

Transfers at an Undervalue; Backfires in Creditor Proofing

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Individuals faced with financial pressures and money problems understandably try to protect what little assets they may have left. In particular they want to protect the family home.

But it isn't that easy. Paul Lee tried to do it and failed. Mr. Lee was facing some difficult times. He had a house in Markham that he decided he would transfer to his wife for nominal consideration. This he did on March 25th, 2014. The house at the time was worth \$712,000 and had a mortgage of \$442,000 against it.

On 27 February 2015, Mr. Lee decided to file a consumer proposal but that proved to be unsuccessful and as a result he was assigned into bankruptcy. The trustee in bankruptcy took the position that the house (or at least Mr. Lee's interest in it) was transferred at an undervalue and that that transaction should be set aside. They were right.

Mr. Justice Myers noted section 96 of the Bankruptcy and Insolvency Act and that he could set aside the deal if it was between non arm's length parties and it occurred within one year before the bankruptcy event. The court could order the payment of the difference between the value received (in this case, nominal) and the value given (ie. half the house value). The mortgage amount would of course be relevant to the calculation.

Mr. Lee tried to argue that the sale costs ought to be taken into account too. This would include lawyer costs, arrears of taxes if any, transaction costs, land transfer tax etc thereby reducing the amount that Mr. Lee would have gotten in his jeans.

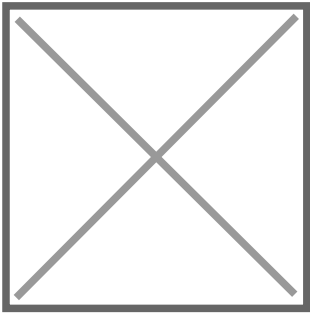
The court found that although these other costs might be relevant unfortunately Mr. Lee hadn't made any real efforts to prove them and so no deduction was made.

Net result was that Mr. Lee has a judgment against him for \$135,000. Worse is the fact that his spouse also went bankrupt some time later. Of course her creditors now find that their asset pool is reduced by \$135,000.

Transfers, preferences and assignments of this kind are also attackable by a trustee or by creditors under a variety of statutes including the Fraudulent Conveyances Act, the Assignment and Preferences Act and the Bankruptcy and Insolvency Act preference provisions. Attempts to protect assets and defeating the rights of legitimate creditors is not going to be condoned by the courts.

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