

SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY

Citation: *Witch's Glen Gold Inc. (Re)*, 2015 NSSC 238

Date: 20150722

Docket: Hfx No. 432287

Registry: Halifax

In the Matter of the Bankruptcy of Witch's Glen Gold Inc.

Decision

Judge: The Honourable Justice Gerald R. P. Moir

Heard: June 25 and July 22, 2015, in Halifax, Nova Scotia

Transcribed and released on: August 18, 2015

Counsel: John O'Neill, for Witch's Glen Gold Inc.
D. Bruce Clarke, QC, for PricewaterhouseCoopers Inc.
Pamela J. Clarke, for Mr. Furlotte

Moir J. (Orally):

[1] Mr. Furlotte applied for a bankruptcy order against Witch's Glen. Registrar Cregan heard the application last January and issued a decision in March allowing the application. Accordingly, he issued a bankruptcy order. Witch's Glen appealed to this court. Mr. Furlotte moved for security for costs.

[2] The motion was argued before me on June 25, 2015. Mr. Furlotte relied on Rule 45 – Security for Costs. During oral arguments, I questioned whether this Rule could apply to an appeal from the Registrar to the Supreme Court in Bankruptcy and Insolvency.

[3] Counsel provided me with helpful briefs on that subject.

[4] Neither the *Bankruptcy and Insolvency Act* nor the *General Rules* under that statute provide for security for costs. The remedy becomes available, if at all, through the incorporation of local procedure by General Rule 3. See *Re Towers Marts & Properties Ltd.* (1968), 11 C.B.R. (N.S.) 175 (O.S.C.).

[5] Rule 45 is limited by its scope rule to “a party who defends or contests a claim”. Rule 45.01(1) reads:

This Rule provides a remedy for a party who defends or contests a claim and will experience undue difficulty realizing on a judgment for costs if the defence or contest is successful.

“Defends ... a claim” connotes Rule 4 – Action as does, “if the defence ... is successful”. And, “contests ... a claim” connotes Rule 5 – Application as does, “if the ... contest is successful.” See Rules 4.05, 5.04, 5.08, and 5.11. This is not an action or an application.

[6] Rule 7 – Judicial Review and Appeal covers judicial review in Rule 7.03 to 7.11, *habeas corpus* in 7.12 to 7.18, and appeals in 7.19 to 7.25. None of these Rules provide for defending a claim or contesting a claim. On appeals, the originating party is referred to as one who brings an appeal, e.g. Rule 7.19(1), and the other is simply referred to as a respondent. The Court of Appeal has its own rule on security for costs: Rule 90.42.

[7] One of the requirements for security for costs under Rule 45 is “the party who makes a motion for the order has filed a notice by which the claim is defended or contested”. That only describes a person who defends an action (including a counterclaim, a crossclaim, or a third party claim) or who contests an application (or a counter application or cross application). Mr. Furlotte cannot bring himself

within the requirement of Rule 45.02(1)(a). He files no notice by which a claim is defended or contested.

[8] The text of Rule 45.02(1)(a) fits within the textual context of the entire Rules and the distinction the text maintains between defending an action, contesting a claim, and being a respondent to a judicial review, *habeas corpus*, or appeal.

[9] In my view, this fits with a choice to allow security for costs in original proceedings but not on judicial review or appeal. The latter account for a significant portion of the work of the court. For judicial review, see the steady flow of reported decisions. For appeal, see the nearly one hundred statutory provisions for appeals to this court.

[10] Rule 45 is to be interpreted according to its text read in textual, schematic, and purposive context: *Re Rizzo Shoes*. In my opinion, the text restricts security for costs to actions and applications. They are generally more expensive and more drawn out than reviews and appeals. The restriction is consistent with a purpose of quick and efficient advancement of reviews and appeals.

[11] Mr. Furlotte submits that Rule 7 does not apply to appeals from the Registrar to a judge as we are both the Supreme Court of Nova Scotia in Bankruptcy and

Insolvency. I do not think Rule 7 is so limited as to exclude such an appeal, but the point is that the appeal is neither an action nor an application. And, Rule 45 is restricted to actions and applications.

[12] Mr. Furlotte also argues that even if Rule 7 applies, the court has power to order security for costs. He points out that the appeal is a proceeding. He refers to the broad meaning of “claim” as defined and as in Rule 3.01. But, then he says that by implication Rule 45 applies to all proceedings. However, the Rule is expressly limited by the action word “defends”, the application word “contests”, and the requirement for “a notice by which the claim is defended or contested”.

[13] Reference is also made to the Court’s inherent jurisdiction. Given the interpretation reached, I would not look to the inherent jurisdiction to supply a power to order security for costs. As far as I am aware, the power has always been based on rules of court. In any case, I would not set up the inherent jurisdiction to avoid a policy adopted by the Rules.

Conclusion

[14] Accordingly, I dismiss the motion for security for costs.

Moir J.