BANKRUPTCY FILE NUMBER	**24-2736961**
COURT	**COURT OF QUEEN'S BENCH OF ALBERTA IN BANKRUPTCY AND INSOLVENCY** **IN THE MATTER OF THE BANKRUPTCY OF MOD PANEL MANUFACTURING LTD.**
JUDICIAL CENTRE	**Calgary**
DOCUMENT	**BENCH BRIEF OF GRAHAM DESIGN BUILDERS LP, BY ITS GENERAL PARTNER GRAHAM DESIGN BUILDERS LTD. AND CARILLION CONSTRUCTION INC.**

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BENCH BRIEF OF THE APPLICANT IN SUPPORT OF APPLICATION TO LIFT THE STAY OF PROCEEDINGS IN BANKRUPTCY

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I. INTRODUCTION

1. This brief is submitted on behalf of Graham Design Builders LP, by its general partner Graham Design Builders Ltd. and Carillion Construction Inc. ("**Carillion**") (collectively, "**Graham**"), further to its Application to Lift the Stay of Proceedings in Bankruptcy (the "**Stay**") arising from the May 7, 2021 Order adjudging Mod-Panel Manufacturing Ltd. ("**Mod-Panel**") bankrupt (the "**Bankruptcy Order**").

2. Graham takes the position that it is appropriate to lift the Stay to allow Graham to proceed with two Saskatchewan Court of Queen's Bench proceedings, being Saskatchewan Court of Queen's Bench Action No. QBG 495 of 2021 (the "**Roof Action**") and 1548 of 2020 (the "**Wall Action**", and together with the Roof Action, the "**Saskatchewan Actions**"), for the limited purpose of pursuing certain of Mod-Panel's insurance policies.

II. STATEMENT OF FACTS

3. Graham is in the business of providing engineering and construction services for industrial and infrastructure projects. Along with Carillion, Graham carries on business as a joint venture under the firm name of Graham Carillion NB JV ("**GCNB**").

4. In August 2015, GCNB entered into a contract whereby it agreed to undertake the design and construction of a hospital and correctional facility project in North Battleford, Saskatchewan (the "**Project**").[1]

5. As GCNB's scope of work for the Project included the supply and installation of a wall and roofing system, GCNB entered into several purchase contracts with Mod-Panel whereby Mod-Panel agreed to supply products and components for each of the wall and roofing systems to be installed (the "**Purchase Contracts**"). As part of these agreements, Mod-Panel was required to have in place Commercial General Liability Insurance in relation to its performance of the work, and to add GCNB as an additional insured party to such insurance contracts.[2]

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[1] Affidavit of Tony Clark, sworn June 25, 2021 ("**Clark Affidavit**") at para 5.
[2] Clark Affidavit at paras 6-8.

6. Accordingly, GCNB was added as a named insured to two policies held by Mod-Panel in relation to the project (the "**Mod-Panel Insurance**").[3]

7. Graham also took out insurance policies of its own in relation to the Project (the "**Graham Policies**").[4]

8. In or around May 2017 and May 2019, GCNB detected damage related to the wall and roofing systems of the Project and the materials supplied by Mod-Panel.[5] Such damage, causing losses to Graham in the total amount of approximately $29 million (the "**Wall and Roof Losses**"), has been assessed by third party investigators as having been caused by the materials manufactured and supplied by Mod-Panel.[6]

9. Graham has filed proof of loss claims under the Graham Policies, but has not yet obtained any recovery under those policies, at least in part because the cause of the loss claimed is considered to be defective materials supplied by Mod-Panel.[7]

10. In the event Graham is unable to recover its losses through the Graham Policies, or if there is a shortfall under the Graham Policies, Graham intends to pursue the Mod-Panel Insurance. Additionally, Graham understands that if it does receive pay-out under the Graham Policies, the respective insurers thereunder intend to advance a subrogation claim against the Mod-Panel Insurance.[8]

11. Prior to the Bankruptcy Order, Graham had commenced the Wall Action and Roof Action against Mod-Panel, among several other defendants. Prior to the commencement of the Saskatchewan Actions, Graham had attempted to arbitrate its disputes with Mod-Panel, but Mod-Panel failed to respond to numerous requests by counsel for Graham to do so.[9] As a result, Graham brought applications before the Saskatchewan Court of Queen's Bench requesting the appointment of arbitrators and stays of the Saskatchewan Actions. Mod-

[3] Clark Affidavit at paras 8, 14.
[4] Clark Affidavit at para 13.
[5] Clark Affidavit at para 10.
[6] Clark Affidavit at paras 11-12.
[7] Clark Affidavit at paras 17-22.
[8] Clark Affidavit at paras 20, 22.
[9] Clark Affidavit at paras 25-26.

Panel insisted on adjournments such that the applications were not decided prior to the Bankruptcy Order.[10]

12. On May 7, 2021, Mod-Panel was petitioned into bankruptcy and Ernst & Young Inc. LIT was appointed as Mod-Panel's trustee in bankruptcy (the "**Trustee**").[11]

13. As a result of the Stay, Graham is prevented from advancing the Saskatchewan Actions against Mod-Panel, and thus unable to enforce any judgment received against Mod-Panel's insurers pursuant to Saskatchewan's *Insurance Act*.[12]

14. The Trustee does not oppose Graham's Application to Lift the Stay in order for Graham to pursue the Saskatchewan Actions for the limited purpose of pursuing the available insurance proceeds.[13]

15. Graham has been prejudiced by Mod-Panel's delays in resolving the disputes, and the continued operation of the Stay prejudices Graham's ability to pursue the Saskatchewan Actions and recover the significant Wall and Roof Losses it incurred several years ago.[14]

III. ISSUES

16. Should the stay of proceedings in the Saskatchewan Actions be lifted, such that Graham may continue with the Saskatchewan Actions?

IV. LAW AND ARGUMENT

17. Upon the bankruptcy of a debtor, a stay of proceedings is imposed with respect to the bankrupt and its property, and creditors are prohibited from commencing or continuing any action or proceeding for a claim provable in bankruptcy. Section 69.3(1) of the BIA provides that:

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[10] Clark Affidavit at paras 26-32.
[11] Clark Affidavit at para 33.
[12] SS 2015, c I-9.11, s 8-23 **[TAB 1]**.
[13] Clark Affidavit at para 34, Exhibit "P".
[14] Clark Affidavit at paras 37-38.

> subject to [section] 69.4…on the bankruptcy of any debtor, no creditor has any remedy against the debtor or the debtor's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy.[15]

18. While Rule 4.34 of the Alberta *Rules of Court*[16] provides for an automatic stay of an action upon the transfer or transmission of interest of a party to the action in the event of bankruptcy, the comparable Rule 4-47 of the Saskatchewan *Queen's Bench Rules* does not impose an automatic stay. Rule 4-47 does however permit a party in such circumstances to bring an application for the conduct of the proceedings:

> If at any time in an action the interest or liability of a party is transferred or transmitted to another person by assignment, bankruptcy, death or other means, **the Court may, on application or on its own motion, make orders** for: (a) the addition, removal, substitution or arrangement of the parties or their personal representatives; (b) **the conduct of the proceedings**; and (c) the service of notice of any proceeding or order. (2) The Court may at any time vary, rescind or modify any order made pursuant to this rule.[17]

19. In the event of the bankruptcy of a party to litigation, another party may apply under each of section 69.4 of the *BIA* to lift the stay of proceedings and Saskatchewan Rule 4-47 for an order regarding the conduct of the proceedings, and continue the action. The test to lift the stay of proceedings is set out in section 69.4 of the *BIA* as follows:

    (a) That a creditor is likely to be materially prejudiced by the continued operation of the stay; or

    (b) Other grounds exist to make it equitable to lift the stay.[18]

20. This is a disjunctive test, such that the moving creditor need only satisfy one of the requisite factors.[19]

21. The Court's function on an application for leave is not to inquire into the merits of the action; the statutory test does not require the applicant to establish a *prima facie* case for the action sought to be continued.[20] However, some consideration of the merits may inform

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[15] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s 69.3(1) (the "*BIA*") **[TAB 2]**.
[16] *Alberta Rules of Court*, AR 124/2010, r 4.34 [**TAB 3**].
[17] *The Queen's Bench Rules*, Sask Gaz December 27, 2013, 2684, r 4-47 [**TAB 4**].
[18] *BIA*, *supra*, s 69.4 **[TAB 2]**.
[19] *Re Great North Data Ltd*, 2020 NLSC 105 at para 11 [*Great North*] [**TAB 5**].
[20] *Re Ma*, 2001 CanLII 24076 (ON CA) at paras 2-3 **[TAB 6]**.

the determination of whether sound reasons exist for lifting the stay. Where the action holds little prospect of success, lifting the stay may be inappropriate.[21]

22. A moving party must demonstrate "sound reasons", consistent with the scheme of the *BIA*, to lift the stay.[22] Courts have consistently recognized certain situations which meet this threshold, including:

(a) Actions against the bankrupt for a debt to which a discharge would not be a defence;

(b) Actions in respect of a contingent or unliquidated debt, the proof of which and valuation has that degree of complexity which makes the summary process prescribed under the *BIA* inappropriate;

(c) Actions in which the bankrupt is a necessary party for the complete adjudication of the matters at issue involving other parties;

(d) Actions brought to establish judgment against the bankrupt to enable the plaintiff to recover under a contract of insurance or indemnity or under compensatory legislation; and

(e) Actions which, at the date of bankruptcy, have progressed to a point where logic dictates that the action be permitted to continue to judgment.[23]

23. The Courts have recognized that the above factors are not an exhaustive codification of the requirements to lift the stay, but simply some of the grounds which may be considered in the exercise of judicial discretion.[24]

24. These non-exhaustive factors speak to the prejudice suffered by the creditor should the stay not be lifted. Prejudice to a creditor is considered objectively, with reference to the degree of prejudice suffered by the creditor in relation to the indebtedness and not to the extent such prejudice may affect the creditor subjectively as an organization.[25] This rationale

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[21] *Ibid*.
[22] *Ibid*.
[23] *Transamerica Life Canada v Oakwood Associates Advisory Group Ltd*, 2020 ABQB 279 [*Transamerica*] at paras 14-15 [**TAB 7**]; *Great North*, *supra* at para 7 [**TAB 5**].
[24] *Great North*, *supra* at para 8 **[TAB 5]**.
[25] *Re Cumberland Trading Inc*, 1994 CanLII 7458 (ON SC) at para 11 **[TAB 8]**.

applies so that financially strong creditors are not precluded from demonstrating "material prejudice" simply because of their strength.[26] Establishing material prejudice requires some quantitative or qualitative analysis of the prejudice.[27]

25. A creditor may also demonstrate that it is otherwise equitable to lift the stay, despite no material prejudice being demonstrated. Equitable grounds to lift the stay will exist where a creditor can show that the operation of the continued stay would be unfair to it and more prejudicial than for other creditors.[28]

26. Where the trustee does not object to the lifting of the stay, this is an important factor that favours the lifting of the stay, as it demonstrates that the making of the order will not affect the bankrupt estate or prejudice any other creditors.[29]

A. Graham Will be Materially Prejudiced if the Stay Continues

27. As further noted below, two of the five factors commonly referred to by the Courts in considering the material prejudice test to lift the stay are present in this case.

28. Where the sole purpose of lifting the bankruptcy stay is to obtain the benefits of insurance, and where the property of the bankrupt will not be affected by the action to be continued, lifting the stay is appropriate.[30]

29. A statutory stay of proceedings in favour of a bankrupt is designed to prevent one creditor from taking proceedings or steps which may give it an unfair advantage relative to other creditors.[31] Where the party seeking relief from the stay is seeking entitlement to recovery from sources outside the bankrupt's estate, such as under contracts of insurance, and where such remedy is not open to other claimants of the bankrupt, courts have recognized material prejudice if the stay is not lifted.[32]

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[26] *Ibid*.
[27] *Ibid*.
[28] *Janodee Investments Ltd. v Pellegrini*, 2001 CanLII 28455 (ON SC) [*Janodee*] at para 28 **[TAB 9]**.
[29] *Canada (Attorney General) v Moss*, 2001 MBQB 199 at para 6 **[TAB 10]**; *Global Royalties v Brook*, 2015 ONSC 6277 at para 32 **[TAB 11]**.
[30] *Royal Trust Corp of Canada v Stevenson*, 1998 CanLII 28667 (NB QB) at para 11 **[TAB 12]**.
[31] *Re Tirecraft Group Inc*, 2009 ABQB 217 at para 21 **[TAB 13]**.
[32] *Ibid* at paras 23-24, 28.

30. A claimant seeking to lift the stay to recover insurance proceeds is not required to prove a *prima facie* case or establish entitlement to the insurance coverage; the question remains whether they are likely to be materially prejudiced.[33] Whether Graham will be successful in the Saskatchewan Actions is ultimately for the Saskatchewan courts to decide.[34]

31. In this case, any recovery by Graham against Mod-Panel in the Saskatchewan Actions would presumptively be payable by Mod-Panel's insurers directly to Graham.[35] Under the Mod-Panel Insurance, which Mod-Panel was required to place pursuant to the Purchase Contracts, the insurers committed to pay "those sums that the insured becomes legally obligated to pay as damages …".[36] Any such insurance proceeds payable under the policies would thus not constitute an asset of or affect the bankrupt's estate, and allowing Graham to pursue such recovery would not impede the distributive or rehabilitative purposes of the bankruptcy system.[37]

32. Allowing the Saskatchewan Actions to proceed against Mod-Panel would thus give Graham no unfair advantage over other creditors. In fact, should Graham recover against the Mod-Panel Insurance, other creditors will benefit from Graham's unsecured claim in Mod-Panel's estate being reduced.[38]

33. Further, in this case Graham has already established that the Saskatchewan Actions are *prima facie* meritorious against Mod-Panel, through a series of third party investigations and expert reports.[39]

34. In addition, Mod-Panel is a proper and necessary party within the Saskatchewan Actions, which are complex construction litigation claims to recover damages in excess of $28 million.[40] Where the claims against a bankrupt are factually intertwined with other

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[33] *Hemeon v West Hants (District)*, 2008 NSSC 234 at paras 18-21 **[TAB 14]**.
[34] *Ibid* at para 22.
[35] Clark Affidavit at para 14, Exhibits "B", "C".
[36] Clark Affidavit at Exhibits "B", "C". In the Royal & Sun Commercial General Liability Policies issued to Mod-Panel, found at Exhibit "C" to the Clark Affidavit, the insurer commits to pay the sums the insured becomes legally obligated to pay as *compensatory* damages.
[37] *Buchanan v Superline Fuels Inc*, 2007 NSCA 68 at paras 32-33, 50-51, 64-65 **[TAB 15]**. See also *Eurasia Auto Ltd v M&M Welding & Supply (1985) Inc*, 1991 CanLII 6227 (AB QB) at paras 5, 8-11, 15 **[TAB 16]**.
[38] Clark Affidavit at para 36.
[39] Clark Affidavit at para 39.
[40] *First Choice Capital Fund Ltd v First Canadian Capital Corp*, 1999 CanLII 12563 (SK QB) [*First Choice Capital*] at para 2 **[TAB 17]**.

defendants, as in the Saskatchewan Actions, it is appropriate to lift the stay. Proceeding without Mod-Panel would leave the liability of a key party undetermined and be neither an efficient nor cost-effective means to proceed.[41]

35. If not permitted to continue the Saskatchewan Actions against Mod-Panel and obtain information through the litigation process, there is a risk of relevant and material information being lost or misplaced, causing material prejudice to Graham's ability to pursue the actions.[42] There cannot be proper adjudication of the issues in the Saskatchewan Actions as among Graham and the other defendants without the evidence and production of documents of Mod-Panel.[43]

36. Moreover, the Trustee does not object to the lifting of the Stay and Graham's continuation of the Saskatchewan Actions against Mod-Panel. As noted, the lifting of the Stay will have no adverse effect on the bankrupt estate or Mod-Panel's other creditors nor limit the pool of realizable assets available to Mod-Panel's other creditors.

37. For all of the foregoing reasons, Graham submits that it will be materially prejudiced if the Stay is not lifted in the Saskatchewan Actions and that it is thus appropriate to do so in the circumstances of this case.

B. The Equities Otherwise Favour Lifting the Stay

38. Moreover, Graham submits that other circumstances make it equitable to lift the Stay.

39. Where a creditor's claim to be advanced will not reduce the potential pool of assets available to other creditors, as here, this Court has found equitable grounds to justify the lifting of a stay.[44] The protections afforded to a bankrupt under the *BIA* are not meant to interfere with a plaintiff's right to access proceeds of insurance policies which may be available to cover damages suffered.[45]

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[41] *Transamerica, supra* at paras 22-23 **[TAB 7]**.
[42] *Re Turner*, 2006 CanLII 2899 (ON SC) at para 9 **[TAB 18]**.
[43] *Re Koval*, 2003 CanLII 20584 (ON SC) at para 7 **[TAB 19]**; *First Choice Capital, supra* at paras 9-10 **[TAB 17]**.
[44] *Tirecraft, supra* at para 28 **[TAB 13]**.
[45] *Howell v Machi*, 2017 BCSC 1806 at para 24 **[TAB 20]**.

40. Additionally, the presence of numerous other co-defendants in the Saskatchewan Actions[46] provides equitable grounds to lift the stay, as Graham should be able to proceed against all parties involved so that all matters in issue can be decided in the Saskatchewan Actions.[47]

41. Graham has taken all actions available to it since being beset by the Wall and Roof Losses, including seeking to arbitrate its disputes with Mod-Panel as early as February 2020. Mod-Panel did not respond to Graham's requests to arbitrate the dispute, necessitating an application by Graham to the Saskatchewan Courts to pursue its arbitration proceedings. [48] This step finally received a response from Mod-Panel in the form of multiple adjournment requests from Mod-Panel's counsel for a variety of reasons, which Graham initially accommodated. These accommodations then allowed Mod-Panel to use its pending bankruptcy as a means to delay and frustrate Graham's efforts to move the Saskatchewan Actions forward to arbitration.[49]

42. Graham should not lose its ability to seek recovery under the Mod-Panel Insurance now, allowing the insurers to garner a windfall, because of Mod-Panel's bankruptcy. The equities therefore favour lifting the Stay to allow Graham to pursue the Saskatchewan Actions.

V. RELIEF REQUESTED

43. Graham has demonstrated that it would be materially prejudiced by the continuation of the Stay. Further, if the Stay were lifted, Graham's continuation of the Saskatchewan Actions would have no adverse effect on Mod-Panel's other creditors. The Trustee does not oppose Graham's application to lift the Stay.

44. Prior to Mod-Panel's bankruptcy, Graham attempted numerous times to advance the resolution of the underlying dispute, without cooperation from Mod-Panel. These delays have been to Graham's detriment, and any further delay in Graham's actions against the Defendants as a whole, including Mod-Panel, would be inequitable. The equities therefore also support lifting the Stay in this case.

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[46] Clark Affidavit at Exhibits "F", "G".
[47] *Re Panorama Parkview Homes Ltd*, 2017 BCSC 2071 at para 17 **[TAB 21]**.
[48] Clark Affidavit at para 26, Exhibits "J", "K".
[49] Clark Affidavit at paras 28-32, Exhibits "M", "N"; *Janodee*, *supra* at paras 34-35 **[TAB 9]**.

45. In the result, Graham respectfully requests this Honourable Court lift the Stay of proceedings to allow Graham to proceed with the Saskatchewan Actions for the limited purpose of allowing Graham to pursue the Mod-Panel Insurance.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of July, 2021.

BORDEN LADNER GERVAIS LLP

Per: J. Cameron

Jessica L. Cameron

Counsel for the Applicant, Graham Design Builders LP, by its general partner Graham Design Builders Ltd. and Carillion Construction Inc.

TABLE OF AUTHORITITES

The Insurance Act

being

Chapter I-9.11* of *The Statutes of Saskatchewan, 2015* (effective January 1, 2020; parts not yet proclaimed. Consult Legislative Tables of Statutes for effective dates) as amended by the *Statutes of Saskatchewan*, 2017, c.P-30.3; and 2018, c.14.

(2) An insurer shall provide the first copy of the policy free of charge, but may charge a reasonable fee to cover its expenses in providing any additional copies.

(3) The insured may agree to be provided with an electronic copy of the documents mentioned in subsection (1).

2015, c.I-9.11, s.8-21.

Insurance against loss through negligence

8-22 It is lawful for an insurer to contract to indemnify an insured for financial loss occasioned by reason of liability to a third person, whether or not the loss is caused by the insured through negligence or while contravening any municipal bylaw or any Act.

2015, c.I-9.11, s.8-22.

Enforcement charge against insured unsatisfied

8-23(1) In any case in which a person insured against liability for injury or damage to persons or property of others has failed to satisfy a judgment obtained by a claimant for the injury or damage and an enforcement charge against the insured with respect to the judgment is returned unsatisfied, the judgment creditor has a right of action against the insurer to recover an amount, not exceeding the amount of insurance under the policy or the amount of the judgment, in the same manner and subject to the same equities as the insured would have if the judgment had been satisfied.

(2) The insurer has any defence against the claim of a judgment creditor made pursuant to subsection (1) that the insurer would have had against the insured had the insured satisfied the judgment.

(3) This section does not apply to contracts of motor vehicle liability insurance.

2015, c.I-9.11, s.8-23.

Assignment of premium refund

8-24(1) If an insured assigns the right to a refund of premium that may accrue by reason of the cancellation or termination of a contract of insurance under the terms of the contract and notice of the assignment is given by the assignee to the insurer, the insurer shall pay any refund to the assignee notwithstanding any provision in this Act or condition in the contract, whether established pursuant to this Act or not, requiring the refund to be paid to the insured or to accompany any notice of cancellation or termination to the insured.

(2) If the condition in a contract of insurance dealing with cancellation or termination by the insurer provides that the refund must accompany the notice of cancellation or termination, the insurer shall include in the notice a statement that, instead of payment of the refund in accordance with the condition, the refund is being paid to the assignee pursuant to this section.

2015, c.I-9.11, s.8-24.

CANADA

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Stays of proceedings — bankruptcies

69.3 (1) Subject to subsections (1.1) and (2) and sections 69.4 and 69.5, on the bankruptcy of any debtor, no creditor has any remedy against the debtor or the debtor's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy.

End of stay

(1.1) Subsection (1) ceases to apply in respect of a creditor on the day on which the trustee is discharged.

Secured creditors

(2) Subject to sections 79 and 127 to 135 and subsection 248(1), the bankruptcy of a debtor does not prevent a secured creditor from realizing or otherwise dealing with his or her security in the same manner as he or she would have been entitled to realize or deal with it if this section had not been passed, unless the court otherwise orders, but in so ordering the court shall not postpone the right of the secured creditor to realize or otherwise deal with his or her security, except as follows:

(a) in the case of a security for a debt that is due at the date the bankrupt became bankrupt or that becomes due not later than six months thereafter, that right shall not be postponed for more than six months from that date; and

(b) in the case of a security for a debt that does not become due until more than six months after the date the bankrupt became bankrupt, that right shall not be postponed for more than six months from that date, unless all instalments of interest that are more than six months in arrears are paid and all other defaults of more than six months standing are cured, and then only so long as no instalment of interest remains in arrears or defaults remain uncured for more than six months, but, in any event, not beyond the date at which the debt secured by the security becomes payable under the instrument or law creating the security.

Exception

(2.1) No order may be made under subsection (2) if the order would have the effect of preventing a secured creditor from realizing or otherwise dealing with financial collateral.

(3) [Repealed, 2012, c. 31, s. 418]

1992, c. 27, s. 36; 2005, c. 3, s. 14, c. 47, s. 62; 2007, c. 29, s. 96, c. 36, s. 36; 2012, c. 31, s. 418.

Suspension des procédures en cas de faillite

69.3 (1) Sous réserve des paragraphes (1.1) et (2) et des articles 69.4 et 69.5, à compter de la faillite du débiteur, ses créanciers n'ont aucun recours contre lui ou contre ses biens et ils ne peuvent intenter ou continuer aucune action, mesure d'exécution ou autre procédure en vue du recouvrement de réclamations prouvables en matière de faillite.

Fin de la suspension

(1.1) Le paragraphe (1) cesse de s'appliquer à tout créancier le jour de la libération du syndic.

Créanciers garantis

(2) Sous réserve des articles 79 et 127 à 135 et du paragraphe 248(1), la faillite d'un débiteur n'a pas pour effet d'empêcher un créancier garanti de réaliser sa garantie ou de faire toutes autres opérations à son égard tout comme il aurait pu le faire en l'absence du présent article, à moins que le tribunal n'en décide autrement. Tout report ordonné à cet égard doit toutefois être conforme aux règles suivantes :

a) dans le cas d'une garantie relative à une dette échue à la date où le failli est devenu tel ou qui le devient dans les six mois suivants, l'exercice des droits du créancier ne peut être reporté à plus de six mois après cette date;

b) dans le cas d'une garantie relative à une dette qui ne devient échue que plus de six mois après la date où le failli est devenu tel, l'exercice des droits du créancier peut être reporté à plus de six mois après cette date — mais en aucun cas au-delà de la date à laquelle la dette devient exigible en vertu de l'acte ou de la règle de droit instituant la garantie — seulement si tous les versements d'intérêts en souffrance depuis plus de six mois sont acquittés et si tous les autres manquements de plus de six mois sont réparés, et seulement tant qu'aucun versement d'intérêts ne demeure en souffrance, ou tant qu'aucun autre manquement ne reste sans réparation, pendant plus de six mois.

Exception

(2.1) L'ordonnance visée au paragraphe (2) ne peut avoir pour effet d'empêcher le créancier garanti de réaliser la garantie financière ou d'effectuer à l'égard de celle-ci toute autre opération.

(3) [Abrogé, 2012, ch. 31, art. 418]

1992, ch. 27, art. 36; 2005, ch. 3, art. 14, ch. 47, art. 62; 2007, ch. 29, art. 96, ch. 36, art. 36; 2012, ch. 31, art. 418.

Stay of proceedings — directors

69.31 (1) Where a notice of intention under subsection 50.4(1) has been filed or a proposal has been made by an insolvent corporation, no person may commence or continue any action against a director of the corporation on any claim against directors that arose before the commencement of proceedings under this Act and that relates to obligations of the corporation where directors are under any law liable in their capacity as directors for the payment of such obligations, until the proposal, if one has been filed, is approved by the court or the corporation becomes bankrupt.

Exception

(2) Subsection (1) does not apply in respect of an action against a director on a guarantee given by the director relating to the corporation's obligations or an action seeking injunctive relief against a director in relation to the corporation.

Resignation or removal of directors

(3) Where all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the corporation shall be deemed to be a director for the purposes of this section.

1997, c. 12, s. 65.

Court may declare that stays, etc., cease

69.4 A creditor who is affected by the operation of sections 69 to 69.31 or any other person affected by the operation of section 69.31 may apply to the court for a declaration that those sections no longer operate in respect of that creditor or person, and the court may make such a declaration, subject to any qualifications that the court considers proper, if it is satisfied

(a) that the creditor or person is likely to be materially prejudiced by the continued operation of those sections; or

(b) that it is equitable on other grounds to make such a declaration.

1992, c. 27, s. 36; 1997, c. 12, s. 65.

Non-application of certain provisions

69.41 (1) Sections 69 to 69.31 do not apply in respect of a claim referred to in subsection 121(4).

No remedy, etc.

(2) Notwithstanding subsection (1), no creditor with a claim referred to in subsection 121(4) has any remedy, or shall commence or continue any action, execution or other proceeding, against

Suspension des procédures — administrateurs

69.31 (1) Entre la date où une personne morale insolvable a déposé l'avis d'intention prévu au paragraphe 50.4(1) ou une proposition et la date d'approbation de la proposition ou celle de sa faillite, nul ne peut intenter ou continuer d'action contre les administrateurs relativement aux réclamations contre eux qui sont antérieures aux procédures intentées sous le régime de la présente loi et visent des obligations dont ils peuvent être, ès qualités, responsables en droit.

Exception

(2) La suspension ne s'applique toutefois pas aux actions contre les administrateurs pour les garanties qu'ils ont données relativement aux obligations de la personne morale ni aux mesures de la nature d'une injonction les visant au sujet de celle-ci.

Démission ou destitution des administrateurs

(3) Si tous les administrateurs démissionnent ou sont destitués par les actionnaires sans être remplacés, quiconque dirige ou supervise les activités commerciales et les affaires internes de la personne morale est réputé un administrateur pour l'application du présent article.

1997, ch. 12, art. 65.

Déclaration de non-application

69.4 Tout créancier touché par l'application des articles 69 à 69.31 ou toute personne touchée par celle de l'article 69.31 peut demander au tribunal de déclarer que ces articles ne lui sont plus applicables. Le tribunal peut, avec les réserves qu'il estime indiquées, donner suite à la demande s'il est convaincu que la continuation d'application des articles en question lui causera vraisemblablement un préjudice sérieux ou encore qu'il serait, pour d'autres motifs, équitable de rendre pareille décision.

1992, ch. 27, art. 36; 1997, ch. 12, art. 65.

Précision

69.41 (1) Les articles 69 à 69.31 ne s'appliquent pas aux réclamations visées au paragraphe 121(4).

Recours interdits

(2) Malgré le paragraphe (1), le créancier d'une réclamation mentionnée au paragraphe 121(4) n'a aucun recours et ne peut intenter ou continuer d'actions, exécutions ou autres procédures relativement aux biens du failli

ALBERTA
RULES OF COURT

Effective November 1, 2010

AR 124/2010
Includes changes from AR 23/2021

VOLUME ONE

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(b) the period of one year after the date of service of a statement of claim on an applicant.

(5) If a respondent and an applicant agree in writing to a suspension period, the period of time under subrule (2) does not include the suspension period agreed to.

(6) A respondent, whether or not the respondent has sought agreement under subrule (5), may serve an applicant with a written proposal setting out a suspension period and requesting that the suspension period not be included in computing the period of time under subrule (2).

(7) An applicant who receives a proposal referred to in subrule (6) must respond within 2 months, and within that time

(a) if the applicant agrees with the proposal, then the period of time under subrule (2) does not include the suspension period agreed to, or

(b) if the applicant disagrees with the proposal or does not respond to the proposal, then the respondent may apply for an order under subrule (9).

(8) If a suspension period is agreed to under subrule (5) or (7)(a), the respondent must give all other parties to the action written notice setting forth what the suspension period is, when it was agreed to and by whom.

(9) A respondent, whether or not the respondent has sought agreement under subrule (5) or served a proposal under subrule (6), may apply for an order setting out a suspension period that shall not be included in computing the period of time under subrule (2).

(10) Rule 13.5 *[Variation of time periods]* does not apply to this rule.

AR 124/2010 s4.33;140/2013;85/2016

Division 7
Transfer and Transmission of Interest

Stay of proceedings on transfer or transmission of interest

4.34(1) If at any time in an action prior to judgment the interest or liability of a party is transferred or transmitted to another person by assignment, bankruptcy, death or other means, the action is stayed until an order to continue the action by or against the other person has been obtained.

(2) If a transfer or transmission of the interest or liability of a party takes place while an application or proceeding in an action is pending, an interested person may, on filing an affidavit verifying the transfer or transmission of the interest or liability and without notice to any other party, request the Court to order that the action continue.

(3) An order to continue the action must be served on each of the other parties as soon as it is received by the party requesting the order.

(4) If an order to continue an action is not made within a reasonable time after the date on which the action is stayed, the defendant or respondent may apply to the Court to have the action dismissed for delay under rule 4.31 *[Application to deal with delay]*.

Death has no effect on action after evidence heard

4.35 If a party dies before judgment but after all the evidence has been heard,

(a) the death does not terminate the action, whether or not the claim survives death, and

(b) judgment may be pronounced and entered despite the death.

Division 8
Discontinuance

Discontinuance of claim

4.36(1) Before a date is set for trial, a plaintiff may discontinue all or any part of an action against one or more defendants.

(2) After a trial date has been set but before a trial starts, a plaintiff may discontinue all or part of an action against one or more defendants only

(a) with the written agreement of every party, or

(b) with the Court's permission.

(3) After the trial starts, a plaintiff may discontinue all or part of an action only with the Court's permission.

(4) A discontinuance under this rule must be in Form 23 and must be filed and served on each of the other parties and, after the plaintiff serves notice of discontinuance, the defendant is entitled to a costs award against the plaintiff for having defended against the discontinued claim.

(5) The discontinuance of the action may not be raised as a defence to any subsequent action for the same or substantially the same claim.

Discontinuance of defence

4.37(1) A defendant may discontinue the whole of a statement of defence by filing a notice of discontinuance in Form 24 and serving it on the plaintiff.

(2) On filing the notice of discontinuance,

(a) the defendant is in default of defence, and

(b) the plaintiff is entitled to a costs award against the defendant for having responded to the discontinued defence.

PART 4: MANAGING LITIGATION

What this Part is about: This Part states that each party is responsible for managing litigation. Once a statement of claim, defence, reply and, in more complicated actions, a counterclaim or third party claim and related pleadings have been served and filed, each party knows what claims and defences are being made in an action. The rules then:

- require the parties to manage the litigation so that the parties know when important stages in the action should be complete;

- provide a means for the parties to obtain Court assistance for managing the litigation, including the appointment of a case management judge; and

- require the parties to participate in mandatory mediation and in a pre-trial conference.

This Part also includes:

- rules describing how an award for security for payment of costs can be obtained; and

- rules for a formal offer to settle the litigation and a description of the potential costs consequences when settlement is not pursued, to ensure that formal offers are given careful consideration.

Lastly, this Part deals with litigation delay, the effects of the death of a party and discontinuing an action.

TABLE OF CONTENTS

Part 4: Managing Litigation

Notice after one year

4-46(1) In any cause or matter in which there has been no proceeding for one year from the last proceeding, the party who desires to proceed shall give a month's notice to the other party of the party's intention to proceed.

(2) On the expiry of one month after the service on all parties of the notice, any party may proceed without further notice, but that further proceeding must be taken within one year of the date of that service.

(3) For the purposes of this rule, an application on which no order has been made, other than a request for a pre-trial conference or for a trial, is not deemed to be a proceeding within this rule.

(4) This rule does not apply to any defendant who has not appeared.

(5) A defendant mentioned in subrule (4) is not required to give a notice pursuant to this rule before applying to dismiss an action for want of prosecution.

DIVISION 8
Transfer and Transmission of Interest

Orders on transfer or transmission of interest

4-47(1) If at any time in an action the interest or liability of a party is transferred or transmitted to another person by assignment, bankruptcy, death or other means, the Court may, on application or on its own motion, make orders for:

(a) the addition, removal, substitution or arrangement of the parties or their personal representatives;

(b) the conduct of the proceedings; and

(c) the service of notice of any proceeding or order.

(2) The Court may at any time vary, rescind or modify any order made pursuant to this rule.

Death has no effect on an action after evidence heard

4-48 If a party dies before judgment but after all the evidence has been heard:

(a) the death does not terminate the action, whether or not the claim survives death; and

(b) judgment may be pronounced and entered despite the death.

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION

Citation: *Great North Data Ltd., (Re)*, 2020 NLSC 105
Date: July 27, 2020
Docket: 20190123048

IN THE MATTER OF the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended

AND IN THE MATTER OF the Bankruptcy of Great North Data Ltd.

Estate No. 51-2586816
Court No. 20190123048

- AND –

Docket: 202001G0847

IN THE MATTER OF the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended

AND IN THE MATTER OF the Bankruptcy of James Goodwin

Estate No. 51-2593527
Court No. 202001G0847

Before: Justice Garrett A. Handrigan

Place of Hearing: St. John's, Newfoundland and Labrador

Date of Hearing: July 22, 2020

Summary:

Bitmain applied to lift automatic stays in a consolidated proceeding of two actions it brought against GND and James Goodwin. The stays took effect under section 69.3 of the *Bankruptcy and Insolvency Act* when GND and Mr. Goodwin made assignments in bankruptcy.

The Court allowed Bitmain's notice of motion, so that Bitmain may proceed with the trial of its claims against GND and Mr. Goodwin. It found that if Bitmain succeeded in its claims of fraud and wrongful conduct, the bankrupts would not be discharged from any debt or liability resulting; that the claims were too complex to be dealt with effectively on the summary process for proving claims under section 135 (1.1) of the Act; that both GND and James Goodwin were necessary parties to the proceedings; and that the proceedings were so far advanced it would be unfair and prejudicial to Bitmain not to allow it to go to trial.

Appearances:

Darren D. O'Keefe	Appearing on behalf of Bitmain Technologies Limited
John C. Taylor-Hood and Sean M. Pittman	Appearing on behalf of PricewaterhouseCoopers, trustee in bankruptcy and rec

Authorities Cited:

CASES CONSIDERED: *Re Advocate Mines Limited*, [1984] O.J. No. 2330 (O.S.C., in Bankruptcy); *Re Francisco*, [1995] O.J. No. 917 (O.C.J, General Division, in Bankruptcy); *Re Ma*, [2001] O.J. No. 1189 (OCA); *Re Panorama Parkview Homes Ltd.*, 2017 BCSC 2071 (BCSC); *Re Taylor Ventures Ltd.*, 2002 BCSC 82 (BCSC).

STATUTES CONSIDERED: *Bankruptcy and Insolvency Act*, RSC 1985, c. G-3;

RULES CONSIDERED: *Rules of the Supreme Court*, *1986* S.N.L. 1986, c. 42, Schedule D.

Ruling on Application to Lift Stay of Proceedings in Bitmain Technologies Limited v. Great North Data Limited/James Goodwin

REASONS FOR JUDGMENT

HANDRIGAN, J.:

INTRODUCTION

[1] Bitmain Technologies Limited ("Bitmain") applied to this Court by Notice of Motion on February 24, 2020 for an order under section 69.4 of the *Bankruptcy and Insolvency Act*, RSC 1985, c. G-3 ("the *BIA*"). Bitmain asks for a declaration that section 69.3 (1) of the *BIA* does not apply to a claim Bitmain brought against Great North Data Limited ("GND") on March 16, 2017. Bitmain amended its claim against GND twice, first on May 1, 2017 and again on June 14, 2018. Bitmain also amended its Notice of Motion on March 4, 2020.

[2] GND filed an assignment in bankruptcy on November 22, 2019, by which PricewaterhouseCoopers Inc ("PWC") was appointed as Trustee. On February 25, 2020, this Court granted a Receivership Order appointing PWC as receiver of all GND's assets, undertakings and property. Paragraph 8 of the Receivership Order provides, in part; that "…all Proceedings currently under way against or in respect

of…[Bitmain]…are hereby stayed and suspended pending further order of this Court”.

[3] I heard Bitmain’s Notice of Motion to lift the stay of proceedings on July 22, 2020 and reserved my decision until now.

THE ISSUE

[4] Bitmain’s Notice of Motion raises this issue: Should Bitmain’s claim against GND be stayed pending its bankruptcy, or may Bitmain proceed with its claim despite GND’s bankruptcy?

THE LAW

Statute – Bankruptcy and Insolvency Act

[5] Section 69.3 (1) provides:

> 69.3 (1) Subject to…[section] 69.4…, on the bankruptcy of any debtor, no creditor has any remedy against the debtor or the debtor’s property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy.

[6] Section 69.4 provides:

> 69.4 A creditor who is affected by the operation of sections 69 to 69.31…may apply to the court for a declaration that those sections no longer operate in respect of that creditor or person, and the court may make such a declaration, subject to any qualifications that the court considers proper, if it is satisfied
> (a) that the creditor or person is likely to be materially prejudiced by the continued operation of those sections; or
> (b) that it is equitable on other grounds to make such a declaration.

Case Law

[7] *Re Advocate Mines Limited*, [1984] O.J. No. 2330 (O.S.C., in Bankruptcy) provides a useful synopsis of circumstances in which a Court may remove an automatic stay of proceedings under section 69.3 of the *BIA*. Registrar Ferron lists five circumstances that might be “appropriate cases” for lifting a stay:

> 1. Actions against the bankrupt for a debt to which a discharge would not be a defence.
>
> 2. Actions in respect of a contingent or unliquidated debt, the proof of which and valuation has that degree of complexity which makes the summary procedure prescribed by s. 95(2) of the *Bankruptcy Act* inappropriate.
>
> 3. Actions in which the bankrupt is a necessary party for the complete adjudication of the matters at issue involving other parties.
>
> 4. Actions brought to establish judgment against the bankrupt to enable the plaintiff to recover under a contract of insurance or indemnity or under compensatory legislation.
>
> 5. Actions in Ontario which, at the date of bankruptcy, have progressed to a point where logic dictates that the action be permitted to continue to judgment.
>
> (*Advocate Mines*, paragraphs 3-7)

[8] While Registrar Ferron’s “list” is comprehensive and is frequently cited, it is generally recognized as a beginning and not the endpoint for discussing the issue. I note, for example, Adams, J.’s comments, in *Re Francisco*, [1995] O.J. No. 917 (O.C.J, General Division, in Bankruptcy):

> It should be understood that *Re Advocate Mines Ltd.*, *supra*, is not an exhaustive codification of the policy underlying the *Bankruptcy and Insolvency Act*. It is but one thoughtful decision attempting to articulate the type of grounds which may provoke the exercise of a judicial discretion. To view *Advocate Mines* as a limiting or exhaustive instrument is an error in principle.

(*Francisco*, paragraph 13)

[9] Adams, J. also stated how he thought a bankruptcy court should proceed on an application under section 69.4 of the *BIA*:

> In considering an application for leave, the function of a bankruptcy court is not to inquire into the merits of the action sought to be commenced or continued. Instead, the role is one of ensuring that sound reasons, consistent with the scheme of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, exist for relieving against the otherwise automatic stay of proceedings.
>
> (*Francisco*, paragraph 1)

[10] In *Re Ma*, [2001] O.J. No. 1189 (OCA) the Ontario Court of Appeal endorsed Adams, J.'s approach. It quoted the preceding passage from Adams, J.'s judgment in its reasons and observed:

> As this passage makes clear, lifting the automatic stay is far from a routine matter. There is an onus on the applicant to establish a basis for the order within the meaning of s. 69.4. As stated in *Re Francisco*, the role of the court is to ensure that there are 'sound reasons, consistent with the scheme of the *Bankruptcy and Insolvency Act*' to relieve against the automatic stay. While the test is not whether there is a *prima facie* case, that does not, in our view, preclude any consideration of the merits of the proposed action where relevant to the issue of whether there are 'sound reasons' for lifting the stay. For example, if it were apparent that the proposed action had little prospect of success, it would be difficult to find that there were sound reasons for lifting the stay.
>
> (*Ma*, paragraph 3)

[11] From my review of section 69.4 of the *BIA*, these are some of the principles that are relevant to its application:

- A creditor applying under section 69.4 of the *BIA* must meet at least one of the two criteria stated in the section, not both;

- A creditor applying under section 69.4 of the *BIA* does not have to show it has a *prima facie* case in its action against the bankrupt: *Re Ma*;
- The bankruptcy court need only consider the merits of the proposed action to see whether there are 'sound reasons' for lifting the stay: *Re Ma*;
- A bankruptcy court on a leave application must ensure that sound reasons exist for relieving against the automatic stay of proceedings: Re Francisco;
- It is an error of law to accept the five circumstances enumerated in *Re Advocate Mines Limited* as "a limiting or exhaustive instrument": *Re Francisco*;
- If the creditor satisfies the court that one or more of the grounds referred to in *Re Advocate Mines Limited* is present and that the creditor is likely to be materially prejudiced or that it is equitable on other grounds to make such a declaration then a court will lift the stay of proceedings: *Re Panorama Parkview Homes Ltd.*, 2017 BCSC 2071 (BCSC); and,
- Fraud alleged by a creditor to have been committed by the bankrupt is a complex matter which should not ordinarily be dealt with on a summary basis and without a full hearing: *Re Taylor Ventures Ltd.*, 2002 BCSC 82 (BCSC).

[12] I turn now to analyze the issue that I stated above, starting with the background to it.

ANALYSIS

Background

[13] While Bitmain is registered to do business in Hong Kong, China, it also operates as an extra-provincially registered company in this Province. Bitmain develops and markets cryptocurrency mining computers and related programs that are used to produce, or "mine" the cryptocurrency, Bitcoin. Bitmain also engages in mining Bitcoin from third-party mining farm facilities. GND developed and offered warehouse space to cryptocurrency miners (known in the business as "collocation") for hosting the hardware used in mining cryptocurrencies, including Bitcoin. Late in 2015 and early in 2016, GND and Bitmain entered into negotiations by which GND offered to host Bitmain's mining hardware at facilities that GND owned in Labrador City, NL. Eventually, Bitmain and GND came to terms on the arrangement and Bitmain supplied the GND facilities with substantial

DATE: 20010404
DOCKET: C34958

COURT OF APPEAL FOR ONTARIO

IN THE MATTER OF THE BANKRUPTCY OF JAMES HOI-PANG MA, OF THE CITY OF MISSISSAUGA, IN THE REGIONAL MUNCIPALITY OF PEEL, IN THE PROVINCE OF ONTARIO

RE: JAMES HOI-PANG MA (Bankrupt (Appellant)) and TORONTO DOMINION BANK (Applicant (Respondent))

BEFORE: ABELLA, CHARRON and SHARPE JJ.A.

COUNSEL: Chi-Kun Shi
For the appellant

Bruce S. Batist
For the respondent

William J. Meyer, Q.C.
For the Trustee in Bankruptcy

HEARD: March 23, 2001

E N D O R S E M E N T

Released orally - March 23, 2001

[1] The appellant argues that when considering an application to lift a stay under s. 69.4 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3, the applicant is required to establish a *prima facie* case for the proposed action. *Bowles v. Barber* (1985), 60 C.B.R. 311 (Man. C.A.) is cited in support of this proposition. It is argued that to the extent Ontario cases such as *Arrojo Investments v. Cardamone* (1995), 33 C.B.R. (3d) 46 (Ont. Gen. Div.) apply a more lenient standard, they are inconsistent with decisions from other provinces.

[2] In our view there is no requirement to establish a *prima facie* case and no inconsistency in the case law. We do not agree that *Bowles v. Barber* imposes a *prima facie* case requirement. More importantly, that requirement is not imposed by the statute. Under s. 69.4 the court may make a declaration lifting the automatic stay if it is satisfied (a) that the creditor is "likely to be materially prejudiced by [its] continued operation" or (b) "that it is equitable on other grounds to make such a declaration." The approach to be taken on s. 69.4 application was considered by Adams J. in *Re Francisco* (1995), 32 C.B.R. (3d) 29 at 29-30 (Ont. Gen. Div.), a decision affirmed by this court (1996), 40 C.B.R. (3d) 77 (Ont. C.A.):

> In considering an application for leave, the function of a bankruptcy court is not to inquire into the merits of the action sought to be commenced or continued. Instead, the role is one of ensuring that sound reasons, consistent with the scheme of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3, exist for relieving against the otherwise automatic stay of proceedings.

[3] As this passage makes clear, lifting the automatic stay is far from a routine matter. There is an onus on the applicant to establish a basis for the order within the meaning of s. 69.4. As stated in *Re Francisco*, the role of the court is to ensure that there are "sound reasons, consistent with the scheme of the *Bankruptcy and Insolvency Act*" to relieve against the automatic stay. While the test is not whether there is a *prima facie* case, that does not, in our view, preclude any consideration of the merits of the proposed action where relevant to the issue of whether there are "sound reasons" for lifting the stay. For example, if it were apparent that the proposed action had little prospect of success, it would be difficult to find that there were sound reasons for lifting the stay.

[4] In the case before us, Justice Lane found that the Deputy Registrar was correct in finding that the applicant would suffer sufficient prejudice to justify an order lifting the stay. This finding accords with s. 69.4 and is supported by the record. We see no basis for interfering with his conclusion. The appeal is therefore dismissed with costs.

"R. S. Abella J.A."
"Louise Charron J.A."
"Robert J. Sharpe J.A."

Court of Queen's Bench of Alberta

Citation: Transamerica Life Canada v Oakwood Associates Advisory Group Ltd, 2020 ABQB 279

Date: 20200423
Docket: 0701 01701
Registry: Calgary

Between:

Transamerica Life Canada

Plaintiff

- and -

Oakwood Associates Advisory Group Ltd., The Oakwood Associates Business Advisory Group Ltd., The Goulet Family Trust Two, Newcastle Capital Corporation, The Newcastle Group of Companies Ltd., Horizon Financial Consultants Inc., George Goulet, Stuart Milc, Holly Price-Goulet and Judith Dykman

Defendants

Endorsement
of the
Honourable Madam Justice B.E. Romaine

---

[1] This is an application to lift a stay imposed under the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3.

[2] Transamerica Life commenced this action in 2007. As noted by each level of court involved in the litigation in 2018 and 2019, Transamerica alleges that between 2001 and 2005, George Goulet and related defendants dishonestly took advantage of a commission miscalculation by Transamerica, which Mr. Goulet should have realized was an error. Mr. Goulet responds that he relied on advice in an email from a Transamerica representative. What occurred with respect to this matter between 2018 and the present is particularly relevant to this application.

[3] On March 18, 2018, more than 10 years after the action was commenced, and nearly 17 years after the events at issue in the litigation began, the defendants applied to dismiss the action for delay. That application was heard by Master Robertson.

[4] On May 2, 2018, the Master dismissed the defendant's application.

[5] On May 28, 2018, Mr. Goulet made a Division 1 Proposal to creditors under the *BIA*, and on August 21, 2018, the Court approved the Proposal. Pursuant to section 69.1(1) of the *BIA*, approval of the Proposal stayed this action as against Mr. Goulet.

[6] Ten days later, on August 31, 2018, the parties appeared before the Master to address, among other things, the details of a procedural order to enable the action to progress to trial. However, the defendants did not advise the Master about the stay with respect to Mr. Goulet arising from the Proposal. The timelines of the procedural order were stayed pending any appeal of the Master's orders.

[7] On October 19, 2018, a few days after the Master's order was finally filed, the defendants appealed the Master's orders. On November 21, 2018, Mr. Goulet filed a supplemental affidavit in support of the appeal, alleging further grounds of prejudice arising from delay. He said nothing in the affidavit about the Proposal or the stay.

[8] The appeal was heard by Justice deWit on January 15, 2019. Again, the defendants did not advise the Court of the stay arising from the Proposal. On January 23, 2019, Justice deWit dismissed the defendants' appeal.

[9] On February 8, 2019, the defendants appealed Justice deWit's order. On June 14, 2019, the Court of Appeal heard the appeal. Again, the defendants did not advise the Court of the stay arising from the Proposal. The appeal was dismissed on July 14, 2019.

[10] At that point, pursuant to the Master's procedural order, the defendants were required to complete questioning by September 24, 2019.

[11] However, on September 4, 2019, Mr. Goulet's Trustee in bankruptcy notified counsel for Transamerica of the Proposal, and on October 2, 2019, the defendants advised Transamerica that all legal proceedings against Mr. Goulet personally were stayed.

[12] Under the Proposal, Mr. Goulet will not be discharged from bankruptcy until June, 2023.

[13] Section 69.4 of the *BIA* provides that a stay will no longer operate with respect to a particular creditor or person affected by the stay if the Court is satisfied:

a) that the creditor or person is likely to be materially prejudiced by the continued operation of the stay, or
b) other grounds exist to make it equitable to lift the stay.

[14] As noted in ***First Choice Capital Fund Ltd v First Canadian Capital Corp.***, 1999 CanLII 12563 at para 7,

> ...a court may lift a stay of proceedings in appropriate cases and has done so in the following circumstances:
>
> a) actions against the bankrupt for a debt to which a discharge would not be a defence;

b) actions in respect of a contingent or unliquidated debt, the proof of which and valuation has that degree of complexity which makes the summary procedure prescribed by s. 95(2) of the *BIA* inappropriate;
c) actions in which the bankrupt is a necessary party for the complete adjudication of the matters at issue involving other parties; and
d) actions which, at the date of bankruptcy, have progressed to a point where logic dictates that the action be permitted to continue to judgment.

[15] These are just examples of cases that may justify lifting a stay, and section 69.4 does not restrict the circumstances in which it is appropriate to do so. Transamerica bears the onus of demonstrating a sound reason to lift the stay.

[16] Transamerica submits that there is no question that its claims against the defendants are based in fraud. The defendants argue otherwise. They submit that the claims do not fit within the exemption set out in section 178(1)(e) of the *BIA*, which exempts from discharge any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation, other than a debt or liability that arises from an equity claim.

[17] The defendants characterize the claim as being, in substance, a commission dispute between Transamerica and the defendant Oakwood. However, the Master in his decision on the delay application stated at paragraph 8 that "Transamerica Life did not actually use the word “fraud” in the statement of claim, but that is effectively the nature of the allegations."

[18] The Court of Appeal stated at para 44 in its decision that:

> ...Transamerica has pleaded forms of misconduct that amount to deceit and fraud.

[19] Another exception to discharge from bankruptcy is set out in section 178(d) of the *BIA*, which exempts from discharge any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity. Transamerica submits that Mr. Goulet was acting in such a capacity; he says he was not.

[20] It is not necessary or appropriate that I decide definitively that the claim would survive discharge from bankruptcy: that depends in the end on the judgment after trial, and not just allegations in the pleadings. However, it is clear that it is arguable that a judgment against Mr. Goulet arising from a trial may survive discharge from bankruptcy.

[21] Another issue is that Mr. Goulet’s Trustee has advised Transamerica that its debt claim is being treated as contingent until the action is resolved. It is apparent from the history of the matter that it cannot be resolved through summary proceedings under the *BIA*, and for that reason, it would be appropriate to allow the stay to be lifted so that the matter may be determined in the ordinary course in the civil courts: ***Re Advocate Mines Ltd***, (1984) 52 C.B.R. (N.S.) 277. Transamerica, if successful, would then be able to claim in the bankruptcy.

[22] It is also apparent that Mr. Goulet is a necessary party to this litigation. It is appropriate to lift a stay where a debtor is a necessary party to litigation and claims against him are factually intertwined with other defendants: ***First Choice*** at paras 9, 10; ***Da Silva v River Run Vistas Corp***, [2016] AJ no 858 at paras 11 and 19.

[23] Although Mr. Goulet submits that the action can proceed against the other defendants, it is neither an efficient use of court resources nor cost-effective to proceed in a way that leaves the liability of one key party undetermined: ***Trust & Guarantee Co v Brenner***, (1932) 518, aff’d in

part 15 C.B.R. (N.S.) 240, aff'd 28 C.B.R. (N.S.) 179 (Ont. C.A.). To do so may also give rise to the risk of conflicting decisions.

[24] Despite the defendants' submissions to the contrary, this is not a case where it is apparent that the proposed action has little prospect of success: ***Re Ma*** (2001) 24 C.B.R. (4th) 68.

[25] Mr. Goulet submits that Transamerica has not been materially prejudiced by the stay. This is an interesting argument, as the defendants argued with considerable vigour in their application to strike for delay that they had suffered prejudice. The various levels of Court in the delay application were clear that, while the degree of prejudice could not support striking the claim, "...that obviously should not be interpreted as any sort of approval of the pace at which this litigation has been conducted. The parties to any litigation, and their counsel, have obligations under the *Rules of Court* to advance litigation in a timely way": Court of Appeal decision at para 52.

[26] It is noteworthy that the defendants now take the position that a delay for over 16 years until Mr. Goulet is discharged from bankruptcy is not prejudicial.

[27] However, even if Transamerica has not shown material prejudice, the Court can lift the stay if it is equitable on other grounds to do so.

[28] In this case, I find that Transamerica has established sound equitable reasons for lifting the stay.

[29] The action is a complex matter, and the claim a contingent claim that is better suited to resolution at trial rather than a summary proceeding;

[30] Mr. Goulet is a necessary party to the proceedings, the facts are intertwined, and it would be unfair and unreasonable to compel Transamerica to proceed against the other defendants without dealing with his liability.

[31] Finally, it is inequitable to allow Mr. Goulet to "lie in the weeds" during the application to strike for delay, and to fail to inform the Courts at three levels involved in that application of the stay arising from the Proposal. At the least, this denied Transamerica the opportunity to apply for security for costs.

[32] The stay is lifted.

[33] Given the history of the matter, I will relieve the parties of the requirement of a dispute resolution process prior to trial.

[34] Transamerica is entitled to costs.

Dated at the City of Calgary, Alberta this 22nd day of April, 2020.

B.E. Romaine
J.C.Q.B.A.

Appearances:

Arpal S. Dosanjh
for the Plaintiff

Peter Levesque
for the Defendants, Oakwood Associates Advisory Group Ltd., The Oakwood Associates Business Advisory Group Ltd., The Goulet Family Trust Two, Newcastle Capital Corporation, The Newcastle Group of Companies Ltd., Horizon Financial Consultants Inc. and George Goulet

Ontario Supreme Court
Cumberland Trading Inc., Re
Date: 1994-01-24

Re proposal of Cumberland Trading Inc.

Ontario Court of Justice (General Division [Commercial List]) [In Bankruptcy] Farley J.

Judgment – January 24, 1994.

Kevin J. Zych, for secured creditor, Skyview International Finance Corporation.

Jeff Carhart, for debtor, Cumberland Trading Inc.

(Doc. 31-282225)

[1] January 24, 1994. FARLEY J.: – Skyview International Finance Corporation ("Skyview") brought this motion for a declaration that the stay provisions (ss. 69 and 69.1) of the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3 as amended ("BIA") no longer operate in respect of Skyview taking steps to enforce its security (including accounts receivable and inventory) given by Cumberland Trading Inc. ("Cumberland") which it has been financing for the last 9 years. In addition Skyview moved for a declaration that the 30 day period to file a proposal mentioned in s. 50.4(8) BIA was terminated. Thirdly, Skyview was asking for an order removing Doane Raymond Limited ("Doane") which was Cumberland's choice as trustee and substituting A. Farber Associates ("Farber") as trustee under the Notice of Intention to File a Proposal of Cumberland. In the alternative to the relief awarded in the last two aspects, Skyview wished to have an order appointing Farber as interim receiver.

[2] On January 5, 1994 Skyview demanded payment in full of its operating financing loan to Cumberland and gave a s. 244 BIA notice of its intention to enforce its security in ten days. The affidavit filed on behalf of Skyview indicated that Cumberland was not cooperating with it in providing appropriate financial information for the last half year. This was disputed in the affidavit filed by Cumberland. Suffice it to say that there has been a falling out between the two. Skyview asserted that it was owed $966,478 and that there was an exposure to it under a guarantee given on Cumberland's behalf to a potential of approximately $200,000 U.S. Skyview's deadline for repayment was January 16th. On January 14th Cumberland filed with

strengthened when one considers that the court need only be satisfied that "the insolvent person will not *likely* be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors…" (emphasis added). This implies that there need not be a certainty of turndown. The act of making the proposal is one that is still yet to come. I am of the view that Skyview's position as indicated above is satisfactory proof that Cumberland will not likely be able to make a proposal that will be accepted by the creditors of Cumberland.

[10] Skyview of course also has the option of proceeding under s. 69.4 BIA which provides:

> A creditor who is affected by the operation of sections 69 to 69.3 may apply to the court for a declaration that those sections no longer operate in respect of that creditor, and the court may make such a declaration, subject to any qualifications that the court considers proper, if it is satisfied
>
> > (*a*) that the creditor is likely to be materially prejudiced by the continued operation of those sections; or
> >
> > (*b*) that it is equitable on other grounds to make such a declaration.

[11] Is Skyview entitled to the benefit of s. 69.4(a) BIA? I am of the view that the material prejudice referred to therein is an objective prejudice as opposed to a subjective one – i.e., it refers to the degree of the prejudice suffered vis-à-vis the indebtedness and the attendant security and not to the extent that such prejudice may affect the creditor *qua* person, organization or entity. If it were otherwise then a "big creditor" may be so financially strong that it could never have the benefit of this clause. In this situation Skyview's prejudice appears to be that the only continuing financing available to Cumberland is that generated by turning Chamberland's accounts receivable and inventory (pledged to Skyview) into cash to pay operating expenses during the period leading up to a vote on a potential proposal, which process will erode the security of Skyview, without any replenishment. However Skyview does not go the additional step and make any quantitative (or possibly qualitative) analysis as to the extent of such prejudice so that the court has an idea of the magnitude of materiality. In other words, Skyview presently estimates that it would be fortunate to realize $450,000 on Cumberland's accounts receivables and inventory, but it does not go on to give any foundation for a conclusion that in the course of the next month $x of this security would be eaten up or alternatively that the erosion would likely be in the neighbourhood of $y per day of future operations. The comparison would be between the "foundation" of a maximum of

$450,000 and what would happen as to deterioration therefrom if the stay is not lifted. I note there was no suggestion by Cumberland that there would be no erosion of Skyview's position by, say, getting a cash injection or by improving margins by increasing revenues or decreasing expenses. Skyview's request for its first relief request is dismissed since in my view Skyview did not engage in the correct comparison of material prejudice.

[12] I note that Cumberland does not oppose Skyview's request for an interim receiver. But for my conclusion that Skyview succeeds in its second relief request (to have the 30 day period in which to file a proposal terminated) and the ancillary third relief request of substitution of Farber for Doane as trustee, I would have granted the fourth relief request of appointing Farber as interim receiver. I would also award Skyview costs of $600 payable out of the estate of Cumberland from the proceeds first realized.

Order accordingly.

Ontario Supreme Court
Janodee Investments Ltd. v. Pellegrini
Date: 2001-04-12

Heard: January 15, 2001

Judgment: April 12, 2001

Docket: Doc. 01-CL-003995, 01-CL-003996

M.L. Solmon, for Applicant

A. Schorr, for Respondent, Pellegrini

H. Gerson, for Applicant

***Lax J.*:**

Nature of Application

1 On January 9, 2001, Rieso Jim Pellegrini ("Pellegrini") filed a Notice of Intention to Make a Proposal under s.50.4 of the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3, as amended ("BIA"). Janodee Investments Limited ("Janodee") and Leroy McQuaid ("McQuaid") brought applications for an Order declaring that the stay pursuant to the BIA did not apply to their Writs of Possession and their execution against Pellegrini's property at 2 Hearthstone Crescent, Richmond Hill. In the alternative, the applicants sought an Order lifting the stay pursuant to s. 69.4 of the BIA. The Janodee application was granted on terms with reasons to follows. These are the reasons.

Facts

2 Janodee and McQuaid are first and second mortgagees respectively of the Pellegrini property at 2 Hearthstone decent, Richmond Hill. Default in payment of the McQuaid mortgage occurred on October 1, 1997. McQuaid commenced an action in May 2000 and default judgment was signed in July. In October, McQuaid obtained a Writ of Possession.

3 Janodee acquired the Pellegrini mortgage from Royal Trust in September 1998. It was to be a short-term loan as the Pellegrinis had been evicted from their home by the prior mortgagee and wished to re-enter to complete a purported sale of the property which was scheduled to close on September 30, 1998. The sale was never completed. The purchasers who were

(b) to prevent a secured creditor who gave notice of intention under subsection 244(1) to enforce that creditor's security against the insolvent person more than 10 days before the notice of intention under section 50.4 was filed, from enforcing that security, unless the secured creditor consents to the stay.

23 Janodee served the Pellegrinis with a Notice of Intention to Enforce Security on February 23, 1999. Pellegrini filed the section 50.4 Notice on January 9, 2001, which was long after the 10-day period. Janodee submits that its s.244 Notice invokes the exception in s.69(2)(b) and the stay does not apply to it.

24 A Notice of Intention to Enforce Security is only given where it is required to be sent under subsection 244(1). The BIA requires it to be sent where the secured creditor intends to enforce security on all or substantially all of the (a) inventory, (b) accounts receivable, or (c) other property of an insolvent person *that was acquired for, or used in relation to, a business* carried on by an insolvent person… There is no evidence that the property at 2 Hearthstone Crescent was acquired or used for a business. It is the family home of the Pellegrinis. The subsection has no application.

Section 69.4

25 Under section 69.4 of the BIA, a creditor who is affected by a stay imposed under section 69 to 69.31 may apply to the court for a lifting of the stay in circumstances where the court is satisfied that:

(a) the creditor or person is likely to be materially prejudiced by the continued operation of those sections; or

(b) it is equitable on other grounds to make such a declaration.

26 The BIA contemplates greater interference with the rights of secured creditors and greater flexibility for debtors than did the former legislation. Nonetheless, as Farley J. pointed out in *Cumberland Trading Inc., Re* (1994), 23 C.B.R. (3d) 225 (Ont. Gen. Div. [Commercial List]), at 228, the BIA does not allow debtors "absolute immunity and impunity from their creditors". While a debtor is entitled to an automatic stay by merely filing a Notice of Intention to Make a Proposal, it does not guarantee the insolvent person a stay without review. The BIA allows the Court to (a) shorten the 30-day time frame for the filing of the proposal (s. 50.4(11)); or (b) lift the stay of proceedings as against a particular creditor (s.69.4).

27 As cutting short the time for filing a proposal under section 50.4(11) has the effect of deeming the debtor to have made an assignment in bankruptcy, there has been some difference of opinion as to when the provision should be resorted to: *Cumberland Trading Inc., supra; Re Triangle Drugs Inc.* (1993), 16 C.B.R. (3d) 1 (Ont. Bktcy.); *Re N.T.W. Management Group Ltd.* (1993), 19 C.B.R. (3d) 162 (Ont. Bktcy.)

28 Section 69.4(b) gives the court discretion to lift the stay if it is "equitable on other grounds" to do so. This subsection has been applied in circumstances where the creditor is able to demonstrate that the operation of the BIA would treat it unfairly or that it will be prejudiced to a greater degree than other creditors. For example, in *Schroeder v. Schroeder* (1993), 47 R.F.L. (3d) 290 (Sask. Q.B.), the court applied s. 69.4 in circumstances where a husband used the bankruptcy process to defeat his wife's entitlement to a portion of a property settlement. By way of contrast, in *Re Ingles* (1997), 46 C.B.R. (3d) 202 (B.C. S.C. [In Chambers]), the court refused an application by the government insurance corporation which was a creditor of the bankrupt. The court rejected the argument that it should be treated differently from other creditors in order to enforce a social policy objective, which was to collect money from drivers who caused losses while in breach of their policies.

29 In *Re Oxley, supra,* the court upheld a Master's lifting of a stay of proceedings resulting from the debtor's filing of a Notice of Intention to File a Proposal. The stay was lifted in favour of a group of execution creditors in a situation where the debtor's property had been seized and sold, but because the proceeds had not yet been distributed, the execution was not complete. The Master found that it would be inequitable to allow the vigilant execution creditors to be prejudiced by the failed bankruptcy proposal and the court declined to interfere with the exercise of his discretion.

30 *Cumberland Trading Inc., supra,* is authority for the proposition that material prejudice is objective prejudice and means significant harm or injury in terms of the indebtedness or the security held by the creditor. It refers to the degree of prejudice suffered by the creditor in relation to the indebtedness and the security held by the creditor and not to the extent that such prejudice may affect the creditor subjectively.

31 While Janodee did not submit that it was prejudiced by the stay, it did submit that maintaining the stay was prejudicial to the second mortgagee, McQuaid. Counsel for McQuaid offered the Court some rough and ready calculations to demonstrate the magnitude

of the erosion of McQuaid's security if the stay remained in place, but the evidence falls short of meeting the test in *Cumberland Trading Inc., supra.* As well, McQuaid took no steps to enforce his security for three years. In these circumstances, it is difficult to make out a persuasive case for prejudice. Neither applicant demonstrated material prejudice within the meaning of s. 69.4(a).

32 The futility of waiting out a proposal which is sure to fail has been recognized by the courts in applications under s. 50.4(11)(b): *Cumberland Trading Inc., supra; Triangle Drugs Inc., supra.* The same principles can be applied under section 69.2(b).

33 In this case, the two mortgagees constitute the class of secured creditors. The outstanding balance on the mortgages owed to Janodee and McQuaid is well in excess of the current appraised value of the property. Neither mortgagee is willing to entertain a proposal. There are no other secured creditors who can enforce security against this asset. As there is no value in the property beyond the mortgagees' security, there is nothing that Pellegrini can propose with respect to the property that could have any effect on other creditors. To maintain the stay of proceedings against Janodee's Writ of Possession cannot assist Pellegrini in putting forward a viable proposal to creditors. It will merely assist the Pellegrinis in remaining in the property at no cost, while further eroding its value for the second mortgagee.

34 The last minute nature of the filing of the Notice of Intention is also relevant. If the appeal of the summary judgment had been a genuine appeal, Pellegrini would have applied to the Court of Appeal for Ontario for an order staying the execution of the Writ of Possession pending the appeal. Instead, the day after Pellegrini filed the Notice of Intention, the appeal was abandoned. This is an abuse of the bankruptcy process and the court should not lend its assistance to it. It is inequitable to continue the stay in circumstances where the creditor has proceeded diligently and in conformity with the court process, while the debtor's conduct is an affront to the process.

35 The conduct of the Pellegrinis is more consistent with a desire to delay and to frustrate the rights of their creditors than with a desire to make serious efforts to resolve their financial difficulties. This does not advance the goals and policies of the BIA. The proposal sections of the BIA are intended to give a debtor some breathing room. They are not intended to create an obstacle course for creditors. This is therefore an appropriate case to exercise my discretion and to lift the stay pursuant to section 69.4(b).

Order accordingly.

Date: 20010720
Docket: BK 97-01-49147
Indexed as: The Attorney General of Canada v. Moss
Cited as: 2001 MBQB 199
(Winnipeg Centre)

COURT OF QUEEN'S BENCH OF MANITOBA

IN THE MATTER OF: The Bankruptcy of Daniel Moss of the City of Winnipeg, in the Province of Manitoba

B E T W E E N:

THE ATTORNEY GENERAL OF CANADA, representing the Minister of National Revenue,	)	DAVID JACYK and JEFF PNIOWSKY for the applicant and plaintiff
applicant,	)	
- and -	)	
DANIEL MOSS,	)	The respondent appearing IN PERSON
respondent.	)	
	)	JUDGMENT DELIVERED: JULY 20, 2001

HAMILTON, J.

[1] Concurrently with these reasons I am releasing my decision annulling the bankruptcy of Rochelle Moss (File No. BK 98-01-54168). Mrs. Moss is the wife of Daniel Moss. The annulment will allow the Attorney General of Canada ("the Attorney General"), on behalf of the Minister of National Revenue ("the Minister"), to proceed with litigation (File No. CI 99-01-13984) against Mrs. Moss.

Three insurance companies are also named as defendants: NN Life Insurance Company of Canada ("NN Life"), Equitable Life Insurance Company ("Equitable Life"), and Manufacturer's Life Insurance Company ("ManuLife"). At this time, only Mrs. Moss has filed a statement of defence, along with a counterclaim.

[2] The lawsuit pertains to the Attorney General's claim to have certain transactions between Mr. Moss and Mrs. Moss declared void as fraudulent conveyances. Specifically, the claim challenges the validity of transfers of money and real property (which were later sold or remortgaged) from Mr. Moss to Mrs. Moss, the purchase by Mrs. Moss from these funds of four annuity policies with a total value of $678,000, and the naming of Mr. Moss as the irrevocable beneficiary of these policies. The policies were purchased from the insurance companies named as defendants.

[3] The Attorney General seeks an order under s. 69.4 of the ***Bankruptcy and Insolvency Act***, R.S.C. 1985, c. B-3 ("the ***Act***") that the stay of proceedings in Mr. Moss's bankruptcy no longer operates against the Minister for the purpose of naming Mr. Moss as a defendant in the fraudulent conveyance lawsuit and amending its statement of claim. The amendments sought by the Attorney General are to clarify that the impugned transactions were the result of joint efforts of Mr. Moss and Mrs. Moss to defraud Mrs. Moss's creditors and that Mr. Moss's intent is an integral issue in the claim. This motion by the Attorney General was argued at the same time as the annulment application. Reference

should be made to my decision annulling Mrs. Moss's bankruptcy for the factual background and detail, which is applicable to this motion.

[4] Mr. Moss appeared without counsel. He did not vigorously oppose the motion; rather he argued that it was not necessary as he would make himself available for examination even if not named as a defendant. The three insurance companies did not take positions. Neither did the trustee in bankruptcy for the estate of Mr. Moss, on the understanding that the Attorney General, if successful on the motion, is not entitled to realize upon any asset of the estate or otherwise interfere with the administration of the estate, without further order of the court.

[5] When a person goes bankrupt there is an automatic stay of proceedings against the bankrupt pursuant to s. 69.3 of the ***Act***. Section 69.4 of the ***Act*** gives the court authority to lift the stay on application by a creditor. It reads as follows:

> **69.4 Court may declare that stays, etc., cease** – A creditor who is affected by the operation of sections 69 to 69.31 or any other person affected by the operation of section 69.31 may apply to the court for a declaration that those sections no longer operate in respect of that creditor or person, and the court may make such a declaration, subject to any qualifications that the court considers proper, if it is satisfied
>
> (a) that the creditor or person is likely to be materially prejudiced by the continued operation of those sections; or
>
> (b) that it is equitable on other grounds to make such a declaration.

[6] Counsel for the Attorney General provided me and Mr. Moss with the form of amended statement of claim, with amendments underlined, that he will wish to file if successful on this motion. There are no amendments that put

Mr. Moss's assets at issue other than, perhaps, his rights as a named beneficiary of the insurance policies. In light of this and the fact that the trustee in bankruptcy took no position with respect to this motion, I conclude that the lifting of the stay cannot be viewed as affecting the bankrupt's estate. This is an important consideration in a motion such as this [see, for example, ***Reznick v. Zitzerman*** (1994), 26 C.B.R. (3d) 125; affirmed by the Court of Appeal, (1994), 28 C.B.R. (3d) 234]. I am persuaded that the addition of Mr. Moss as a defendant is necessary for the complete adjudication of the matters in issue in the Attorney General's fraudulent conveyance claim [see ***First Choice Capital Fund Ltd. v. First Canadian Capital Corp.*** (1999), 10 C.B.R. (4th) 277 (Sask. Q.B.]. There is certainly evidence to support the Attorney General's argument that Mr. Moss was integrally involved in the transactions under attack, including the nomination of Mr. Moss as an irrevocable beneficiary. In fact, his nomination is a persuasive reason alone to name him as a party.

[7] I, therefore, conclude that both criteria of s. 69.4 of the ***Act*** are satisfied in these circumstances: the Attorney General is likely to be materially prejudiced by the continued operation of the stay and it is equitable to lift the stay.

[8] Accordingly, there will be an order that the stay under s. 69.4 of the ***Act*** no longer operates in respect of the Attorney General to allow the Attorney General to add Mr. Moss as a defendant in Suit No. CI 99-01-13984.

[9] Within 60 days of the expiry of the applicable appeal period from this order, counsel for the Attorney General shall bring the necessary motion under

Queen's Bench Rule 5.03 to add Mr. Moss as a defendant and under Rule 26 to amend the statement of claim. I will expedite the hearing of this motion; perhaps this can be done through the case management process.

[10] Arrangements may be made through the trial coordinator's office, if costs must be spoken to.

[11] In light of the fact that Mr. Moss is not represented by counsel, it will not be necessary for him to approve the form of the order before the Attorney General submits it to me for signing. A copy of the signed order is to be served by the Attorney General on Mr. Moss by ordinary mail at his home address.

_________________________________J.

CITATION: Global Royalties Limited v. David Brook, 2015 ONSC 6277
COURT FILE NO.: 32-1774278
CV-15-11006-00CL
DATE: 20151013

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Global Royalties Limited and Benchmark Conversion International Limited O/A BCI, Plaintiffs

AND:

David Brook, Anna Brook, 2323593 Ontario Inc., Geoffrey Black aka Geoff Black, Griffin & Highbury Inc., Dario Beric aka Dario Beri-Maskarel, Dikran Khatcherian aka Diko Khatcherian aka Danny Matar, Leslie Frohlinger aka Les Frohlinger, Diversity Wealth Management Inc. and Diversity Wealth Management Holdings Inc., Defendants

BEFORE: Penny J.

COUNSEL: *Harvey Stone* for the Plaintiffs

Russell Bennett for David Brook

HEARD: October 8, 2015

ENDORSEMENT

[1] In this motion the plaintiff seeks orders in connection with s. 69.4 of the *Bankruptcy and Insolvency Act*:

(1) declaring that injunctive and declaratory relief claimed against David Brook as well as monetary claims arising from Brook's conduct post-bankruptcy, are not subject to the stay under s. 69 because these grounds of relief are not claims provable in bankruptcy; and

(2) lifting the stay of proceedings with respect to monetary relief claimed against Brook in connection with Brook's pre-bankruptcy conduct.

[2] Brook was deemed bankrupt on February 27, 2015. The statement of claim in action C-15-11006-00CL was issued in June 2015. Brook is a defendant in that action.

fundamental procedural tools under the Rules and trial practice would constitute a form of material prejudice, *Sher (Re)*, 1999 CanLII 15015 (Ont. S.C.) at para. 59.

[29] Based on the allegations in the statement of claim, Brooks is a central figure in the events giving rise to the causes of action pleaded against all defendants. It would make little sense to have one procedure to deal with the other eight defendants and another, entirely different procedure, to deal with Brooks. The conclusion of Ground J. in *Royal Bank of Canada v. Societe Generale (Canada)*, [2003] O.J. No. 5139 is equally applicable here:

> the evidence of the Bankrupts will be crucial in the action to establish the factual framework surrounding the various transactions which are alleged to be part and parcel of the fraudulent scheme and, accordingly, there cannot be a completed adjudication of the issues in the action among the other parties without the production of documents in the possession of, and the discovery of, [an, I would note, the evidence of] the Bankrupts."

[30] Finally, Brook argues that lifting the stay will interfere with the proper administration of his bankrupt estate.

[31] Apart from the potentially negative effect on his income-earning capacity of an interlocutory injunction (assuming one were sought and that the plaintiffs were able to meet the stringent test for the grant of an interlocutory injunction) Brook has not raised any concrete consequences for the administration of his estate resulting from his continued participation as a defendant in this action.

[32] The trustee does not oppose the relief sought on this motion. That is some indication, at least, from an independent player actually charged with the administration of the bankrupt's estate, that lifting the stay would not interfere with the proper administration of that estate.

[33] In conclusion, I find that:

(1) The claims for injunctive and declaratory relief sought in the action, as well as claims for monetary damages arising post-bankruptcy, are not stayed by the operation of s. 69.3; and

(2) the test for lifting the stay under s. 69.4 regarding the claim for pre-bankruptcy monetary damages has been met.

This conclusion is subject to one proviso. The enforcement (recovery) of any monetary damages arising out of pre-bankruptcy conduct, if any such damages are ever found owing and awarded, is stayed subject to further order of the court.

[34] Both parties filed bills of costs. They are roughly equivalent in amount. This is a case where costs on a partial indemnity scale should follow the event. As the plaintiffs were successful, costs are fixed in the amount of $13,500 payable by Brook.

In The Matter Of the Bankruptcy
of Andrew F. Wood;

And In The Matter Of an application
for an order to allow proceedings
against the Bankrupt
(Estate No. 51057267)
(N.B. Court No. NB 6941)

In The Matter Of the Bankruptcy
of George T. Yeamans;

And In The Matter Of an application
for an order to allow proceedings
against the Bankrupt
(Estate No. 51057269)
(N.B. Court No. NB 6941)

Royal Trust Corporation of Canada,
a body corporate (plaintiff) v. Donald
J. Stevenson and Carolyn A.
Layden-Stevenson, carrying on
business as Stevenson & Stevenson,
and the said Stevenson & Stevenson,
a partnership (defendants)
(Court File No. F/C/45/98)

Indexed As: Royal Trust Corp. of Canada v. Stevenson et al.

New Brunswick Court of Queen's Bench
Trial Division
Judicial District of Fredericton
Russell, J.
October 5, 1998.

Dans l'affaire de la faillite
d'Andrew F. Wood;

Et dans l'affaire d'une demande
d'ordonnance autorisant la tenue
d'une instance contre le failli
(n° d'actif: 51057267)
(n° de greffe du N.-B.: NB 6941);

Dans l'affaire de la faillite
de George T. Yeamans;

Et dans l'affaire d'une demande
d'ordonnance autorisant la tenue
d'une instance contre le failli
(n° d'actif: 51057269)
(n° de greffe du N.-B.: NB 6941);

Société Trust Royal du Canada,
corps constitué (demanderesse)
c. Donald J. Stevenson et
Carolyn A. Layden-Stevenson,
exerçant leur activité sous la
dénomination Stevenson &
Stevenson, et la société de personnes
susnommée Stevenson & Stevenson
(défendeurs)
(n° du dossier: F/C/45/98)

Répertorié: Royal Trust Corp. of Canada c. Stevenson et al.

Cour du Banc de la Reine
du Nouveau-Brunswick
Division de première instance
Circonscription judiciaire de Fredericton
Le juge Russell
Le 5 octobre 1998

Counsel:
Hugh J. Cameron, for the plaintiff;
E. Ann Mowatt, for the defendants;
D. Leslie Smith, Q.C., for the proposed third parties, Andrew F. Wood and George T. Yeamans.

This motion was heard on October 5, 1998, by Russell, J., of the New Brunswick Court of Queen's Bench, Trial Division, Judicial District of Fredericton, who delivered the following oral decision on the same date.

Avocats:
Hugh J. Cameron, pour la demanderesse;
E. Ann Mowatt, pour les défendeurs;
D. Leslie Smith, c.r., pour les mis en cause éventuels Andrew F. Wood et George T. Yeamans.

La motion a été entendue le 5 octobre 1998 par le juge Russell, de la Cour du Banc de la Reine du Nouveau-Brunswick, Division de première instance, circonscription judiciaire de Fredericton, qui a prononcé le même jour la décision ci-après.

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[1] **Russell, J.** [orally]: This is a motion in which the defendants, who are lawyers and who have been sued for professional negligence arising out of a property transfer in which they acted for the plaintiff mortgagee, seeks leave to commence third party proceedings against George T. Yeamans, a bankrupt discharged December 2, 1997, and against Andrew F. Wood, an undischarged bankrupt, and that the court declare s. 69.3 of the **Bankruptcy Act and Insolvency Act** no longer operates with respect to the defendants as creditors pursuant to s. 69.4 of that **Act**.

[2] The material before me leads me to believe that an action was started against the defendants in January of 1998, that a State-

[1] **Le juge Russell** [oralement] [Traduction]: Il s'agit d'une motion dans laquelle les défendeurs, qui sont avocats et qui ont été poursuivis pour négligence professionnelle découlant d'un transfert de biens au sujet duquel ils occupaient pour la créancière hypothécaire demanderesse, présentent deux demandes à la cour: premièrement, d'autoriser l'introduction d'une mise en cause contre George T. Yeamans, failli libéré le 2 décembre 1997, et contre Andrew F. Wood, failli non libéré, deuxièmement, de déclarer que l'art. 69.3 de la **Loi sur la faillite et l'insolvabilité** ne leur est plus applicable en leur qualité de créanciers conformément à l'article 69.4 de cette **Loi.**

[2] Les documents dont je suis saisi me permettent de croire qu'une action a été introduite contre les défendeurs en janvier

ment of Defence was entered not that long ago, and that no further proceedings have taken place, with the exception of this motion which has been delayed somewhat through no fault of the defendants. When I say "no further proceedings have taken place", I mean discovery proceedings, either by way of affidavit and inspection of documents or oral discovery, has not yet occurred.

[3] The action, it should be noted, is one for something in excess of two million dollars. It appears that the defendants did act for the plaintiffs with respect to the property transfer. The defendants now allege, and I categorize it as being somewhat bizarrely, that they as lawyers acting for the mortgagee relied on the projected third parties, who in fact were the borrowers or the mortgagors and who are also lawyers, for legal advice with respect to this particular transaction. That, in any event, is the allegation that the defendants wish to make when they seek to join the two individuals as third parties.

[4] It has been brought to my attention in the material and certainly in the argument that the defendants do not seek to attach the personal property of the two individuals they seek to join as third parties, but rather the proceeds of their professional liability insurance policies should liability attach to the third parties.

[5] Accordingly, this has somewhat the same characteristics as the facts in **Duvall, Re** (1992), 11 C.B.R.(3d) 264 (B.C.S.C.), a judgment of Mr. Justice MacKinnon, in which Duvall was a dentist. He made an

1998, qu'un exposé de la défense a été déposé il n'y a pas si longtemps et qu'aucun autre acte de procédure n'a eu lieu, si on excepte la présente motion qui a été retardée quelque peu, les défendeurs n'y étant pour rien. Lorsque je dis qu'"aucun autre acte de procédure n'a eu lieu", j'entends qu'une procédure d'interrogatoire préalable, au moyen d'un affidavit et d'un examen des documents ou d'un interrogatoire oral, n'a pas encore eu lieu.

[3] L'action, il convient de le noter, met en jeu une somme supérieure à deux millions de dollars. Les défendeurs auraient effectivement occupé pour la partie demanderesse au sujet du transfert de biens. Ils prétendent maintenant, ce que je qualifie de plutôt bizarre, qu'en tant qu'avocats occupant pour la créancière hypothécaire ils se sont fiés aux mis en cause éventuels, lesquels étaient en fait les emprunteurs ou les débiteurs hypothécaires tout en étant également avocats, pour obtenir un avis juridique concernant l'opération en question. C'est là, quoi qu'il en soit, l'allégation qu'ils désirent énoncer lorsqu'ils cherchent à joindre les deux personnes physiques comme mis en cause.

[4] Il a été porté à mon attention dans les documents et certainement lors du débat que les défendeurs n'entendent pas saisir-arrêter les biens personnels des deux particuliers qu'ils cherchent à joindre comme mis en cause, mais plutôt les sommes assurées de leurs polices d'assurance responsabilité professionnelle si la responsabilité devait être établie contre les mis en cause.

[5] Cette situation présente donc d'une certaine manière les mêmes caractéristiques que les faits établis dans **Duvall, Re** (1992), 11 C.B.R.(3d) 264 (C.S.C.-B.), décision du juge MacKinnon, affaire dans laquelle

assignment in bankruptcy in June 1990 and was discharged on April 24, 1991. The claim of the applicants against Duvall was for damages arising out of dental treatment and so in effect it was professional negligence.

[6] Mr. Justice MacKinnon said at page 268 of the judgment:

"As the respondent is named in this case only for the purpose of establishing liability and the delay was unavoidable - due to monetary and solicitor difficulties - the fact the bankrupt has been discharged is not sufficient to deny this application."

[7] Earlier he had said:

"Further, in cases involving insurance funds the discharge of the bankrupt is not seen as sufficient on its own to deny leave."

[8] Finally, he concluded:

"The proposed action will have very little effect on Duvall and certainly none on his property. To grant leave will not offend the primary purpose of the **Bankruptcy Act**. It appears fair that, on the facts, leave should be given."

[9] A similar conclusion was reached in the case of **Reznick v. Ziterman** (1994), 97 Man.R.(2d) 304; 26 C.B.R.(3d) 125 (Q.B.), judgment May 9, 1994 of Mr. Justice Barkman of the Manitoba Court of Queen's Bench. In that case the defendant was a member of the Manitoba Law Society and would stand in the same position as the

Duvall était dentiste. Ce dernier a fait une cession de faillite en juin 1990 et a été libéré le 24 avril 1991. Les requérants présentaient contre lui une demande en dommages-intérêts découlant d'un traitement dentaire, aussi s'agissait-il bien de négligence professionnelle.

[6] Le juge MacKinnon a dit, à la page 268 de la décision:

"Puisque l'intimé n'est nommé en l'espèce que pour établir la responsabilité et que le retard était inévitable — en raison d'ennuis financiers et de difficultés avec son avocat —, le fait que le failli ait été libéré ne suffit pas pour justifier le rejet de la présente requête."

[7] Il avait dit précédemment:

"En outre, dans les cas mettant en cause des fonds d'assurance, la libération du failli n'est pas considérée comme suffisante en elle-même pour justifier le refus de l'autorisation."

[8] Il a conclu, enfin:

"L'action proposée aura très peu d'effet sur Duvall et certainement aucun sur ses biens. Accorder l'autorisation ne méconnaîtrait pas l'objet principal de la **Loi sur la faillite**. Il apparaît juste que, compte tenu des faits, l'autorisation soit accordée."

[9] Une conclusion semblable a été tirée dans **Reznick c. Ziterman** (1994), 97 Man.R.(2d) 304; 26 C.B.R.(3d) 125 (C.B.R.), décision rendue le 9 mai 1994 par le juge Barkman, de la Cour du Banc de la Reine du Manitoba. Dans cette affaire, le défendeur était membre de la Société du Barreau du Manitoba et se trouvait dans la

potential third parties here, at least as far as this judgment is concerned.

même position que les mis en cause éventuels en l'espèce, du moins dans l'optique de la présente décision.

[10] Mr. Justice Barkman said:

"The plaintiffs submit that it is equitable to grant their application since the continuation of this action against the bankrupt is only for the purpose of establishing the liability of the personal defendant. Allowing the action to continue will not affect the bankrupt's estate and, therefore, granting the declaration will not offend the primary purpose of the bankruptcy legislation."

[10] Le juge Barkman a dit:

"Les demanderesses prétendent qu'il est équitable de faire droit à leur demande puisque la poursuite de la présente action contre le failli ne vise qu'à établir la responsabilité du particulier défendeur. Permettre la poursuite de l'action n'aura pas d'effet sur l'actif du failli et accorder la déclaration ne méconnaîtrait donc pas l'objet principal de la loi sur la faillite."

He went on to cite **Cravit, Re** (1984), 54 C.B.R.(N.S.) 214 (Ont. H.C.), and granted the application.

Il a poursuivi en invoquant l'affaire **Cravit, Re** (1984), 54 C.B.R.(N.S.) 214 (H.C. Ont.), et a accueilli la demande.

[11] I have relied on these judgments and grant the application pursuant to s. 69.4 of the **Act** and declare that s. 69.3 no longer operates with respect to the individuals Yeamans and Wood. It is evident that the application is only for the purpose of obtaining the benefits of liability insurance relative to their practice of law and that the property of the bankrupts as defined will not be affected.

[11] M'étant fondé sur ces décisions, j'accueille la demande conformément à l'art. 69.4 de la **Loi** et déclare que l'article 69.3 ne s'applique plus aux particuliers Yeamans et Wood. Il est évident que la demande ne vise qu'à obtenir les avantages de l'assurance responsabilité liés à leur pratique du droit et que les biens des faillis tels qu'ils sont définis ne seront pas touchés.

[12] Returning to the question of the third party claim, I am satisfied that it all arises out of one transaction as mentioned by Mr. Smith and it would be rather silly to have two separate actions, even if the plaintiff didn't know that the third parties were involved giving legal advice - and I would be rather surprised if they did know. I am sure they would be surprised. In any event, assuming these allegations are true - and that is all I can deal with at the moment - I am prepared to grant the motion under rule 30,

[12] Pour revenir à la question de la mise en cause, je suis convaincu que toute l'affaire découle d'une seule opération, comme l'a mentionné M^e^ Smith, et il serait plutôt ridicule d'intenter deux actions distinctes, même si la demanderesse ne savait pas que les mis en cause donnaient leur avis juridique — et je serais plutôt surpris d'apprendre qu'elle le savait. Je suis sûr qu'elle aurait été surprise. De toute manière, si l'on présume que ces allégations sont vraies — et c'est tout ce que je puis examiner pour le moment — je suis

Court of Queen's Bench of Alberta

Citation: Tirecraft Group Inc. (Re), 2009 ABQB 217

Date: 20090409
Docket: 0803 05196
Registry: Edmonton

Between:

In the Matter of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 as Amended

And in the Matter of a Plan of Compromise or Arrangement of Tirecraft Group Inc., Tirecraft Auto Centers Ltd., Tirecraft Auto Centers (Operations) Ltd., Remington Tire Distributors Inc., Canadian Treads Mfg. Corporation, Canadian Treads Corporation, 333274 Alberta Ltd., 282500 Alberta Ltd., 598847 Saskatchewan Ltd., 3846947 Manitoba Inc., 347343 Alberta Ltd., 312084 Alberta Ltd., 881122 Alberta Ltd., 308950 Alberta Ltd., 598846 Saskatchewan Ltd. and Totem Tire Stores (Alberta) Ltd. (collectively, the "Companies")

And in the Matter of the Receivership of the Companies

Reasons for Judgment
of the
Honourable Madam Justice M.B. Bielby

Decision

[1] Leave is granted, *nunc pro tunc*, to permit a former employee of a bankrupt company to sue that company and its insured Directors for vacation pay, unreimbursed expenses and severance pay. The Directors' liability, if any, arises under s. 119(1) of the Alberta *Business Corporations Act*, R.S.A. 2000, c. B-9 ("BCA") which requires the employee, as a prerequisite to recovery, to sue for the debt within six months of it becoming due or to file a Proof of Claim within six months of the date of bankruptcy. She sued for debt and filed a Proof of Claim in

> 69.3(1) Subject to subsections (1.1) and (2) and sections 69.4 and 69.5, on the bankruptcy of any debtor, no creditor has any remedy against the debtor or the debtor's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy.
>
> 69.4 A creditor who is affected by the operation of sections 69 to 69.31 or any other person affected by the operation of section 69.31 may apply to the court for a declaration that those sections no longer operate in respect of that creditor or person, and the court may make such a declaration, subject to any qualifications that the court considers proper, if it is satisfied
>
>> (a) that the creditor or person is likely to be materially prejudiced by the continued operation of those sections; or
>>
>> (b) that it is equitable on other grounds to make such a declaration.

[17] The Receiver did not consent to, nor has the Court yet granted leave to Summer Bradko to commence her action nor to subsequently amend her Statement of Claim nor to serve it.

[18] The parties were unable to locate any case authority which addresses whether an application to lift a stay to allow former employees to pursue a statutory claim which is unavailable to other unsecured creditors of a bankrupt meets one of the two prerequisites in s. 69.4 of the BIA.

[19] The parties agree that the test I am to apply to determine whether the stay imposed by s. 9 of the receivership order and by s. 69.3 of the BIA is that imposed by s. 69.4. The onus is upon Ms. Bradko to show that those tests have been met. As the Ontario Court of Appeal stated in *Ma v. Toronto Dominion Bank* (2001) 24 C.B.R. (4th) 68 at para. 3:

> ...lifting the automatic stay is far from a routine matter. There is an onus on the applicant to establish a basis for the order within the meaning of s. 69.4. As stated in *Re Francisco*, the role of the court is to ensure that there are "sound reasons, consistent with the scheme of the Bankruptcy and Insolvency Act" to relieve against the automatic stay...

[20] That said, the two provisions of s. 69.4 of the BIA are disjunctive so that the applicant need establish only one of them to succeed; see *Turkawski v. 738675 Alberta Ltd.* 2008 CarswellAlta 701.

[21] One of the objects of the BIA which I must consider in determining whether there are "sound reasons, consistent with the scheme of the Bankruptcy and Insolvency Act" for the lifting of the stay is that all creditors of the same class are to be treated equally, and that an "orderly distribution" is made, with creditors ranking *pari passu*. The statutory stay of proceedings is designed to achieve that by preventing one creditor from taking proceedings or steps which may

give it an unfair advantage relative to other creditors; see *Stone Sapphire Ltd. v. Transglobal Communications Group Inc*., 2008 CarswellAlta 896 at para. 40.

[22] In *Stone Sapphire* the Court went on to state at para. 46:

> Generally, Courts will consider lifting a stay when the action is one that would survive the *BIA* proceedings, that the matter is an unliquidated debt that is so complex that the summary process under the *BIA* is inappropriate, if the insolvent person's involvement is necessary in respect of other parties, *if the action is necessary to recover under an available policy of insurance*, or that the action has progressed to a point where logic dictates that the action continue to judgment. (emphasis added)

[23] The Directors are insured for their potential liability in the proposed class action. The Applicant argues that her action is a necessary prerequisite to recover under that action and one which falls within the second last category enumerated in *Stone Sapphire*. Recovery is sought from sources outside the bankrupts' estate or, indeed, any of the Corporations' estates.

[24] This is not a situation where an unsecured creditor is otherwise attempting to secure an advantage over the interests of other unsecured creditors by continuing with a lawsuit; no multiple proceedings will result if the stay is lifted. The lifting of the stay will not give Ms. Bradko a procedural advantage over other claimants in relation to the assets of the Corporations. Rather, it would permit her to pursue a remedy not open to other claimants, i.e. to non-employees.

[25] This is also not a situation in which the Receiver/Trustee will necessarily be put to any unnecessary expense in defending the action to the detriment of the estate. While presumably Ms. Bradko would have to pursue the action to judgment against the Corporations to obtain a judgment which would be the subject of attempted execution as required by s. 119(1)(a) of the BIA, the Receiver/Trustee would not necessarily be required to defend that action. The Directors have retained counsel which appeared at and argued against Ms. Bradko's position on this application. They will defend her action if leave is given.

[26] Ms. Bradko argues that the stay should be lifted as she meets both aspects of the test under s. 69.4 of the BIA. She and potentially 800 other former employees would be prejudiced from seeking recovery pursuant to a statutorily provided right against the Directors should leave not be given. While she herself may be protected in that her claim is only against Tirecraft and thus falls within the provisions of s. 119(c) for which no lawsuit is required, to the extent that she may be successful in becoming the representative of others who worked for Companies other than Tirecraft or Remington those claimants would be prejudiced by the complete loss of their claim against the Directors should leave not be given. Further she argues that it is equitable to lift the stay as the estates of the Companies will not be negatively impacted by her litigation; it is a dispute between herself and the Directors alone.

[27] Section 119(3)(c) clearly does not contemplate that the corporate bankruptcy run its course without full recovery to a claimant before she can commence action. It creates a right to recovery upon a claim for the debt being proved, not upon the discharge of the bankrupt.

[28] I conclude that Ms. Bradko and the other employees who may seek recovery if her action is ultimately certified as a class action will be materially prejudiced if the stay contained in the receivership and bankruptcy orders is not lifted, albeit after the fact, to allow this action to proceed. Further, given that the claim will not reduce the potential pool of assets available to other creditors of the Companies but will allow her to pursue a recovery potentially available only to herself and other employees from a third party it would be equitable to declare the stay lifted.

proof of claim

[29] In arriving at that conclusion I have accepted that the fact that the Proof of Claim filed by Ms. Bradko in the Tirecraft bankruptcy is potentially defective is not a reason to refuse leave.

[30] The Directors argue that the proofs of claim filed by Ms. Bradko are defective and thus do not meet the definition of proof required by s. 119(3)(c) of the BCA. The Trustee has not raised any objection to them.

[31] Ms. Bradko purported to file a claim on behalf of each employee against each of the Companies without designating which employee worked for which of the Companies. She replies that she did so because it was not clear to her who worked for whom; that is the reason she has also requested the preservation of payroll record so that her Proof of Claim might be amended once that information has been provided to her. When that issue is addressed in the ultimate certification application in the class action she will then be able to take steps to amend the Proof of Claim appropriately.

[32] Similarly the Directors complain that the Proof of Claim is also inadequate because Ms. Bradko is not owed any unpaid wages by Tirecraft but rather her claim is for severance pay, expense reimbursement and vacation pay. They note that an employee's claim against a corporate director is limited to a claim for unpaid wages under the *Employment Standards Code*, R.S.A. 2000, c. E-9. However, Ms. Bradko advances her claim under s. 119(1) of the BCA which arguably provides a wider right of recovery. In any event this is also an issue to be raised at the certification application or, ultimately, in the Statement of Defense.

[33] The Directors further argue that her Proofs of Claim are defective in that they fail to meet the requirements of s. 124(3) and (4) of the BIA in that they do not reveal her authority to make them on behalf of the other employees, they do not reveal the means of her knowledge and they do not include a proper statement of account showing the particulars of claims.

[34] Section 124 of the BIA provides:

IN THE SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY

Citation: Dorey, Re; Geneva Florence Hemeon v. The Municipality of the District of West Hants, 2008 NSSC 234

Date: 20080731
Docket: B 31844
Registry: Halifax

District of Nova Scotia
Division No. 1
Court No. 31844
Estate No. 51-933191

In the Matter of the Bankruptcy of Gregory Paul Dorey

IN THE MATTER OF THE APPLICATION OF GENEVA FLORENCE HEMEON FOR LEAVE TO CONTINUE AN ACTION AGAINST THE BANKRUPT'S INSURER

- and -

2006 S.K. No. 268782

IN THE SUPREME COURT OF NOVA SCOTIA

BETWEEN:

GENEVA FLORENCE HEMEON

PLAINTIFF

- and -

THE MUNICIPALITY OF THE DISTRICT OF WEST HANTS, CHERYL LYNN LAWRENCE, ~~JOHN KENNETH LAWRENCE~~ and GREGORY DEAN DOREY

DEFENDANTS

LIBRARY HEADING

Registrar: Richard W. Cregan, Q.C.

Heard: May 30, 2008

Written Decision: July 31, 2008

Subject: Whether the applicant should be allowed under Section 69.4 of the *Bankruptcy and Insolvency Act* to proceed with an action against a now discharged bankrupt for damages arising from misrepresentations alleged to have been made before his assignment in bankruptcy in hope of being able to collect under a liability policy held at the time by the bankrupt but where coverage has not been admitted by the insurer.

Summary: The Applicant relied on the *Buchanan* case a recent decision of the Court of Appeal of Nova Scotia which held that although the defendant may be a discharged bankrupt, thereby discharged of responsibility for the debt, the underlying obligation continues and the plaintiff could proceed against the insurer. The bankrupt argued that this case did not apply when the insurer has not admitted coverage.

Held: The insurer cannot rely on a self serving non admission of coverage. Whether it is admitted or not does not affect the continued existence of the underlying liability. The better way to approach the problem is to rely on *Re Ma* and related cases and ask whether in the circumstances the Applicant is being "materially prejudiced" by the stay imposed by the *BIA*. The court was satisfied that she was. She was granted the declaration sought.

THIS INFORMATION SHEET DOES NOT FORM PART OF THE COURT'S DECISION QUOTES MUST BE FROM THE DECISION, NOT THIS LIBRARY SHEET

[1] This is an application by Geneva Florence Hemeon, the Plaintiff in this action, for an order under Section 69.4 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, (*BIA*), to permit her to continue the action against Gregory Paul Dorey, one of the Defendants, notwithstanding the stay which was imposed on the action by Mr. Dorey's assignment in bankruptcy on February 20, 2007, and subsequent discharge on November 21, 2007.

[2] In 2005, Mrs. Hemeon purchased a house in Windsor, but shortly thereafter detected the presence of mold in it, possibly caused by the deficiency of the drainage surrounding the house. She brought this action against the Defendant Municipality alleging its failure to properly inspect the building and its misrepresentation respecting its compliance with by-laws, against the Defendant Mrs. Lawrence from whom she had purchased the house alleging breaches in various terms, conditions and warranties of the agreement of purchase and sale between them, and against Mr. Dorey, who had been the contractor who built the house, alleging misrepresentation on his part

policies.

[16] The effect of the lengthy decision of Oland J A is expressed in paragraph 58

> I am not persuaded that the bankrupt judge erred by relying on the reasoning in *Miller (Re),* supra and the cases referred to therein and thereafter that, although s. 178(2) releases the bankrupt from claims provable in bankruptcy, it does not extinguish the debts that form the basis of such claims. In the appeal before us, this means that s. 178(2) releases Buchanan, from having to satisfy the debt, but it does not extinguish the underlying legal obligation. As I will explain, that underlying obligation survives for the purpose of the insurance policy and s. 28 of the *Insurance Act*, whether the extent of the obligation is crystallized by settlement or judicial determination before or after the order for discharge issues. (underlining added)

[17] I need not proceed to review the reasoning in this decision. Mr. Dorey's counsel conceded that where there is insurance in place the decision is determinate of the right for a creditor to have a stay lifted so that it can pursue a judgment, which although not enforceable against the now discharged bankrupt, can be enforceable against his insurer under the above quoted section of the *Insurance Act.*

[18] However, he says that it is not applicable to the situation where coverage is denied or not admitted. He is thus saying that establishing insurance coverage is a condition precedent to having a stay lifted under the authority of the *Buchanan* case. I think the principle of the case as quoted in [16] is

unaffected by whether there is insurance coverage or not.

[19] An applicant should be able to proceed to prove its case. If successful, obtain its judgment and seek relief under Section 28 of the *Insurance Act*. It is at this point that the issue of coverage should be determined.

[20] To follow submissions of Mr. Dorey's counsel in an application such as this would be to allow an insurer to unilaterally frustrate creditors with claims which may possibly be indemnified by making self serving statements regarding coverage, without having to submit such statements to judicial scrutiny. I do not think that such should be allowed.

[21] However, I think the problem of whether the *Buchanan* case covers the situation where insurance coverage is in question can for the present purposes be avoided. Instead I rely on the cases mentioned in the passage from my earlier decision quoted in [13]. One is not required to prove that there is a *prima facie* case. Rather one is directed to look at the situation of the applicant and ask whether the applicant is likely in the circumstances to be materially prejudiced. Mrs. Hemeon is making a claim against Mr. Dorey.

Mr. Dorey is no longer personally liable for the claim. Mr. Dorey has insurance which at least on the surface appears possibly to be available to Mrs. Hemeon.

[22] A reasonable foundation particularly with the assertion in the *Buchanan* case about the underlying legal obligations remaining has been set to suggest that Mrs. Hemeon may be entitled to be paid by the insurer for any damages for which Mr. Dorey may be liable, but for his having been discharged from bankruptcy. She should have the opportunity to pursue this possibility. Otherwise I think without the declaration sought she will be "materially prejudiced" in being denied the opportunity to pursue a course of action which may be of benefit to her. Whether she will be successful or whether the insurer will have a defence is for another court to determine.

[23] I think this is a "sound reason" or a "compelling reason" for allowing the action to continue against Mr. Dorey.

[24] Mrs. Hemeon's application will be granted.

NOVA SCOTIA COURT OF APPEAL

Citation: *Buchanan v. Superline Fuels Inc.*, 2007 NSCA 68

Date: 20070606
Docket: CA 266625
CA 266629
CA 266631
CA 266635
Registry: Halifax

Between:

Thomas W. Buchanan and The Dominion of Canada General Insurance Company, a body corporate, and Rexel North America Inc., a body corporate under the laws of the Dominion of Canada

Appellants

v.

Superline Fuels Inc.

Respondent

Judge(s): Cromwell, Saunders and Oland, JJ.A.

Appeal Heard: October 17, 2006, in Halifax, Nova Scotia

Held: Appeal dismissed per reasons for judgment of Oland, J.A.; Cromwell and Saunders, JJ.A. concurring.

Counsel: David Coles, Q.C., Brian Casey and Shelly Martin, Articled Clerk, for the appellant, Rexel North America Inc.
W. Augustus Richardson and Lisa Richards, for the appellants, Buchanan and Dominion of Canada
Wendy Johnston, Q.C. and Stephen Kingston for the respondent, Superline Fuels
Michael Brooker, Q.C. for Marsha Watkins, not participating

Reasons for judgment:

Introduction

[1] An absolute order of discharge releases a bankrupt from all claims provable in bankruptcy. But how does that order affect a claimant which, before the bankrupt made an assignment in bankruptcy, brought an action against him but had not obtained judgment before the absolute discharge order, and where, at all material times, the bankrupt had insurance against the type of loss claimed? Does the order act as a complete defence to the claim? Or can a claim against the insurer survive that order? These are the main issues to be determined on this appeal.

Background

[2] The facts giving rise to this litigation are not in dispute. They were set out in *Superline Fuels Inc. v. Buchanan*, 2006 NSSC 51, the decision in the Supreme Court of Nova Scotia in Bankruptcy and Insolvency (the "Bankruptcy Court") under appeal. Following are extracts from the summary by Justice Donald M. Hall:

> ¶ 3 . . . In November, 1999, Superline, through one of its divisions, registered as Discount Fuels (Discount), contracted with a home owner, Marsha Watkins (Watkins) for the supply and installation of an oil tank at Watkins' residence for domestic heating purposes. Superline, through Discount, then entered into a subcontract with Buchanan, who was carrying on business under the firm name "Sable Heating and Ventilation" (Sable), to supply and install the oil tank.
>
> ¶ 4 Approximately nine months later a leak was discovered in the oil filter on the line leading from the tank to the interior of the house. The leak caused significant contamination of the soil in the vicinity of the oil tank for which Superline accepted responsibility and paid a substantial sum of money to remedy the problem.
>
> ¶ 5 Superline, however, determined that the leak had been caused by a pinched gasket in the oil filter installed by Discount [sic.] Superline contended that Discount [sic] was negligent in the manner in which it completed the installation of the oil tank and was responsible for the damage and demanded full compensation from Discount [sic] for its remediation costs.

> 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) Contingent and unliquidated claims – 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. . . .

According to s. 135(1)(1.1), the trustee in bankruptcy determines whether any contingent claim is a provable claim and, if so, values it.

[31] The "modern approach" to statutory interpretation is well established. In *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, [2005] S.C.J. No. 26, Binnie, J. described it as follows:

> ¶ 95 In his book *Construction of Statutes* (2nd ed. 1983), at p. 87, E.A. Driedger sets out this often-cited principle:
>
>> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>>
>> It is now well settled in law that this modern approach is the preferred method of statutory interpretation … However, this framework need not be applied in a formulaic manner. The factors need not be canvassed separately in every case, given that they are very closely related and interdependent…" [Emphasis added]

See also *Re: Rizzo & Rizzo Shoes Ltd. (Re)* (1998), 154 D.L.R. (4th) 193 (S.C.C.) at ¶ 21; *Bell ExpressVu Limited Partnership v. R.* (2002), 212 D.L.R. (4th) 1 (S.C.C.) at ¶ 26-28.

[32] As indicated, the object of the legislation and the intention of Parliament in its enactment are factors to be considered in undertaking the interpretation of a statute. In *Husky Oil Operations Ltd. v. M.N.R.* (1995), 128 D.L.R. (4th) 1 (S.C.C.), Iacobbuci, J. set out the objects of the *BIA* generally as follows at ¶ 7:

> A. *The purposes of federal bankruptcy legislation*

> At the outset, it is useful to remember that our bankruptcy system serves two distinct goals. The first is to ensure the equitable distribution of a bankrupt debtor's assets among the estate's creditors *inter se*. As one commentator has noted (Aleck Dadson, "Comment" (1986), 64 Can. Bar Rev. 755, at p. 755):
>
> > Bankruptcy serves this goal by replacing a regime of individual action with a regime of collective action. While the pre-bankruptcy regime of individual action allows creditors to pursue their separate and competing claims to the debtor's assets, bankruptcy's regime of collective action sorts out those diverse claims and deals with the debtor's assets in a way which brings benefits to creditors as a group (reduced costs, increased recovery). . . . The collectivization of insolvency proceedings can only be achieved by denying to creditors the use of pre-bankruptcy remedies.
>
> See also Peter W. Hogg, *Constitutional Law of Canada* (3rd ed. (supplemented) (Scarborough), Ont.: Toronto, 1992), vol. 1, at p. 25-3 (looseleaf). The second goal of the bankruptcy system is the financial rehabilitation of insolvent individuals (Dadson, *supra*, at p. 755). This goal is furthered through the opportunity for an insolvent individual's discharge from outstanding debts. (Emphasis added)

See also *Houlden and Morawetz, The 2007 Annotated Bankruptcy and Insolvency Act*, (Toronto: Carswell, 2006) at pp. 2-3.

[33] Those purposes of bankruptcy and insolvency legislation both relate to the property of the bankrupt. One seeks to effect a fair distribution of his or her assets among the bankrupt's creditors. The second relates to his or her financial rehabilitation, in order to allow him or her to start anew and protect any future property the bankrupt might acquire from existing creditors.

[34] With the objects of the *BIA* in mind, I return to the express wording of s. 178(2) which is repeated for convenience:

> 178 (2) Claims released – Subject to subsection (1), an order of discharge releases the bankrupt from all claims provable in bankruptcy.

> damages may recover by action against the insurer the amount of the judgment up to the face value of the policy, but subject to the same equities as the insurer would have if the judgment had been satisfied.

That provision is virtually identical to s. 28 of the current *Insurance Act*.

[47] In *Vandepitte*, supra the respondent was injured when the vehicle in which she was a passenger collided with one owned by Berry and operated, with his consent, by his daughter. After having obtained judgment against the daughter, the respondent's action against the owner's insurer to recover the amount of the judgment was unsuccessful. The court reasoned that there was no privity of contract between the daughter and the insurer. It ultimately concluded that s. 24 of the British Columbia legislation did not oblige the insurer to satisfy the judgment against the daughter, who was an unnamed insured.

[48] As a result of *Vandepitte*, several provinces, including Nova Scotia, amended their insurance legislation. Locke, J. of the Supreme Court of Canada recounted the history of these changes in *Northern Assurance Co. v. Brown*, [1956] S.C.R. 658 at pp. 665-667, [1956] S.C.J. No. 42. The amendments enabled persons recovering judgments for damages for negligence against insured persons, named or unnamed, to access the insurance monies to the extent provided. In view of that specific and narrow objective, and the fact that s. 133 relates to motor vehicle liability insurance, it is not appropriate to draw any inference in regard to s. 178(2) of the *BIA* from the existence of that provision of the *Insurance Act*.

[49] In summary, the existence of neither s. 145 of the *BIA* nor s. 133 of the *Insurance Act* leads to the inference that claims to the proceeds of a commercial general liability insurance policy are precluded by s. 178(2) of the *BIA*.

(d) *Re Major* and *Miller (Re)*

[50] In granting Superline the declaration it sought, as well as relying on the Leave Order and the wording of the Policy, the judge relied on case law. It is helpful to set out relevant provisions of the Policy at this point, in order to provide context for my analysis of the jurisprudence. The insuring agreement contained in the Policy imposes two obligations on the insurer, Dominion. These are set out in Section I, Coverage A as follows:

> 1. Insuring Agreement.
>
> a. We will pay those sums that the insured becomes legally obligated to pay as compensatory damages because of "bodily injury" or "property damage" to which this insurance applies. No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under SUPPLEMENTARY PAYMENTS – COVERAGES A, B AND D. This insurance applies only to "bodily injury" and "property damage" which occurs during the policy period. The "bodily injury" or "property damage" must be caused by an "occurrence". The "occurrence" must take place in the "coverage territory". We will have the right and duty to defend any "action" seeking those compensatory damages . . . (Emphasis added)

I will call the first, the "duty to indemnify;" and the second, the "duty to defend."

[51] It is noteworthy that the Policy does not specify whether any payments by the insurer are made on behalf of the insured, directly to the claimant, or otherwise. The parties to the appeal agree that any payments payable pursuant to the duty to indemnify would be made by the insurer to the claimant on behalf of the insured. For the purposes of this decision, I have accepted that position.

[52] I turn then to the case law. Neither the bankruptcy judge nor this court was provided with any appellate decisions on the effect of an absolute order of discharge on claims against a bankrupt who had insurance coverage. In each of the two principal decisions the bankruptcy judge relied upon, *Re Major*, supra and *Miller (Re)*, supra the insuring agreement called on the insurer to pay "on behalf of" the insured.

[53] In *Re Major*, supra a solicitor who had been sued for breach of fiduciary duty made an assignment in bankruptcy. The plaintiffs sought leave to continue their action, and a declaration that any insurance proceeds belonged to them, rather than the trustee of the estate in bankruptcy. The British Columbia Supreme Court granted their application, holding that once the liability of the bankrupt insured was established, the insurance policy called for a payment by the insurer directly to the creditor. At ¶ 24, it commented:

> To permit the estate of the bankrupt to receive the proceeds of the policy of insurance in this case would result in an injustice to the applicants, for whose benefit one would have expected that the policy was intended. The other creditors of the estate would gain a windfall from the misfortune of the applicants

> being done outside the bankruptcy estate. I also query whether the insurer would be required to pay after the bankrupt's discharge because, in the phraseology of Commonwealth's policy, the insured bankrupt would not be legally obligated to pay because the discharge from bankruptcy operated to release the bankrupt from the claim.

Later in my decision, I will address the meaning of “legally obligated to pay.” For the present purposes of my examination of *Miller (Re)*, supra and the reasoning in that and other cases, it is sufficient to note that these comments are clearly *obiter dicta*. Moreover, the appeal before us pertains, not to a proposal as in *Woodworth*, supra, but to a bankruptcy and the effect of a discharge from bankruptcy.

[64] I conclude that the bankruptcy judge did not err in relying upon *Re Major*, supra and *Miller (Re)*, supra in granting Superline its application. Despite the issuance of the Discharge Order, Superline is not preluded from continuing its claim against Buchanan in an attempt to access the insurance proceeds. Such a conclusion accords with the purposes of the *BIA* described earlier. It does not affect the orderly distribution of the bankrupt’s property among his creditors nor, since the claim does not affect Buchanan or his assets, does it impede his financial rehabilitation.

[65] Moreover, as the bankruptcy judge pointed out, policy reasons also support this conclusion. Were Superline not able to continue, Dominion would garner a windfall. The liability insurer would be permitted to obtain a financial benefit from the absolute discharge of its own insured. Finally, I do not accept the argument that if the bankruptcy judge’s decision is upheld, both insured and uninsured claimants will delay proceeding until after a bankrupt’s discharge, in order to increase the payment that might be received. Uninsured claims will not include features such as the payable on behalf of the insured characteristic, which was significant here. The same might be said of many insured claims and, of course, generally parties have an interest in concluding disputes and claims expeditiously and efficiently.

(4) Does a provision in the Policy providing that bankruptcy of the insured does not relieve the insurer of its obligation mean that Dominion has waived its right to rely upon Buchanan's Discharge Order as a defence?

Alberta Court of Queen's Bench
Eurasia Auto Ltd. v. M & M Welding & Supply (1985) Inc.
Date: 1991-05-01

DA. Yungwirth, for plaintiff.

S. Livingstone, for trustee.

A. McCue, for insurer.

(Doc. BKCY 31664; Q.B. 8903-16399)

May 1, 1991.

One

[1] FUNDUK, Master: — Neither the trustee nor the insurer oppose the plaintiff's application to be allowed to proceed with the action. The understanding is that the action is being defended by counsel for the insurer on behalf of the bankrupt, and the plaintiff wants to proceed to be able to get at any insurance money.

Two

[2] The plaintiff's claim is not one which falls within the scope of s. 145 of the *Bankruptcy Act,* R.S.C. 1985, c. B-3. The issue between the trustee and the plaintiff is whether any insurance money would go to the plaintiff or to the estate of the bankrupt. That is a critical issue to the plaintiff because it may not want to prosecute the action if any insurance money goes to the estate of the bankrupt.

[3] I do not think that the existence of s. 145 means that insurance money for any other kind of insurance coverage falls into the estate.

[4] I think that it depends on the terms of the policy of insurance. Is the insurer to pay to the insured or is it to pay to the injured party? If it is the second, the insured cannot call on the insurer to pay to him instead.

[5] A copy of the coverage is found in *M & M Trailer Co. v. Guardian Insurance Co. of Canada, Doc.* 9003-08495 (Alta. Q.B.) [unreported]. The Comprehensive General Liability Coverage Form says, in regard to property damage liability:

> "The insurer will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of property damage caused by accident."

[6] I see no difference between that and the insurance policies found in *Re Major* (1984), 54 C.B.R. (N.S.) 28, 56 B.C.L.R. 342, [1984] 6 W.W.R. 435 (S.C.) and the cases that decision relies on.

[7] If the bankrupt had not gone bankrupt, it could not have demanded that the insurer pay it. The policy calls for something else.

[8] The bankruptcy does not (and cannot) change the terms of the policy. All that the trustee can demand of the insurer is that it pay to the injured third party.

[9] If the insurance proceeds fell into the estate, it would mean that creditors of the bankrupt would get money from an insurance policy for claims not covered by the policy.

[10] If the policy provided that the insurer would pay to the insured, that might well result in a different conclusion, but that is not the case here. The bankrupt (and the trustee) can only call on the insurer to perform its obligations as the parties agreed to. What they agreed to is that the insurer pay to the injured party.

[11] The fact that the injured party might be able to file a claim against the bankrupt in the bankruptcy is irrelevant.

[12] The obiter comment in *Re Robert M. Parry Sales Ltd.* (1970), 14 C.B.R. (N.S.) 127 (Ont. S.C.) is of little value. The trustee can get against the insurer only that which the bankrupt can get against the insurer.

[13] In this case that is:

> (a) a declaration that the insurer must pay to the plaintiff on be half of the bankrupt any judgment the plaintiff gets against the bankrupt; or
>
> (b) a money judgment against the insurer if the trustee pays the plaintiff's claim.

[14] In this case the insurer is neutral about who it should pay to if it has to pay.

[15] I find that this is a *Re Major,* supra, situation. The plaintiff does not have to share with other creditors if it gets a judgment which is covered by the policy. The insurer can pay directly to the plaintiff in that case.

[16] *Re Rewers* (1989), 74 C.B.R. (N.S.) 47, 35 B.C.L.R. (2d) 340 (S.C.) is of no assistance to the trustee. There was no evidence about the terms of the policy (if there was one) so the Court just ordered that a copy of the policy be delivered. The Court appears to accept Re Major as sound law.

Decision

[17] The application is allowed in accordance with the notice of motion.

Application allowed.

Q.B.
No. 1757

A.D. 1996
J.C.S.

IN THE QUEEN'S BENCH
JUDICIAL CENTRE OF SASKATOON

BETWEEN:

FIRST CHOICE CAPITAL FUND LTD. ET AL.

APPLICANTS
(PLAINTIFFS)

- and -

FIRST CANADIAN CAPITAL CORPORATION ET AL.

DEFENDANTS

COURT NO. 4984
IN THE COURT OF QUEEN'S BENCH FOR SASKATCHEWAN
IN BANKRUPTCY
IN THE MATTER OF THE BANKRUPTCY OF
DELBERT GEORGE BLEWETT

ESTATE NO. 025613
IN THE COURT OF QUEEN'S BENCH FOR SASKATCHEWAN
IN BANKRUPTCY
IN THE MATTER OF THE BANKRUPTCY OF
FIRST CANADIAN CAPITAL CORPORATION

J.M. Lee and P.A. Beke — **for the applicants(plaintiffs)**
P.J. Gallet and T.J. Schonhoffer — **for the defendant bankrupt Blewett**
J.R. Beckman, Q.C. and C.A. Sloan — **for the defendants Deloitte and Hicks**
W.F.J. Hood — **for the defendant Larry Machula**
No one appearing for First Canadian Capital Corporation ("FCCC")

JUDGMENT — **BAYNTON J.**

February 26, 1999

THE APPLICATIONS

[1] Two applications are brought to lift bankruptcy stays respecting the plaintiffs' action against Delbert George Blewett ("Blewett") and First Canadian Capital Corporation et al. ("FCCC"), and to grant the plaintiffs priority to Blewett's estate in any proceeds realized from the prosecution of the action. As the issues are similar, I will deal with them jointly.

FACTS

[2] Blewett is one of several defendants in a complex civil action commenced by the plaintiff applicants to recover damages respecting investment losses in excess of $40,000,000. Blewett's alleged liability arises from his conduct and involvement in the investment funds as a solicitor. During the period of time in issue he was entitled to practice law in Saskatchewan and carried professional liability insurance through the Law Society of Saskatchewan.

[3] Blewett made an assignment into bankruptcy in British Columbia on May 19, 1998. He appears to have no assets to satisfy any judgment that the plaintiffs might obtain against him. The applicants seek a declaration pursuant to s. 69.4 of the Bankruptcy and Insolvency Act, R.S.C. 1985, c.B-3 ("BIA") that sections 69 to 69.31 inclusive no longer operate in respect of the plaintiffs so that they can continue to prosecute their civil action against the bankrupt. They also seek declaratory relief confirming that they have priority to Blewett's bankruptcy estate to any proceeds of the action including proceeds which may be payable under the professional insurance policy.

[4] On December 18, 1998, Mr. Justice Vickers of the Supreme Court of British Columbia in Bankruptcy, ordered that the applicants' application for relief be remitted to be heard and decided by the Court of Queen's Bench for Saskatchewan in Bankruptcy.

[5] FCCC is also a defendant in the action and its alleged liability arises from its conduct and involvement respecting the management of the investment funds. It is also bankrupt. A receiving order was issued against it on March 3, 1998, by the Court of Queen's Bench for Saskatchewan in Bankruptcy, and an appeal of that order was dismissed by the Court of Appeal on November 20, 1998.

ANALYSIS

a. Lifting of the Stays

[6] I am satisfied that the conditions of s. 69.4 have been established by the applicants respecting each of the bankrupts and that they are entitled to an order lifting the stays effected by s. 69.3 of the BIA to permit them to continue with their action against the bankrupts. Section 69.4 provides as follows:

> **69.4** A creditor who is affected by the operation of sections 69 to 69.31 or any other person affected by the operation of section 69.31 may apply to the court for a declaration that those sections no longer operate in respect of that creditor or person, and the court may make such a declaration, subject to any qualifications that the court considers proper, if it is satisfied
>
> (a) that the creditor or person is likely to be materially prejudiced by the continued operation of those sections, or
> (b) that it is equitable on other grounds to make such a declaration.

[7] Registrar Ferron in Re Advocate Mines Ltd. (1985), 52 C.B.R.(N.S.) 277 (Ont. S.C.) sets out the following summary of the circumstances in which the courts have lifted a stay of proceedings:

> Section 49 of the Bankruptcy Act, R.S.C. 1970, c. B-3, is plain in its terms that no creditor with a claim provable in bankruptcy shall have any remedy against the property or the person of the bankrupt in respect of it, except in the manner directed by the Act.
>
> The court may, however, remove the stay of proceedings prescribed by that section in appropriate cases and has done so in the following circumstances:
>
> 1. Actions against the bankrupt for a debt to which a discharge would not be a defence.
> 2. Actions in respect of a contingent or unliquidated debt, the proof of which and valuation has that degree of complexity which makes the summary procedure prescribed by s. 95(2) of the Bankruptcy Act inappropriate.
> 3. Actions in which the bankrupt is a necessary party for the complete adjudication of the matters at issue involving other parties.
> 4. Actions brought to establish judgment against the bankrupt to enable the plaintiff to recover under a contract of insurance or indemnity or under compensatory legislation.
> 5. Actions in Ontario which, at the date of bankruptcy, have progressed to a point where logic dictates that the action be permitted to continue to judgment.

[8] Re Advocate Mines Ltd., supra, has been applied in Saskatchewan in Re Angelstad (1991), 4 C.B.R. (3d) 235 (Sask. Q.B.). The principles set out have not been changed by the amendments to the BIA which became effective November 30, 1992. Schroeder v. Schroeder (1993), 19 C.B.R. (3d) 316 (Sask. Q.B.).

[9] Principle three is clearly applicable to Blewett and FCCC and entitle the applicants to a lift of the stays respecting these bankrupts. They are necessary parties for the

complete adjudication of the matters at issue involving the other parties in the action. At least one of the other defendants has commenced his own action against Blewett alleging professional negligence. Another defendant maintains that the misrepresentations alleged by the plaintiffs were made by Blewett and FCCC. The claims against Blewett, FCCC and the other defendants are factually intertwined. To refuse to lift the stays would preclude the plaintiffs from having the bankrupts' liability determined, or at the least, where fraud is in issue, would lead to a multiplicity of proceedings. Re Wagman (1977), 23 C.B.R. (N.S.) 240 (Ont. S.C.); aff'd (1979), 28 C.B.R. (N.S.) 179 (Ont. C.A.). Shinkaruk v. Ecclesiastical Insurance Office Public Ltd. (1988), 69 C.B.R. (N.S.) 259 (Sask. Q.B.); Agricultural Credit Corp. of Saskatchewan v. Verwimp (1993), 15 C.B.R. (3d) 116 (Sask. Q.B.).

[10] In the case of Blewett, it is obvious that his evidence to the civil action as a whole is important. This is a factor that can be taken into account by the court in determining if the bankrupt is a necessary party for the complete adjudication of the matters at issue in the action. Agricultural Credit Corp. of Saskatchewan v. Verwimp, supra. Counsel should have the opportunity to examine Blewett for discovery. I am not convinced that the ability of counsel to examine him as a non-party under Rule 222A is a sufficient substitute, considering the cost implications of Rule 222A and in particular the prohibition under subsection five respecting the reading of the examination for discovery questions and answers into evidence at trial.

[11] Principle four also applies to Blewett. The fact that the insurer has given a reservation of rights letter to Blewett or that Blewett has executed a non-waiver agreement, does not disentitle the plaintiffs from relying on principle four as grounds for a lifting of the stay. I reject the submission on behalf of Blewett that the case before me is distinguishable from Dutchak Estate v. Seidle, Sask. Q.B., Q.B. 40/92 and Bankruptcy File No. 122, J.C. Yorkton and J.C. Regina, November 24, 1998, Dawson J. (as yet unreported). In that case Dawson J. lifted a stay against a bankrupt lawyer to permit the action against him to continue so that the plaintiffs could access his professional liability insurance. The nature of the insurance in that case is similar to that in the case before me. A lifting of the stay respecting the bankrupt does not in any way constitute a finding that the professional liability insurance policy proceeds are payable to the bankrupt's estate or that the insurer has no defence to a claim on the policy. That is a separate issue which may have to be determined in due course. The sole effect of the order is to permit the action against the bankrupt to continue despite his intervening bankruptcy.

[12] Principles one and two also apply to FCCC. The plaintiffs allege fraud and fraudulent misrepresentation on the part of FCCC. A discharge does not release the bankrupt from liability arising out of fraud. Section 178(1)(d) and (e) provides as follows:

> 178.(1) An order of discharge does not release the bankrupt from
>
> . . .
>
> (d) any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity;

SUPERIOR COURT OF JUSTICE
IN BANKRUPTCY AND INSOLVENCY

In the Matter of the
Bankruptcy of Brian Edward Turner of the
Town of Thornhill in the
Province of Ontario

Estate No.: 31-826976

February 6, 2006

Counsel:	Robert A. Spence	-for the Moving Parties
	Lorne S. Silver	-for the Bankrupt

Heard: January 26, 2006

Reasons

[1] The plaintiffs in Superior Court of Justice Action No. 04-BN-1839 (the "Action"), being Mayfield Adams, Jane Davis, Alzira Fernandes, Mervyn Fernandes, Judy Jackson, Lawrence Nelson, Afrose Persad and Anna Sikic and Neville Fernandes (the "Moving Parties") move for an Order under s. 69.4 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA") lifting the stay of proceedings engendered by the BIA of the Action. The motion was opposed by Brian Edward Turner (the "Bankrupt"). The Bankrupt filed no affidavit or other evidence in response to the affidavit materials of the Moving Parties. Counsel for the Bankrupt did file a letter from the Trustee in this matter, somewhat opposed to the motion. However, the Trustee did not appear at the motion, although served, and the comments of Mr. Harris in his letter of January 25, 2006, were not in affidavit form. I attach no weight to the contents of the letter. If the Trustee had wanted to oppose the motion, it should have appeared and put in evidence or argument, or both, in the usual manner.

[2] The Action claims payment from the Bankrupt on the basis of allegations that the Bankrupt was one of a group of individuals who solicited the Moving Parties to invest their funds in an offshore investment. Perhaps needless to say, the Moving Parties lost significant, if not all of their, funds on the investment, and allege that six parties, including the Bankrupt, are responsible for their losses. The affidavit of Barry Smith, sworn November 28, 2005, (the "Smith Affidavit") and filed on behalf of the Moving Parties alleges that there is fraud or misrepresentation involved, although I do not note any mention of such grounds in the prayer for relief in the Amended Statement of Claim

at Exhibit A to the Smith Affidavit. For the reasons below, however, this is not germane to my decision.

[3] Section 69.4 BIA provides that the Court may declare that the stay of proceedings under the BIA no longer operates in respect of the claim or claims of persons affected by the stay if the Court is satisfied that:

(a) the creditor making the claim is likely to be materially prejudiced by the continued operation of the stay, or
(b) it is equitable on other grounds to make such a declaration.

[4] The Moving Parties allege that, as there are a number of parties to the Action, it is necessary and proper that the stay be lifted in order that the Bankrupt be bound by the outcome of the trial of the Action, and in order that they are able to discover the Bankrupt as a party to the Action. They also argue that no good would be served by multiple trials, both from a cost perspective, and with respect to the risk of differing outcomes.

[5] Counsel for the Bankrupt argued that the stay should not be lifted for a number of reasons, the chief of which is the argument that permitting the Action to continue against the Bankrupt will somehow afford the Moving Parties an advantage over the other two creditors of the Bankrupt. Not only was this not explained by Mr. Silver (or, for that matter by Mr. Harris who makes the same point in his letter), but the very case relied upon by the Bankrupt's counsel in support of this proposition, *R. v. Fitzgibbon*, [1990] 1 S.C.R. 1005, at paragraph 22, goes on to say that this concern is addressed by providing that leave of the Court is required to proceed and that the Court may impose terms. The usual terms imposed to prevent such an unwarranted priority in execution against what might otherwise be Estate assets is to provide in the s. 69.4 BIA Order that no enforcement may take place until after the Trustee is discharged. I do not, therefore, accept Mr. Silver's argument that the Moving Parties ought to fail in the motion because to succeed will necessarily grant them an advantage or priority over other creditors.

[6] The Bankrupt also argued impecuniosity and ill health. There was no evidence whatsoever as to the Bankrupt's health. The only evidence as to his finances is in Form 65 to his Statement of Affairs. Form 65 indicates that the Bankrupt and his spouse somehow manage to live a lifestyle where their expenses of $8,649.00 per month outstrip their rather handsome income of $4,280.00 per month by some $4,369.00 per month. Whether this is argued as evidence of financial ability to defend the Action, or as evidence of being so far in the hole each month as to never be financially able to defend the Action matters not, as will be seen below.

[7] Have the Moving Parties met the burden of the test for a s. 69.4 BIA Order? In my view they have.

[8] The leading case on the test and the standard in Ontario is *Re Ma*, [2002] O.J. No. 1189 (C.A.). In *Ma*, the Court of Appeal, quoting favourably from *Re Francisco* (1995), 32 C.B.R. (3d) 29 at 29-30 (O.C.J. G.D.) finds:

> In considering an application for leave, the function of a bankruptcy court is not to inquire into the merits of the action sought to be commenced or continued. Instead, the role is one of ensuring that sound reasons, consistent with the scheme of the [BIA] exist for relieving against the otherwise automatic stay of proceedings.

[9] The burden then is to show sound reasons to lift the stay. The case law holds that *Re Advocate Mines Ltd.* (1985), 52 C.B.R. (N.S.) 277 (Ont. S.C.) is still valid, and provides a useful list of types of case which have sound reasons for lifting the stay. As in *Re Catahan*, [2003] O.J. No. 1300, the existence of sound reasons for lifting the stay will constitute material prejudice to the moving party. In the case at bar, it is clear that there are multiple defendants, and the Bankrupt is a necessary party to the complete and proper adjudication of the facts. This is within the types of situation listed in *Advocate Mines*. The decision of Ground J in *Royal Bank of Canada v. Société Générale (Canada)*, [2003] O.J. No. 5139 also supports this. At paragraph 6, His Honour finds that the jurisprudence "in this area establishes that material prejudice will be found and that the stay will be lifted …where the Bankrupt is a necessary party for the completed [sic] adjudication of the matters in an action involving other parties". At least two of the Statements of Defence in the Action plead involvement of the Bankrupt in the investment scheme at the heart of the Action. As well, as in *Catahan*, I find that the Moving Parties would be materially prejudiced if deprived of the ability to discover the Bankrupt as a party in the Action as they proceed against the other defendants. I adopt and re-iterate the analysis therein at paragraphs 15 and 16 thereof. Obtaining the evidence of the Bankrupt as a witness to the Action is not a satisfactory substitute for the rights that the Moving Parties have against the Bankrupt as a party to the Action.

[10] I also find that, given the Action as the mechanism to resolve liability against the other defendants, it would be inequitable to require the Moving Parties to rely on the summary provisions of the BIA to determine the quantum of their claim against the Bankrupt. This will add unnecessarily to the costs of the Moving Parties, and might result in inconsistent findings.

[11] I also adopt the reasoning in *Catahan* with respect to the financial ability of the Bankrupt to defend the Action. That is completely irrelevant. The test under s. 69.4 relates to the material prejudice of the Moving Parties, not the Bankrupt. This is consistent with paragraph 8 of Deputy Registrar Sproat's decision (as she then was) in *Ma*. The Bankrupt's financial circumstances are not a consideration in the within motion.

[12] Finally, the position of the Trustee should be addressed. As indicated above, it took no position at the hearing of which the Court is able to take note. However, the Action cannot proceed against the Bankrupt without the Trustee being made a party at least nominally. The Order herein shall include that the Trustee is to be made a party to the Action, but so long as it does not defend the Action or take a position therein, it shall not be liable to discovery or for costs.

[13] For the foregoing reasons, the motion is allowed. The Moving Parties are entitled to an Order permitting continuation against the Bankrupt of the Action, and the adding of the Trustee as a party thereto on the terms above. The Order shall permit the Action to continue against the Bankrupt, however, only for the purpose of establishing the Bankrupt's liability and whether or not any such liability shall survive his discharge under s. 178 BIA. No enforcement steps with respect the Action or any judgment therein, shall be taken until after the Trustee's discharge, or on further Order of this Court.

[14] With respect to costs, I see no reason why they should not follow the event. Counsel for the Moving Parties suggested $500.00 to the successful party. I find this to be reasonable. The Moving Parties are entitled to their costs, fixed at $500.00, and payable by the Bankrupt forthwith.

Scott W. Nettie
Registrar in Bankruptcy

COURT FILE NO.: 02-CL-004797
31-OR-710270
31-OR-710268
31-OR-382133
DATE: 20031210

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: BANKRUPTCIES OF LOREN KOVAL, ROMAN KOVAL, B.A.C.C. CAPITAL CORPORATION

BEFORE: GROUND J.

MOTIONS HEARD: December 5, 2003

E N D O R S E M E N T

[1] The motions now before this court are brought pursuant to section 69.4 of the *Bankruptcy and Insolvency Act* 1985, as amended, (the "*BIA*") to lift the stay of proceedings against the above noted Bankrupts in connection with an action commenced by Royal Bank of Canada ("RBC") against Société Générale (Canada) et al.

[2] The RBC action arises out of an alleged fraudulent scheme perpetrated by the Bankrupts based upon forged documents, forged endorsements and forged financial instruments in connection with a number of transactions relating to the purchase or leasing of medical equipment for the Kings Health Centre.

[3] There are a number of cross-claims and third party claims in the action involving not only the financial institutions providing funding for the subject transactions but also involving insurers and certain parties which participated in the various transactions in respect of which the alleged frauds were committed.

[4] The motions before this court also seek leave to issue third party claims and fourth party claims in the within action upon the stay having been lifted.

[5] Section 69.4 of the *BIA* provides that the court may make a declaration that the stay of proceedings under the *BIA* no longer operates in respect of the claims of persons affected by the stay if the court is satisfied:

(a) that the creditor or person making the claim is likely to be materially prejudiced by the continued operation of the stay, or

(b) that it is equitable on other grounds to make such a declaration.

[6] The jurisdiction in this area establishes that material prejudice will be found and that the stay will be lifted in circumstances where the claims against the Bankrupt are for debts which would not be released by an order of discharge or where the Bankrupt is a necessary party for the completed adjudication of the matters in an action involving the other parties.

[7] In the case at bar, the claims made against the Bankrupts all arise out of the alleged fraudulent scheme perpetrated by the Bankrupts and accordingly, none of such claims would be released by an order of discharge. In addition, it is abundantly clear that the evidence of the Bankrupts will be crucial in the action to establish the factual framework surrounding the various transactions which are alleged to be part and parcel of the fraudulent scheme and, accordingly, there cannot be a completed adjudication of the issues in the action as among the other parties without the production of documents in the possession of, and the discovery of, the Bankrupts.

[8] Accordingly, an order will issue lifting the stay pursuant to section 69.3 of the BIA against the Bankrupts BACC Capital Corporation, Roman Koval and Loren Koval in connection with all claims brought in the RBC action and granting leave, to the extent required, to commence the third party claims and fourth party claims referred to in the motions now before this court.

[9] Counsel are to submit draft orders to me based upon the forms of orders submitted to the court today by counsel for CitiCapital Limited.

Ground J.

Released: December 10, 2003

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Howell v. Machi,* 2017 BCSC 1806

Date: 20171012
Docket: M147984
Registry: Vancouver

Between:

Veronica Howell

Plaintiff

And

Leon Anthony Machi, John Doe, Richard Roe and Insurance Corporation of British Columbia

Defendants

And

Insurance Corporation of British Columbia

Third Party

Before: The Honourable Madam Justice MacNaughton

Reasons for Judgment

Counsel for the Plaintiff:	J. Rice H. MacDonald
The Defendant Leon Anthony Machi	In Person (for part)
Counsel for Insurance Corporation of British Columbia	D. Griffin M. Sull (for part) J. Kwang (for part)
Place and Date of Trial/Hearing:	Vancouver, B.C. April 24-28, May 1-5 and 8-12, 2017
Place and Date of Judgment:	Vancouver, B.C. October 12, 2017

Table of Contents

Introduction

[1] Veronica Howell, who was then 22, was injured in a hit-and-run accident at about 6:15 p.m. on January 20, 2014 (the “Accident”). She was crossing the eastbound lanes of East 1st Avenue, in the block west of the intersection at Commercial Dr., in Vancouver. She jaywalked between eastbound cars which had stopped for the red light at Commercial Dr. Westbound traffic was also stopped for the red light.

[2] Ms. Howell had safely navigated the two lanes of stopped eastbound traffic, but as she started to cross the clear westbound lanes, she was struck by a black pickup truck which was travelling eastbound in the westbound lanes. Ms. Howell was thrown up onto the hood of the truck, before landing on the ground unconscious and bleeding.

[3] To access the left turn lane on East 1st at Commercial Dr., the driver of the pickup truck must have travelled, at least in part, the wrong way in the westbound lanes on East 1st, and over a yellow painted traffic island.

[4] The driver of the pickup truck did not stop after striking Ms. Howell. He drove up the dedicated left turn lane and then, instead of turning left, turned right in front of the two lanes of stopped eastbound traffic, pulled over for a moment, then sped off.

[5] The parties agree that Ms. Howell suffered serious life-altering injuries in the Accident; one witness thought she had been killed. Her injuries included a skull fracture to the petrous aspect of her temporal bone and a complicated mild traumatic brain injury. Ms. Howell now has chronic pain, or a Somatic Symptom Disorder, cognitive issues, and an aggravation of certain pre-existing conditions. Her life has changed dramatically.

[6] Ms. Howell alleges that the truck which struck her was a 2013 GMC Sierra, BC License Plate No. HG9 959 (the “Sierra”), owned and driven by Leon Machi, whose driver’s license was suspended at the time.

[7] Mr. Machi denies that his Sierra struck Ms. Howell and/or that he was driving it.

[8] Ms. Howell filed and served her notice of civil claim naming as defendants both Mr. Machi and an unknown driver and owner of the vehicle. The Insurance Corporation of British Columbia ("ICBC") was added as a nominal defendant with respect to the claim against the unidentified owner and driver. ICBC filed a statutory third party notice with respect to Mr. Machi. In the event that I find that Mr. Machi was the driver involved in the Accident, ICBC has denied liability to indemnify Mr. Machi as he was driving without a valid BC driver's license at the time of the Accident. ICBC pursued its right to contest Mr. Machi's liability and the quantum of Ms. Howell's claims against him.

[9] Despite the issues on which the parties agree, they have widely disparate views of Ms. Howell's residual capacity and how her future will unfold.

[10] Ms. Howell is seeking non-pecuniary damages, special damages, damages for past loss of income, damages for loss of the capacity to earn income in the future, an award for the cost of future care, and her costs.

[11] On April 7, 2017, just before the commencement of this trial, Mr. Machi filed an assignment in bankruptcy.

[12] Mr. Machi, who was self-represented, only attended part of the trial. He was there for most of the first three days but, after being cross-examined on April 26, 2017, did not reappear. He advised me that he did not intend to call any witnesses but wished to cross-examine Ms. Howell. Ms. Howell gave evidence over a number of days, but Mr. Machi never attended to cross-examine her.

The Issues

[13] I must determine the following issues:

Procedural Matters

a) Should the stay of proceedings under ss. 69.3(1) and 70(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 [*BIA*] be lifted?

b) Should Ms. Howell be permitted to amend her notice of civil claim to claim punitive damages?

Liability Issues

c) Was the Sierra involved in the Accident, and was Mr. Machi the driver of the Sierra?

d) Was Ms. Howell contributorily negligent? If so, to what extent?

Quantum Issues

e) What is Ms. Howell's long-term medical prognosis, and will her current condition improve?

f) What is an appropriate quantum of damages and what impact do Ms. Howell's pre-existing mental health conditions have on that quantum? Of particular significance to the quantum of Ms. Howell's damages are the issues of:

(i) the degree to which her lifetime income earning capacity has been affected by her injuries;

(ii) the extent of her ongoing care needs; and

(iii) whether she has mitigated her damages.

[14] Before turning to liability for the Accident and the quantum of Ms. Howell's damages, I will deal with the two procedural matters.

Should the stay of proceedings under ss. 69.3(1) and 70(1) of the Bankruptcy and Insolvency Act be lifted?

[15] At the commencement of trial, I heard Ms. Howell's submissions with respect to lifting the statutory stay of the proceedings against Mr. Machi in order to permit Ms. Howell to continue her action against him. I lifted the stay. These are my reasons for that decision.

[16] Section 69.3 of the *BIA* effects a stay of proceedings against a bankrupt. Section 69.4 of the *BIA* permits a creditor, or a person affected by the stay, to apply

for a declaration that the stay no longer operates in respect of them. It provides two bases for the granting of such a declaration: a) the applicant is likely to be materially prejudiced by the continuation of the stay, or b) there are other equitable grounds on which to make such a declaration.

[17] Mr. Machi's trustee and ICBC did not object to the lifting of the stay. Although he was in attendance during Ms. Howell's submissions, and was given an opportunity to make his own, Mr. Machi made none.

[18] For the reasons which follow, I was satisfied that Ms. Howell would be materially prejudiced if the stay was not lifted.

[19] First, the issue of fault for the Accident must be decided if Ms. Howell is to obtain compensation from any insurance policies which might be available to her, including a third party liability policy or a first party hit-and-run or underinsured motorist policy.

[20] Second, Mr. Machi declared bankruptcy just weeks before the commencement of the trial. By then, preparation for the trial was almost complete. The parties had completed disclosure and examinations for discovery, retained a number of experts and served their reports, and attended a trial management conference. ICBC and Mr. Machi had filed trial adjournment applications which had been denied. Final trial preparation was all that remained.

[21] Third, I was satisfied that delay in determining the issues in this case might aggravate the psychological injuries Ms. Howell alleged as a result of the Accident and cause her financial hardship. This was, in part, why the trial adjournment applications were denied.

[22] Even if I had not concluded that there would have been material prejudice to Ms. Howell from not lifting the stay, I would have determined that there were other equitable grounds on which to do so.

[23] In Houlden, Morawetz and Sarra's *Annotated Bankruptcy and Insolvency Act*, 2016-17 edition (United States: Thomson Reuters, 2016) at 486, the authors suggest that the usual practice on applications to lift stays in motor vehicle actions is to grant leave to the injured party to bring or continue an action, and to permit an application to be made to add the trustee as a party defendant to the action. In this case, although initially indicating an intention to appear, the trustee did not appear to seek an order adding it as a defendant, and I did not make that order.

[24] Lifting stays of proceedings in motor vehicle actions involving bankrupts should rarely be refused as declining to do so might frustrate the timely and efficient determination of such cases, thereby frustrating access to a defendant's available insurance. The *BIA* should not interfere with a plaintiff's right to access the proceeds of insurance policies which may be available to cover personal or property damages and would not, in any event, be available to satisfy creditors.

Should Ms. Howell be permitted to amend her claim to seek punitive damages?

[25] At the commencement of trial, and while Mr. Machi was in attendance, Ms. Howell's counsel served an application and supporting materials, seeking leave to amend her notice of civil claim to seek both aggravated and punitive damages pursuant to Rules 1-3, 6-1 and 6-1(8) of the *Supreme Court Civil Rules* (the "Amendment").

[26] As set out in the application, the grounds for the Amendment were:

> a) At the time of the Accident, Mr. Machi had been prohibited from driving for 12 months pursuant to ss. 98 and 99 of the *Motor Vehicle Act,* RSBC 1996, c. 318 [*MVA*];
>
> b) Prior to the Accident, Mr. Machi had been prohibited from driving five times and had three convictions for Driving While Prohibited pursuant to ss. 89(1), 98 and 99 of the *MVA;*
>
> c) Mr. Machi struck Ms. Howell and fled the scene without stopping to render aid or determine Ms. Howell's condition in violation of s. 68(1) of the *MVA*; and
>
> d) Mr. Machi illegally and negligently pulled out and accelerated into the oncoming westbound lanes on East 1st Ave. to get around the stopped traffic before straddling the westbound traffic lane and the painted

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Panorama Parkview Homes Ltd. (Re),* 2017 BCSC 2071

Date: 20171115
Docket: B150826
Registry: Vancouver

IN THE MATTER OF THE BANKRUPTCIES OF:
PANORAMA PARKVIEW HOMES LTD. AND
690174 B.C. LTD.

Before: The Honourable Mr. Justice Bowden

Reasons for Judgment
re: Garcha Application to Lift Stay

Counsel for Applicants:	G. A. Phillips
Counsel for Trustee:	R. Millar
Place and Date of Trial/Hearing:	Vancouver, B.C. October 25, 2017
Place and Date of Judgment:	Vancouver, B.C. November 15, 2017

[1] 690174 B.C. Ltd. and Panorama Parkview Homes Ltd., (the “Bankrupt Corporations”), and Jaswant Sangha were involved in a series of joint ventures formed for the purpose of subdividing and selling real property. Mr. Sangha was the sole shareholder, director and officer of the Bankrupt Corporations. The proposed undertaking attracted a number of investors.

[2] In April 2014, a number of those investors, (the “Grewal Group”), commenced civil proceedings against Mr. Sangha, the Bankrupt Corporations and others alleging various forms of wrongful conduct by Mr. Sangha and the Bankrupt Corporations.

[3] In February 2015, other investors, Daljit Garcha and Jaswinder Garcha, (the “Garchas”), commenced proceedings against Mr. Sangha, the Bankrupt Corporations and others also alleging various forms of wrongful conduct by Mr. Sangha and the Bankrupt Corporations.

[4] On August 24, 2015, Mr. Sangha made an assignment into bankruptcy and on April 21, 2016, the Bankrupt Corporations were assigned into bankruptcy by the Trustee. Their estates are currently being administered by Crowe MacKay & Company as Trustee.

[5] Pursuant to s. 69.1 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, (the “BIA”), the proceedings against Mr. Sangha and the Bankrupt Corporations were stayed.

[6] On April 8, 2016 during an application before Kirkpatrick, JA in the Court of Appeal, the Trustee and the Grewal Group consented to an order lifting the stay of proceedings in respect of Mr. Sangha. In a recently released decision, 2017 BCSC 2064, this Court found that the Trustee had also agreed with the Grewal Group to lift the stay of proceedings in respect of the Bankrupt Corporations. As a result, the stay of proceedings has been lifted in respect of the proceedings by the Grewal Group against Mr. Sangha and the Bankrupt Corporations.

[7] In *Sangha (Re),* 2016 BCSC 1830, the Honourable Madam Justice B.J. Brown considered an application by the Garchas to continue their action against Mr. Sangha and the Bankrupt Corporations. She decided that as the Trustee had entered a consent arrangement with the Grewal Group to advance their litigation, it would be inequitable if the Grewal Group could advance claims to specific assets while the Garchas are precluded from doing so. (para. 31). She ordered that the Garchas be permitted to continue their proceedings against Mr. Sangha on the same terms as the Grewal Group. She also granted permission to the Garchas to apply to lift the stay of proceedings against the Bankrupt Corporations at the same time as the Grewal Group.

[8] Following an application by the Grewal Group to lift the stay of proceedings against the Corporation, in this application, the Garchas seek a declaration that the stay of proceedings no longer applies to their action against the Bankrupt Corporations.

[9] Under s. 69(4) of the *BIA*, a stay of proceedings may be lifted by the court if it is satisfied that the applicant is likely to be materially prejudiced by the continued operation of the stay or that it is equitable on other grounds to make such a declaration.

[10] In *Re Advocate Mines Limited*, (1984), 52 C.V.R. (N.S.) 277 (Ont. S.C.) the court provided examples of when a stay has been lifted by a court at page 278:

> 1. Actions against the bankrupt for a debt to which a discharge would not be a defence.
> 2. Actions in respect of a contingent or unliquidated debt, the proof of which and valuation has that degree of complexity which makes the summary procedure prescribed by s. 95(2) of the B.I.A. inappropriate.
> 3. Actions in which the bankrupt is a necessary party for the complete adjudication of the matters at issue involving other parties.
> 4. Actions brought to establish judgment against the bankrupt to enable the plaintiff to recover under a contract of insurance or indemnity or under compensatory legislation.

5. Actions in Ontario which, at the date of bankruptcy, have progressed to a point where logic dictates that the action be permitted to continue to judgment.

[11] If the applicant satisfies the court that one or more of the grounds referred to in *Advocate Mines* is present and that the applicant is likely to be materially prejudiced or that it is equitable on other grounds to make such a declaration then a court will lift the stay of proceedings. (*In the Matter of the Proposal of Maple Homes Canada Ltd*., 2000 BCSC 1443, at para. 29)

[12] In my view the applicants have satisfied the burden of establishing that their action against the Bankrupt Corporations is for a debt to which a discharge would not be a defense. In particular the applicants' pleadings recite facts that if established will show deceit on the part of Mr. Sangha and the Bankrupt Corporations who he alone represented. The alleged deceit if proven would amount to dishonest or fraudulent breach of trust by Mr. Sangha and the Bankrupt Corporations and thus come within the wording of s. 178(1)(d) of the *BIA*.

[13] In addition, I am satisfied that the claim by the Garchas against Mr. Sangha and the Bankrupt Corporations involves sufficient complexity to merit the procedural advantages available in an action rather than the summary procedures available under s. 135 of the *BIA*.

[14] Further, I consider that the Bankrupt Corporations are necessary parties for the complete adjudication of the matters at issue. While proceedings may continue against Mr. Sangha, because of his close relationship with the Bankrupt Corporations in their dealings with the joint ventures and the various investors, including the Garchas, their action should proceed against all three parties to ensure that all matters in issue can be decided.

[15] There are also equitable grounds to lift the stay of proceedings.

[16] As noted by Madam Justice Brown in *Sangha (Re)*, as this Court has lifted the stay of proceedings by the Grewal Group against the Bankrupt Corporations, it would be inequitable to let the Grewal Group advance their claims against the Bankrupt Corporations while the Garchas continue to be precluded from doing so.

[17] Further, as noted in *Krishnatheva (Re)*, (2000) O.J. No. 3552, the fact that there are numerous co-defendants in the Garchas' action is an equitable ground to lift the stay.

[18] Also, there is some evidence that Mr. Sangha, who is the sole controlling mind of the Bankrupt Corporations has attempted to delay proceedings. In particular, he was not co-operative in attending an examination for discovery until this Court ordered that it take place on a specified date.

[19] In the end result, pursuant to s. 69.4 of the *BIA*, the stay of proceedings under s. 69(1) no longer applies in respect of the claim by the Garchas against the Bankrupt Corporations under action number S151725, provided that, in the event the Garchas obtain judgment against the Bankrupt Corporations, all further proceedings in respect of the judgment are stayed and no further proceedings, including any execution proceedings, may be commenced without leave of this court.

[20] As the stay of proceedings has been lifted in respect of the proceedings by the Garchas against the Bankrupt Corporations, the Trustee seeks the direction of the Court in relation to its obligation to defend claims against the assets in the estates of the Bankrupt Corporations. The Trustee has reported to the court that on September 1, 2016, the Inspectors in the bankruptcy resolved that if the stay of proceedings were lifted as against the Bankrupt Corporations, the Trustee was authorized to fully defend all claims against their estates and assets and to appoint counsel. Accordingly, the Trustee has the necessary authority under the *BIA* to defend the proceedings against the Bankrupt Corporations. Based on that resolution this Court confirms the authority of the Trustee to defend those actions and directs

that its reasonable costs in doing so be compensated for out of the estates of the Bankrupt Corporations.

[21] The application by the Garchas to stay the bankruptcy proceedings are adjourned generally.

[22] No award of costs is made.

"Bowden J."