

Supreme Court of Nova Scotia
In Bankruptcy and Insolvency

IN THE MATTER OF THE BANKRUPTCY OF ATLANTIC SEA CUCUMBER LTD.

WRITTEN SUBMISSIONS OF ATLANTIC GOLDEN AGE HOLDINGS INC.

O'KEEFE & SULLIVAN
80 Elizabeth Ave., 2nd Floor
St. John's, NL A1A 1W7

Darren D. O'Keefe
Tel: 709-700-0911

Solicitors for the Company

COX & PALMER
1625 Grafton Street, Suite 1500
Halifax, NS B3J 0E8

Gavin MacDonald
Tel: 902-491-4464

Solicitors for Weihai Haiyan
Aquatic Food Co. Ltd.

BOYNECLARKE LLP
99 Wyze Road, Suite 600
Dartmouth, NS B3A 4S5

Joshual J. Santimaw
Tel: 902-460-3451

Solicitors for the Proposal
Trustee

LAWSON CREAMER
133 Prince William Street, Suite 801
Saint John, NB E2L 2B5

Christopher D. J. Isnor
Tel: 506-633-3539

Solicitors for Atlantic Golden Age
Holding Inc.

OVERVIEW

1. This is the submission of behalf of Atlantic Golden Age Holding Inc. (“**AGAH**”), a secured creditor of Atlantic Sea Cucumber Ltd. (“**ASC**”). AGAH is seeking *inter alia*, an order pursuant to section 38(4) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, to have the loans advanced by AGAH to ASC declared valid, enforceable and secured against the real property and assets of ASC.
2. AGAH is a private company that is owned by the Gao Family Trust (the “**Family Trust**”). The Family Trust owns other corporations, including ASC. AGAH and ASC share a directing mind: Songwen “Sam” Gao.
3. In January of 2018, AGAH agreed to a loan agreement by which it would extend a revolving line of credit to ASC for its use in operations. The loan agreement stipulated specifically that security was provided by ASC to AGAH in the form of building, land, and equipment. ASC and AGAH operated in respect of the terms of the loan agreement. Ultimately, the building, land, and equipment were bound by the terms of a general security agreement and a mortgage. These instruments were then registered on the Nova Scotia Personal Property Registry (“**NSPPR**”) and the Nova Scotia Land Registry, respectively.
4. Accordingly, the security granted by ASC in favour of AGAH was perfected by April 13, 2023.
5. On April 28, 2023, Weihai Haiyan Aquatic Food Co. Ltd. (“**WTH**”) recorded a judgment against ASC in the amount of \$1,625,863 under the *PPSA* and in the Judgment Roll of the Halifax County Land Registration Office.
6. This took place after perfection by AGAH.
7. WTH now claims that it is in a priority position over the security of AGAH, presumably because the granting of that security was a fraudulent preference under section 95 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (“**BIA**”).
8. AGAH states that its security over the building, land, and equipment of ASC is valid and enforceable and does not give rise to a fraudulent preference. Accordingly, AGAH has priority over the later registration of the WTH judgment.

BACKGROUND

9. ASC is a privately held Nova Scotia company which operates a sea cucumber manufacturing operation in Hackett's Cove, Nova Scotia.
10. AGAH is a holding company and has been a source of funding to ASC throughout its operations.
11. ASC and AGAH are both owned by the same entity, namely, the Gao Family Trust (the "**Family Trust**"). All outstanding shares in both ASC and AGAH are owned by the Family Trust. are both controlled by Mr. Songwen Gao. AGAH does not own any common shares or other equity holdings in ASC.
12. AGAH does hold preferred shares in ASC for discretionary dividend purposes.
13. On or about January 2, 2018, AGAH provided financing to ASC for its use in its operations as an end-to-end supplier of dried sea cucumbers in Nova Scotia (the "**AGAH Loan**"). The AGAH loan had a principal amount of \$2,174,000.00 and was in the form of a revolving line of credit for ASCL to draw from.
14. Pursuant to clause 6 of the Loan, AGAH and ASC contemplated and agreed that the Loan would be secured by real property and equipment when it stated:

SECURED. There shall be property to secure this Agreement described as:

building, land and equipment ("Security").

"The Security shall transfer to the possession and ownership of the Lender immediately pursuant to Section 11 of this Agreement. The Security may not be sold or transferred without the Lender's consent until the Due Date. If Borrower breaches this provision, Lender may declare all sums due under this Agreement immediately due and payable, unless prohibited by applicable law. The Lender shall have the sole option to accept the Security as full payment for the Borrowed Money without further liabilities or obligations. if the market value of the Security does not exceed the Borrowed Money, the Borrower shall remain liable for the balance due while accruing interest at the maximum rate allowed by law.

15. Accordingly, The terms of the AGAH Loan included that AGAH would receive security in the form of building, land, and equipment (the “**Security**”). The Security would be granted immediately upon signing of the Agreement.
16. The AGAH Loan was done by separate instrument and is not, in any way, a shareholder loan between related companies. There was no intention on my part, when designing the corporate structure for AGAH and ASCL, for AGAH to have or hold equity in ASCL.
17. The size of the debt by ASCL to AGAH has varied since 2018 because the AGAH Loan acted as a line of credit. ASCL would be advanced funds by AGAH as its operations needed it.
18. By the end of 2018, AGAH had advanced approximately \$390,000 to ASCL as part of the ASCL Loan. AGAH would continue to advance funds to ASCL as needed after 2018 in order to support the operations of ASCL. However, for the most part during this time, ASCL was profitable.
19. Subsequently, between 2018 and 2020 ASC experienced significant financial growth.
20. However, in 2021 ASC fell into default on its mortgage with the Toronto-Dominion Bank (“**TD Bank**”) and loans provided by Farm Credit Canada (“**FCC**”). ASC used some of the funds from AGAH to avoid insolvency and to pay out the TD Bank mortgage and the loans owed to FCC.
21. On November 14, 2022, the Royal Bank of Canada registered a security interest in the general collateral of ASC under the *Personal Property Security Act*, 1995-96, c 13 (“**PPSA**”), which security interest was registered as registration number 37085685.
22. As of November 30, 2022, ASC had withdrawn \$2,003,802 from the Loan. As of the date of bankruptcy, AGAH was owed \$2,163,190.
23. The TD Bank mortgage was discharged on February 10, 2023.

24. On March 5, 2023, AGAH entered into a general security agreement with ASC (the “**GSA**”) to solidify the security granted in the Loan agreement. On March 13, 2023, AGAH registered a security interest against the general collateral of ASC under the *PPSA* which security interest was registered as registration number 37551231 (the “**Security Interest**”).
25. On April 13, 2023, ASC executed a collateral mortgage (the “**Mortgage**”) in keeping with the requirements of Clause 6 of the Loan.
26. On April 13, 2023, the Mortgage was recorded against the buildings, land and premises owned by ASC located at Paul’s Point Road, Hackett’s Cove, Nova Scotia, PID nos. 41075649 and 41211806 in the Halifax County Land Registration Office as Document No. 122300339.
27. On April 28, 2023, Weihai Haiyan Aquatic Food Co. Ltd. (“**WTH**”) recorded a judgment against ASC in the amount of \$1,625,863 under the *PPSA* and in the Judgment Roll of the Halifax County Land Registration Office.
28. On May 1, 2023, ASC filed a Notice of Intention to Make a Proposal (“**NOI**”) in accordance with section 50.4(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (“**BIA**”). MSI Spergel Inc. (“**MSI**”), was appointed as Trustee.
29. MSI has confirmed its position the Mortgage and Security Interest granted to AHAG are valid and are not fraudulent preferences under the meaning of section 95 of the *BIA*.
30. AGAH seeks confirmation from this Honourable Court that this is the case.

ISSUE

31. The issues to be determined in respect of this motion are as follows:

- a. Do the Mortgage and Security Interest constitute fraudulent preferences under section 95 of the *BIA*?

LAW AND ANALYSIS

Perfection of the AGAH Security

32. It is trite law that the registration of valid security instruments on the appropriate registries perfects a security interest and crystalizes the priority position of that security holder over others who either have not perfected or perfected at a later date. The registration acts as notice to the public that the security holder already has a claim over the assets or real property in question. Registration is a critical component of a security holder's position and priority.

33. In this case, AGAH has taken all of the steps necessary to register the Mortgage and perfect its Security Interest. The Loan agreement specifically detailed how AGAH is granted a security interest in the building, land, and equipment of ASC. AGAH and ASC entered into the GSA on March 5, 2023, to give effect to the Loan agreement. The Security Interest was then perfected by registration in the NSPPR on March 13, 2023.

34. Similarly, the Mortgage was duly signed and registered as a first charge as against ASC's property as follows:

- a. PID 41075649, Paul's Point Road, Hackett's Cove, Lot F-1; and
- b. PID 41211806, 212 Paul's Point Road, Hackett's Cove, Lot F-1.I (the "**Real Properties**").

35. Accordingly, the starting point here is that Security Interest forms a valid binding charge on the property of ASC in favour of AGAH. Further, the Mortgage constitutes a binding and registered first charge against ASC's real property in favour of AGAH.

36. There is a judgment in the favour of WTH which was registered against the Real Properties on April 28, 2023. Given that it was registered after the AGAH Security Interest and Mortgage, it is subordinate to the Security Interest and the Mortgage.

Preferences Generally

37. As a starting point, we know that the Security Interest and the Mortgage are valid, binding, and perfected by way of registration. There is an open question for this Honourable Court, however, on whether or not the Security Interest and/or the Mortgage should be set aside or overturned on the basis of a preference under section 95 of the *BIA*. AGAH submits that it is not.

38. Section 95 of the *BIA* grants authority to this Honourable Court, and to the Trustee in Bankruptcy, to set aside/overturn conveyances of assets made by a bankrupt party which are intended to give preference to one creditor over others prior to bankruptcy.

Preferences

95. (1) A transfer of property made, a provision of services made, **a charge on property made**, a payment made, an obligation incurred or a judicial proceeding taken or suffered by an insolvent person

(a) in favour of a creditor who is dealing at arm's length with the insolvent person, or a person in trust for that creditor, with a view to giving that creditor a preference over another creditor is void as against - or, in Quebec, may not be set up against - the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy; and

(b) **in favour of a creditor who is not dealing at arm's length with the insolvent person**, or a person in trust for that creditor, **that has the effect of giving that creditor a preference over another creditor is void as against** - or, in Quebec, may not be set up against - the trustee if it is made, incurred, taken or suffered, as the case may be, **during the period beginning on the day that is 12 months before the date of the initial bankruptcy event and ending on the date of the bankruptcy.**

[Emphasis Added]

Preference presumed

(2) If the transfer, charge, payment, obligation or judicial proceeding referred to in paragraph (1)(a) has the effect of giving the creditor a preference, **it is, in the absence of evidence to the contrary, presumed to have been made, incurred, taken or suffered with a view to giving the creditor the preference** - even if it was made, incurred, taken or suffered, as the case may be, under pressure - and evidence of pressure is not admissible to support the transaction.

Exception

(2.1) Subsection (2) does not apply, and the parties are deemed to be dealing with each other at arm's length, in respect of the following:

- (a) a margin deposit made by a clearing member with a clearing house; or
- (b) a transfer, charge or payment made in connection with financial collateral and in accordance with the provisions of an eligible financial contract.

[Emphasis Added]

39. AGAH and ASC executed/recorded the Mortgage in 2023, and registered the Security Interest in 2023, within one year of ASC's insolvency. Accordingly, the question of whether the Mortgage and Security Interest were fraudulent preferences as contemplated by section 95 was raised. This gives rise to the presumption set out in section 95(2).

40. However, AGAH submits that the Mortgage and Security Interest do not constitute preferential transactions under section 95(2) because the presumption of a preferential transaction is rebutted by the evidence.

41. In *Grant Brother Contracting Ltd., Re*, 2005 NSSC 358 McDougall J. described the applicable test for transactions that fall under section 95 of the *BIA*:

33 The presumption raised in subsection 95(2) of the *Act* has not been rebutted. In *Norris, Re*, 1996 CarswellAlta 884 (Alta. C.A.) , the Alberta Court of Appeal held at page 6 that the test for a section 95 fraudulent preference is as follows:

13 (1) that the payment in question was made to an ordinary creditor within three months of the bankruptcy; (2) that the bankrupt

was at the date the payment was made an insolvent person within one of the definitions in s. 2 and; (3) that the payment was made by the debtor "with a view to giving that creditor a preference over the other creditors", in the words of the statute.

14 If elements (1) and (2) are established and the Trustee proves that the creditor received a preference in fact over other creditors, s. 95(2) then raises a presumption in the absence of evidence to the contrary that the preference in fact was made with a view to giving that creditor a preference over the other creditors, and was thus a fraudulent preference within s. 95(1).

42. The *Grant Brother Contracting* decision gives us the lens by which the evidence should be examined in this case. The test has been clearly set out. AGAH submits that the facts of this case demonstrate that there was no preference in this case. There is sufficient evidence to rebut the presumption set out in section 95(2) of the *BIA*.
43. Specifically, the evidence demonstrates that in 2018, when the Loan was executed, it included an express provision containing an agreement to execute a collateral mortgage and granted a security interest in ASC's building, land, and equipment which would secure repayment of funds advanced. It was in the contemplation of AGAH and ASC at the time that the Loan would have this security. The Loan instrument itself was signed on January 2, 2018, some five (5) years prior to the NOI having been filed. Funds flowed from AGAH to ASC since 2018 and the same continued throughout the lifetime of the Loan.
44. These facts alone rebut any presumption of a preference. The intention of the parties, and the effect of the language in the Loan agreement, is important here. In 2018, while ASC was solvent and five (5) years removed from its insolvency and the filing of the NOI, agreed to grant security to AGAH. This was not on the eve of bankruptcy, and it was not when ASC was insolvent.
45. AGAH recognizes that the actual execution of the Mortgage and registration of the Security Interest in the PPRS took place after the Loan agreement was signed in 2018. However, temporarily of those instruments is not required. The agreement between the parties was that the funds flowing from the Loan were to be secured through those instruments from the beginning. It is only the formal registration of the Security Interest and the Mortgage that takes

place later. Formal documents are signed in 2023, but they are only to reflect terms already agreed upon in 2018: that AGAH would have security over the building, land, and equipment of ASC. In this way, the later signing of the Mortgage and registration of the Security Interest were simply parts of the same financing transaction that began in 2018, and not separate transactions intended to give preference.

46. Below, we have divided our analysis into two (2): one review of the Mortgage and the other a review of the equipment bound by the GSA and the Security Interest.

(1) The Real Property of ASC

47. With respect to the Real Property of ASC, The *Assignments and Preferences Act*, RSNS 1989, c 25 (the “*APA*”) is relevant to the question of whether the Mortgage was intended to give AGAH a better priority than what was intended. Specifically, section 4 addresses what constitutes an unjust preference.

Void property transfer

4 (1) Every transfer of property made by an insolvent person

- (a) with intent to defeat, hinder, delay or prejudice his creditors,
or any one or more of them; or
- (b) to or for a creditor with intent to give such creditor an unjust preference over other creditors of such insolvent person, or over any one or more of such creditors,

shall as against the creditor or creditors injured, delayed, prejudiced or postponed, be utterly void.

(2) If any transfer to or for a creditor has the effect of giving such creditor a preference over the other creditors of such insolvent person, or over any one or more of them, the transfer shall

- (a) in and with respect to any action or proceeding which is brought, had or taken to impeach or set aside such transfer within sixty days after the giving of the same; or
- (b) if such insolvent person makes an assignment for the benefit of his creditors within sixty days from the giving of such transfer,

be presumed to have been made with intent to give such creditor an unjust preference as aforesaid, and to be an unjust preference, whether such transfer was made voluntarily or under pressure.

[Emphasis Added]

48. The test for whether a transfer falls under section 4 of the *APA* was set out in *Kent Building Supplies v. Cumberland Builders Ltd.*, 1997 CarswellNS 257, 163 N.S.R. (2d) 289 at para. 28:

Determination of the issue depends upon **whether Cumberland Builders transferred property, whether it was then an insolvent person, and whether it did so within intent to defeat, hinder, delay or prejudice its creditors**, or any one or more of them. If all three questions are answered in the affirmative, then the transaction is utterly void against a creditor or creditors injured, delayed, prejudiced or postponed. **This Court has concluded that all three questions must be answered in the affirmative.**

[Emphasis Added].

49. In *Project Forest Lakes Pte. Ltd. v. Terra Firma Development Corporation Limited*, 2021 NSSC 350 McDougall J. assessed a similar fact scenario and determined that, *inter alia*, the mortgage did not constitute a fraudulent preference under section 4 of the *APA*. His comments are instructive in this case:

71 Aside from the issue of insolvency, none of these "badges" obviously applies to the facts of this case. There is little evidence showing the extent of Terra Firma's assets or their respective values, although we do know that two other properties were foreclosed upon. PFL is an arm's-length lender, not a family member or related company, which was the case in many of the decisions where intent was inferred. There is no suggestion the parties were running a Ponzi Scheme. The Refinancing Mortgage was recorded on the Land Property Registry shortly after it was executed and was therefore not secret. The evidence does not disclose any outstanding judgments against Terra Firma at the time the Mortgage was executed. There are no terms of the Mortgage which are alleged to be unusual or self-serving. There is no evidence to suggest that the Mortgage was made with unusual haste, because it was essentially a continuation of past obligations between the parties. While counsel for the Encumbrancers alluded to suspicious circumstances, none were argued before the court.

72 The consideration for the transfer was not "grossly inadequate". There is no doubt that things like forbearance from suit and extension of time can be considered good and valuable consideration. Several recent decisions provide that Canada is moving away from a strict interpretation of the law of consideration to allow for less obvious forms, such as implied forbearance from suit (see the discussion in *Greater Fredericton Airport Authority Inc v NAV Canada*, 2008 NBCA 28, at paras 24-31). For the purposes of inferred intent under the *APA*, the consideration should evoke a fair exchange (*Feher v Healey*, 2006 CarswellOnt 5203, aff'd 2008 ONCA 191):

45 Where, however, a transaction is attacked as a fraudulent conveyance, the court is required to examine the adequacy of the consideration. Although the courts do not weigh the adequacy of consideration "in too nice scales", nominal or grossly inadequate consideration is not sufficient and can be an indication or badge of fraud.

The court's examination of adequacy is thus an attempt to ensure that there is a *bona fide* exchange and a reasonable *quid pro quo* for the impugned transfer of property: see generally Springman, Stewart and MacNaughton, *Fraudulent Conveyances and Preferences* (1994) at pages 14-22 to 14-29, and *Dougmor Realty Holdings Ltd., Re* (1966), [1967] 1 O.R. 66 (Ont. H.C.)

[emphasis added]

50. AGAH submits that the question of preference turns on whether the funds advanced under the Loan constitute past consideration or execution consideration. AGAH submits that there was execution consideration, i.e. that AGAH provided financing to ASC and that said financing was always intended to be consideration for the Mortgage. As noted previously, this was always the intent of the parties and was reduced to writing in the Loan agreement five (5) years previously.

51. This question was discussed by Cullen J. in *Wilburn Properties Inc. v. Silver Resources Ltd.*, 2001 BCSC 1084:

81 In *Chitty on Contracts* 27th ed., vol. 1 (London: Sweet & Maxwell, 1994) at para. 3-023, p. 181 the issue of contemporaneity is addressed:

In determining whether consideration is past, the courts are not, it is submitted, bound to apply a strictly chronological test. **If the giving of consideration and the making of the promise are substantially one transaction, the exact order in which these events occur is not decisive.**

[Emphasis Added]

...

84 In other words, the parties must have assumed throughout their negotiations that the act or service would be compensated once performed. In *Anson's Law of Contract*, 25th ed. (Oxford: Oxford University Press, 1975), p. 92-93 the distinction between executed and past consideration is described as follows:

But executed must be distinguished from past consideration. In the case of executed consideration, both the promise and the act which constitutes the consideration are integral and co-related parts of the same transaction; but in the case of past consideration the promise is subsequent to the act and independent of it.

52. Applying this framework, Cullen J. found that while security documents were not executed contemporaneously with funds advanced, it was clear from the evidence that the parties intended the two as one transaction.

85 **While the execution of the security documents was not contemporaneous with the advance of the funds, in my view there clearly was an implied promise on the part of the respondent to provide the highest and best security for the loans being advanced both in relation to the US \$400,000 and in relation to the subsequent US \$231,000.** In addition, in view of the correspondence between Silver Peak and Werbes Sasges at or around the time of the advance of the funds, **I am satisfied that the security documents represent the respondent's promises based on the consideration advanced by the petitioner.** In my view therefore' there was valid and existing consideration for the execution of the following documents.

[Emphasis Added]

53. Clause 6 of the Loan demonstrates that AGAH and ASC intended that the Properties would be secured by a valid Mortgage binding the Real Property and its fixtures, and the funds advanced

constitute execution consideration akin to the circumstances set out in *Wilburn Properties Inc.*, *supra*.

54. Further, AGAH submits that the test set out in *Kent Building Supplies*, *supra*, requires that a transfer have an intention to defeat creditors. That could not have been the case here, because the parties agreed on the Mortgage in 2018. This was during a period of solvency and five (5) years prior to the filing of the NOI.

55. Given that the transfer was not fraudulent, the *Land Registration Act*, SNS 2001 c 6, directs that the Mortgage forms a first charge on the Properties ahead of the judgment recorded by WTH: see *Xceed Mortgage Corporation v. Baker*, 2012 NSSC 221, at paras 33-34.

(2) The equipment of ASC

56. The analysis above related to section 95 is also applicable to the equipment of ASC and the Security Interest.

57. Pursuant to sections 51 and 52 of the *Bills of Exchange Act*, RSC 1985, c B-4, the Loan constituted a valid and binding security agreement for the equipment of ASC, supported by valuable consideration.

Bill of exchange

16 (1) A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay, on demand or at a fixed or determinable future time, a sum certain in money to or to the order of a specified person or to bearer.

...

Valuable consideration

52 (1) Valuable consideration for a bill may be constituted by
(a) any consideration sufficient to support a simple contract; or
(b) an antecedent debt or liability.

Form of bill

(2) An antecedent debt or liability is deemed valuable consideration, whether the bill is payable on demand or at a future time.

58. Further, the security interest was perfected when it was registered in the *PPSA*:

Perfection by registration

26 Subject to Section 20, registration of a financing statement perfects a security interest in collateral.

59. Indeed, the Loan was given in 2018 and specifically included clause 6 which gave AGAH a security agreement in the equipment of ASC in exchange for valuable consideration. The Loan was a valid and binding contract pursuant to the *Bills of Exchange Act, supra*, and was perfected upon recording the security pursuant to the *PPSA*.

60. Pursuant to the analysis set forth with respect to the Mortgage, the security interest was granted in 2018, years prior to ASC's insolvency, and does not constitute a fraudulent preference within the meaning of section 95 of the *BIA*.

61. The fact that the security interest was not perfected until 2023 does not alter the contractual agreement between AGAH and ASC, nor does it alter the fact that ASC agreed to give a security interest in its equipment in exchange for the Loan in 2018. The intent of the parties is critical to this analysis. The intent of the parties was crystalized and reduced to written agreement on January 2, 2018. Effect must be given to the intent of the parties.


62. Thus, the analysis with respect to section 95 applies to the equipment, and the Security Interest should not be set aside under section 95(2).

CONCLUSION

63. Based on the foregoing, AGAH submits that the facts rebut the presumption that the Mortgage and Security Interest were preferential transactions under section 95 of the *BIA*. AGAH submits that the evidence demonstrates that it has a valid first-charge mortgage against the Properties, and a valid second-charge security interest in ASC's equipment.

64. Therefore, AGAH respectfully requests that this Honourable Court grant an order confirming same.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 6th day of November 2024.



Christopher D. J. Isnor

LAWSON CREAMER

133 Prince William Street, Suite 801

Saint John, New Brunswick E2L 2B5

Tel: 506-633-5339

Fax: 506-633-0465

E: cisnor@lawsoncreamers.com

Solicitors for Atlantic Golden Age Holding Inc.