

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTRÉAL

N°: 500-11-039188-103

DATE : **JANUARY 12, 2012**

PRESENT: THE HONOURABLE MR. JUSTICE CLÉMENT GASCON, J.S.C.

DOVER FINANCIAL CORP.
Bankrupt

and

RSM RICHTER INC.
Trustee/Petitioner

v.

UGOSAC IMPORT LTD.
Respondent

**REASONS FOR JUDGMENT RENDERED ORALLY
ON PETITION TO RECOVER PAYMENTS FRAUDULENTLY AND ILLEGALLY
MADE PURSUANT TO A FRAUDULENT PONZI SCHEME, PAYMENTS MADE
WITHOUT CONSIDERATION AND UNDERVALUE (#40)**

- [1] I am of the view that this is a case where Section 96 *BIA*¹ clearly applies.
- [2] The two transfers at issue² were made by the Debtor, Dover Financial Corp., to a related person, Ugosac Import Ltd. ("Ugosac"), within one year prior to its bankruptcy, for no consideration whatsoever.
- [3] As such, they cannot be set up against the Trustee. Ugosac must thus repay the amounts received to the Estate, with interest and costs.

¹ *Bankruptcy and Insolvency Act (BIA)*, R.S.C. 1985, c. B-3.

² Exhibit P-12.

[4] In my opinion, here is why.

[5] The Debtor was petitioned in bankruptcy on June 23, 2010, and afterwards declared bankrupt on July 12, 2010.

[6] In short, the Debtor never carried any legitimate or effective business. It was a Turks & Caicos corporation, controlled by one person, a certain Perry Newman³. Even if its original business intent and purpose was to operate in currencies analysis and currencies trading, it never did, in essence, since at least 1995.

[7] Rather, the Debtor was used by Newman to defraud numerous investors through a Ponzi scheme type of operation, pursuant to which the investors' money was deposited in the Debtor's US bank account⁴, and then used, or transferred to the Debtor's Canadian bank account⁵ to be used, to cover the personal expenses and life style of Newman and his immediate family.

[8] In total, based on Newman's examination⁶ under Section 163 *BIA*, some 8.5 million dollars was so defrauded from investors, with some 3.2 million dollars repaid as fictitious returns to a few of them, and the balance fraudulently used by Newman over some 15 years.

[9] Newman has pleaded guilty to criminal charges of fraud and is now serving a five-year jail term in that regard⁷.

[10] As the Trustee explained, the Debtor has been in reality insolvent since its inception, as it never did any real investment on behalf of those who entrusted it with their money. Its whole operation was a sham; no books and records were kept, no financial statements were ever prepared, and no employees besides Newman ever worked for it.

[11] It went bankrupt when the Ponzi scheme was uncovered, albeit too late for most of its investors.

[12] The transfers at issue⁸ took place in August 2009 and January 2010. They constituted in transfers of money by way of two cheques issued from the Debtor's US bank account to the order of Ugosac Import Ltd. They amounted respectively to \$20,892US and \$21,879US, namely \$43,387CDN in total as of today's date⁹.

³ Exhibit P-2.

⁴ Exhibit P-6.

⁵ Exhibits P-7 and P-7A.

⁶ Examination of October 27, 2010, at pages 120 and 122.

⁷ Exhibit P-15.

⁸ Exhibit P-12.

⁹ Exhibit P-16

[13] Ugosac and the Debtor never did any business together beside these two transfers. The Trustee explained that the Debtor received no consideration whatsoever for the two transfers. No evidence indicates that any indeed existed.

[14] Ugosac is a company controlled by Lou Stern Sales Inc.¹⁰, who is in turn controlled by Lou Stern¹¹. Lou Stern is the father of Newman's wife, and therefore, the father-in-law of Newman.

[15] According to the explanations given at trial by Morton Stern, the son of Lou Stern and the Vice-President of Ugosac, and the brother-in-law of Newman as well, the reasons for the transfers were the following.

[16] On two separate occasions, Newman asked his brother-in-law to advance to him personally the funds necessary to pay the university tuition fees of his son, Charles Newman, at Yeshiva University in New York. Ugosac, the company, did it on behalf of Morton Stern, by way of two separate wire transfers made directly to the university¹².

[17] In each case, about one to two weeks later, the Debtor repaid to Ugosac the amount wired, plus the wire transfer fees and some interest. Even though Morton Stern tried to explain at trial the rationale for the interest charges, he was not able to do so in a credible manner. He offered three different versions that were, in each case, contradictory to each other and that did not support the figures of the cheques received in any of the scenarios offered.

[18] Morton Stern explained that even though he realized that Ugosac had advanced the tuition fees for the personal benefit of Newman or his child, he did not ask any questions when Ugosac received the payment transfers at issue from the Debtor corporation instead of Newman. Ugosac simply cashed the cheques that ended up using the amounts received by the Debtor from its investors and deposited in its US bank account¹³.

[19] In the Court's opinion, the transfers at issue are covered by Section 96 of the *BIA* for the following reasons:

1. They constitute a transfer (in French, an "*opération*"). The expression used in Section 96, namely, "transfer at undervalue" (or in French, "*opération sous-évaluée*"), is defined in the *BIA* as a "disposition of property" (or in French, a "*disposition de bien*"). Still according to the definitions found in the *BIA*, "property" (or in French, "*bien*") includes money. The operations at issue

¹⁰ Exhibit P-11.

¹¹ Exhibit P-11A.

¹² Exhibits D-1 and D-2.

¹³ Exhibit P-6.

definitely involved a transfer of money, or a disposition of money, that was in the Debtor's patrimony, namely, in its US bank account¹⁴.

2. The transfer was made at undervalue in that the Debtor received no consideration for what it gave, namely its money. The consideration, if any, was indeed rather received by others, that is, Newman or his son, or at best, Yeshiva University.
3. The transfer was made to a related person. Ugosac was ultimately controlled by Lou Stern. The Debtor was controlled by Newman. Lou Stern and Newman were related persons connected by marriage according to the definitions of Sections 4(2)(a) and 4(3)(f) of the *BIA*. At all relevant times, Newman was married to the daughter of Lou Stern. Therefore, Ugosac and the Debtor were related entities by application of Sections 4(2)(c)(ii) and 4(2)(c)(iii) of the *BIA*.
4. The presumption that, because of that, Ugosac and the Debtor were not dealing at arm's length was not rebutted by any evidence to the contrary. As stated in *PricewaterhouseCoopers v. Legge*¹⁵, to rebut such presumption, Ugosac should have established that a proper consideration was given for the transaction in the normal course of business. It did not.

To that end, suffice to say in addition that, even though the evidence showed that Ugosac and the Debtor had no business relationship, they had their respective offices next door to each other. As well, it is apparently a receptionist of Ugosac who regularly prepared, albeit unknowingly, the key documents that were forged and that allowed Newman and the Debtor to perpetrate their fraud over the years.

5. When the transfers took place, the Debtor was clearly insolvent, as explained by the Trustee in his testimony. His assertion in this regard is, in fact, supported by the case law. As stated in *Titan Investments Ltd. Partnership, Re*¹⁶, in a situation where a Ponzi scheme exists, the entity involved is insolvent from the moment the first investment contract is entered into, namely, from its inception. This certainly applies here.
6. Finally, the evidence shows that, in the end, the Debtor used the transfers to defraud its creditors, as it took their money deposited in its US bank account to make the two payments to Ugosac.

[20] None of the arguments raised by Ugosac to contest the Trustee's Motion have any merit.

¹⁴ Exhibit P-6.

¹⁵ 2011 CarswellNB 498, 2011 NBQB 255, at para. 15.

¹⁶ (2005), 14 C.B.R. (5th) 112, at para. 16 (Alta Q.B.)

[21] Ugosac first alleged that it was not a related person, in clear contradiction of the wording of Sections 4(3)(f) and 4(2)(a) of the *BIA*.

[22] It then pretended, without any authority in support, that the transfers at issue were not transfers covered by Section 96 *BIA* because they merely involved a payment of money. With respect, this is simply wrong from a simple reading of the Section.

[23] Ugosac finally argued that its liability should be limited to one transfer as, in essence, the same amount of money was in fact transferred twice. This assertion is again incorrect in fact. The Debtor's patrimony ended up being reduced by the total amount of the two transfers.

[24] Even if one was to assume, as the evidence seems to indicate, that in all probability, Ugosac may well have been in good faith, this does not change the end result. As stated in the case law¹⁷ "(...) *even if we assume that the personal respondent was innocent of any fraud, she still must sustain the loss rather than the other innocent party (i.e., the creditors of the bankrupt represented by the trustee) because she enabled her related defrauders to occasion the loss*".

[25] In this case, Ugosac and Morton Stern seemingly assumed, and wrongly so, that Newman and the Debtor were one and the same person. They were wrong, as it was not the case. They could and should have asked questions. They did not. They, and certainly not the Debtor's Estate and its creditors, have to suffer the resulting loss.

[26] As the well-known doctrine of Houlden, Morawetz & Sarra¹⁸ says "(...) *if the preference (the transfer at undervalue under Section 96) was made to a non-arm's-length creditor (or person) within one year, no intention test is required; rather, it is an effects-based test. (...)*".

[27] Accordingly, the Trustee's Motion is well founded on all grounds. It is thus entitled to the conclusions sought, plus interest and costs.

[28] Section 197(2) of the *BIA* indicates that in awarding costs, the Court may direct that they be paid as between solicitor and client. This is a case where, given the circumstances, costs should be awarded to the Trustee on that basis.

FOR THESE REASONS GIVEN VERBALLY AND REGISTERED, THE COURT:

[29] **DECLARES** that the transfers (Exhibit P-12) were made at undervalue and constitute a preference that cannot be set up against the Trustee, and are accordingly void;

¹⁷ *Claubert Products Corp., Re*, (1983), 51 C.B.R. (N.S.) 38, at para. 18 (Que.S.C.).

¹⁸ Lloyd W. HOULDEN, Geoffrey B. MORAWETZ & Janis P. SARRA, *The 2012 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell, 2011), at page 524, F\$201 (1).

[30] **CONDEMNS** the Respondent Ugosac Import Ltd. to pay to the Trustee/Petitioner the sum of \$43,387CDN, together with legal interest and the additional indemnity from the date of service of the Petitioner's Motion;

[31] **WITH COSTS** as between solicitor and client in application of Section 197(2) *BIA*.



CLÉMENT GASCON, J.S.C. *J.S.C.*

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