Case Name:

Thow (Re)

IN THE MATTER OF the Bankruptcy of Ian Gregory Thow

[2009] B.C.J. No. 1729

2009 BCSC 1176

57 C.B.R. (5th) 222

2009 CarswellBC 2293

Docket: B051318

Registry: Vancouver

British Columbia Supreme Court
(In Bankruptcy and Insolvency)
Vancouver, British Columbia

J.S. Sigurdson J.

Heard: June 12, 2009.
Judgment: August 28, 2009.

(48 paras.)

Bankruptcy and insolvency law -- Creditors and claims -- Claims -- Provable claims -- B.C. Securities Commission The Court held that a B.C. Securities Commission administrative penalty imposed after the date of bankruptcy was not a claim provable in bankruptcy -- The fine was imposed on the bankrupt for his conduct prior to his bankruptcy -- The penalty was not an obligation as contemplated by section 121 of the Bankruptcy and Insolvency Act until it was assessed by the Commission -- There was no contingent liability as the Commission's decision to impose the penalty was discretionary -- Bankruptcy and Insolvency Act, s. 121 -- Securities Act, s. 162.

Statutes, Regulations and Rules Cited:

Aeronautics Act, R.S.C. 1985, c. A-2, s. 7.7

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 121, s. 121(1), s. 178

Canadian Aviation Regulations, SOR/96-433,

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 12

Employment Insurance Act, S.C. 1996, c. 23, s. 43

Securities Act, RSBC 1996, CHAPTER 418, s. 162

Counsel:

Counsel for Ian Gregory Thow: R.N. Pelletier, D. Reid.

Counsel for British Columbia Securities Commission:
W.L. Roberts.

Reasons for Judgment

J.S. SIGURDSON J.:--

INTRODUCTION

1 In this case the bankrupt, after becoming bankrupt, was assessed an administrative penalty by the British Columbia Securities Commission ("BCSC") for his conduct as a mutual fund dealer prior to his bankruptcy.

2 The issues on this application are whether that penalty is a claim provable in his bankruptcy under s. 121(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, ("BIA") and, if so, whether the claim is exempted by s. 178 such that it would not be released by an order of discharge from bankruptcy.

FACTS

3 The bankrupt, Ian Gregory Thow (the "Bankrupt"), was employed by Berkshire Investment Group Inc. ("Berkshire") as a mutual fund salesperson. The Bankrupt was also an officer, director, and branch manager with Berkshire.

4 Mr. Thow had hundreds of clients and, through the promotion of securities other than the mutual funds he was registered to sell, he misappropriated millions of dollars of his clients' funds.

5 In June 2005, the Bankrupt was terminated from his employment with Berkshire. At that time, a number of complaints had been made against him by his clients to the BCSC, and the BCSC was in the process of beginning its investigation.

6 On July 22, 2005, the Bankrupt filed a notice of intention to make a proposal. Immediately thereafter, the trustee, Wolridge Mahon Limited, determined that there were a number of companies inextricably linked to the Bankrupt's affairs, and applied in the bankruptcy court to be appointed as interim receiver, then to petition the Bankrupt's companies into bankruptcy.

7 On August 22, 2005, the Bankrupt filed a proposal with the trustee, and, at a meeting of creditors held on September 12, 2005, his proposal was rejected. As such, the Bankrupt was deemed to have made an assignment into bankruptcy pursuant to s. 57(a) of the *BIA*, with the date of bankruptcy being July 22, 2005 (the date of the filing of the notice of intention to file a proposal).

8 On June 29, 2006, the BCSC issued a notice of hearing. That hearing was held on various dates in May, June and July 2007.

9 The evidence before the BCSC included:

(i) Interviews with 26 of the Bankrupt's clients, with their interviews forming part of the record;
(ii) Thirteen of the clients also gave direct testimony at the hearing itself; and
(iii) Evidence by way of expert report from James P. Blatchford Consulting Limited, a forensic accounting firm. Mr. Blatchford's qualifications as an expert included 30 years of forensic accounting, 14 of which were with the RCMP.

10 On October 16, 2007, the BCSC issued its findings and found that Mr. Thow:

(i) failed to deal fairly, honestly and in good faith with his clients, contrary to s. 14(2) of the *Securities Rules* and the rules of the Mutual Fund Dealers Association, when he lied to them and took their money;
(ii) traded in securities without being registered to do so, contrary to s. 34(1)(a) of the *Securities Act,* when, while registered as a mutual fund salesperson, he traded securities that were not mutual funds;
(iii) made representations, contrary to s. 50(1)(d) of the *Securities Act*, when he made untrue statements for material facts about the securities he offered to his clients, and when he omitted material facts about those securities; and
(iv) perpetrated a fraud, contrary to ss. 57(b) and 57.1(b) of the *Securities Act*, when he made misrepresentations to his clients, and used their funds for his own purposes instead of investing them as his clients intended.

11 On December 20, 2007, the BCSC issued its decision in relation to the sanctions (the "Decision"). This decision incorporated by reference the findings noted above.

12 In addition to a number of sanctions prohibiting the Bankrupt from dealing and trading in securities, the BCSC by the Decision ordered the Bankrupt to pay an administrative penalty of $6 million pursuant to s. 162 of the *Securities Act,* R.S.B.C. 1996, c. 418 (the "Penalty").

13 The Decision was registered in the British Columbia Supreme Court, Vancouver Registry, under action No. L080017, on January 7, 2008, and, by virtue of s. 163 of the *Securities Act*, the Decision became an order of the court on that date.

14 Subsequently, the British Columbia Court of Appeal reduced the Penalty to $250,000, based on the statutory provisions in force at the time of Mr. Thow's conduct: *Thow v. British Columbia Securities Commission*, 2009 BCCA 46.

NATURE OF THE APPLICATION

15 The BCSC seeks the following orders:

(i) a declaration that the amounts owing by the Bankrupt to the BCSC pursuant to the Decision are not a provable claim as contemplated by s. 121 of the *BIA*, and thus are a post-filing claim and thereby not subject to s. 69.3 of the *BIA*; and

(ii) if it is a provable claim in Mr. Thow's bankruptcy, then, pursuant to s. 178(1)(a), (d), (e) of the *BIA*, the amount owing by the Bankrupt to the BCSC pursuant to the Decision issued by the BCSC on December 20, 2007, is not released by any order of discharge granted to the Bankrupt.

DISCUSSION

16 I will first discuss whether this claim, arising from conduct prior to Mr. Thow's bankruptcy but resulting in a penalty after his bankruptcy, is a claim provable in his bankruptcy.

17 Section 121(1) of the *BIA* provides:

> 121(1) 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 shall be deemed to be claims provable in proceedings under this Act.
>
> (2) The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such a claim shall be made in accordance with section 135.

18 The Securities Commission argues that its claim was not provable under s. 121(1) of the *BIA* at the date of bankruptcy because the regulatory fine did not become an obligation until it was actually assessed, which was after the date of bankruptcy. It says that the imposition of the fine was a discretionary decision and the obligation of Mr. Thow only arose when the Commission chose to exercise its discretion.

19 The Commission imposed the fine under s. 162 of the *Securities Act*:

> 162 If the commission, after a hearing,
>
> (a) determines that a person has contravened
>
> (i) a provision of this Act or of the regulations, or
> (ii) a decision, whether or not the decision has been filed under section 163, and
>
> (b) considers it to be in the public interest to make the order,
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> the commission may order the person to pay the commission an administrative penalty of not more than $1 million for each contravention.

20 On the other hand, Mr. Thow argues that an administrative penalty based on conduct before the bankruptcy is a contingent or unliquidated claim under s. 121(2) and is a claim provable in bankruptcy. His counsel notes that although some claims are so remote and speculative they cannot be considered contingent claims, the potential liability arising out of pending litigation, like this claim by the BCSC, is not one of those types of claims. He says that the date of the impugned conduct is the date giving rise to the Bankrupt's liability to the Commission. His counsel refers to several cases that have found that the fact that a claim does not crystallize until after bankruptcy is immaterial, it is when the obligation arises that is determinative. He argues that the Commission was already investigating Mr. Thow prior to his bankruptcy.

21 Neither party referred to a decided case where the impugned conduct occurred before bankruptcy but the regulatory penalty was imposed by a discretionary decision after bankruptcy.

22 The law is clear that fines imposed after the date of bankruptcy are not provable claims if the fine could not have been imposed until after bankruptcy. For example, in *(Re) Wosk's (Ltd.)* (1985), 58 C.B.R. (N.S.) 312 (B.C.S.C.), Cumming J. found that since the fine imposed by Revenue Canada was for the bankrupt's failure to remit taxes, which were due after the bankruptcy, the liability for the penalty did not arise until after bankruptcy and so it was not a provable claim. This is different than the situation in the present case because here both the impugned conduct and the investigation by the Commission into the impugned conduct occurred prior to bankruptcy. Only the hearing and the decision imposing the fine occurred after bankruptcy. Unlike in *(Re) Wosk's Ltd.*, there is nothing to suggest that the Commission's fine could not have been imposed prior to bankruptcy had the hearings been held earlier and the decision rendered before bankruptcy.

23 Mr. Pelletier, counsel for Mr. Thow, points out that in *(Re) Wosk's Ltd.*, Cumming J. held that Revenue Canada did not have a provable claim because the penalty did not arise from anything which preceded the date of proposal. Mr. Thow's counsel argues that to consider the penalty imposed by the BCSC a post-proposal debt would defeat the purpose of the *BIA*, to permit a debtor to obtain a discharge from all debts and start afresh, and it would allow provinces to create their own priorities under the *BIA*, which is impermissible constitutionally.

24 Both counsel referred to *(Re) Air Canada* (2006), 28 C.B.R. (5th) 317 (Ont. S.C.J.), a case that has relevance to both issues on this application. *(Re) Air Canada* was decided under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, ("*CCAA*") rather than the *BIA*.

25 The question in that case was whether a monetary penalty was a "claim" for the purposes of the *CCAA* and the claims procedure and sanction orders made in that proceeding.

26 The facts briefly were as follows. The Minister of Transport alleged that on December 23, 2000, an Air Canada aircraft landed at Montreal International Airport (Dorval) at 3:41 a.m. in contravention of the noise abatement requirements under the *Canadian Aviation Regulations*, SOR/96-433. On December 19, 2001, the Minister of Transport issued an assessment of monetary penalty against Air Canada under s. 7.7 of the *Aeronautics Act*, R.S.C. 1985, c. A-2., which read:

> 7.7 (1) If the Minister believes on reasonable grounds that a person has contravened a designated provision, the Minister may decide to assess a monetary penalty in respect of the alleged contravention, in which case the Minister shall, by personal service or by registered or certified mail sent to the person at their latest known address, notify the person of his or her decision.

27 On April 1, 2003, Air Canada applied for protection from its creditors under the *CCAA*, which resulted, *inter alia*, in an immediate stay of all proceedings. The Court issued a claims procedure order on September 18, 2003, which set forth the process by which creditors' claims would be determined. Paragraph 8 provided that any creditor who did not file a proof of claim before the claims bar date was "... forever barred from making or enforcing any Claim against [Air Canada] and the Claim shall be forever extinguished."

28 The Minister of Transport and Transport Canada did not make a claim in the *CCAA* proceedings even though it had notice of the claims procedure order. The Court issued a sanction order on August 23, 2004, which provided that a creditor who did not file a proof of claim in accordance with the claims procedure is "forever barred from making any Claim against [Air Canada]".

29 Air Canada emerged from *CCAA* protection on September 30, 2004.

30 The first issue was whether the monetary penalty was a claim covered by the claims procedure and sanctions order.

31 "Claim" was defined, in that case, under the claims procedure order as:

> "Claim" means any right of any Person against one or more of the Applicants in connection with any indebtedness, liability or obligation of any kind of one or more of the Applicants owed to such Person and any interest accrued thereon or costs payable in respect thereof, whether liquidated, un-liquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, present, future, known or unknown, by guarantee, surety or otherwise, and whether or not such right is executor or anticipatory in nature, including the right or ability of any Person to advance a claim for contribution or indemnity or otherwise with respect to any matter, action, cause or chose in action, whether existing at present or commenced in the future, which indebtedness, liability or obligation is based in whole or in part on facts existing prior to [the date of Air Canada's application for protection under the *CCAA*] or a Restructuring Claim; provided however, that "Claim" shall not include an Excluded Claim.

32 Section 12 of the *CCAA* provides that determinations as to whether any unsecured indebtedness, liability or obligation is a "claim" within the meaning of the *CCAA* are made by reference to the *BIA*. Subsection 12(1) of the *BIA* provides:

> 12.(1) For the purposes of the Act, "claim" means any indebtedness, liability or obligation of any kind that, if unsecured, would be a debt provable in bankruptcy within the meaning of the Bankruptcy and Insolvency Act.

33 The court summarized the position of Air Canada as follows:

> 31 Air Canada submits that the Monetary Penalty is a "claim". It points out that the definition of "claim" in the Claims Procedure Order is broad. It submits that the fact that a claim is contingent, unliquidated or disputed does not change the character of a claim as one provable under the *BIA* so long as the claim is not too remote or speculative. Air Canada submits that given the factual situation at hand, it is clear that a contingent obligation arose on the part of Air Canada prior to the *CCAA* filing and the date of the stay. It submits that liability for the alleged penalty arose on or about December 23, 2000 when the Air Canada plane landed at Montreal's Dorval airport allegedly in contravention of the noise abatement regulations. Finally, Air Canada says the fact that the TATC had not yet upheld

> the imposition of the Monetary Penalty as of the date of the *CCAA* stay does not change the character of the Monetary Penalty as a claim provable in bankruptcy.
>
> 32 I agree with and accept the submissions of Air Canada. I would only add that while it could be said that Air Canada's liability for the Monetary Penalty first arose on December 23, 2000, in my view that liability only became an "obligation" when the Minister of Transport issued the Monetary Penalty on December 19, 2001. Such a liability is not too remote or speculative and is therefore a provable claim under the *BIA*.

34 Mr. Justice Cumming held that the monetary penalty was a "claim" for the purposes of the *CCAA* and the claims procedure and sanction orders and that the Minister of Transport's right to enforce the monetary penalty was extinguished.

35 The Commission however relies on Cumming J.'s comment at para. 32 that the regulatory penalty in that case did not become an "obligation" until it was actually assessed, rather than becoming an obligation on the date of the impugned conduct. Like the Commission's decision to impose a fine in the case at bar, the fine imposed by the Minister of Transport in *(Re) Air Canada* was discretionary.

36 Both parties referred to *(Re) Harvey*, 2004 ABQB 773, 373 A.R. 373, in which Human Resources and Development Canada ("HRDC") sought repayment from Mr. Harvey of an overpayment of employment insurance. HRDC claimed that it had to be repaid after bankruptcy. However, Registrar Smart held, at para. 19, that since all the events which gave rise to the liability to HRDC occurred prior to bankruptcy, all HRDC had to do was review its file, calculate how much was overpaid, and give notice. The liability for repayment to HRDC was under s. 43 of the *Employment Insurance Act*, S.C. 1996, c. 23:

> 43. A claimant is liable to repay an amount paid by the Commission to the claimant as benefits
>
> (a) for any period for which the claimant is disqualified; or
> (b) to which the claimant is not entitled

37 Thus, the bankrupt was liable to the HRDC once he received overpaid benefits; the HRDC did not have to exercise its discretion and demand repayment. Therefore the obligation to pay arose prior to bankruptcy, even though the liability to repay crystallized after bankruptcy.

38 The present case differs from *(Re) Harvey*, because here the Commission had to do more than merely review a file and calculate the penalty. The Commission had to undertake an investigation, hold a hearing, make findings and reach a decision. Also, unlike in *(Re) Harvey*, in this case the Commission's decision to impose the fine is discretionary.

39 Both parties also referred to *British Columbia (Director of Employment Standards) v. Eland Distributors Ltd. (c.o.b. Toys & Wheels) (Trustee of)* (1996), 21 B.C.L.R. (3d) 91, [1996] 7 W.W.R. 652 (S.C.), which is a similar case to *(Re) Harvey*. In *Eland Distributors* all of the employees were fired after bankruptcy and the issue was whether the Director of Employment Standard's claim for severance pay for employees was a provable claim at the time of bankruptcy. Madam Justice Sinclair-Prowse found that the severance pay claim arose from a contractual obligation the employer had assumed long before the company went bankrupt and said at para. 23 that:

> ... the obligation of the employer to pay severance pay upon the happening of specified events was incurred before the bankruptcy and therefore constitutes a debt or liability to which the employer was subject on the day on which it became bankrupt.

40 The obligation to pay severance arose on the day of bankruptcy automatically by operation of the bankruptcy, because the employees were terminated without cause or notice; there was no exercise of discretion required for the obligation to exist. As a result, I do not think that *Eland Distributors* is applicable to the present case because here there is an exercise of discretion; the Commission's penalty did not automatically follow from the pre-bankruptcy conduct.

41 The position of the Securities Commission is supported by two cases which held that costs, which are at the court's discretion, are not an obligation under s. 121 of the *BIA* until they are awarded: *Chaloux v. Kingston Fairways Golf Course* (2004), 48 C.B.R. (4th) 237 (Ont. S.C.J.); and *Strini v. Mihalicz*, 2006 ABQB 912, 411 A.R. 202. In *Chaloux*, the plaintiff in a personal injury case made a voluntary assignment into bankruptcy before the issue of costs in favour of a defendant in the matter could be settled (the action was discontinued against that defendant). The issue was whether the costs were a provable claim under s. 121 of the *BIA*. Likewise, the issue of whether costs are a contingent liability was considered in *Strini*.

42 In both *Chaloux* and *Strini*, the court considered and relied on *Glenister v. Rowe*, [1999] 3 All E.R. 452 (Eng. C.A.), which found that because costs awards are discretionary, they are not a contingent liability under the English equivalent of the *BIA*. In *Chaloux* Belch J. found that *Glenister* is persuasive authority in Canada because the English statute is similar to the *BIA*. In *Glenister*, the English Court of Appeal held that since costs awards are at the discretion of the court, until an order for costs is made there is no "obligation" and there is no liability to pay them and so there is no contingent liability (even if the contingency aspect is there).

43 In *Strini* Kenny J. said this about *Glenister*:

> 27 The essence of the ruling of the English Court of Appeal is that a claim for costs is purely discretionary and comes into existence only when the court makes the order. At the time of bankruptcy there was merely a risk of costs being awarded at a future date. There was no contingent provable liability. Therefore, the Court of Appeal ruled that the costs order did not fall within the bankruptcy.
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> 28 Applying *Glenister* the court, in *Chaloux v. Kingston Fairways Golf Course* ... awarded costs against an undischarged bankrupt. Here the plaintiff was seeking damages for assault. The action did not proceed. The plaintiff declared bankruptcy. After the plaintiff's discharge from bankruptcy, the defendant sought costs. Such were awarded based on the reasoning in *Glenister*.
>
> 29 I adopt the reasoning in *Glenister*. Costs are a completely discretionary remedy. There is no obligation until there is an order for payment. I am therefore sat-

> isfied that any costs I might award would not be provable in bankruptcy and are therefore not released by the discharge granted ...

44 In both *Strini* and *Chaloux*, the courts found that since costs are completely discretionary there is no obligation until the court orders payment and so costs awarded after an assignment into bankruptcy are not a provable claim.

45 In my opinion, these cases support the Commission's position. The Commission's decision to impose a penalty was discretionary and so Mr. Thow was not liable to the Commission until it exercised its discretion. Thus the penalty was not a contingent liability or an "obligation" under s. 121 of the *BIA* at the date of his bankruptcy.

46 In my opinion, the *(Re) Air Canada* case supports the Commission's position that the penalty is not an obligation as contemplated by s. 121 of the *BIA* until the penalty is assessed by the Commission. Likewise, *Chaloux*, *Strini* and *Glenister* also support the Commission's position that because its decision was discretionary, there was not a contingent liability or "obligation" until the Commission actually fined Mr. Thow, which was after the date of his bankruptcy. Therefore, in my opinion the obligation did not arise until after bankruptcy and the Commission's penalty is not a provable claim in this bankruptcy.

47 Given my conclusion that the penalty imposed by the Securities Commission after the date of bankruptcy is not a claim provable in this bankruptcy, I do not have to go on to decide the next issue, that is, if it was a provable claim, whether it would survive any discharge from bankruptcy.

48 The application of the Securities Commission for a declaration that the Penalty is not a claim provable in Mr. Thow's bankruptcy is allowed.

J.S. SIGURDSON J.