Indexed as:

Confederation Treasury Services Ltd. (Re)

IN THE MATTER OF The Bankruptcy of Confederation Treasury Services Limited, a corporation incorporated under the laws of the Province of Ontario having its head office in the City of Toronto, in the Municipality of Metropolitan Toronto, Province of Ontario, and
AND IN THE MATTER OF the Winding-Up Act, and
AND IN THE MATTER OF the Liquidation of Confederation Life Insurance Company

[**1997] O.J. No. 67**

96 O.A.C. 75

43 C.B.R. (3d) 4

68 A.C.W.S. (3d) 396

Court File No. M19800 (C24399)

Ontario Court of Appeal
Toronto, Ontario

Catzman, Carthy and Moldaver JJ.A.

Heard: December 19, 1996.
Judgment: January 14, 1997.

(5 pp.)

Bankruptcy -- Creditors -- Claims -- What constitutes a provable claim -- Practice -- Orders -- Appeals -- When available -- Leave to appeal.

This was a motion for leave to extend the time to appeal an order disallowing Ernst & Young's proof of claim in the bankruptcy of Confederation Treasury Services Ltd. and, if leave was granted, an appeal from the order. The order disallowing the proof of claim was one of several made on the same day. No appeal was taken from this order until its significance became apparent during the argument of an appeal from another order made on the same day. On that appeal, the trustee argued that since Ernst's claim had been disallowed, it was not a creditor entitled to the relief it sought.

HELD: Leave to extend the time to appeal was granted. The appeal was allowed. Since Ernst had always intended to appeal the total dispositions made on the same day and since the trustee would not suffer any prejudice, leave was granted. The appeal was allowed from the order disallowing Ernst's proof of claim and in its place, a declaration was issued that Ernst's contingent claim was a claim provable in the bankruptcy. The matter was remitted to the court for valuation of the claim. Ernst's claim was a valid contingent claim within the contemplation of section 121 of the Bankruptcy and Insolvency Act.

Statutes, Regulations and Rules Cited:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 2, 69, 121(2).
Winding-up Act.

Counsel:

Peter H. Griffin and Risa Kirshblum for Ernst & Young.
A. Sternberg for former directors and officers of Confederation Life Insurance Company and Confederation Treasury Services Limited.
William G. Horton for the Rehabilitator of Confederation Life Insurance Company in the United States.
R.N. Robertson and E. Lamek for the trustee of the estate of Confederation Treasury Services Limited, a bankrupt.

The following judgment was delivered by

1 THE COURT (endorsement):-- Ernst & Young ("E&Y") filed a proof of claim, dated February 21st, 1996, with the trustee of the estate of Confederation Treasury Services Limited ("the trustee"). In one of several orders made on April 8th, 1996, Farley J. granted a motion by the trustee disallowing E&Y's proof of claim. No appeal was taken from this order until its significance became apparent during the argument of the appeal from another order made by Farley J. on the same day. In that appeal, E&Y and the former directors and officers of Confederation Life Insurance Company and Confederation Treasury Services Limited ("the directors and officers") sought an order that would entitle them to assert a claim against the trustee for relief arising out of their potential liability in an action now pending in Michigan. But only a creditor may seek such leave: see ss. 69 ff. of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 ("the BIA"). Section 2 of the BIA defines "creditor" to mean a person having a claim, preferred, secured or unsecured, provable as a claim under the Act, and defines "claim provable in bankruptcy", "provable claim" and "claim provable" to include any claim or liability provable in proceedings under the Act by a creditor. The trustee resisted the other appeal on a number of grounds, including the ground that, because E&Y's proof of claim had been disallowed, it was not a "creditor" entitled to the relief it sought.

2 E&Y immediately brought this motion for leave to extend the time to appeal from the order disallowing its proof of claim. The uncontradicted evidence of E&Y is that it always intended to appeal the whole of the disposition of Farley J. made on April 8th, 1996 which had the result of foreclosing its entitlement to assert a claim for contribution and indemnity from the trustee, and we are not satisfied that the trustee would suffer any prejudice from the granting of such leave. Leave to extend the time to appeal from the order disallowing the proof of claim is therefore granted.

3 We turn to the appeal itself. Section 121 of the BIA deems all debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt to be claims provable in proceedings under the Act. Section 121(2) makes specific reference to contingent claims and unliquidated claims. The claim of E&Y is, on its face, a contingent claim and, because E&Y is subject to a claim for treble damages in the Michigan proceedings, is not the same as the claim asserted against the trustee in Ontario by the Rehabilitator and exceeds that claim to the extent that any such damages may be awarded over and above the amount that may be awarded against the trustee.

4 In so far as the cases of Claude Resources Inc. (Trustee of) v. Dutton (1993), 22 C.B.R. (3d) 56 and Re Wiebe (1995), 30 C.B.R. (3d) 109, relied upon by the trustee, articulate as a test for a valid contingent claim the need for probability of liability arising from the court proceedings in question, we believe that they impose too high a threshold for the establishment of such a claim. While there may be claims so remote and speculative in nature that they could not properly be considered contingent claims, the claim of E&Y in the present case for contribution and indemnity in respect of the relief sought against it in the Michigan proceedings does not fall into that category and, in our view, constitutes a valid contingent claim within the contemplation of sec. 121 of the BIA.

5 Accordingly, the appeal from the order disallowing E&Y's proof of claim is allowed and, in its place, a declaration will issue that E&Y's contingent claim is a claim provable in the bankruptcy of Confederation Treasury Services Limited. Pursuant to s. 121(2) of the BIA, the matter is remitted to the Ontario Court (General Division) to value E&Y's claim upon such evidence as may be adduced by the parties in respect of such valuation and E&Y's claim shall be deemed a proved claim to the amount of its valuation.

6 It has been common ground throughout the argument of these appeals that the directors and officers, who have not yet filed a proof of claim with the trustee, fall into the same category as E&Y with respect to the relief sought against them in the Michigan proceedings. Such a proof of claim, as and when it is filed by the directors and officers, is to be treated in the same manner as we have directed in respect of E&Y's proof of claim.

7 Having regard to the circumstances out of which the appeal from the disallowance of E&Y's proof of claim arose, we order that there should be no costs of this appeal except the usual order for payment of the costs of the trustee out of the estate of Confederation Treasury Services Limited.

CATZMAN J.A.
CARTHY J.A.
MOLDAVER J.A.

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