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Foiled by Fonts: How Expert Evidence on Fonts Demonstrated Trusts Were Shams

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The Ontario Superior Court of Justice recently reviewed the indicia of a sham trust in *McGoey (Re)*.[1]

Gerald McGoey, an undischarged bankrupt, and his wife, Kathryn McGoey, claimed to be holding two properties in trust for their children. The Trustee in Bankruptcy brought a motion to have the properties declared assets of the Estate of Gerald McGoey, subject to realization for the benefit of his creditors.

The Trustee in Bankruptcy was successful in proving that these alleged trusts were sham trusts, by applying the indicia of a sham trust, but also by demonstrating that the fonts used in the trust documents did not exist at the time the documents were allegedly entered into.

The case is an excellent review of the principles that point towards a trust's legitimacy; but also a good reminder to litigators that, when trying to undermine a document's legitimacy, they should examine the format of a document and not just its content.

The Facts

Gerald McGoey and his wife were married in 1994. After their marriage, in September 1994, they purchased a cottage in Muskoka ("**Ledge Lodge**") for $700,000. In May 2003, the McGoeys purchased a farm in Caledon ("**Humber Station**") for $635,000. Title to both Ledge Lodge and Humber Station was taken in both names as joint tenants.[2]

Gerald McGoey was an executive in the telecommunications industry from 1991 – 2010, holding a variety of senior executive positions. In May 2004, he became the CEO of Look Communications Inc ("**Look**"), where he was also vice-president of the Board of Directors.[3]

In 2008, Look began experiencing financial problems, and entered into a plan of arrangement, consisting of a court-supervised auction for the sale of its assets. It received one bid of substance for $80 million. The Board and Mr. McGoey decided to proceed with this offer, despite considering it a disappointing one. [4]

As part of the closing of this transaction, the Board of Look approved compensation awards to the directors and officers, totaling $20 million (Mr. McGoey received $5.6 million). The valuation of the compensation package was predicated on a share valuation of $0.40 per share.[5]

Look disclosed the compensation awards in December 2009 through a management circular. This led to subsequent litigation, as the market value of the shares at the time of the transaction had never come close to $0.40 per share. In 2011, Look commenced an action against Mr. McGoey and the other members of the board and senior management, alleging a breach of fiduciary duty. The action sought restitution of the entire compensation package.[6]

On June 1, 2017, Mr. McGoey was found liable to repay Look $5,565,969. On June 26, 2017, Mr. McGoey and his management company filed a notice of intention to make a proposal under the *Bankruptcy and Insolvency Act* ("**BIA**"). His creditors voted against acceptance of the proposal, and he was deemed to have made an assignment into bankruptcy on December 12, 2017.[7]

The McGoeys relied on two trust documents, one alleged to have been created in 1995 for Ledge Lodge (the "**Ledge Lodge Trust**") and one in 2004 for Humber Station (the "**Humber Station Trust**"), to argue that that these two properties were held in trust for their children.[8]

Sham Trusts

The Court held that the evidence "overwhelmingly supports the conclusion" that the Ledge Lodge Trust and the Humber Station Trust were shams.[9]

The Court explained that a sham is a transaction or instrument designed to give the appearance of creating legal rights or obligations that are different from what the party actually intended to create. In the context of a trust, a sham trust is usually created for a fraudulent, deceitful or illegal purpose, such as avoiding a creditor's claim. Whether a trust will be declared a sham will depend on the intention that existed at the time that the alleged trust was made. [10]

The validity of a trust must be assessed in light of all of the circumstances, taking into account the following red flags (or badges of fraud) that place upon the party asserting the trust an obligation to explain:

(a) listing a trust property for sale without disclosing the existence of the trust;

(b) failing to notify a bank or mortgagee as to the existence of the trust and its effect on title;

(c) operating in a manner which disregards the proper operation of the trust;

(d) treating the property as one's own and only invoking the alleged trust when convenient to do so;

(e) using a property to secure financing (particularly where the trust is not disclosed);

(f) the payment of all expenses for property by the settlor, while the alleged beneficiaries contribute nothing;

(g) retaining personal control of an asset for one's own use;

(h) encumbering an asset by using it as security for personal finances;

(i) not registering a trust agreement on title; and

(j) a general lack of documentation[11].

Here, the Court found the following red flags with respect to Ledge Lodge:

(a) McGoey's previous cottage (which he also claims to have held in trust for his children) was sold without mention of any trust;

(b) there was no registration of the purported trust on title;

(c) there was no reference to or disclosure of a trust with respect to any of the charges registered by the Bank of Montreal;

(d) and Mrs. McGoey had free reign to use the cottage as they wished, to the point of using it to secure financing which flowed into their personal accounts;

(e) there was no evidence of Mr. or Mrs. McGoey mentioning the existence of the trust to anybody (other than Mr. McGoey's son, Jordan) until many years after it was allegedly created;

(f) and Mrs. McGoey paid all operating expenses while Jordan and Linsey, the alleged beneficial owners, contributed nothing;

(g) the monies advanced by the Bank of Montreal secured by a mortgage on Ledge Lodge were co-mingled with Mr. and Mrs. McGoey's personal funds and the account into which all of Mr. McGoey's employment income previously flowed;

(h) the only document establishing the existence of the trust is a single page created by Mr. McGoey without any input from lawyers or accountants, even though he had regularly used legal and financial professionals, including for the creation of other trusts;

(i) the trust indenture is backdated and Justice Penny found that Mr. and Mrs. McGoey lied about the date of its creation, as expanded on below;

(j) Jordan (but not Linsey) was added to title to Ledge Lodge in 2012 (well after Mr. McGoey's emerging exposure in the Look litigation) but the land transfer tax statement for that transfer described Mr. and Mrs. McGoey as the beneficial owners, even though they had purportedly ceased to be beneficial owners over 17 years earlier;

(k) the only accounting or tax related document relating to the Ledge Lodge trust was prepared in 2017, long after Mr. McGoey's financial troubles had crystallized. That T3 document was, in any event, based on a false premise that Jordan had ceased actively using Ledge Lodge in 2000;

(l) there is a general dearth of documentation related to the purported trust. Mr. and Mrs. McGoey did not use their personal accountant or his firm to handle any documentation for this trust (until 2017), even though the firm handled all other financial matters for them; and

(m) by early 2010, Mr. McGoey knew he was in serious financial jeopardy and thus had the motive and incentive to attempt to put his assets beyond the reach of creditors.[12]

Justice Penny found that the same red flags applied to Humber Station, with two additional red flags. Firstly, Mrs. McGoey gave evidence that Humber Station was acquired with the intention of holding it in trust for her children, when the documents stated it was to be in trust for both their children[13], and this discrepancy was never explained. Secondly, Mrs. McGoey admitted that one of the reasons for the trust was to protect the assets from potential creditors.[14]

Fonts Used Show Documents Were Back-Dated

In a novel approach, the Trustee in Bankruptcy successfully demonstrated that the Ledge Lodge Trust and Humber Station Trust documents were shams, by putting forward expert evidence to prove that the fonts used in the documents were not in widespread use at the time they were allegedly executed.

The Ledge Lodge Trust documents were written in the font Cambria. The Humber Station Trust documents were written in the font Calibri. Both Cambria and Calibri will be familiar to any Microsoft Word user.

However, Cambria was not designed until 2002 and did not reach the general public until January 2007, when Microsoft released Windows Vista and Office 2007. It was therefore impossible for the Ledge Lodge Trust document to have been executed on January 4, 1995, because the font it was written in had yet to be designed.

Similarly, Calibri, the font used in the Humber Station Trust, was developed in 2002 but not released to the public until 2007. Accordingly, the only person who could have had access to the Calibri font at the time of the Humber Station Trust's alleged execution on March 4, 2004, was a Microsoft employee, contract designer or consultant. Even if that had been the case, the Trustee's expert further testified that the numbers used in the Humber Station Trust were Calibri's "tabular lining" numbers, which did not become the default Calibri numbering system until after November 2005.

The expert used by the Trustee in Bankruptcy, Thomas W. Phinney, has a Master of Science in graphic arts from Rochester Institute of Technology School of Printing, specializing in design and typography. He has over 20 years of experience in the font industry, including a decade at Adobe Systems Inc., and has personally been granted four patents relating to the design or utility of fonts. He has previously been retained as an expert in fonts, particularly in font identification cases involving allegedly forged documents. He has also given expert testimony on issues relating to font identification in the UK, Australia, and five states of the United States.

The McGoeys did not put forth a competing expert, and were unable to explain the discrepancy between the expert evidence and alleged dates of execution.

The Court ultimately found that the evidence overwhelmingly supported the conclusion that the alleged trusts were shams, and found that the expert evidence on fonts was the centerpiece of this conclusion.[15]

The Trustee's approach in *McGoey* is a good reminder to question the face of a document as well as its contents. While the Court held that the expert evidence was not the sole determining factor in arriving at its conclusion that the trusts were shams, the expert evidence was considered central to the conclusion, and reinforced the other indicia of fraud present in this case.

[1] 2019 ONSC 80.

[2] *Ibid* at paras 4 – 6.

[3] *Ibid* at para 7.

[4] *Ibid* at para 8.

[5] *Ibid* at para 9.

[6] *Ibid* at paras 9 – 11.

[7] *Ibid* at paras 13- 14.

[8] *Ibid* at paras 15 – 17.

[9] *Ibid* at para 23.

[10] *Ibid* at paras 19 – 20.

[11] *Ibid* at para 22; citing *Re Forsyth* 2010 BCSC 1720, and *Bayerische Landesbank Girozentrale v Sieber Estate (Trustee Of)*, 2015 ONSC 27.

[12] *Ibid* at para 41.

[13] Mr. and Mrs. McGoey each had children from a prior marriage.

[14] *McGoey (Re)*, *supra* note 1 at paras 42-43.

[15] Paras 23-24.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

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