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Docket: BK 19-02-01898
(Brandon Centre)
Indexed as: Bankruptcy of Dwight Logeot
Cited as: 2022 MBKB 214

COURT OF KING'S BENCH OF MANITOBA

IN THE MATTER OF:
THE ESTATE OF DWIGHT CHARLES LOGEOT, A BANKRUPT

		Appearances/Counsel
C. BUHLER & ASSOCIATES LTD. Trustee,	)	DONALD DOUGLAS for the Trustee
- and -	)	
VICTOR LOGEOT & ANNETTE LOGEOT Respondents.	)	NORM SIMS, K.C. for the Respondents
	)	RENADO MAMUCUD for the Bankrupt
	)	REASONS FOR DECISION DELIVERED: November 16, 2022

REGISTRAR PATTERSON

INTRODUCTION

[1] This case involves a determination of whether a preferential payment, or alternatively, a transfer under value occurred pursuant *to* the ***Bankruptcy and Insolvency Act***, R.S.C., 1985, c. B-3 (the "***Act***").

[2] Issues such as but not limited to whether there is sufficient evidence to establish the existence of a lease and a partnership agreement, as well as the extent of statutory protections against self-incrimination, are considered within this bankruptcy proceeding.

[3] For the reasons as set forth within this decision, I have concluded that the Trustee is entitled to the relief requested.

BACKGROUND

[4] Dwight Charles Logeot (the "Bankrupt") made an assignment in personal bankruptcy for the general benefit of his creditors on July 22, 2019 (the "date of bankruptcy").

[5] The Bankrupt is married to Denise Logeot ("Denise"), and presently resides in Brandon, Manitoba.

[6] Within his Statement of Affairs dated July 16, 2019 ("Form 79"), the Bankrupt confirmed that as of the date of bankruptcy, he was employed as a sales manager with a large farm implement and machinery dealership. He was also the sole shareholder and principal of Blue Diamond Holdings Ltd. ("Blue Diamond") and Hometown Ag Ltd. ("Hometown"), as well as a shareholder (with fifty percent of the issued shares) in Corner Equipment Ltd. ("Corner Equipment").

[7] The Bankrupt disclosed within his Form 79, that as of the date of bankruptcy, he had secured debt outstanding in an amount of $1,120,432.00, as

well as unsecured debt outstanding in an amount of $964,119.00, for total liabilities equaling $2,084,551.00.

[8] The discharge application (for what is the first bankruptcy of the Bankrupt) was initially adjourned *sine die* on September 23, 2021 by the Trustee. The contested hearing for consideration of the Bankrupt's application for discharge has now been scheduled for November 15, 2022.

TRUSTEE'S MOTION

[9] Pursuant to the third motion filed by the Trustee on August 13, 2021 (Document No. 63 and hereinafter the "Trustee's Motion"), the Trustee requested the following relief from the Court:

> a) An order requiring Victor and Annette Logeot, jointly and severally, as either:
>
> i) Persons privy to transfers undervalue pursuant to Section 96 of the Bankruptcy and Insolvency Act, or in the alternative;
>
> ii) Creditors in receipt of a preferential payment pursuant to Section 95 of the Bankruptcy and Insolvency Act
>
> to pay the amount of $93,846.73 to the Estate.
>
> b) Costs of the Motion; and
>
> c) Such further and other relief that this Honourable Court may allow.

[10] In addition to sections 95 and 96 of the ***Act***, the Trustee's Motion relies upon section 34(1) of the ***Act*** whereby "a trustee may apply to the court for directions in relation to any matter affecting the administration of the estate of a bankrupt …".

[11] The Respondents pursuant to the Trustee's Motion, Victor Logeot ("Victor") and Annette Logeot ("Annette"), or collectively, the "Logeots", are the parents of the Bankrupt. They are farmers, and reside in the Oak Lake, Manitoba area.

EVIDENCE FOR TRUSTEE'S MOTION

[12] There were six exhibits entered into evidence, which were as follows:

EX 1: Affidavit of Crystal Buhler, sworn January 7, 2021 (the "Trustee's 1st Affidavit");

EX 2: Affidavit of Crystal Buhler, sworn August 11, 2021 (the "Trustee's 2nd Affidavit");

EX 3: Affidavit of Crystal Buhler, sworn October 24, 2021 (the Trustee's "Supplemental Affidavit");

EX 4: Affidavit of Victor and Annette Logeot, sworn January 15, 2021 (the "Logeot's 1st Affidavit");

EX 5: Affidavit of Victor and Annette Logeot, sworn April 13, 2021 (the "Logeot's 2nd Affidavit"); and

EX 6: Affidavit of Annette Logeot sworn September 27, 2001 ("Annette's Affidavit").

HEARING FOR TRUSTEE'S MOTION

[13] By consensus of counsel, the direct evidence for the contested hearing of the Trustee's Motion was pursuant to affidavit, with the affiants being cross-examined in Court. Following resolution of a preliminary procedural issue raised

on behalf of the Bankrupt (addressed later within this decision), the Trustee was cross-examined by counsel for the Logeots (Mr. Sims, K.C). Thereafter, Victor, Annette and the Bankrupt were cross-examined by counsel for the Trustee (Mr. Douglas).

[14] Once the evidence was completed in relation to the Trustee's Motion, a half-day was then scheduled for submissions. Counsel each filed detailed briefs, which together with their respective submissions, was most helpful and much appreciated by the Court.

[15] At the close of the hearing concerning the Trustee's Motion, and pending issuance of this decision, I pronounced an Interim Attaching Order, with consent of Victor (Document No. 78).

[16] A transcript of the hearing was subsequently ordered by Mr. Douglas, and made available to the Court.

JURISDICTION

[17] While no concern was raised by any of the parties, it is nonetheless appropriate to confirm that I proceeded with hearing the Trustee's Motion in accordance with section 192(1)(j) of the ***Act***, which provides as follows:

> **Powers of registrar**
> 192(1) The registrars of the courts have power and jurisdiction, without limiting the powers otherwise conferred by this Act or the General Rules,
>
> …
>
> (j) to hear and determine any matter with the consent of all parties.
>
> …

PRIOR MOTIONS FILED BY THE TRUSTEE

[18] As a result of proceeding with the Trustee's Motion, the two motions filed previously by the Trustee (the "Trustee's 1st Motion" and the "Trustee's 2nd Motion" respectively) were discontinued by the Trustee, without opposition from the Logeots or the Bankrupt. In particular:

a) The Trustee's 1st Motion was filed on December 16, 2020 (Document No. 23), and requested a declaration that the Logeots were persons privy to transfers under value pursuant to section 96 of the ***Act***; and

b) The Trustee's 2nd Motion was filed on January 8, 2021 (Document No. 33), and amended the Trustee's 1st Motion, such that in the alternative, it was requested the Court determine that there had been preferential payments made by the Bankrupt to the Logeots in accordance with section 95 of the ***Act.***

OTHER INTERIM PROCEEDINGS

[19] Aside from the Trustee's Motion (and the Trustee's 1st Motion as well as the Trustee's 2nd Motion), the following interim motions have also proceeded before the Court:

a). The motion of the Trustee requesting that a portion of the net proceeds from sale of the family home in Brandon (for which Denise held title) be held in trust pending resolution of the Trustee's 1st Motion; subsequent to the Interim Order that I had pronounced following a contested hearing on December 15, 2020 (Document No. 25), the parties

reached consensus, such that this particular motion filed by the Trustee was dismissed, resulting in the Order which I granted on February 23, 2022 (Document No. 49); and

b) The motion of the Trustee seeking approval of the Court for acceptance by the Trustee of a specified payment from Denise, in order to settle the interests of the Bankrupt in certain mines and minerals interests; by consent, I pronounced an Order on March 22, 2022 (which is Document No. 85).

PRELIMINARY PROCEDURAL ISSUE CONCERNING THE TRUSTEE'S MOTION

[20] Counsel for the Bankrupt (Mr. Mamucud) raised a preliminary procedural issue at the outset of the hearing with respect to the Trustee's Motion, which involved a request for a "sealing order" concerning the evidence of the Bankrupt. The basis for this request was explained by Mr. Mamucud as follows:

a) The Bankrupt was served with a subpoena issued by counsel on behalf of the Trustee (Mr. Douglas intended to cross-examine the Bankrupt at the hearing for the Trustee's Motion);

b) Mr. Mamucud expressed concern about the potential for the Bankrupt's evidence in these proceedings being used in relation to the pending criminal charges faced by the Bankrupt (which the Bankrupt is contesting);

c) Similarly, Mr. Mamucud was apprehensive about the prospect for evidence of the Bankrupt becoming available for purposes of the ongoing

investigation being conducted by the Office of the Superintendent of Bankruptcy (the "OSB"), as well as in relation to the pending civil proceedings where the Bankrupt has been named as a party;

d) According to Mr. Mamucud, it was uncertain if the OSB would be bound by the ***Manitoba Evidence Act***, C.C.S.M. c. E150 (the "***MEA***"), despite the existence of the ***Canada Evidence Act***, R.S.C. 1985, c. C-5 (the "***CEA***"); and

e) As a result, it was submitted by Mr. Mamucud that a sealing order regarding the evidence of the Bankrupt would be reasonable and warranted.

[21] While Mr. Sims advised that the Logeots were not opposed to a sealing order as requested on behalf of the Bankrupt, Mr. Douglas confirmed that the Trustee did not agree.

[22] The position of the Trustee can be summarized as follows:

a) Mr. Douglas submitted that sections 5 and 6 of the ***CEA*** are applicable to this case, and have been designed or drafted so as to contemplate and allow for parallel proceedings, where questions can be asked and answered, with appropriate protection afforded to the witness; and

b) The Bankrupt, should he be cross-examined without there being a sealing order, can still rely upon the evidentiary protections available to him pursuant to the ***CEA***.

[23] The relevant sections from the ***CEA*** and the ***MEA*** are as follows:

> ***CEA***:
>
> **Application**
>
> 2 This Part applies to all criminal proceedings and to all civil proceedings and other matters whatever respecting which Parliament has jurisdiction.
>
> . . .
>
> **Incriminating questions**
>
> **5(1) No witness shall be excused from answering any question on the ground that the answer to the question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person.**
>
> **Answer not admissible against witness**
>
> **(2) Where with respect to any question a witness objects to answer on the ground that his answer may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this Act, or the Act of any provincial legislature, the witness would therefore have been excused from answering the question, then although the witness is by reason of this Act or the provincial Act compelled to answer, the answer so given shall not be used or admissible in evidence against him in any criminal trial or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury in the giving of that evidence or for the giving of contradictory evidence.**
>
> ***MEA*****:**
>
> **Incriminating questions**
>
> 6(1) No witness shall be excused from answering any question, or producing any document, upon the ground that the answer thereto or the production thereof may tend to criminate him, or may tend to establish his liability to a legal proceeding at the instance of the Crown or of any person.
>
> **Evidence not to be used**
>
> 6(2) If, with respect to any question or the production of any document, a witness objects to answer or to produce upon any of the

> grounds mentioned in subsection (1), and if but for this section or any Act of the Parliament of Canada, the witness would have been excused from answering that question or from producing that document, then although the witness is, by reason of this section or any Act of the Parliament of Canada, compelled to answer or to produce, the answer so given or the document so produced shall not be used or receivable in evidence in any legal proceeding against him thereafter taking place.
>
> **(emphasis added)**

[24] In the circumstances, I agreed with the Trustee's position.

[25] The ***Act*** is a federal statute, and as such, the ***CEA*** is applicable. The Bankrupt was served with a subpoena, compelling him to attend the hearing for the Trustee's Motion. Pursuant to section 5(1) of the ***CEA***, the Bankrupt was required to answer questions properly put to him during cross-examination. He could, however, rely upon section 5(2) of the ***CEA***, and invoke his rights against self-incrimination with respect to his evidence (which is exactly what he did once I delivered my ruling).

[26] While sealing orders may be granted pursuant to the ***Act,*** in this case, I declined to do so (in view of the foregoing statutory rights and protections available to the Bankrupt).

DETAILS OF THE INVOICES (FOR PURCHASE OF PRODUCTS AND SERVICES BY THE BANKRUPT)

[27] **The following documents, all of which are exhibits to the Trustee's 1st Affidavit** (certain of which are also included as exhibits to other affidavits filed in these proceedings), **are of primary focus and importance in these proceedings:**

a) **invoice dated October 9, 2018** (three pages), describing the customer as being the Bankrupt, and issued by Dueck Laminated Rafters, for purchase of building materials involving the "roof exterior", "2nd storey loft", "roof interior-optional material only", "endwall #1-closed-optional insulate/sheeting", "endwall #2 -c/w OH door + 36" steel door", "concrete work" and "miscellaneous", for a total of $35,583.33 inclusive of taxes (Exhibit "C" to the Trustee's 1st Affidavit);

b) **invoice dated December 3, 2018** (two pages), made out to the Bankrupt as the customer and issued by Rona for the purchase and delivery of various building materials referenced as the "Truss Pkg", for the total sum of $10,199.80 (Exhibit "D" to the Trustee's 1st Affidavit).

c) **invoice dated December 18, 2018** (two pages), which notes the Bankrupt as the customer and was issued by Rona for the purchase of various building materials, described as the "Rustic Red Tin Pkg", for the total sum of $9,658.53 (Exhibit "E" to the Trustee's 1st Affidavit).

(the foregoing three invoices, collectively, the "**Building Materials Invoices**")

d) **invoice dated "August 2018"** (one page), made out to the Bankrupt as the customer and issued by KD Sparrow Farms ("Sparrow") for provision and delivery to property owned by the Logeots of 680 yards of shale, for the total sum of $14,280.00 inclusive of taxes (Exhibit "D" to the

Trustee's Supplemental Affidavit, and hereinafter the "**Shale Invoice**"); and

e) **invoice dated November 1, 2018** (one page), which reads "in account with" the Bankrupt and concerns provision of certain specific products and services upon the property owned by the Logeots (a 30 inch diameter and 40 foot deep well was drilled) by Paddock Drilling ("Paddock"), for the total sum of $9,170.07 inclusive of taxes (contained within Exhibit "G" to the Trustee's Supplemental Affidavit, and hereinafter the "**Paddock Invoice**").

(the five invoices, collectively, the "**Invoices**")

[28] Even though the aforementioned sums detailed within the Building Materials Invoices total $58,599.46, there was a deposit paid initially by the Bankrupt, in an amount of $15,000.00 (referred to within Exhibit "D" to the Trustee's 1st Affidavit).

[29] Pursuant to the email of the Bankrupt to the Trustee dated March 17, 2020 (Exhibit "F" to the Trustee's 1st Affidavit), the total purchases referenced within the Building Materials Invoices properly amounts to $73,599.46.

[30] Ultimately, the total of the Invoices (the Building Materials Invoices, Shale Invoice and Paddock Invoice) equals $93,846.73.

ISSUES TO DETERMINE

[31] The issues to be determined in accordance with the Trustee's Motion, and when considering the Invoices, are as follows:

a) If there was a valid and enforceable lease in effect at the date of bankruptcy between the Bankrupt and the Logeots (as alleged by the Bankrupt but disputed by the Trustee), were the purchases of products and services in an amount totalling $93,846.73 (as evidenced by the Invoices) a "preferential payment" made by the Bankrupt pursuant to section 95 of the ***Act*** ("**ISSUE 1"**)?

b) In the alternative, and regardless if there was no valid and enforceable lease between the Bankrupt and the Logeots, were the purchases of products and services in an amount totalling $93,846.73 (as evidenced by the Invoices) a "transfer under value" pursuant to section 96 of the ***Act*** ("**ISSUE 2**")?

c) Aside from what is determined by the Court with respect to **ISSUES 1 and 2**, was there a partnership agreement between the Bankrupt and Denise prior to or at the date of bankruptcy, and if so, is it only one half (½) of the value of the purchases of products and services (as evidenced by the Invoices) that can be categorized as a preferential payment or transfer under value ("**ISSUE 3**")?

(**emphasis added**)

ISSUE 1: Was there a "preferential payment" made by the Bankrupt to the Logeots?

Relevant provisions of the Act:

[32] Section 95 of the ***Act*** provides as follows:

Preferences

95(1) **A transfer of property made, a provision of services made**, a charge on property made, **a payment made**, an obligation incurred or a judicial proceeding taken or suffered **by an insolvent person**

(a) in favour of a creditor who is dealing at arm's length with the insolvent person, or a person in trust for that creditor, with a view to giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy; and

(b) in favour of a creditor who is not dealing at arm's length with the insolvent person, or a person in trust for that creditor, that has the effect of giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is 12 months before the date of the initial bankruptcy event and ending on the date of the bankruptcy.

Preference presumed

(2) If the transfer, charge, payment, obligation or judicial proceeding referred to in paragraph (1)(a) has the effect of giving the creditor a preference, it is, in the absence of evidence to the contrary, presumed to have been made, incurred, taken or suffered with a view to giving the creditor the preference — even if it was made, incurred, taken or suffered, as the case may be, under pressure — and evidence of pressure is not admissible to support the transaction.

Exception

(2.1) Subsection (2) does not apply, and the parties are deemed to be dealing with each other at arm's length, in respect of the following:

(a) a margin deposit made by a clearing member with a clearing house; or

(b) a transfer, charge or payment made in connection with financial collateral and in accordance with the provisions of an eligible financial contract.

(**emphasis added**)

[33] In addition to the foregoing sections, the following definitions from the ***Act*** are integral to interpreting the legislation and assessing the evidence in this case:

> **Definitions**
>
> **2**. In this Act,
>
> . . .
>
> **creditor** means a person having a claim provable as a claim under this Act;
>
> **date of the bankruptcy**, in respect of a person, means the date of
>
> (a) the granting of a bankruptcy order against the person,
>
> (b) **the filing of an assignment in respect of the person**, or
>
> (c) the event that causes an assignment by the person to be deemed;
>
> **date of the initial bankruptcy event**, in respect of a person, means the earliest of the day on which any one of the following is made, filed or commenced, as the case may be:
>
> (a) **an assignment by or in respect of the person**,
>
> (b) a proposal by or in respect of the person,
>
> (c) a notice of intention by the person,
>
> (d) the first application for a bankruptcy order against the person, in any case
>
> (i) referred to in paragraph 50.4(8)(a) or 57(a) or subsection 61(2), or
>
> (ii) in which a notice of intention to make a proposal has been filed under section 50.4 or a proposal has been filed under section 62 in respect of the person and the person files an assignment before the court has approved the proposal,
>
> (e) the application in respect of which a bankruptcy order is made, in the case of an application other than one referred to in paragraph (d), or
>
> (f) proceedings under the Companies' Creditors Arrangement Act;

debtor includes an insolvent person and any person who, at the time an act of bankruptcy was committed by him, resided or carried on business in Canada and, where the context requires, includes a bankrupt;

insolvent person means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

(a) who is for any reason unable to meet his obligations as they generally become due,

(b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

(c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due;

time of the bankruptcy, in respect of a person, means the time of

(a) the granting of a bankruptcy order against the person,

(b) the filing of an assignment by or in respect of the person, or

(c) the event that causes an assignment by the person to be deemed;

4(1). In this section,

…

related group means a group of persons each member of which is related to every other member of the group;

Definition of related persons

(2) For the purposes of this Act, persons are related to each other and are **related persons** if they are:

(a) **individuals connected by blood relationship, marriage**, common-law partnership or adoption;

(b) **an entity and**

(i) **a person who controls the entity, if it is controlled by one person,**

(ii) a person who is a member of a related group that controls the entity, or

> (iii) any person connected in the manner set out in paragraph (a) to a person described in subparagraph (i) or (ii);
>
> **Question of fact**
>
> **(4)** It is a question of fact whether persons not related to one another were at a particular time dealing with each other at arm's length.
>
> **Presumptions**
>
> **(5) Persons who are related to each other are deemed not to deal with each other at arm's length while so related**. For the purpose of paragraph 95(1)(b) or 96(1)(b), the persons are, in the absence of evidence to the contrary, deemed not to deal with each other at arm's length.
>
> (**emphasis added**)

Summary from 2022 Annotated Act

[34] The issue of preferential payments is addressed in detail within "***The 2022 Annotated Bankruptcy and Insolvency Act***" (the "**2022 Annotated Act**"), the long standing authoritative treatise concerning insolvency law authored by Houlden, Morawitz and Sarra, which is updated twice annually.

[35] At page 643 of the ***2022 Annotated Act*** (mid-portion of the last paragraph), what constitutes a preference is described simply, yet functionally, as follows: "A preference occurs when an insolvent debtor pays one or more creditors at the expense of other creditors."

[36] Within the second paragraph on page 661 of the ***2022 Annotated Act***, it states further that:

> The presumption created by section 95(2) is not an absolute or conclusive presumption; it is capable of being rebutted: **Salter & Arnold Ltd. v. Dominion Bank** (1926), 7 C.B.R. 639 (S.C.C.). It is a question of fact whether the presumption has been displaced.

[37] It is also confirmed within the first paragraph on page 666 of the ***2022 Annotated Act*** that:

> If the evidence of the creditor against whom the presumption operates is capable of corroboration e.g. by calling a witness who was involved in the transaction, the omission to call such evidence, where it is readily available, may render the evidence given insufficient to rebut the presumption.

Evidence from cross-examination upon affidavits:

Trustee

[38] The affidavit material of the Trustee was very detailed.

[39] That being stated, the Trustee was candid and openly volunteered during cross-examination by counsel for the Logeots that she had made a calculation error initially (by inadvertently ignoring the down payment or deposit of $15,000.00 made by the Bankrupt which was applied as a credit against the sums set forth within the Building Materials Invoices).

Victor

[40] The following represents a summary of Victor's testimony, as a result of being cross-examined by counsel for the Trustee:

a) Victor advised that he has "farmed all of his life", and "has been on the farm for 82 years";

b) He did not recall where the document was signed by the parties, which the Bankrupt as well as the Logeots contend is a valid and enforceable lease for certain of the farm property and equipment owned by the

Logeots (the "Lease", a copy of which is attached as Exhibit "A" to the Logeots 1st Affidavit);

c) Victor was adamant that it was his signature that appears upon the Lease;

d) He explained that his family was in a succession phase when the Lease was signed, although he admitted that there had been no planning with a lawyer or accountant at that time;

e) Victor acknowledged that there were no provisions within the Lease with respect to maintenance of the property being farmed (what counsel for the Trustee referred to generally as “common farm lease clauses” for items such as crop rotation, fertilizer application and clean up in the spring as well as the fall);

f) The amount of rent set forth within the Lease that was allocated towards use of the Logeot's farm equipment was admittedly an estimate according to Victor;

g) Victor confirmed that there were no payments made by the Bankrupt to the Logeots pursuant to the Lease (other than the provision of products and services purchased by the Bankrupt valued in an amount totalling $93,846.73);

h) Any long term improvements made by the Bankrupt to the farm property of the Logeots could, according to Victor, serve as a credit towards and be deducted against rent payable by the Bankrupt;

i) The work on the cattle structure started in 2018 and was finished in 2019, prior to the date of bankruptcy;

j) Victor stated that there was an old barn upon the Logeot's farm property, which was torn down, with some of that salvage used to then build the new cattle structure; and

k) He had some cattle himself when, in 2018, the Bankrupt and Denise were commencing their own cow-calf operation from the Logeot's farm property.

Annette

[41] As a result of being cross-examined by counsel on behalf of the Trustee, the following is a summary of Annette's testimony:

a) Annette believed the Bankrupt and Denise prepared the Lease, which she remembered talking to the Bankrupt and Denise about in her home before signing it;

b) She advised that the Bankrupt and Denise had some cattle by 2018, as the Bankrupt was intent upon getting going with a cow-calf operation;

c) Annette explained that the Bankrupt was able to use the Logeot's line of credit in connection with their cattle operation;

d) One benefit from the Lease was construction of a new cattle structure upon the Logeot's farm property;

e) No rental income was received or claimed by Annette or Victor from the Bankrupt (or Denise) in accordance with the Lease; and

f) Annette (similar to Victor) did not claim the value of the capital improvements made upon the Logeot's farm property within their respective income tax returns (she did not believe there had to be any reporting, as the new cattle structure was not ready for use until the spring of 2019).

Bankrupt

[42] Prior to cross-examination of the Bankrupt commencing, the Bankrupt confirmed that he was relying upon sections 5(1) and (2) of the ***CEA*** (as reviewed earlier herein).

[43] The highlights of the Bankrupt's testimony from cross-examination by counsel for the Trustee are as follows:

a) As confirmed within paragraph 7 of the Trustee's 1st Affidavit, January 20, 2021 was the first time that the Trustee became aware of the existence of the Lease (through then counsel for the Logeots, and essentially eighteen months after the date of bankruptcy);

b) The Bankrupt acknowledged emailing the Trustee on March 17, 2020 to provide clarification requested of him in relation to the Invoices (he did not mention the Invoices to the Trustee until well after the date of bankruptcy);

c) It was also well after the date of bankruptcy when the Bankrupt first mentioned the partnership agreement of the Bankrupt with Denise to the Trustee;

d) The Bankrupt admitted that he never paid any rent to the Logeots in accordance with the Lease;

e) When asked about the information received by the Trustee from the Bankrupt's accountant, included at Exhibit "G" to the Trustee's 1st Affidavit (wherein there was no deduction for rent with respect to the Bankrupt's 2018 income tax return, and instead, the purchases of products and services by the Bankrupt were described as capital improvements), the Bankrupt was not sure why the documentation was prepared in that manner;

f) The Bankrupt claimed that he had bought some cattle for his intended cow-calf operation, and needed a new or renovated barn for the cows and calves in the spring of 2019;

g) It was acknowledged by the Bankrupt that the Lease contained no terms with respect to items such as responsibility for fertilizer inputs in the spring, or in relation to general maintenance work upon the Logeot's farm property in the fall;

h) Use by the Bankrupt of some of the equipment owned by the Logeots, and the requirement for payment of a stipulated amount for rent pursuant to the Lease, was because the Bankrupt needed the equipment as a result of having cattle upon the Logeot's farm property in 2018;

i) Once he made his assignment in personal bankruptcy, the Bankrupt ceased the cow-calf operation that he had commenced with Denise;

j) With respect to the "Notice to Produce" received by the Bankrupt, he claimed that he did not know to whom he had sold the computer, or when he had sold it (the Lease was prepared using this computer);

k) The Bankrupt confirmed the shale that he had ordered (reflected within the Shale Invoice) was delivered to the Logeot's farm property; and

l) Blue Diamond, the entity that made payment to Paddock, is a corporation of which the Bankrupt was a principal at all material times (the products and services as set forth within the Paddock Invoice being provided at the Logeot's farm property).

Trustee's Position:

[44] At paragraph 9 of the Trustee's 1st Affidavit, the Trustee succinctly stated as follows:

> Based on my personal knowledge of the information contained herein and as Trustee for the estate**, I believe that if the expenses paid by the Bankrupt, as evidenced on the receipts, were considered as payments against the Lease Agreement, they would constitute preferential payment** pursuant to Section 95 of the Bankruptcy and Insolvency Act. **Alternatively, if the expenses paid by the Bankrupt, as evidenced on the receipts, were not considered payments as against the Lease Agreement, but as capital improvements as reported on the Bankrupt's 2018 Tax Returns, it may be that they constitute a Transfer Under Value** pursuant to Section 96 of the Bankruptcy and Insolvency Act.
>
> (**emphasis added**)

[45] The Trustee disputes that the Lease was a valid and enforceable agreement between the Bankrupt and the Logeots. Nonetheless, counsel for the Trustee submitted that if the purchase of products and services by the Bankrupt

(as evidenced by the Invoices) is recognized as being provided by the Bankrupt in lieu of rent owing to the Logeots, such purchases of products and services should be considered as preferential payments pursuant to section 95 of the ***Act***.

[46] As outlined by counsel for the Trustee (paragraph 34 of the Trustee's Motion Brief), the necessary elements to substantiate a preference are as follows:

> **a) a transfer of property or provision of services and materials;**
>
> **b) by an insolvent person in favour of the creditor who is not dealing at arm's length with the insolvent person which has the effect of creating a preference for the creditor or other creditors; and**
>
> **c) was made within 12 months prior to the date of assignment in personal bankruptcy.**
>
> (**emphasis added**)

[47] In support of the position that the transactions in question resulted in the Logeots receiving a preference from the Bankrupt over his other creditors, counsel for the Trustee referred to the decision in ***Keith G. Collins Ltd., as Trustee of the Estate of Dubois-Vandale, a Bankrupt v. MBNA Canada Bank,*** 2006 MBQB 258 ("***Collins***"). At paragraph 17 of that case, it was noted that:

> The bankrupt selected the accounts which she wanted to pay …[s]he paid these accounts knowing other debts would receive only minimal payment or no payment whatsoever.

[48] Following ***Collins***, the Court of Appeal released its decision in ***Forbes (Bankrupt)***, **Re**, 2011 MBCA 41 ("***Forbes***"), wherein at paragraph 60, it was

confirmed that the plan by the insolvent person in that case to reorganize his financial affairs must be objectively reasonable to rebut the presumption that there was a preference to creditors.

[49] As to the case at bar, counsel for the Trustee submitted that there is no dispute the construction or repair and renovation of the cattle structures, supply of shale and a new well (all of which was arranged by the Bankrupt) was of benefit to the Logeots by improving the Logeot's farm property.

[50] It is further asserted on behalf of the Trustee that the expenditures incurred by the Bankrupt for the above noted purchases and services was at a time when the Bankrupt was insolvent.

[51] When considering the 1st Trustee's Affidavit, and in particular, the dates of the invoices, counsel for the Trustee noted that there had been no payments made by the Bankrupt in relation to at least two other debts which were in default (and outstanding at the date of bankruptcy):

a) an unsecured sum owing by the Bankrupt to Compass Credit Union (the "Credit Union") in an amount of $10,165.73; and

b) an unsecured amount owing by the Bankrupt to CWB National Leasing ("CWB") totalling $103,721.25.

[52] It was submitted by counsel for the Trustee that it only needs to be established that the payments made by the Bankrupt for the products and services he had ordered had the effect of giving another creditor (the Logeots) a

preference over, at a minimum, the Credit Union and CWB, pursuant to the section 95 of the ***Act***.

[53] Counsel for the Trustee also referred to the Notice of Intention to Make a Proposal pursuant to the ***Act*** that was filed by Corner Equipment on June 15, 2018 (the Bankrupt holding fifty percent of the issued shares in Corner Equipment). The total dollar value of creditors' claims listed within that particular notice was in excess of $10,000,000.00.

[54] In addition, on February 14, 2019, Farm Credit Canada ("FCC") filed a claim against the Bankrupt, seeking judgment for an amount in excess of $1,000,000.00, together with interest and costs.

[55] As a result, counsel for the Trustee submitted that the Bankrupt owed more than $1,000.00 and had ceased meeting his obligations, thereby becoming insolvent pursuant to the ***Act***, at the time he made the purchases and secured the services as confirmed by the Invoices.

[56] In accordance with the definitions from the ***Act*** included at paragraph 33 herein, counsel for the Trustee further articulated that the Bankrupt and the Logeots are "related persons", and as such, are presumed to be dealing at non-arm's length for these purposes.

[57] Counsel for the Trustee reiterated that the transactions in question involving the Bankrupt occurred within one year prior to the date of bankruptcy.

[58] Accordingly, even if the Lease is determined by this Court to be valid, the Trustee takes the position that an amount of $93,846.73 should be determined

to be the value of the preferential payment made by the Bankrupt for benefit of the Logeots.

[59] It was also the position of the Trustee that even if the shale had not been paid for by the Bankrupt (as argued by the Logeots), the product was still delivered to the Logeot's farm property.

[60] While Blue Diamond was involved with the Paddock Invoice, the Trustee stressed that the Bankrupt was the principal and sole shareholder of Blue Diamond (they were related parties).

Logeot's Position:

[61] First and foremost, the Logeots (as well as the Bankrupt) contend that the Lease was a valid and enforceable contract, and that it was in existence well before and at the date of bankruptcy.

[62] It was further submitted by counsel for the Logeots that even if a debtor-creditor relationship existed between the Logeots and the Bankrupt, the presumption of there being a preferential payment can be rebutted. In particular, it was argued that the expenditures incurred by the Bankrupt (as evidenced by the Invoices) were incurred in the ordinary course of business.

[63] The Logeots (and the Bankrupt) also take the position that there was no intention on the part of the Bankrupt to prefer the Logeots over the Bankrupt's other creditors.

[64] With respect to the Shale Invoice, the Logeots contend that it represents products that were ordered but not paid for by the Bankrupt.

[65] As to the Paddock Invoice, the Logeots state that this expenditure was not incurred by the Bankrupt, but rather, by Blue Diamond.

Analysis

[66] Without conceding that the Lease was valid and in existence at the date of bankruptcy, the Trustee and her counsel have nonetheless presented a convincing argument in support of the request that the Court determine the transactions in question resulted in the Logeots receiving a preferential payment from the Bankrupt, which was to the detriment of his other creditors.

[67] Despite the reply in opposition articulated by counsel for the Logeots, with respect, I disagree, and accept the Trustee's position.

[68] At the outset, and if the Bankrupt and the Logeots were at "arm's length", the presumption of the purchase of products and services by the Bankrupt representing a preference could be rebutted with "evidence to the contrary", in accordance with sections 95(1)(a) and 95(2) of the ***Act***. In this situation, however, the Bankrupt and the Logeots are not at arm's length (they are "related parties"), such that an explanation of the Bankrupt's expenditures being in the ordinary course of business is not determinative.

[69] Similarly, intent of the Bankrupt is not a defence to the application of section 95(1)(b) of the ***Act*** to these circumstances.

[70] As to the Shale Invoice, and even if it was not paid for by the Bankrupt, he created this debt obligation, and the Logeots received the product (it is not in evidence that the Logeots paid for the shale themselves subsequently).

[71] With respect to the Paddock Invoice, the Bankrupt was the sole shareholder of Blue Diamond (he was a related party with Blue Diamond).

[72] Ultimately, I am satisfied that evidence establishes the following:

a) there were expenditures for products and services (as evidenced by the Invoices);

b) which were incurred by the Bankrupt, who at that time was insolvent;

c) that involved a "related person" (the Logeots); and

d) occurred within one year prior to the date of bankruptcy.

[73] Based upon the foregoing, I find that the purchases of products and services (as evidenced by the Invoices) was a "preferential payment" made by the Bankrupt in favour of the Logeots, pursuant to section 95(1)(b) of the ***Act***.

[74] Subject to what is determined in relation to **ISSUE 3** herein, the Logeots are obligated to and shall pay the sum of $93,846.73 to the Trustee on behalf of the estate of the Bankrupt. There was no evidence provided on behalf of the Logeots to suggest that the above noted sum was improperly calculated (other than their assertion that any payment obligation should be less due to there being a partnership agreement between the Bankrupt and Denise at the date of bankruptcy).

[75] Unless requested by the parties, I will leave the timing of payment by the Logeots in favour of the Trustee to be discussed and confirmed between counsel. Once payment in full is made, the security in effect pursuant to the Interim Attaching Order pronounced can be released.

ISSUE 2: Was there a "transfer under value" made by the Bankrupt in favour of the Logeots

[76] Based upon what I have decided, and ordered, with respect to **ISSUE 1**, I could conclude my analysis at this point.

[77] In the event, however, that I am in error, or should the Trustee be correct in her position that the Lease was not valid or enforceable, I should consider the alternative argument or other determination sought by the Trustee, namely, did the Bankrupt make a transfer under value pursuant to the ***Act***? The reality is that both the Trustee and the Logeots, along with their respective counsel, have committed a significant portion of their submissions to this question, which properly deserves review.

Relevant provisions of the Act:

[78] Section 96 of the ***Act*** is concerned with transfers under value, and provides as follows:

> **Transfer at undervalue**
>
> 96 (1) On application by the trustee, **a court may declare that a transfer at undervalue is void as against**, or, in Quebec, may not be set up against, **the trustee — or order that a party to the transfer or any other person who is privy to the transfer, or all of those persons, pay to the estate the difference between the value of the consideration received by the debtor and the value of the consideration given by the debtor if**
>
> (a) **the party was dealing at arm's length with the debtor and**
>
> (i) the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and that ends on the date of the bankruptcy,
>
> (ii) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, and

(iii) the debtor intended to defraud, defeat or delay a creditor; or

(b) **the party was not dealing at arm's length with the debtor and**

(i) **the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and ends on the date of the bankruptcy, or**

(ii) the transfer occurred during the period that begins on the day that is five years before the date of the initial bankruptcy event and ends on the day before the day on which the period referred to in subparagraph (i) begins and

(A) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, or

(B) the debtor intended to defraud, defeat or delay a creditor.

Establishing values

(2) **In making the application referred to in this section, the trustee shall state what, in the trustee's opinion, was the fair market value of the property or services and what, in the trustee's opinion, was the value of the actual consideration given or received by the debtor, and the values** on which the court makes any finding under this section **are, in the absence of evidence to the contrary, the values stated by the trustee.**

Meaning of person who is privy

(3) **In this section, a person who is privy means a person who is not dealing at arm's length with a party to a transfer and, by reason of the transfer, directly or indirectly, receives a benefit or causes a benefit to be received by another person.**

(**emphasis added**)

[79] The term "transfer under value" is precisely defined at section 2 of the ***Act***:

transfer at undervalue means a disposition of property or provision of services for which no consideration is received by the debtor or for which the consideration received by the debtor is conspicuously less than the fair market value of the consideration given by the debtor.

Summary from 2022 Annotated Act

[80] At page 646 of the ***2022 Annotated Act*** (the second, fourth, fifth and sixth paragraphs), a concise summary concerning transfers at under value pursuant to section 96 of the ***Act*** is provided as follows:

> **If the court finds that the transaction was a transfer at undervalue and that the other party was not at arm's length, the court may grant judgment for the difference between the actual consideration and the fair market value if the transfer took place within one year before the date of the initial bankruptcy event or within one to five years before the date of initial bankruptcy event if the debtor was insolvent at the time of the transfer or intended to defeat the interests of creditors. If a preference was made to a non-arm's length creditor within one year, no intention test is required; rather, it is an effects-based test. The transfer at undervalue and preference provisions in the BIA are incorporated by reference into the CCAA.**
>
> **For a party not dealing at arm's length with the debtor, the period is one year prior to the date of the initial bankruptcy**. The period is extended to five years if the debtor was insolvent at the time of the transfer or was rendered insolvent by it, or the debtor intended to defraud, defeat or delay a creditor. **Hence, for transfers at undervalue within one year before the date of the initial bankruptcy event between non-arm's length parties, the trustee will not have to demonstrate intent to defraud, defeat or delay a creditor.** The trustee can look back up to five years where parties are not dealing at arm's length and the transaction may be declared void where intention to defraud, defeat or delay creditors can be established or where the debtor was insolvent at the time of the transfer.
>
> **In making an application under s. 96, the trustee must state what, in its opinion, was the fair market value of the property or services and what was the value of the actual consideration given or received by the debtor. The values on which the court makes any finding under this section are, in the absence of evidence to the contrary, the values stated by the trustee.**
>
> **A "person who is privy" means a person who is not dealing at arm's length with a party to a transfer and, by reason of the**

> **transfer, directly or indirectly, receives a benefit or causes a benefit to be received by another person: s. 96(3).**
>
> **(emphasis added)**

Trustee's Position:

[81] As previously confirmed herein, the Trustee disputes that the Lease was a valid and enforceable agreement between the Bankrupt and the Logeots as of the date of bankruptcy.

[82] If no debtor-creditor relationship is established upon the evidence, the Trustee submits that the purchases of products and services on the part of the Bankrupt (represented by the Invoices) constitutes a transfer under value in consideration of section 96 of the ***Act***.

[83] A succinct summary of the Trustee's position concerning application of section 96 of the ***Act*** to the Bankrupt's circumstances is contained at paragraph 15 on page 13 of the Trustee's Motion Brief, where the "necessary elements" required to establish a transfer under value are confirmed to be as follows:

> a) evidence that there was a disposition of property or a provision of services for which no consideration is received by the debtor or where consideration received by the debtor is conspicuously less than the fair market value consideration given by the debtor;
>
> b) the party was not dealing at arm's length with the debtor; and
>
> c) the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and ends on the date of the bankruptcy.

[84] It was of concern to the Trustee that the expenses confirmed by the Invoices were not described as rent by the Bankrupt, and instead were recorded as capital contributions for accounting and taxation purposes.

[85] The Trustee was equally concerned that the expenditures made by the Bankrupt, and corresponding Invoices, were not raised or brought to the attention of the Trustee until well after the date of bankruptcy.

[86] Exhibit "G" to the Trustee's 1st Affidavit is a copy of the email exchange on April 14, 2020 between the Trustee and Chris Morrison ("Morrison"), an accountant with Alliance Accounting Group (a CPA firm in Brandon). The Trustee inquired of Morrison as to why expenses incurred for building materials to carry out construction or repairs were not included within the relevant statement of farming activities for the Bankrupt (for income tax purposes).

[87] In response, Morrison advised that these expenses were classified as "Class 6" on the Bankrupt's 2018 income tax return.

[88] The Trustee submits that it would have been more advantageous to the Bankrupt had he claimed the costs evidenced by the Invoices as rent, which is 100% deductible, versus an addition to an existing capital cost allowance, where only a certain percentage is deductible.

[89] It was suggested on behalf of the Trustee that the Bankrupt did not advise his accountant of the Lease for purposes of preparing his 2018 income tax return, because there was no such agreement with the Logeots.

[90] According to counsel for the Trustee, the Lease does not satisfy the necessary legal requirements set forth by the Ontario Court of Appeal in ***Canada Square Corp. et al. v. VS Services Ltd et al***., 1981 CanLII 1893 (ON CA) ("***Canada Square***") which is attached at Tab 5 within the Trustee's Motion Brief.

[91] In ***Canada Square***, it was held that in order to be considered valid, an agreement for lease must satisfy the following:

a) sufficiently describe the parties;

b) include a description of the premises to be demised;

c) confirm the commencement date;

d) set forth the duration of the term;

e) note the amount payable for rent; and

f) include all material terms of the contract, such as covenants or conditions, exceptions and reservations, if any.

[92] I note that ***Canada Square*** has been cited in subsequent Manitoba decisions, such as ***Canadian National Railway Co. v. Huntingdon***, 2013 MBCA 3 (CanLII) as well as ***Homestead Properties (Canada) Ltd. v. Sekhri et al.***, 2007 MBCA 61 (CanLII), at paragraph 26.

[93] With respect to the Lease in the case at bar, and while the parties and the date of commencement of the agreement are confirmed, the Trustee states that there is no specification as to what lands are being leased (it only refers to 1120

acres), nor are there specifics as to the duration of the Lease. Rent payable for 2018 is clarified, but nothing is indicated if the Lease is to operate beyond 2018.

[94] Counsel for the Trustee also relies upon the decision of the Ontario Supreme Court in ***Indcondo v. Sloan***, 2014 ONSC 4018 (CanLII) ("***Indcondo"***), which is located at Tab 6 of the Trustee's Motion Brief. At paragraph 52 thereof, it was held that in cases involving a transfer to near relatives, as a matter of prudence, the Court should most often require corroborative evidence as to the bona fides of the transaction.

[95] I did not locate ***Indcondo*** being cited within any subsequent Manitoba cases, although it was noted within a decision from earlier this year in ***Suevilia Development Corporation v. Liang***, 2022 ONSC 1856 (CanLII).

[96] ***Garlicki (Trustee of) v. Garlicki***, 2015 MBQB 125 ("***Garlicki"***) is another decision included by counsel (Tab 7 of the Trustee's Motion Brief). In ***Garlicki***, there was focus upon an assignment document that had been executed by a bankrupt in favour of his mother. As summarized by counsel for the Trustee, the Court held at paragraphs 77 and 78 of this decision "**that in the absence of direct evidence, fraudulent intent may be inferred from suspicious circumstances**".

(**emphasis added**)

[97] From the Trustee's perspective, the Lease "is, at a minimum, suspicious" (paragraph 11 of the Trustee's Motion Brief).

[98] On page 666 of the ***2022 Annotated Act***, in reliance upon a number of authorities such as ***Kisluk v. B.L. Armstrong Co***., 1982 CanLII 1931 (ON SC) ("***Kisluk***"), it reads that:

> **If the evidence of the creditor against whom the presumption operates is capable of corroboration, e.g., by calling a witness who was involved in the transaction, the omission to call such evidence, where it is readily available, may render the evidence actually given, insufficient to rebut the presumption.**
>
> (**emphasis added**)

[99] In addition, at page 665 of the ***2022 Annotated Act***, it is summarized as follows with reference to cases including but not limited to ***Re Olexson*** (1979), 30 C.B.R. (N.S.), 193 (Sask. Q.B.) ("***Olexson***"):

> **If the preferential transaction is in favour of a person related to the bankrupt, the evidence as to the bona fides of the transaction must be clear and convincing.**
>
> (**emphasis added**)

[100] Based upon the above noted authorities, counsel for the Trustee submits that the Court should be cautious to accept uncorroborated evidence as it involves the Lease, and directed the Court's attention to the following circumstances:

a) Signing of the Lease by the Bankrupt, Denise, Victor and Annette was not witnessed or notarized;

b) There was no affidavit filed by Denise, nor was Denise subpoenaed to testify and be cross-examined in relation to the Trustee's Motion (Denise was present for this hearing concerning the Trustee's Motion, and

remained in the courtroom after an order for exclusion of witnesses was made);

c) Counsel for the Trustee expressed concerns with respect to the authenticity of Victor's signature upon the Lease, when compared against Victor's signature on other documentation;

d) The computer upon which the Lease was drafted was not produced for inspection by the Bankrupt (as referenced earlier within this decision);

e) As suggested by counsel for the Trustee, "it is no accident" that the Lease is dated March 17, 2018, exactly two years before the date of the Bankrupt's explanatory email to the Trustee on March 17, 2020; and

f) Existence of the Lease was not disclosed on a timely basis by the Bankrupt to the Trustee.

[101] Further concerns involving the content of the Lease were outlined by counsel on behalf of the Trustee, which can be summarized as follows:

a) There was no term specified within the Lease beyond completion of the last nine months of 2018 (which was curious to counsel for the Trustee, when it had been intimated by the Bankrupt and the Logeots that the Lease was consistent with a long term commitment made by the Bankrupt to take over or purchase the Logeot's farm property);

b) It is the position of the Trustee that the numbers or amounts for payment obligations within the Lease appeared to be arbitrary;

c) The Trustee was of the belief that with the Lease commencing in March of 2018, there presumably would have been some form of crop to harvest in late summer or fall, from which the Bankrupt could have made at least some payment towards the rent due under the Lease (Victor acknowledged, however, that there was no rent paid by the Bankrupt in 2018, other than purchase of the products and services evidenced by the Invoices, which the Bankrupt and the Logeots have stated were provided in lieu of rent);

d) At paragraph 15 of the Logeot's 2nd Affidavit, they state that an amount of $19,903.34 remains owed to them pursuant to the Lease; this sum was not, however, added to the separate amount which the Logeots had paid as guarantors on behalf of the Bankrupt (the Logeots made payment for the sum of $300,101.80 as a result of the "Guarantee" which is further described within paragraph 115 herein);

e) Although it was a term within the Lease, there was no evidence of any accounting taking place between the parties insofar as use by the Bankrupt, as of November 30, 2018, of the credit facilities that were to be made available to him by Victor and Annette;

f) When questioned by counsel for the Trustee, the Bankrupt admitted that there had not been an actual agreement finalized between the Bankrupt and his parents for purchase or transfer of the Logeot's farm property; the Bankrupt also acknowledged Victor had actually stated,

under cross-examination, that the Logeot's farm property would be for the Bankrupt's children someday, not the Bankrupt); and

g) As already highlighted, the Logeots did not report the products and services purchased by the Bankrupt, and received by them, as being in the nature of rent (or specifically, in lieu of rent) which was contemplated as being possible in accordance with the Lease.

[102] Counsel for the Trustee argued that the Court should take recognition of the fact that there was a "long pause" at one point on the part of the Bankrupt during the course of questioning with respect to the Bankrupt's claim that the purchase of products and services evidenced by the Invoices was in lieu of rent owed to the Logeots.

[103] It was also strongly asserted by counsel for the Trustee that the Bankrupt "played fast and loose with the truth", citing what were argued to be inconsistencies in evidence between the Bankrupt, Victor and Annette concerning use of the building materials purchased as one of many examples (taking down the old barn and building a new one versus repairing and renovating the existing structures).

[104] Counsel for the Trustee submits that the fair market value of the property or services received by the Logeots should be determined in accordance with the opinion of the Trustee, acting reasonably. It is only if there is compelling evidence to the contrary where the value stated by the Trustee should not be followed.

[105] According to the Trustee, there has been no evidence presented on behalf of the Bankrupt to counter the position of the Trustee concerning the value of the transfers under value. As such, the Trustee's opinion on value should be accepted by the Court.

[106] The Trustee is of the view that the value of the benefit received by the Logeots should be calculated in recognition of the total dollar value of the Invoices. As previously reviewed, the total value of Building Materials Invoices was $70,396.66. With $14,280.00 for the Shale Invoice, and $9,170.07 for the Paddock Invoice, the total value of materials and services provided totals $93,846.73.

[107] In this regard, the Trustee relies upon ***Re Paul W. Lee, a Bankrupt***, 2017 ONSC 388 (CanLII) ("***Lee***"). At paragraph 7 in ***Lee***, it is confirmed that:

> [7] Nothing in the BIA require the trustee to set out in its report the reasons for its opinion of value under section 96. It is not a court's role to choose between competing inputs used or not used by the trustee. **Rather the court is required to accept the trustee's opinion in absence of evidence to the contrary**.
>
> (**emphasis added**)

[108] It was further confirmed by counsel for the Trustee that in accordance with section 96(1) of the ***Act***, there is a "discretion" to the Court, in that it may declare transfers as being under value, and order that a party to the transfer (or any other person who is "privy" to the transfer) pay the difference between the value of the consideration received by the debtor and the value of the consideration given by the debtor.

[109] The Trustee referred to ***Rizzo & Rizzo Shoes Ltd. (Re)***, 1998 CanLII 837 (SCC), 1998 1 SCR 27 ("***Rizzo***"), where it states as follows at paragraph 21 of the decision (the Honourable Justice Iacobucci writing for the majority):

> Today, there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the act, the object of the act, and the intention of Parliament.

[110] A further decision cited by the Trustee is ***Price Waterhouse Ltd. v. The Standard Trust Co.***, 1995 CanLII 3508 (ONCA) ("***Price Waterhouse"***), wherein it was confirmed that the exercise of discretion by a trustee ought to be exercised based upon the notion of fairness. This decision of the Ontario Court of Appeal has been subsequently cited in ***Lau v. McDonald***, 2021 BCSC 1207 (CanLII) and ***Mercado Capital Corporation v. Qureshi***, 2018 ONCA 711 (CanLII).

[111] Counsel for the Trustee relied further upon ***Lee***, as with respect to the issue of discretion, it was stated as follows within the second clause of paragraph 16 in that decision:

> While the statute allows relief using the word may, in my view, **on proof of the requisite facts, relief should be granted at the amount calculated in accordance with statute, in all but the most exceptional circumstances; and**
>
> **in my view, judgment should be nearly automatic in such cases.**
>
> (**emphasis added**)

[112] Based upon the foregoing, counsel for the Trustee argued that the Court, when guided by the above noted equitable principles to ensure fair treatment of all parties to these proceedings, should not deny the remedy requested by the Trustee in these circumstances.

[113] It was also submitted on behalf of the Trustee that while the Logeots paid a substantial sum as a result of the Guarantee referred to within paragraphs 115 and 116 of this decision, it is not relevant to the issues to be determined by this Court pursuant to the Trustee's Motion.

Logeot's Position

[114] From the perspective of the Logeots, the following represents a summary of the arguments advanced by their counsel in opposition to the Trustee's claim that a transfer under value occurred:

a) A formal lease would have been preferable in the circumstances, but it is not uncommon for parties to negotiate and enter into agreements such as leases, on their own, without benefit of legal counsel;

b) The Logeo's are farmers, and do not have legal training, such that it is not unexpected for verbal or informal arrangements to have been discussed and agreed upon between the parties, especially when the Bankrupt is their son;

c) Even if certain of the leasing arrangements were made verbally, such agreements can still be valid and contractually binding;

d) There is no requirement for a lease to be corroborated beyond the evidence of the parties to the contract;

e) The Lease was sufficiently detailed to be valid, as the number of acres to be farmed was described, as was the starting date, and the specific sums payable for rent (whether it be the rent per acre, rent for use of farm structures, rent for leasing farm equipment, or expenses to be incurred such as vehicle registration, insurance and any invoices related to the cow-calf operation of the Bankrupt and Denise);

f) Even though the specific farm structures or equipment to be leased were not itemized, there were sufficient particulars included within the Lease ("rental of farm facilities for wintering cows" and "rental of all the existing equipment of site for purposes of making hay and maintaining the farm");

g) The obligation for the Bankrupt and Denise to be responsible for "wear and tear" associated with use of the Logeot's farm equipment was also confirmed within the Lease;

h) The Trustee is not a forensic handwriting analyst, and there was no expert evidence presented to substantiate the allegations made on behalf of the Trustee about Victor's signature upon the Lease;

i) The computer was sold by the Bankrupt prior to receipt of the request from the Trustee to produce it for inspection;

j) Victor did not claim rental income in 2018, as he stated that he did not have other income that year;

k) The above noted situation concerning Victor also applied for Annette (explaining why she did not claim rental income within her 2018 income tax return);

l) The Bankrupt responded to the issue raised by the Trustee about not claiming a rental expense within his 2018 income tax return by stating it was an accounting issue (he was not sure why the expenditures incurred were reported as a capital addition as well as long-term investment, and that because he was "new to farming", he did not need to maximize his deductions at that time);

m) The rent owed by the Bankrupt to the Logeots for 2018 in accordance with the Lease was calculated (not an estimate), and in an amount of $75,300.00, versus the sum of $93,846.70 in value received by the Logeots pursuant to improvements for the Logeot’s farm property;

n) When considering the Lease, and the Logeot’s evidence, a reasonable explanation was provided as to why the Bankrupt incurred expenses for purchase of products and materials in excess of $93,000.00 in relation to the Logeot's farm property; and

o). Even if the Lease is determined to be invalid by this Court, it was submitted by counsel for the Logeots that there was still consideration received by the Bankrupt, as those improvements to the Logeot’s farm

property were intended to and would have allowed the Bankrupt and Denise to own and operate a cow-calf business on a long term basis.

[115] Exhibit "A" to the Logeot's 1st Affidavit is a copy of the Loan and Guarantee document with FCC (the "Guarantee"), which noted the Bankrupt and Blue Diamond as borrowers, and described Corner Equipment, Corner Equipment Shoal Lake Ltd., Michael Carlisle and Victor as the guarantors.

[116] Counsel for the Logeots highlighted the prejudice and financial hardship that the Logeots have already endured, noting that on June 5, 2021, the Logeots paid an amount of $300,101.80 to discharge the FCC security and satisfy the Guarantee (upon doing so, the Logeots filed an unsecured claim themselves against the Bankrupt in these proceedings).

Analysis

[117] Regardless of my determination that there were preferential payments made by the Bankrupt in favour of the Logeots (in reliance upon the position advanced by the Logeots, and the Bankrupt, that there was a debtor-creditor relationship in existence prior to and at the date of bankruptcy due to the Lease), the Trustee has maintained her alternate argument, by disputing the validity of the Lease, and asserting that the Court should conclude that there was a transfer under value between the Bankrupt and the Logeots (who are not at arm's length), in accordance with section 96(1)(b) of the ***Act***.

[118] The Trustee has presented a compelling argument in this regard, which the Logeots (and the Bankrupt) have disputed.

[119] Counsel for the Trustee has skillfully pointed out that the decisions attached at Tabs 5 and 6 of the Motion Brief filed on behalf of the Logeots were unfortunately focused upon the ***Act*** as it existed prior to certain amendments made in 2009 (which has resulted in the current provisions contained at sections 95 and 96 of the ***Act***).

[120] In ***Pitblado LLP v. Houde***, 2016 MBQB 177 (CanLII), the Honourable Justice Bond confirmed that amendments were made to section 96 of the ***Act***, which became effective as of September 18, 2009.

[121] Where there has been provision of products and services between parties who are not at arm's length, within one year before the date of bankruptcy, which the Trustee contends were a transfer under value, section 96(1)(b) of the ***Act*** does not require that the Trustee demonstrate there was an intent on the part of the Bankrupt to defraud, defeat or delay creditors.

[122] Counsel for the Logeots, to his credit, was forthright and candid by acknowledging it was "hard to get around" the above noted submission of the Trustee (that the intent of the Bankrupt, or the Logeots, may have been a consideration in cases decided prior to September of 2009, but is not now, nor was it in 2018 or the date of bankruptcy).

[123] Aside from the issue of intent, I find that the evidence presented in this case is sufficient to establish that there was a transfer under value, without the validity or enforceability of the Lease being called into question. In particular, and while a debtor-creditor relationship may have existed, the Bankrupt did not

claim the expenditures that he incurred in 2018 (as evidenced by the Invoices) as being in the nature of rent in accordance with the Lease. On a consistent basis, the Logeots did not declare receipt of rental income from the Bankrupt for 2018. Rather, the expenditures of the Bankrupt were recorded as being capital contributions (for purposes of his 2018 income tax return).

[124] Within the email dated August 4, 2021 from Tom Frohlinger, a partner at the firm were Mamucud practices (a copy of which is attached as Exhibit "H" to the Trustee's 1st Affidavit), Frohlinger stated at paragraph 3 thereof that:

> the repaired structures are located on property that Dwight and Denise were intending to buy from his parents. It cannot be consummated as a result of Dwight's financial problems and the property remains owned by Victor and Annette Logeot.

[125] Accordingly, the outcome is that the Logeots benefitted from the foregoing improvements to the Logeot farm property, but there has been no corresponding consideration received by the Bankrupt or estate of the Bankrupt. Upon this basis, I find that a transfer under value can be established between the Bankrupt and the Logeots, parties who are "related" (not dealing at arm's length in accordance with the ***Act***).

[126] The Trustee has, however, put forward a steadfast challenge to the validity and existence of the Lease at the date of bankruptcy. A number of inconsistencies and allegedly suspicious circumstances have been raised on behalf of the Trustee (as already described in some detail within this decision), which to summarize, include but are not limited to the following:

a) The Bankrupt did not raise with the Trustee, on a timely basis, the expenditures that he had incurred for purchase of products and services (as evidenced by the Invoices);

b) Disclosure of the Lease to the Trustee did not occur until the Trustee learned about it through then counsel for the Logeots, on January 20, 2021, over eighteen months following the date of bankruptcy);

c) The existence of a partnership agreement between the Bankrupt and Denise in 2018 was not promptly disclosed to the Trustee by the Bankrupt;

d) The Lease is dated March 17, 2018, exactly two years before the date of the Bankrupt's explanatory email to the Trustee on March 17, 2020;

e) Even if the computer used to prepare the Lease had been sold (by the time a request for its production to the Trustee for inspection was made), the Bankrupt surprisingly claimed that he did not know when or to whom it was sold;

f) The expenditures of the Bankrupt as confirmed by the Invoices were not recorded as rent in accordance with the Lease, and instead were claimed as capital contributions by the Bankrupt for accounting and taxation purposes (the Bankrupt did not know why, and the accountant of the Bankrupt did not provide an affidavit or testify to provide a full explanation, especially when it had been suggested on behalf of the

Trustee that it may have been more advantageous for the Bankrupt to deduct these costs as rental payments);

g) While asserting that there was a shortfall in rent owing to them for 2018 by the Bankrupt ($19,903.34), the Logeots did not include this sum when making a claim against the Bankrupt in these proceedings as a result of the Guarantee; and

h) Despite mentioning the above noted shortfall in rent, and it being submitted by the Bankrupt and the Logeots, that the Lease was valid and enforceable, the Logeots did not report the value of the products and services purchased by the Bankrupt, and received by them in 2018, as being in lieu of rent, nor did they report the capital improvements made to their farm property for income tax purposes in 2018; and

i) Denise was available to testify, but did not, which would have served as an opportunity to potentially corroborate the evidence of the Bankrupt and the Logeots (the parties to what the Trustee has argued was a transfer under value).

[127] I also note that the Logeots did not rely upon section 136(1)(f) of the ***Act*** (reproduced below) to claim a priority in relation to unpaid rent owing by the Bankrupt.

> **Priority of claims**
>
> 136 (1) **Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows:**
>
> …

> (f) **the lessor for arrears of rent for a period of three months immediately preceding the bankruptcy and accelerated rent for a period not exceeding three months following the bankruptcy if entitled to accelerated rent under the lease,** but the total amount so payable shall not exceed the realization from the property on the premises under lease, and any payment made on account of accelerated rent shall be credited against the amount payable by the trustee for occupation rent;
>
> (**emphasis added**)

[128] I appreciate that the Trustee did not present expert evidence from a forensic handwriting analyst in support of her concerns with respect to Victor's signature as it appears upon the Lease. In addition, and even though the Trustee was able to demonstrate that some details or expected clauses were omitted, the Lease contained certain terms and conditions, and generously, could be described as a basic agreement.

[129] Nonetheless, and while I have already made a determination that there was a preferential payment, or alternatively, a transfer under value made by the Bankrupt in favour of the Logeots, I have reflected upon the decisions cited on behalf of the Trustee. Upon doing so, I am not prepared to determine the Lease was a valid and enforceable agreement between the Bankrupt and the Logeots.

[130] The Bankrupt and the Logeots are family. It is prudent to expect corroborative evidence as to the *bona fides* of the Lease (***Indcondo***), especially where the Trustee has raised concerns or suspicions as to the veracity of the Bankrupt's position that the Lease was valid and enforceable (***Garlicki***). Aside from the Bankrupt and the Logeots (who have an understandable motive to minimize the extent of any obligation to the Trustee given the substantial sum

already paid as a result of enforcement of the Guarantee), the other party to the Lease (and alleged verbal partnership agreement) is Denise. Evidence could have been presented from Denise, as well as by the accountant of the Bankrupt and the Logeots, but it was not (***Kisluk***). As a result, I am not satisfied that the evidence before me is "clear and convincing" concerning existence of the Lease between the Logeots and the Bankrupt (***Olexson***).

[131] Given the foregoing considerations, I find that the fundamental elements of a transfer under value pursuant to the ***Act*** have been established. In particular:

a) The expenditures evidenced by the Building Materials Invoices were incurred to improve the farm property of the Logeots (which was acknowledged by the Logeots, as pursuant to paragraph 11 of the Logeot's Affidavit, it was confirmed that the improvements made were for "long term improvement of the property");

b) At paragraph 7 of Annette's Affidavit, it was admitted that shale had been delivered to the Logeot's property;

c) The Logeots acknowledged that Paddock Drilling had provided certain services at the Logeot's farm property, such as drilling for a new well;

d) The Bankrupt did not claim payment of rent as a deduction within his 2018 tax return (nor did the Logeots declare receipt of rent within their respective income tax returns for 2018);

e) No consideration was received by the Bankrupt for the expenses evidenced by the Invoices;

f) The Bankrupt and the Logeots are "related" pursuant to the definition within the ***Act***, and as a result, are not considered to be arm's length for these purposes; and

g) All five of the Invoices were incurred, and dated, within one year prior to the date of bankruptcy.

[132] Accordingly, I find that within the one year period immediately prior to the date of bankruptcy, the Logeots received property and services to their benefit from the Bankrupt, for no consideration, such that the Logeots should be required to pay the sum of $93,846.73 to the Trustee on behalf of the estate of the Bankrupt (this being a joint and several obligation).

[133] In making this determination, I am mindful that the Logeots have already been required to make a substantial payment to satisfy the obligations to which Victor committed when he provided a guarantee in support of the Bankrupt (raising the funds necessary to make this payment involved sale of some of the Logeot's farm property). That being stated, the Guarantee is a separate issue from what is before this Court for determination pursuant to the Trustee's Motion.

[134] It should be remembered, however, that the Logeots did receive a benefit, as the Logeot farm property was improved as a result of the purchases

made and services obtained by the Bankrupt (a new cattle structure, shale and a new well).

ISSUE 3: Was there a partnership agreement between the Bankrupt and Denise?

Trustee's Position:

[135] With respect to the contention of the Bankrupt that Denise and the Bankrupt were partners in a cow-calf operation prior to the date of bankruptcy, the Trustee disagrees for a number of reasons, summarized as follows:

a) There was no partnership agreement in writing between the Bankrupt and Denise;

b) The primary evidence of there being a partnership agreement between the Bankrupt and Denise is from themselves;

c) There was no registration of the partnership with the Companies Office (Manitoba);

d) There was no business name for the partnership registered in accordance with ***The Business Names Registration Act***, RSM 1987, c. B110 ("***BNRA***");

e) The Bankrupt confirmed that there was a Goods and Services Tax (GST) number for the cow-calf business, although it was not clarified if it was a personal or partnership GST number;

f) Although insisting that there was a partnership in effect with Denise prior to the date of bankruptcy, the Bankrupt acknowledged there had not been any specific transfer or consideration provided by Denise for the

benefit of the partnership (despite what had been confirmed by Morrison concerning preparation of the 2018 income tax returns for the Bankrupt and Denise);

g) The Bankrupt has not disclosed any documentation, such as a bill of sale, to confirm when assets were transferred to Denise for purposes of their partnership; and

h) The Invoices (all five of them) are made out in the name of the Bankrupt solely. There is no reference within the Invoices to a partnership with Denise, or anyone else for that matter.

[136] ***The Partnership Act,*** CCSM c. P30 (the "***PA***") provides as follows at section 4:

> **Rules for determining existence of partnership**
>
> **4. In determining whether a partnership does or does not exist, regard shall be had to the following rules:**
>
> (a) joint tenancy, tenancy in common, joint property, common property, or **part ownership does not of itself create a partnership as to anything so held or owned**, whether the tenants or owners do or do not share any profits made by the use thereof;
>
> …
>
> (**emphasis added**)

[137] In reliance upon section 4(1)(a) of the ***PA,*** counsel for the Trustee argues that even if the Lease does exist, it does not necessarily mean that the products and services purchased by the Bankrupt (as evidenced by the Invoices) did become partnership property with Denise.

[138] The Trustee also relies upon Section 23 (1) of the ***PA***, which specifies as follows:

> 23(1) All property and rights and interests in property originally brought into the partnership stock or acquired, whether by purchase or otherwise, on account of the firm, or for the purposes and in the course of the partnership business, are called in this Act "partnership property", and must be held and applied by the partners exclusively for the purposes of the partnership, and in accordance with the partnership agreement)

Logeot's Position:

[139] The submissions of counsel for the Logeots as to existence of a partnership agreement involving the Bankrupt can be summarized as follows:

a) "Content" is more important than "form" when it comes to partnerships;

b) Even if there is no partnership agreement in writing, Morrison referred to there being a partnership between the Bankrupt and Denise when responding to questions about preparation of the 2018 income tax return for the Bankrupt;

c) There is no requirement for the existence of a partnership agreement to be corroborated beyond the evidence of the parties themselves to the contractual arrangement;

d) If the Court accepts that there was a partnership between the Bankrupt and Denise, then it is only one-half of the preferential payment or transfer under value which would be repayable in accordance with the Trustee's Motion ($46,923.36, representing the Bankrupt's one-half interest); and

f) The Trustee cannot make a claim against Denise's interest in the partnership with the Bankrupt.

Analysis

[140] The Lease does name both the Bankrupt and Denise as "lessees". The Lease does not, however, refer to a partnership between the Bankrupt and Denise.

[141] Within the Statement of Affairs of the Bankrupt (Form 79), there is no reference to the Bankrupt having been in a partnership with Denise leading up to the date of bankruptcy. There is also no mention of the Lease, and in particular, that there was rent outstanding in favour of the Logeots pursuant to the Lease.

[142] Although the Bankrupt explained that the partnership agreement with Denise ceased as he prepared to make an assignment in personal bankruptcy, I note that the ***Bankruptcy and Insolvency General Rules***, C.R.C., c. 368 (the "***Rules***") provides as follows, at Rule 114:

> **Bankrupt Partnerships**
>
> **114. A partnership that is bankrupt shall submit to the trustee a statement of its partnership affairs,** verified by one of the partners or by the manager in charge of the partnership affairs, **and each bankrupt partner shall submit a statement of their own personal affairs.**
>
> (**emphasis added**)

[143] There is no evidence that the Bankrupt, or Denise, prepared or provided any such a statement to the Trustee.

[144] No partnership agreement in writing existed between the Bankrupt and Denise.

[145] The Invoices did not mention Denise or a partnership between the Bankrupt and Denise.

[146] Documentation which could support a conclusion that a partnership existed is not available, such as a registration of the partnership at the Companies Office, or a BNRA registration.

[147] Even as it relates to the GST number used by the Bankrupt for the cow-calf operation prior to the date of bankruptcy, there was no clarification as to whether it was for the Bankrupt, or a partnership with Denise.

[148] It was acknowledged by the Bankrupt that there had not been any specific transfer or consideration provided by Denise for the benefit of the partnership, nor was there a bill of sale or supporting documentation to establish what, if anything, was contributed or transferred to the partnership by Denise (other than what was generally described within the email exchange involving Morrison and the Trustee).

[149] Section 4 of the ***PA*** is relevant to this situation, because even if expenditures were incurred by the Bankrupt in relation to the Logeot farm property (as evidenced by the Invoices), it should not be presumed that all or some of these purchases of products and services were for a partnership with Denise.

[150] While the expenses represented by the Building Materials Invoices were recorded as capital expenditures (as reviewed at paragraphs 85 and 86 herein, with a copy of page 5 of the Bankrupt's 2018 income tax return attached as Exhibit "M" to the Trustee's 1st Affidavit), Morrison does confirm within the email exchange with the Trustee on April 14, 2020 (Exhibit "G" to the Trustee's 1st Affidavit) that the income tax returns were prepared on the basis of the information supplied by the Bankrupt as well as Denise. At one point within the email exchange, Morrison confirmed in relation to the Bankrupt and Denise that "They provided only the bare necessities to get things filed" and that "When asking questions, we got what we needed and nothing more".

[151] No detailed explanation was given by Morrison as to why the expenses evidenced by the Invoices were not recorded as being in the nature of rental payments (when the Bankrupt has insisted the Lease existed and was a valid agreement). Morrison did not provide an affidavit, nor did he testify.

[152] In addition, there was no affidavit filed from Denise, and she did not testify in support of the position advanced by the Bankrupt as well as the Logeots (that the Bankrupt and Denise were partners in a cow-calf operation prior to the date of bankruptcy).

[153] As already highlighted earlier within this decision, there have also been certain inconsistencies raised on behalf of the Trustee in relation to the evidence from the Bankrupt as compared to the evidence from the Logeots concerning the Lease.

[154] In consideration of the foregoing, I am not satisfied with the evidence presented by the Logeots, and the Bankrupt, and as such, I am unable to conclude that the Bankrupt and Denise were partners prior to or at the date of bankruptcy, so as to exempt or reduce by one-half (½) the sum payable by the Logeots to the Trustee on behalf of the estate of the Bankrupt.

SUMMARY

[155] I have concluded as follows with respect to the Trustee's Motion:

a) Victor and Annette Logeot (whom together with the Bankrupt were of the position that the Lease was valid and enforceable at the date of bankruptcy) were in receipt of a preferential payment as creditors of the Bankrupt, pursuant to section 95(1)(b) of the ***Act***, and are ordered to pay, jointly and severally, the amount of $93,846.73 to the Trustee on behalf of the estate of the Bankrupt;

b) In the alternative (and regardless of the status of the Lease), Victor and Annette Logeot were persons privy to a transfer under value, pursuant to section 96(1)(b) of the ***Act***, and are ordered to pay, jointly and severally, the amount of $93,846.73 to the Trustee on behalf of the estate of the Bankrupt; and

c) The aforementioned amount of $93,846.73, payable by the Logeots to the Trustee on behalf of the estate of the Bankrupt, is not to be reduced by one-half (½) as requested by the Logeots (and supported by the Bankrupt).

COSTS

[156] In the event the parties are unable to resolve the issue of costs in relation to the Trustee's Motion and these proceedings, a further hearing may be scheduled.

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REGISTRAR