

Court of King's Bench of Alberta

Citation: MNP Ltd (Eco-Industrial Business Park Inc) v Symmetry Asset Management Inc, 2023 ABKB 429



Date:
Docket: B203 806171
Registry: Edmonton

Between:

MNP Ltd, in its capacity as the Trustee in Bankruptcy of Eco-Industrial Business Park Inc, and not in its personal capacity

Applicant

- and -

Symmetry Asset Management Inc.

Respondent

**Reasons for Decision
of the
Honourable Justice Kevin Feth**

Overview

[1] MNP Ltd, as the trustee in bankruptcy of Eco-Industrial Business Park Inc, applies to set aside the assignments of two legal claims from Eco-Industrial to a related company, Symmetry Asset Management Inc. MNP contends the assignments were transfers at undervalue, inviting relief pursuant to s 96(1)(b)(ii) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (*BIA*), or alternatively, fraudulent transfers or conveyances under the *Fraudulent Preferences Act*, RSA 2000, c F-24 or the *Statute of Fraudulent Conveyances*, 1571, 13 Eliz 1, c 5 (UK) (*Statute of Elizabeth*).

[2] MNP asserts that Eco-Industrial received either no consideration for the transfers or consideration conspicuously less than the fair market value of the legal claims. The transfers deprived Eco-Industrial's creditors of the potential proceeds from the claims.

[3] Symmetry denies that the transfers were undervalued or fraudulent. The assignments allegedly compensated Symmetry for services provided to Eco-Industrial, including the payment of legal expenses associated with prosecuting or preserving the claims.

[4] I conclude that MNP has demonstrated both assignments were transfers at undervalue and should be declared void under s 96 of the *BIA*. One of the legal claims was transferred for no consideration. The other was transferred for modest consideration that was conspicuously less than the fair market value of the claim. Given those conclusions, determining whether the transfers were fraudulent preferences or conveyances is unnecessary.

Background

[5] Eco-Industrial owns industrial lands in Edmonton, Alberta, including a waste disposal facility with two disposal wells, related equipment, and operating licenses. Symmetry provided some management services for Eco-Industrial over an unspecified time period. Daniel White is the sole director of both companies. Eco-Industrial and Symmetry are owned by the same shareholder, 1468527 Alberta Ltd. That company is owned by the Daniel White Family Trust (“Family Trust”).

[6] Daniel White, either personally or through the Family Trust, is the owner of or has a beneficial interest in several related commercial entities including Eco-Industrial, Symmetry, Absolute Environmental Waste Management Inc (“Absolute Waste Management”), and 3443 Zen Garden Limited Partnership (“Zen Garden”).

[7] In April 2018, Eco-Industrial secured a loan from Romspen Mortgage Limited Partnership and Romspen Investment Corporation (collectively “Romspen”) to Zen Garden for a maximum principal value of US\$125 million. The security included a US\$40 million mortgage, a guarantee, and an assignment of leases and rents and a general security agreement.

[8] On October 11, 2019, Romspen asserted that Zen Garden had defaulted on the loan and demanded that Zen Garden, Eco-Industrial, and other related entities pay the outstanding amount, which was approximately US\$87.9 million plus interest accruing at a rate of approximately US\$29,000 per day. Payment was not made.

[9] MNP contends that Eco-Industrial was insolvent by October 2019 and that because of the insolvency, the company also failed to pay outstanding municipal property taxes of \$383,387.

[10] On or about December 1, 2019, Eco-Industrial executed two Assignment and Assumption Agreements (“Assignment Agreements”) in favour of Symmetry assigning all rights, title and interest in two legal claims:

- a) Eco-Industrial was suing Alberta Diluent Terminal Ltd (ADT) for \$100 million relating to the sale of lands by Eco-Industrial to ADT in 2008 and 2013, and a resulting dispute about rail access through some of the lands (the “ADT Action”); and
- b) Eco-Industrial has a potential negligence claim against the law firm Dentons Canada LLP, which acted as counsel for Eco-Industrial in selling the lands to ADT; the claim arose from the legal advice provided in relation to the ADT land transactions and the allegations in the ADT Action (the “Dentons Claim”).

[11] The Assignment Agreements were executed by Daniel White on behalf of both Eco-Industrial and Symmetry. The agreements were not disclosed to Romspen when executed despite Romspen's active efforts to enforce its security against Eco-Industrial.

[12] On April 2, 2020, by court order, MNP was appointed as the Interim Monitor of Eco-Industrial with authority to monitor the company's operations and records.

[13] On November 4, 2021, by court order, MNP was appointed the Receiver of Eco-Industrial's current and future assets, undertakings, properties of every nature, and all related proceeds ("Receivership Order"). MNP learned of the Assignment Agreements when legal counsel for Eco-Industrial disclosed them on November 8, 2021.

[14] On February 18, 2022, MNP was appointed as the Trustee in Bankruptcy for Eco-Industrial.

[15] Each of the Assignment Agreements characterizes Symmetry as the "asset manager" for Eco-Industrial and states that "Symmetry provides ongoing management services to Eco to which Eco pays Symmetry for costs and fees." The specific services and the "costs and fees" are not described. However, each Assignment Agreement contains the following statements in a preamble:

- D. From the filing date of the Court Action, Symmetry has managed the legal action for Eco by supplying services and paying costs including legal fees.
- E. Eco has relied on Symmetry for these services but has been unable to pay for these services or costs. As a partial offset Eco is willing to assign the Lawsuit referenced above to Symmetry. Symmetry is willing to accept partial offset from Eco for the Lawsuit referenced above and the assumption thereof.

[16] MNP, as the Interim Monitor, Receiver, and then the Trustee in Bankruptcy, sought financial records from Eco-Industrial and Mr. White about the company's business activities and any services performed or expenses paid by Symmetry for the company's benefit. Despite numerous requests and court orders compelling record production, Eco-Industrial and Mr. White failed to substantially respond. Similar requests were directed to Symmetry, as a related company, but the disclosure was incomplete. MNP and Symmetry disagree about the extent of the supplied disclosure.

[17] The prosecution of the ADT Action has been controlled by Symmetry since December 2019. However, the Court's Procedure Record reveals that no formal steps have been taken in that action since November 22, 2019. The Dentons Claim is subject to a December 2014 Standstill Agreement, so no lawsuit has been filed. Symmetry has been responsible for the preservation of that claim since December 2019.

[18] The legal claims have not vested in MNP because of the Assignment Agreements. Accordingly, the information about those claims is controlled by Symmetry and Mr. White.

Preliminary issue – Conflicting or incomplete evidence on a chambers application

[19] The parties tendered some potentially conflicting affidavit evidence about Symmetry's funding of the ADT Action, the extent of Symmetry's disclosure in response to requests from

MNP, and whether Mr. White had a fraudulent intention when transferring the legal claims from Eco-Industrial to Symmetry.

[20] Generally, conflicting evidence on material facts cannot be resolved in chambers: *Charles v Young*, 2014 ABCA 200 at para 4; *Nieuwesteeg v Barron*, 2009 ABCA 235 at para 9.

[21] The Court's obligation, however, is to resolve bankruptcy disputes in a cost-effective and timely manner having regard for proportionality and the interests at stake, so long as procedural fairness is preserved. Protracted and costly litigation should be avoided when the issues can be determined summarily. Findings about uncontested facts and those facts not seriously challenged may be sufficient to arrive at a fair and just disposition: *Royal Bank of Canada v Racher*, 2017 ABQB 181 at paras 11-12 [*Racher*]; *Re National Telecommunications Inc*, 2017 ONSC 1475 at paras 33-39 [*National Telecommunications*].

[22] This approach to litigation economy was discussed in *Sandhu v Siri Guru Nanak Sikh Gurdwara of Alberta*, 2015 ABCA 101 at para 81:

Therefore, conflict on certain points in the parties' affidavits does not alone mean [the application] should have been adjourned for oral testimony or a full trial. It may be that the conflicts do not arise on essential facts. It may be that analysis shows no factual conflict exists, but only a conflict of the litigants' separate opinions. It may be, as here, that one party relies on several affidavits, which contain internally conflicting evidence, including some evidence which agrees with or supports the evidence lead by the opposite party, and thus amount to admissions against interest. It may be that issues can be resolved on the basis of those portions of the affidavits which are not in dispute ...

[23] The Court may also consider whether the issues can be determined by applying the correct burdens of proof: *Racher* at para 14; *Wildeman v Wildeman*, 2014 ABQB 732 at paras 16-17.

[24] In *Racher*, where a similar application was made to set aside a transfer at undervalue per s 96(1) of the *BIA*, or to find a fraudulent preference or conveyance, my colleague Justice Eamon cautioned at paras 15-16 that a respondent's vague and self-serving affidavit evidence is generally insufficient to raise a triable issue:

...A self-serving affidavit alone is not sufficient to create a triable issue in the absence of detailed facts and supporting evidence ... statements in affidavits that are merely conclusory, argumentative, or have no detailed evidence supporting them may not be sufficient to require a trial of an issue. ...

In determining whether there is a proportional means short of trial that should be used in a bankruptcy or related application, where final relief is sought, a self-serving affidavit alone may not be sufficient to create a meritorious issue in the absence of detailed facts and supporting evidence. The respondents in such proceedings should provide more. Otherwise, respondents could force trials merely by swearing to a set of general conclusions. The tolerance for that has long passed given the concerns for facilitating access to justice through proportionate procedures. [*authorities omitted*]

[25] This approach respects the objects of the *BIA* as a "businessperson's statute ... particularly focused on efficiency and affordability": *National Telecommunications* at para 33.

[26] Here, I have considered whether the inconsistencies in the evidence can be resolved without a trial or a trial of an issue. For the reasons to follow, any inconsistencies are irrelevant, immaterial, or can be reconciled by applying the preceding principles.

[27] Finally, Symmetry submits that I should defer making any decision about a transfer at undervalue, or a fraudulent preference or conveyance, in the absence of a complete evidentiary record. However, Symmetry generally fails to explain what material evidence is missing or why material evidence within its control has not been provided.

[28] When addressing an application under s 96(1) of the *BIA*, the Court considers whether sufficient findings can be made on the record to arrive at a fair and just disposition without conducting a trial or a trial of an issue: *Racher* at para 12. Contested factual issues might require a trial, but a trial is not the default process.

[29] The goals of the bankruptcy process include timeliness, affordability and proportionality: *National Telecommunications* at para 37. Section 96 is remedial in nature and should be given a “fair, large and liberal construction and interpretation that best ensures the attainment of [its] objects”: *Ernst & Young Inc v Aquino*, 2022 ONCA 202 at paras 22-23 [*Aquino*]. Needless delay, expense and complexity do not serve stakeholders and should be avoided. Section 96(1) applications therefore should be resolved in chambers, absent a demonstrated need for a trial or a trial of an issue to achieve a fair and just disposition.

[30] Provincial legislation governing fraudulent preferences and conveyances is also remedial in nature and given a similar fair, large and liberal construction and interpretation: *Royal Bank of Canada v North American Life Assurance Co*, [1996] 1 SCR 325 at para 59, 1996 CanLII 219. Again, unnecessary trial process should be discouraged.

Rendering a transfer void under the *BIA*

[31] Section 96 of the *BIA* allows a trustee in bankruptcy to challenge a debtor’s pre-bankruptcy transfers at undervalue that diminish the bankrupt’s estate and limit the ability of creditors to recover all or a part of their debts.

[32] Section 96(1)(b) of the *BIA* states in relevant part:

96 (1) On application by the trustee, a court may declare that a *transfer at undervalue* is void as against ... the trustee ... if

...

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

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

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

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

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

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

[33] A “transfer at undervalue” is defined in s 2 of the *BIA*:

... a *disposition of property* or provision of services for which *no consideration is received* by the debtor or for which *the consideration received by the debtor is conspicuously less than the fair market value of the consideration given* by the debtor; [*emphasis added*]

[34] MNP asserts that the assignments were dispositions of property for which either no consideration was received, or the consideration received was conspicuously less than the fair market value of the legal claim. More specifically, the trustee opines that the face value of the claims was \$100 Million and the actual consideration received was either nothing or nominal. As for the requirements of s 96(1)(b), Symmetry was not dealing at arm's length and the transfers occurred during the five-year window described in subsection (ii) when Eco-Industrial was either insolvent or rendered insolvent by the transfers, or the company intended to defraud, defeat or delay a creditor.

[35] Symmetry resists on the basis that “considerable” consideration was given for the legal claims. Further, Eco-Industrial's insolvency at the time of the transfers has not been established and the directing mind of the company did not intend to defraud any creditors. Symmetry also raises a technical argument that MNP failed to offer a proper opinion about the fair market value of the legal claims, allegedly violating s 96(2) of the *BIA*.

[36] Section 96 contains multiple elements, some of which are disjunctive, including the components of a transfer at undervalue. As I will explain, the transfer of the Dentons Claim offends s 96(1)(b)(ii)(A) because no consideration was given. The transfer of the ADT Action offends the same subsection because the consideration provided was conspicuously less than the fair market value of that legal claim. As the transfers are within the scope of s 96(1)(b)(ii)(A), no finding of fraudulent intention is necessary.

[37] Before turning to the elements of s 96 and a transfer at undervalue, some evidentiary principles require explanation.

Evidentiary principles

[38] MNP bears the legal burden of establishing a transfer at undervalue: *Racher* at para 76. However, where the facts are particularly within the knowledge of the respondent, the evidence adduced by the applicant may result in an adverse inference being drawn against the respondent in the absence of contrary evidence or an explanation for not calling it: Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, 6th Edition (Toronto: LexisNexis Canada Inc, 2022) at 437. Moreover, “very little affirmative evidence will be sufficient where the facts lie almost entirely within the knowledge of the other side”: *Snell v Farrell*, [1990] 2 SCR 311 at 328-330, 1990 CanLII 70 [*Snell*]; see also *Servus Credit Union v JRD Investments Inc*, 2020 ABQB 249 at para 37.

[39] Symmetry submits that MNP must state the fair market value of the legal claims as a precondition to receiving relief. Section 96(2) prescribes:

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

[40] Additionally, Symmetry suggests that the fair market valuation of a legal claim requires MNP to provide a formal risk assessment, including an estimate about the chances of success in establishing liability, failing which the transfers cannot be declared void. I disagree.

[41] Section 96(2) describes an evidentiary principle. The "purpose of s 96(2) is, absent evidence to the contrary, to make a trustee's opinion of value available to a court for purposes of a proceeding under that provision": *Juhasz Estate v Cordeiro*, 2015 ONSC 1781 at para 70. The Court utilizes the trustee's opinion in the absence of evidence to the contrary: *Re Lee*, 2017 ONSC 388 at para 7 [*Lee*]. If other evidence is available, the Court may make its own findings.

[42] A trustee must refer to some evidence, even very slight evidence – as stated in *Snell* – to meet its burden of proof. However, s 96 does not impose a specific methodology for arriving at an opinion. Further, the provision does not require a trustee to rely on an expert opinion in making the assessment: *Cerson v McCarney Group LLP*, 2023 ONSC 2550 at para 106. A trustee in bankruptcy is expected nonetheless to act in good faith, respecting its obligations to the Court.

[43] Even if s 96(2) imposes a precondition, any oversight might be curable under s 187(9) of the *BIA*.

[44] Here, MNP describes the legal claims as having a "face value of \$100 Million". No formal risk assessment is offered to value the claims. The Trustee acknowledges that the claims are disputed, so establishing liability and quantum is uncertain. Nevertheless, MNP opines that each claim likely has "substantial value" because Eco-Industrial and Symmetry took the step of transferring the claims from one company to the other, and each claim has a high face value.

[45] MNP has limited information by which to value the legal claims. Symmetry controls the necessary information and the solicitor's file. I find that a detailed risk assessment is therefore not available to the Trustee.

[46] Where the responding party controls the information, a trustee cannot reasonably be expected to offer more than a general understanding of the nature of the claim and its value. If the respondent rejects that assessment, it can adduce contrary evidence. To conclude otherwise invites the mischief of a respondent withholding necessary information and preventing a trustee from satisfying a statutory condition, thereby frustrating the operation of s 96 and its remedial purpose.

[47] In the present matter, I need not rely on s 96(2) to determine the fair market value of the legal claims. As discussed later in these Reasons, I have considered instead all the evidence in arriving at any necessary valuation.

[48] With the benefit of these principles, I will now address the elements under s 96(1)(b)(ii) and a transfer at undervalue, beginning with the uncontroverted matters.

Not dealing at arm's length with the debtor

[49] Eco-Industrial and Symmetry had common ownership and the same director. Mr. White signed the Assignment Agreements on behalf of both companies. Symmetry concedes that the companies were related and not dealing at arm's length.

The transfers occurred during the five-year look-back period

[50] Symmetry acknowledges that the transfers occurred within the five-year period in s 96(1)(b)(ii).

A transfer at undervalue - disposition of property

[51] The assignments of the legal claims were dispositions of property as they were "things in action", as contemplated by s 2 of the *BIA*. Symmetry accepts that the legal claims are "property" within the scope of the *Act*.

A transfer at undervalue – no consideration or conspicuously less consideration than fair market value

[52] The parties disagree about the consideration given for the transfers.

[53] In response to MNP's assertions about deficient or no consideration, Symmetry submits the following consideration was provided to Eco-Industrial: a) management services; b) payment of legal expenses on behalf of Eco-Industrial without reimbursement; and c) assumption of legal responsibility for Eco-Industrial's obligations relating to the legal claims.

[54] Each of these submissions will be reviewed in turn, following which I will address the fair market value of the claims.

a) Management services

[55] MNP searched the business and banking records of Eco-Industrial for any indication that Symmetry supplied management services to the bankrupt and that the services were provided under an agreement by which Symmetry was to be compensated for them by Eco-Industrial. Nothing was located. Most notably, no service invoices or records of past payments were found. Eco-Industrial's management informed MNP that Symmetry was set up to manage the asset portfolio of Eco-Industrial and related companies under an asset management agreement. MNP requested that agreement, but neither Eco-Industrial nor Symmetry ever provided a copy.

[56] While acting as the Interim Monitor, MNP directed multiple formal requests for information to Eco-Industrial and its related companies about assets, insurance policies, bank records, financial information, and property taxes. Few records were delivered to MNP. Eco-Industrial did not maintain externally prepared financial statements.

[57] Absolute Waste Management operated the disposal well operations on Eco-Industrial's lands. Absolute Waste Management had a management services arrangement with Symmetry and supplied MNP with an unexecuted copy of that agreement. At the hearing before me, the evidence did not identify any management services for the operation of Eco-Industrial's business outside the scope of the services already provided by Absolute Waste Management.

[58] MNP obtained some bank records for Eco-Industrial for the period April 2018 to April 2020. During that timeframe, Eco-Industrial paid approximately \$136,000 to Symmetry. The reasons for the payments were not identified.

[59] During 2020 and 2021, MNP sought financial and management information about Eco-Industrial's operations from David Gamage, Vice-President Finance for Symmetry. In three Interim Reports submitted to this Court, MNP opined that Eco-Industrial and Symmetry were substantially non-compliant with the requests. By October 2021, MNP characterized the disclosure as "incomplete and delinquent."

[60] Under the Receivership Order, Mr. White was required to provide MNP with any records (including contracts) related to the business or affairs of Eco-Industrial, including management services records in his possession or under his control as a director. On March 3, 2022, I granted a follow-up Order directing him to disclose that information. He represented to me that he had no such records, and none were delivered in response to the Court Order.

[61] By an Affidavit affirmed on November 11, 2022, Mr. Gamage responded to this application. He identified no specific management services supplied by Symmetry to Eco-Industrial before December 1, 2019 (when the Assignment Agreements were executed). His only evidence on this point was the bald statement that "[f]rom time to time since 2002, I have provided financial consulting and accounting services to businesses held for the benefit of [the Family Trust], including Symmetry and Eco-Industrial."

[62] Mr. Gamage was a trustee of the Family Trust over the years and occupied many roles in Mr. White's group of companies. Mr. Gamage did not depose that any of his "financial consulting and accounting" services were performed on behalf of Symmetry for the benefit of Eco-Industrial before December 1, 2019, or that they were supplied pursuant to a management services agreement between Symmetry and Eco-Industrial, or that Eco-Industrial was required to pay for them, or that Symmetry invoiced Eco-Industrial for those services and the invoices were unpaid as of December 1, 2019. He provided no details about the nature and value of the services he supplied to Eco-Industrial.

[63] Appended to Mr. Gamage's Affidavit are two Affidavits he affirmed in Romspen's litigation for the recovery of the loan proceeds. Those Affidavits assert that Mr. Gamage provided numerous business and financial records to MNP starting September 4, 2020, and that he is "not aware of any ongoing requests by [MNP] for existing records that I have not answered." He listed the records produced (but did not attach them). None of the listed records is a management services agreement. The Affidavits do not identify any records specifically addressing the supply of, or the invoicing or payment of fees for management services performed by Symmetry for Eco-Industrial.

[64] Mr. Gamage was cross-examined on his Affidavit in this proceeding. While he testified to acting as a "point of contact" between Eco-Industrial and MNP starting August 14, 2020, and maintaining that role until November 2021, he did not identify any specific management services performed for the benefit of Eco-Industrial during that time, nor did he testify that any work performed as a "point of contact" was a service within the scope of any management services agreement between Eco-Industrial and Symmetry.

[65] During cross-examination, Mr. Gamage was confronted with an exchange of emails in which MNP requested that he disclose monthly Symmetry reports showing amounts paid on

behalf of Eco-Industrial and invoices for any management fees charged to Eco-Industrial. Mr. Gamage represented to MNP that the information would follow. It did not. The suggestion in his Affidavit that he had fully responded to all information requests from MNP is clearly inaccurate.

[66] Some discrepancies exist between Mr. Gamage's description of the requests made of him by MNP and his responses, and the evidence of MNP on the same points. However, the differences are immaterial. Following the cross-examination of Mr. Gamage, the evidence is clear that requests for details about the management services were never answered, including requests for the invoices.

[67] Mr. White also provided an Affidavit in response to MNP's application. His evidence did not address any management services allegedly performed by Symmetry for the benefit of Eco-Industrial. He had that opportunity but did not supply any information.

[68] From the historical pattern of non-disclosure and the ongoing silence of Mr. Gamage and Mr. White, I infer that no such information exists.

[69] Accordingly, Symmetry offers no materially conflicting evidence. Mr. Gamage's bald and vague evidence about providing financial consulting and accounting services from time to time since 2002 does not establish the necessary agreement between Eco-Industrial and Symmetry, nor the provision of services under it, nor an obligation under which Eco-Industrial was required to pay for them. Moreover, his evidence does not state that the Assignment Agreements were intended by the parties to compensate Symmetry for any unpaid management services or the future delivery of any such services.

[70] Mr. Gamage's Affidavit refers to Mr. White telling him that the Assignment Agreements were intended to document "a reasonable exchange of value for services rendered", but he does not explain his own understanding of what services were contemplated, nor does he assert Mr. White informed him that general management services were captured by the Agreements.

[71] In summary, MNP conducted a diligent search for any records of an agreement under which Symmetry would supply management services to Eco-Industrial and Eco-Industrial would pay fees in return to Symmetry. MNP also diligently searched for records substantiating the performance of management services by Symmetry (rather than another company such as Absolute Waste Management), a history of payments, and outstanding payments as of December 1, 2019. I find the absence of such records to be inconsistent with common commercial practices and infer from their absence that management services were not performed or that no agreement was in place by which Symmetry would be compensated by Eco-Industrial (rather than one of Mr. White's other companies).

[72] The vague evidence about Symmetry providing some asset management for Eco-Industrial is unhelpful. The timing of those services is not identified. The evidence does not indicate that Eco-Industrial was required to pay for those services, rather than another company. No evidence is before me that those services, if provided, were still unpaid by December 1, 2019. The payments totalling \$136,000 might have extinguished any accounts receivable.

[73] Eco-Industrial management also made vague assertions about Symmetry being set up to manage the asset portfolios of Eco-Industrial and other related companies under an agreement, but no details were provided about the agreement or which company was required to pay.

[74] I find that Symmetry should be in possession of any management services agreement, proof of services performed, invoices, and records of past payments and accounts receivable. At

this stage, the records are exclusively within the knowledge and under the control of Symmetry and Mr. White, but no reason is offered for failing to provide that information in response to this application. I draw a negative inference against Symmetry for failing to provide that evidence.

[75] I conclude that Symmetry did not supply Eco-Industrial with general management services for which any compensation was owed by the bankrupt to Symmetry. No consideration is established on this basis.

b) Payment of legal expenses

[76] MNP has limited information about the quantum of legal fees Eco-Industrial incurred to prosecute the ADT Action or to negotiate the Standstill Agreement for the Dentons Claim.

[77] MNP conducted a search for records about the two legal claims, including invoices and proof of payment. No records were located of legal fees charged to or paid by Eco-Industrial for the ADT Action or the Dentons Claim. However, in November 2021, litigation counsel for Eco-Industrial confirmed that the accounts receivable owed to his firm for Eco-Industrial was \$88,292.24. The specific litigation services covered by those fees or when the services were provided was not disclosed.

[78] MNP reviewed Eco-Industrial's monthly bank records for March 1, 2018, through April 30, 2020. No payments of legal fees appeared to be debited directly from Eco-Industrial's bank account but on March 1, 2019, the sum of \$119,549.89 was withdrawn from the account with a note "to Symmetry asset management." That payment might have reimbursed Symmetry for any fees paid before December 1, 2019.

[79] During 2020 and 2021, MNP made repeated requests of Symmetry, including through Mr. Gamage, for monthly reports showing the amounts paid by Symmetry on behalf of Eco-Industrial, including for legal fees. Mr. Gamage replied in March 2021 that detailed monthly invoices would be delivered "within the next few days." They were not. In October 2021, Mr. Gamage emailed that the detailed information was "to follow", but it never did.

[80] Symmetry has produced no invoices, proof of payment, receipts, ledgers, or bank records showing that it paid legal expenses on behalf of Eco-Industrial at any time.

[81] The ADT Action was commenced in November 2013. According to the Procedure Report for that action, no steps have been taken in the litigation since November 22, 2019, except for an adverse party filing an Affidavit of Service.

[82] I conclude that MNP engaged in a diligent search for information about the legal fees allegedly incurred on behalf of Eco-Industrial by Symmetry. Repeated requests were directed at Symmetry. Court Orders were obtained to compel disclosure, including from Mr. White. Symmetry and Mr. White never produced the information. They offered no reasonable excuse for the failure to do so.

[83] In response to this application, Mr. Gamage had the opportunity to produce the reports or other details about the legal fees paid on behalf of Eco-Industrial but did not. During cross-examination on his Affidavit, he conceded that the monthly reports mentioned in the emails were never provided. He offered no excuse.

[84] Mr. Gamage deposed that the ADT Action "had been ongoing for some years and had cost a considerable amount in legal fees." He added that Symmetry "had been paying the legal bills for the ADT lawsuit."

[85] His evidence does not explain when the considerable legal fees were incurred, the specific amount paid (or even an estimate), or whether Eco-Industrial had reimbursed Symmetry in full by December 1, 2019. Notably, he did not depose that Symmetry was owed reimbursement from Eco-Industrial when the Assignment Agreements were executed.

[86] Mr. Gamage deposed to Mr. White telling him that the Assignment Agreements were intended to document a reasonable exchange of value for services rendered, but did not assert that Mr. White informed him the Agreements covered the payment of legal expenses incurred in the past.

[87] In short, Mr. Gamage's evidence is vague, superficial, and relays hearsay opinion that is inadequately explained. The imprecision in the evidence must be construed against Symmetry. The company failed to respond to MNP's inquiries, failed to disclose relevant information and records, and did not engage the specific concerns raised by MNP in this application. Additionally, Mr. Gamage's evidence can be interpreted consistently with MNP's contention that Symmetry was not owed reimbursement from Eco-Industrial for legal expenses as of December 1, 2019, and therefore was not assuming any liability for outstanding legal expenses. Consequently, Mr. Gamage's evidence does not create a controversy about material facts. A trial is not necessary.

[88] Mr. White deposed in his Affidavit that his "understanding and belief" is that before the Receivership Order was granted in November 2021, the costs of the ADT Action "were funded by Symmetry in its capacity as asset manager." He did not explain the basis for his understanding. He did not contend that he was involved in the daily operations of either Eco-Industrial or Symmetry, or that he reviewed any financial information about the payment of legal expenses. Before me, he previously represented that he neither possessed nor controlled any such documents.

[89] As with Mr. Gamage's evidence, Mr. White did not address when the legal costs were funded, the amounts paid, or deny MNP's suggestion that reimbursement was already made either through the payment of \$119,549.89 in March 2019 or otherwise. He did not depose that Eco-Industrial still owed money to Symmetry when the Assignment Agreements were executed. More pointedly, he did not even opine that the Assignment Agreements provided a reasonable exchange of value for services rendered and liabilities assumed, or the factual foundation for any opinion communicated to Mr. Gamage.

[90] Mr. White's bald and vague evidence does not establish a controversy on material facts requiring a trial.

[91] In summary, I find the absence of records showing that Symmetry paid legal expenses on behalf of Eco-Industrial before December 1, 2019 to be inconsistent with common commercial practices. Proof of payment would be expected in Eco-Industrial's business, accounting or banking records. I infer from the absence of the records that Symmetry either did not make payments for Eco-Industrial or was fully reimbursed as of December 1, 2019.

[92] Very little affirmative evidence from MNP is sufficient because the facts lie almost entirely within Symmetry's knowledge. Symmetry should have access to its own financial records showing any payments made for the benefit of Eco-Industrial. Symmetry controls the litigation and the solicitor's file so confirming information could also be obtained from the

litigation lawyers. Those records are exclusively within the control of Symmetry and Mr. White. No reason was offered for failing to provide that information in response to this application.

[93] From the historical pattern of non-disclosure and the ongoing silence from Mr. Gamage and Mr. White about any details concerning the legal expenses, I draw a negative inference against Symmetry: no legal expenses were owing and no reimbursement was outstanding from Eco-Industrial to Symmetry as of December 1, 2019.

[94] No consideration is established on this basis.

c) Assumption of other obligations relating to the legal claims

[95] The two Assignment Agreements are virtually identical, except that one applies to the ADT Action and the other captures the Dentons Claim. Each Agreement refers to the “Lawsuit”, which is the ADT Action under one Agreement and the Dentons Claim under the other. The Dentons Claim is only a potential claim covered by the Standstill Agreement – no action has been commenced.

[96] Clause 2 of each Assignment Agreement addresses the obligations and liabilities assumed by Symmetry:

Assumption

As of the signing of this Agreement, [Symmetry] hereby *assumes all the obligations of [Eco-Industrial] under the Lawsuit* (the “Assumed Obligations”) and covenants and agrees with [Eco-Industrial] that *from and including the signing date of this Agreement*, [Symmetry] will observe and perform all the Assumed Obligations and will indemnify [Eco-Industrial] for any claims, costs, damages, expenses, liabilities and generally any demands resulting from or arising out of the failure by [Symmetry] to observe and perform the Assumed Obligations. [*emphasis added*]

[97] MNP opines that the Assumed Obligations did not provide any consideration to Eco-Industrial because Symmetry did not undertake to do anything benefiting Eco-Industrial and did not assume any liabilities owed by Eco-Industrial.

i) Litigation remedies are not pursued for the benefit of Eco-Industrial

[98] Each Assignment Agreement transfers to Symmetry all of Eco-Industrial’s rights and interest in the Lawsuit together with “all proceeds” from it. Eco-Industrial therefore does not participate in any settlement proceeds or a monetary judgment.

[99] The Amended Statement of Claim for the ADT Action seeks some non-monetary remedies, including declarations, rescission of a rail line and right of way agreement to which Eco-Industrial is a party, and a permanent mandatory injunction enjoining ADT from preventing Eco-Industrial’s use of specific lands. However, nothing in the Assignment Agreement requires Symmetry to pursue any of those remedies. Consequently, no benefit to Eco-Industrial is contemplated.

[100] The Assignment Agreement for the Dentons Claim does not identify any non-monetary relief for Eco-Industrial. All the potential benefit flows to Symmetry alone.

ii) Assuming Eco-Industrial's obligations under the Lawsuit

[101] The Assumed Obligations under each Agreement are “the obligations of [Eco-Industrial] under the Lawsuit.” If Symmetry fails to “observe and perform” those obligations, it will indemnify Eco-Industrial. However, the Agreement does not explain what Eco-Industrial's obligations are under either legal claim. Symmetry is not required to prosecute either claim, nor to pursue any relief for Eco-Industrial.

[102] If Symmetry prosecutes either claim, it incurs legal expenses to advance its own interests but that does not create any value for Eco-Industrial.

[103] Prosecuting an action can expose the claimant to an award of costs against it if unsuccessful. Paying an adverse costs award is likely an obligation “under the Lawsuit”. However, that liability only accrued until December 1, 2019. After the transfer of the legal claim, any additional costs liability was incurred solely for the benefit of Symmetry.

[104] For the Denton's Claim, no action has been commenced so Eco-Industrial did not have any risk of liability for a costs award when the legal claim was transferred.

[105] For the ADT Action, the analysis is more complicated. The Procedure Report reveals several steps in that action for which Eco-Industrial might be at risk of a costs award if the Lawsuit is abandoned or unsuccessful. Those steps predate the transfer of the legal claim and therefore could give rise to an adverse costs award.

[106] MNP has not provided a specific estimate of the potential liability for an adverse costs award, but describes the financial obligation as “nominal.”

[107] In my view, the financial obligation is greater than nominal, but still modest.

[108] The costs liability can be assessed as a function of the risk of a costs award against Eco-Industrial and the reasonable quantum of the award. Estimating the financial risk is intrinsically imprecise and therefore dependent on approximation.

[109] A costs award against Eco-Industrial is highly unlikely if the claim is successful. As discussed later in these Reasons, the chances of success are substantial, so an adverse costs award is substantially avoidable.

[110] The magnitude of the reasonable quantum of the award can be estimated utilizing the steps identified in the Procedure Report (placed in evidence by Symmetry) and the corresponding party-and-party costs calculated under Schedule C of the *Alberta Rules of Court*. In arriving at an estimate, I have concluded that the amount of the claimed damages and the complexity of the litigation would reasonably invite enhanced costs. I have used double costs under Column 5 to estimate the award.

[111] The Procedure Report in the ADT Action reveals an exchange of pleadings, amendments to the pleadings, record production, five interlocutory applications (three with written briefs), and seven transcripts for Questioning of witnesses (suggesting up to one full day of Questioning for each). In December 2018, the Statement of Claim was amended to increase the damages sought from \$2.5 Million to \$100 Million.

[112] Calculated on the basis of double Column 5, the party-and-party costs are approximately \$100,000, excluding disbursements.

[113] In valuing the liability to pay costs incurred up to December 1, 2019, a discount could be applied to reflect the substantial chance that no costs would ever be awarded against Eco-Industrial. However, as will become plain, that measure of specificity is unnecessary here. I have used \$100,000 as the valuation for the consideration received. A trial to establish a more precise assessment is not required.

[114] Symmetry identifies no other Assumed Obligations under the Lawsuit that might establish consideration flowing to Eco-Industrial.

d) Conclusions about the consideration received by Eco-Industrial

[115] For the Denton's Claim, MNP has demonstrated that Eco-Industrial received no consideration of any kind through the Assignment Agreement. The absence of consideration offends s 96(1)(b)(ii)(A).

[116] As for the ADT Action, the evidence demonstrates that Symmetry likely assumed an obligation to pay an adverse award of costs against Eco-Industrial (contingent on those costs ultimately being awarded to ADT). Eco-Industrial was relieved of the costs liability accrued up to the transfer date of December 1, 2019. The magnitude of the potential costs award is ascertainable. A reasonable valuation of the consideration received by Eco-Industrial is approximately \$100,000.

[117] MNP must show that the value of that consideration was conspicuously less than the fair market value of the claim against ADT.

e) Fair market value of the legal claims

[118] The calculation of the property's fair market value is an exercise in judgment rather than the application of a mathematical formula: *Re Hofer*, 2019 ABQB 405 at para 31 [*Hofer*]. Based on the evidence before me, I must determine whether a fair market valuation of the legal claim is possible, rather than directing the determination to a trial. If so, I must then assess whether the consideration received falls conspicuously below that value.

[119] Weighing the adequacy of the consideration is also an exercise of judgment rather than precision. Nominal or grossly inadequate consideration is insufficient: *Montor Business Corporation v Goldfinger*, 2016 ONCA 406 at para 53. In *Racher* at para 116, Justice Eamon held: "There is no exact range, but the cases appear to suggest that 17% below fair market value is conspicuously less, while 6% might not be." See also: *Re Indarsingh*, 2015 ABQB 158 at para 15; *Hofer* at para 31.

[120] Determining the fair market value of a disputed legal claim is inherently challenging. No definitive methodology exists. Symmetry contends that the best method is a risk assessment based on the estimated chances of establishing liability and the likely range of reasonable outcomes for damages.

[121] During cross-examination on Affidavit, MNP explained that no detailed assessment about the likelihood of recovery was developed because the legal claims have not yet vested in the Trustee. Accordingly, MNP does not have access to the solicitor's file and the factual details underpinning the claims. Any risk assessment is dependent on information controlled by Symmetry and Mr. White.

[122] I conclude that MNP cannot reasonably be expected to provide a detailed risk assessment to value the legal claims. The limited access to information invites a less rigorous approach.

[123] For the ADT Action, Symmetry suggests the outcome of the lawsuit is highly uncertain. In particular, the company refers me to an interlocutory decision, early in the ADT Action, where Justice Veit refused to grant a mandatory interlocutory injunction because Eco-Industrial could not demonstrate that it would “probably win at trial”: *Eco-Industrial Business Park Inc v Alberta Diluent Terminal Ltd*, 2014 ABQB 302 at para 3. Justice Veit also refused to summarily dismiss the claim, implying that the liability argument was strong enough to create a genuine issue warranting a trial.

[124] Eco-Industrial’s position before Justice Veit was that the tripartite test for a mandatory injunction was met, including the requirement to show a strong *prima facie* case, meaning that the claim would probably succeed at trial. The company’s position before the Court offers some evidence about Eco-Industrial’s assessment of liability, presumably informed by the lawyers representing the company at the time. While Justice Veit was not convinced on the evidence before her that success was probable, I infer that Eco-Industrial’s own assessment was reasonably close to that threshold.

[125] In December 2018, Eco-Industrial prevailed in a contested chambers application to increase the damages claimed from \$2.5 Million to \$100 Million. Eco-Industrial necessarily provided sufficient evidence to justify the increase to the claimed amount. Again, Eco-Industrial was represented by legal counsel. From that application and the outcome, I infer that Eco-Industrial had legal advice valuing the quantum of the claim close to the \$100 Million figure.

[126] On this evidence, when the ADT Action was transferred on December 1, 2019, it had an almost 50% chance of succeeding, with the quantum being close to \$100 Million. The risk assessment analysis proposed by Symmetry would value the claim in the tens of millions of dollars (approaching \$50 Million).

[127] Symmetry had the opportunity to provide evidence about its own risk assessment of the ADT Action but did not. No explanation was given for failing to do so. I draw an adverse inference against Symmetry for failing to provide contrary evidence. I therefore find that the fair market value of the claim is close to \$50 Million.

[128] The only consideration given by Symmetry for the transfer of the ADT Action was the assumption of liability for an adverse costs award, which I have valued at approximately \$100,000. The consideration received by Eco-Industrial was conspicuously below the fair market value of the legal claim, offending s 96(1)(b)(ii)(A). No greater precision is required to reach that conclusion. No trial is necessary.

[129] For the Denton’s Claim, as no consideration was received, MNP does not have to prove the fair market value of the legal claim for comparative purposes. However, s 96(2) still refers to the trustee providing an opinion about the property’s fair market value.

[130] Where a transfer at undervalue is established because no consideration was given, the trustee’s opinion about the fair market value of the property simply assures the Court that the property has more than notional value, thereby warranting the Court’s intervention.

[131] Here, MNP opined about the Denton’s Claim having a face value equivalent to that of the ADT Action, with both liability and quantum being uncertain. The Trustee opined that the Dentons Claim has “substantial” value. Symmetry did not dispute that the Denton’s Claim has more than notional value.

[132] In these circumstances, I conclude that MNP's opinion about the Denton's Claim having substantial value is sufficient to meet any obligation under s 96.

Insolvency or an intention to defraud, defeat or delay a creditor

[133] MNP must demonstrate that Eco-Industrial was insolvent at the time of the transfers (December 1, 2019) or that Eco-Industrial intended to defraud, defeat or delay a creditor. If insolvency is established, MNP need not prove that Eco-Industrial intended to defraud, defeat or delay a creditor: *Hofer* at para 29; *Lee* at para 16. Further, MNP is not required to show that Symmetry intended to defraud, defeat or delay a creditor: *Hudson v Benallack*, [1976] 2 SCR 168 at 176, 1975 CanLII 158; *Pitblado LLP v Houde*, 2015 MBQB 85 at para 45.

a) Insolvency

[134] A company is insolvent when it: a) is unable to meet its obligations generally as they become due; b) ceases paying current obligations in the ordinary course of business as they generally become due; or c) has insufficient assets to pay its obligations. MNP opines that Eco-Industrial was insolvent on December 1, 2019, or rendered insolvent by the transfers because the company was unable to meet its obligations generally as they became due or alternatively, ceased paying current obligations in the ordinary course of business.

[135] By October 2019, Eco-Industrial was on notice that Romspen was seeking to enforce its security for a debt of approximately US\$87.9 Million. Romspen had issued a Notice of Intention to enforce the Romspen mortgage against Eco-Industrial in Canada and a Declaration of Default and Notice of Acceleration in the United States.

[136] By October 2019, Eco-Industrial's municipal property taxes in Edmonton were in arrears by \$383,387. The non-payment of property taxes was an act of default under the mortgage Eco-Industrial gave to Romspen. Eco-Industrial's management offered no explanation to MNP for failing to pay the municipal taxes.

[137] During 2020, Eco-Industrial's property tax arrears increased to \$1.385 Million. The pattern of non-payment and default suggests a continuing inability to pay beyond October 2019.

[138] Symmetry offers no explanation for the non-payment of property taxes, notwithstanding having some role in the management of Eco-Industrial's operations at the time. Similarly, neither Mr. White nor Mr. Gamage provided any explanation.

[139] No one suggests that Eco-Industrial had ample funds to meet its obligations but chose not to do so. No one suggests that Eco-Industrial was engaged in a genuine dispute with the municipality about the payment of property taxes.

[140] I find that by the end of October 2019, Eco-Industrial was unable to meet its obligations generally as they became due and had ceased paying current obligations in the ordinary course of business as they generally became due. That state of affairs remained unchanged by December 1, 2019. Consequently, Eco-Industrial was insolvent at the time of the transfers.

b) Intending to defraud, defeat or delay a creditor

[141] Mr. Gamage deposed that the Assignment Agreements were not fraudulent and were not intended to defraud. Similarly, Mr. White affirmed that he had no intention to divert assets from Eco-Industrial or to effect any fraud.

[142] As I have concluded that Eco-Industrial was insolvent at the time of the transfers, I need not determine whether Eco-Industrial or its principal intended to defraud, defeat or delay a creditor.

The discretion not to void the transfers

[143] The Court has a residual discretion to decline relief under s 96, as reflected by Parliament’s use of the word “may” in the opening line of the section. However, relief should be refused only in exceptional circumstances: *Lee* at para 16.

[144] Symmetry did not invite me to exercise my discretion to deny relief and the circumstances here are not exceptional. To the contrary, the remedial purpose of s 96 would be defeated if Eco-Industrial’s creditors were deprived of the value of the legal claims.

[145] Accordingly, I conclude that the transfers should be rendered void as against the Trustee in Bankruptcy.

Fraudulent preference or conveyance

[146] MNP seeks alternative relief under either the *Fraudulent Preferences Act* or the *Statute of Elizabeth*.

[147] Given that the transfers are rendered void by operation of s 96 of the *BIA*, I decline to make any determination about a fraudulent preference or conveyance.

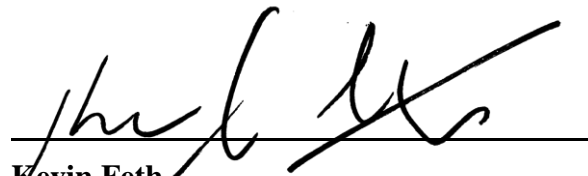
Conclusion

[148] The transfers of the ADT Action and the Dentons Claim from Eco-Industrial to Symmetry are declared void. If the parties require any related Order to address the transfer of the solicitor’s file to the Trustee in Bankruptcy, I retain jurisdiction to address that concern.

[149] MNP requested the opportunity to address costs, including enhanced costs arising from a successful objection to certain evidence tendered on behalf of Symmetry through a legal secretary. The parties may provide written submissions to me about costs within 30 days.

Heard on the 23rd day of June, 2023.

Dated at the City of Edmonton, Alberta this 18th day of July, 2023.



Kevin Feth
J.C.K.B.A.

Appearances:

Emily Paplawski
Osler, Hoskin & Harcourt LLP
for MNP Ltd (Trustee in Bankruptcy)

Timothy Froese
for Symmetry Asset Management Inc.