**COURT OF APPEAL**

ON APPEAL FROM the order of the Honourable Justice Winteringham of the Supreme Court of British Columbia pronounced on the December 1, 2023

BETWEEN:

**JM FOOD SERVICES LTD., FRESHSLICE HOLDINGS LTD. RFSP EQUIPMENT & OPERATING INC. A&M ENTERPRISE LTD., 1015214 B.C. LTD., RF FRANCHISING INC., and THE TRUSTEES OF THE FRESHSLICE FAMILY TRUST**

**APPELLANTS**
Defendants

AND:

**TARIQ WAHEED and 0923063 B.C. LTD.**

**RESPONDENTS**
Plaintiffs

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# APPEAL RECORD

**JM Food Services Ltd., Freshslice Holdings Ltd., RFSP Equipment & Operating Inc., A&M Enterprise Ltd., 1015214 BC Ltd., RF Franchising Inc., and The Trustees of the Freshslice Family Trust**

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JM Food Services Ltd., Freshslice Holdings Ltd., RFSP Equipment & Operating Inc., A&M Enterprise Ltd., 1015214 BC Ltd., RF Franchising Inc., and The Trustees of the Freshslice Family Trust

Attention: Vincent Li

Tariq Waheed and 0923063 BC Ltd.

Attention: David Grunder

1610 Ingleton Avenue
Burnaby, British Columbia
V5C 5R9

Telephone: 604.251.7444
E-mail: vincent@freshslice.com

Counsel for the Appellants

1436 – 3 Sutherland Avenue
North Vancouver, British Columbia
V7L 4B3

E-mail: david@dwglawcorp.com

Counsel for the Respondents

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Court File No. VLC-S-S-2011355

VANCOUVER REGISTRY

# IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

TARIQ WAHEED and 0923063 B.C. LTD.

PLAINTIFFS

AND:

JM FOOD SERVICES LTD., FRESHSLICE HOLDINGS LTD., RFSP EQUIPMENT & OPERATING INC., A&M ENTERPRISE LTD., 1015214 B.C. LTD., and THE TRUSTEES OF THE FRESHSLICE FAMILY TRUST

DEFENDANTS

## NOTICE OF CIVIL CLAIM

**This action has been started by the plaintiff for the relief set out in Part 2 below.**

If you intend to respond to this action, you or your lawyer must

(a) file a response to civil claim in Form 2 in the above-named registry of this court within the time for response to civil claim described below, and
(b) serve a copy of the filed response to civil claim on the plaintiff.

If you intend to make a counterclaim, you or your lawyer must

(a) file a response to civil claim in Form 2 and a counterclaim in Form 3 in the above-named registry of this court within the time for response to civil claim described below, and
(b) serve a copy of the filed response to civil claim and counterclaim on the plaintiff and on any new parties named in the counterclaim.

JUDGMENT MAY BE PRONOUNCED AGAINST YOU IF YOU FAIL to file the response to civil claim within the time for response to civil claim described below.

### Time for response to civil claim

A response to civil claim must be filed and served on the plaintiff,

(a) if you were served with the notice of civil claim anywhere in Canada, within 21 days after that service,
(b) if you were served with the notice of civil claim anywhere in the United States of America, within 35 days after that service,
(c) if you were served with the notice of civil claim anywhere else, within 49 days after that service, or
(d) if the time for response to civil claim has been set by order of the court, within that time.

**Claim of the Plaintiffs**

**Part 1: STATEMENT OF FACTS**

1. The Plaintiff, Tariq Waheed, is a businessman with an address for service of: 2 – 1879 Barclay Street, Vancouver, British Columbia.

2. The Plaintiff, 0923063 B.C. Ltd., is a corporation incorporated under the laws of British Columbia with a registered address, and address for delivery at 32815 George Ferguson Way, Abbotsford, British Columbia.

3. The Defendant, JM Food Services Ltd., is a corporation incorporated under the laws of British Columbia with a registered address and address for delivery at 1610 Ingleton Avenue, Burnaby, British Columbia.

4. The Defendant, Freshslice Holdings Ltd., is a corporation incorporated under the laws of British Columbia with a registered address and address for delivery at 1610 Ingleton Avenue, Burnaby, British Columbia.

5. The Defendant, RFSP Equipment & Operating Inc. ("RFSP"), is a corporation incorporated under the laws of British Columbia with a registered address and address for delivery at 1610 Ingleton Avenue, Burnaby, British Columbia.

6. The Defendant, A&M Enterprise Ltd., is a corporation incorporated under the laws of British Columbia with a registered address and address for delivery at 1610 Ingleton Avenue, 2nd Floor, Burnaby, British Columbia.

7. The Defendant, 1015214 B.C. Ltd., is a corporation incorporated under the laws of British Columbia with a registered address and address for delivery at 2 - 1610 Ingleton Avenue, Burnaby, British Columbia.

8. The Defendant, The Trustees of the Freshlice Family Trust are the trustees of a trust created pursuant to the laws of the Province of British Columbia whose address for delivery is 2602 – 1277 Melville Street, Vancouver, British Columbia.

9. On April 11, 2019, reasons for judgment of Mr. Justice Macintosh in favour of the plaintiffs were released. On November 18, 2019 by the Order of Mr. Justice Macinstosh of the British Columbia Supreme Court, in Court File No. S153190, Vancouver Registry, otherwise styled as 0923063 B.C. Ltd. and Tariq Waheed, Plaintiffs, and JM Food Services Ltd., Freshslice Properties Ltd., and RFSP Equipment & Operating Inc., Defendants, and 0923063 B.C. Ltd., Defendant by Counterclaim, the court clarified that the Plaintiffs obtained judgment against JM Food Services Ltd. (the "Judgment").

10. On October 22, 2020, the Plaintiffs were issued certificates of costs as against JM Food Services Ltd. in the amount of $197,168.69; and against JM Food Services Ltd. and Ray Russell, jointly and severally, in the amount of $7,402.00.

11. On some date after June 21, 2013, but before the date of the Judgment, the Defendant, JM Food Services Ltd. transferred some or all of its assets ("Property") to one or more of the remaining Defendants ("Transferees") with only nominal consideration or without adequate consideration, with the intent to delay, hinder or defraud the Plaintiffs of the just and lawful remedies of the Plaintiffs.

12. Prior to the Transfer, the Defendant, JM Food Services Ltd., owned the Property.

13. Since the date of the Transfer and continuing to the present, some or all of the remaining Defendants have held the Property and have received the benefit of the Property.

14. At the time of the Transfer of the Property, the Defendant, JM Food Services Ltd., was in insolvent circumstances or was on the eve of insolvency.

**15.** The Transfer was made with the intention of creating a preference in favour of the remaining Defendants.

## Part 2: RELIEF SOUGHT

1. A Declaration that the Transfer of the Property was a fraudulent conveyance within the meaning of the *Fraudulent Conveyance Act*, R.S.B.C. 1996, c. 163 and is of no force and effect insofar as it affects the rights of the Plaintiffs as Judgment Creditors of the Defendant, JM Food Services Ltd.

2. A Declaration that the Transfer of the Property was a fraudulent preference within the meaning of the *Fraudulent Preference Act*, R.S.B.C. 1996 c. 164 and is of no force and effect insofar as it affects the rights of the Plaintiffs as Judgment Creditors of the Defendant, JM Food Services Ltd.

3. An Order that the Plaintiffs are entitled to pursue their just and lawful remedies as Judgment Creditors against the Defendant, JM Food Services Ltd., as if it were still the legal and beneficial owner of the Property to the same extent as they were before the Transfer of the Property.

4. An Injunction restraining the Defendants, Freshslice Holdings Ltd., RFSP Equipment & Operating Inc., A&M Enterprise Ltd., 1015214 B.C. Ltd., and The Trustees of the Freshslice Family Trust, from disposing of, encumbering or in any way dealing with any part of the rights, title or interest of the Plaintiffs in the Property.

5. A Declaration that the Defendants hold the Property in trust for the Plaintiffs.

6. Judgment against each Defendant for the value of the Property that was fraudulently conveyed to it by JM Food Services Ltd.

7. Court order interest.

8. The Plaintiffs claim costs, including reasonable legal fees.

9. Such further relief as this Court seems just.

**Part 3: LEGAL BASIS**

1. The Transfer of the Property constitutes a fraudulent conveyance as its effect is to delay, hinder and defraud the Plaintiffs of their just and lawful remedies for the enforcement of the Judgment contrary to the *Fraudulent Conveyance Act*, R.S.B. C. 1996, c. 163.

2. If the Court finds that the Defendants, Freshslice Holdings Ltd., RFSP Equipment & Operating Inc., A&M Enterprise Ltd., 1015214 B.C. Ltd., and The Trustees of the Freshslice Family Trust, or any one of them, was a creditor of the Defendant, JM Food Services Ltd. at a material time, the Transfer of the Property constitutes a fraudulent preference of the remaining Defendants contrary to the *Fraudulent Preference Act*, R.S.B.C. 1996, c. 164.

Plaintiffs' address for service: 2 - 1879 Barclay Street, Vancouver, B.C. V6G 1K7

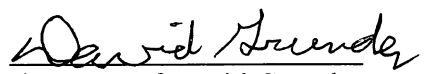
Fax number address for service: 604 687-4463

E-mail address for service: david@dwglawcorp.com

Place of trial: Vancouver, British Columbia

The address of the registry is: 800 Smithe Street, Vancouver, British Columbia

Date: 06/Nov/2020



Signature of David Grunder
Solicitor for the Plaintiffs

Rule 7-1 (1) of the Supreme Court Civil Rules states:

(1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,

(a) prepare a list of documents in Form 22 that lists

(i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and

(ii) all other documents to which the party intends to refer at trial, and

(b) serve the list on all parties of record.

## Appendix

**Part 1: CONCISE SUMMARY OF NATURE OF CLAIM:**

The claims of the Plaintiffs are against the Defendants for declaratory relief pursuant to the *Fraudulent Conveyance Act*; or in the alternative, for declaratory relief pursuant to the *Fraudulent Preference Act*.

**Part 2: THIS CLAIM ARISES FROM THE FOLLOWING:**

A dispute concerning:

[x] The provision of goods and services or other general commercial matters

**Part 4: THIS CLAIM INVOLVES:**

[x] none of the above

**Part 4:**

*Fraudulent Conveyance Act*, R.S.B.C. 1996, c. 163

*Fraudulent Preference Act*, R.S.B.C. 1996, c. 164

NO. VLC·S-S-2011355
VANCOUVER REGISTRY

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

BETWEEN:

TARIQ WAHEED and 0923063 B.C. LTD.

PLAINTIFFS

AND:

JM FOOD SERVICES LTD., FRESHSLICE HOLDINGS LTD.,
RFSP EQUIPMENT & OPERATING INC., A&M ENTERPRISE LTD.,
1015214 B.C. LTD., and THE TRUSTEES OF THE FRESHSLICE FAMILY TRUST

DEFENDANTS

# RESPONSE TO CIVIL CLAIM

Filed by: JM FOOD SERVICES LTD.
FRESHSLICE HOLDINGS LTD.
RFSP EQUIPMENT & OPERATING INC.
A&M ENTERPRISE LTD.
1015214 B.C. LTD.
THE TRUSTEES OF THE FRESHSLICE FAMILY TRUST

(the "Defendants")

## Part 1:RESPONSE TO NOTICE OF CIVIL CLAIM FACTS

### Division 1 - Defendant’s Response to Facts

1. The facts alleged in paragraphs 3-8 of Part 1 of the notice of civil claim are admitted.

2. The facts alleged in paragraphs 9-15 of Part 1 of the notice of civil claim are denied.

3. The facts alleged in paragraphs 1 and 2 of Part 1 of the notice of civil claim are outside the knowledge of the defendants.

### Division 2 - Defendant’s Version of Facts

1. Unless expressly admitted herein, the Defendants deny each and every allegation in the Notice of Civil Claim and put the Plaintiffs to the strict proof thereof.

2. The Defendant, JM Food Services Ltd. ("JM") admits that judgment was obtained against it by the Plaintiffs in British Columbia Supreme Court Action No. S153190 (the "Action"), and further admits that Certificates of Costs were issued against it in the Action.

3. In response to paragraph 11 of the Notice of Civil Claim, the Defendants expressly deny that, between June 21, 2013 and November 18, 2019, JM transferred some or all of its assets to any of the other Defendants with only nominal consideration or without adequate consideration, with the intent to delay, hinder, or defraud the Plaintiffs of their just and lawful remedies as alleged, or at all.

4. In response to paragraphs 12-15 of the Notice of Civil Claim, JM's failure as a business is the cause of its current insolvency. While the term "Transfer" is capitalized but not defined in the Notice of Civil Claim, the Defendants in any event deny that any transfer was ever made with the intention of creating a preference in favour of the remaining Defendants as alleged, or at all.

**Division 3 - Additional Facts**

None

**Part 2: RESPONSE TO RELIEF SOUGHT**

1. The Defendants consent to the granting of NONE of the relief sought in Part 2 of the notice of civil claim.

2. The Defendants oppose the granting of ALL of the relief sought Part 2 of the notice of civil claim.

3. The Defendants take no position on the granting of NONE of the relief sought in Part 2 of the notice of civil claim.

**Part 3: LEGAL BASIS**

1. The Defendants have not committed a fraudulent conveyance within the meaning of the *Fraudulent Cpnveyance Act* as alleged, or at all.

2. The Defendants have not committed a fraudulent preference within the meaning of the *Fraudulent Preference Act* as alleged, or at all.

3. The Defendants deny that the Plaintiffs are entitled to an injunction, and further deny that the Defendants, or any of them, hold any property in trust for the Plaintiffs.

4. If a party makes unfounded allegations of fraud, that conduct is worthy of rebuke by way of an order for special costs.

WHEREFORE the Defendants submit that the Plaintiff's claim be dismissed with special costs or, in the alternative, special costs.

Defendant's address for service:

Kamachi Law Group (Attn: David Kamachi)
205 – 15240 – 56th Avenue
Surrey, BC V3S 5K7
Canada

Fax number address for service: None

E-mail address for service: dmk@kamachilaw.com

Date: 10 Dec 2020

KAMACHI LAW GROUP
(David M. Kamachi)
Lawyer for the Defendant

Rule 7-1 (1) of the Supreme Court Civil Rules states:

(1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,

(a) prepare a list of documents in Form 22 that lists

(i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and

(ii) all other documents to which the party intends to refer at trial, and

(b) serve the list on all parties of record.

Schedule "A"
Amended pursuant to Rule 6-1(b) of the *Supreme Court Civil Rules*
by Order dated August 20, 2021
Original filed on November 6, 2020

NO. VLC-S-S2011355
VANCOUVER REGISTRY

# IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

TARIQ WAHEED and 0923063 B.C. LTD.

PLAINTIFFS

AND:

JM FOOD SERVICES LTD., FRESHSLICE HOLDINGS LTD., RFSP EQUIPMENT & OPERATING INC., A&M ENTERPRISE LTD., 1015214 B.C. LTD., RF FRANCHISING INC., and THE TRUSTEES OF THE FRESHSLICE FAMILY TRUST

DEFENDANTS

## AMENDED NOTICE OF CIVIL CLAIM

**This action has been started by the plaintiff for the relief set out in Part 2 below.**

If you intend to respond to this action, you or your lawyer must

(a) file a response to civil claim in Form 2 in the above-named registry of this court within the time for response to civil claim described below, and
(b) serve a copy of the filed response to civil claim on the plaintiff.

If you intend to make a counterclaim, you or your lawyer must

(a) file a response to civil claim in Form 2 and a counterclaim in Form 3 in the above-named registry of this court within the time for response to civil claim described below, and
(b) serve a copy of the filed response to civil claim and counterclaim on the plaintiff and on any new parties named in the counterclaim.

JUDGMENT MAY BE PRONOUNCED AGAINST YOU IF YOU FAIL to file the response to civil claim within the time for response to civil claim described below.

### Time for response to civil claim

A response to civil claim must be filed and served on the plaintiff,

(a) if you were served with the notice of civil claim anywhere in Canada, within 21 days after that service,
(b) if you were served with the notice of civil claim anywhere in the United States of America, within 35 days after that service,

(c) if you were served with the notice of civil claim anywhere else, within 49 days after that service, or

(d) if the time for response to civil claim has been set by order of the court, within that time.

**Claim of the Plaintiffs**

**Part 1: STATEMENT OF FACTS**

1. The Plaintiff, Tariq Waheed, is a businessman with an address for service of: 2 – 1879 Barclay Street, Vancouver, British Columbia.

2. The Plaintiff, 0923063 B.C. Ltd., is a corporation incorporated under the laws of British Columbia with a registered address, and address for delivery at 32815 George Ferguson Way, Abbotsford, British Columbia.

3. The Defendant, JM Food Services Ltd., is a corporation incorporated under the laws of British Columbia with a registered address and address for delivery at 1610 Ingleton Avenue, Burnaby, British Columbia.

4. The Defendant, Freshslice Holdings Ltd., is a corporation incorporated under the laws of British Columbia with a registered address and address for delivery at 1610 Ingleton Avenue, Burnaby, British Columbia.

5. The Defendant, RFSP Equipment & Operating Inc. ("RFSP"), is a corporation incorporated under the laws of British Columbia with a registered address and address for delivery at 1610 Ingleton Avenue, Burnaby, British Columbia.

6. The Defendant, A&M Enterprise Ltd., is a corporation incorporated under the laws of British Columbia with a registered address and address for delivery at 1610 Ingleton Avenue, 2nd Floor, Burnaby, British Columbia.

7. The Defendant, 1015214 B.C. Ltd., is a corporation incorporated under the laws of British Columbia with a registered address and address for delivery at 2 - 1610 Ingleton Avenue, Burnaby, British Columbia.

8. The Defendant, RF Franchising Inc., is a corporation incorporated under the laws of British Columbia with a registered address and address for delivery at 1610 Ingleton Avenue, Floor 2, Burnaby, British Columbia.

9. The Defendant, The Trustees of the Freshlice Family Trust are the trustees of a trust created pursuant to the laws of the Province of British Columbia whose address for delivery is 2602 – 1277 Melville Street, Vancouver, British Columbia.

10. On April 11, 2019, reasons for judgment of Mr. Justice Macintosh in favour of the plaintiffs were released. On November 18, 2019 by the Order of Mr. Justice Macinstosh of the British Columbia Supreme Court, in Court File No. S153190, Vancouver Registry,

otherwise styled as 0923063 B.C. Ltd. and Tariq Waheed, Plaintiffs, and JM Food Services Ltd., Freshslice Properties Ltd., and RFSP Equipment & Operating Inc., Defendants, and 0923063 B.C. Ltd., Defendant by Counterclaim, the court clarified that the Plaintiffs obtained judgment against JM Food Services Ltd. (the "Judgment").

11. On October 22, 2020, the Plaintiffs were issued certificates of costs as against JM Food Services Ltd. in the amount of $197,168.69; and against JM Food Services Ltd. and Ray Russell, jointly and severally, in the amount of $7,402.00.

12. On some date after June 21, 2013, but before the date of the Judgment, the Defendant, JM Food Services Ltd. transferred some or all of its assets ("Property") to one or more of the remaining Defendants ("Transferees") with only nominal consideration or without adequate consideration, with the intent to delay, hinder or defraud the Plaintiffs of the just and lawful remedies of the Plaintiffs.

13. Prior to the Transfer, the Defendant, JM Food Services Ltd., owned the Property.

14. Since the date of the Transfer and continuing to the present, some or all of the remaining Defendants have held or transferred the Property and have received the benefit of the Property.

15. At the time of the Transfer of the Property, the Defendant, JM Food Services Ltd., was in insolvent circumstances or was on the eve of insolvency.

16. The Transfer was made with the intention of creating a preference in favour of the remaining defendants.

**Part 2: RELIEF SOUGHT**

1. A Declaration that the Transfer of the Property was a fraudulent conveyance within the meaning of the *Fraudulent Conveyance Act*, R.S.B.C. 1996, c. 163 and is of no force and effect insofar as it affects the rights of the Plaintiffs as Judgment Creditors of the Defendant, JM Food Services Ltd.

2. A Declaration that the Transfer of the Property was a fraudulent preference within the meaning of the *Fraudulent Preference Act*, R.S.B.C. 1996 c. 164 and is of no force and effect insofar as it affects the rights of the Plaintiffs as Judgment Creditors of the Defendant, JM Food Services Ltd.

3. An Order that the Plaintiffs are entitled to pursue their just and lawful remedies as Judgment Creditors against the Defendant, JM Food Services Ltd., as if it were still the legal and beneficial owner of the Property to the same extent as they were before the Transfer of the Property.

4. An Injunction restraining the Defendants, Freshslice Holdings Ltd., RFSP Equipment & Operating Inc., A&M Enterprise Ltd., 1015214 B.C. Ltd., RF Franchising Inc., and The Trustees of the Freshslice Family Trust, from disposing of, encumbering or in any way dealing with any part of the rights, title or interest of the Plaintiffs in the Property.

5. A Declaration that the Defendants hold the Property in trust for the Plaintiffs.

6. Judgment against each Defendant for the value of the Property that was fraudulently conveyed to it by JM Food Services Ltd.

7. Court order interest.

8. The Plaintiffs claim costs, including reasonable legal fees.

9. Such further relief as this Court seems just.

**Part 3: LEGAL BASIS**

1. The Transfer of the Property constitutes a fraudulent conveyance as its effect is to delay, hinder and defraud the Plaintiffs of their just and lawful remedies for the enforcement of the Judgment contrary to the *Fraudulent Conveyance Act*, R.S.B. C. 1996, c. 163.

2. If the Court finds that the Defendants, Freshslice Holdings Ltd., RFSP Equipment & Operating Inc., A&M Enterprise Ltd., 1015214 B.C. Ltd., RF Franchising Inc., and The Trustees of the Freshslice Family Trust, or any one of them, was a creditor of the Defendant, JM Food Services Ltd. at a material time, the Transfer of the Property constitutes a fraudulent preference of the remaining Defendants contrary to the *Fraudulent Preference Act*, R.S.B.C. 1996, c. 164.

Plaintiffs' address for service: 2 - 1879 Barclay Street, Vancouver, B.C. V6G 1K7

Fax number address for service: 604 687-4463

E-mail address for service: david@dwglawcorp.com

Place of trial: Vancouver, British Columbia

The address of the registry is: 800 Smithe Street, Vancouver, British Columbia

Date: 06/Nov/2020

"David Grunder"
Signature of David Grunder
Solicitor for the Plaintiffs

Rule 7-1 (1) of the Supreme Court Civil Rules states:

(1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,

(a) prepare a list of documents in Form 22 that lists

(i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and

(ii) all other documents to which the party intends to refer at trial, and

(b) serve the list on all parties of record.

## Appendix

**Part 1: CONCISE SUMMARY OF NATURE OF CLAIM:**

The claims of the Plaintiffs are against the Defendants for declaratory relief pursuant to the *Fraudulent Conveyance Act*; or in the alternative, for declaratory relief pursuant to the *Fraudulent Preference Act*.

**Part 2: THIS CLAIM ARISES FROM THE FOLLOWING:**

A dispute concerning:

[x] The provision of goods and services or other general commercial matters

**Part 4: THIS CLAIM INVOLVES:**

[x] none of the above

**Part 4:**

*Fraudulent Conveyance Act*, R.S.B.C. 1996, c. 163

*Fraudulent Preference Act*, R.S.B.C. 1996, c. 164

NO. VLC·S-S-2011355
VANCOUVER REGISTRY

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

BETWEEN:

TARIQ WAHEED and 0923063 B.C. LTD.

PLAINTIFFS

AND:

JM FOOD SERVICES LTD., FRESHSLICE HOLDINGS LTD., RFSP EQUIPMENT & OPERATING INC., A&M ENTERPRISE LTD., 1015214 B.C. LTD., RF FRANCHISING INC. and THE TRUSTEES OF THE FRESHSLICE FAMILY TRUST

DEFENDANTS

**RESPONSE TO CIVIL CLAIM**

Filed by: RF FRANCHISING INC.
(the "Defendant")

**Part 1: RESPONSE TO AMENDED NOTICE OF CIVIL CLAIM FACTS**

**Division 1 - Defendant's Response to Facts**

1. The facts alleged in paragraphs 3-11 of Part 1 of the notice of civil claim are admitted.

2. The facts alleged in paragraphs 12-16 of Part 1 of the notice of civil claim are denied.

3. The facts alleged in paragraphs 1 and 2 of Part 1 of the notice of civil claim are outside the knowledge of the defendant.

**Division 2 - Defendant's Version of Facts**

1. Unless expressly admitted herein, the Defendant denies each and every allegation in the Amended Notice of Civil Claim and put the Plaintiffs to the strict proof thereof.

2. Judgment was issued against the Defendant, JM Food Services Ltd. ("JM") in favour of the Plaintiffs in British Columbia Supreme Court Action No. S153190 (the "Action"), and Certificates of Costs were issued against JM in the Action.

3. In response to paragraph 12 of the Amended Notice of Civil Claim, the Defendant expressly denies that, between June 21, 2013 and November 18, 2019, JM transferred some or all of its assets to any of the other Defendants with only nominal consideration or without adequate consideration, with the intent to delay, hinder, or defraud the Plaintiffs of their just and lawful remedies as alleged, or at all.

4. In response to paragraphs 13-16 of the Amended Notice of Civil Claim, JM's failure as a business is the cause of its current insolvency. While the term "Transfer" is capitalized but not defined in the Notice of Civil Claim, the Defendant in any event denies that any transfer was ever made with the intention of creating a preference in favour of the remaining Defendants as alleged, or at all.

5. Th Defendant puts the Plaintiffs to the strict proof of the alleged allegations of fraud.

**Division 3 - Additional Facts**

None

**Part 2: RESPONSE TO RELIEF SOUGHT**

1. The Defendant consents to the granting of NONE of the relief sought in Part 2 of the notice of civil claim.

2. The Defendant opposes the granting of ALL of the relief sought Part 2 of the notice of civil claim.

3. The Defendants take no position on the granting of NONE of the relief sought in Part 2 of the notice of civil claim.

**Part 3: LEGAL BASIS**

1. The Defendant has not committed a fraudulent conveyance within the meaning of the *Fraudulent Cpnveyance Act* as alleged, or at all.

2. The Defendant has not committed a fraudulent preference within the meaning of the *Fraudulent Preference Act* as alleged, or at all.

3. The Defendant denies that the Plaintiffs are entitled to an injunction, and further denies that the Defendant holds any property in trust for the Plaintiffs.

4. If a party makes unfounded allegations of fraud, that conduct is worthy of rebuke by way of an order for special costs.

WHEREFORE the Defendant submits that the Plaintiff's claim be dismissed with special costs or, in the alternative, costs.

Defendant's address for service:

Kamachi Law Group (Attn: David Kamachi)
205 – 15240 – 56th Avenue
Surrey, BC V3S 5K7
Canada

Fax number address for service: None

E-mail address for service: dmk@kamachilaw.com

Date: 20 Dec 2021

KAMACHI LAW GROUP
(David M. Kamachi)
Lawyer for the Defendant

Rule 7-1 (1) of the Supreme Court Civil Rules states:

(1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,

(a) prepare a list of documents in Form 22 that lists

(i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and

(ii) all other documents to which the party intends to refer at trial, and

(b) serve the list on all parties of record.

NO. VLC-S-S2011355
VANCOUVER REGISTRY

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

BETWEEN:

TARIQ WAHEED and 0923063 B.C. LTD.

PLAINTIFFS

*AND:*

JM FOOD SERVICES LTD., FRESHSLICE HOLDINGS LTD., RFSP EQUIPMENT & OPERATING INC., A&M ENTERPRISE LTD., 1015214 B.C. LTD., RF FRANCHISING INC., and THE TRUSTEES OF THE FRESHSLICE FAMILY TRUST

*DEFENDANTS*

**ORDER AFTER TRIAL**

| | | |
|---|---|---|
| BEFORE THE HONOURABLE JUSTICE WINTERINGHAM | ) | FRIDAY |
| | ) | THE 1st DAY OF |
| | ) | DECEMBER, 2023 |

THIS ACTION coming on for trial on September 18, 19, 20, and 21, 2023, at the Law Courts at Begbie Square, 651 Carnarvon Street, in the City of New Westminster, in the Province of British Columbia, and on hearing David Grunder, counsel for the Plaintiffs, and David Kamachi, counsel for the Defendants, AND JUDGMENT being reserved to this date:

THIS COURT ORDERS that:

1. A declaration that the transfer of the property of the defendant, JM Food Services, to each or any of the defendants was a fraudulent conveyance within the meaning of the *Fraudulent Conveyance Act*, and is of no force and effect insofar as it affects the rights of the plaintiffs as judgment creditors of the defendant, JM Food Services.

2. A declaration that the transfer of the property was a fraudulent preference within the meaning of the *Fraudulent Preference Act* and is of no force and effect insofar as it affects the rights of the plaintiffs as judgment creditors of the defendant, JM Food Services.

3. The plaintiffs are entitled to pursue their just and lawful remedies as judgment creditors against the defendant, JM Food Services, as if it were still the legal and beneficial owner of the transferred property to the same extent as it was before the transfer of the property.

4. The plaintiffs are awarded their costs on Scale B.

THE FOLLOWING PARTIES APPROVE THE FORM OF THIS ORDER AND CONSENT TO EACH OF THE ORDERS, IF ANY, THAT ARE INDICATED ABOVE AS BEING BY CONSENT:

David Grunder

Signature of David Grunder
Lawyer for the Plaintiffs

Signature of David Kamachi
Lawyer for the Defendants

BY THE COURT

REGISTRAR

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# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Waheed v. JM Food Services Ltd.,*
2023 BCSC 2113

Date: 20231201
Docket: S2011355
Registry: Vancouver

Between:

**Tariq Waheed and 0923063 B.C. Ltd.**

Plaintiffs

And

**JM Food Services Ltd., Freshslice Holdings Ltd., RFSP Equipment & Operating Inc., A&M Enterprise Ltd., 1015214 B.C. Ltd., RF Franchising Inc., and The Trustees of the Freshslice Family Trust**

Defendants

Before: The Honourable Justice Winteringham

## Reasons for Judgment

| | |
|---|---|
| Counsel for the Plaintiffs: | D. Grunder |
| Counsel for the Defendants: | D. Kamachi |
| Place and Dates of Trial: | New Westminster, B.C.<br>September 18-21, 2023 |
| Place and Date of Judgment: | New Westminster, B.C.<br>December 1, 2023 |

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## I. OVERVIEW

[1] In 2019, Justice Macintosh awarded damages and court-ordered interest totalling over $500,000 against three of the instant defendants in reasons indexed at *0923063 B.C. Ltd. v JM Food Services Ltd.*, 2019 BCSC 553 [*First Proceeding*]. Only $6,000 of this award has since been paid. The plaintiffs now allege that the defendants reorganized closely held and related companies to avoid compliance with Macintosh J.'s order.

[2] The *First Proceeding* arose out of Tariq Waheed's operation of a Freshslice Pizza franchise through his numbered company, 0923023 B.C. Ltd. ("092"). Mr. Waheed and 092, the plaintiffs, alleged that three defendant companies acted to put them out of business, those being JM Food Services Ltd. ("JM Food Services"), Freshslice Properties Ltd. ("Freshslice Properties"), and RFSP Equipment & Operating Inc. ("RFSP"). Justice Macintosh found that the defendants were liable insofar as they had breached contractual duties in addition to good faith performance obligations.

[3] In this proceeding, the plaintiffs allege that, at some point after June 21, 2013—the date the plaintiffs were "put out of business"—all of the assets of JM Food Services were transferred to other defendant companies. These transfers were organized, the plaintiffs allege, by Ray Russell who is the sole shareholder and director of JM Food Services, Freshslice Holdings Ltd. ("Freshslice Holdings"), and RFSP, and the sole trustee of the Freshslice Family Trust (the "Family Trust").

[4] The plaintiffs assert that the transfer of assets out of JM Food Services was a fraudulent conveyance within the meaning of the *Fraudulent Conveyance Act*, R.S.B.C. 1996, c. 163 [*FCA*], and a fraudulent preference within the meaning of the *Fraudulent Preference Act*, R.S.B.C. 1996, c. 164 [*FPA*]. As will be described, the plaintiffs characterize as "assets" or "property" certain streams of income once earned by JM Food Services. The plaintiffs maintain that they are entitled to the remedy granted in the *First Proceeding* from the defendants, jointly and severally.

[5] The defendants submit that any corporate reorganization was necessary to salvage and ensure the future viability of their business, which, at the material time, was losing money. In light of this reasoning, the defendants take the position that the plaintiffs have failed to establish a contravention of the *FCA* or *FPA* and that all of the plaintiffs' claims should be dismissed.

[6] Furthermore, the defendants submit that they acquired a "post dissolution legal right" when, in 2017, 092 lost its corporate status. On this basis, the defendants submit that the action by 092 is statute-barred regardless of the retroactive effect of the company's revival.



## II. ISSUES

[7] The parties generally agreed on the primary issues to be determined:

a) Did JM Food Services dispose of property within the meaning of the *FCA* to any of the other defendants named in this action?

b) Did JM Food Services dispose of any property which, in law, is invalid against creditors within the meaning of the *FPA* to any of the other defendants named in this action?

c) If JM Food Services disposed of property to one or more of the defendants in this action, to which defendant(s) was the disposition made?

d) Did the defendants acquire a post-dissolution legal right that limits any recovery to the personal plaintiff?

## III. BACKGROUND

[8] The background in this civil claim is largely uncontested. For the most part, the defendants agreed with the facts as asserted by the plaintiffs.

### A. The *First Proceeding*

[9] In the *First Proceeding*, the plaintiffs alleged that the defendants put their pizza franchise out of business. By way of a notice to admit, the defendants effectively admitted the following facts in respect of the *First Proceeding* and which are relevant to the within proceeding:

a) On October 18, 2011, 092 signed a standard franchise agreement with JM Food Services in which Mr. Waheed was a guarantor. The business was to operate a Freshslice Pizza franchise;

b) On April 20, 2015, the plaintiffs filed a notice of civil claim ("NOCC") naming 092 and Mr. Waheed as plaintiffs and JM Food Services, Freshslice Properties, and RFSP as defendants;

c) On April 4, 2017, 092 was dissolved;

d) Originally, the *First Proceeding* was scheduled to commence on December 11, 2017 but was adjourned;

e) The trial in the *First Proceeding* commenced on December 3, 2018 before Macintosh J. who delivered reasons for judgment on April 11, 2019;

f) On November 18, 2019, Macintosh J.'s order after trial provided as follows:

i. 092 is awarded as against JM Food Services the sum of $342,435.13 broken down as follows:

(1) Damages of $127,485 for loss of income to May 31, 2020;

(2) Damages of $83,000 for loss of good will;

(3) Punitive damages of $125,000;

(4) Less $11,582 for the counterclaim payable; and

(5) Prejudgment interest of $18,532.13 on the damages of $323,903;

ii. Mr. Waheed is awarded as against JM Food Services the sum of $26,852.98 broken down as follows:

(1) Damages of $25,000 for conversion; and

(2) Prejudgment interest of $1,852.98;

g) In addition, Macintosh J.'s order allowed for costs to be assessed under R. 8-1(1) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 to determine the amount recoverable by 092 under the standard franchise agreement for reasonable legal fees and expenses, as costs of the action, in accordance with the *First Proceeding* decision. On October 22, 2020, the Registrar certified "the costs of 092 and Mr. Waheed against JM Food Services in the amount of $197,168.69;"

h) The defendants filed a notice of appeal on May 9, 2019;

i) On July 26, 2019, the appellants were ordered to post $6,000 for security for costs;

j) On December 11, 2020, the appeal was ordered dismissed as abandoned. By consent, the costs of the appeal were awarded to the respondents in the amount of $2,593.15;

k) On February 17, 2021, the Court of Appeal registry released the security for costs in the amount of $6,000 (posted by the appellants) to the respondents. In fact, this is the only money received by the plaintiffs on account of their judgment.

### B. The Within Proceeding

[10] Despite the orders in the plaintiffs' favour, the defendants failed to pay to the plaintiffs anything beyond the $6,000 mentioned above. On November 6, 2020, Mr. Waheed and 092 commenced this action. It was scheduled for trial on September 6, 2022. At that point, however, it was found that 092 had been inadvertently dissolved and the trial could not proceed. As a result of the forced adjournment, the plaintiffs were ordered to pay $2,000 as costs thrown-away and $20,000 as security for costs.

[11] On September 9, 2022, 092 was restored under the *Business Corporations Act*, S.B.C. 2002, c. 57 [*BCA*].

[12] In this proceeding, the plaintiffs sought agreement that "JM Food Services effectively put the pizza franchise being operated by [092] and [Mr. Waheed] out of business." The defendants refused to make this admission.

[13] I agree with the plaintiffs that Macintosh J. indeed made this finding when, in the *First Proceeding*, he stated:

> [94] The harm caused to Mr. Waheed was the loss of the franchise. He had paid $160,000 for that franchise. He had little money, but he sunk further funds into developing it. He devoted a year and a half of his life to the business. During that time, he was living far from his wife and children, who were in London, with the hope of making the franchise a success. By prohibiting Wallace & Carey from delivering supplies to the franchise, the Defendants intentionally put the franchise out of business. The harm to Mr. Waheed and the Plaintiff Company was substantial and was inflicted with complete indifference.
>
> [Emphasis added.]

See also *First Proceeding* at paras. 55, 60 and 70–71.

## IV. EVIDENCE

[14] I will describe the evidence tendered by the plaintiffs in more detail. As will be seen, the plaintiffs' evidence consisted exclusively of examination for discovery read-ins, cross-examination of the defendant, Mr. Russell and admissions. I will thus commence this review by examining the evidence of Mr. Russell.

### A. Ray Russell

[15] Mr. Russell founded and is the CEO of Freshslice Pizza. He is the sole director and sole shareholder of JM Food Services, Freshslice Holdings, RFSP and RF Franchising ("RF Franchising"). He is the sole trustee of the Family Trust.

[16] For context, JM Food Services was incorporated on September 17, 2008 to run franchise operations and RFSP was incorporated on January 29, 2013. The plaintiffs and JM Food Services entered into a standard franchise agreement dated October 18, 2011. JM Food Services then assigned franchise agreements after June 21, 2013 when it had started "shutting down" and was selling franchises as late as September 3, 2013. JM Food Services maintained some revenue through the fiscal year ending September 30, 2015, in which it had a net income from the sale of pizza dough of $638,797.

[17] In respect of Mr. Russell and his companies, the plaintiffs alleged that three main business streams of JM Food Services—franchise fees, pizza dough for sale to franchisees, and the sale of equipment to franchisees—generated revenue and constituted property within the meanings of the *FCA* and *FPA*. Their contention is that JM Food Services transferred some assets to RFSP, however, they could not point to what exactly was transferred and when exactly these transfers occurred.

[18] The evidence demonstrates that JM Food Services transferred to RFSP its right to receive income from franchisees. Mr. Russell did not, however, produce any written assignments of franchise agreements from JM Food Services to RFSP. The plaintiffs submit that it is significant that the defendants have not produced any documentation regarding these transactions. Moreover, it appears that the transfers occurred without any consideration.

[19] Mr. Russell attributes the decision to transfer the rights of the franchise agreements vested in JM Food Services to RFSP to a decision made by Freshslice Holdings, a company that he also controlled. Mr. Russell stated that RFSP operated for two or three years starting on January 29, 2013, but did not remember when the first or last assignment of franchises from JM Food Services went to RFSP.

[20] In examination for discovery and at trial, Mr. Russell testified that once RFSP stopped operating, franchise rights were transferred to Freshslice Holdings and then to RF Franchising. Rights in respect of providing operational advice to franchisees and dough production, services that JM Food Services had previously provided, were transferred to A&M Enterprise Ltd. ("A&M), and numbered company, 1015214 B.C. Ltd. ("101"), took over the provision of equipment and small-wares.

[21] I note that, per Mr. Russell's evidence, A&M was incorporated on April 8, 2014. The first directors of A&M were Mr. Russell's nephews. Amir Sarabijamab resigned as director from A&M as of April 1, 2018. The second nephew, Mohammad Sarabijamab resigned as director of A&M as of December 26, 2018 and was replaced by Frank Alexander.

[22] At his examination for discovery, Mr. Russell testified that he did not have access to documents proving the noted transactions. However, during his testimony, and following an overnight recess, Mr. Russell brought a document to Court that was later marked as an exhibit. The document, dated March 31, 2013, was on letterhead of Freshslice Pizza/RFSP and was titled as an agreement between RFSP, JM Food Services, and Freshslice Holdings (the "March 31 Agreement"). The text of the document read as follows:

> Here to agree and confirm that RFSP will purchase the inventory of JM Food Services.
>
> Also RFSP is titled to all the loans receivable from JM Food Services and Freshslice Holding.
>
> In return RFSP will service all the legal cases again JM Food Services and Freshslice Holdings. For greater clarity RFSP will only pay for servicing the law suits and any judgment from small claims court. RFSP will not be responsible or pay for any judgment against Freshslice Holding and JM Food Services in supreme court.

[23] The document has a signing line for RFSP, JM Food Services, and Freshslice Holdings. Mr. Russell signed on behalf of each of those named companies.

[24] During cross-examination, Mr. Russell agreed that the March 31 Agreement was intended to partially "judgment proof" JM Food Services, though he resisted the

suggestion that the agreement had anything to do with the plaintiffs' claims. More broadly, at his examination for discovery, Mr. Russell testified that litigation between JM Food Services and other parties was not a demonstrable factor in the decision to transfer assets from JM Food Services.

[25] Effective December 18, 2017 or sometime in early 2018, Mr. Russell re-organized the Freshslice group of companies to move operations from JM Food Services and RFSP to Freshslice Holdings, RF Franchising, and a new holding company, referred to as "Benco" in a letter dated December 12, 2017 from Encompass Chartered Professional Accountants.

[26] Mr. Russell agreed that the effect of the re-organization of the Freshslice group of companies was to vest assets in the Family Trust that had previously been held by Freshslice Holdings and RF Franchising.

[27] Mr. Russell stated that he decided to transfer the dough selling part of the business from JM Food Services to A&M, and that RFSP was initially used as an intermediary. RFSP did not pay anything to JM Food Services for the right to sell dough to franchisees.

[28] Based on a notice of appeal filed by JM Food Services in the Tax Court of Canada, JM Food Services was paid a sum for the purchase of franchise locations in Ontario. JM Food Services (or possibly one of the other Freshslice companies) sold the right to franchise in Ontario for $800,000. JM Food Services treated some of the amounts paid to it by the Ontario franchisees as deferred fees "to reflect services performed in future."

[29] I note that Mr. Russell has not produced any tax returns or financial documentation other than a tax return and financial statement for the year ending September 30, 2015, despite demands, court orders, and an obligation to do so under the *Rules*. As will be discussed in more detail below, the state of document disclosure in this case has supported adverse inferences against the defendants and stymied the prospect of supporting the positions they take.

### B. Frank Alexander

[30] Mr. Alexander is the director of 101 and A&M. Mr. Alexander worked closely in many capacities with his brother, Mr. Russell, in the Freshslice group of companies since the beginning of the business. The plaintiffs characterized the line between 101 and A&M as “blurry.”

[31] On October 1, 2014, Mr. Alexander incorporated 101 and became its sole shareholder. According to Mr. Alexander, he incorporated 101 to conduct construction business and the sale of small-wares to Freshslice franchises. Freshslice franchisees are required to purchase small-wares from 101 or approved suppliers.

[32] The evidence demonstrates that JM Food Services held the right to distribute small-wares to franchisees in 2013. That right was transferred to 101 without consideration.

[33] Mr. Alexander purchased A&M from Mohammed Sarabijamab around 2019 for “something like” $1,500,000, though the purchase price was not paid all at once. When Mr. Alexander purchased A&M, its primary asset was the manufacture of pizza dough and its operations.

[34] In his evidence, Mr. Alexander maintained that the money used to buy A&M was paid by 101 and any ongoing payments for the purchase were made from 101. No documents were produced by the defendants confirming whether any payment was made.

[35] In respect of the transaction described in Mr. Russell’s evidence, Mr. Alexander agreed that A&M did not provide consideration to JM Food Services for the right to handle operations of the Freshslice group of companies. He also agreed that A&M’s source of income is the sale of dough. He explained that a distributor, Wallace & Carey, pays A&M “something over” $2 per dough delivered to franchisees. Of that amount, A&M pays $0.50 to Freshslice Holdings.

[36] Mr. Alexander's evidence also indicated that on November 24, 2017, 101 purchased Mr. Russell's residence for $2,249,000.

## V. EVIDENTIARY ISSUES

[37] This section considers three evidentiary issues that bear on the Court's analysis of the core legal issues. First, it considers the admissibility of the read-in evidence for certain purposes, second, it considers Mr. Russell's credibility, and third, it considers the impact of Mr. Russell's repeated refusals and inaction in respect of the usual documentary disclosure required in civil proceedings.

[38] As set out previously, it is part of the defendants' evidence and they agree that JM Food Services earned income by: (1) selling and distributing dough; (2) franchising and financing franchises; and, (3) selling equipment/small-wares. Further, the defendants agree that Freshslice Holdings "took the rights away from JM Food Services and gave them to RFSP (and later RF Franchising), Wallace and Carey Distribution, A&M, 101 and RBC."

[39] The evidence supports, and it is not disputed that JM Food Service's right to sell equipment was given to 101 and the dough production was given to A&M. Wallace & Carey acted as a distributor and financing was left to traditional banks. Then in early 2018, further reorganization was done to include the Family Trust.

[40] It is not disputed that not one of these entities paid to acquire the "rights." There was no consideration in these transfers.

[41] Mr. Russell claims that the reason for granting JM Food Services' rights to other entities was to improve his failing group of companies via a different corporate structure, and had nothing to do with avoiding payment to the plaintiffs. He claims that approximately $1 million was written off as bad debts from JM Food Services' end of business.

[42] In respect of credibility, during cross-examination, Mr. Russell was challenged on assertions related to the corporate restructuring. Steadfastly denying any

improprieties, Mr. Russell was defensive and confrontational in response to counsel's suggestion that he transferred his book of business from one small company (with him as the director) to another.

[43] In respect of documentary disclosure, the difficulty the Court has in this case is the failure of the defendants to disclose documents that could have corroborated their assertions. Though corroboration is not necessary, as I will explain below, in certain circumstances, the plaintiff will satisfy its burden of proof in circumstances such as the ones presented here. In that case, the burden shifts to the defendant to provide a reasonable explanation for the disposition or transfer of property.

[44] Ultimately, I find Mr. Russell to be wanting in respect of credibility. This finding is intimately linked with the adverse inference I draw in respect of the defendants' non-disclosure of documents.

### A. Admissibility of Read-In Discovery Transcripts

[45] Most of the plaintiffs' case proceeded by way of admissions of fact and examination for discovery read-ins.

[46] Having no direct knowledge in respect of the instant asset transfers, the plaintiffs seek to rely on read-ins of the discovery transcripts of Mr. Russell and his brother, Mr. Alexander. The evidence of Mr. Russell would be tendered on behalf of JM Food Services, Freshslice Holdings, RFSP, and RF Franchising and the Family Trust, and that of Mr. Alexander on behalf of A&M and 101.

[47] The plaintiffs seek to apply the read-in evidence in respect of two issues: (1) the disposition of assets of JM Food Services; and (2) the intention of the defendants to put the assets out of reach of creditors.

[48] Rule 12-5(46) of the *Rules* considers against whom discovery evidence is admissible and provides that:

> (46) If otherwise admissible, the evidence given on an examination for discovery by a party or by a person examined under Rule 7-2 (5) to (10) may be tendered in evidence at trial by any party adverse in

> interest, unless the court otherwise orders, but the evidence is admissible against the following persons only:
>
> (a) the adverse party who was examined;
>
> (b) the adverse party whose status as a party entitled the examining party to conduct the examination under Rule 7-2 (5) to (10);
>
> …

[49] The plaintiffs rely on *Nazerali v. Mitchell*, 2015 BCSC 2560 in their submission that the discovery read-ins can be used as against all of the defendants. In *Nazerali* at para. 46, Justice Affleck favourably cites *Le Soleil Hotel & Suites Ltd. v. Le Soleil Management Inc.*, 2009 BCSC 1303 where Justice Dickson stated that:

> [47] The *viva voce* testimony of Dato Chee, Deborah Chang and Michael Tham and the Documents are plainly admissible evidence against all of the defendants. As a general rule, however, admissions made in the course of examinations for discovery are admissible against only the party who made them: *Bower v. Cominco* (1998), 53 B.C.L.R. (3d) 322 (S.C.). Accordingly, the discovery evidence read-in by the plaintiffs would typically be admissible against only the individual defendant involved.
>
> [48] An exception to the general rule may arise where the admitting party has a common or identical interest with other defendants. In particular, where parties have a community of joint interest in the conduct of their business affairs and associated litigation to the extent one may fairly be characterised as representing the others that party's admissions on discovery may be used as evidence against the others: *Tri-Con Concrete Finishing Co. v. Caravaggio*, [2002] O.J. No. 2771 (Q.L.) (Ont. Sup.Ct.). Such circumstances are unusual, however, and, in the absence of express agreement, should only be found where the independent evidence of commonality is abundantly clear.

[50] Subject to some limitations and relying on the exception, Affleck J. accepted in *Nazerali* that:

> [47] … in the present instance there is a common interest among the defendants that provides for the exception to the general rule which would exclude the discovery evidence. …

[51] Relying on this discussion and finding from *Nazerali*, the plaintiffs submit that, given the commonality of interests amongst the defendants, the evidence obtained in the examination for discovery of Mr. Russell and Mr. Alexander can be admitted as against each of the other defendants.

[52] The defendants did not suggest otherwise.

[53] I agree with the plaintiffs. There is a commonality of interests between the brothers and their closely-held companies. In the circumstances, and in light of the defendants' position on this point, I find that the discovery read-ins and the exhibits are admissible as against each of the defendants.

### B. Credibility of Ray Russell

[54] Typically, with civil disputes, there is a credibility contest between the parties. This case is different because the plaintiffs did not present *vive voce* testimony. Nonetheless, I wish to say something about the credibility assessment of Mr. Russell and his evidence.

[55] As a starting point, I have kept in mind the well-known principles governing the court's credibility and reliability assessment.

[56] Credibility assessment involves a determination of a witness's testimony based on their veracity or sincerity, in addition to the accuracy of the evidence they provide: *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, aff'd 2012 BCCA 296.

[57] Credibility assessment involves consideration of various factors, including:

a) the witness's ability and opportunity to observe events;

b) the firmness of the witness's memory;

c) the witness's ability to resist the influence of interest to modify his or her recollection;

d) whether the witness's evidence harmonizes with independent evidence that has been accepted;

e) whether the witness changes his or her testimony during direct and cross-examination;

f) whether the witness's testimony seems unreasonable, impossible or unlikely;

g) whether the witness has a motive to lie; and

h) the demeanour of the witness generally.

See: *Bradshaw* at para. 186; *Gichuru v. Smith,* 2013 BCSC 895 at para. 129, aff'd 2014 BCCA 414.

[58] Ultimately, when assessing the truthfulness of the testimony of any interested witness, I am to be guided by the words articulated in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 357, 1951 CanLII 252 (B.C.C.A.):

> In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[59] The burden of proof in a civil dispute such as this is a balance of probabilities. Where there is conflicting testimony, "the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred": *F.H. v. McDougall*, 2008 SCC 53 at para. 49.

[60] In *Wu v. Gu*, 2020 BCSC 396, Justice MacNaughton held that special emphasis is placed on the assessment of credibility in the context of the *FCA* and the *FPA* and set out the following examples:

> [99] … The cases repeatedly stress the need for extra care in scrutinizing the testimony of the parties to a *prima facie* fraudulent transaction. For example:
>
> (a) In *Cabaniss*, Justice Masuhara noted that, "care in scrutinizing the testimony of the parties to the transaction is required" (para. 52);
>
> (b) In *Jennings*, Justice Bernard, again citing *CIBC Mortgage Corp.*, emphasized that, "the testimony of the parties must be scrutinized with care and suspicion; it is seldom that such evidence can be safely acted upon without corroboration" (para. 18);

(c) In *B. (L.A.)*, Justice Holmes cited case law affirming that, "where there is a conveyance between close relatives, under suspicious circumstances, the plaintiff has established a *prima facie* case of fraud. It is then up to the defendants to produce credible evidence to substantiate the transaction. Some corroborative evidence of the *bona fides* of the transaction should be given" (para. 18); and

(d) In *Pacific Wagondepot*, a case involving promissory notes between related corporations, Justice Macintosh held that, "there is a need for caution, and even suspicion, in receiving the uncorroborated evidence of related defendant parties" (para. 19).

[61] With those principles in mind, I turn to the Court's determination of the material issues.

[62] I have assessed Mr. Russell's credibility in accordance with the above principles.

[63] Mr. Russell's testimony was flawed in a number of respects.

[64] First, he maintained a hostility during the cross-examination that was not warranted. The parties have now been engaged in litigation for many years. However, this proceeding was only necessary because a substantial judgment has remained unpaid.

[65] I appreciate the risks of relying on demeanour of a witness in the overall credibility assessment. However, this observation goes far beyond Mr. Russell's performance in the witness stand. His hostility permeated from the substance of the answers he gave—it was apparent to the Court that he was angry and frustrated about losing to the plaintiffs and, in particular, Mr. Waheed in the *First Proceeding*. He was asked during cross-examination whether he disliked Mr. Waheed. He agreed that he disliked him very much, though he made a point of stating that his dislike grew over the years, and that he liked him very much at the beginning. Ultimately, Mr. Russell agreed that one of the final meetings with Mr. Waheed resulted in a physical altercation where Mr. Waheed had to go to the hospital.

Mr. Russell believed that he had been overdramatic about the physical altercation, suggesting he did not need medical attention.

[66] All of that said, it was evident that Mr. Russell maintains a palpable dislike for Mr. Waheed that he holds to this day. Mr. Russell's dislike for Mr. Waheed appeared to extend to plaintiffs' counsel. Twice during his cross-examination, Mr. Russell suggested counsel was acting improperly. The attacks on counsel's professionalism were inappropriate and detracted from Mr. Russell's statements that he had respect for this process. It appeared to the Court that he did not. Moreover, he appeared to resent having to answer the questions about his decision-making authority.

[67] Second, as will be discussed in more detail below, he did not comply with basic document disclosure, despite orders compelling the defendants to do so. Mr. Russell was quick to blame others for his failings in this regard, whether it be a disgruntled employee, inadequate representation at the *First Proceeding*, or opposing counsel. In my view, with respect to matters generally and the document production in particular, these were all matters within Mr. Russell's control. Though a failure to disclose some documents might be explained, Mr. Russell has demonstrated over the years a refusal to comply with the document disclosure orders. His explanations for failing to do so were not persuasive.

[68] Third, despite Mr. Russell's testimony that he respected the Court's process, he seemed to suggest that he intended to revisit the judgment from the *First Proceedings*. The exchange proceeded as follows:

> Q: You think the judgment against JM Foods was unfair?
>
> A: Overall, I respect the judgment. We could not find statements. We have more resources now. Going to fight it and hopefully get it right this time.

[69] Mr. Russell seemed to believe that he and his companies would have a chance for a "do-over". This is so even though the appeal was dismissed as abandoned and in the face of a judgment that remains unpaid. Despite his repeated claims that he "respected the court," it was very clear that he did not respect the decision that the defendants were liable to the plaintiffs. He harbours a resentment

to the plaintiffs, and to their lawyer that seems to drive Mr. Russell's decision-making, at least so far as it related to the within proceeding.

### C. Document Disclosure

[70] The plaintiffs contend, and the defendants did not disagree, that JM Food Services has not produced any tax returns or financial documentation other than the tax return and financial statement for the year ending September 30, 2015, despite demands, Court orders, and an obligation to do so under the *Rules*. Indeed, in response to an inquiry from the court, the defendants agreed that the court could draw an adverse inference against the defendants with respect to its failure to produce documents—for at least for one or two years of the nondisclosure.

[71] I touch on the orders compelling document production:

a) On August 20, 2021, Justice McDonald ordered that the defendants prepare and serve a list of documents within 21 days;

b) On February 9, 2022, Master Bilawich ordered:

i. The defendants shall amend their list of documents to include:

(1) Any documents of JM Food Services pertaining to any restructuring of its business since June 21, 2013, to date, including any documents relating to the transfer of any of its assets arising from the restructuring; and

(2) Any documents of defendants other than JM Food Services relating to the receipt of assets from JM Food Services from June 21, 2013, to date;

ii. The defendants shall, within 21 days, serve the plaintiffs with an amended list of documents that includes all of the documents identified in para. 1 of this order;

c) On August 5, 2022, Master Robertson ordered the defendants to amend their list of documents to include all of the documents or classes of document that are within their possession or control listed in Schedule "A."[1]

[72] In response to Master Robertson's order compelling production of the Schedule A items, the defendants produced a second amended list of documents, dated August 31, 2022. It is clear from this document that the defendants claimed many of the documents particularized in Schedule A were "no longer in the listing party's possession or control." Despite the multiple Court orders, it seems only a handful of documents were produced by the defendants.

[73] Also relating to disclosure failures, and emanating from the *First Proceeding*, is a finding of contempt made by Macintosh J. On February 3, 2020, Macintosh J. made the following order after application:

> 1. [JM Food Services] and [Mr. Russell], jointly and severally, be fined $5,000 for their contempt of court, for their willful disobedience of the order of Master Vos dated October 15, 2019, which ordered [Mr. Russell] to pay to the judgment creditors $246.75, and ordered [JM Food Services] to provide to the judgment creditors, among other things, documents relating to the income and assets of [JM Food Services] which terms they have wilfully disobeyed in defiance and contempt of the authority and dignity of this court.
> 2. There is a finding of contempt against [Mr. Russell] and [JM Food Services] for nonpayment of $246.75 and from failure to produce documents pursuant to the Order of Master Vos dated October 15, 2019.

[74] Mr. Russell was cross-examined about the contempt finding. He was flippant in his response, stating that cross-examining counsel would know more about this than he. Mr. Russell testified that his former representative (not a lawyer, the evidence indicated) missed some filing deadlines and that was why Mr. Russell was

[1] Schedule A particularized 69 documents and included such documents as share certificates, share purchase and sales agreements, directors' resolutions authorizing the transfer of shares, and corporate tax filings.

fined and found to be in contempt. Mr. Russell agreed that he paid the fine and an order for costs in compliance with the February 3, 2020 order.

[75] Mr. Russell focused on two reasons to explain the lack of document disclosure. First, Mr. Russell testified that many of the documents ordered to be produced had been stolen by a disgruntled employee. He was cross-examined about this. If there was in fact a disgruntled employee stealing documents, it may provide an excuse for certain categories of documents, such as original documents or correspondence not otherwise available from another source. However, financial documents, including bank accounts, CRA filings, financial statements, share purchase documents, and the like would have been available from another source, even if the defendants' copies had been removed. The defendants could have obtained copies of such documents from their bank, accountants or lawyers.

[76] I do not accept Mr. Russell's explanation about his failure to produce documents. If there was a disgruntled employee, other sources were available to access these basic corporate documents.

[77] Second, Mr. Russell testified repeatedly that he granted plaintiffs' counsel full access to the corporate documents. Indeed, Mr. Russell blamed opposing counsel for his failure to take advantage of the offer. Mr. Russell testified that he told counsel to speak to his accountant and obtain the documents directly.

[78] In my view, this is not an answer to a party's disclosure obligations. The *Rules* do not require lawyers to search out documents in the opposing party's possession or control by rummaging through an accountant's office. Disclosure rules are not a game. Rather, civil disputes can only be resolved fairly and efficiently if both sides engage with the *Rules* and with the rules compelling document production.

[79] The history presented above demonstrates the plaintiffs did all they could to compel production. The shortfall is the defendants' responsibility—no one else.

[80] From the history of the litigation outlined above, it is evident that the plaintiffs attempted to obtain the disclosure to which they were entitled, including attending at Court to obtain orders compelling production. Unfortunately, the defendants did not produce this basic disclosure, that is banking records from a financial institution or corporate financial statements or CRA documents.

[81] As a result, I am left with Mr. Russell's assertion and a handful of documents to support the assertions about the companies' financial viability.

[82] Mr. Russell's failure to produce documents has caused the Court to draw adverse inferences to the extent that had documents been produced, they would have supported the plaintiffs' position in respect of two primary issues before me: (1) whether there was a disposition of property; and, (2) whether the transfer of property was solely to restructure a struggling company or to hinder or delay the ability of the creditor to exercise its rights.

## VI. LEGAL FRAMEWORK

[83] There is a two-part test for establishing a fraudulent conveyance under the *FCA*. The plaintiffs must establish: (1) a disposition of property; and, (2) an intent to delay, hinder or defraud a creditor: *A.B. v. E.F*, 2023 BCSC 1799 at para. 19.

[84] In respect of the first element, the plaintiffs identify the relevant property as the rights to sell the pizza dough, to sell franchises, and to sell equipment/small-wares. The plaintiffs contend that JM Food Services had the right to do these things when the debt to the plaintiffs arose following the *First Proceeding*. But, they allege, JM Food Services disposed of those rights to avoid paying the plaintiffs.

[85] The *FCA*, in its entirety, provides:

> **Fraudulent conveyance to avoid debt or duty of others**
>
> 1. If made to delay, hinder or defraud creditors and others of their just and lawful remedies
>
> (a) a disposition of property, by writing or otherwise,
>
> (b) a bond,
>
> (c) a proceeding, or

(d) an order

is void and of no effect against a person or the person's assignee or personal representative whose rights and obligations are or might be disturbed, hindered, delayed or defrauded, despite a pretence or other matter to the contrary.

**Application of Act**

2. This Act does not apply to a disposition of property for good consideration and in good faith lawfully transferred to a person who, at the time of the transfer, has no notice or knowledge of collusion or fraud.

[86] The *FPA* has overlapping application with the *FCA* and provides:

**Transfers which prejudice creditors**

3. Subject to section 6, a disposition of property by a person at a time when the person is in insolvent circumstances, is unable to pay the person's debts in full, or knows that he or she is on the eve of insolvency, is void as against an injured creditor, if made

(a) with intent to defeat, hinder, delay or prejudice creditors or some of them, and …

[87] The *FPA* also has a tracing provision:

**Following proceeds of property fraudulently transferred**

7. In the case of a disposition of any property which in law is invalid against creditors, if the person to whom the disposition was made has disposed of, realized or collected all or some of the property, the money or other proceeds or the value of it may be seized or recovered in an action by a person who would be entitled to seize and recover the property if it had remained in the possession or control of the debtor or of the person to whom the disposition was made.

[88] The purpose of fraudulent conveyance legislation was described by Justice Gonthier in *Royal Bank of Canada v. North American Life Assurance Co.*, [1996] 1 S.C.R. 325 at para. 59:

> … However, the other provincial statutes all refer to some sort of "conveyance" or "disposition" of "property" with the "intent to defeat" creditors' claims. All the provincial fraud provisions are clearly remedial in nature, and their purpose is to ensure that creditors may set aside a broad range of transactions involving a broad range of property interests, where such transactions were effected for the purpose of defeating the legitimate claims of creditors. Therefore, the statutes should be given the fair, large and liberal construction and interpretation that best ensures the attainment of their

> objects, as required by provincial statutory interpretation legislation (see, for example, *The Interpretation Act, 1993*, S.S. 1993, c. I-11.1, s. 10). . . .

[89] Chief Justice McEachern adopted this purposive analysis espoused by Gonthier J. in *Sykes (Re),* (1998), 48 B.C.L.R. (3d) 169 at para. 68. The purposive analysis is also evident in *Mawdsley v. Meshen*, 2010 BCSC 1099 [*Mawdsley BCSC*] at para. 204, aff'd 2012 BCCA 91 [*Mawdsley BCCA*], leave to appeal ref'd [2012] S.C.C.A. No. 182.

[90] In the paragraphs that follow, I address some of the specific legal concepts raised by the parties in the context of this fraudulent conveyance/preference action. These include:

a) The meaning of creditor;

b) The role insolvency may play in determining fraudulent conveyance;

c) Determining the disposition of property;

d) Whether a chose in action constitutes "property" within the meaning of the *FCA*; and

e) Establishing intent and the role of "badges of fraud."

### A. Meaning of Creditor

[91] What or who constitutes a creditor for the purposes of the *FCA* is given a fair, large, and liberal meaning. In *Mawdsley BCCA*, in assessing whether an entity constitutes a "creditor" as required by the *FCA*, Justice Ballance stated:

> [75] The word "creditor" normally refers to a person to whom a debt or obligation is owed, or to someone entitled to the fulfilment of an obligation: see *Black's Law Dictionary* (9th ed.) and *Dictionary of Canadian Law* (3rd ed.). The courts have historically regarded "and others" in the FCA as referring to persons who do not have debts owing to them by the transferor, but who do have 'just claims' not yet brought to fruition in terms of legal process.

[92] In *0848052 B.C. Ltd. v. 0782484 B.C. Ltd.*, 2023 BCCA 95, the Court of Appeal said this of the temporal dimensions of being a creditor:

> [56] Similarly, the fact 0782 and SIA were not yet creditors of Accredit or Great Pacific at the time of the transfer of title to 0848 does not, by itself, establish that the respondents' fraudulent conveyance claim is bound to fail. In *Abakhan & Associates Inc. v. Braydon Investments Ltd.,* 2009 BCCA 521, leave to appeal SCC ref'd, 33545 (24 June 2010), this Court confirmed it is not necessary for a plaintiff to show it was a creditor of the defendant at the time of the challenged transfer. The Court also affirmed that future creditors can be protected by the Fraudulent Conveyance Act: at paras. 60, 78 and 87. See also *CIBC v. Bourkalis*, 1987 CanLII 2694 (BCCA) at paras. 10, 15 and 22; *Zhu v. Zhang*, 2021 BCSC 2524 at para. 117; *PR Mechanical Ltd. v. Schneider Construction Group Inc.*, 2021 BCSC 1261 at paras. 46–47.

### B. Insolvency

[93] The plaintiffs submit that JM Food Services is insolvent because it does not have assets available to meet its obligations to creditors. Indeed, overall, it is unclear what assets are in JM Food Services' possession. What was clear from the evidence, however, is that JM Food Services had contractual rights to sell pizza dough, small-wares, and franchises, and that all of those rights or assets were transferred away—for no consideration—to related corporate entities.

[94] Insolvency of the transferor is a consideration when assessing whether a transaction occurred with an intent to delay, hinder, or defraud. In *Ashcroft Holding Ltd. v. Almas*, 1992 CanLII 845 (B.C.S.C.) at 8, 11 CBR (3d) 221, Justice Houghton said this about the insolvency of the grantor:

> There is no necessity under the Fraudulent Conveyance Act to prove that the grantor was insolvent at the time of the making of the conveyance. The Act renders void a conveyance of real or personal property made with intent to defeat, hinder, delay or defraud creditors or others. If the grantor is insolvent after the conveyance, an inference of fraudulent intent must be drawn.

[95] Evidence of insolvency of the grantor may constitute circumstantial evidence to account for the reason for the disposition: *Watts v. Klaemt*, 2010 BCSC 1122 at paras. 37–40.

### C. Disposition of Property

[96] The defendants assert that the right to sell dough or small-wares does not constitute property within the meaning of the *FCA*. In support of this proposition, the

defendants cite *Manrell v. Canada (C.A.)*, 2003 FCA 128 where Justice Sharlow said this about the definition of property:

> [25] It is implicit in this notion of "property" that "property" must have or entail some exclusive right to make a claim against someone else. A general right to do something that anyone can do, or a right that belongs to everyone, is not the "property" of anyone. …

[97] I note that this excerpt comes from Sharlow J.A.'s discussion of the *ordinary meaning* of the word "property." Justice Sharlow went on to discuss the meaning of the word in the applicable statutory context—the *Income Tax Act*, R.S.C., 1985 (5th Supp.), c. 1 in that case—which she found was "broader than its ordinary meaning": *Manrell* at para. 26.

[98] On the basis of *Manrell*, however, the defendants submit there has been no disposition of property because property involves exclusive rights. They argue that here, the right to make or distribute dough, for example, does not entail an exclusive right that belongs to only one party. Therefore, it cannot be said to be 'property.'

[99] In response to this submission, the plaintiff relies on *Finness Yachting Inc. v. Menzies*, 2015 BCSC 1322 [*Finness*], appeal dismissed, 2016 BCCA 360. There was no dispute that an interest under a contract is a form of property that could be the subject of a fraudulent conveyance action: *Finness* at paras. 19-20. The trial judge found, however, that the defendant sought to frustrate the plaintiffs' ability to collect on the judgment by nominating one entity to receive payment for his management and consulting services instead of another entity, which did not constitute a fraudulent conveyance under the *FCA*: *Finness* at para. 28. The finding on what may constitute property was not disrupted on appeal.

### D. The Role of Intention

[100] The Court of Appeal examined the role of intent in the context of a fraudulent conveyance allegation in *Botham Holdings Ltd. (Trustee of) v. Braydon Investments Ltd.*, 2009 BCCA 521. At trial, this Court held the transfer of assets from Botham Holdings Ltd. ("Botham") to Braydon Investments Ltd. ("Braydon"), pursuant to an agreement made October 31, 2005, to be void and of no effect as against the

plaintiff, Abakhan & Associates Inc. (“Abakhan”). Abakhan was the trustee in bankruptcy of Botham. On appeal, Chief Justice Finch wrote:

> [2] Following a trial on affidavit evidence under Rule 18A, the learned summary trial judge held that one purpose of the asset transfer was to put BHL’s assets out of reach of its creditors, and the transfer was therefore a fraudulent conveyance within the meaning of the Fraudulent Conveyance Act, 1996, R.S.B.C. c.163. The trial judge held this to be so, despite the fact that BHL’s and Braydon’s principal, William Botham, had no dishonest intent, or *mala fides*, and acted on professional advice to effect legitimate business purposes.

[101] At para. 60, Finch C.J. discussed what is required to constitute intent under s. 1 of the *FCA* by reference to the following excerpt from *Ocean Construction Supplies Ltd. v. Creative Prosperity Capital Corp.*, 34 C.B.R. (3d) 241, 1995 CanLII 740 (B.C.S.C.) [*Ocean Construction*]:

> [25] In essence, a fraudulent conveyance is a transfer of an interest in property which is made with the intention, and which has the effect, of hindering or impairing the right of a creditor or other person to satisfy a claim against the transferor. It is not necessary for the person seeking relief to show that the transferor was insolvent at the time the transfer was made, and the applicant need not establish that he or she was a creditor, or an unsecured creditor, at the time the transfer was made. Re Skinner (1960), 1960 CanLII 349 (BC SC), 27 D.L.R. (2d) 74 (B.C.S.C.).
>
> [26] All that the applicant must show is that the transferor, in making the gift or transfer, did so with intent to delay, hinder or defraud creditors or others. Canadian Imperial Bank of Commerce v. Ash, (1964), 1964 CanLII 546 (BC SC), 47 D.L.R. (2d) 620(B.C.S.C.); C.I.B.C. v. Boukalis, (1987) 1987 CanLII 2694 (BC CA), 11 B.C.L.R. (2d) 190 (C.A.).

[102] Chief Justice Finch went on to succinctly summarize the necessity of intent:

> [73] The only intent now necessary to avoid a transaction under the modern version of the *Act* is the intent to “put one’s assets out of the reach of one’s creditors” (per *RBC v. Clarke*). No further dishonest or morally blameworthy intent is required.

[103] Regarding proof of fraudulent intent in the statute, Finch C.J. referred again to *Ocean Construction*:

> [27] Fraudulent intent is essentially a matter of fact to be proved in the circumstances of each particular case. Proof that the transferor intended to defeat or delay its creditors usually involves drawing inferences from the circumstances surrounding its transaction. Where some consideration has

> flowed from the transferee to the transferor, the court may consider the adequacy of the consideration in relation to the issue of intent, since a transfer at an undervalue raises suspicions about motive. Inadequate consideration may be considered to be a badge of fraud.

[104] Finally, on the issue of intent, in *Mawdsley BCCA*, Justice Newbury stated:

> [71] I do not agree with Mr. Mawdsley's submission, then, that *Braydon* did away with the requirement of intention on the part of the transferor for the FCA to apply. In some cases, of course, that intention may be inferred from the effect of the transaction, and indeed a presumption may arise in some circumstances from that effect. If there is no credible evidence to the contrary, the FCA may be satisfied; but there is no rule of law that in every case, an intention to defeat creditors must be inferred from the effect of the impugned transaction. As Freedman J.A. stated in *Mandryk*, evidence that the effect of the impugned transfer was to defeat or delay creditors "is not conclusive." In the result, I cannot accede to Mr. Manson's argument in the case at bar that Ms. Meshen must be taken as a matter of law to have intended to delay or hinder Mr. Mawdsley (assuming for these purposes that he qualifies as a 'creditor or other' under the FCA) in advancing a WVA claim.
>
> [Emphasis in original.]

[105] In *Mawdsley BCSC*, Ballance J. provided some insight into the basis for the "badges of fraud" used to assess intention when examining an impugned transaction:

> [211] Intention is a state of mind and is a question of fact to be ascertained based on the whole of the evidence of each particular case. Accordingly, whether a conveyance has been made with the required fraudulent intent will turn on the facts unique to each case. The precedential value of the large volume of case law is therefore limited. Authorities can be as readily found upholding transfers between a parent and children as they can setting them aside. The Court will examine the circumstances existing at the time the disposition was made as well as subsequent events that have a bearing on the question of intention at that time. At the same time, however, the law has long recognized that there may not be direct evidence of intention, and that fraud and concealment often march hand-in-hand. The courts have therefore identified certain circumstantial hallmarks, deemed suspicious, which may support an inference of fraudulent intent. In *Dexia Credit Local v. Rogan*, 2008 BCSC 1406 [*Dexia*], at paras. 23-24, Walker J. recites these so-called badges of fraud which the courts have traditionally resorted to in determining whether a transfer is fraudulent. The list is not closed:
>
> > [23] It is a question of fact, for the court to determine, whether the disposition was made with an intention to defeat, hinder, delay, or prejudice creditors. In *Banton v. Westcoast Landfill Diversion Corp*., 2004 BCCA 293 Braidwood J.A., writing for the court, cited at para. 5 a number of factual *indicia*

> of fraudulent intention or "badges of fraud" from *Frimer v. Lurcher*, [1984] B.C.J. No. 728 (S.C.):
>
> (1) The state of the debtor's financial affairs at the time of the transaction, including his income, assets and debts;
>
> (2) The relationship between the parties to the transfer;
>
> (3) The effect of the disposition on the assets of the debtor, i.e. whether the transfer effectively divests the debtor of a substantial portion or all of his assets;
>
> (4) Evidence of haste in making the disposition;
>
> (5) The timing of the transfer relative to notice of the debts or claims against the debtor;
>
> (6) Whether the transferee gave valuable consideration for the transfer.
>
> [24] There are other *indicia* or badges of fraud that include continuing to remain in possession following a conveyance and secrecy respecting the transactions.

[106] These badges of fraud have been referred to as well by the Court of Appeal: *Vancouver Coastal Health Authority v. Moscipan*, 2019 BCCA 17 at para 43.

[107] In their written submission, the plaintiffs provided some examples of transfers to a related person or company or trust indicating a “badge of fraud”:

a) Transfer to a sibling: *Stenson v. Stenson*, 2000 BCSC 724;

b) Transfer to a family trust: *Idaho (Department of Finance, Securities Bureau) v. Ultimate Ventures Inc.*, 2007 BCSC 1710; and,

c) Transfer to a related company: *Ocean Construction*.

**E. Burden**

[108] Where the same person is the director of the transferor and the transferee, with knowledge of the transferor’s ability to service debts, “the burden of explanations falls on the related parties.” In *Ocean Construction*, Baker J. explained this burden:

> [28] Where a transaction renders the transferor insolvent, the circumstances may also be considered suspicious. *Freeman v. Pope* (1870), L.R. 5 Ch. App. 538. If a transferor with debts makes a transfer the effect of which is to render him unable to meet his then existing liabilities, that circumstance furnishes very strong evidence of an intent to defraud his creditors. *Manryk v. Merko* (1971), 19 D.L.R. (3d) 238, (Man. C.A.). This case is also authority for the proposition that where parties to a transaction are related to each other, and the circumstances are suspicious, the burden of explanation falls on the related parties. In such a case the testimony of the related parties must be scrutinized with care and suspicion, and a judge may reject the evidence absent corroboration. As Justice Duff said in *Koop v. Smith*, (1915) 51 S.C.R. 55, 8 W.W.R. 1203, 25 D.L.R. 355, at page 1204:
>
> > ....it is very seldom that such evidence can safely be acted upon as in itself sufficient….

[109] Justice Steeves described the burden of proof when badges of fraud are found in *Kelly v. Gonzalez*, 2014 BCSC 1269:

> [41] Previous decisions have established that a dishonest intent, or *mala fides,* is not necessary to void a transaction under s. 1 of the FCA. The test is whether there has been an intent to hinder or delay or defeat a creditor (*Abakhan & Associates Inc. v. Braydon Investments Ltd.*, 2009 BCCA 521 at paras. 65 and 81). As well, generally, the onus is on a plaintiff to establish fraud or lack of consideration. However, once "badges of fraud" are shown to be present a presumption of fraud exists and the burden of explaining the circumstantial evidence of fraud falls on the parties to the conveyance. That is, the persuasive burden remains with the plaintiff and the evidential burden lies with the defendant (*Conte Estate v. Alessandro*, [2002] O.J. No. 5080 (S.C.J.) at paras. 20-22, aff'd [2004] O.J. No. 3275 (C.A.)).

[110] Where there is "inadequate or nominal" consideration for a disposition the plaintiff need only show that the intent of the transferor was to delay or hinder the ability of the creditor to exercise its rights. The intention of the transferee is not involved: *Chan v. Stanwood*, 2002 BCCA 474 at para. 20.

## VII. ANALYSIS

[111] The following issues require determination:

a) Were the plaintiffs creditors?

b) Did the defendants dispose of property?

c) If yes, was the disposition of property made to delay, hinder or defraud creditors and others of their just and lawful remedies?

**A. Were the plaintiffs creditors?**

[112] I start with the evidence about Mr. Russell's knowledge about the debt owing to the plaintiffs. He was cross-examined about when it was the defendants, through Mr. Russell, became aware that there would be a claim by the plaintiffs against the defendants. For the reasons that follow and on the totality of the evidence presented and, in part, Mr. Russell's testimony on this point, I am satisfied that the defendants knew about the plaintiffs' claim against the defendants in the *First Proceeding* by June 22, 2013.

[113] The focus of the cross-examination on the point of timing was that Mr. Russell became aware of the potential claim in or about June 2013. On this point, paragraphs of Macintosh J.'s decision from the *First Proceeding* were put to Mr. Russell during his cross-examination. Justice Macintosh spent some time reviewing the various exchanges between the parties as the business relationship fell apart. During the cross-examination, Mr. Russell was taken to this part of the *First Proceeding*:

> [49] I find it telling that on June 22, 2013, when the Defendants were tape recording Mr. Waheed without his knowledge, he said this about the telephone call with Wallace & Carey the day before: "I received a call from Wallace & Carey that the supplies has been stopped, which is a clear breach, clear breach, and I repeat a clear breach of my franchise agreement. Or else ... that everything, every loss in sales, everything is on Freshslice now." It was the Defendants who put the transcript of that tape recording into evidence at trial.
>
> [50] Similarly, when Mr. Waheed wrote to the Defendants, also on June 22, 2013, he included the following in his letter:
>
> > Just yesterday i.e. on 21st June 2013, I received a phone call followed by an email from Wallace & Carey (The distributor) who advised me that the Freshslice Head Office has stopped them from selling me and supplying me with Freshslice products with immediate effect. This action is in clear breach of the Franchise agreement I signed with you therefore I will hold you responsible for any losses from daily sales, inventory, all supplier invoices, monthly rent, any breach of lease agreement with the land lord, operating costs, food costs,

> Labor cost and all other costs associated with the day to day running of the business.

[114] The questioning proceeded as follows:

> Q: You were aware as early as June 22, 2013 that Mr. Waheed and his numbered company would be seeking compensation from JM Food Services for their business being terminated.
>
> A: He may have a claim. That is 100% normal.

[115] I was not asked to revisit Macintosh J.'s findings on this point. In their closing submissions, the defendants did not object to the plaintiffs' suggestion that the defendants knew by June 22, 2013 that the plaintiffs would seek compensation for allegedly breaching the franchise agreement.

[116] Based on the whole of the evidence, I find that the plaintiffs have proven on a balance of probabilities that they were creditors within the meaning of the *FCA* and that the defendants knew as much by June 22, 2013.

### B. Did the defendants dispose of property?

[117] At one point, JM Food Services had agreements to provide franchisees with pizza dough and equipment. JM Food Services also earned revenue from franchise fees. The evidence demonstrates, however, that the main source of ongoing revenue to JM Food Services was the sale of pizza dough to franchisees. On the totality of the evidence and the reasons that follow, I accept that these earning streams constituted property of JM Food Services, and that this property was transferred to the defendants.

[118] JM Food Services transferred the right to sell pizza dough, equipment/small-wares, and franchise sales. The franchise rights were first transferred to RFSP, then to Freshslice Holdings, and then to RF Franchising. JM Food Services assigned the franchise rights after June 21, 2013. The right to sell equipment (including small-wares) was transferred to 101, and the dough production and operation aspects of the business were transferred to A&M.

[119] Mr. Russell described each of these dispositions by stating JM Food Services "gave" the rights. Indeed, the defendants agreed that the "giving of these rights" was done without any consideration.

[120] I accept the plaintiffs' submission that the effect of the transfers from JM Food Services was to funnel all of the assets of JM Food Services to the defendants as described. Profits from the sale of dough that had been accruing to JM Food Services were diverted through A&M to the Family Trust. I further accept the plaintiffs' submission that Mr. Russell has moved the rights from one company he controls to another company or trust he controls.

[121] I am satisfied, based on the whole of the evidence, that the right to sell pizza dough to Freshslice franchisees created an income stream once available to JM Food Services. This book of business was, before June 2013, exclusively that of JM Food Services. Applying the principles in *Finness* and *Manrell*, I am satisfied that these income streams constituted "property" within the meaning of the *FCA*. I make the same finding regarding the right to sell equipment/small-wares. Again, this was a book of business once exclusively available to JM Food Services. This book of business was transferred after June 22, 2013.

### C. Did JM Food Services make the disposition to delay or hinder the ability of the plaintiffs to exercise their rights?

[122] The plaintiffs contend that the evidence as a whole supports the argument that the aforementioned dispositions were made to hinder the ability of the plaintiffs to exercise their rights. Mr. Russell disagreed with the suggestion that the "restructuring" was an attempt to avoid payment to the plaintiffs. Ultimately, I agree with the plaintiffs and make the following findings of instant "badges of fraud."

[123] First, the dates when the dispositions occurred are not clear. Based on my review of the evidence and documents tendered, it is apparent that the transactions occurred on or after June 22, 2013. The transactions may have occurred as late as 2016. The income tax return and financial statement for the fiscal year ending September 30, 2015 show that JM Food Services had income from the sale of pizza

dough of $638,797. At this time, the defendants would have had notice of the plaintiffs claim.

[124] The March 31 Agreement does not answer the issue about when the transfer occurred. This document, produced at the last minute, seems to be a partial attempt to shield the companies from small claims court judgments. The Court has not characterized this document as a document effecting the transfer of assets from one company to another.

[125] The plaintiffs invite the Court to infer that the defendants sought to adjourn the proceedings more than once in order to finalize the corporate reorganization. In my view, I am not able to draw such an inference and decline to do so.

[126] Second, based on the defendants' lack of document disclosure, the state of the debtor's financial affairs at the time of the transaction, including income, assets and debts is not known.

[127] As of June 21, 2013, JM Food Services was a solvent company with a stream of income from dough sales, continuing sales of franchises and rights to receive interest payments on loans it made to franchisees. JM Food Services had assets in terms of the "valuable rights" associated with the franchise systems.

[128] JM Food Services did not produce any tax returns or financial documents other than the tax return and financial statement for the year ending September 30, 2015. This is despite demands, Court orders and an obligation to do so under the *Rules*. Again, the defendants identified a number of documents ordered to be produced to be no longer in the possession of the "listing party."

[129] Though repeatedly uttered by Mr. Russell that the company was not viable, I do not have any financial records that would have easily supported (or refuted) this assertion. That was potential evidence in the possession and control of Mr. Russell. He chose to proceed without it.

[130] Third, the relationship between the parties to the transfers is very close. Mr. Russell is the sole director and sole shareholder of JM Food Services, Freshslice Holdings, RFSP, and RF Franchising. He is the sole trustee of the Family Trust. A&M is a company incorporated by Mr. Russell's nephews on April 8, 2014. Mr. Russell's brother, Mr. Alexander, bought A&M from the remaining nephew in 2019. Mr. Alexander incorporated 101 on October 1, 2014.

[131] These entities are all very closely related. The defendants do not suggest otherwise.

[132] Fourth, it seems uncontroverted that the disposition of the assets from JM Food Services rendered the corporation, at least currently, without any assets to pay the judgment. Though there is evidence before me that JM Food Services had revenue in the September 2015 year-end, I do not have any financial information to demonstrate current earnings.

[133] In sum, in my view the following factors can be seen as "badges of fraud" in this case:

a) The dispositions occurred without any consideration;

b) The entities are closely related with Mr. Russell serving as the sole director for most of the defendant companies and sole trustee of the Family Trust and his brother, someone he has worked with for many years, as the director of the remaining related companies; and

c) The disposition occurred after the defendants became aware of the plaintiffs' claims.

[134] Moreover, the dispositions appear to have divested JM Food Services of a substantial portion of its assets.

[135] I have concluded that any evidence of insolvency in this case—if it can be considered that—is itself circumstantial and I have not found it to be a significant

factor in the disposition. In other words, the insolvency factor does not play a central role on the instant facts.

[136] Though not necessary to my determination, I note the animus Mr. Russell has towards Mr. Waheed. His abhorrence for Mr. Waheed does not appear to have subsided in the years since Macintosh J. rendered his decision. If anything, Mr. Russell has vowed to "make things right" for his own companies and suggests he intends to "get it right this time."

### D. Have the defendants met the burden on them?

[137] I am satisfied that the evidence supports a finding that the dispositions were performed to hinder, delay or put out of reach assets for the plaintiffs. I look then to examine whether the defendants have established a satisfactory explanation for the impugned transactions.

[138] The defendants have not provided a credible explanation for the transfers, here occurring without any consideration. On his word only, Mr. Russell testified that the purpose was to restructure because the corporate defendants were struggling and were not viable. At one point, he referred to JM Food Services' write off of $1 million.

[139] As the director and shareholder, Mr. Russell appears to have a strongly held belief that he is entitled to move assets from one company to another without consequence.

[140] The defendants have not provided a credible explanation for the dispositions. If corporate reorganization was the basis for the dispositions then it would not have been difficult to prove this through corporate financial statements. In light of the credibility issues plaguing Mr. Russell's testimony, his word alone is insufficient in this case.

[141] I am satisfied that the plaintiffs have established that JM Food Services transferred all of its assets to some of the other defendants, without consideration, at

a time when they knew that it had creditors whose rights to be paid would be hindered or delayed as a result of the dispositions. The fact that these transfers were made without consideration is material to this analysis. The transfers were made either to companies sharing a common sole director and sole shareholder (Mr. Russell), or to close relatives of that sole director/shareholder.

[142] Mr. Russell agreed that the sale of pizza dough to franchisees was the chief asset of JM Food Services. This asset has ended up as an ongoing stream of income to the benefit of the Family Trust. Mr. Russell is the sole trustee of the Family Trust, established by him.

[143] Mr. Russell testified that he decided to transfer to 101, for no consideration, the right of JM Food Services to sell small-wares and equipment. Again, 101 was incorporated on October 1, 2014. Mr. Alexander is the sole director and shareholder of 101. 101 has not produced any income or tax documents so as to examine the profitability of the company or the value of the right to sell small-wares.

[144] What evidence is available in respect of the defendants' burden generally favours the position of the plaintiffs.

[145] There is some evidence, for example, to show that 101 was generating income. First, there is evidence that 101 purchased Mr. Russell's residence on November 24, 2017 for $2,249,000. Second, there is evidence to show that 101 provided money for the $1,500,000 purchase by Mr. Alexander of A&M on December 26, 2018. Though Mr. Alexander would not say how long it took for 101 to pay for the purchase of A&M, it appears that 101 has been profitable.

[146] With respect to the dough operations, Mr. Russell testified that he transferred these rights either directly to A&M or to RFSP and then to A&M, for no consideration. Mr. Russell is the sole director and shareholder of RFSP. A&M was incorporated in 2014 and Mr. Russell's nephews were the directors. They resigned when A&M was sold to Mr. Alexander for $1,500,000, a portion of which was paid for by 101.

[147] A&M took over the manufacture and sale of pizza dough from JM Food Services. For each pizza dough A&M sold, it paid $0.50 to Freshslice Holdings. After the reorganization of the Freshslice companies as described in the correspondence of December 12, 2017, Freshslice Holdings changed from being 100% owned by Mr. Russell to 100% owned by the Family Trust.

[148] Though the evidence was thin on this point, Mr. Russell suggested figures that would have the profit of pizza dough to be over $1 million. Though this was a rough figure, it appears that the disposition from JM Food Services for the sale of pizza dough moved a stream of income that had been increasing, from $658,000 in 2015 to over a million dollars in subsequent years.

[149] In sum, the defendants have not dispelled their burden in respect of the propriety of the dispositions.

### E. *Fraudulent Preferences Act*

[150] The parties focused their submissions on whether the impugned transactions constituted a fraudulent conveyance under the *FCA*.

[151] It is not uncommon at the commencement of the proceedings to seek relief under both the *FPA* and the *FCA*. Here, the parties agree that the plaintiffs must prove that the impugned disposition was made with the intention of defeating, hindering, delaying, prejudicing or defrauding creditors. Therefore, the parties submit, the plaintiffs must prove the same elements as a plaintiff in an action brought pursuant to the *FCA*.

[152] The *FCA* differs from the *FPA* to the extent that it applies only to transfers to creditors: *Trans Canada Insurance Marketing Inc. v. Fransen Insurance Services Ltd*., 2019 BCSC 1250 at para. 103. As MacNaughton J. indicated in *Wu*:

> [98] Section 6(a) of the FPA shields a transfer where it is made to a creditor: (1) in good faith, and (2) for a present actual payment. The effect of s. 6 of the FPA is similar to that of s. 2 of the FCA in that it has the effect of protecting good faith dispositions for good consideration: *Trustees of the IWA – Forest Industry Pension Plan v. Leroy*, 2017 BCSC 158 at para. 25.

[153] In light of the discussion of intention above, I would not find that the applicable dispositions were made in good faith.

[154] Because of the parties' submissions, I have also focused these reasons on the *FCA*. Based on the findings of fact I have made above, the plaintiffs have established the dispositions also constituted a fraudulent preference as defined in the *FPA*.

### F. Dissolution of 092

[155] The defendants have taken the position that 092 was dissolved and ceased to exist for any purpose on April 4, 2017. The NOCC was filed on November 6, 2020 while the company remained dissolved. The defendants assert that the declarations and injunctive relief sought by the plaintiffs should be dismissed because 092 has no legal status or capacity to bring or maintain an action against any defendant, including the defendants in the within action.

[156] The defendants assert that when a company is dissolved, it ceases to exist for any purpose and has no legal status or capacity to bring or retain an action as against a defendant. As a result, submits the defendants, a claim commenced by a dissolved company is a nullity and the claim cannot be effective until after the corporation is revived: *DeBoer v. Fletcher*, 2013 BCSC 143 at para. 4; *BCA*, s. 344(1).

[157] The defendants submit that if a dissolved company files an action and the limitation period lapses during the period between the dissolution and the revival of that company, the purported defendant acquires "a post-dissolution legal right" that it is entitled to rely upon to assert that the action is statute-barred, regardless of the retroactive effect of the company's revival. They rely on *Boake v. Blair*, 2019 BCSC 830 in taking the position that limitation periods that expire after a company is dissolved continue to run during any period of dissolution: at para. 85.

[158] Here, the defendants submit that the NOCC was filed by 092 while it was dissolved and did not exist as a legal entity. 092 was restored on September 9, 2022.

[159] In response, the plaintiffs rely on ss. 358(2) and 364(4) of the *BCA* which provide:

> 358(2) Subject to section 368, unless the court orders otherwise, a restoration under subsection (1) of this section is without prejudice to the rights acquired by persons before the restoration.
>
> …
>
> 364(4) A company that is restored is deemed to have continued in existence as if it had not been dissolved, and proceedings may be taken as might have been taken if the company had not been dissolved.

[160] These provisions were interpreted by Justice Funt in *Rising Star Learning (Kingsway) Ltd. v. Kandola*, 2018 BCSC 1541. Justice Funt considered the applicable principles in relation to federal legislation as follows:

> [33] In *Litemor Distributors (Ottawa) Limited v. W.C. Somers Electric Ltd.* (2004), 2004 CanLII 39026 (ON SC), 73 O.R. (3d) 228 (S. Ct. J.), Justice Panet considered the effect of a restoration under s. 209(4) of the *Canadian Business Corporations Act*, R.S.C. 1985, c. C-44 [CBCA] of a federally incorporated corporation.
>
> [34] Section 209(4) of the CBCA read:
>
> > 209(4) Subject to any reasonable terms that may be imposed by the Director, to the rights acquired by any person after its dissolution and to any changes to the internal affairs of the corporation after its dissolution, the revived corporation is, in the same manner and to the same extent as if it had not been dissolved,
> >
> > (a) restored to its previous position in law, including the restoration of any rights and privileges whether arising before its dissolution or after its dissolution and before its revival; and
> >
> > (b) liable for the obligations that it would have had if it had not been dissolved whether they arise before its dissolution or after its dissolution and before its revival.
>
> [35] Justice Panet held that the effect of s. 209(4) of the CBCA was to "cure" acts taken in the name of a corporation during its dissolution so that such acts are deemed to have been taken by the corporation. Justice Panet stated (in part):

> [27] On a plain reading of the wording of the statute, it appears that Parliament intended that the effect of revival is to be retroactive, such that the revival extends back to the moment of dissolution. The dissolution is deemed not to have occurred. This would imply that, upon revival, any acts undertaken in the name of the corporation by its principals during the period of dissolution would be "cured" so that such acts are deemed to have been taken by the corporation itself even though it was dissolved at the time.
>
> …
>
> [29] This makes good sense [retroactive effect] from a policy perspective, since any other conclusion would carry serious economic and logistical consequences for dissolved corporations and parties entering into transactions with them. Corporations are dissolved from time to time, sometimes without the knowledge of the corporation's principals. If the corporation is subsequently revived, it would create unwarranted confusion and uncertainty as to the rights and obligations of the revived corporation and third parties if courts were to hold these principals personally liable for acts undertaken in the name of the corporation during its dissolution: see the comments of Hanssen J. to this effect in *Helcor Enterprises Ltd. v. Moore & James Food Services Ltd*., 1990 CanLII 11064 (MB KB), [1990] 5 W.W.R. 596, 66 Man. R. (2d) 221 (Q.B.).
>
> [36] I find that, although the wording of the relevant provisions of the BCA is different than that of the CBCA considered in Litemor, the same principle arises. Generally, the dissolution is deemed not to have occurred and actions taken in the name of the corporation are cured. In the case at bar, I do not see prejudice to the plaintiff as a result of the restoration of Roofing.

See also *Yung v. Three Good Friends Property Holdings Inc.*, 2018 BCSC 1963 at paras. 68–69.

[161] I find that, to the extent a company is deemed to have continued in existence as though it had never been dissolved by operation of s. 364(4) of the *BCA*, it would be true (if that company had initiated an action while dissolved) so long as that action was initiated in accordance with any applicable limitation period, the limitation period should not be deemed to have elapsed just because the restoration of the company occurs after the limitation might have otherwise elapsed.

[162] On this basis, I agree with the plaintiffs' submissions that the recent authority interpreting the *BCA* and the interaction between the limitation of liability sections of the *BCA* and the restoration provisions answer the defendants' submission. The time that has elapsed since 092's dissolution and its restoration is not a bar to the plaintiffs claim because, according to the statute, 092 is deemed to have never been dissolved.

## VIII. CONCLUSION/ORDERS

[163] Mr. Russell learned on June 22, 2013 that the plaintiffs would pursue the defendants for compensation as a result of their allegations that they had been put out of business by the defendants. There then began a shifting of corporate assets from JM Food Services to the other defendants. The assets were transferred for no consideration. The assets were transferred either to other companies controlled by Mr. Russell or to companies controlled by his relatives. Based on the compelling evidence that the transfers constituted fraudulent conveyances as defined in the *FCA*, Mr. Russell failed to provide a reasonable or credible explanation for the transfer. In light of the presence of multiple badges of fraud, I draw the inference that the transfer was made to hinder and delay the defendants' creditors, here being the plaintiffs.

[164] Based on this conclusion, the Court makes the following orders:

a) A declaration that the transfer of the property by the defendant, JM Food Services, to each or any of the defendants was a fraudulent conveyance within the meaning of the *FCA*, and is of no force and effect insofar as it affects the rights of the plaintiffs as judgment creditors of the defendant, JM Food Services.

b) A declaration that the transfer of the property was a fraudulent preference within the meaning of the *FPA* and is of no force and effect insofar as it affects the rights of the plaintiffs as judgment creditors of the defendant, JM Food Services.

c) An order that the plaintiffs are entitled to pursue their just and lawful remedies as judgment creditors against the defendant, JM Food Services, as if it were still the legal and beneficial owner of the transferred property to the same extent as it was before the transfer of the property.

[165] The plaintiffs did not pursue their claim for an injunction restraining the defendants from disposing of or encumbering their interest in the property. Nor did the plaintiffs advance submissions in support of a declaration that the defendants hold the property in trust for the plaintiffs. I decline to make those orders.

[166] The plaintiffs additionally pleaded for judgment against the defendants jointly and severally for the sum of $563,049.95, plus Court order interest, which was the quantum fraudulently conveyed by JM Food Services. The plaintiffs pleaded no basis of liability for such an order. To the extent that such basis could be found in tort, the Court of Appeal has disposed of any tort directly affiliated with a fraudulent conveyance: *Chan* at paras. 37-39; *Stene v. White Caste Ventures Inc.*, 2022 BCCA 29 at para. 49; *Chan v. Stanwood et al.*, 2001 BCSC 378 at para. 49, aff'd 2002 BCCA 474. To the extent that a fraudulent conveyance could give rise to liability flowing from a different, established tort, the basis for that liability must be—and has not been—pleaded.

[167] As the successful party, the plaintiffs are entitled to their costs in the ordinary course. If required, counsel is granted leave to present further submissions on the issue of costs. Any request to appear on the issue of costs is to be presented to scheduling within 60 days of the date of these reasons.

"Winteringham J."

# COURT OF APPEAL FOR BRITISH COLUMBIA

## FORM 1 NOTICE OF APPEAL *(RULE 6(1) )*

VANCOUVER
27-Dec-23
COURT OF APPEAL REGISTRY

Court of Appeal File No. **(For Registry Use Only)**: Case File No. CA49562

Supreme Court File No.: VLC-S-S-2011355

*The file number can be found on the upper right corner of the Supreme Court documents*

Supreme Court Registry Location: Vancouver Registry

**To the respondent(s)**
A Court proceeding has been commenced against you in the Court of Appeal. See the final page of this form for details on how to respond.

### 1. PARTIES TO THE APPEAL

**Appellant(s)**
*List the party(ies) appealing the Supreme Court or tribunal order. Identify their roles in the proceeding below in brackets. E.g., Jane Doe (plaintiff, petitioner, etc.)*

JM FOOD SERVICES LTD., FRESHSLICE HOLDINGS LTD., RFSP EQUIPMENT & OPERATING INC., A&M ENTERPRISE LTD., 1015214 B.C. LTD., RF FRANCHISING INC., and THE TRUSTEES OF THE FRESHSLICE FAMILY TRUST (Defendants)

**Respondent(s)**
*List the other party(ies) in the Supreme Court or tribunal order you are appealing who are affected by the appeal. Identify their roles in the proceeding below in brackets. E.g., Jane Doe (defendant).*

TARIQ WAHEED and 0923063 B.C. LTD. (Plaintiffs)

## 2. THE ORDER YOU ARE APPEALING

**Is leave to appeal required?**
*Court of Appeal Rule 12 explains when you need leave to appeal. If you are unsure, check "Yes".*

☐ Yes ☑ No

**Who made the order?**
*Name the justice or other decision maker who pronounced the order you are appealing.*

THE HONOURABLE JUSTICE WINTERINGHAM

**What court and/or tribunal pronounced the order(s)?**

☑ Supreme Court ☐ Tribunal

Name of tribunal

**Date the order was pronounced**
*Include the day, month and year that the order being appealed was pronounced (not the date the order was entered).*

01/12/2023

*DD/MM/YYYY*

**City where the order was pronounced**

NEW WESTMINSTER

**Length of lower court hearing**
*Indicate in days or hours the length of the hearing that led to the order you are appealing from. For example, if you are appealing a judgment from a trial that took two hours, enter "two hours."*

FOUR DAYS

**What type of proceeding are you appealing from?**
*Check one only.*

☑ Trial Judgment ☐ Order of a Tribunal
☐ Summary Trial Judgment ☐ Chambers Judgment

## 3. RELIEF SOUGHT

If leave to appeal is not required, fill out Part A. If you are seeking leave to appeal, fill out Part B.

**PART A: LEAVE NOT REQUIRED**

**Part of the order being appealed**
*If you only want to appeal one part of an order, enter the part that is being appealed.*

a) A declaration that the transfer of the property by the defendant, JM Food Services, to each or any of the defendants was a fraudulent conveyance within the meaning of the FCA, and is of no force and effect insofar as it affects the rights of the plaintiffs as judgment creditors of the defendant, JM Food Services.

b) A declaration that the transfer of the property was a fraudulent preference within the meaning of the FPA and is of no force and effect insofar as it affects the rights of the plaintiffs as judgment creditors of the defendant, JM Food Services.

c) An order that the plaintiffs are entitled to pursue their just and lawful remedies as judgment creditors against the defendant, JM Food Services, as if it were still the legal and beneficial owner of the transferred property to the same extent as it was before the transfer of the property.

d) Costs to the Plaintiffs in the Set aside the trial judgment and dismiss the action with costs to the Defendants in the ordinary course.

**Order(s) you are seeking on appeal**
*Briefly list the order(s) you will ask this Court to make on appeal For example: "Set aside the trial judgment and order a new trial". Include any order as to costs.*

Set aside the trial judgment and dismiss the action with costs to the Appellants/Defendants.

## PART B: SEEKING LEAVE TO APPEAL

**Part of the order being appealed**
*If you are only seeking leave to appeal one part of an order, enter the part that you are seeking leave to appeal.*

**Grounds for leave to appeal**
*Be as specific as possible. For example, if you believe the trial judge used an incorrect legal test or otherwise misapplied the law, indicate that here.*

## 4. ADDITIONAL INFORMATION

**Sealing order**
*Is there an order sealing any part of the trial court or tribunal file? If yes, add date(s).*

☐ Yes ☑ No Date

*DD/MM/YYYY*

**Anonymity order/publication ban**
*Are there orders that protect the identity of a party or parties? If yes, add date(s).*

☐ Yes ☑ No Date

*DD/MM/YYYY*

**Areas of law raised in the appeal**
*You may check more than one box if appropriate. For example, you should check "motor vehicle accidents" and "torts" for a personal injury claim involving a motor vehicle accident.*

| | | |
|---|---|---|
| ☐ Constitutional/Administrative | ☑ Civil Procedure | ☑ Commercial |
| ☐ Motor Vehicle Accidents | ☐ Municipal Law | ☐ Real Property |
| ☑ Torts | ☑ Equity | ☐ Wills and Estates |
| ☐ Divorce Act (Canada) | ☐ Family Law Act | ☐ Other |

**Appeals involving children**
*Does this appeal involve the rights or interests of a child? E.g., Parenting order*

☐ Yes ☑ No

## 5. SERVICE

**Are you representing yourself?**

☐ Yes ☑ No

**Name(s) and address(es) within BC for service of appellant(s).** *If you have a lawyer, include the law firm's address; otherwise provide your own residential address.*

1610 INGLETON AVENUE
BURNABY, BRITISH COLUMBIA
V5C 5R9

**Phone number(s) of appellant(s)**

604.251.7444

**Email address(es) for service of appellant(s)**
*If you provide an email address, you are consenting to have documents served on you by email.*

VINCENT@FRESHSLICE.COM

Date form completed

Date: 22/12/2023 *DD/MM/YYYY*

Name of lawyer or party authorizing filing of this form: VINCENT LI

**To the appellant(s):**
You must file and serve this form on each respondent named in this document within the timelines required by the *Court of Appeal Act* and Court of Appeal Rules. You must file a Notice of Hearing **not more than one year** after filing this Form 1 or your appeal will be placed on the inactive list (Rule 50(1)(a)).

**To the respondent(s)**

**If you intend to participate** in this proceeding, **you must give notice** of your intention by doing the following **not more than 10 days** after receiving this Notice of Appeal: (1) file a "Notice of Appearance" (Form 2 of the *Court of Appeal Rules*) in a Court of Appeal registry and; (2) serve the Notice of Appearance on the appellant.

If you fail to file and serve a Notice Appearance:

(a) You are presumed to take no position on the appeal, or the application for leave to appeal (if leave is required).

(b) The parties are not obliged to serve you with any further documents related to the appeal, including an order granting leave to appeal (if leave is required).

**You are presumed to take no position if you fail** to file and serve a Notice of Appearance within the time described above. The filing registries for the British Columbia Court of Appeal are as follows.

Central Registry:

B.C. Court of Appeal
Suite 400, 800 Hornby St.
Vancouver BC V6Z 2C5

Other Registries:

B.C. Court of Appeal
The Law Courts
P.O. Box 9248
STN PROV GOVT
850 Burdett Ave.
Victoria BC V8W 1B4

B.C. Court of Appeal
223 - 455 Columbia St.
Kamloops BC V2C 6K4

Inquiries should be addressed to (604) 660-2468.