IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Sran (Re),*
2010 BCSC 937

Date: 20100702
Docket: B092373
Registry: Vancouver

In the Supreme Court of British Columbia
In Bankruptcy and Insolvency

In the matter of the Bankruptcy of
Manjit Singh Sran

BETWEEN:

Gurjant Singh Sran

Appellant

AND:

Sands & Associates, Trustees in Bankruptcy

Respondent

Before: The Honourable Madam Justice Lynn Smith

Reasons for Judgment

Counsel for the Appellant:	S.F. Robertson
Counsel for the Respondent:	K.A. Robertson
Place and Date of Hearing:	Vancouver, B.C. May 13, 2010
Place and Date of Judgment:	Vancouver, B.C. July 2, 2010

[1] On March 24, 2009, Manjit Singh Sran (the “Bankrupt”), made an assignment in bankruptcy, and a Trustee in Bankruptcy (the “Trustee”) was appointed.

[2] This is an appeal under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 [*BIA*], from the Trustee’s disallowance of a claim that a third party is the actual owner of property in the possession of the Bankrupt.

[3] Section 81 of the *BIA* provides:

> 81. (1) Where a person claims any property, or interest therein, in the possession of a bankrupt at the time of the bankruptcy, he shall file with the trustee a proof of claim verified by affidavit giving the grounds on which the claim is based and sufficient particulars to enable the property to be identified.
>
> (2) The trustee with whom a proof of claim is filed under subsection (1) shall within 15 days after the filing of the claim or within 15 days after the first meeting of creditors, whichever is the later, either admit the claim and deliver possession of the property to the claimant or send notice in the prescribed manner to the claimant that the claim is disputed, with the trustee’s reasons for disputing it, and, unless the claimant appeals the trustee’ decision to the court within 15 days after the sending of the notice of dispute, the claimant is deemed to have abandoned or relinquished all his or her right to or interest in the property to the trustee who may then sell or dispose of the property free of any right, title or interest of the claimant.
>
> (3) The onus of establishing a claim to or in property under this section is on the claimant.
>
> (4) The trustee may send notice in the prescribed manner to any person to prove his or her claim to or in property under this section, and, unless that person files with the trustee a proof of claim, in the prescribed form, within 15 days after the sending of the notice, the trustee may then, with the leave of the court, sell or dispose of the property free of any right, title or interest of that person.
>
> (5) No proceedings shall be instituted to establish a claim to, or to recover any right or interest in, any property in the possession of a bankrupt at the time of the bankruptcy, except as provided in this section.
>
> (6) Nothing in this section shall be construed as extending the rights of any person other than the trustee.

[4] Subsection 81(3) makes clear that where property is in the possession of a bankrupt at the time of bankruptcy, a person who claims an interest in that property bears the onus of proving that claim.

[5] The Bankrupt’s brother, Gurjant Singh Sran (the “Appellant”) claims an interest in land registered in the name of the Bankrupt and is appealing the Trustee’s disallowance of his claim.

[6] The Bankrupt, at his initial meeting with the Trustee, stated that he owned real property at 13175–75A Avenue in Surrey, British Columbia (the “Property”), which had previously been registered in the joint names of the Appellant and himself. The Bankrupt said, however, that the Property had been transferred into his sole name in 2007. He also advised the Trustee that his brother had a trust agreement and that he owed his brother $65,000 in that regard.

[7] The Trustee deposed that the reason for the transfer, the exact nature of the transaction and the nature of any interest the Appellant held in the Property were unclear. The Trustee deposed that the Bankrupt was the only registered owner of the Property at the time of the assignment into bankruptcy, and that no declaration of trust had been registered against the Property.

[8] The Trustee deposed that he advised the Bankrupt that he would require clear evidence of any interest the Appellant might have in the Property before he could determine if it was a valid interest binding on the Trustee.

[9] The Trustee deposed that he subsequently determined that the Appellant himself had made an assignment in bankruptcy prior to the transfer of his one-half interest in the Property to the Bankrupt. That assignment was made on June 11, 2002. The value of the Property was then stated as $189,500, and some $181,000 was owing on a mortgage on the Property. The Appellant received a conditional order of discharge from bankruptcy and was discharged absolutely on February 28, 2005 upon payment of $1,325. The Trustee deposed that, based upon his review of the Appellant's trustee's final statement of receipts and disbursements, there was only a small amount of non-exempt equity in the Property, and the Appellant's trustee took no interest in the Property. Thus, the Appellant and the Bankrupt remained as joint owners of the Property after the Appellant's discharge from bankruptcy.

[10] On or about October 16, 2009, the Appellant filed a proof of claim in debt with the Trustee, claiming that he held assets of the Bankrupt valued at $189,000 as security for a debt in the amount of $65,000. In addition, he also provided two statutory declarations and a copy of a trust agreement.

[11] The trust agreement reads as follows:

> Trust Agreement
>
> I the undersigned of the City of 13255 88 Avenue Surrey, Province of British Columbia, **HEREBY DECLARE THAT**:
>
> - Pursuant to a verbal agreement between myself and Gurjant Singh Sran in the lands located in British Columbia and described as follows:
>
> Municipal: Surrey
> Address: 13175 67A Avenue, Surrey British Columbia
> PID: 010 445 528 010 445 528
> Legal: Lot 20, Section 17, Township 2 New Westminster, District Plan 18975
> (hereinafter referred to as the "Lands")
>
> - I hold legal and registered title to the Lands and Gurjant Singh Sran is the beneficial owner of 50% in the Lands.
> - I will transfer legal and registered title to the Lands from time to time to Gurjant Singh Sran or to other such persons or entities as may be specified by Gurjant Singh Sran and shall execute any documents and take any other steps as may be necessary to allow Gurjant Singh Sran to have complete control of the Lands if and when directed to do so by Gurjant Singh Sran.
> - I do not and will not hold any beneficial interest in the Lands whatsoever and all benefits and advantages from the Lands which are received by me, the undersigned and bare trustee, are on account and for the benefit of Gurjant Singh Sran and will be delivered to Gurjant Singh Sran forthwith upon receipt.

- This agreement will be cancelled upon payment of $65,000 by Manjit Singh Sran to Gurjant Singh Sran.

Dated at the City of Surrey as of 28th day of May 2007.

SIGNED SEALED AND DELIVERED by in the presence of Manjit Singh Sran; Gurjant Singh Sran; Witness, Swarn Singh Buttar.

[12] The document was signed by the Bankrupt, the Appellant, and a witness, Swarn Singh Buttar.

[13] The two statutory declarations dated November 4, 2009, one by the Bankrupt Manjit Singh Sran, and the other by the Appellant, Gurjant Singh Sran, are virtually identical. The statutory declaration of the Bankrupt states that he signed the trust agreement with his brother on May 28, 2007, that he is the registered owner of the Property, that despite the fact he is the legal owner he only has a 50% beneficial interest in the Property, and that at all material times he held and continues to hold the other 50% beneficial interest in the lands in trust for his brother. It further states that the purpose and intent of the trust agreement was to clarify that the Bankrupt held 50% of the beneficial interest in the lands despite the fact that the lands were registered solely in his name, and to clarify that if he was to pay the Appellant the sum of $65,000, the Appellant would no longer have any interest in the lands and the Bankrupt would be the sole owner.

[14] The Trustee deposed that he found the trust agreement and the statutory declarations vague and ambiguous, and that it was unclear that such a trust would be enforceable against the Trustee. He stated that he met with the Bankrupt and the Bankrupt's father, and advised them that the proof of claim would have to be supported by all evidence they had that would establish that the Appellant had an interest in the Property, that the Appellant had held the Property out to third parties as his, that any such interest was established for a legitimate purpose, and that there was consideration for the trust, specifically that no funds were paid to the Appellant at the time of the transfer. He swore that he advised the Bankrupt and the Bankrupt's father of his concern that the alleged trust seemed to have been established for no specific purpose; that he had not heard any explanation that made practical sense as to why they would transfer the Property from joint ownership into sole ownership; that it was unclear how the finances relating to the Property had been dealt with; and that there was no explanation as to why the trust, if it was a true trust rather than an unsecured debt, would be extinguished upon payment of $65,000 (an amount that was unexplained).

[15] The Trustee deposed that he made it clear to the Bankrupt and his father that in order for the Trustee to determine the merits of the Appellant's trust claim, he would need the Appellant to present in a sworn statement the full and complete story of how, why and when the trust was created, how the Property had been dealt with by them financially, and full particulars of how the equity in the Property had been dealt with, with supporting sworn statements by anyone with knowledge of the matters, including the Bankrupt.

[16] On November 16, 2009, the Appellant filed his claim in the required form, a Reclamation of Property, pursuant to subsection 81(4) of the *BIA*. In it, he claimed a 50% interest in the Property by virtue of the trust agreement. He swore that he and his brother, the Bankrupt, had purchased the Property on April 26, 1995, with each party owning an undivided one-half interest, that they entered into the trust agreement on May 28, 2007, and that on June 11, 2007, title to the Property was transferred from their joint ownership

to the Bankrupt as the sole registered owner, holding the Appellant's one-half interest in the Property in trust for him.

[17] In the sworn Reclamation of Property, the Appellant stated that he received no consideration for the transfer of the Property, he had transferred his one-half interest in the Property to the Bankrupt in reliance on the trust agreement and trust obligations of the Bankrupt, and he has not received any monies from the Bankrupt to cancel the obligations of the Bankrupt under the trust agreement.

[18] The Trustee deposed that on the same day (June 8, 2007) that a Land Title Form A Transfer was signed transferring the Property from joint ownership to the sole ownership of the Bankrupt, the Bankrupt signed a mortgage for the amount of $450,000 against the Property. In the mortgage agreement, the Bankrupt promised and confirmed that he owned the Property and had the right to give the mortgage, that there were no limitations or restrictions on his title to the Property except those disclosed, and that title to the Property was subject only to those interests filed in the Land Title Office, such unregistered interests as the mortgagee had approved, and zoning and building bylaws with which he had complied.

[19] The Trustee gave Notice of Dispute to the Claim of Reclamation of Property to the Appellant on November 30, 2009, stating that the Appellant had failed to provide adequate documentation or other evidence, or to specify and particularize all evidence by which the claim and alleged trust could be substantiated.

[20] The Trustee also referred in his Notice of Dispute to a number of matters regarding which he said that the Appellant had failed to provide sufficient evidence: (a) the date on which the trust agreement was drafted, by whom, and for what purpose; (b) proper or any consideration being given by the Appellant for the transaction; (c) an explanation as to the statements made in the trust agreement and statutory declaration that contradict the existence of a trust; (d) whether there was an intention by the Bankrupt to hold 50% of the Property in trust for the Appellant for all purposes and at all times; (e) whether there was a common intention by both the Bankrupt and the Appellant that the trust agreement and property ownership documents create the legal rights and obligations that they give the appearance of creating, or whether the transaction was set up for improper purposes; (f) confirmation by the Bankrupt that he has at all times and in all respects dealt with the Property in accordance with the limitations of the alleged trust and held himself out as being only a 50% owner of the Property and not a full owner.

[21] Finally, the Trustee referred to the fact that the Appellant had filed a separate proof of claim alleging that the advance made by him in respect of the Property was a debt.

[22] At the hearing of this appeal, counsel for the Trustee stated that the Trustee does not dispute that the trust agreement was signed on the date that it bears, May 28, 2007. Thus, the Trustee conceded that the trust agreement pre-existed the Bankrupt's bankruptcy by almost two years, and that the trust agreement was signed prior to the transfer of the property from joint tenancy to the sole name of the Bankrupt.

[23] The Trustee, without court order, may obtain authority from the creditors or a majority of the inspectors under s. 163 of the *BIA* to examine under oath the Bankrupt or any person reasonably thought to have knowledge of the affairs of the Bankrupt respecting the Bankrupt's dealings over the Property, or to order the production of books, documents or other records. The Trustee did not avail himself of those provisions.

[24] The issues before me on this appeal are:

(1) Can the Appellant introduce evidence that was not before the Trustee?

(2) What is the standard of review of the Trustee's decision?

(3) Should the Trustee's decision be set aside?

(1) Can the Appellant introduce evidence that was not before the Trustee?

[25] I will first address the issue of "fresh evidence" (evidence not provided to the Trustee at the time the Appellant made his claim).

[26] The Court of Appeal in *Galaxy Sports Inc. (Re)*, 2004 BCCA 284 (CanLII), 2004 BCCA 284, at paras. 40-42, 29 B.C.L.R. (4th) 362 [*Galaxy Sports*], held that an appeal under s. 135(4) of the *BIA* is not intended to be a trial *de novo* but a true appeal. Newbury J.A., at para. 40, referred to authorities from other contexts in which the original decision-maker may be expected to have had many years of experience in the field, leading to expertise that would enter into his or her decision-making, and then said at para. 41:

> In my opinion, similar considerations apply in this case with respect to the expertise of trustees in bankruptcy. As I have already mentioned, they can be expected to have considerable experience and expertise in the area of business financing, restructurings and insolvency. If "fresh evidence" - i.e., evidence not before the trustee or chair at the time of his or her decision - were to be adduced in Supreme Court on appeal as a matter of course, it seems to me that much would be lost in the way of efficiency in the operation of the bankruptcy scheme generally. Creditors who neglected to file proofs of claim in compliance with the requirements of s. 124 would suffer no practical consequences if, in Farley J.'s phrase, they could expect to "cooper up" their proofs at a later date in court; and the business now conducted at creditors' meetings by trustees (who are generally supervised by inspectors under the *BIA*) would be largely co-opted to courts of law, with all the attendant expense, delay and formality. [Emphasis in original.]

[27] In *Campen v. Campbell Saunders Ltd.*, 2008 BCSC 1524 (CanLII), 2008 BCSC 1524, 48 C.B.R. (5th) 81 [*Campen*], Goepel J. followed *Galaxy Sports* and reached the same conclusion regarding fresh evidence with respect to an appeal under s. 81 of the *BIA*. I agree that the same principles should apply.

[28] The appeal of a trustee's decision under s. 81(3) is not intended to be a trial *de novo*, but a true appeal, and accordingly fresh evidence is only admissible if necessary in the interests of justice, or on some other principled basis.

[29] In *Scott v. Scott*, 2006 BCCA 504 (CanLII), 2006 BCCA 504 at para. 23, 61 B.C.L.R. (4th) 9, Ryan J.A. for the Court of Appeal described the circumstances in which fresh evidence is admissible on an appeal:

> In order to adduce fresh evidence on appeal, the appellant must meet the test set out in *Palmer v. The Queen*, 1979 CanLII 8 (S.C.C.), [1980] 1 S.C.R. 759; *Spoor v. Nicholls* 2001 BCCA 426 (CanLII), (2001), 90 B.C.L.R. (3d) 88 (C.A.) at para. 16. This requires the appellant to demonstrate that the evidence was not discoverable by reasonable diligence before the end of the trial; that the evidence is credible; that it would be practically conclusive of an issue before the court; and that if believed, the evidence could have affected the result of the trial.

[30] Counsel for the Appellant argues, however, that a principled basis for admitting the evidence exists in this case because the Trustee raised an affirmative defence to the claim, alleging in effect that this is a "sham trust", and urges that justice requires that the Appellant be able to reply to it with further evidence.

[31] The evidence tendered by the Appellant is, first, the affidavit of Swarn Singh Buttar, who deposed on December 8, 2009, that he was a witness to the trust agreement. Given that the Trustee does not dispute that the trust agreement was signed on the date it bears, the application to put that affidavit before the court need not be addressed.

[32] The second piece of evidence tendered is Affidavit #2 of the Appellant, sworn December 11, 2009. In it, he deposed that he and the Bankrupt purchased the Property on April 26, 1995, with each owning an undivided one-half interest. He swore that they both lived in the Property for about three years, and that they equally shared mortgage payments and other expenses. He swore that sometime in 2002, they rented the property to tenants, and by May, 2007 (when they entered into the trust agreement) there was about $145,000 in equity in the Property, such that his half interest in the Property was worth about $65,000.

[33] The Trustee opposes the admission of further evidence. Counsel for the Trustee submits that the Trustee made the Appellant aware that he was expected to provide all of the relevant evidence with the claim itself, and advised him as to the kind of evidence required to support his claim.

[34] The scheme created by the legislation is that property in a bankrupt's possession is presumptively that of the bankrupt, and parties who wish to assert otherwise must put their case before the trustee. If a trustee then disputes a claim, the appeal from the trustee's decision is on the basis of the record before the trustee.

[35] The Appellant's Affidavit #2 relates to events predating the claim and known to the Appellant. No explanation is offered as to why the evidence could not have been provided to the Trustee with the Reclamation of Property. It is not suggested that the Appellant was unaware of the requirement to present all available evidence with his Reclamation of Property.

[36] Accordingly, the Appellant may not adduce this evidence. I decline to consider it and will consider this appeal on the basis of the record that was before the Trustee.

[37] However, there is a dispute regarding the contents of the record. The Appellant's position is that the record consists solely of the Reclamation of Property that he filed with the Trustee (including the declaration of trust and the two statutory declarations). The Trustee's position is that the record encompasses, in addition, documents in the Trustee's possession, including the land title records, the documents regarding the Appellant's bankruptcy, and the Bankrupt's Statement of Affairs in this bankruptcy.

[38] I note that in *American Corporate Suites (Canada) Inc. (Re)*, 2005 BCSC 1925 (CanLII), 2005 BCSC 1925, 39 C.B.R. (5th) 199, where the issue was the trustee's disallowance of a claim by a secured creditor, Neilson J. stated at para. 25:

> An appeal from the trustee's decision is not a trial *de novo*: *Galaxy Sports Inc. v. Abakhan & Associates Inc. et al*, 2004 BCCA 284 (CanLII), 2004 BCCA 284 at paras. 41-42. Thus on an appeal it is only open for the Court to consider the same material that was submitted to the trustee with the proof of claim.

[39] I think that, in addition, the court can consider other material that was before the trustee (so long as that material was also available to the claimant), including, for example, land title records with respect to the property in question.

[40] The affidavit sworn by the Trustee and filed on this appeal contains references to his dealings with the Bankrupt, the Appellant and their father and, in addition, to land title documents and bankruptcy documents.

[41] The evidence as to the Trustee's dealings with the Bankrupt and his father (bearing on whether the Appellant was made aware of the evidentiary burden on him before he filed his claim) is relevant only to the Appellant's application to submit further evidence, and I consider it only for that purpose.

[42] As for the land title documents and bankruptcy documents, I find that they provide the context in which the Trustee assessed the claim. The land title documents were a matter of public record. The Appellant was aware of his own bankruptcy. The Statement of Affairs of the Bankrupt also forms part of the record before the Trustee in this case.

[43] Having said that, in the end I did not find it necessary to rely upon those documents in reaching my conclusions about this matter, and took into account only the evidence provided by the Appellant and the Bankrupt to the Trustee in connection with the Appellant's claim.

(2) What is the standard of review of the Trustee's decision?

[44] In *Galaxy Sports* at para. 39, Newbury J.A. discussed the standard of review with respect to a trustee's disallowance of a proof of claim under s. 135(2) of the *BIA*:

> On a consideration of all the "contextual" factors mandated by the "pragmatic and functional" approach, I see no reason to disagree with the long-standing principle enunciated in *Re McCoubrey*, *supra*, which requires the application of a "correctness" standard where compliance with a "mandatory" provision (which I would equate to a question of law or statutory compliance) is involved, and the application of a "reasonableness" standard where the determination of a factual matter or an exercise of true discretion is called for. In the former category, I would place the chair's decision under s. 108 rejecting a proof of claim for voting purposes and the trustee's decision disallowing a proof of claim under ss. 124 and 135(2). In the latter category, I would place the trustee's role in valuing contingent and unliquidated claims under s. 135(1.1). This general approach conforms with the objective, which I see as implicit in the *BIA*, of enabling debtors to have their proposals voted upon expeditiously and permitting creditors to have their rights and claims determined in a business-like manner, while at the same time providing a meaningful appeal to a court of law on questions that clearly affect legal rights, engage the relative expertise of judges, and set precedents for other cases.

[45] In *Campen* at para. 13, Goepel J. held that an appeal pursuant to s. 81(2) of the *BIA* raises considerations similar to those addressed in *Galaxy Sports* with respect to s. 135(2) of the *BIA*, and that the trustee's decision under s. 81(2) was to be reviewed on a correctness standard.

[46] The decision of the Trustee in this case was not one involving a purely factual issue or the exercise of true discretion. It was not a question of the valuation of contingent or unliquidated claims or a similar exercise. The Trustee was determining the validity of

the Appellant's claim, taking into account both the facts before him and the applicable legal principles.

[47] Following the principles referred to in *Galaxy Sports*, in particular that there should be a meaningful appeal to a court of law on questions that clearly affect legal rights and engage the relative expertise of judges, I find that the standard of review in this case is correctness.

(3) Should the Trustee's decision be set aside?

Position of the Appellant

[48] Mr. Robertson for the Appellant submits that the Trustee erred in disputing the claim because the trust agreement satisfies the prerequisites for the creation of a valid trust: certainty of intention; certainty of subject matter; and certainty of objects (referring to D.V.M. Waters, M.R. Gilllen, and L.D. Smith, eds., *Waters' Law of Trusts in Canada*, 3d ed., (Toronto: Thomson Canada Limited, 2005) at 132). He submits that there is clear language in the trust agreement evidencing an intention to create a trust, that the Property is clearly identified as the lands that were described in the trust agreement, and that the object of the trust was to give the Appellant the power to recall the legal interest from the Bankrupt to himself at any time.

[49] Mr. Robertson submits that s. 81(4) of the *BIA* does not require any of the particulars requested by the Trustee, and that if the trust agreement creates a valid trust, the Trustee cannot impose additional requirements on the Appellant.

[50] Counsel for the Appellant submits that the absence of consideration speaks in favour of the existence of a valid trust. He urges that there was no evidence of a gift, and that the trust agreement contradicts the notion that the transfer of the Appellant's 50% legal interest in the Property was pursuant to an unsecured loan of $65,000 since there was no promissory note, payment schedule, interest or other indication of a loan.

[51] Mr. Robertson refers to *Quesnel & District Credit Union v. Smith* 1987 CanLII 2477 (BC C.A.), (1987), 45 D.L.R. (4th) 386, 19 B.C.L.R. (2d) 105 (C.A.), and to *McMillan v. Hughes*, 2004 BCSC 1210 (CanLII), 2004 BCSC 1210, 11 E.T.R. (3d) 290. He submits that trusts are often used to secure payment of a debt or obligation, as in *McMillan v. Hughes*, where the Court found an oral trust agreement over life insurance proceeds that had as its object the provision of security for the repayment of parental loans made to the deceased insured.

[52] Mr. Robertson says that the other conditions imposed by the Trustee are inappropriate since this was a valid trust, asserted against the Trustee who has stepped into the shoes of the Bankrupt, and not against a third party. Therefore, he argues, the fact that the trust agreement was not registered is irrelevant.

[53] The Appellant's position is that the trust agreement was established to secure the $65,000, which represented the Appellant's interest in the Property at the time of entering into the trust agreement. Mr. Robertson says that the fact that the Appellant initially filed a proof of claim in debt shows only that the Appellant was confused about the actual forms necessary to make his claim and is not determinative, since in the end it was the Reclamation of Property that he relied on. He says that the claim of a trust and of a security interest are not inconsistent in these circumstances.

[54] In the alternative, Mr. Robertson submits that if the Court finds that there is a defect in the express trust agreement, the circumstances in this case satisfy the requirements for the creation of a resulting trust in favour of the Appellant. He refers to *Waters' Law of Trusts in Canada* at 364, stating that if an express trust fails for uncertainty or failure of the trust objects, the Trustee again holds on a resulting trust for the settlor or his estate.

[55] In addition, Mr. Robertson observes that if A voluntarily transfers property into the name of B, then B becomes the resulting trustee of A's interest. Mr. Robertson submits that there is no evidence of any intention on the Appellant's part to provide his 50% legal interest in the Property to the Bankrupt as a gift, and therefore the Bankrupt is presumed to hold the 50% legal interest on a resulting trust in favour of the Appellant.

Position of the Trustee

[56] Ms. Robertson, counsel for the Trustee, submits that the Trustee was correct in disallowing the claim. She argues that the trust is an improper trust because it was created for some purpose other than to accurately define the interests of the parties in the Property.

[57] Counsel for the Trustee relies on John Mowbray, Lynton Tucker, Nicholas Le Poidevan, and Edwin Simpson, *Lewin on Trusts*, 17th ed. (London: Sweet & Maxwell, 2000) at 78-84. On occasion, settlors have been found to have declared themselves trustees in order to create a sham, executing a deed of trust "not to be acted upon but to be put in a safe for a rainy day" (*Midland Bank plc v. Wyatt*, [1997] 1 B.C.L.C. 242, [1995] 1 F.L.R. 696). Thus, a sham agreement is one not reflecting the true agreement between the parties. The authors of *Lewin on Trusts* state at 83:

> … Where a settlor has declared himself to be a trustee, as in *Midland Bank plc v. Wyatt*, it will be a great deal easier to regard what has been done as of no effect than where he has instead transferred the trust property to a trustee, and both of them have executed a deed declaring the trusts on which the trustee is to hold.

[58] Ms. Robertson also refers to other cases regarding "sham trusts", including *Hilltop Group Ltd. v. Katana*, [2002] O.T.C. 423, 121 A.C.W.S. (3d) 673; *Merklinger v. Merklinger* reflex, (1992), 11 O.R. (3d) 233, 43 R.F.L. (3d) 109 (Ont. C.J. Gen. Div.) [*Merklinger*]; and *Biggar (Re)*, 2004 BCSC 290 (CanLII), 2004 BCSC 290, 50 C.B.R. (4th) 44, upheld in *In the Matter of the Bankruptcy of Larry Peter Biggar*, 2005 BCSC 1657 (CanLII), 2005 BCSC 1657, 16 C.B.R. (5th) 1 [*Re Biggar*].

[59] In *Merklinger*, for example, a husband had acquired a summer cottage through a company, whose shares were held on trust for the children of the marriage. He treated the property as his own, but pleaded trust in the context of litigation regarding the division of assets of the marriage. The court at O.R. 241-242 held that the claim of trust for the children was a "pure sham", and that if there was any trust it was for the benefit of the husband.

Analysis

[60] Although the wording of the trust agreement is most unclear and gives rise to a number of questions, it is unnecessary for me to assess the "sham trust" allegation in detail because I have concluded, for other reasons, that the trust agreement signed by the Appellant and the Bankrupt failed to create a valid trust.

[61] I have concluded that the trust agreement does not create a valid trust because it does not define with certainty the subject matter of the trust.

[62] For a trust to be valid, there must be certainty as to its subject matter. In *Waters' Law of Trusts*, at 149, the authors state:

> For a trust to be validly created, it must also be possible to identify clearly the property which is to be subject to the trust. Moreover, even if the trust property is thus clearly defined, the shares in that property which the beneficiaries are each to receive must also be clearly defined. Certainty of subject-matter as a term refers to both of these required certainties.

[63] Specifically, there must be certainty as to the extent of the beneficial shares, according to *Waters' Law of Trusts* at 154:

> Even if the trust property is clearly defined or ascertainable, the trust will still be void and the trust property revert to the settlor if the beneficial shares in that property are not clearly defined.

[64] It is true that the Property is clearly defined through its legal description. However, as to the share which the beneficiary (the Appellant) is to hold in the Property, there are two directly contradictory statements in the same document: (1) that the Appellant is the beneficial owner of 50% of the Property; and (2) that the Bankrupt does not hold any beneficial interest in the Property and the Appellant is the beneficial owner of 100% of the Property. Thus, it is unclear whether the purported trust relates to the entirety of the Property, or to 50% of it. (It is also unclear whether the agreement is in substance a loan by the Appellant of $65,000, secured by some or all of the Property, rather than the creation of a trust, a point I will return to later.)

[65] If there was no valid express trust created by the trust agreement, what then?

[66] A resulting trust does not arise where an express trust fails for uncertainty of subject matter since the trust then never existed (Eileen E. Gillese, *The Law of Trusts* (Concord: Irwin Law, 1997) at 100)). In such a situation the property reverts to the settlor (in this instance, the Bankrupt, who in the document declares that he holds legal title in whole or in part in trust for his brother, the Appellant.)

[67] However, a resulting trust may arise for reasons other than the failure of an express trust.

[68] Counsel for the Appellant submits that there was a resulting trust in the Appellant's favour, arising because of the 2007 transfer by the Appellant of his interest in the Property to the Bankrupt.

[69] Ms. Robertson for the Trustee argues that the Appellant cannot raise that argument at this stage because there was no allegation of a resulting trust in the Reclamation of Property that he filed. However, I do not find that it was incumbent on the Appellant, when he filed his Reclamation of Property with the Trustee, to specify that he relied upon resulting trust. The presumption of resulting trust arises as a matter of equity, and the underlying factual circumstances (the circumstances of the transfer) were known to the Trustee; the Appellant should not be precluded from asserting a resulting trust in this situation.

[70] Counsel for the Appellant refers to *Pecore v. Pecore*, 2007 SCC 17 (CanLII), 2007 SCC 17, [2007] 1 S.C.R. 795 [*Pecore*], for the proposition that a presumption of resulting trust arises upon a voluntary or gratuitous transfer, with the onus on the transferee to rebut the presumption by demonstrating that a gift was intended. The Supreme Court stated in *Pecore* at para. 24:

> The presumption of resulting trust is a rebuttable presumption of law and general rule that applies to gratuitous transfers. When a transfer is challenged, the presumption allocates the legal burden of proof. Thus, where a transfer is made for no consideration, the onus is placed on the transferee to demonstrate that a gift was intended: [citations omitted]. This is so because equity presumes bargains, not gifts.
>
> [Emphasis added]

[71] The Appellant's position is that he gratuitously transferred his interest in the Property into the Bankrupt's name, and that, even without the declaration of trust, the Bankrupt's interest was thereby impressed with a trust in the Appellant's favour.

[72] The presumption of a resulting trust arises because courts presume bargains, not gifts. If the presumption arose in this case, the onus would fall on the Bankrupt, or in his place on the Trustee, to rebut it by proving (on the balance of probabilities) that the transfer by the Appellant of his share in the Property to the Bankrupt was in fact a gift.

[73] The threshold question is whether the transfer was gratuitous, that is, without consideration.

[74] The Trustee concedes that the trust agreement was signed in May 2007, prior to the transfer of the Property. I note that, although the trust agreement states that the Bankrupt holds legal and registered title to the Property, that was not in fact the case when the agreement was signed, since the transfer of the Property did not take place until about ten days later. However, the trust agreement seems intended to have effect after the Appellant transferred his interest in the Property to the Bankrupt.

[75] The Appellant stated that he received the trust agreement as consideration and denied that there was any other consideration. In the sworn Reclamation of Property filed by the Appellant, he stated that he transferred his one-half interest in the Property to the Bankrupt in reliance on the trust agreement. The trust agreement did not create a valid trust, but it does contain the Bankrupt's agreement to transfer his interest in the Property to the Appellant upon demand, such commitment to be cancelled if the Bankrupt pays the Appellant $65,000.

In short, the trust agreement (though it did not create a valid trust) was the consideration for the transfer of the Property. Having received the trust agreement as consideration, the Appellant did not transfer the Property gratuitously, but instead did so as consideration for the trust agreement that he and the Bankrupt had previously executed. The presumption of resulting trust did not arise in these circumstances.

[76] The issue before me is not what the actual effect of the agreement, if any, was; for example, whether it shows that the Appellant is a creditor of the Bankrupt or that the Appellant holds an equitable mortgage over the Property.

[77] The only question before me is whether the Trustee was correct in disallowing the Appellant's claim to be the beneficial owner of some or all of the Property registered in the Bankrupt's name. I have concluded that there was no express trust, and that the transfer of the Appellant's interest in the Property to the Bankrupt was not gratuitous. The transfer was pursuant to a bargain, whereby the Appellant received the Bankrupt's covenants in the trust agreement as consideration. The presumption of resulting trust did not arise.

[78] I find that the Appellant did not have a proprietary interest in the Property registered in the name of the Bankrupt.

[79] Accordingly, the Trustee was correct in disallowing the Appellant's claim and the appeal is dismissed.

"Lynn Smith J."