") from the B.C. Liquor Control and Licensing Branch (the "Liquor Branch"), and began to operate as the Khamoro Pub.
- [7] Two months later, in May 2008, Ms. Litvinov on behalf of the plaintiff 067 Ltd. signed a purchase agreement with two individuals who had approached her: Simon Gould and Stefano Monachese. They signed the agreement "on behalf of a new company to be incorporated".
- [8] On June 4, 2008, the purchasing company, 082 Ltd., was incorporated. It had eight shareholders, one of whom, Daniel Mocerri, was a U.S. resident. Michael Gould's company, Duchess of Dublin Investments Inc., owned 300 of the 1,100 shares in 082 Ltd. Kenneth Roker owned 150 shares.
- [9] Simon Gould assigned his rights under the purchase agreement with the plaintiff to 082 Ltd. On June 14, 2008, the subject clauses were removed and on June 17, 2008, the solicitor for 082 Ltd. wrote to the solicitor for the vendor, 067 Ltd., saying that 082 Ltd. was to be the company taking the benefit of the purchase agreement.
- [10] Neither Simon Gould, Michael Gould nor Kenneth Roker paid cash for shares. However, they were to put in "sweat equity", with Simon Gould designing the pub and running it, and Mr. Roker doing project management, at least on the financial side. Michael Gould became the pub manager. The other shareholders put in cash in varying amounts, although the level of investment originally envisioned did not materialize. For example, Mr. Monachese backed out and never purchased shares in 082 Ltd.
- [11] The purchase price was \$500,000, with \$300,000 payable immediately and \$200,000 payable in monthly instalments over two years at 10%.
- [12] The sale closed on July 17, 2008, and \$300,000 was paid to the plaintiff through transfer between the solicitors' trust accounts.
- [13] The monthly payments of the balance were to be \$9,189.25, payable on the 15th day of the month.
- [14] 067 Ltd. signed a "Contract of Sale of Goods (Absolute)" transferring the Liquor Licence to 082 Ltd. and a similar contract transferring the fixtures and chattels in the pub to 082 Ltd. 082 Ltd. executed a promissory note for the remaining balance of \$200,000 and a General Security Agreement granting a first charge over "all assets now and when the pub is renovated", including the Liquor Licence.

[15] The document executed with respect to the transfer of the Liquor Licence is headed "Contract of Sale of Goods (Absolute)", "In Pursuance of the Sale of Goods Act", and sets out that the seller, 067 Ltd., is "possessed of the goods and specific goods hereinafter described" and has agreed to sell them for consideration of \$1.00 and other good and valuable consideration. The contract states that the "goods" sold consist of the Liquor Primary Licence Number 302867.

[16] I pause to note that the definition of "goods" in the Sale of Goods Act, R.S.B.C. 1996, c. 410, s. 1, is as follows:

"goods" includes

- (a) all chattels personal, other than things in action and money, and
- (b) growing crops, whether or not industrial, and things attached to or forming part of the land that are agreed to be severed before sale or under the contract of sale;

Counsel did not address this point specifically, but arguably what the plaintiff sold was not a "good" within that definition. What the plaintiff had was a chattel personal, but of the intangible variety, normally classified as a thing in action. Nevertheless, the intent of the parties was clear that whatever rights the plaintiff had to the Liquor Licence were sold to 082 Ltd.

[17] The separate Contract of Sale of Goods (Absolute) transferring the pub equipment and furniture to 082 Ltd. specified that the consideration for those items was \$5,000.

[18] In the General Security Agreement is the following provision:

1. SECURITY INTEREST

- (a) For value received, [082 Ltd.] hereby grants to [067 Ltd.] by way of mortgage, charge, assignment and transfer, a security interest ... in the undertaking of [082 Ltd.] and in all of [082 Ltd.'s] present and after acquired personal property including, without limitation, in all Goods (including all parts, accessories, attachments, special tools, additions and accessions thereto), Chattel Paper, Documents of Title (whether negotiable or not), Instruments, Intangibles, Money and Securities now owned or hereafter owned or acquired by or on behalf of [082 Ltd.] (including such as may be returned to or repossessed by [082 Ltd.]) and in all proceeds and renewals thereof, accretions thereto and substitutions therefor (hereinafter collectively called the "Collateral"), and including, without limitation, all of the following now owned or hereafter owned or acquired by or on behalf of [082 Ltd.]:
 - (i) all inventory of whatever kind and wherever situate;
 - (ii) all equipment (other than Inventory) of whatever kind and wherever situate including, without limitation, all machinery, tools, apparatus, plant, furniture, fixtures, Leasehold Improvements situate at 103-888 Burrard Street, Vancouver, B.C., and vehicles of whatsoever nature or kind;

(iii) all accounts and book debts and generally all debts, dues, claims, choses in action and demands of every nature and kind howsoever arising or secured including letters of credit and advices of credit...

(iv) all deeds, documents, writings, papers, books of account and other books relating to or being records of Debts, Chattel Paper or Documents of Title or by which such are or may hereafter be secured, evidenced, acknowledged or made payable;

(v) all contractual rights and insurance claims and all goodwill, patents, trademarks, copyrights, and other industrial property;

(vi) all property described in schedule "C" or any schedule now or hereafter annexed hereto.

[19] Schedule "C" to the General Security Agreement listed as its sole item the Liquor Licence, "Liquor Primary Licence Number 302867".

[20] In the General Security Agreement, 082 Ltd. covenanted that it would not "sell, exchange, transfer, assign, lease, or otherwise dispose of the Collateral or any interest therein without the prior written consent of [067 Ltd.]" aside from sales or leases of inventory in the ordinary course of its business and the use of available money.

[21] On August 1, 2008, after closing, 082 Ltd. signed a new lease with the landlord of the pub premises, Lok Sing Developments Ltd., commencing September 1, 2008.

[22] Simon Gould and his son Michael took over active control of the business. Mr. Roker also had some involvement, although his was more limited.

[23] It appears that early on in their dealings with the Liquor Branch, Simon Gould and Kenneth Roker learned that in order to apply for a transfer of the Liquor Licence from the vendor 067 Ltd., it was necessary to list all of the shareholders for criminal record check purposes, and that the presence of a shareholder who was a non-resident of Canada made that process more complicated. Mr. Roker suggested to Simon Gould that to deal with that problem, he and Simon Gould should set up a holding company to hold the Liquor Licence. Accordingly, on August 11, 2008, 083 Ltd. was incorporated. The directors and shareholders of 083 Ltd., holding 50% of the shares each, were Simon Gould and Kenneth Roker.

[24] The plan, Mr. Roker testified, was that 083 Ltd. was to be the holding company and 082 Ltd. was to be the business.

[25] Ms. Litvinov agreed to stay on and run the pub for another month after the closing. Mr. Roker testified that although Ms. Litvinov was around and helping with the renovations, they did not discuss with her their plan to have the Liquor Licence held by 083 Ltd. instead of by 082 Ltd. which was the purchaser under the agreement with the vendor 067 Ltd. Mr. Roker said that he did not think at that time about which company would be the applicant for the Liquor Licence.

[26] In fact, it transpired that, when the application was sent to the Liquor Branch, it named 083 Ltd., not 082 Ltd., as the proposed transferee.

[27] On August 15, 2008, Simon Gould, on behalf of 083 Ltd., signed a document headed "Declaration of Trust", which stated:

KNOW ALL MEN BY THESE PRESENTS THAT WE, 0832414 B.C. LTD. (Incorporation No. BC0832414), Azure One Suite 1003, 1438 Richards Street, Vancouver, B.C., V6Z 3B8, confirm:

(A) That we hold the Liquor Primary Licence Number 302867 for Khamoro Pub ("Liquor Licence"), a copy of which is attached as Schedule "A" to this Declaration.

(B) That we hold the Liquor Licence on behalf of 0826857 B.C. Ltd. (Incorporation No. BC0826857) the "Beneficiary").

WE FURTHER DECLARE AND ACKNOWLEDGE THAT:

1. Our consideration for acting as Trustee herein is the sum of ONE DOLLAR (\$1.00) and other good and valuable consideration now paid by the Beneficiary to us, the receipt of which is hereby acknowledged.
2. In our capacity as Trustee, we are acting for and in the best interest of the Beneficiary and we further declare that we shall make our best efforts to attend to all matters referred to herein on behalf of the Beneficiary.
3. We shall hold the Liquor Licence, or any replacement thereof and any interest derived therefrom in trust for the Beneficiary.
4. We shall execute such documents and enter into and perform such agreements and carry out all directions or orders as the Beneficiary shall direct from time to time.

[28] Anna Litvinov testified that she was not aware of the existence of this Declaration of Trust until 2009, when she learned of it in the course of this legal dispute. Kenneth Roker testified that he did not see the Declaration of Trust until about February 2009.

[29] Simon Gould testified that he prepared the Declaration of Trust of his own volition in order to give a declaration to 083 Ltd. from 082 Ltd. that 082 Ltd. recognized what it had done in transferring the licence.

[30] Simon Gould and Kenneth Roker assumed control of the pub business from the plaintiff on August 16, 2008. It is a fair inference that this was on behalf of both 082 Ltd. and 083 Ltd.

[31] The Liquor Branch insists that the holder of a liquor licence also hold the lease to the premises specific to the licence. Accordingly, on September 1, 2008, 082 Ltd. sublet the premises to 083 Ltd. with the landlord's approval. Ms. Litvinov was not aware of this sublease until much later, when she learned of it at her examination for discovery. There was no written consent by the plaintiff company to the sublease, nor (it appears) was the plaintiff's consent sought.

- [32] There is no evidence that 082 Ltd. received any benefit for the assignment of the lease or for agreeing to the transfer of the Liquor Licence to 083 Ltd., aside from receiving the Declaration of Trust. It appears that this shift from 082 Ltd. to 083 Ltd. was made as a matter of convenience, in order to obtain approval of the transfer of the Liquor Licence to the purchasers.
- [33] Aside from the initial payment of \$300,000 to 067 Ltd., which was made through solicitors, 083 Ltd. made all payments to 067 Ltd. for the pub business.
- [34] After the \$300,000 payment to 067 Ltd., it appears that the remaining funds invested by the shareholders in 082 Ltd. were placed in the bank account of 083 Ltd. Mr. Roker testified, in fact, that 082 Ltd. never had a bank account.
- [35] On September 8, 2008, the plaintiff company was paid for the inventory in the pub, by cheque from 083 Ltd. for \$7,156.21.
- [36] After the new owners took over the pub business, Ms. Litvinov and her family went away on a vacation. She testified that when she came back at the end of September 2008 she learned of alleged violations of the Liquor Licence through a call from City Hall advising that the licence had been suspended. She testified that she was still the licence holder and wanted to get the transfer of the licence completed so that she would not be responsible for violations. She knew that the transfer of the licence had to be approved by the Liquor Board General Manager, and that the purchaser would have to go through the approval process.
- [37] Her evidence was that she therefore provided assistance with the paperwork, on a voluntary basis. Simon Gould testified, on the other hand, that it was part of the purchase agreement that she would assist with the transfer.
- [38] Ms. Litvinov said that she had left with Simon Gould an incomplete draft of the Liquor Branch application form for the transfer when she departed on vacation and that she worked on further drafts when she returned. She said she did up to seven drafts; I find that she was involved in a few drafts, but not that many.
- [39] Because one of the issues raised by the defendants is whether the plaintiff company and its principal Ms. Litvinov were aware of the intention to put the Liquor Licence in the name of 083 Ltd. rather than 082 Ltd., there was considerable evidence about what was on the drafts and what Ms. Litvinov understood as she worked on them. In particular, on page 6 of the sole draft of the application that was placed in evidence, there is a typewritten entry with reference to Kenneth Roker. That entry reads: "We hold this Liquor Licence in trust for another B.C. company, and I hold 15% of that company. That company name is 0826857 B.C. Ltd." Ms. Litvinov says that she did not complete that page of the application (and that none of it is in her handwriting), but she knew that Mr. Roker had some other businesses and she understood that he had another licence somewhere that he was required to list.

- [40] Mr. Roker testified that he does not recall any discussion with Ms. Litvinov about there being a new company in whose name the Liquor Licence would be held. Simon Gould testified that Ms. Litvinov was fully aware of the existence of 083 Ltd. and knew that the transaction was being done in this way. He testified that he did not explain to her that the transfer would affect her security for the balance of the purchase price because it did not cross his mind.
- [41] No party entered in evidence the final version of the application for transfer of the Liquor Licence. However, from the fact that the application, once accepted, resulted in the transfer of the licence to 083 Ltd., I infer that the application was made in the name of 083 Ltd.
- [42] Ms. Litvinov's evidence is that she simply did not notice that it was "0832414 B.C. Ltd.", rather than "0826857 B.C. Ltd.", on the documents, or on the cheques she received, because the two numbered company names were quite similar. She says that when she worked on the application or filled in other documents, she simply copied the number that was before her.
- [43] In the fall of 2008, the new proprietors of the pub made renovations to the premises worth several hundred thousand dollars. In October 2008, the defendants 082 Ltd. and 083 Ltd. began operating the Winking Judge Pub. Mr. Simon Gould testified, when asked if it was 082 Ltd. or 083 Ltd. that took possession of the premises, "we took responsibility - we did what we could - we didn't try to figure out what was right or wrong - we just kept going."
- [44] Ms. Litvinov agreed during her testimony that 067 Ltd. agreed to pay 50% of certain expenses required to repair the pub's heating unit so long as receipts were provided, and that that expense came to \$2,000.
- [45] The first instalment to 067 Ltd. under the Promissory Note from 082 Ltd. was paid on October 18, 2008 by cheque from 083 Ltd. for \$8,189.25. I find that 067 Ltd. agreed to accept that payment late, and that 067 Ltd. had also agreed that up to \$2,000 could be deducted from the payments to compensate for repairs that the defendants had to make to the heating system in the premises.
- [46] On October 24, 2008, the new owners filed the application with the Liquor Branch for transfer of the Liquor Licence. They also applied to the City for renewal of the development permit.
- [47] On October 27, 2008, a letter came from the Liquor Branch to 067 Ltd. Ms. Litvinov testified that she glanced at the letter and then turned it over to Simon Gould. The letter advised that the application for licence transfer was incomplete and deficient in a number of ways. Among other things, the letter stated the following:

In the personal history summary and consent for criminal record search for Roker, Kenneth Edward, question 8 was answered: "We hold this Liquor Licence in trust for another B.C. company and I hold 15% of that company. That company name is 0826857 B.C. Ltd." Please clarify this statement, as we have no record of this Liquor Licence being held in trust, and at this time, the licensee we have listed for this licence is 0679372 B.C. Limited. It appears that the applicant is 0832414 B.C. Ltd., and there is no documentation for 0826857 B.C. Ltd.

- [48] Ms. Litvinov testified that she did not note the above comment. She said that she did not read the letter thoroughly at the time, and did not pay attention to the mention of two numbered companies. There is no evidence that she consulted her lawyer regarding the preparation of the application for licence transfer.
- [49] Ms. Litvinov testified that Mr. Gould and Mr. Roker did not tell her that a second company had been incorporated. She said that she did not intend to transfer the Liquor Licence to 083 Ltd. rather than 082 Ltd.
- [50] Although Mr. Roker testified that he does not recall any discussion with Ms. Litvinov about the application going in from 083 Ltd. rather than from 082 Ltd., he said there was no intention to keep it a secret from Ms. Litvinov.
- [51] On October 27, 2008, Ms. Litvinov sent a memorandum to Simon Gould about the letter from the Liquor Branch. Her memorandum referred to 083 Ltd. and listed the company documents that were required for the application. She testified, however, that it did not occur to her to compare the numbered company name on the application with the name on her sales agreement. She said that she was getting paid, and Simon Gould and his son were at the premises and she trusted them.
- [52] Ms. Litvinov testified that when she received the November 21, 2008 cheque for \$8,000.00 from 083 Ltd., she asked Mr. Gould why it was short, why it was late and why there was no proof of expenses despite the deduction of a thousand dollars, and she said that he screamed at her, saying she would not get a penny and he would see her in court.
- [53] Ms. Litvinov went to her lawyer, Vicente Asuncion, and on November 24, 2008, Mr. Asuncion wrote to Gordon Ruley, the solicitor for 082 Ltd., referring to the amount and lateness of the October and November payments. Mr. Asuncion purported to invoke the acceleration clause under the Promissory Note and, on behalf of the plaintiff, demanded the entire balance owing (\$203,810.75) by the close of business on November 26, 2008.
- [54] The October and November payments were the only ones ever made under the Promissory Note. After the November 24 letter from the plaintiff's solicitor, no further instalments were tendered or paid.

- [55] Throughout December 2008 and January 2009, it appears that Mr. Gould and Mr. Roker tried to raise more investment money from the existing shareholders in 082 Ltd. However, they had only nominal success, and by the beginning of 2009, 082 Ltd. was very short of funds to keep the business going. Not only was there the demand from the plaintiff for the full balance payable under the Promissory Note, but also, Mr. Gould testified, there was a threat of "foreclosure" from the landlord and writs of seizure and sale from the tax department.
- [56] Simon Gould wrote to all of the investors in 082 Ltd. The letter, dated January 1, 2009 and addressed to "the shareholders of 0826857 B.C. Ltd. dba the Winking Judge Pub", stated:

Cash requirements

During the renovations and the subsequent repair and maintenance monies paid out to correct and repair the equipment warranted by the previous owner as good working order, we require 50,000.00 to get us current and add a new beer cooler to the barber shop area. The business has steadily improved and we are now reaching about 4,000.00 dollars average per day, and without the full renovations this is very good and will now increase as the weather improves. See statement attached. Since the business has steadily increased we expect a return on your investment by the middle of the summer.

The Company requires each partner to put up 1,250.00 dollars for each 25 shares in the company. ie. 50 shares requires 2500.00 dollars, 100 shares is 5,000.00 dollars. This cash investment will pay a carried interest of 10% calculated annually and can be paid monthly.

Please indicate one of the following options and return to Simon Gould @ fax (604) 669-6703 or (604) 684 9467

- will pay my cash equivalent of my shares as outlined above
- will loan to the company 50,000.00 or a portion @ 10% interest
- will buy shares in the company that can be made available
- none of the above at this time.

- [57] On January 2, 2009, the Liquor Board accepted the transfer application, and the Liquor Licence was transferred from 067 Ltd. and issued to 083 Ltd.
- [58] On January 19, 2009, the plaintiff's new lawyer, Mr. May, wrote to 082 Ltd. and demanded payment of \$191,909.90, which he said was the balance owing under the Promissory Note, and also demanded reimbursement of payments made by the plaintiff since the closing under certain equipment leases with third parties that had not been transferred into the name of the purchaser. Mr. May enclosed a Form 86 Notice of Intention to Enforce Security under s. 244(1) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, and advised that the plaintiff intended to appoint a receiver over 082 Ltd. pursuant to the General Security Agreement.

- [59] New counsel for 082 Ltd. (Mr. Baylis) replied on January 27, 2009, stating that 082 Ltd. was not in possession of the pub premises but had subleased the premises to 083 Ltd. Mr. Baylis for his client took the position that any enforcement of security under the instrument would require a court order, and that attempting to take possession of the Winking Judge Pub would be treated as a trespass. He attached a copy of the sublease.
- [60] Ms. Litvinov testified that receipt of this letter was the first time that the existence of 083 Ltd. had been brought to her attention, and that she was shocked by the defendants' position.
- [61] On February 13, 2009, Mr. Roker transferred one of his shares in 083 Ltd. to Simon Gould in return for a payment of \$10. That transfer put Simon Gould in the position of owning 51% of the shares in 083 Ltd. Both Mr. Roker and Mr. Gould testified that this was done in order that Mr. Gould would be able to secure financing for the company, because Mr. Roker was unwilling to sign loan applications.
- [62] The plaintiff commenced this action for damages and declaratory relief on February 17, 2009.
- [63] Mr. Roker testified that by March 2009, the shareholders of 082 Ltd. were losing confidence in Simon Gould. They were not confident that Mr. Gould was going to be able to properly manage the pub and the business. Mr. Roker testified that he had become frustrated by the difficulty of obtaining documentation or financial information from Mr. Gould. Accordingly, Mr. Roker said, he approached Mr. Gould about Mr. Gould leaving his position as manager of the pub. When he did so, Mr. Gould told him that 082 Ltd. did not operate the pub and did not have a contract with Simon Gould; instead, Mr. Gould said that he was representing and working under 083 Ltd., and it was the pub.
- [64] On March 10, 2009, Simon Gould, as President and Director of 083 Ltd., executed a document headed "Cancellation of Declaration of Trust". The document stated:

On behalf of 0832414 B.C. Ltd., Simon Gould as a director and majority shareholder of the above named company, residing at 1003 1438 Richards Street, Vancouver B.C. V6Z 3B8 confirm that in August of last year 2008, signed a Declaration of Trust holding a liquor license in favor of 0826857 B.C. Ltd.

On January 18, 2009 a request was made to all the shareholders of an injection of funds to rectify the amounts of money owing for rent and other payables. We told the shareholders that this was very urgent because the landlord was ready to foreclose. Other than some small cheques from 3 shareholders, we were short 40,000.00 dollars and Simon Gould had to make arrangements to stop foreclosure by providing necessary funding.

On Feb. 13, 2009, Ken Roker signed control of 0832414 B.C. Ltd to Simon Gould for the purpose of securing new financing for the company.

For the reasons listed above, as of today's date, I am cancelling the Declaration of Trust in favor of 0826857 B.C. Ltd.

- [65] Mr. Roker testified that he did not see this "Cancellation of Declaration of Trust" document until the day before he testified at trial, even though he was a director of 082 Ltd. in March 2009.
- [66] Simon Gould testified that he felt he had to save the business, and to get hold of the assets that he could and move forward, borrowing money and pledging the assets.
- [67] On April 21, 2009, a third company was incorporated, Winking Judge Pub Ltd., of which the sole director and shareholder was Michael Gould, Simon Gould's son.
- [68] Michael Gould had been involved in the pub from the outset, initially working on the renovations and then becoming the general manager of the pub.
- [69] Michael Gould testified that WJP Ltd. was incorporated because the other companies were totally in default of all their responsibilities and the pub could not move forward without financing. He said that the idea was "to bring the financial end of the business forward into a clean entity", one not hindered by law suits or debts to other people, to be the operating company for the pub. He testified that 082 Ltd. and 083 Ltd. were not able to achieve anything, mainly because of this litigation and shareholder dysfunction.
- [70] On November 1, 2009, 083 Ltd. entered into a sublease in favour of WJP Ltd. with the landlord's approval and on December 22, 2009, the Liquor Board approved the transfer of the Liquor Licence from 083 Ltd. to WJP Ltd.
- [71] As for whether any consideration was paid by WJP Ltd. to 083 Ltd. for the Liquor Licence or assignment of the sublease, Michael Gould testified that it was "not yet decided"; Simon Gould testified that WJP Ltd. did not pay any money for the assets.
- [72] Simon Gould testified that because the pub business was going to go under, they incorporated a new company that his son owned (WJP Ltd.) and transferred the licence into that company so that they could borrow money. He said that they wanted to get control of the licence, "put it in a clean company" and go forward. He said that they had had trouble getting financing for 083 Ltd. because banks and mortgage brokers were concerned about the plaintiff's claim in this litigation. Also, he said, they wanted a company where the shareholders would sign financing applications. However, he testified, they incorporated WJP Ltd. in order to get financing and not because of this law suit. He said that the assets were transferred in order to get the financing and save the business.
- [73] Mr. Roker testified that he only heard about the transfer to WJP Ltd. in December 2009, and testified that he has never authorized a resolution to transfer the assets.

- [74] On February 17, 2010, the plaintiff took default judgment against 082 Ltd. (which had withdrawn its defence and discontinued its counterclaim) for damages to be assessed and costs to be assessed.
- [75] On October 28, 2010, Mr. Justice Cullen granted leave for 082 Ltd's defence and counterclaim to be pursued, but declined to grant the defendants' application for an adjournment. He ordered that the counterclaim be tried separately.
- [76] In what I was advised was a settlement of litigation among the shareholders of 082 Ltd., in October 2010, Duchess of Dublin Investments Inc. (the company owned by Michael Gould) purchased 70% of the shares in 082 Ltd. and Mr. Roker resigned from that company.
- [77] Ms. Litvinov testified that she has been paying \$160.41 per month since November 2008 to keep a lease of a "point of sale system" to the pub from National Leasing in good standing, and that to cancel the lease will cost \$397. She testified that the lease of this equipment has never been transferred to 082 Ltd., the purchaser, although the lease was supposed to be assumed by it. Simon Gould agreed in his testimony that the purchaser assumed responsibility for the equipment leases. He said that he did not remember this particular lease. Counsel for the plaintiff calculates that the total amount owed by the defendant 082 Ltd. is \$4,407.25.

CREDIBILITY

- [78] All four witnesses who testified (Anna Litvinov, Kenneth Roker, Simon Gould and Michael Gould) have some interest in the outcome of these proceedings, although Mr. Roker's is lesser than that of the others.
- [79] I found that Anna Litvinov had some problems of exaggeration in her testimony regarding her work on the application form that was submitted to the Liquor Branch. Her answers about the provenance of the draft application form that was produced in evidence were confusing and seemed evasive. Further, the evidence that Ms. Litvinov provided to the purchasers of the business a copy of the plan of the pub's liquor serving area with an "X" whited out was troubling. Clearly, there are reasons for viewing her testimony with careful scrutiny, and I have done so.
- [80] Mr. Roker was closest to being an independent witness in this matter, although I do not overlook that he has been involved in litigation against Simon Gould. His testimony was clear and straightforward, and consistent with the available documents. I see no reason to doubt the accuracy of his testimony, and by and large I accept his evidence.
- [81] I did not find Simon Gould to be a credible witness. He seemed to give answers that would be convenient, whether or not they were accurate or true. For example, in the statement of defence he prepared and filed himself in the parallel action by 082 Ltd. and 083 Ltd., he said that he had resigned as a director of 082 Ltd. However, on discovery he said that he had asked to be removed as a director of 082 Ltd. and at trial, he said that he has been a director

of 082 Ltd. and 083 Ltd. since their incorporation. He was challenged on cross-examination to explain his transfer of assets from 083 Ltd. to WJP Ltd., and said that he did not transfer any assets. The specifics were then put to him - that the lease, the leasehold improvements, and the Liquor Licence that had once been held by 083 Ltd. were now held by WJP Ltd. - and he responded that "we didn't even think about it, we didn't fill out a document transferring assets". He then complained that counsel kept asking him about assets when he had already answered that question.

[82] Michael Gould, like Simon Gould, seemed to think that transfer of the assets of 082 Ltd. into WJP Ltd., a newly created company he controlled, was justifiable simply in order to save the business. While his answers on examination in chief seemed relatively frank and straightforward, on cross-examination he seemed to try to tailor his answers to a desired outcome. For example, in chief he stated that this litigation was one of the reasons that he and his father had trouble raising funds for the business and therefore wanted to move the business into a "clean company". On cross-examination, which followed a break in the proceedings, he denied that this law suit factored into the decision to set up a new company.

ISSUES

[83] In this trial of the plaintiff's claim, the following are the major issues:

- (1) Was the plaintiff entitled to accelerate the debt on November 24, 2008?
- (2) What was the effect of the transfer of the assets of the pub business from 082 Ltd. to 083 Ltd.? If the transfer was effective, was it a fraudulent conveyance?
- (3) What was the effect of the transfer of the assets of the pub business from 083 Ltd. to WJP Ltd.? If that transfer was effective, was it a fraudulent conveyance?

POSITIONS OF THE PARTIES

[84] Counsel for the plaintiff submits that the plaintiff is entitled to judgment against 082 Ltd. for the debt owing on the Promissory Note. It is the plaintiff's position that it is irrelevant if acceleration of the debt was premature because the final due date on the note was prior to the first day of trial (September 15, 2010 was the final due date on the note and this trial began on November 1, 2010). The defendants failed to meet their obligations by continuing to make payments, and the debt, according to counsel, as of November 1, 2010 was \$229,412.03, of which \$190,589.47 is the principal amount.

[85] The plaintiff says that it is further entitled to judgment against the defendants jointly and severally for \$4,407.25 because of payments made by the plaintiff under the National Leasing agreement that should have been made by the defendants.

[86] The plaintiff also seeks declarations that the transfers of the assets were fraudulent conveyances and of no force or effect with respect to the plaintiff.

- [87] The plaintiff emphasizes that there was no consideration for the transfers. It says that although possibly initially there was a rational explanation for the transfer from 082 Ltd. to 083 Ltd., at least as of January 27, 2009, 082 Ltd. intended to put its assets out of the reach of its creditors and confirmed this when Simon Gould purported to cancel the Declaration of Trust on March 10, 2009. With respect to the transfer from 083 Ltd. to WJP Ltd., again counsel for the plaintiff emphasizes the absence of consideration and the admissions by both Simon Gould and Michael Gould that WJP Ltd. was set up in order to obtain financing as a "clean company" as opposed to 082 Ltd. and 083 Ltd., which were defendants to this law suit.
- [88] The plaintiff seeks a declaration that 083 Ltd. induced 082 Ltd. to breach its contract with the plaintiff and damages against 083 Ltd. in the amount of the assessment of the plaintiff's default judgment against 082 Ltd. Mr. May for the plaintiff submits that Simon Gould, although he was aware of 082 Ltd.'s agreement not to lease or assign the assets, acting as a Director of 083 Ltd., caused 082 Ltd. to do so and to put 082 Ltd. in a position where it could not pay the debt to the plaintiff.
- [89] The plaintiff seeks an order that Mr. Gould is jointly and severally liable under s. 20 of the Business Corporations Act. Section 20 provides:
- 20 (1) In this section:
- "facilitator" means a person referred to in subsection (2) who, before a company is incorporated, purports to enter into a contract in the name of or on behalf of the company;
- "new company" means a company incorporated after a pre-incorporation contract is entered into in the company's name or on the company's behalf;
- "pre-incorporation contract" means a purported contract referred to in subsection (2).
- (2) Subject to subsections (4) (b) and (8), if, before a company is incorporated, a person purports to enter into a contract in the name of or on behalf of the company,
- (a) the person is deemed to warrant to the other parties to the purported contract that the company will
- (i) come into existence within a reasonable time, and
- (ii) adopt, under subsection (3), the purported contract within a reasonable time after the company comes into existence,
- (b) the person is liable to the other parties to the purported contract for damages for any breach of that warranty, and
- (c) the measure of damages for that breach of warranty is the same as if
- (i) the company existed when the purported contract was entered into,

- (ii) the person who entered into the purported contract in the name of or on behalf of the company had no authority to do so, and
 - (iii) the company refused to ratify the purported contract.
- (3) If, after a pre-incorporation contract is entered into, the company in the name of which or on behalf of which the pre-incorporation contract was purportedly entered into by the facilitator is incorporated, the new company may, within a reasonable time after its incorporation, adopt that pre-incorporation contract by any act or conduct signifying its intention to be bound by it.
- (4) On the adoption of a pre-incorporation contract under subsection (3),
- (a) the new company is bound by and is entitled to the benefits of the pre-incorporation contract as if the new company had been incorporated at the date of the pre-incorporation contract and had been a party to it, and
 - (b) the facilitator ceases, except as provided in subsections (6) and (7), to be liable under subsection (2) in respect of the pre-incorporation contract.
- (5) If the new company does not adopt the pre-incorporation contract under subsection (3) within a reasonable time after the new company is incorporated, the facilitator or any party to that pre-incorporation contract may apply to the court for an order directing the new company to restore to the applicant any benefit received by the new company under the pre-incorporation contract.
- (6) Whether or not the new company adopts the pre-incorporation contract under subsection (3), the new company, the facilitator or any party to the pre-incorporation contract may apply to the court for an order
- (a) setting the obligations of the new company and the facilitator under the pre-incorporation contract as joint or joint and several, or
 - (b) apportioning liability between the new company and the facilitator.
- (7) On an application under subsection (6), the court may, subject to subsection (8), make any order it considers appropriate.
- (8) A facilitator is not liable under subsection (2) in respect of the pre-incorporation contract if the parties to the pre-incorporation contract have, in writing, expressly so agreed.
- [90] The plaintiff also seeks a declaration that the pub assets are held in resulting trust by WJP Ltd. for the benefit of 082 Ltd. Counsel argues that the transfers were without consideration, and that 083 Ltd. has not demonstrated that a gift was intended; thus, the presumption of trust is not rebutted here because clearly 082 Ltd. was to retain the beneficial interest in the pub assets.

- [91] The position of the defendants 082 Ltd., 083 Ltd. and Simon Gould is that any asset transfers were for bona fide purposes, and were not made with the intention of delaying or frustrating the plaintiff as a creditor. Their position is that WJP Ltd. holds the Liquor Licence and is the sublessee of the pub premises because of Liquor Branch requirements and the difficulty of raising money, not for the purpose of defeating the plaintiff as a creditor.
- [92] The defendants argue that resulting trust was not pleaded and the defendants did not have a fair and reasonable opportunity to defend against it. They assert that 082 Ltd. never was the legal owner of the Liquor Licence, and therefore did not transfer it to 083 Ltd. They argue that the furniture and equipment are still owned by 082 Ltd. and are leased to 083 Ltd. or WJP Ltd., and that neither the lease nor the Liquor Licence is an asset. They argue that although the Declaration of Trust signed by Mr. Gould was perhaps well intentioned, it was of no legal force and effect.
- [93] The position of the defendant WJP Ltd. is that the plaintiff was not entitled to accelerate the debt of 082 Ltd. when it did. Further, it argues that at the time of the acceleration, the Liquor Licence was still in the plaintiff's name subject to the approval of the General Manager of the Liquor Branch and the plaintiff could not transfer the licence as it purported to do in the contract of sale of goods. It argues that most of the General Security Agreement is meaningless and unenforceable. Mr. Carter for WJP Ltd. argues that since the licence had not been transferred when 082 Ltd. executed the Promissory Note, there had not yet been substantial performance of the contract by the plaintiff, and thus the defendant had not yet received consideration. He argues that the initial transfer of the licence to 083 Ltd. was not a fraudulent conveyance because it was done for good and valid reason and the plaintiff was aware of it. WJP Ltd. submits the transfer from 083 Ltd. to WJP Ltd. was not a fraudulent conveyance since the intention was to ensure the survival of the asset. Further, WJP Ltd. argues that the only parties that could complain about the transfer would be the shareholders of 083 Ltd. or possibly of 082 Ltd.
- [94] With respect to the trust argument, counsel for WJP Ltd. emphasizes that any trust declaration with respect to the licence was void because it was based on mistaken assumptions, about, for example, the existence of a property interest in a Liquor Licence - which in fact requires the approval of the General Manager of the Liquor Branch.

ANALYSIS

- [95] I have referred to the problems with Ms. Litvinov's testimony and the need to view her evidence with careful scrutiny. I have concluded that those problems do not require the conclusion that she was failing to tell the truth when she testified about the state of her knowledge regarding 083 Ltd. or the identity of the applicant for transfer of the Liquor Licence.

- [96] Ms. Litvinov's evidence that there was no discussion with her about the existence of two companies or about the fact that the application was being made for transfer of the Liquor Licence to 083 Ltd. rather than to 082 Ltd. is corroborated by that of Mr. Roker. Indeed, neither Simon Gould nor Michael Gould testified about a specific discussion with Ms. Litvinov. Rather, the tenor of their evidence was that Ms. Litvinov was around while the matter was discussed, she saw the letter from the Liquor Branch with the reference to 083 Ltd., she received cheques from 083 Ltd. and wrote a document herself that referred to 083 Ltd. - therefore, she must have been aware.
- [97] I find plausible Ms. Litvinov's evidence that she was unaware, given the close similarity in the names of the two companies. Her explanation for signing documents and sending a memorandum referring to 083 Ltd. is one that I accept - she copied the numbers from a recent document, assuming that it was the same company to which she had sold her business. Further, from my observation, Ms. Litvinov is not an unsophisticated or stupid person. If she had been aware that it was a new company taking the licence, especially after the issues that had emerged about the payments on the Promissory Note, she would not have proceeded with the application for transfer or would have tried to stop the transfer process set in motion by the application.
- [98] I find on the balance of probabilities that the principal of the plaintiff company, Anna Litvinov, was not aware that the application she signed for the transfer of the Liquor Licence was in favour of 083 Ltd. - a corporate entity other than the one (082 Ltd.) with which she had contracted. She was not aware that the application, if successful, would result in the Liquor Licence being held by a company that had not executed the Promissory Note or the General Security Agreement.
- [99] Even if Ms. Litvinov had been aware of the existence of two corporate entities controlled by Mr. Gould, and knew that 083 Ltd. was to hold the liquor licence, there is no evidence whatsoever that she understood the possible implications for her security of the licence being transferred to 083, or that she knowingly agreed to give up her security against the outstanding debt of roughly \$200,000.
- [100] Counsel for both defendants suggest in their submissions that the purchase and sale agreement was ill-designed and possibly ineffective because in fact the plaintiff did not own the Liquor Licence or have the unfettered right to transfer it in the same way it might have owned and had rights over the kitchen equipment or liquor inventory.
- [101] It is true that the chief assets of the pub business, the Liquor Licence and the lease of the premises, were both ones that could not be transferred without the permission of other persons. In the case of the Liquor Licence, the General Manager had to approve the transfer; in the case of the lease, it was the landlord.
- [102] It does not follow that the interests held by 067 Ltd. and sold to 082 Ltd. were not assets. After the plaintiff executed the various agreements, 082 Ltd. acquired the right to compel the plaintiff to execute the appropriate documentation to effect an application for transfer

of the Liquor Licence, and to effect an assignment of the lease to the premises. These rights were not tangible chattels, but they were the form of property called "choses in action" or "things in action". Choses in action, according to Crossley Vaines' Personal Property (Toronto: Butterworth and Co., 1973) ["Crossley Vaines"] at 11 are "all rights and incorporeal things, not being chattels real or choses in possession, which make up personality." Indeed, they were assets for which 082 Ltd. agreed to pay a significant sum of money.

[103] These choses in action were a form of property that could be held in trust for another person: see Crossley Vaines at 30.

[104] The Liquor Licence went into the name of 083 Ltd. with the permission of 082 Ltd. and pursuant to an express trust in favour of 082 Ltd. Simon Gould on behalf of 082 Ltd. set it up that way, in furtherance of the plan suggested by Mr. Roker for avoiding the problem caused by 082 Ltd. having a non-Canadian shareholder. Mr. Gould on behalf of 083 Ltd. executed the Declaration of Trust confirming that arrangement. He had authority to do so as a Director of that company.

[105] I accept Mr. Roker's evidence that 082 Ltd. was to own the remaining assets and operate the pub business, and that he was not aware of the sublease from 082 Ltd. to 083 Ltd. until January of 2009, after the Liquor Licence had been issued to 083 Ltd. The funds for the purchase of the pub business had come from investors who put their money into 082 Ltd. Mr. Roker and the other investors are unlikely to have agreed to a plan that would see their funds go to purchase assets that were then put into the name of another company, unless it was understood that the assets were beneficially owned by the company that had paid for them.

[106] Thus, I find that the original plan was that only the Liquor Licence would be in the name of 083 Ltd.; aside from the Liquor Licence, 082 Ltd. would own the assets and operate the pub business. However, that plan changed when Simon Gould realized that the Liquor Branch demanded that the licence and lease be in the same name; accordingly, Mr. Gould, without the knowledge of Ken Roker, had 082 Ltd. agree to a sublease of the premises to 083 Ltd. That sublease was in breach of a term of the General Security Agreement with the plaintiff.

[107] It was probably more convenient after that for Simon and Michael Gould simply to run the business through 083 Ltd. It became the operating entity, the one with the bank account. However, everything that 083 Ltd. owned had came from 082 Ltd. - the investment funds, the plaintiff's participation in applying for the transfer of the Liquor Licence, the lease, the fixtures, the equipment and inventory. There is no evidence that 083 Ltd. paid anything for any of the assets that it acquired, either to 082 Ltd. or to the plaintiff directly. Further, 083 Ltd. acquired those assets with knowledge of the trust. In other words, it was not a bona fide purchaser for value without notice of the equitable claim of 082 Ltd. to ownership of the assets.

[108] Crossley Vaines states at 30-31:

The essence of a trust is that the legal ownership of the property is vested in a trustee, who holds it subject to the equitable right of the person (the cestui que trust or "beneficiary") in whose favour the trust is created to enjoy his beneficial interest. ... The trustee has the legal ownership, and if he disposes of the chattels to a bona fide purchaser for value who takes them in circumstances where he has no notice, actual or constructive, of the trust, the purchaser takes them freed from the equitable interest of the beneficiary, who is left only with an action for breach of trust against the trustee. But if the trust property comes into the hands of a stranger who does not give value or who takes with notice of the trust, the beneficiary's equitable rights prevail.

- [109] I find that 083 Ltd. received no beneficial interest in any of the pub assets, including the Liquor Licence and the lease. It held them all in trust for 082 Ltd.
- [110] When the General Manager approved the application for the transfer and issued the Liquor Licence to 083 Ltd. in early January 2009, the chief asset of 082 Ltd. was its beneficial interest in that licence. Without the licence, there was no viable business. In early 2009, Mr. Gould and Mr. Roker were busy trying to raise more money from the investors in 082 Ltd. in order to keep the business going; this was on the premise that 082 Ltd. had an interest in that business. They acknowledged that 083 Ltd. held the license for the benefit of 082 Ltd.
- [111] It was only when the dispute arose, and the plaintiff purported to accelerate the debt of 082 Ltd. under the Promissory Note, that the defendant 082 Ltd. asserted that it had no interest in the business and that the business was owned by 083 Ltd. A little later, Mr. Gould purported to cancel the Declaration of Trust. I say "purported" because I find that both the assertions by 082 Ltd.'s lawyer, and the "Cancellation of Declaration of Trust", were ineffective. They did not change the beneficial ownership of the pub assets, which remained in 082 Ltd.
- [112] I accept the plaintiff's position that in early January 2009, 083 Ltd. held the Liquor Licence for the benefit of 082 Ltd. I find that the same is the case with respect to all of the other assets held by 083 Ltd. even though they were not referred to in the Declaration of Trust. 083 Ltd. provided no consideration for them to 082 Ltd. and they were held by 083 Ltd. only in order to enable 082 Ltd. and its investors to operate the pub business.
- [113] Sections 1 and 2 of the Fraudulent Conveyance Act, R.S.B.C. 1996, c. 163, state:
1. If made to delay, hinder or defraud creditors and others of their just and lawful remedies
 - (a) a disposition of property, by writing or otherwise,
 - (b) a bond,
 - (c) a proceeding, or
 - (d) an order

is void and of no effect against a person or the person's assignee or personal representative whose rights and obligations by collusion, guile, malice or fraud are or might be disturbed, hindered, delayed or defrauded, despite a pretence or other matter to the contrary.

2. This Act does not apply to a disposition of property for good consideration and in good faith lawfully transferred to a person who, at the time of the transfer, has no notice or knowledge of collusion or fraud.

[114] I find that the transfer of assets from 082 Ltd. to 083 Ltd. was not a fraudulent conveyance, since it had a legitimate purpose (to permit the Liquor Licence to be transferred to a company that would hold it for 082 Ltd.), and was not made to delay, hinder or defraud creditors. However, the transfer was ineffective to alter the beneficial ownership of the property. 083 Ltd. continued to hold it in trust for 082 Ltd.

[115] When 083 Ltd., a few months later, transferred the same assets to WJP Ltd., WJP Ltd. was fully aware of the trust pursuant to which 083 Ltd. held those assets. The transfer to WJP Ltd. was without consideration. Both Simon and Michael Gould testified that 083 Ltd. transferred the pub assets to WJP Ltd. in order to be in a better position to obtain financing for the pub business. There was difficulty in obtaining financing, in part, because of the existence of the plaintiff's law suit and her assertion of a security interest in the pub assets including the Liquor Licence. Michael Gould admitted as much, and Simon Gould acknowledged it too, in his evidence that they wanted to move the assets into a "clean" company. What did "clean" mean? In context, there is no doubt that it meant "clean" of creditors, most notably the plaintiff, seeking payment.

[116] The assets continued to be beneficially owned by 082 Ltd. after the transfer to WJP Ltd., which was not a bona fide purchaser for value.

[117] Further, I find that the transfer to WJP Ltd. was in any event a fraudulent conveyance within the meaning of the Fraudulent Conveyance Act.

[118] In its recent decision in *Abakhan & Associates Inc. v. Braydon Investments Ltd.*, 2009 BCCA 521, 314 D.L.R. (4th) 360, the Court of Appeal for British Columbia considered whether it is necessary to show morally blameworthy dishonest or quasi-criminal intent, or mala fides, on the part of the transferor, in order for a conveyance to come within the meaning of s. 1 of the Act. The Court, per Finch C.J.B.C., concluded that it is not necessary. Instead, the applicant need simply show that the transferor made the gift or transfer with intent to delay, hinder or defraud creditors or others. The Court referred at para. 58 to *Freeman v. Pope* (1870), L.R. 5 Ch App 538, where Lord Hatherley stated at 540 that the principle on which the Fraudulent Conveyance Act is based is "that persons must be just before they are generous, and that debts must be paid before gifts can be made". Chief Justice Finch stated at para. 73:

The only intent now necessary to avoid a transaction under the modern version of the Act is the intent to "put one's assets out of the reach of one's creditors" (per *RBC v. Clarke* [Royal Bank of Canada v. Clarke, 2009 BCSC 481]). No further dishonest or morally blameworthy intent is required.

[119] There is clear evidence in the testimony of Simon Gould and of Michael Gould that the transfer to WJP Ltd. was made with the intent to delay or defeat creditors of 083 Ltd. and creditors of 082 Ltd. Further, the effect of the transfer was in fact to delay or defeat those creditors, and the transfer was made without consideration.

[120] The defendants 082 Ltd. and 083 Ltd. were both under the effective control of the same person, Simon Gould, who treated them (until late January 2009) as interchangeable. He and Michael Gould both seem to have operated from the premise that the magic of the corporate veil would allow them to move the pub assets from one corporate entity to another, without regard to any niceties of corporate governance or responsibilities to secured creditors, in the greater good of saving their pub business. They seemed to be of the mistaken view that ownership is a matter of convenience, not a matter of law.

[121] If it were necessary to establish dishonest intent, I would find that the plaintiff has done so, with respect to the transfer from 083 Ltd. to WJP Ltd.

[122] I find that the transfer of the pub assets to WJP Ltd. was a fraudulent conveyance and should be set aside.

[123] The plaintiff did not explicitly rely on a trust analysis. Instead, its case was formulated alternatively on the basis of fraudulent conveyances, or on the basis of 083 Ltd. having induced 082 Ltd. to breach its contract with the plaintiff, or of 083 Ltd. having adopted the purchase agreement.

[124] There were no substantive submissions from counsel regarding the theory that 083 Ltd. adopted the contract, and few regarding inducing breach of contract.

[125] Since I have concluded that the assets continued to be beneficially owned by 082 Ltd., it is unnecessary to address counsels' alternative approaches to legal characterization. Further, the "resulting trust" arguments need not be addressed in the light of my conclusion that there was an express trust, pursuant to which the pub assets in the name of 083 Ltd. were beneficially owned by 082 Ltd.

[126] I note that the evidence as to the express trust came from the defendants themselves, and I do not find that there is any unfairness to the defendants in disposing of the case in this way.

- [127] I find that the plaintiff agreed to share the cost of repairs of the mechanical systems, to the extent of about \$2,000.00. The deductions the defendants made from the instalment payments were pursuant to that agreement although they were not supported by receipts. As for timeliness, the plaintiff accepted the October and November payments late, and cashed the cheques. The plaintiff did not give notice, after having accepted late payments, that it would henceforth consider time to be of the essence.
- [128] I find that the plaintiff had waived the defaults in amounts and in time, and that when it purported on November 24, 2008, to give notice of acceleration of the entire balance of the Promissory Note, it was not entitled to do so. However, the promisor did not tender any further payments and because the final payment was due in September 2010, the entire balance is now due and payable. The balance is \$190,589.47, but is interest payable? If so, at what rate? Counsel for the parties did not make specific submissions in this regard.
- [129] If counsel are unable to agree as to the basis for calculation of the interest payable on the balance due under the Promissory Note, there will be a reference to the Registrar as to that matter.
- [130] I accept Ms. Litvinov's evidence regarding the plaintiff's payments under the National Leasing equipment lease, and find that the plaintiff is entitled to damages from 082 Ltd. in the sum of \$4,407.25.
- [131] As for the claim against Simon Gould personally, the plaintiff has not established that Simon Gould guaranteed the obligations of 082 Ltd., 083 Ltd. or WJP Ltd. or that he acted in a personal capacity. Further, I find that the provisions of s. 20 of the Business Corporations Act are not applicable in this context.

CONCLUSION

- [132] The plaintiff is entitled to damages against 082 Ltd. of \$190,589.47 and interest in an amount to be agreed by the parties or as determined by the Registrar upon a reference.
- [133] The plaintiff is entitled to damages against 082 Ltd. for \$4,407.25 as a result of the failure of 082 Ltd. to assume the equipment leases or to make the required payments thereunder.
- [134] The plaintiff is entitled to a declaration that 083 Ltd. and WJP Ltd. hold in trust for 082 Ltd. the Liquor Licence and all of the assets formerly in the name of, or controlled by, 082 Ltd. Further, the transfer of assets from 083 Ltd. to WJP Ltd. is set aside as a fraudulent conveyance.
- [135] The plaintiff's claims against Simon Gould personally are dismissed.

OTHER ISSUES

- [136] Because of my conclusions set out above, it is not necessary to address the other issues raised by the parties.

[137] I will be seized of this matter, including the hearing of the counterclaim.

[138] Costs of this trial will be determined after the counterclaim has been heard.

"Lynn Smith J."

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