CITATION: FL Receivables Trust 2002-A v. Cobrand Foods Ltd., 2007 ONCA 425
DATE: 20070612
DOCKET: C43408 & C42354

COURT OF APPEAL FOR ONTARIO

LASKIN, BORINS and FELDMAN JJ.A.

BETWEEN:

PRUDENTIAL SECURITIES CREDIT CORP., LLC in its capacity as Administrator of FL RECEIVABLES TRUST 2002-A on its own behalf and on the behalf of all creditors of Robert Laba

Plaintiff (Respondent in C43408 and Appellant in C42354)

and

COBRAND FOODS LTD., ROBERT LABA, BARRY O. TELFORD, CHARLES XAVIER and ANGELA LABA

Defendants (Robert Laba, Appellant in C43408 and Respondent in C42354 and Angela Laba, Respondent)

Martin Sclisizzi for the appellant/respondent Robert Laba

Brett Harrison for the respondent/appellant Prudential Securities Credit Corp., LLC

Myron W. Shulgan, Q.C. for the respondent Angela Laba

Heard: December 13, 2006

On appeal from the judgment of Justice Herman J.W. Siegel of the Superior Court of Justice dated March 29, 2005.

LASKIN J.A.:

A. OVERVIEW

[1] The plaintiff, Prudential Securities Credit Corp., LLC, claimed against Robert Laba on a guarantee, and against Robert Laba and his wife, Angela Laba, on the ground that Robert's transfer of his interest in two properties to Angela were fraudulent conveyances and thus void under s. 2 of the *Fraudulent Conveyances Act*, R.S.O. 1990, c. F.29. The action was tried by a judge alone.

[2] At the end of Prudential's case, both Robert Laba and Angela Laba brought motions for a non-suit and elected to call no evidence. The trial judge dismissed Robert Laba's motion and granted Angela Laba's motion, with reasons to follow. Later, and without hearing further submissions, he delivered reasons granting Prudential judgment against Robert Laba on his guarantee in the amount of its claim (US $639,348.32 and Can $600.00, together with prejudgment interest of US $139,189.45), and dismissing Prudential's claim against Angela Laba.

[3] Both Robert Laba and Prudential have appealed. On his appeal, Robert Laba makes a single submission: the trial judge failed to give him an opportunity to make closing argument. Robert Laba submits that this failure amounted to a miscarriage of justice and must be remedied by a new trial.

[4] On its appeal, Prudential submits that in dismissing its action against Angela Laba, the trial judge made three errors. First, he applied the wrong legal test on a non-suit motion. Second, he applied the wrong test for establishing a fraudulent conveyance. And third, he failed to properly assess the evidence in support of Prudential's claim.

B. BACKGROUND FACTS

[5] In 1996, Robert Laba became the chief financial officer and a 50 per cent shareholder in T.B. Extreme Foods Limited. Over the next three years, T.B. Extreme acquired twenty-six Taco Bell franchises. In 1999, the defendant, Cobrand Foods Ltd. was incorporated to acquire additional Taco Bell franchises. Robert Laba became the chief financial officer and a director of Cobrand. He was sued on a written guarantee that he gave in connection with a loan from Captec Financial Group Inc. to Cobrand. Prudential is Captec's assignee.

[6] Captec was in the business of making loans to franchised restaurant operators for the purchase of restaurant equipment. In November 1999, Captec agreed to finance Cobrand's purchase of equipment for a Taco Bell / Pizza Hut restaurant in Toronto. In April 2000, Captec advanced the loan in the amount of US $523,680.00, and Cobrand gave Captec a promissory note and security over the equipment. Robert Laba guaranteed payment of Cobrand's debts and liabilities in respect of the Captec loan.

[7] In March 2001, Cobrand defaulted on the loan. In February 2002, Prudential began this action. It obtained a default judgment against Cobrand, and proceeded to trial against Robert and Angela Laba.

C. ANALYSIS

I. Robert Laba's Appeal

1) Did the trial judge's failure to give Robert Laba an opportunity to make closing argument amount to a miscarriage of justice?

[8] The non-suit motions were argued over two and a half days in late July 2004. The trial judge reserved his decision on the motions. Before adjourning court, however, he advised counsel that if the non-suit motions were unsuccessful they should be ready to re-attend for closing argument. On July 30, 2004, the trial judge issued a brief endorsement. He dismissed Robert Laba's non-suit motion and granted Angela Laba's motion, and said, "Written reasons with respect to both motions will follow."

[9] The trial judge apparently forgot about reconvening for final argument. Instead, on March 29, 2005, he delivered written reasons in which he not only explained his decision on the non-suit motions, but also went farther, granting judgment against Robert Laba and dismissing the action against Angela Laba.

[10] In finding Robert Laba liable on his guarantee, the trial judge said at para. 35 of his reasons:

> [35] For the foregoing reasons, I am satisfied that the plaintiff has raised a *prima facie* case. Accordingly, the motion for non-suit must be dismissed. In fact, as set out above, I am satisfied that the plaintiff has established well beyond a balance of probabilities that Robert Laba is liable on the Guarantee.

[11] Robert Laba submits that the right to make closing argument is a substantive right, essential to a fair trial. As he was deprived of this right, albeit inadvertently, he was denied the opportunity to fully present his case. He points out that though he presented argument on the non-suit motion, a plaintiff's burden to defeat a non-suit differs from and is less onerous than its burden to obtain judgment on its claim. Thus, Robert Laba contends that the result of being denied the right to make closing argument amounts to a miscarriage of justice, which can be remedied only by an order for a new trial.

[12] Before addressing Robert Laba's submission, I want to say a few words about non-suit motions in civil non-jury trials. The term "non-suit" refers to a motion brought by the defendant at the close of the plaintiff's evidence to dismiss the action on the ground that the plaintiff has failed to make out a case for the defendant to answer. Neither the *Courts of Justice Act*, R.S.O. 1990, c. C.43, nor the *Rules of Civil Procedure* specifically provides for non-suit motions, but judges continue to have a recognized jurisdiction to entertain these motions.

[13] Still, I question whether in this province a non-suit motion in a civil non-jury trial has much value. In Ontario, when a defendant moves for a non-suit, the defendant must elect whether to call evidence. See *Ontario v. Ontario Public Service Employees Union (OPSEU)* (1990), 37 O.A.C. 218 at para. 40 (Div. Ct.). If the defendant elects to call evidence, the judge reserves on the motion until the end of the case. If the defendant elects to call no evidence – as Robert Laba elected in this case – then the judge rules on the motion immediately after it has been made.

[14] A non-suit motion adds to the time and expense of a trial. And because of the election requirement, it has little practical value. Perhaps a defendant bringing the motion sees a tactical advantage in being able to argue first. To succeed on the motion, however, the defendant must show that the plaintiff has put forward no case to answer, in most lawsuits an onerous task. Why not simply take on the less onerous task of showing that the plaintiff's claim should fail? It is small wonder that most commentators consider that in civil judge alone trials, non-suit motions gain little and are becoming obsolete. See *Phipson on Evidence*, 16th ed. (London: Sweet & Maxwell, 2005) at 274, and John Sopinka, Donald B. Houston & Melanie Sopinka, *The Trial of an Action*, 2d ed. (Toronto: Butterworths Canada, 1999) at 151-52.

[15] In this case, I agree with Robert Laba on three points. First, as my discussion above signals, Prudential's burden on the non-suit motion differed from and was less onerous than its burden to obtain judgment on its claim. To defeat the non-suit motion, Prudential had to satisfy the trial judge that it had put forward a *prima facie* case – that it had put forward evidence, which, if believed, would allow the trial judge to decide in its favour. To obtain judgment, Prudential, of course, had to establish its claim on a balance of probabilities.

[16] Second, I agree with Robert Laba that the opportunity to make closing argument is a substantive right. And third, I agree that though he did so inadvertently and not deliberately, the trial judge erred in depriving Robert Laba of that opportunity. Because of this error, Robert Laba asks for a new trial.

[17] Not every error by a trial judge entitles an aggrieved party to a new trial. Section 134(6) of the *Courts of Justice Act* stipulates that this court should order a new trial only

where "some substantial wrong or miscarriage of justice has occurred." This stringent standard reflects the underlying policy that new trials ordinarily are contrary to the public interest. New trials cause increased costs or wasted costs as well as delay in resolving disputes, and are therefore to be avoided unless plainly required by the interests of justice. See *Arland and Arland v. Taylor*, [1955] O.R. 131 (C.A.).

[18] Thus, the narrow question on this appeal is whether the trial judge's failure to give Robert Laba an opportunity to make a closing argument caused a miscarriage of justice. I would answer that question, no.

[19] There are decisions of this court standing for the proposition that a litigant has a substantive right to present closing argument, and where that right is denied, we should order a new trial. The main case, followed many times, is *Felker v. Felker*, [1946] O.W.N. 368 (Ont. C.A.). In that case, this court held that the defendant was deprived of her substantive right to have her case fully presented because the trial judge gave judgment without giving her an opportunity to present argument. The court ordered a new trial.

[20] In the appeal before us, I come to a different conclusion. In doing so, I do not intend in any way to depart from *Felker* and its progeny. But, as is invariably the case, context matters. Here, the context includes three important considerations.

[21] First, Robert Laba cannot say that he had no opportunity to present argument after all the evidence was in. To the contrary, he fully argued over the course of two and a half days all the defences to the guarantee available to him. Although he did so on his non-suit motion instead of in final argument, he nonetheless had an opportunity to fully present his side of the case. It seems to me that is all *Felker* requires. Indeed, the trial judge's reasons show that even on the non-suit motion, Robert Laba argued Prudential had not established its claim against him on a balance of probabilities. At para. 25 of his reasons, the trial judge set out Robert Laba's principal argument: "The principal argument of the defendant is that the plaintiff has failed to prove, on a balance of probabilities, that the Guarantee relates to the Loan."

[22] Second, and critically important, Robert Laba has not shown that if he had been given an opportunity to make closing argument, the result would have been different. On appeal, his trial counsel filed an affidavit stating that he expected to have the opportunity to make closing submissions. But, his affidavit is silent on any new arguments that he might have presented.

[23] In his factum on appeal, Robert Laba raised but one defence: his guarantee was meant to be an "interim measure", to end once the landlord of the restaurant premises agreed – as it eventually did – to subordinate its interest in Cobrand's equipment to that

of Captec. This defence was not even pressed at trial, and was quickly and correctly disposed of by the trial judge at para. 13 of his reasons:

> [13] While Robert Laba has pleaded that he understood the Guarantee to be effective only until the landlord waiver issue was finalized to the satisfaction of Captec, this was not seriously argued at trial and there is no evidence to support this position.

[24] Third, when the trial judge released his reasons granting judgment, Robert Laba did not write to him or go back to him to complain that he had been prejudiced in any way by being deprived of the opportunity to make closing argument.

[25] In the light of these considerations, I am not persuaded that a miscarriage of justice has occurred. Had Robert Laba been given the opportunity to present a closing argument, I am not satisfied that the result would have been different. I would dismiss his appeal.

II. Prudential's Appeal

1) Did the trial judge apply the wrong test on Angela Laba's non-suit motion?

[26] In October 2000, Robert Laba transferred his interest in two properties to his wife, Angela. In its action, Prudential alleged that the transfers were void because they were made with intent to defeat its claim as creditor, contrary to s. 2 of the *Fraudulent Conveyances Act*. Section 2 states:

> Every conveyance of real property or personal property and every bond, suit, judgment and execution heretofore or hereafter made with intent to defeat, hinder, delay or defraud creditors or others of their just and lawful actions, suits, debts, accounts, damages, penalties or forfeitures are void as against such persons and their assigns.

[27] At the end of Prudential's case, Angela Laba moved for a non-suit, which the trial judge granted. Prudential submits that by doing so the trial judge applied the wrong test. The factual background of this submission is briefly as follows.

[28] As I have said, Robert Laba was a 50 per cent shareholder in T.B. Extreme. T.B. Extreme's lender was the Royal Bank of Canada ("RBC"). In May 1998, Robert Laba gave RBC a personal guarantee of T.B. Extreme's indebtedness limited to $1 million. By

1999, T.B. Extreme was in financial difficulty. In April 2000, Robert Laba gave Captec his personal guarantee of Cobrand's indebtedness.

[29] At the time he gave these two guarantees, Robert Laba had an interest in two properties. He held a 50 per cent interest in the matrimonial home at 4 Lyon Court in Leamington, Ontario. Angela Laba held the other 50 per cent. He also held a 50 per cent interest in the property at 39 Erie Street South in Leamington. His father held the other 50 per cent.

[30] In the summer of 2000, because of T.B. Extreme's financial difficulties, RBC asked for additional security and threatened to put in a monitor. In July 2000, the Labas entered into a transfer agreement in which Angela consented to a $500,000 mortgage in favour of RBC on a property at 10 Hillview Crescent in Leamington owned by her numbered company, 1220812 Ontario Inc. ("122"). In return, Robert Laba agreed to transfer his interest in 4 Lyon Court and 39 Erie Street South to Angela. Robert transferred his interest in the properties in October 2000. The trial judge found that when Robert Laba gave his guarantee to Captec, his interest in the two properties was worth approximately $562,000.

[31] In February 2001, T.B. Extreme was assigned into bankruptcy. RBC claimed against Robert Laba on his guarantee and against 122 to enforce the mortgage. 122 defended the action, contending that the mortgage was invalid.

[32] In resisting Angela's non-suit motion, Prudential put forward what it claimed were numerous "badges of fraud" associated with the transfers. The trial judge itemized these badges at para. 61 of his reasons:

> [61] The plaintiff says Robert Laba conveyed the property "with intent to defeat, hinder, delay or defraud his creditors and others". It says the following "badges of fraud" raise an evidentiary burden on Robert Laba which he has not discharged:
>
> 1. the conveyance represented substantially all of his remaining assets at the time;
> 2. Robert Laba continued in possession and used the Properties after the transfers;
> 3. the transfers were made at a time when RBC was putting in place a monitor over TB Extreme whose debts Robert Laba had guaranteed;

4. the deeds refer to nominal consideration which the plaintiff says is untrue if the true consideration was the granting of a mortgage by 122 if called upon in the future;
5. unusual haste to make the transfers in October, 2000;
6. retention by Robert Laba of some benefits in 4 Lyon, reflected in his receipt of funds from a later mortgage on 4 Lyon in 2002;
7. the close relationship between the parties as husband and wife; and
8. an alleged lack of good consideration.

[33] The trial judge nonetheless granted Angela Laba's motion. He concluded, at para. 71, that the "badges of fraud do not, on a balance of probabilities, evidence fraud when considered against the background of the purpose of the Transfer Agreement." According to the trial judge, at para. 69, "it is at least as likely that the Transfer Agreement and the transfers of the Properties were entered into by Robert Laba with a view to having 122 grant the RBC Mortgage in favour of RBC, one of his two creditors, rather than with an intent to defeat, hinder, delay or defraud his creditors."

[34] Prudential submits that the trial judge applied the wrong test on the non-suit motion. It argues that the trial judge should not have weighed the competing inferences available from the evidence to determine whether fraud had been established on a balance of probabilities. Instead, he should simply have determined whether Prudential's evidence, assuming it was believed, made out a *prima facie* case, a case for Angela Laba to answer. I agree with this submission.

[35] On a non-suit motion, the trial judge undertakes a limited inquiry. Two relevant principles that guide this inquiry are these. First, if a plaintiff puts forward some evidence on all elements of its claim, the judge must dismiss the motion. Second, in assessing whether a plaintiff has made out a *prima facie* case, the judge must assume the evidence to be true and must assign "the most favourable meaning" to evidence capable of giving rise to competing inferences. This court discussed this latter principle in *Hall et al. v. Pemberton* (1974), 5 O.R. (2d) 438 at 438-9, quoting *Parfitt v. Lawless* (1872), 41 L.J.P. & M. 68 at 71-72:

> I conceive, therefore, that in judging whether there is in any case evidence for a jury the Judge must weigh the evidence

> given, must assign what he conceives to be the most favourable meaning which can reasonably be attributed to any ambiguous statements, and determine on the whole what tendency the evidence has to establish the issue.
>
> …
>
> From every fact that is proved, legitimate and reasonable inferences may of course be drawn, and all that is fairly deducible from the evidence is as much proved, for the purpose of a *prima facie* case, as if it had been proved directly. I conceive, therefore, that in discussing whether there is in any case evidence to go to the jury, what the Court has to consider is this, whether, assuming the evidence to be true, and adding to the direct proof all such inferences of fact as in the exercise of a reasonable intelligence the jury would be warranted in drawing from it, there is sufficient to support the issue.

[36] In other words, on a non-suit motion the trial judge should not determine whether the competing inferences available to the defendant on the evidence rebut the plaintiff's *prima facie* case. The trial judge should make that determination at the end of the trial, not on the non-suit motion. See John Sopinka, Sidney N. Lederman & Alan W. Bryant, *The Law of Evidence in Canada*, 2d ed. (Toronto: Butterworths Canada, 1999) at 139.

[37] In granting Angela Laba's motion, the trial judge went beyond his limited mandate and failed to apply either of the two principles set out above. Ordinarily, where an appellate court reverses a decision to grant a non-suit in a judge alone trial, a new trial is ordered. Prudential, however, does not want a new trial. Instead, it wants this court to decide whether the trial judge erred in concluding that it had not established that the transfers were fraudulent conveyances. Furthermore, although Prudential does request, in the alternative, that the case be sent back for a new trial, in my view, that remedy is not warranted as the trial judge's reasons provide a sufficient basis for this court to determine the merits of Prudential's action.

2) Did the trial judge apply the wrong test for establishing a fraudulent conveyance claim?

[38] Prudential submits that by putting the onus on it to establish fraud on a balance of probabilities, the trial judge applied the wrong test. Prudential argues that the trial judge

should have engaged in a two-step analysis. First, he should have concluded that the "badges of fraud", on which Prudential relied, gave rise to an inference of fraud and that that inference then put a "burden of explanation" on Angela Laba to show that her husband did not act with an intent to defeat his creditors. See *Rinaldo v. Rosenfeld (Trustee of)*, [2001] O.J. No. 4189 (C.A.). Second, as neither Robert nor Angela Laba put forward any evidence to meet their burden, the trial judge should have found that Prudential was entitled to a judgment against Angela Laba and declared the transfers void. I do not accept Prudential's submission.

[39] The crucial question in any fraudulent conveyance action is whether the plaintiff has proved the fraudulent intent of the debtor. While the legal burden to prove fraudulent intent remains on the plaintiff throughout the trial, the plaintiff can raise an inference of fraud sufficient to put a "burden of explanation" on the defendant debtor. The plaintiff typically raises an inference of fraud by putting forward "badges of fraud." These "badges of fraud" vary from case to case. They are no more than typical and suspicious facts that may allow the court to make a finding of fraud absent an explanation from the debtor. See C.R.B. Dunlop, *Creditor-Debtor Law in Canada*, 2d ed. (Toronto: Thomson Canada, 1995) at 613-15.

[40] The court, however, is not compelled to draw this inference of fraudulent intent from badges of fraud pleaded by the plaintiff. See *Koop v. Smith* (1915), 51 S.C.R. 554 at 558-59. The court may dismiss a fraudulent conveyance action because it has decided that the surrounding circumstances taken as a whole explain away the plaintiff's evidence. It seems to me that is what the trial judge did in this case.

[41] It is clear from his reasons that the trial judge was well aware that it was within his discretion to draw an inference of fraudulent intent from Prudential's alleged badges of fraud. Unfortunately, the trial judge's reasons are not entirely clear on whether he drew this inference. One or two paragraphs in his judgment suggest that he did. On balance, however, on my reading of his reasons, it appears that the trial judge decided not to draw an inference of fraudulent intent and thus not to place the "burden of explanation" on Angela Laba. Instead, he decided Prudential's claim on the basis it had the burden of proof to establish a fraudulent conveyance on a balance of probabilities and did not have the benefit of an inference of fraudulent intent. He looked at all the circumstances surrounding the badges of fraud and drew inferences that explained away Prudential's evidence. He therefore concluded that Prudential had not made out its case.

[42] For example, at para. 69 of his reasons, in a passage I have already quoted, he said, "it is at least as likely" that the transfers were made to facilitate the RBC mortgage rather than to defeat his creditors. Implicitly, he concluded Prudential did not establish a fraudulent intent on a balance of probabilities. Also, at para. 71, he found, "the facts which the plaintiff submits represents badges of fraud do not, on a balance of

probabilities, evidence fraud." Again, he determined that Prudential failed to meet its burden. And, more importantly, in several paragraphs, which I discuss below, the trial judge rejected a number of the badges of fraud alleged by Prudential. In my view, these passages demonstrate, as in *Rinaldo*, *supra*, that the trial judge concluded, in the circumstances before him, that Prudential had not met the threshold necessary to put the burden of explanation on Angela Laba. In my view, it was open to him to do so.

[43] In the next section of these reasons, I discuss the inferences that the trial judge did draw. On this ground of appeal, it is sufficient to say that the trial judge did not and was entitled not to draw the permissive inference of fraudulent intent. I am therefore not persuaded that he applied the wrong test for establishing a fraudulent conveyance.

3) Did the trial judge fail to properly assess Prudential's evidence?

[44] Even accepting that it had the burden throughout to establish that the transfers were fraudulent on a balance of probabilities, Prudential contends that in finding against it the trial judge failed to properly assess the evidence. Central to this contention is Prudential's submission that, as the entire fraudulent conveyance case against Angela Laba was based on a written record, the principle of appellate deference to a trial judge's fact-finding and inference-drawing does not apply.

[45] The principle of deference means that an appellate court may substitute its own view of the evidence and draw its own inferences only if the trial judge committed a palpable and overriding error or made findings of fact or drew inferences that are unreasonable or unsupported by the evidence. See *H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401 at para. 4. However, because the relevant evidence in this case is written, Prudential submits that this court may make its own findings of fact and draw its own inferences without giving any deference to the trial judge.

[46] That submission has been overtaken by recent decisions of the Supreme Court of Canada and this court. See *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, *Schwartz v. Canada*, [1996] 1 S.C.R. 254, *Equity Waste Management of Canada v. Halton Hills (Town)* (1997), 35 O.R. (3d) 321 (C.A.), *Gottardo Properties (Dome) Inc. v. Toronto (City)* (1998), 162 D.L.R. (4th) 574 (Ont. C.A.), and *Waxman v. Waxman* (2004), 44 B.L.R. (3d) 165 (Ont. C.A.). The principle of appellate deference to a trial judge's fact-finding and inference-drawing applies even when the entire trial record is in writing. That is so because the principle of deference is grounded in more than a trial judge's ability to see and hear the witnesses. Deference recognizes that even on a written record, the trial judge "lives through" the trial while a court of appeal reviews the record only through the lens of appellate review. Deference also preserves the integrity of the trial process, maintains the confidence of litigants in that process, reduces the number and

length of appeals and therefore, the cost of litigation, and appropriately presumes that trial judges are just as competent as appellate judges to resolve disputes justly.

[47] The principle of deference, therefore, applies to the trial judge's finding that Prudential failed to establish that the transfers were fraudulent. That finding was based on inferences the trial judge drew from the factual record. In drawing those inferences, the trial judge rejected as evidence of fraudulent intent a number of the badges of fraud put forward by Prudential.

[48] For example, at para. 66 of his reasons, the trial judge refused to infer that Robert Laba selected 10 Hillview Crescent to defeat his creditors. Instead, he inferred that RBC selected the security on 10 Hillview Crescent for reasons that do not impeach the transfers. At para. 73, the trial judge also drew the inference that Angela Laba would not have consented to the RBC mortgage if she had not received consideration roughly equal in value to the equity in 10 Hillview Crescent.

[49] And, faced with a choice of whether the transfers showed an intent to defeat creditors or an attempt to meet the demands of T.B. Extreme's lender, at para. 69, the trial judge drew the inference that the latter was at least as likely as the former. Prudential contends that favouring one creditor over another amounted to a fraudulent conveyance under s. 2 of the *Fraudulent Conveyances Act*. Although this court has held that this statute may apply to conveyances made for the benefit of other creditors, the trial judge correctly concluded that s. 2 requires a fraudulent intent on the part of the debtor regardless of whether one creditor is "favoured" over another. See *Optical Recording Laboratories Inc. v. Digital Recording Corp.* (1990), 1 O.R. (3d) 131 at 139 (C.A.). He refused to find that intent in this case.

[50] Finally, at para. 72, the trial judge refused to draw an inference of fraud either from the mere fact that Robert and Angela Laba were husband and wife or from the fact that she later permitted him to take some of the mortgage proceeds on the matrimonial home at 4 Lyon Court for his personal use.

[51] Thus, the only question on this branch of the appeal is whether the inferences drawn by the trial judge on which he based his ultimate finding are supported by the evidence or, I might add, by the absence of evidence put forward by Prudential. See *H.L.*, *supra*, at para. 74. In my view, they are.

[52] When the transfers took place, neither Robert Laba nor Cobrand was insolvent. Neither was in breach of any obligation to Captec. The transfers themselves gave RBC access to about the same amount of security as it would have had access to if Robert Laba had not conveyed the two properties to his wife. Prudential led no evidence to show or suggest that Angela Laba would have consented to the mortgage on 10 Hillview Crescent even if she had received nothing in return. And, Prudential led no evidence to show that

Robert and Angela Laba chose 10 Hillview Crescent with a view to defeating his creditors.

[53] The trial judge found that the badges of fraud put forward by Prudential did not establish a fraudulent intent on a balance of probabilities. In the light of the record before him, I do not think that the trial judge committed a palpable and overriding error in so finding. I would dismiss Prudential's appeal.

D. CONCLUSION

[54] I would dismiss both Robert Laba's appeal and Prudential's appeal. Although the trial judge erred by not giving Robert Laba an opportunity to make a closing argument, in the context of this case, I do not think that this error caused a miscarriage of justice.

[55] The trial judge also erred by going beyond his limited mandate on Angela Laba's non-suit motion. However, in dismissing the action against her, he applied the correct legal test and drew inferences that are reasonably supported by the record.

[56] Prudential is entitled to the costs of Robert Laba's appeal, which I would fix in the amount of $6,000, inclusive of disbursements and GST. Angela Laba is entitled to the costs of Prudential's appeal. I would also fix those costs in the amount of $6,000, inclusive of disbursements and GST, but I would then deduct $1,000 for Angela Laba's abandoned cross-appeal on costs. Angela Laba is therefore entitled to $5,000 in costs.

RELEASED: JUN 12, 2007

J.L.

"John Laskin J.A."

"I agree S. Borins J.A."

"I agree K. Feldman J.A."