



NO. 3169/84
PRINCE GEORGE REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:)

NORTHLAND BANK)

PLAINTIFF)

AND:)

WALTER SMETANIUK and)
ELIZABETH VIDA SMETANIUK)

DEFENDANTS)

REASONS FOR JUDGMENT

OF THE HONOURABLE

MR. JUSTICE CALLAGHAN

D. Byl

counsel for the plaintiff

C. R. MacLean

counsel for the defendants

Dates and place of Hearing:

December 9 and 10, 1985,
Prince George, B. C.

The defendants, Walter Smetaniuk and Elizabeth Smetaniuk, were the registered owners in joint tenancy of a residence located at Fort St. John, British Columbia. The male defendant transferred his interest to his wife on June 15, 1982. The plaintiff, a creditor of the male defendant, seeks to set aside the transfer under the Fraudulent Preference Act, R.S.B.C. 1979, c. 143, or under the Fraudulent Conveyance Act, R.S.B.C. 1979, c. 142.

The defendants have been married 26 years. They owned at least two family homes as joint tenants prior to the construction

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3 of the residence which is the subject of this lawsuit. In August
4 1980, as joint tenants, they purchased a lot and immediately there-
5 after commenced construction of a dwelling house. Approximately
6 \$65,000.00 from the sale of their former residence which they had held
7 as joint tenants was used to pay part of the cost of the new residence.
8 The parties moved into their new home in June 1981.
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10 I turn first of all to the recessionary effects on the
11 male defendant's businesses and his fortunes generally. Although the
12 evidence was not absolutely clear, it was apparent that the male
13 defendant had at least a controlling interest in Bet-Wall Industries
14 Corp. whose principal business was the retailing of building supplies.
15 In 1981 the business started to decline. In 1980 its sales totalled
16 \$230,332.00. In 1981 its sales were \$161,908.00 and in 1982 sales had
17 plummeted to \$33,395.00. By the end of its fiscal year, April 30,
18 1982, Bet-Wall Industries Corp. had an operating loss of \$11,721.00.
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20 The male defendant also owned two apartment blocks,
21 Wesnor I and Wesnor II. They were completed in 1979 by a partnership
22 comprising the male defendant and one Jerry Doell. In the fall of
23 1981, Doell transferred his interest in the blocks to the male defen-
24 dant in consideration of the defendant assuming the mortgage obligations.
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26 The vacancy rates which were already high continued to
27 increase due to the recession and consequently the cash flow continued
28 to diminish. As the income level dropped so did the value of the
29 blocks. As of December 1980, Wesnor I and Wesnor II had a market value
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3 of approximately \$480,000.00 and \$720,000.00 respectively. By June
4 1982 the value of Wesnor I and Wesnor II, based on the income approach,
5 had dropped to approximately \$146,000.00 and \$266,000.00 respectively.
6 At that time the vacancy rate was in excess of 43%.

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8 Because the apartments did not generate sufficient
9 cash flow to meet the usual expenses including mortgage payments,
10 the defendant Walter Smetaniuk found it necessary to use his savings
11 at the rate of \$6,000 a month to meet those obligations. This continued
12 through until March of 1983 when his savings were virtually exhausted.

13
14 In September 1983, Cooperative Trust Company of Canada,
15 the first mortgagee, commenced foreclosure proceedings and in October
16 1983, the plaintiff commenced action against the male defendant for
17 failure to repay upon demand a \$171,000.00 loan he had taken out in
18 November 1980. The plaintiff obtained judgment by default on the
19 12th day of November, 1984, in the sum of \$181,766.73.

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21 Immediately following the transfer of his half interest
22 in his personal residence to his wife for \$1.00, Walter Smetaniuk's
23 liabilities exceeded his assets by \$24,906.00. Accordingly, he was in
24 insolvent circumstances and his insolvency, because of a negative cash
25 flow from the apartments, increased by \$6,000 per month.

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27 Under s. 3 of the Fraudulent Preference Act the plaintiff
28 bank must prove first the transfer of property, secondly that at the
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3 time of the transfer the husband was in insolvent circumstances, or
4 was unable to pay his debts in full, or that he knew that he was on
5 the eve of insolvency and finally, that the husband made the transfer
6 or disposition with intent to defeat, hinder, delay or prejudice his
7 creditors. However, s. 3 of the Act does not apply to property
8 transfers where:

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10 "...the property disposed of bears a fair and reasonable
11 relative value to the consideration, to a sale in good faith,
12 to a payment made in the ordinary course of business to
13 innocent persons, to a payment to a creditor, or to a dis-
14 position in good faith of property of any kind made

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- 16 (a) in consideration of a present actual payment in good
17 faith in money;
 - 18 (b) by way of security for a present actual advance of money
19 in good faith; or
 - 20 (c) in consideration of a present actual disposition in good
21 faith of any property." (see s. 6)

22 Under s. 1 of the Fraudulent Conveyance Act the plain-
23 tiff need only prove that there was a transfer of property by way of
24 gift from the husband to the wife and that the husband, in making the
25 gift did so with intent to delay, hinder or defraud creditors.
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27 The husband disputed that he was in insolvent circum-
28 stances and could not pay his debts in full. He further said that the
29 transfer was made to fulfil a promise he made to his wife prior to
30 commencing construction. He said it was not transferred with intent to
delay, hinder or to defraud his creditors.

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3 However, the evidence is clear the husband was in
4 perilous financial straits in June 1982. His retail business was
5 operating at a loss. The apartments were not generating sufficient
6 income to meet his mortgage commitments and his savings were being
7 rapidly depleted. Fort St. John was then in the depths of a serious
8 recession. Employment was down, business was slow and there was
9 little likelihood of a quick turn around.

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11 The husband said his wife was the beneficial owner and
12 that the property was initially registered jointly for the sake of
13 convenience only. He said he did so as it would be easier for him to
14 obtain financing and acquire building materials with his name on
15 title. But that explanation has a hollow ring. If so, why wasn't
16 the property transferred to the wife a year earlier, that is, upon
17 substantial completion. Why did the parties wait a full year and
18 transfer only when he was on the eve of insolvency. However, what is
19 even more telling was his conduct with the bank. He continued to
20 show the residence as a personal asset on statements of net worth
21 prepared for financial institutions both prior and subsequent to
22 the conveyance to his wife. His statement of net worth as of September
23 30, 1981, showed the residence at \$300,000.00. His personal statement
24 of net worth dated November 25, 1982, five months after the conveyance
25 indicated the residence had a value of \$255,000.00 and the personal
26 financial statement he gave to the plaintiff on January 14, 1983,
27 included his residence free and clear of encumbrances at \$255,000.00.
28 Why claim the residence as his if it was not unless he was attempting to
29 allay the fears of the bank and thus delay it in taking action to secure or
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3 collect the loan. No explanation for his conduct was tendered by
4 the husband.
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6 I also find it difficult to believe that a couple
7 with a stable 26-year marriage, having always held their residence
8 in joint tenancy, would suddenly decide the matrimonial residence
9 should be the sole property of the wife. The explanation given by
10 the husband is wholly inadequate and in a sense no explanation at all
11 particularly when the family home was not transferred to the wife
12 until a year after substantial completion and at a time when the
13 husband was in financial difficulty. The circumstances are such
14 that one is drawn inexorably to the conclusion that the purpose of
15 the gift was to protect the defendants' home property from the husband's
16 creditors.
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18 In Koop v. Smith (1915), 25 D.L.R. 355, an action was
19 brought to set aside a bill of sale executed in favour of the defen-
20 dant by her brother at a time when the latter was financially
21 embarrassed. Davies, J. at p. 356 had this to say:

2 " I think the rule laid down by the Courts of
3 Ontario with regard to assignments made between near
4 relations and impeached by the creditors of the assignor
5 as fraudulent is a salutary one, namely, that where it
6 is accessible some corroborative evidence of the bona
7 fides of the transaction should be given. No attempt
8 was made by the defendant to act upon that rule in this
9 case. Smith's evidence was not accepted and the trial
10 Judge pointed out many alleged facts which were accessible
11 and could have been proved, if true, as corroborative
12 evidence but were not. Under all the circumstances I
13 think the trial Judge was right and that the appeal should
14 be allowed with costs and his judgment restored."

At p. 358 Duff, J. said:

" In other words, I think the weight of the fact of relationship and the question of necessity of corroboration are primarily questions for the discretion of the trial Judge subject, of course, to review; and that any trial Judge will in such cases have regard to the course of common experience as indicated by the pronouncements and practice of very able and experienced judges such as Armour, C.J., and Mowat, V.C., and will depart from the practice only in very exceptional circumstances."

In the result I have concluded that the transfer of land is void and must be set aside. It is void not only under the Fraudulent Preference Act but is void as well under the Fraudulent Conveyance Act. The plaintiff is entitled to a declaration that the defendant, Walter Smetaniuk, is a joint owner of the land and premises, the subject of this law suit. It is also entitled to an order that the property be sold. One-half of the proceeds received shall be applied against the plaintiff's outstanding judgment. The plaintiff is also entitled to its costs.



Vancouver, B. C.

January 6, 1986.