CANADA
PROVINCE OF NOVA SCOTIA
COURT NO. B 28149

IN THE SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY

Citation: Brookville Carriers Flatbed GP Inc. v Blackjack Transport Ltd., 2005 NSSC 234

Date: August 19, 2005
Docket: B 28149 & S.H. 240198
Registry: Halifax

IN THE MATTER OF THE PROPOSAL OF
JASON WAYNE JENKINS

- and -

2005 S. H. 240198

IN THE SUPREME COURT OF NOVA SCOTIA

BETWEEN:

BROOKVILLE CARRIERS FLATBED GP INC.

PLAINTIFF

- and -

BLACKJACK TRANSPORT LIMITED, 4157371 CANADA INC., CANADIAN AMERICAN SPECIALIZED (C.A.S.) INC., CANADIAN AMERICAN SPECIALIZED (C.A.S.) NOVA SCOTIA LTD., DIMENSIONALLY SPECIALIZED CARRIERS INC., TRANSPORTATION LOGISTICS & LEASING LTD., WAYNE JENKINS, JASON JENKINS, and DAVID BRADLEY MACDONALD

DEFENDANTS

D E C I S I O N

Registrar:	Richard W. Cregan, Q.C.
Heard:	July 7, 2005
Counsel:	Colin D. Piercey for the applicant Brookville Carriers Flatbed GP Inc. Richard A. Bureau for Jason Wayne Jenkins

Introduction

[1] The Plaintiff in this action is a trucking company specializing in oversized loads. Jason Wayne Jenkins ("Mr. Jenkins"), one of the Defendants, was once its Operations Manager. The Plaintiff alleges that Mr. Jenkins along with the other individual Defendants and through the corporate Defendants conspired to defraud it of profits on certain oversized trucking loads, to charge unauthorized commissions and other unauthorized charges and to divert corporate opportunities from it to the various corporate Defendants which were owned and controlled by the individual Defendants. This action was commenced on February 7, 2005.

[2] On May 18, 2005, Mr. Jenkins filed a proposal under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, (the "*Act*"). This resulted in an automatic stay of proceedings, particularly of this action, against Mr. Jenkins, by the operation of subsection 69.1(1) of the *Act.* The Plaintiff filed a proof of claim, but the Trustee ruled that the claim has not been liquidated and is contingent. The Plaintiff was not allowed to vote at the creditors' meeting. The creditors' meeting approved the proposal. There is an

application for approval of the proposal now pending before this Court.

[3] In this application, the Plaintiff asks, relying on subsection 69.4 of the *Act,* for a declaration that the automatic stay no longer operates with respect to the claim in this action against Mr. Jenkins.

[4] It is convenient to quote the following paragraphs of the Plaintiff's Amended Statement of Claim:

> 17 Beginning in or about 1998, the individual Defendants, conspired to defraud Brookville of its profit on certain oversized trucking loads, to charge unauthorized commissions and other unauthorized charges on certain oversized trucking loads, and to divert corporate opportunities away from Brookville to various corporate Defendants which were owned and controlled by the individual Defendants.
>
> 18 In particular, Jason Jenkins with the knowledge and assent of Wayne Jenkins, set a price below fair market value for Brookville's trucking services for oversized loads and entered into contracts for the shipment of those oversized loads at below fair market value with the corporate Defendants.
>
> 19 The corporate Defendants, with the knowledge and assent of Jason Jenkins, Wayne Jenkins, and David MacDonald in turn charged a price to the ultimate customer for shipment of those certain oversized trucking loads at a price higher than that charged by Brookville. This resulted in Brookville being deprived of a profit it could otherwise have obtained, and that profit being wrongly diverted into the hands of the corporate Defendants owned and controlled by Wayne and Jason Jenkins and / or their co-conspirators.
>
> 20 Furthermore, Jason Jenkins with the knowledge and assent of Wayne Jenkins, and to the knowledge of David MacDonald authorized the payment of commissions averaging 4% of the

amounts charged to clients of Brookville and payable as a referral fee from Brookville to TLL (*Transportation Logistics & Leasing Ltd.*). Those referrals did not come from arms length third parties and therefore the commissions paid were unauthorized and improper.

21 Furthermore, Jason Jenkins, with the knowledge and assent of Wayne Jenkins, and the knowledge of David MacDonald charged certain additional unauthorized charges on certain oversized trucking loads.

and as well the following sections from the *Act:*

69.1(1) - Subject to subsections (2) to (6) and section 69.4 and 69.5 on the filing of a proposal under subsection 62(1) in respect to an insolvent person,

(a) no creditor has any remedy against the insolvent person or the insolvent person's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy, until the trustee has been discharged or the insolvent person becomes bankrupt.

69.4 - A creditor who is affected by the operations 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.

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 or, in the Province of Quebec, as a trustee or administrator of the property

of others;

(e) any debt or liability for obtaining property by false pretenses or fraudulent misrepresentation.

[5] The Plaintiff's position is that the claims against Mr. Jenkins concern matters described in paragraphs (d) and (e) of subsection 178(1) quoted above. Any judgment resulting from these claims would not be discharged or otherwise affected by Mr. Jenkins' proposal proceedings and by any bankruptcy proceedings should the proposal fail. Therefore, it should not be held back in pressing its claims against Mr. Jenkins along with all the other Defendants. To do so would likely result in material prejudice to the Plaintiff or be inequitable. These are the tests laid out in section 69.4.

Law

[6] Section 69.4 has been recently interpreted by the Ontario Court of Appeal in *Re Ma* (2001), 24 C.B.R. (4th) 68. This case concerned the creditor of an undischarged bankrupt bringing a motion for an order lifting the stay of proceedings to permit the commencement of a fraudulent misrepresentation action against the bankrupt.

[7] The central issue was whether an applicant is required to establish a *prima facie* case for the proposed action. This question was earlier reviewed in *Re Francisco* (1995), 32 C.B.R. (3rd) 29 (Ont. Bktcy.), affirmed at (1996), 40 C.B.R. (3rd) 77 (Ont. C.A.)

[8] In that case a *Construction Lien Act* proceeding involved an action against a director who became bankrupt. Leave was sought to proceed against the bankrupt. Adams J found that the pleadings were sufficient to bring the claim arguably within s.178(1)(d) and lifted the stay.

He said at page 30:

> 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 <u>reasons</u>, 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. (underlining added)

[9] In *Re Ma* this statement was affirmed.

[10] The point is also expressed using a different adjective to describe the reasons required in *Wychreschuk v. Sellors* (1988), 71 C.B.R. (N.S.) 37 (Man. Monnin J.) in paragraph 5:

> In order for leave to be granted, an applicant must demonstrate to

> the court that there exits compelling reasons to permit an action either to commence or proceed. (underlining added)

[11] The practical result of these authorities is that the applicant in a section 69.4 application is not required to prove a *prima facie* case, or actually prove any facts respecting the case, rather it is for the applicant to satisfy the court either that it is likely to be materially prejudiced by the stay or that there are other equitable grounds for lifting it.

[12] What does the Plaintiff say about how the stay is prejudicing it and about the equitable grounds for lifting the stay?

[13] First, it says that its claim is framed so that, if successful, any judgment resulting will not be discharged by the proposal or other bankruptcy proceedings, being of the nature covered by paragraphs 178(1)(d) or (e). Subsection 62(2) speaking of the effect of a proposal concludes in these words:

> "but does not release the insolvent person from the debts and liabilities referred to in section 178, unless the creditor assents thereto"

No such assent has been or is intended to be given. What it is saying is that

since judgment would stand alone and not be affected by proceedings under the *Act* it should be free to pursue it as well as the remedies which follow from it.

[14] Second, it says that the action involves several other defendants not subject to the *Act.* To have to proceed against them without also now proceeding against Mr. Jenkins is, simply put, a nuisance. However, it is more than that, it is prejudicial to the proper conduct of the case. Discovery proceeding will be affected. Mr. Jenkins cannot be discovered as a party, but only as an outside witness. More on this is considered elsewhere. If the Plaintiff has to wait until the proposal is performed which will take more than 4 years, it will have the expense of a second trial, the possibility of inconsistent findings and all the practical troubles of a trial delayed for several years.

[15] Third, it says that the case is so complex that the claim cannot be properly disposed of through the normally summary proceeding of the Bankruptcy Court. It requires a trial.

<u>Evidence</u>

[16] The Plaintiff filed an affidavit by its counsel, Mr. Piercey, outlining the relevant procedural events which are summarized above. It also filed minutes of the creditors' meetings and information regarding a corporate Defendant from the website of the Registry of Joint Stock Companies. However, it did not file any material or otherwise present any evidence to substantiate any of the allegations in the Statement of Claim. In effect, it presented no evidence regarding the merits of the claim.

[17] In contrast Mr. Jenkins filed two affidavits which do address the merits, the intent being to convince the court that he did not commit any fraudulent acts which might bring into application paragraphs 178 (1)(d), or (e). This attacks the principal submission of the Plaintiff that the claim in the action will survive proceedings under the *Act*.

[18] He asserted that his relations with the other individual Defendants were known to some seventeen senior employees and officers of the Plaintiff. As well, he gave commentary on the reasonableness of the amounts paid to the Plaintiff respecting transactions which may be the subject matter of the alleged fraud. He further stated that he did not defraud the Plaintiff nor

conspire with the other individual Defendants to defraud it. He said that his activities were reviewed at monthly meetings of the staff of the Plaintiff. No complaints were raised at these meetings.

[19] In cross examination he admitted that he looked after the incorporation of the Defendant Blackjack Transport Limited, which allegedly was a vehicle used to effect the alleged frauds, on the instruction of the Defendant David Bradley MacDonald. He was named an officer and director, but he said this was a mistake on the part of the incorporating solicitor which was now being corrected. He said he was not a shareholder of this company.

[20] I do not think that this evidence, being of the merits of the claim, needs to be considered by me in disposing of this application. Fraud must be proved with great care. There is authority that in applications before a registrar in bankruptcy which normally are conducted in a summary way, as is this one, except in the clearest of cases, findings of fraud should not be made. Such matters should proceed by way of a trial. See *Re Schnare* (1991), 15 C.B.R. (3rd) 255 (N.S., Davison J.).

[21] However, more to the point, it is established in *Re Ma* that an application under section 69.4 is not to consider the merits of the case. Therefore, any submissions by Mr. Jenkins based on his evidence as contained in his affidavit or cross examination thereon as to what he did or did not do is not really germane to what I must decide.

[22] I must, however, recognize the comment in paragraph 3 of the Court of Appeal decision in *Re Ma* which I quote:

> While the test is not whether there is a *prima facia* 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.

[23] I do not see that any evidence was presented which affects whether there are sound reasons for lifting the stay. The attempt was to put significant doubt before the court as to whether Mr. Jenkins has done anything fraudulent. As stated before, it is beyond the scope of this application to make any finding in this regard. There is nothing before me on which I can make any determination as to the prospects of success of the action.

[24] There is nothing before me to suggest that the case is not being pursued seriously. It raises great risks not just for the Defendants but also for the Plaintiff particularly considering the consequences which may fall on a plaintiff who fails to substantiate the fraud he has alleged.

[25] It is, however, not for me to otherwise make any assessment of the merits of the case or the ability of the Plaintiff to make a case or the Defendants to defeat it.

Pleading Fraud

[26] Mr. Bureau made a strong submission that the Statement of Claim may not be sufficiently rigorous in alleging fraud so as to substantiate that the claims are of the nature described in paragraphs 178(1)(d) or (e). If this is the case, then the Plaintiff's submission that the claims survive the proposal or any other proceeding under the *Act* has no foundation. I think I must explain why I do not accept it.

[27] He relies on the reasoning in *Canada Deposit Insurance Corp. v Prisco*, (1994), 29 C.B.R. (3d) 157 (Alberta Q.B.). This was a claim by the Plaintiff

against several directors of the Northland Bank presumably for reimbursement of the money the Plaintiff had to pay to depositors of the bank allegedly because of the fraud of its directors.

[28] One of the directors, Mr. Rix, had filed a proposal. He sought a declaration that the claims against him were stayed by the *Act.* The Plaintiff sought a declaration that the claims were not released by the proposal, and that no leave was required in bringing the action against Mr. Rix or, if required, that it be granted, *nunc pro tunc*.

[29] It was argued for Mr. Rix that the requirement of fraud in paragraph 178(1)(d) or (e) had not been properly pleaded and therefore that the action could not be sustained against Mr. Rix. The court accepted this submission, found the pleading to be insufficient and dismissed the action.

[30] Rule 115 of the Alberta Rules of Court provides:

> In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default or undue influence, particulars (with dates and items, if necessary) shall be stated in the pleadings.

[31] The corresponding Rule in the Nova Scotia Rules of Civil Procedure is Rule 14.12 (1)(a)

> (1) Subject to paragraph (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded, including
>
> (a) particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies ...

[32] The task is then to look at the paragraphs in the Statement of Claim quoted above. Do they meet the requirements of this rule? Unfortunately the paragraphs in the Statement of Claim against Mr. Rix are not available for comparison.

[33] The wording of both rules is similar, except the Alberta Rules parenthetically use the phrase "(with dates and items, if necessary)". I suspect that these words do not add to the rule, but say what is in any event implied. Forsyth J. referred to a very thorough discussion by Lutz J. of the same court in *Pepsi-Cola Canada Inc. and Pizza Hut Inc. v P.M. Foods Ltd., Roach, Malloy, Dietrich and Smith* (1985), 61 A.R. 340, particularly paragraphs 128 to 136. Most to the point is the following quotation at paragraph 130, from *Lawrance v Norreys* (Lord) (1890), 15 App. Cas. 210 where at p. 221 Lord Watson said:

> 'The ordinary rule of pleading applicable to cases of fraud, was thus expressed by Earl Selborne in Wallingford v. Mutual Society (1880), 5 App. Cas. 685, at p. 697, 50 L.J.Q.B. 49: "General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any court ought to take notice." It is not sufficient compliance with the rule to state facts and circumstances which merely imply that the defendant, or some one for whose action he is responsible, did commit a fraud of some kind. There must be probable, if not necessary, connection between the fraud averred and the injurious consequences which the plaintiff attributes to it; and if that connection is not sufficiently apparent from the particulars stated, it cannot be supplied by general averments. Facts and circumstances must in that case be set forth, and in every genuine claim are capable of being stated, leading to a reasonable inference that the fraud and the injuries complained of stood to each other in the relation of cause and effect.'

[34] Does the Statement of Claim, particularly paragraphs 17 to 21, stand up to these requirements so that Mr. Jenkins can know the case he has to meet?

[35] The details of specific transactions are not provided, but the kind of transactions are described. The necessary documentation will be found with the discovery of documents. The details will be worked out. Mr. Jenkins should be reasonably able to identify the transactions. The alleged conspiracy is described. The evidence given by Mr. Jenkins in his affidavit and cross examination on it at the hearing made it clear that he knows basically what the Statement of Claim is about. He simply denied that his actions can be characterized as fraudulent.

[36] These paragraphs are not simply general averments of fraud. They are carefully thought out descriptions of alleged series of events which, if proved with the detail underlying them, will show "a probable, if not necessary, connection between the fraud averred and the injurious consequences which the Plaintiff attributes to it". For the purposes of this application at least, I think that the pleadings are adequate to identify the subject matter of the action, and to characterize the claims as of the kind referred to in subsection 178(1). They comply sufficiently with Rule 14.12(1) and with Lord Watson's comments

[37] I therefore do not think that it can be argued that the Statement of Claim is defective so as to conclude that it does not form an adequate substantiation that this is a case which must be allowed to proceed.

Discovery of Mr. Jenkins

[38] The Plaintiff says it will be prejudiced because Mr. Jenkins will not be available for discovery as a party, but only as a witness. Mr. Jenkins stated in his first affidavit that he would be available for discovery and interrogatories, and to appear as a witness. He is also prepared to provide

and disclose all documentation he has in his possession. Given this the only apparent difficulty is the limitation in Rule 18.14(b) respecting the use of a deposition. When the deponent is a party, it can be used "for any purpose by an adverse party". This will eliminate the ability of the Plaintiff to use the deposition as evidence against the other Defendants. There is certainly a potential for prejudice on this point.

Conclusion

[39] I am satisfied that the Plaintiff will be materially prejudiced by the continuation of the stay. The pleadings satisfactorily make out that the claim relates to matters described in subsection 178(1). If proven they survive bankruptcy. No significant evidence was presented which suggested there was little prospect of success. Not being able to proceed against Mr. Jenkins will cause serious problems with discovery, considerable delay in eventually bringing the action forward against him, and all the problems with having a second trial on the same set of facts. As well, the Bankruptcy Court summary procedures are inadequate to properly deal with the complications of this action.

[40] Mr. Bureau's submissions, though well put, regarding the sufficiency of the Statement of Claim respecting fraud, do not convince me otherwise. Mr. Jenkins' offer to present himself as a non party discovery witness, though showing a genuine intent to be helpful, falls short of what the Plaintiff should fairly have available.

[41] There are "sound reasons" and "compelling reasons" why the Plaintiff should be able to proceed against all the Defendants, including Mr. Jenkins, in the same trial.

[42] A declaration will issue that the stay of proceeding under subsection 69.1(1) of the *Act* no longer operates in respect of the Plaintiff.

[43] If costs are sought, I shall hear the parties.

R.

Halifax, Nova Scotia
August 19, 2005