SUPREME COURT OF NOVA SCOTIA
Citation: *Chadroui Estate v. Chedrawy*, 2022 NSSC 136

Date: 20220516
Docket: Hfx No. 499297
Registry: Halifax

Between:

The Estate of Ronald Chadroui

Plaintiff

v.

Jehad Chedrawy and Habibi Holdings Ltd.

Defendants

Judge:	The Honourable Justice Frank P. Hoskins
Heard:	November 9, 2021 and February 2, 2022, in Halifax, Nova Scotia
Counsel:	Owen Bland, for the Plaintiff Brian Awad, Q.C., for the Defendants

By the Court:

Introduction

[1] The Applicant, the Estate of Ronald Chadroui moves for a preservation order under Rule 42 of the *Civil Procedure Rules*. It is said to be needed in order to ensure that assets are available to satisfy an outstanding judgment in accordance with this rule.

[2] The asset in issue is a property which Jehad Chedrawy, the Defendant, in the Action (Hfx. No. 338266), transferred to his sister's business, Habibi Holdings Ltd., ("HHL"). This transfer occurred sometime prior to the grant of a judgment debt against him to his cousin, Ronald Chadroui.

[3] The overall claim in the Action is for an Order to set aside a fraudulent conveyance by the Defendants, Jehad Chedrawy and HHL, that is alleged to have been made to avoid the debt owed to Ronald, now his Estate, by the Defendant, Jehad Chedrawy.

[4] As will be seen, I am not satisfied based on the evidence adduced in this motion that Jehad is, or was at the time of the conveyance insolvent. In fact, I would have to speculate to infer that he may have been because he did not honour his promissory note. Accordingly, in my view, the *Assignments and Preferences Act*, R.S.N.S. 1989, c.25, is not applicable, for the purposes of this motion for an interlocutory injunction. While, the Respondents may be able to demonstrate that point when the Action is heard, they have not done so to this point.

[5] As was pointed out in *Bishop (Re)*, [1982] N.S.J. No. 77, at para. 52:

> In examining s.3(d) of the *Assignments and Preferences Act* (supra) the burden is upon the Bishops or one of them to prove that the transaction falls within the framework of the section.

[6] As a consequence, the issue of a fraudulent conveyance will be dealt with in the course of my analysis, pursuant to the *Fraudulent Conveyances Act (Statute of Elizabeth)*, 1571, 13 Eliz.1, c.5., to be discussed below.

[7] For clarity, I will reference the Parties by their first names. I mention this out of respect to the Parties.

[8] The Applicant, Ronald, was the moving party. He has since passed away. I will refer to his estate as the Plaintiff and/or the Applicant. The Respondent to this

motion is HHL and will be referenced at times as the Defendant. Jehad is a Defendant in the Action and will be referred to as the Defendant, Jehad.

[9] Before embarking upon my analysis of the central issue in this motion, I will outline the history of the proceeding to provide context; and summarize the positions of the parties and the evidence adduced in the motion.

Background: History of the Proceedings

[10] I will outline, mostly in point form, the somewhat complicated background to this motion.

[11] Ronald signed a Promissory Note with Jehad, his cousin, on January 2, 2008. Under the terms of the Note, Ronald loaned Jehad $150,000 at 8% semi-annual interest. In return, Jehad, provided Ronald a security interest on "all real estate properties owned by the borrower". At the time, the only real estate held by Jehad, was 5537 Sebastian Place, Halifax, Nova Scotia (the "Property").

[12] Sometime in 2009, Jehad, defaulted on the loan. At the time, Jehad still owed Ronald approximately $113, 227.00, plus interest.

[13] On April 8, 2010, HHL was incorporated.

[14] On April 9, 2010, Jehad, conveyed the Property to HHL. HHL's head office is located at 12 Beckfoot Drive, Dartmouth, Nova Scotia. Its President is Tanya Chedrawy (Jehad's sister).

[15] On October 21, 2010, Ronald commenced an Action for Debt (Hfx. No. 338266) against Jehad, for repayment of the outstanding balance of $114, 524.29.

[16] An Order for substituted service upon Jehad was necessary. A Notice of Defence and Statement of Defence was filed on December 20, 2010.

[17] Ultimately, on May 14, 2015, Ronald successfully obtained a Default Order for Jehad to repay a total of $175, 986.27, as well as an award of costs on July 6, 2015, of $8,000.

[18] On June 19, 2015, Jehad filed a Notice of Appeal seeking to appeal the Order dated, May 14, 2015. Jehad failed to perfect the appeal. The motion to dismiss was heard and granted on February 18, 2016.

[19] On May 6, 2016, Jehad failed to attend a Discovery in Aid of Execution.

[20] On May 26, 2016, Ronald filed an *Ex Parte* motion and sought a new Discovery Subpoena in Aid of Execution.

[21] On June 2, 2016, Ronald obtained from the Court a discovery subpoena in aid of execution by substituted service. The Discovery in Aid of Execution was scheduled on June 28, 2016. Once again, Jehad did not attend.

[22] In January 2018, HHL had the certificate of *lis pendens* removed from the title to the Property due to the passage of time of more than five years.

[23] On July 17, 2020, HHL listed the Property for sale for $519,000.00.

[24] On July 21, 2020, Ronald commenced a second Action (Hfx. No. 499297) against both Jehad and HHL to set aside Jehad's conveyance of the Property to HHL.

[25] The second Action (Hfx No. 499297) duplicated the first Action (Hfx No. 354473) as well as the allegations and relief sought. Upon filing the second Action (Hfx No. 499297), Ronald obtained a new certificate of *lis pendens* and registered it on the title of the Property. HHL then delisted the Property.

[26] On August 24, 2020, Ronald filed a Notice by Correspondence to renew his Execution Order against Jehad. The renewal was granted on August 28, 2020.

[27] On May 19, 2021, HHL filed a motion to dismiss the second Action (Hfx. No. 499297) on the basis that it was duplicative of (Hfx. No. 354473) and, therefore, an abuse of process ("the Rule 88 Motion").

[28] On August 15, 2021, Justice John Bodurtha heard the Rule 88 Motion, the Joinder Motion, and the Motion for Substituted Service. He refused to hear the present Rule 42 Motion, for a preservation order, at that time.

[29] On September 15, 2021, Justice Bodurtha rendered his oral decision. He decided that Action (Hfx. No. 499297) was an abuse of process and ordered its dismissal. He ordered that the certificate of *lis pendens* remain in place until the hearing of the current Rule 42 Motion.

[30] On November 9, 2021, I heard the subject motion for a preservation order.

[31] On December 31, 2021, Ronald passed away. Pursuant to Rule 35.11 (1) of the *Civil Procedure Rules* the proceeding was stayed until an executor, administrator, or other personal representative of the estate of Ronald was appointed.

[32] On February 2, 2022, Anthony Chedrawy (Ronald's Executor) was appointed as representative of the Estate pursuant to Rule 36.01. The style of cause was amended accordingly.

[33] The Court further ordered that from February 2, 2022, onward, the title of this proceeding is amended to Anthony Chedrawy as representative of the Estate of Ronald Chadroui and Habibi Holdings LTD and Jehad Chedrawy.

The Central Issue

[34] As a consequence, the issue to be decided in this motion is whether a preservation order and interlocutory injunctive relief pursuant to Civil Procedure Rule 42 should be granted.

Summary of the Competing Arguments

The Moving Party's Position

[35] The Estate argues that prior to defaulting on the debt, the Defendant, Jehad, transferred ownership of his only major asset, his home (the Property), to his sister's business, HHL: a corporation created for no other purpose than to take ownership of the property. HHL has only a single director, Tanya Chedrawy ("Tanya"). It claims that HHL itself has no discernable business, and only has this single asset, and that HHL recently attempted to sell the Property. Thus, the argument continues without the preservation order it risks losing any chance at executing on Ronald's judgment against Jehad.

[36] The Estate submits that I should infer that HHL was created for the purpose of defeating and delaying Jehad's creditors by putting his property out of reach of the Estate. Thus, it is argued that the transfer of the Property to HHL was a fraudulent conveyance under the *Statute of Elizabeth (Fraudulent Conveyances Act)*, 1571, 13 Eliz 1, c. 5., and the Property or the relevant proceeds from its sale should be conveyed to the Applicant.

The Responding Parties' Position

[37] HHL disputes that this was a fraudulent transaction and opposes the motion for a preservation order. It submits that the Court must dismiss the Rule 42 Motion because there is insufficient evidence to warrant granting the order. Further, HHL submits that Tanya paid fair market value for the property to her brother, Jehad, in April 2010, and therefore the relief sought by Applicant is not available due to s. 5(d) of the *Assignments and Preferences Act*, as there has been no actionable fraudulent conveyance of the property.

[38] The Respondents maintain that HHL was and is a valid business venture, and that the conveyance of the Property was a valid conveyance.

Summary of the Evidence

[39] The evidence proffered in the motion consists of Ronald's Affidavit, Tanya's Affidavit, and *viva voce* evidence.

The Affidavit of Ronald Chadroui

[40] The following is a summary of Ronald Chadroui's Affidavit.

[41] The promissory note provided for collateral consisting of "all real estate properties owned by the borrower"(at para. 5).

[42] At the time of the signing of the promissory note, Jehad was the owner of a single piece of real Property located at 5537 Sebastian Place, Halifax, Nova Scotia, which Ronald believed to be Jehad's residence **(**at para. 6).

[43] In the two years that followed, Jehad defaulted on the promissory note and conveyed the ownership of his residence at 5537 Sebastian Place (Property) to HHL, a holding company (at para. 7).

[44] Ronald's Affidavit goes on to add that a search of the Registry of Joint Stock Companies reveals that HHL was incorporated in April 2010. Jehad's sister, Tanya is the Director, effective April 14, 2010, facts which are not disputed (at para.8).

[45] The Affidavit also recounts events leading up to, and following the filing of a Notice of Action for Debt (Hfx. No. 338266) on October 21, 2020. After several failed attempts to personally serve Jehad, Justice Wright issued an Order for substituted service of the Notice of Action for Debt on December 7, 2020, by leaving a copy of the documents for substituted service in the mailbox of the residence

located at 12 Beckfoot Drive, Halifax, which is the residence of Assad and Theresa Chedrawy, Jehad's parents (at para.8).

[46] Ronald alleges that Jehad has consistently evaded personal service throughout these proceedings, which resulted in obtaining an order for substituted service (at paras. 13-19).

[47] He further claims that Jehad's evasion has frustrated obtaining and enforcement of the Judgment Debt, as it has increased his costs in these proceedings (at paras.13-19).

[48] Ronald alleges that Jehad's parents, spouse, and sister (Tanya) have refused to cooperate in assisting him to effect personal service on Jehad. In doing so, they have actively sought to protect him from personal service and frustrated his cousin's attempts to enforce the Judgment Debt (at para.15).

[49] At the one Discovery examination of Jehad, which was held on November 30, 2011, he had confirmed that his address was 12 Beckfoot Drive, Dartmouth, N.S. (at para.18).

[50] As was mentioned in the years that followed, this application ultimately was converted into a Summary Judgment on the evidence (at paras.22-23).

[51] On June 3, 2014, Jehad filed a Designation of Address for mail/delivery as PO Box 48006 Mill Cove PO, Bedford, NS B4A 3Z2 (at para.15).

[52] Following the hearing of the Summary Judgment, Justice M. Heather Robertson of this Court issued the following two Court Orders:

(a) An Order issued on May 14, 2015, which required Jehad to pay Ronald forthwith the amount of $175, 986.27, with post-judgment interest of five percent per annum; and

(b) A Cost Order issued on July 6, 2015, which required Jehad to pay forthwith the amount of $8,000.00 (at para.22).

[53] It has been already mentioned that, on June 19, 2015, Jehad filed a Notice of Appeal seeking to appeal the May 14, 2015, Order. Jehad failed to perfect this appeal and it was accordingly dismissed on February 18, 2016 (at paras. 20-21).

[54] Ronald obtained an Execution Order to enforce the judgment against his cousin, Jehad. The Execution Order was sent to the Sheriff's Office on January 11, 2016, for enforcement. Following failed attempts to execute on the Order, he sought to arrange a Discovery in Aid of Execution. He scheduled a Discovery in Aid of Execution for May 6, 2016. Jehad failed to attend. It was rescheduled to June 28, 2016, and again, Jehad failed to attend (at paras.22-32).

[55] In the Summer of 2020, Ronald noticed that the Property, 5537 Sebastian Place, was listed for sale, and commenced an Action to set aside the conveyance of the Property from Jehad to HHL (Hfx. No. 499297). On the same date, Ronald registered a certificate of *lis pendens* against the Property (at paras. 37-38).

[56] During August 2020 and May 2021, Ronald attempted to locate Jehad in order to serve him with the Notice of Action (at para.39).

[57] Ronald claims that Jehad holds no properties in his name, has not provided contact information, and has no online presence (at para. 40).

[58] In April 2021, Ronald discovered a property at 46 Smith Road, Bedford, Nova Scotia, held by Adel Abu El-Hosn, which he believes is the maiden name of Jehad's wife, Adel Chedrawy. He points out that Adel Chedraway and Abu El-Hosn signed the warranty deed for Jehad's transfer of 5537 Sebastian Place to HHL, as releasors. Ronald goes on to say states that on page 2 of that Warranty Deed, from Jehad to HHL, Adel Chadrawy explicitly makes it known that she was formerly known as Adel Abu El-Hosn on the second page, and also on the Affidavit of Status (at para.43).

[59] Ronald discovered an obituary for his niece, Linda Khour, who had passed away in 2020. In this obituary, he saw a message from "Jehad and Adel Chedrawy" expressing their condolences to Linda Khour's family (at para.57).

[60] Ronald directed his process server to personally serve Jehad at 46 Smith Road but he was unsuccessful. The process server met a man that resembled Jehad at the property. The man refused to identify himself as Jehad (at paras. 47-52).

The Affidavit Evidence of Tanya Chedrawy

[61] The following is a summary of Tanya Chedrawy's Affidavit.

[62] As stated in her Affidavit, Tanya Chedrawy admits that she is the President of the Defendant, HHL (at para.1).

[63] HHL is a Nova Scotia company that was incorporated in April 2020. Tanya has always been the sole owner, director and officer of HHL (at paras. 3-4).

[64] She states that as of 2009, she was interested in investing in real estate in Halifax. This was part of her personal long-term financial plan. She incorporated HHL because she wanted to own any investment properties by way of a corporation, rather than personally (at para. 5).

[65] In 2009, Tanya contacted the Royal Bank of Canada ("RBC") regarding financing a purchase of a residential property. She was pre-approved by RBC for a loan. On the advice of RBC, she retained legal counsel, whereby she incorporated HHL (at paras. 6-7).

[66] Tanya deposed that she had lived in the Halifax area her entire life and was aware that residences in the Hydrostone district of peninsular Halifax were rising in value as of 2009 (at para. 8).

[67] She stated that her brother, Jehad, and his spouse lived in the Hydrostone in a small residence located at 5537 Sebastian Place. They had renovated their residence. Tanya said that she had advised Jehad that she would consider purchasing their residence if he ever wanted to sell it (at paras. 9-10).

[68] Sometime in early 2010, she stated, Jehad advised her that he and his spouse were considering moving, and that he would be selling 5537 Sebastian, their residence (at para.11).

[69] Tanya further stated that as of early 2010, she had researched the prices of residential properties that had been sold recently in the Hydrostone area. She stated that comparable properties had been sold for between $225, 000 and $266,000 in recent months, and attached Exhibit "1", as a list of some comparable properties sold months prior to HHL's purchase of 5537 Sebastian Place (at para.12). She further elaborated that she is aware that the 2010 assessment for 5537 Sebastian Place was $264,100.00. She and Jehad negotiated and agreed on a sale of $275,000. Based on her personal knowledge of property values in the area, and the 2010 assessment, she considered $275,000.00 to be a fair price for the Property (at para.15).

[70] Tanya stated that she obtained financing from RBC. As security for the RBC financing, HHL provided RBC with a first mortgage on the Property (at paras. 16-18).

[71] At para. 19 of Tanya's Affidavit, she acknowledges that the purchase price for 5537 Sebastian Place is stated to be $350,000.00, not $275,000.00. She said that the $350,000.00 figure was suggested by the mortgage officer with whom she dealt at RBC. She says that he advised her that having the Property indicated as having been sold for $350,000.00 would avoid the need for her to provide a down payment or to pay Canadian Mortgage Housing Corporation insurance. The additional $75,000.00 was never paid to Jehad. As Exhibit "4" of Tanya's Affidavit provides, that amount was said to be negated by a notional gift back from Jehad to HHL (at para. 19-20).

[72] HHL has always had only one asset – 5537 Sebastian Place (the Property) - and one debt, which it is owes to RBC. HHL has never paid a shareholder dividend or undertaking any commercial activities except when it financed, and subsequently attempted to sell the Property (at paras. 23-25).

[73] Tanya stated that she contacted the Nova Scotia Property Valuation Services Corporation ("PVSC") and had been advised verbally with respect to the assessment history of the Property at 5537 Sebastian Place from 2008 to 2016, which is set out in her Affidavit. On September 28, 2021, she printed information on the Property shown on the PVSC website. She sets out this in Exhibit "8" to her Affidavit: (at paras. 29-30). She stated that from April 2010 to March 2020, the market value of 5537 Sebastian Place (Property) increased incrementally and modestly, as indicated in the PVSC valuations: (at para. 32).

[74] In July 2020, Tanya decided to list 5537 Sebastian Place (Property) because she felt that residential prices in Halifax had skyrocketed. The Property was de-listed when she received notice that Ronald had commenced the Action Hfx. 499297, and filed a second *lis pendens* certificate on the title to the Property: (at paras. 33-34).

The *Viva Voce* Evidence of Tanya Chedrawy

[75] When she testified, Tanya confirmed that she had reviewed her Affidavit sworn on October 17, 2021, and there were no issues with its content.

[76] On Cross-Examination, however, she acknowledged that it was, in fact, her legal counsel, rather than herself, who put together the comparative analysis set out in Exhibit "1" of her Affidavit. She was not sure when he had put it together but thought it had been done within the last few weeks.

[77] Tanya further acknowledged that she, herself, had done the comparative analysis 11 or 12 years ago (as described above) but that she did not have her records available any longer, so she believes that her lawyer would have contacted the Land Registry to get those numbers. She was also asked whether she put the comparative analysis together or her lawyer had. She repeated that she put a list together years ago but did not now have that list. She agreed that Exhibit "1" of her Affidavit was therefore a new list, and added that the same numbers were used. She was then asked whether she used the same exact properties as the list in Exhibit "1" of her Affidavit, to which she answered that she believes that her lawyer had gone to the land registry and that they would be the same properties, and that the comparative analysis in Exhibit "1" involved the same properties and prices that she researched 11 years ago. She replied that she assumed so. She also agreed, however, that she cannot say for sure that they are, since it was her lawyer who did it.

[78] Interestingly, Tanya also confirmed that all of the properties described in Exhibit "1" to her affidavit are in located in the north end peninsular of Halifax. However, when she did her research 11 years ago, she did not limit her research to the north end of Halifax. Rather, she agreed that her research included peninsular Halifax and Central Dartmouth.

[79] Tanya confirmed that she resides at 5537 Sebastian, and that she has lived there since 2010, "minus two long term tenancies." She could not recall the dates when the tenants lived there without reviewing Lease Agreements. She stated that the term of one lease was for a one year and the other lease was for a couple of years. She was asked the name of the one-year tenant to which she replied that she would have to look at the Lease Agreement. She thought that the one-year tenant rented three or four years ago. She could not recall the names of the one-year tenant, other than it was a man and a woman with different last names. She does not remember their names. With respect to the two-year tenant, Tanya stated that she rented the property before the one-year tenant, approximately four years ago, around 2014 to 2015. She does not recall the woman's name, but remembers she had four kids and was single. She added that the information is documented in lease agreements, which she can produce.

[80] Tanya's attention was directed to Exhibit "4" of her Affidavit. She agreed that she purchased the Property for $350,000.00, according to the bank. She stated $275,000.00 was the price to which she and Jehad had agreed for the property. She further explained that her brother purchased the house in 2003 and completely gutted it, renovated it. She "fell in love with" the house and told him that if he ever wanted to sell, it she would buy it. She repeated that the opportunity arose in April of 2010, and they agreed upon a price of $275,000.00. She added that she had already been pre-approved for a mortgage by the Bank and that RBC had it appraised for $350,000.00. Her evidence was to the effect that she was not, however, willing to pay the price of $350,000.00 for the property. When she threatened to walk away, she was told that she could be provided a notional gift of $75,000.00 to bring the price down to $275,000.00, the price to which she and her brother had agreed. She stressed that $75,000.00 was, however, not put either in her bank account, nor in her brother's. It was just on paper. She added that the mortgage advisor at RBC explained that he could do it that way. She stressed that it was not her idea.

[81] Tanya confirmed that there was no formal written agreement of purchase and sale for $275,000.00. There was just a verbal agreement with her brother. The only paperwork that she signed consisted of mortgage documents with RBC.

[82] She explained that she had met the mortgage advisor before, as she was pre-approved for a mortgage. She could not remember how much she was preapproved for, as it was in 2008 - 2009. When she was reminded of this, she said that she was preapproved for a mortgage of $350,000.00, and asked if the earlier preapproval was more or less than that amount. She replied she could not remember, but it was most likely greater.

[83] Tanya testified that she was not aware of her brother Jehad's financial circumstances when she purchased the Property. Nor was she aware that Jehad had borrowed money from their cousin, Ronald. She knew that Jehad worked at a company but said that she does not know when Jehad's employment ended at the company. She testified that his employment at the company ended after she purchased his Property.

[84] Tanya's attention was, once again, directed to Exhibit "4" by counsel for the Estate. She was asked whether HHL made a monetary deposit in respect of the purchase of the Property. Her attention was directed to the line in Exhibit "4" of her Affidavit, which states a sum of zero for a deposit. She disagreed with the suggestion that she did not put any money down as a deposit in advance of the purchase of the

Property. She added that she even paid "around $5,000.00" because she obtained a mortgage in the amount of $280,000.00. Tanya was asked where we would find the amount of $5,000.00 in Exhibit "4", to which she responded that she "did not know."

[85] Tanya was further questioned as to whether she understood what the line in Exhibit "4" of her Affidavit, page 1, "balance due to vendor – 274, 875.70" represented. She said that it represents proceeds given to her brother. She agreed that another entry on Exhibit "4", page 1, "Gift to Vendor … 75,000.00" was the notional gift between her and her brother but emphasized again that no money was exchanged between them.

[86] Tanya's attention was then directed to page 2. She agreed that she had to pay the Municipal Deed Transfer Tax of $4,125.00 in order to transfer title of the property from her brother, Jehad, to her company, HHL. She also agreed that the amount showing "E-Submitting Deed" and "E-Submitting and Registry Mortgage" represents what she paid to register the Deed and mortgage with the Land Registry. Moreover, she agreed that another item on page 2, "Legal Invoice re: Incorporation of Company … 1,148.34 and Legal Fees… 500.00," represents the amount of money she spent to incorporate her company, HHL. She confirmed that Peter Tsuluhas was the lawyer who did her legal work, but she did not know who her brother's lawyer was for the transaction. She thought it was Peter Tsuluhas as well. She cited the passage of time as the reason why she did not recall.

[87] Tanya gave evidence with respect to the amounts shown in Exhibit "4", page 2, which included: Legal fees, Tax Certificate, Administration Fee, Property Online Subsearch Fee, Verbal Confirmation of Property Taxes, and HST. She agreed that those amounts reflect the closing costs associated with the purchase and sale. She confirmed that total disbursements, shown on page 2 of Exhibit "4", were $6,188.99, and that these monies were needed to close the deal.

[88] Tanya also confirmed that the amount of $281,064.69 as shown on page 2 of Exhibit "4", is the amount of money to be paid to her brother, Jehad. She also agreed that the amount showing $280,000.00 represents the mortgage funds that she received. Tanya added that the amount shown on page 2 of Exhibit "4", $1,064.69, was the amount of money that she actually had to pay out of pocket. Tanya added that the $1,064.69 came from her account but could not remember whether she paid it to her legal counsel by cheque or cash. She added that she probably paid by credit card.

[89] Tanya was questioned as to her understanding of the nature of the notional gift of $75,000.00 to which she repeated that it was notional because no money was exchanged. She reiterated that RBC inflated the price of the property, as it was not worth $350,000.00. The notional gift of $75,000.00 brought down the cost to $275,000.00, which was the price she and Jehad agreed to, which saved her the need to supply a down payment. Tanya only ever had to pay $1064.69 for out of pocket expenses, as mentioned earlier, because the bank (RBC) relied upon the $350,000.00 appraisal, and had been left with the impression that that was the actual purchased price.

[90] Tanya was asked why the amount of $75,000.00 is mentioned in Exhibit "4". She speculated as to why, but stressed that she did not know. She also said that she was not aware of any other documentation where that amount, $75,000.00, is shown.

[91] Tanya testified that she thought that the date of closing for the purchase was April 9, 2010. She is not sure why the date of April 16, 2010, is shown on page 1 of Exhibit "4". She then added that she was certain that the closing date was April 9, 2010.

[92] Tanya went on to testify that HHL was incorporated around the same time as the closing. She also agreed that HHL had no credit history at the time of the closing, and that it is a holding company which she created at the time of the purchase. The purchase of the Property was the first asset of HHL. There have been no subsequent additional assets or debts of HHL. She stated that she would have opened a bank account for HHL at the time of the purchase of the Property. She does not remember how she paid the $1,064.69 to her lawyer. She does not remember whether she paid it from HHL or directly from herself.

[93] Tanya testified that during the time periods in which she had tenants living at the Property, she lived with her parents at 12 Beckfoot, in Dartmouth. She stated that she works for the Government of Canada. She does not recall her earnings in 2020, however, she earned over $100,000.00 in 2021. She also has a communication company. Between her government job and her communication company she earned between $130,000.00 - $140,000.00 in 2021.

[94] When asked why Jehad chose to sell her the Property in 2010, Tanya stated that he did not tell her, and she did not ask.

[95] Tanya testified that HHL has a mortgage with RBC in the amount of approximately $280,000.00. She stressed that is because of the line of credit. She

disagreed with the suggestion that she has not paid much down on the principal amount of mortgage during the last ten years. She stated that she has, but because of subsequent maintenance expenses the balance has remained approximately at $280,000.00. She is paying the interest on the principal of the loan. Although, HHL has no other assets or debt, she is looking to purchase another property when the real estate market calms down.

[96] Tanya stated that she does not know how much money her brother owed on the Property when she purchased it from him. Her brother moved out of the home after she purchased it. He moved to Bedford West. She does not know where her brother lives, nor does she know whether her brother's current home is owned by his wife. She agreed that her brother's wife's name is Adel Chadrawy, and her maiden name is Abu Hosm. She is not aware whether her sister-in- law uses her maiden name. She does not think that Jehad has a vehicle. She stated that Jehad has not been to the house on Sebastian since 2021. She believes that Jehad is not coming to her house because he feels bad that she has been dragged into this.

[97] Tanya testified that she decided to list her house in 2020 to capitalize on the hot market.

[98] She stated that since she purchased the Property from her brother there has not been any work done to the Property by contractors. She has, however, had work done to the Property by her brother, "unofficial work." Her brother did electrical work, and painting. He also put cupboard doors in the kitchen. She added that she did not pay her brother for his labour, as she only purchased the materials.

[99] Tanya stated that her property taxes for the year 2021 were about $309.00 per month, which is paid by HHL. She confirmed that her brother, Jehad, has no access to HHL's account.

The Legal Framework: Rule 42.01 and 42.02, or Rule 42.11

Issue: Which Test applies - *RJR-MacDonald* or *Mareva* Injunction

[100] A preliminary issue that arises in this motion is whether the Court should conduct its analysis under Civil Procedure Rule 42.01 and 42.02, or Rule 42.11. In other words, is the proper test set out in *RJR-MacDonald v. Canada* (Attorney General), [1994] 1 S.C.R. 311("*RJR-MacDonald* "), or is the more onerous test for a *Mareva* injunction under Rule 42 applicable ?

[101] This issue arises because the Applicant's motion invokes two slightly different forms of prohibitory order: a preservation order under Rule 42.01 and 42.02, and a *Mareva* injunction under Rule 42.11. These two forms of order have similar effects, but govern in different situations, and have similar but distinct tests. For example, the *RJR-MacDonald* analysis (governing Rule 42.01 and 42.02) first requires a "serious issue to be tried." A *Mareva* injunction under Rule 42.11on the other hand, imposes the more stringent requirement of a "strong *prima facie* case."

[102] The Respondent HHL argues that the *Mareva* test governs, because the Applicant's judgment is against the individual Defendant, not the Property. As such, the purpose of the order sought is to protect the Estate's (the Applicant's) ability to collect on a judgment, not to protect property or assets that are the subject matter of the proceeding.

[103] In my view the Property in question here is not "property claimed in the proceeding" (R 42.01(1)(b) because the Plaintiff's aim is to ensure that a judgment can be satisfied, not to recover the Property itself. This is the hallmark of a *Mareva* injunction. Consequently, the more stringent test of a strong *prima facie* case is called for. I also observe that the Estate in its pleadings relies on Rule 42.11, rather than Rule 42.02. In effect, the Plaintiff has conceded that the *Mareva* standard applies by framing the motion this way, notwithstanding that it has described what it seeks as a "preservation order". I will explain.

[104] The Applicant (Plaintiff) cites the requirements for a "preservation order", and specifically references Rules 42.01(1)(c) and Rule 42.11. I will refer to the *Rules* in in their entirety to provide some context.

[105] Rules 42.01 and 42.02 provide:

> **42.01 Scope of Rule 42**
>
> 42.01 (1) A party to a proceeding may make a motion for an order preserving any of the following, in accordance with this Rule:
>
> (a) evidence that is relevant to an issue in the proceeding;
>
> (b) property claimed in the proceeding;
>
> (c) assets that would be available to satisfy a judgment claimed in the proceeding.
>
> **42.02 Preservation of evidence or property by injunction**

> (1) A party who files an undertaking as required by Rule 42.07 may make a motion for an injunction to preserve evidence relevant to an issue in, or to preserve property claimed in, a proceeding.
>
> (2) The motion must be made on notice to each party and the person in control of the evidence or property, unless the motion may be made ex parte under Rule 22.03, of Rule 22 - General Provisions for Motions.
>
> (3) The order may be restraining, mandatory, or part restraining and part mandatory.

[106] Rule 42.11 sets out the requirements for a *Mareva* injunction:

> **42.11 Preservation of assets (Mareva Injunction)**
>
> (1) A party who files an undertaking required by Rule 41.06, of Rule 41 - Interlocutory Injunction and Receivership, may make a motion for an interim or interlocutory injunction that does any of the following:
>
> (a) restrains a party from disposing of assets available to satisfy a judgment claimed in the proceeding;
>
> (b) restrains a party from removing assets from Nova Scotia;
>
> (c) requires a party or other person to cooperate in preserving assets.
>
> (2) The party must satisfy the judge that the party has met requirements of the common law for an injunction preserving assets, such as the requirements on each of the following subjects:
>
> (a) a claim for damages;
>
> (b) the strength of the party's case;
>
> (c) the risk that assets will be made unavailable to satisfy a judgment for the damages;
>
> (d) the likelihood of recovery on a judgment for the damages if the assets are not preserved.

[107] While the term "preservation order" is the title of Rule 42, this phrase encompasses at least three types of orders with distinct purposes. For example, Rule 42.01(1)(c) describes a *Mareva* injunction: an order to preserve "assets that would be available to satisfy a judgment claimed in the proceeding." By contrast, a preservation order, as that term is used in the caselaw, appears to be codified in Rule 42.01(1)(b), which is to say an order preserving "property claimed in the proceeding." A motion for such an order is made under Rule 42.02, which properly permits "a motion for an injunction to preserve evidence relevant to an issue in, or to preserve property claimed in, a proceeding": Rule 42.02(1).

[108] It would appear that terms or phrases (wording) under the different branches of Rule 42 have created some confusion in the case law between the test to be applied on a motion for injunctive relief in the form of a preservation order pursuant to Rule 42.02, and that applied on a motion for a *Mareva* injunction pursuant to Rule 42.11.

[109] These rules have been considered in several decisions. For example, in *Korem v. Crown Jewel Resort Ranch Inc*, 2011 NSCA 102, this Court had dismissed a motion for a preservation order against a company that the Appellant had sued for debt. The Respondent was one of a network of companies through which the Appellant and his estranged wife had operated a resort business. MacDonald, C.J. set out the test for "this type of injunctive relief", by which, the context suggests, he was referring to an injunction under Rule 42.02:

> [9]…Specifically, Mr. Korem would have had to establish three things: namely, that (a) his claim has merit to the extent that it at least represents a serious issue to be tried; (b) without a preservation order, he will suffer "irreparable harm"; and (c) when the consequences of making such an order are fully considered, the "balance of convenience" favours its issuance.
>
> [10] For example, in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, the Supreme Court of Canada confirmed:
>
> > ¶43. Metropolitan Stores adopted a three-stage test for courts to apply when considering an application for either a stay or an interlocutory injunction. First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the Applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits. It may be helpful to consider each aspect of the test and then apply it to the facts presented in these cases…

[110] In holding that there was "no serious issue to be tried", the chambers judge had characterized the debt action as a "strategic manoeuvre" in a matrimonial property dispute, with no evidentiary basis to substantiate the alleged debt. As MacDonald, C.J., noted, "Edwards, J. was not favourably impressed with what he viewed as Mr. Korem's 'artificial' attempt to disguise a matrimonial dispute as commercial litigation":(*Korem*, at *para.11*).

[111] As it transpired, the appeal was decided on the issue of irreparable harm, and Chief Justice MacDonald did not find it necessary to comment on the merits. However, the Court of Appeal's remarks on the application of the *RJR-MacDonald*

standard are provide a bright line for determining the merits aspect of a motion for a preservation order.

[112] The tests under the different branches of Rule 42 were clarified in *Reddick v MacInnis*, 2018 NSSC 201. In that case the dispute involved the ownership of a winning lottery ticket, which the organizers had split equally. The Plaintiff claimed that she was entitled to the entire prize and applied for a preservation order requiring the Defendant to retain the half that had been paid to him pending a decision on the merits. Murray J. noted, at para. 7 that "there is some confusion in the case law" between the test to be applied on a motion for injunctive relief in the form of a preservation order under Rule 42.02, and that applied on a motion for a *Mareva* injunction under Rule 42.11. He distinguished between the two orders:

> [10] Preservation orders and *Mareva* injunctions are both forms of injunctive relief that preserve property. **As Rule 42.02(1) indicates, however, a preservation order is the appropriate remedy where the property sought to be preserved is the property actually claimed in the proceeding. A *Mareva* injunction, on the other hand, is aimed at preserving assets to satisfy a judgment. The burden on the party seeking a *Mareva* injunction is much higher**. In *Injunctions and Specific Performance* (Looseleaf edition, updated to November 2017), at para. 2.700, the Honourable Justice Robert J. Sharpe states:
>
> > **Interlocutory injunctions are frequently granted to restrain disposition of an asset where the Plaintiff asserts a specific or proprietary claim in respect of that asset**. Rules of Court, and in some jurisdictions legislation, typically provide for interim preservation of property. If the Plaintiff sues for specific performance of an agreement of sale, an interlocutory injunction may be granted, restraining the Defendant from defeating the Plaintiff's claim by disposing of the property in question before trial. Similarly, even where the Plaintiff asserts a money claim, an interlocutory injunction may be granted to protect the claim where the Plaintiff has some proprietary right in the money or right to trace the particular fund. **The basis for injunctive relief here is to prevent dissipation or destruction of the property which is the subject matter of the suit. Such orders are made in accordance with the usual principles governing interlocutory injunctions and are to be distinguished from *Mareva* injunctions**. [Emphasis in *Reddick*]

[113] Holding that the Plaintiff was asserting "a proprietary claim in respect of the lottery winnings in the Defendant's possession, and she seeks an order restraining him from disposing of those funds," Justice Murray held that a "preservation order is the proper form of relief in these circumstances…":(*Reddick*, at para.11). Therefore, the matter was governed by *Korem*, where the court "confirmed that the test for a preservation order is the three-part test for an interlocutory injunction set

out in *R.J.R. -MacDonald*.…" (*Reddick,* at para. 11). Murray J. thus confirmed once again that the test applicable under Rule 42.02 is a "serious issue" standard.

[114] The subject was again considered in *Water Shed Water Conditioning Ltd v MacAskill*, 2019 NSSC 183, where the allegation was that the Defendants, while employed by the Plaintiff, had fraudulently converted some $200,000.00 to their personal use, specifically for the purchase of a boat and a truck. The Defendants agreed they owed the Plaintiff money in relation to the purchase of the boat, but not the truck, and claimed that the Plaintiff's principal authorized the use of funds on the basis that they would be repaid. The Plaintiff sought a preservation order and a *Mareva* injunction in respect of the boat, the truck, and certain real property. Rosinski J. endorsed the distinction between the two orders as set out by Justice Murray in *Reddick*: (*Water Shed*, at para.8). He characterized the application before the court in the following terms:

> 10. Thus, as I see it, I am being asked to consider a preservation of specific property order pursuant to CPR 42.02 involving as it does any monies actually claimed directly or as traceable; and a preservation of assets order (*Mareva* injunction) pursuant to CPR 42.11.

[115] With respect to the evidentiary basis for the Rule 42.02 motion, Rosinski J. stated:

> 11. Regarding the order sought under CPR 42.02, I reiterate, the quotation from *Sharpe on Injunctions and Specific Performance* cited above:
>
> > Similarly, even where the Plaintiff asserts a money claim, an interlocutory injunction may be granted to protect the claim where the Plaintiff has some proprietary right in the money or right to trace the particular fund.
>
> 12. Arguably this may relate to a $70,000 RAM Dodge truck (which included an ATV in the package) and a 4 Winns Celebrity Renko motorboat, registration number RE9785M.
>
> 13. Let me indicate at this point that for present purposes there is insufficient evidence to suggest that the Defendants used monies allegedly converted to purchase the truck (ATV). On the other hand, the boat is linked to an alleged $17,000 payment showing on the financial records of WW in May 2015, and referenced in the pleadings of the Defendants' Notice of Contest (Exh. 32 of S. Burke affidavit at para 7)-thus there is an evidentiary basis to argue for a CPR 42.02 order regarding the boat. Moreover, the Defendants do not dispute that some money is owing to WW in relation to this purchase.

[116] Applying the *Korem* and *RJR-MacDonald*, test, Rosinski J. held that there was a "serious question to be tried" in respect of the boat but dismissed the motion on the other two branches of the test: (*Water Shed*, at paras. 14-23)

[117] As to the *Mareva* injunction sought under Rule 42.11, Rosinski J. wrote:

> 26. The parties agree on the common-law test for a section 43(9) *Judicature Act*, RSNS 1989, c. 240 and CPR 42.11 (*Mareva*) injunction, and that on each of these elements the Plaintiff in this case must satisfy the court:
>
> > 1 -that there is a strong *prima facie* case that the Plaintiff will be successful on the merits (and this has been held to be "a strong likelihood" on the law and the evidence that the Plaintiff will succeed at trial -- *R v Canadian Broadcasting Corporation*, 2018 SCC 5 at paras. 12-18 see below)
> >
> > 2 -that there is a genuine or serious risk of disappearance of assets, (dissipation or concealment) by the Defendants which could otherwise satisfy a judgment.
> >
> > 3 -that the balance of convenience favours the Plaintiff.
>
> CPR 42.11(2) also requires the Plaintiff to satisfy the court such order should be granted considering:
>
> > (a) a claim for damages;
> >
> > (b) the strength of the party's case;
> >
> > (c) the risk that assets will be made unavailable to satisfy a judgment for the damages;
> >
> > and
> >
> > (d) the likelihood of recovery upon a judgment for the damages if the assets are not preserved.

[118] There was no dispute that a strong *prima facie* case existed: (*Water Shed* at paras. 26-27). In making this finding, Rosinski J. took note of the court's remarks about the framework for mandatory interlocutory injunctions and the interpretation of the "strong *prima facie* case" standard in *R. v. Canadian Broadcasting Corporation*, 2018 SCC 5, where Brown J., after confirming the applicability of the "strong *prima facie* case" rather than the "serious issue" standard, wrote:

> 17. This brings me to just what is entailed by showing a "*strong prima facie case*". Courts have employed various formulations, requiring the Applicant to establish a "strong and clear chance of success"; a "strong and clear" or "unusually strong and clear" case; that he or she is "clearly right" or "clearly in the right"; that he or she enjoys a "high probability" or "great likelihood of success"; a "high degree of assurance" of success; a "significant prospect" of success; or "almost certain"

> success. Common to all these formulations is a burden on the Applicant to show a case of such merit that it is very likely to succeed at trial. Meaning, that upon a preliminary review of the case, the application judge must be satisfied that there is a strong likelihood on the law and the evidence presented that, at trial, the Applicant will be ultimately successful in proving the allegations set out in the originating notice.

[119] Justice Rosinski held that the Plaintiff had established the grounds for an order under Rule 42.11 against the real property: (*Water Shed*, at paras 5 and 50).

[120] In *Good AI Capital GP, LLC v. Robinson*, 2020 NSSC 399, the Defendant had agreed to invest $9.7M USD in the Plaintiff company, on the condition that the Plaintiff transferred $100,000.00 to cover anticipated banking fees. The individual Defendant, who was the principal of the corporate Defendant, executed a promissory note to the effect that the $100,000.00 was repayable if the funding agreement was not carried out. The Plaintiffs transferred the $100,000.00, but the agreed investment was never delivered, and the fees were not refunded. The individual and corporate Defendants came under investigation by the Securities Commission. The Plaintiff sought an interim *Mareva* injunction and an interim preservation order. Jamieson, J. set out the prerequisites to a *Mareva* injunction pursuant to s 43(9) of the *Judicature Act* and Rule 42.11, as derived from *Roynat Inc v. A&A Auctioneers*, 2003 NSSC 114, and ordered the injunction. She concluded, *inter alia*, that the Plaintiffs had established a strong *prima facie* case for their claims: (*Good AI Capital* at paras 9-10).

[121] As to the interim preservation order under Rule 42.02(1), Jamieson, J. cited *Korem* and *Reddick* as authority for the proposition that "[w]hile both preservation orders and *Mareva* injunctions are forms of injunctive relief that preserve property, a preservation order preserves the property actually claimed in the proceeding", and said, "the Plaintiff is asserting a proprietary claim in respect of the bank facility fee that they believe is in the possession of the Defendants":(*Good AI Capital* at para 12). In holding that an interim preservation order was called for, she stated:

> 13. Clearly, there is a serious issue to be tried. With regard to irreparable harm the Supreme Court in *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, at para. 64, discussed its meaning stating:
>
> > ..."Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other...

> I also refer to the *Vogler v. Szendroi*, 2011 NSCA 11, decision of the Nova Scotia Court of Appeal at paragraphs 13-15.
>
> 14. Based on the evidence, I am of the opinion there is a risk the Plaintiff will not be able to recover its funds after trial, given there is evidence before this court of strikingly similar patterns of behaviour in six matters set out in the allegations in the proceeding before the Nova Scotia Securities Commission, as well as in various civil matters. Further, I find the balance of convenience clearly favours the Plaintiff in the interim injunctive relief being sought. I find the granting of a preservation order is just and equitable in all of the circumstances of this case.

[122] In *Smith v. Barrett*, 2021 NSSC 29, the Plaintiff had commenced an action, essentially for fraud, against the individual Defendant and his associated companies, which were in the car business, and by whom he had previously been employed. The Defendant Barrett had joined several third parties, who he accused of participating in a fraud scheme along with the Plaintiff. Criminal fraud charges had been laid against the Plaintiff and the third parties. The Defendants sought a *Mareva* injunction pursuant to Rule 42.11 against the third parties (the Batemans), who were in the process of selling their house. Coady, J. ordered the injunction on an emergency *ex parte* motion:

> 7. I heard the motion on October 29, 2020. I was satisfied that the Batemans' Kentville home was their only known asset. I was further satisfied the four-part test set out in Civil Procedure Rule 42.11(2) had been met. I acknowledged that a *Mareva* Injunction is an extraordinary remedy. On the basis of the affidavit evidence, I was satisfied that if I did not issue the injunction, the proceeds of the sale would likely dissipate. On the basis of these conclusions, I issued the *Mareva* Injunction requested.
>
> 8. The Batemans' Kentville home was purchased in 2012 and the title was put in the name of Ms. Bateman only. On or about October 19, 2020, the Batemans entered into an Agreement of Purchase and Sale to sell the property for $610,000 on December 1, 2020. There is a private collateral mortgage in the amount of $223,800 as of November, 2020. It was anticipated that the sale would realize net proceeds of approximately $375,000. As a result of the injunction, the proposed purchaser walked away and the listing agreement was terminated.

[123] The third parties subsequently sought an *inter partes* re-hearing. In holding that the injunction would issue on the re-hearing, Coady, J. made the following remarks about the strong *prima facie* case standard:

> 21. The strong *prima facie* case standard is an extremely high threshold and is more onerous than a serious question to be tried threshold as set forth in *RJR MacDonald*

v. Canada (Attorney General). The Honourable Robert J. Sharpe, *Injunctions and Specific Performance*, notes at paragraphs 2-58-59:

> While it is difficult to be precise about the strength of case the Plaintiff must demonstrate, it is clear that the courts have proceeded cautiously, recognizing the risk of substantial harm and inconvenience which may be caused to the Defendant. The *Mareva* injunction is one which calls for careful scrutiny of the merits of the claim and refusal of injunctive relief unless there is good prospect of success at trial. The Canadian courts have tended to emphasize the importance of the Plaintiff establishing a strong *prima facie* case ...
>
> ...
>
> The court will not grant an injunction merely because the Defendant is foreign but will examine such factors as the nature of its operations, the stringency of company law under which it is incorporated and the existence of reciprocal enforcement legislation.

[124] Coady, J. concluded that there was a strong *prima facie* case, given that Mr. Bateman had been criminally charged with defrauding Summit Hyundai. The RCMP would have to have reasonable and probable grounds before they could charge Mr. Bateman. Added to that were the conclusions of a forensic audit of Summit Hyundai's books:(*Smith* at para 22).

[125] For all the foregoing reasons, as noted, I am of the view that the Applicant's (Estate's) motion references two different forms of prohibitory order: a preservation order under Rule 42.01 and 42.02, and a *Mareva* injunction under Rule 42.11. I agree with the Respondent, HHL, that the latter is the most appropriate form in the circumstances of this case.

Central Issue

[126] Therefore, the central issue in this matter is whether the Applicant (Plaintiff) can meet the requirements for a *Mareva* injunction.

The Nature of *Mareva* Injunctions (in general)

[127] It has been pointed out that one of the prerequisites for a *Mareva* injunction is a requirement that the applicant show a strong *prima facie* case, as a condition of obtaining interlocutory injunctive relief. It is an exceptional or extraordinary remedy: courts are reluctant to interfere with the assets or property of a Defendant before the trial is completed. Thus, this exception arises when the Applicant has a

strong *prima facie* case and there is a real risk that to avoid the possibility of judgment, the Defendant will dissipate assets: *Aetna Financial Services Ltd. v. Fegelman,* [1985] 1 S.C.R. 2., at paras. 8-9.

[128] In *Tobin v. Beck*, 2017 NSCA 42, the Court held:

> 7 In a proper case, *Mareva* relief may be appropriate. But in general, pre-judgment orders of this type are not granted by our courts, and ordinarily it would be wrong to interfere prior to trial with the freedom of a defendant to deal with his assets, in the absence of a strong case for the plaintiff and the risk of serious consequences to him, should interim relief not be ordered.

[129] In *Front Carriers Ltd. v. Atlantic & Orient Shipping Corp*., [2006] F.C.J. No. 26, at para. 15, Blais, J., explained that the test for an interlocutory injunction as set out in *RJR-MacDonald* is merged with the separate distinct criteria of a *Mareva* injunction.

> As Lord Denning MR, in *Marvea Compania Navier SA v. International Bulkcarriers SA, The Marvea*, [1980] 1 All ER 213, at 215, CA, stated: It appears that the debt is due and owing and there is a danger that the debtor may dispose of his assets so as to defeat it before judgment, the Court has jurisdiction in a proper case to grant an interlocutory judgment so as to prevent him disposing of those assets.

[130] In *Tobin,* the Court of Appeal also pointed out that *Civil Procedure Rule* 42.11(2), does not alter the common law test for an interlocutory injunction, but merely refers to the common law 'requirements' for obtaining injunctive relief: (*Tobin, at para*. 8).

Preservation of Assets: Rule 42.11 (*Mareva* Injunction)

[131] I have earlier set out the provisions of the *Civil Procedure Rules* 42.11. Rule 42.11 (a) may be used to restrain a party from disposing of assets available to satisfy a judgment claimed in the proceeding.

[132] In addition, Rule 41 deals with Interlocutory Injunctions. It includes the following provisions:

> **Interlocutory Injunction and Receivership**
>
> 41.02(1) Nothing in this Rule alters the general law about obtaining an interim or interlocutory injunction before a dispute is heard and determined on the merits…

> (6) A party may make a motion for an interim or interlocutory injunction, or an interim or interlocutory receivership, in accordance with this Rule.
>
> (7) A judge may grant an injunction, or appoint a receiver, before the trial of an action or hearing of an application, in accordance with subsection 43(9) of the Judicature Act and his Rule.

[133] Section 43 (9) of the *Judicature Act*, also refers to injunctions:

> (9) A mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the Supreme Court, in all cases in which it appears to the Supreme Court to be just or convenient that such order should be made, and any such order may be made either unconditionally or upon such terms and conditions as the Supreme Court thinks just, and if an injunction is asked, either before or at or after the hearing of any cause or matter, to prevent any threatened or apprehended waste or trespass, such injunction may be granted if the Supreme Court thinks fit, whether the person against whom such injunction is sought is, or is not, in possession under any claim of title or otherwise, or, if out of possession, does or does not claim a right to do the act sought to be restrained, under any colour of title, and whether the estates claimed by both or by either of the parties are legal or equitable.

[134] To recapitulate, we know that the Estate has successfully obtained a default judgment against the Defendant (Jehad) and seeks repayment of the loan debt. The Applicant is seeking interlocutory injunctive relief with respect to assets otherwise available to satisfy the judgment in the proceedings. The asset is a property which Jehad transferred to his sister's business, HHL, before the summary judgment was granted against him. In this motion, the Court is asked to set aside an alleged conveyance by the Defendants, Jehad and HHL, on the basis that it was done to avoid the debt owed first to Ronald, and to his Estate.

[135] Therefore, I must consider each of the following:

1. Is there a strong *prima facie* case that the Plaintiff will be successful on the merits (this has been held to be "a strong likelihood" on the law and the evidence that the Plaintiff will succeed at trial)?
2. Is there a genuine or serious risk of disappearance of assets (dissipation or concealment) by the Defendants which could otherwise satisfy a judgment?
3. Does the balance of convenience favour the Plaintiff?

1. Is there a Strong *Prima Facie* Case of a Fraudulent Conveyance?

[136] The case law discussed earlier establishes that a strong *prima facie* case standard is an extremely high one, and is more onerous than merely a *serious question to be tried* threshold (as set out in *RJR-MacDonald*).

[137] In deciding whether the Applicant (Plaintiff) has established a strong *prima facie* case, to support a fraudulent conveyance, the court must carefully consider the totality of the evidence proffered in the motion, which includes the *viva voce* evidence, and affidavit evidence. In doing so, I am also mindful that the *Statute of Elizabeth* prohibits any conveyance of property made by the grantor with the intention of delaying, hindering, or defrauding creditors. Such a conveyance is null and void against them, their heirs and assigns.

[138] In *Bank of Montreal v. Crowell and Crowell*, [1980] N.S. J. No. 371, para. 27, Hallett, J. found there was a three-fold test necessary to succeed under the statute. He wrote:

> To succeed under the *Statute of Elizabeth*, the Plaintiff need only prove three facts:
>
> > 1. The conveyance was without valuable consideration. It may not be sufficient if the Plaintiff proves only that the consideration was somewhat inadequate (*Leighton v. Muir, supra*); in that case, there was inadequate consideration and although the Court held the conveyance could not be set aside under the *Statute of Elizabeth*, it was set aside under the *Assignment and Preferences Act*. The consideration must be "good consideration"; so-called meritorious consideration, that is, love and affection, is not valuable consideration and therefore not consideration within the meaning of the *Statute of Elizabeth*. (*Cromwell v. Comeau* (1957), 8 D.L.R.(2d) 676, at p. 684.)
> >
> > 2. The grantor had the intention to delay or defeat his creditors. It is not necessary that the creditor exist at the time of the conveyance (*Traders Group Ltd. v. Mason et al., supra*.). However, the Court will impute the intention if the creditors exist at the time of the conveyance provided the conveyance is without consideration and denudes the grantor debtor of substantially all his property that would otherwise be available to satisfy the debt (*Sun Life v. Elliott, supra*). Apart from that situation, intention to delay or defeat creditors is a question of fact. The Court must look at all the circumstances surrounding the conveyance. The Court is entitled to draw reasonable inference from the proven facts to ascertain the intention of the grantor in making the conveyance. Suspicious circumstances surrounding the conveyance require an explanation by the grantor.
> >
> > 3. That the conveyance had the effect of delaying or defeating the creditors. This too is a question of fact. The Plaintiff must first obtain a judgment against the debtor prior to commencement of proceedings to set aside the

> conveyance under the *Statute of Elizabeth* and must on the application to set aside adduce sufficient evidence to enable the court to make a finding that the conveyance had the effect of delaying or defeating the creditors.

[139] As stated, the Applicant (Plaintiff) in this case is asserting a proprietary claim with respect to the Property. The Estate seeks an order restraining the Defendant (HHL) from disposing of the Property. The Applicant asserts that Jehad (Defendant) owes a debt, which he has made no effort to pay, and which he has made every effort to avoid. The Applicant (Plaintiff) further submits that he obtained summary judgment for the outstanding debt and legal costs against the Defendant (Jehad), which remains unsatisfied.

[140] The Applicant stresses that, prior to defaulting on the debt, Jehad transferred ownership of his only major asset, the Property, to HHL (Defendant). The Applicant claims that HHL has no discernable business, and only has a single asset, which is the property. HHL has a single director, the Defendant's sister, Tanya (Defendant). The Applicant (Plaintiff) alleges that the conveyance of the property was a *fraudulent conveyance* made in anticipation of litigation.

[141] On the other hand, as previously mentioned, the Defendant (Tanya) submits that HHL paid her brother, Jehad, money for the Property, which it borrowed from RBC. She further submits that, pursuant to s. 5 of the *Assignments and Preferences Act*, R.S.N.S., 1989, c. 25, a transfer of property is not voidable where a buyer has paid market value for an asset, even where purchased from a judgment creditor, and regardless of intention.

[142] The responding party (HHL) submits that the *Statute of Elizabeth* is to similar effect. Appositely, section 5 of the *Assignments and Preferences Act*, provides:

> Nothing in Section 4 shall apply to
>
> (a) …;
>
> (b) any bona fide sale or payment made in the ordinary course of trade or calling to innocent purchasers or parties;
>
> (c) …; or
>
> (d) to any *bona fide* gift, conveyance, assignment, transfer or delivery over of any property which is made in consideration of any present actual *bona fide* payment in money, or by way of security for any present actual *bona fide* advance of money, or which is made in consideration of any present actual *bona fide* sale or delivery of property; **provided that the money**

> **paid, or the property sold or delivered, bears a fair and reasonable relative value to the consideration therefor**.
>
> [Emphasis added]

[143] HHL, argues that the evidence establishes that HHL paid market value for the Property (5537 Sebastian Place) and there is no evidence to suggest otherwise. The Respondent (Defendant) further submits that the relief sought by the Applicant (Plaintiff) is not available due to s. 5(d) of the *Assignments and Preferences Act*. The Respondent (HHL) asserts that there has been no actionable fraudulent conveyance of the property.

[144] As previously mentioned, there has been no evidence led in this motion with respect to Jehad's financial status. I cannot speculate that he was in insolvent circumstances, or was unable to pay his debts in full, or knew himself to be about to become insolvent, or near insolvent, at the time the Property was conveyed or transferred, which are the three alternative criteria noted in Section 2 (a) of the *Assignments and Preferences Act*.

[145] As Justice Grant observed in *Bishop*, the burden is upon the Respondent to prove that the transaction falls within the framework of the relevant sections of the *Assignments and Preferences Act*.

[146] Thus, for the purposes of this motion for interlocutory injunctive relief, s.5(d) of the *Assignment and Preferences Act*, cannot be relied on as there is no evidence to support its application in this motion. The Respondents may be able to demonstrate that at trial, but they have not done so in this motion.

[147] By way of contrast, I observe that under the *Statute of Elizabeth*, there is no requirement to establish that the transferor is insolvent at the time of the transfer or conveyance: (*Bank of Montreal v. Crowell & Crowell*, at para. 11).

[148] The issue that arises is whether the conveyance was made without valuable consideration.

Evidence of Market Value

[149] In Tanya's Affidavit, sworn October 17, 2021, she acknowledges that she is the President of HHL and has always been the company's sole owner, director and officer. She also confirmed these facts when she testified in the motion. For ease of reference, I repeat Tanya's evidence, at para. 12 of her Affidavit, where she states:

> As of early 2010, I had researched the process of residential properties that had been sold recently in the Hydrostone area. Comparable properties had sold for between $225,000 and $265,000, in recent months. Attached hereto and marked as Exhibit 1 is a list of some comparable properties sold in the months prior to HHL's purchase of 5537 Sebastian Place.

[150] Exhibit "1" to Tanya's Affidavit sets out a comparative analysis of homes sold in the Hydrostone area around the time HHL purchased the property.

[151] In the Respondent's (HHL) written and oral submissions, counsel for HHL stressed that the evidence before the court indicates that HHL paid market value for the Property (5537 Sebastian Place).

[152] The difficulty with that proposition is that it implies that the comparative analysis set out in Exhibit "1" of Tanya's Affidavit is "evidence"; that is, admissible evidence that buttresses Tanya's other evidence. In cross-examination she clearly stated that she did not conduct a recent comparative analysis, and that Exhibit "1", is a document that her legal counsel created. She testified that she was not sure when her legal counsel put it together but thought it was in the last few weeks. She testified that her lawyer would have contacted the Land Registry to get the numbers shown in Exhibit "1".

[153] Tanya's evidence was that her legal counsel created Exhibit "1", not her. Indeed, she was specifically asked whether her comparative analysis that she conducted approximately 11 years ago involved the same properties and prices as described in Exhibit "1", to which she answered that she assumed so, yes. She added, however, that she was not certain. Tanya further testified that her comparative analysis of 11 years ago, was not limited to the north end of Halifax, as it included Halifax and Dartmouth. She also confirmed that her research included peninsular Halifax and Central Dartmouth.

[154] Obviously, the initial issue that arises from Tanya's *viva voce* evidence is whether Exhibit "1" is *admissible evidence*. Exhibit "1" is relevant evidence, but it is not admissible in this motion because she cannot speak to its authenticity or accuracy. Moreover, it is hearsay evidence because it is reasonable to infer that it is being proffered for the truth of its content. The purpose of the evidence is to show that HHL paid a fair market value for the property. Thus, the only evidence about the market value of the Property (5537 Sebastian Place) is Tanya's evidence, which is that she conducted a comparative market analysis that was broader in scope than what is purported in Exhibit "1" before she purchased the Property. She stressed

that she believes that she paid fair market value for the Property. The difficulty with her evidence is that it is her opinion, her subjective belief, which is not supported or confirmed by any objective evidence which would provide the court with a solid basis to draw a well-founded inference that she did indeed pay fair market value for the Property.

[155] Having listened intently to and carefully observed Tanya testify, I was struck by her lack of knowledge and understanding of the transaction involved in the conveyance of the property from her brother to her company, HHL. She had very limited knowledge of the transaction involved in the conveyance. This may be a result of the passage of time, but her evidence raises troubling questions, which manifest suspicion surrounding the conveyance. For example, what was the purpose of the "notional gift" and why is there no written Agreement of Purchase and Sale? She stated that the only paperwork is the paperwork completed with the bank. In fairness, there may be a reasonable explanation for not having a written Agreement of Purchase and Sale, but she did not offer one, other than that she and her brother had a verbal or oral agreement. She stressed that she did not know why her brother was selling the property. Nor did she ask. She also stated that she was not aware of her brother's financial circumstances, nor was she aware that her brother had borrowed money from their cousin, Ronald (Plaintiff).

[156] I am mindful that I am only applying the "strong *prima facie* test" based on the evidence as required in this motion for an interlocutory injunction. The merits of the case will be decided by the trial judge. The evidence at the trial could be different than the evidence adduced in this motion.

[157] With that caveat having been stated, I have concluded that Exhibit "1" is not admissible evidence, and that Tanya's evidence is of limited probative value. This includes her evidence respecting details surrounding the conveyance. I cannot infer that HHL paid fair market value for the Property. There is scant evidence on this issue. It would simply be too speculative to draw an inference of market value based only on Tanya's subjective opinion, which is not based on any expertise or acquired acknowledge or experience in the area of real estate appraisals or comparative market evaluations.

[158] The more significant issue, however, is whether the conveyance in issue was "without valuable consideration."

Conveyance with or without Consideration

[159] As Justice Hallet explained in *Bank of Montreal v. Crowell and Crowell*, the Plaintiff must establish that the conveyance in issue was without valuable consideration. While it may not be sufficient to prove that the consideration was somewhat inadequate, to set aside the conveyance under the *Assignments and Preferences Act*, "good consideration" or so-called meritorious consideration, that is love and affection, is not valuable consideration and therefore not consideration within the meaning of the *Statute of Elizabeth*.

[160] Justice Hallet quoted with approval the decision in *Cromwell v. Comeau*, [1957] N.S.J. No. 10, wherein Ilsley, C.J., wrote:

> 30. Lord Kenyon in *Mathews v. Feaver* (1786), 1 Cox Eq. Cas. 278 at p. 280, said: "This is a transaction between the father and the son, and natural love and affection is mentioned as part of the consideration, upon which, as against creditors, I cannot rest at all. It is true, it is a consideration, which though not valuable, is called meritorious, and which in many instances the Court will maintain, but not against creditors."

[161] Based on the totality of the evidence, especially that of Tanya, I have concluded that a reasonable person, fully informed of the circumstances surrounding the conveyance, would be of the view that there is a strong *prima facie* case that the conveyance was without valuable consideration.

[162] Indeed, the only consideration that has been shown to have been involved in the conveyance of the Property is so-called *meritorious consideration* as per *Bank of Montreal v. Crowell,* at para. 27. Put differently, there was no *valuable* consideration involved in the conveyance and thus there was no consideration within the meaning of the *Statute of Elizabeth*.

[163] Consider that Tanya stated in her Affidavit (and testified) that she incorporated HHL because she wanted to own investment properties by way of corporation, rather than personally. She testified that she and her brother, Jehad, negotiated and agreed on a sale price of $275,00.00. She confirmed in her testimony that there is no written Agreement of Purchase and Sale, as she and her brother had only an oral or verbal agreement. Tanya stressed that the only paperwork was with RBC.

[164] It is indisputable that the statement of adjustments and proceeds (Exhibit "4" of Tanya's Affidavit), shows that there was no deposit. There was, however, a "gift from vendor" of $75,000.00. As set out in Exhibit "4", the balance to close was $1,064.69. This was the amount that Tanya paid to close the transaction.

[165] Tanya elaborated that this $75,000.00 was never paid to Jehad, contrary to what is indicated in Exhibit "4". That amount was negated by a notional "gift" back from Jehad to HHL.

[166] It is helpful to also revisit some of the other things to which she testified. For example, she was asked whether HHL made a money deposit in respect to the purchase of the Property. Her attention was directed to the line in Exhibit "4" which states a zero sum for a deposit. She disagreed with the suggestion that she did not put any money down as a deposit, in advance of the purchase of the property. She stated that she paid "around $5,000.00" because she "took on $280,000.00." Tanya was asked where the amount of $5,000.00 is shown in Exhibit "4", to which she stated that she did not know. She stated that the mortgage she took on is stated on the second page of Exhibit "4", which is $280,000.00.

[167] Tanya was asked whether she understood what the line in Exhibit "4", page 1 meant that states, "Balance to Due to Vendor … 274, 875.70". She answered that it represents what went to her brother. She agreed that the entry on Exhibit "4", page 1, "Gift to Vendor …75,000.00" was the notional gift between her and her brother but stressed that no money was exchanged between them.

[168] Tanya's attention was directed to page 2 of Exhibit "4", where she agreed that she had to pay the Municipal Deed Transfer Tax of $4, 125.00 as shown on page 2 in order to transfer title of the Property from her brother, Jehad, to her company, HHL. She also agreed that the amount for E-Submitting Deed and E-Submitting Mortgage represents what she paid to register the mortgage. Further, she agreed that another item on page 2 of Exhibit "4", "Legal Invoice re: Incorporation of Company … 1,148.34 and Legal Fees… 500.00", represents the amount of money she spent to incorporate her company, HHL. She confirmed that Peter Tsuluhas was the lawyer who did her legal work, but she does not know who her brother's lawyer was for the transaction. She thought it was Peter Tsuluhas as well. She does not recall who the lawyer was because of the passage of time.

[169] Tanya further stated that the $1,064.69 came from her account but could not remember whether she paid her legal counsel by cheque or cash. She added that she "probably" paid by credit card.

[170] With respect to the notional gift of $75,000.00, Tanya explained that it is "notional" because no money was exchanged. She added that RBC inflated the price of the property, as it was not worth $350,000.00. She stressed that she was not going to pay that amount. She was prepared to walk away. She would not have paid that

amount 11 years ago but mortgage advisor at RBC told them that they could do it the way they did it. She stressed that she had a $10,000.00 down payment ready at the time. It was the mortgage advisor's idea to do the transaction the way it was done, she testified.

[171] Again, mindful that this is an motion for interlocutory injunctive relief, I have considered all of the evidence, including Tanya's Affidavit, and her *viva voce* evidence and I find that there is a strong *prima facie* case that there was no *valuable consideration* involved in the conveyance.

[172] For the purposes of this motion, what has been established, on the balance of probabilities, does not amount to "valuable consideration" but rather, so-called "meritorious consideration, as explained in the decision of the *Bank of Montreal v. Crowell*. I am satisfied on the totality of the evidence that the Estate has made out a strong *prima facie* case that there was no valuable consideration involved in the conveyance of the Property.

The Intent to Delay or Defeat the Creditor

[173] The next factual issue to address is whether the Applicant (Plaintiff) established that the Defendant, Jehad, had the intention to *delay or defeat* his creditor, the Plaintiff, Ronald at the time that the property was conveyed to HHL.

[174] In *Bank of Montreal v. Crowell*, once again, I note the comments of Justice Hallet, at para. 36:

> 36… intention to deny or defeat creditors is a question of fact. The court must look at all the circumstances surrounding the conveyance. The court is entitled to draw reasonable inferences from the proven facts to ascertain the intention of the grantor in making the conveyance. **Suspicious circumstances surrounding the conveyance require an explanation by the grantor**.
>
> [Emphasis added]

[175] In the instant case, there are, in my view, circumstances which, taken together, raise suspicion surrounding the execution of the conveyance. These are as follows: that Jehad sold his property to his sister's corporation, HHL, which was created in close proximity to the conveyance; and there has been no valuable consideration shown in the conveyance. To that, I add that I an satisfied again for the purposes of his motion only that there is a strong *prima facie* case that Jehad's intention in

conveying the Property was to defeat or delay the rights of his creditor, Ronald. I will explain.

[176] First, there was, within the context of this motion, no direct evidence proffered by Jehad that he was not making his payments on the loan, or that his cousin, Ronald, was pursuing him for the debt. However, there is evidence in which it can be inferred that that Jehad must be taken to have contemplated litigation in all of the circumstances of this case.

[177] In other words, there is evidence that in anticipation of litigation he conveyed the property in the manner that he did to his sister's business, HHL, with the intention of defeating or denying his creditor, Ronald.

[178] Moreover, another issue that emerges from the suspicious circumstances surrounding the conveyance to HHL is whether Tanya created HHL knowing that her brother's intention was to defeat or delay his creditor. I raise this issue mindful that she testified that she was unaware of her brother's debt to Ronald, and she presently does not know where her brother resides. I mentioned this issue because it may arise at trial in the context of other trial related issues, such as whether Tanya is an innocent, *bona fide* purchaser of the Property. However, for the purposes of this motion for interlocutory injunctive relief, it is clearly only an issue that arises from suspicious circumstances surrounding the conveyance, which should be tangentially considered in determining whether the on the whole of the evidence there is a strong *prima facie* case that there has been a fraudulent conveyance of the Property.

[179] Next, Tanya testified that her purpose in creating the corporation in 2010 was to invest in real estate in Halifax. However, since HHL's inception, it has always held only one asset, the Property (5537 Sebastian Place). In fact, HHL has had only one debt, the amount owed on the mortgage of the property with RBC. There has never been a shareholder dividend, nor any evidence of another real estate transaction during the last decade. Tanya's evidence that HHL is a holding company, and that she is looking to purchase another property when the real estate market calms down, raises suspicion. This is particularly so when one considers that (to repeat) HHL has not completed any business transaction since its inception, and its current financial situation.

[180] Tanya testified that she did not know why her brother was selling the Property, and that she did not ask. This is also a suspicious circumstance. It defies common

sense that she would not ask her brother why he is selling his Property to her, especially in the circumstances which included a notional gift of $75,000.00.

[181] Obviously, I am not saying that the evidence leads to the inescapable inference that Tanya aided or abetted her brother in a fraudulent conveyance. It does, however, raise the issue of whether she knew what her brother's intent was at the time of the conveyance. In other words, when I consider the entire evidence surrounding the conveyance, including her limited knowledge and understanding of the details of the transaction involved in the conveyance, and why her brother was selling the Property, the question emerges of whether she was actually aware of an improper intention on the part of her brother, at the time of the conveyance, to delay or defeat his creditor. Again, it is not for me to weigh heavily into this issue for the purposes of this motion, but it may be for the trial judge to decide on the merits. I only mention it because it factors into the context of this motion. The constellation of factors certainly raises suspicion surrounding the circumstances of the conveyance of the Property**.**

[182] Consider that in *Krumm v. McKay*, 2003 ABQB 437, at para. 18, the court referred to certain *badges of fraud* which may assist the court in determining if there is a fraudulent intent to hinder the creditors. They are as follows:

1. the transfers were made pending the Applicant's efforts to obtain judgment;
2. the transfer documents contain false statements as to the consideration;
3. the consideration was grossly inadequate;
4. there was unusual haste to make the transfers; and
5. a close relationship exists between the parties to the transfers.

[183] In this case, there is clear evidence to support a strong *prima facie* case that the conveyance was made pending the Plaintiff's (Estate) efforts to obtain default judgment; the consideration was grossly inadequate, and a close relationship exits between the parties, Jehad and Tanya. Although it is not necessary that the creditor exist at the time of the conveyance, in this case, the creditor existed: (*Krumm v. McKay*, at paras. 29-30).

[184] The following facts are indisputable: that the Defendant (Jehad) was indebted to the Plaintiff (Ronald) on the date of the conveyance of the Property to HHL; the promissory note secured the loan by granting the Plaintiff an interest, albeit unregistered, in the Property (5537 Sebastian Place); and that the Plaintiff

successfully obtained a default order for the Defendant (Jehad) to repay the loan. Thus, it is reasonable to infer that the conveyance of the Property to HHL has made it impossible for the Plaintiff (Estate) to enforce the Court orders against the Defendant, Jehad.

[185] Based on the suspicious circumstances surrounding the conveyance in issue, there is a strong *prima facie* case that is that the Defendant, Jehad, had the intention to delay or defeat his creditor, the when he conveyed the Property to HHL. This inference is readily available based on the fact that the conveyance is without valuable consideration and that it denudes the Plaintiff (Estate) of his proprietary interest in the Jehad's only asset, the Property, conveyed to HHL, that would otherwise be available.

The Effect of the Conveyance – to Delay or Defeat the Creditor

[186] The third, and final element of a fraudulent conveyance is that the conveyance in issue had the effect of delaying or defeating the creditor, the Plaintiff (Estate). In this case, it is clear that the Estate had obtained a judgment against the debtor, Jehad, prior to the commencement of this motion, to set aside the conveyance under the *Statute of Elizabeth*. It is also clear that there is a strong *prima facie* case that the conveyance has had the effect of delaying or defeating the Plaintiff's (Estate's) right to enforce the Court Orders he had obtained against the Defendant, Jehad, in these circumstances. Moreover, the Defendant, HHL listed the asset, the property, for sale in July 2020, but de-listed it after the Plaintiff (Ronald) filed a *lis pendens* on the property.

[187] I find based on the evidence that there is a strong *prima facie* case that the Defendant, Jehad, conveyed his only asset, the Property at 5537 Sebastian Place, to HHL, to delay or defeat the collection of the debt he owed to the Plaintiff (Ronald).

[188] I have been satisfied that there is strong *prima facie* case that the conveyance was not made for valuable consideration. I have also considered the timing and the other suspicious circumstances surrounding the conveyance which establishes a strong *prima facie* case for the proposition that Jehad's intent was to delay or defeat the creditor, the Plaintiff, and that the Plaintiff (Estate) would be delayed or hindered in collecting on any judgment by the conveyance of the asset, the property, if it is not set aside as void.

[189] This is buttressed by earlier references to evidence that Jehad has evaded multiple attempts by Ronald and/or his Estate to discover assets so that he can enforce the judgment debt on the Defendant (Jehad).

[190] The evidence clearly establishes, on the basis of a strong *prima facie* standard, that the Defendant (Jehad) has demonstrated a pattern of evasion to delay and defeat the Plaintiff's judgment debt against him. As noted in the Plaintiff's Affidavit, the Defendant (Jehad) has repeatedly sought to avoid personal service. For the duration of all actions related to the debt, the Plaintiff has only been able to proceed against the Defendant (Jehad) by way of substituted service. Tanya, his sister, herself denies that she has knowledge of where Jehad presently lives. Thus, there is insufficient evidence in this motion to infer that Tanya aided or assisted her brother, Jehad, in evading the court process.

[191] Having considered the all the evidence including Tanya's Affidavit and her *viva voce* evidence, I am satisfied that is a strong *prima facie* case that there has been a fraudulent conveyance of the property.

2. Genuine or Serious Risk of Disappearance of Assets

[192] The next element of the test for a *Mareva* injunction is whether there is a genuine or serious risk of disappearance of assets (dissipation or concealment) by the Defendant which could otherwise satisfy a judgment.

[193] The Plaintiff (Applicant) argues that if the Defendant (HHL) was to dispose of the Property, it would make it more difficult for the Plaintiff to enforce his judgment debt against Jehad (Defendant), a goal frustrated intentionally to date.

[194] The Applicant (Plaintiff) submits that he has no knowledge of any bank accounts or financial investments held by the Defendant (Jehad) from which he could seek the proceeds of sale. The Plaintiff fears that the Defendant (Jehad) could hide the proceeds of the sale from execution by the Plaintiff.

[195] While the term "irreparable harm" is not used in the context of interlocutory *Mareva* injunctions, the underlying principle is the same in determining whether there is a serious risk of dissipation or concealment of assets by the Defendant which would other wise satisfy a judgment.

[196] In *RJR MacDonald*, the Supreme Court of Canada described "irreparable harm" as follows:

> 59. "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms **or which cannot be cured, usually because one party cannot collect damages from the other**. Examples of the former include instances where one party will be put out of business by the court's decision (*R.L. Crain Inc. v. Hendry* (1988), 48 D.L.R. (4th) 228 (Sask. Q.B.)); where one party will suffer permanent market loss or irrevocable damage to its business reputation (*American Cyanamid, supra*); or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined (*MacMillan Bloedel Ltd. v. Mullin*, [1985] 3 W.W.R. 577 (B.C.C.A.)). The fact that one party may be impecunious does not automatically determine the application in favour of the other party who will not ultimately be able to collect damages, although it may be a relevant consideration (*Hubbard v. Pitt*, [1976] Q.B. 142 (C.A.)).
>
> [Emphasis added]

[197] In my view, it is reasonable to infer that there is a real risk that Defendant (HHL) will dispose of the property, particularly where the Plaintiff (Applicant) has a strong *prima facie* case for fraudulent conveyance. This supports the conclusion that the interlocutory injunction is necessary to ensure that the remedy the Plaintiff (Applicant) is seeking in the Action is possible. In other words, unless protected by the interlocutory injunction the Plaintiff's claim for proprietary interest in a judgment for damages will be inadequate as there is no evidence of other assets owned by the Defendant (Jehad) personally, as he has failed to attend the Discovery in Aid of Execution.

[198] The Plaintiff (Applicant) claims that the harm from being unable to execute would be irreparable to him because he would be unable to carry his *Action* or subsequent judgment to its conclusions. In essence, the Plaintiff would be unable to hold the Defendant (Jehad) to account for his default of the promissory note that he provided to the Plaintiff. The Plaintiff further submits that it would also mean rewarding the Defendant (Jehad) for his own disreputable conduct, as the Defendant (Jehad) has demonstrated disregard for the Court's process by evading service, and as the Plaintiff alleges, concealing assets.

[199] In my view, the Applicant's (Estate) concerns are well-founded in the Court record, which is concerning, especially where there exists a strong *prima facie* case for fraudulent conveyance.

[200] It is indisputable that the Defendant (HHL) desires to sell the property. Indeed, HHL removed the property from the market listings after the Plaintiff filed a *lis pendens* on the property.

[201] Therefore, for the foregoing reasons, I conclude there is a genuine or serious risk that the Defendant (HHL) will put the assets (property) out of reach if given the opportunity based on the evidence proffered in this motion. It should be emphasized that I have reached that conclusion mindful that the test on a *Mareva* injunction is not simply that there is a *risk* that assets will be dissipated, but rather there is a *genuine or serious risk that* the Respondent HHL will dissipate the asset or put it beyond reach of the Court

[202] As Justice Coady emphasized in *Smith v. Barrett*, at para. 26,

> 26. Robert J.C. Deane, "*Varying the Plaintiff's Burden: An Efficient Approach to Interlocutory Injunctions to Preserve Future Money Judgements*" (1999) 49 Univ. of Toronto L.J. 1, UTLJ 61 (QL) concludes that, **in the absence of improper intention, an injunction may still be granted where there is a very compelling and strong claim. I conclude that Mr. Barrett's claim is compelling and strong**.
>
> [Emphasis added]

[203] Again, given the Respondent's (Tanya's) intent to sell the property, coupled with a very compelling and strong *prima facie* case for the Plaintiff (Applicant) based on the court record, I conclude that there is a genuine or serious risk that the property will be put out of reach of the Court.

3. Balance of Convenience

[204] The last element of the test for a *Mareva* injunction is the balance of convenience, which requires the Court to consider the relative impact upon the parties of granting or withholding the interlocutory injunction. The balance of convenience must favour the Plaintiff (Applicant).

[205] In *Maxwell Properties Ltd. v. Mosaik Property Management Ltd*, 2017 NSCA 76, Bryson, J.A., wrote:

> 61. The balance of convenience involves determining which of the parties will suffer the greater harm from the granting or refusing of an interlocutory injunction, pending trial. Lord Diplock puts it this way:
>
> > **It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises**. It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in

> deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.
>
> Where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo…
>
> [Emphasis added]

[206] In *Smith v. Barrett*, Coady J.'s comments are apposite:

> [28] The likelihood of recovery upon a judgment for damages if the asset is not preserved is a factor that I can consider in determining the potential prejudice faced by the Applicant. This factor must be weighed against the extraordinary impact of a *Mareva* injunction. Further, the interests of the Applicant must not be given priority over those of the Respondent. In *Pretty v. Clute*, 2011 ONSC 262, Justice Lauwers stated at paragraph 54, citing *Stearns v. Scocchia*, 2002 CarswellOnt 3700 (ONSC):
>
> > Because of the extreme nature of a rule 45.02 order and/or a Mareva injunction, they are remedies that should be available only when it is necessary to balance the interests of the Plaintiff and Defendant. Both orders maintain the status quo until trial in a way that is fair to both the Plaintiff and Defendant and must not place the interests of the Plaintiff before those of the Defendant. Such orders are not merely procedural in nature and should be granted only in exceptional circumstances because they have the potential to injure a Defendant before the Plaintiff has proven its case at trial. Furthermore, it can place a Defendant in an unfair position because it freezes a fund that would otherwise be available to the Defendant and available for the purpose of operating its business. In short, such an order can appreciably tilt the scales in favour of a Plaintiff on the basis of unproven allegations. Judicial discretion is therefore to be carefully exercised when considering a Rule 45 order or the granting of a Mareva injunction given the severe prejudicial consequences that can result.
>
> [29] The term "balance of convenience" is a broad phrase with a variety of meanings in a variety of situations. Essentially, it allows for an expansive view of the facts of any particular case to allow a Court, in the exercise of its discretion, to make an order where it is just and convenient to do so. The nature of the relief sought must be viewed against the backdrop of the particular facts of each case when determining whether it is just and convenient to make such an order. Before such an order is granted, a moving party must show that there are cogent reasons to grant such an order and that without the order a palpable unfairness would result (*Stearns v. Scocchia, supra*).

[207] As for the balance of convenience, I find that there is real no hardship to the Respondent (HHL), but rather an inconvenience caused by delay in selling the property. However, without the interlocutory injunction the Applicant (Plaintiff)

would suffer real hardship because he would have no other means of seeking remedy against the Defendant (Jehad). As the Applicant (Plaintiff) submits, if the Defendant (Jehad) continues to unnecessarily prolong the proceedings until the *lis pendens* expires and the property is sold, it would in effect render the Plaintiff's judgment unenforceable. For this reason, the balance of convenience clearly favours the Plaintiff (Applicant). While the Defendant (HHL) is temporary delayed from selling the property, the Plaintiff (Applicant) risks losing the ability to enforce his entire judgment.

[208] Based on all the evidence, I am satisfied that Plaintiff has clearly demonstrated that the balance of convenience overwhelmingly favours granting the interlocutory injunction.

[209] In striking a fair balance, it is my view that the Respondent (HHL) does not have to be prohibited from selling the property, as the balance of convenience could support an order that, if the property sells, HHL must provide security by paying the sum of the debt owed to the Plaintiff (Ronald) in Court or provide a solicitor undertaking to have the amount owed put in a trust account.

Conclusion

[210] While a *Mareva* injunction is an exceptional remedy, it is also an equitable one, which for all the forgoing reasons must be granted.

[211] I would ask that Counsel for the Estate prepare the Order. If necessary, I will hear the parties on costs, and will expect written submissions within 15 business days.

Hoskins, J.