IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Grant Bros. Contracting Ltd. v. Grant, 2005 NSSC 358

Date: 20051230
Docket: SH 217342 (B-26325)
Registry: Halifax

IN THE MATTER OF The bankruptcy of Grant Bros. Contracting Limited, a body corporate

and

IN THE MATTER OF An application by Deloitte & Touche Inc., Trustee of the Estate of the Bankrupt against Dr. Neil Grant and Dr. Neil Grant (1997) Professional Corporation, pursuant to Subsections 91(1), 95(1) and 95(2), 98(1) and 98(2), 100(1) and 100(2), and 165(1) and 165(2) of the *Bankruptcy and Insolvency Act ("Act")*

Judge: The Honourable Justice Glen G. McDougall

Heard: June 29, 2005, in Halifax, Nova Scotia

Counsel: Dufferin R. Harper and Pam Clarke, on behalf of Deloitte & Touche Inc.
Robert Pineo, Douglas Caldwell and Ryan Brennan, on behalf of Dr. Neil Grant and Dr. Neil Grant (1997) Professional Corporation

By the Court:

[1] This application is made by Deloitte & Touche Inc. (the "Trustee") in its capacity as Trustee of the Estate of Grant Bros. Contracting Limited ("Grant Bros."), a Bankrupt. The Trustee seeks:

i) an Order pursuant to subsections 95(1) and 95(2) of the Act declaring that the payment of the amount of $25,680.47, being a portion of $110,207.49 paid by the Bankrupt to Dr. Neil Grant

(1997) Professional Corporation (the "Professional Corporation") and subsequently transferred to Dr. Neil Grant, on or about October of 2003 is a fraudulent transaction and void as against the Trustee and the Trustee shall have judgment against Dr. Neil Grant in the amount of $25,680.47;

(ii) an Order pursuant to subsections 100(1) and 100(2) of the Act declaring that:

a. the payment of the amount of $110,207.49, paid by the Bankrupt to the Professional Corporation on or about October of 2003 was a supply of property in a reviewable transaction;

b. the consideration received by the Bankrupt in that transaction was conspicuously less than the fair market value of that property;

c. Dr. Neil Grant was privy to that transaction; and

d. the Professional Corporation and Dr. Neil Grant, jointly and severally, pay to the Trustee the sum $110,207.49 forthwith, and for judgment against the Professional Corporation and Dr. Neil Grant for that amount.

iii) For an Order pursuant to section 165(1) of the Act declaring that the amount of $84,527.02, being a portion of $110,207.49 paid by the Bankrupt to the Professional Corporation on or about October 2003, is an amount owing to the Bankrupt and for an Order that the Professional Corporation pay to the Trustee the sum of $25,680.47 forthwith, and for judgment against Dr. Neil Grant for that amount.

iv) For an Order pursuant to subsection 165(2) of the Act declaring that the amount of $25,680.47, being a portion of $110,207.49 paid by the Bankrupt to the Professional Corporation on or about October of 2003, and subsequently transferred to Dr. Neil Grant, is the property of the Bankrupt in the possession of Dr. Neil Grant, and for an Order that Dr. Neil Grant deliver to the Trustee the sum of $25,680.47 forthwith, and for judgment against Dr. Neil Grant for that amount.

v) For an Order pursuant to subsections 98(1) and 98(2) of the Act declaring that:

a. all or a part of the amount of $110,207.49 paid by the Bankrupt to the Professional Corporation on or about

October of 2003, was property of the Bankrupt acquired by the Professional Corporation under a transaction that is void or voidable;

b. such property was subsequently disposed of to Dr. Neil Grant and/or to Kevin Grant; and

c. the Professional Corporation return to the Trustee the sum of $110,207.49 forthwith, and for judgement against the Professional Corporation for that amount.

vi) an Order pursuant to subsection 91(1) of the Act declaring that payment of the amount of $110,207.49, paid by the Bankrupt to Dr. Neil Grant (1997) Professional Corporation (the "Professional Corporation") on or about October of 2003 is a settlement of property and void as against the Trustee and the Trustee shall have judgment against the Professional Corporation in the amount of $110,207.49;

SUMMARY OF FACTS

[2] The following is a summary of the facts pertaining to this case.

[3] Grant Bros. was primarily involved in the road building business. Its main contracts were with the Nova Scotia Department of Transportation.

[4] The president of Grant Bros. is Kevin Grant.

[5] On or about the 4th day of November, 1999 Grant Bros. entered into a General Security Agreement ("GSA") with the Toronto Dominion Bank (the "Bank"). As part of its commitment to the Bank, Grant Bros. pledged its accounts receivable.

[6] In June of 2003, Grant Bros. borrowed the sum of $25,000.00 from Dr. Neil Grant personally. Dr. Neil Grant is the brother of Kevin Grant, president of Grant Bros.

[7] On October 15, 2003, the Bank appointed Deloitte & Touche Inc. as receiver of the property and assets of Grant Bros. pursuant to the GSA.

[8] On October 16, 2003, after being appointed receiver, Mr. G. Alan Gladwin, a representative of the receiver, attended at the premises of Grant Bros. and met with Kevin Grant to advise him of the appointment.

[9] On or about the same day, the receiver made arrangements to freeze the bank accounts of Grant Bros. — one of which was at the Bank and the other at the Bank of Nova Scotia.

[10] On the day prior to being appointed receiver and unbeknownst to either the receiver or the Bank, Grant Bros. received a cheque from the Province of Nova Scotia, Department of Transportation ("DOT") for $110,207.49 (the "cheque"). This represented a partial payment or draw on a certain road building contract between Grant Bros. and DOT.

[11] Instead of depositing the cheque to one of Grant Bros.' bank accounts, Kevin Grant endorsed the cheque as president of Grant Bros. and gave it to his brother, Dr. Neil Grant. This occurred on October 22, 2003. Before doing anything with the endorsed DOT cheque, Dr. Grant discussed the matter with his wife. He then directed her to deposit the cheque to an account at the Canadian Imperial Bank of Commerce ("CIBC") in Fredericton, New Brunswick. The account was in the name of Dr. Neil Grant (1997) Professional Corporation (the "Professional Corporation"). Dr. Neil Grant is president of the Professional Corporation. Along with his wife, they form the company's board of directors. The deposit to the Professional Corporation's bank account was made on the 22nd day of October, 2003.

[12] The DOT cheque was a receivable of Grant Bros. and should have been part of the Bank's security under the GSA.

[13] On October 22, 2003, immediately after the deposit of the DOT cheque to the Professional Corporation's CIBC account, a cheque or bank draft in the amount of $25,000.00 was paid from this account to Kevin Grant personally.

[14] On or about October 30, 2003 additional cheques or bank drafts were issued from the Professional Corporation's account to Kevin Grant, personally, in the amount of $59,522.02 and to Dr. Neil Grant, personally, for $25,680.47.

[15] These three cheques or bank drafts that were issued from the account of the Professional Corporation totalled $110,207.49 — the same amount as the cheque

issued to Grant Bros. by DOT and later endorsed in favour of the Professional Corporation by Kevin Grant.

[16] The $25,680.47 cheque given to Dr. Neil Grant was intended to pay back the $25,000.00 he had loaned personally to Grant Bros. in June of 2003 together with accrued interest of $680.47. It should be noted that Grant Bros. was never indebted to the Professional Corporation. The money loaned to Grant Bros. was a loan from Dr. Neil Grant personally. The Professional Corporation's only involvement was to receive the DOT funds that should have been deposited to one of Grant Bros. two bank accounts and then to pay out the full proceeds to Dr. Neil Grant and Kevin Grant.

[17] As a result of this series of transactions, the receiver which had been appointed under the terms of the GSA on October 15, 2003 was by-passed.

[18] On or about October 30, 2003 the Bank filed a petition for a receiving order against Grant Bros. Initially Grant Bros. opposed the petition but later, after withdrawing its opposition, the petition was granted and a receiving order was issued on January 16, 2004.

[19] Neither the Trustee nor the Bank became aware of the DOT cheque until sometime in January of 2004. The existence of the cheque was first disclosed to counsel for the Bank in correspondence from DOT regarding other receivables of Grant Bros.

[20] The Trustee conducted an examination of Kevin Grant on May 4, 2004 in accordance with section 163 of the *Act*.

[21] On May 20, 2004 a similar examination was made of Dr. Neil Grant.

[22] It was during the examinations of Kevin Grant and Dr. Neil Grant that the Trustee learned the full details of what had happened to the DOT cheque and how the funds were subsequently disbursed by the Professional Corporation.

DISCUSSION

[23] The Trustee seeks the recovery of the monies paid by Grant Bros. through its president, Kevin Grant, to the Professional Corporation and subsequently from the Professional Corporation to Kevin Grant and Dr. Neil Grant personally.

[24] The Trustee submits that the payments were made in contravention of the *Bankruptcy and Insolvency Act* (the "*Act*"). In particular, the Trustee relied on sections 91, 95, 98, 100 and subsections (1) and (2) of section 165 of the *Act*.

[25] Counsel for Dr. Neil Grant and the Professional Corporation argue that the repayment of the loan with interest to Dr. Grant as well as the payment of the balance of proceeds of the DOT cheque to Kevin Grant personally was not a contravention of the *Act* and hence the Trustee is not entitled to the relief sought.

[26] Furthermore, it was argued on behalf of these two respondents that it would not be fair or just to grant the remedies sought by the applicant. Equitable principles should be considered when interpreting and applying the various provisions of the *Act*.

[27] For the purpose of the application, the respondents admit that Dr. Neil Grant, the Professional Corporation, Grant Bros. and Kevin Grant constitute a "related group" pursuant to subsection 4(1) of the *Act*. Additionally, the respondents admit that, pursuant to section 96 of the *Act*, the transactions in question are between members of the related group and the time period referred to in subsection 95(1) shall be one year instead of three months.

[28] I propose to deal with the various sections of the *Act* in the same order they were argued on behalf of the applicant.

Section 95

[29] Section 95 states:

> 95. (1) Every conveyance or transfer of property or charge thereon made, every payment made, every obligation incurred and every judicial proceeding taken or suffered by any insolvent person in favour of any creditor or of any person in trust for any creditor with a view to giving that creditor a preference over the other creditors is, where it is made, incurred, taken or suffered within the period beginning on the day that

> is three months before the date of the initial bankruptcy event and ending on the date the insolvent person became bankrupt, both dates included, deemed fraudulent and void as against the trustee in the bankruptcy.
> (2) Where any conveyance, transfer, charge, payment, obligation or judicial proceeding mentioned in subsection (1) has the effect of giving any creditor a preference over other creditors, or over any one or more of them, it shall be presumed, in the absence of evidence to the contrary, to have been made, incurred, taken, paid or suffered with a view to giving the creditor a preference over other creditors, whether or not it was made voluntarily or under pressure and evidence of pressure shall not be admissible to support the transaction.

[30] The Trustee, in seeking an order that the payment of $25,680.47 to Dr. Neil Grant was fraudulent preference, requests that the Trustee be given judgment against Dr. Neil Grant for this amount.

[31] The respondents request the Court to find that the loan from Dr. Neil Grant to Grant Bros. was made with the reasonable belief that it would enable the company to remain in business. Specifically, it was suggested that Dr. Neil Grant gave the loan to Grant Bros. to enable it to pay its labour, purchase fuel and to cover other operating expenses so it could continue to operate. It was argued that the fact that the loan was given to Grant Bros. for the express purpose of allowing it to continue in business rebuts the presumption in section 95 that a fraudulent preference occurred upon the repayment of that loan.

[32] Clearly the repayment of the loan along with interest to Dr. Neil Grant put him in a preferred position when compared with other creditors of Grant Bros. The arguments advanced on behalf of the respondents do not convince me otherwise.

[33] The presumption raised in subsection 95(2) of the *Act* has not been rebutted. In **Re Norris** (1996), Carswell Alta 884 (Alta. C.A.), the Alberta Court of Appeal held at page 6 that the test for a section 95 fraudulent preference is as follows:

> ¶ 13 .... (1) that the payment in question was made to an ordinary creditor within three months of the bankruptcy; (2) that the bankrupt was at the date the payment was made an insolvent person within one of the definitions in s. 2 and; (3) that the payment was made by the debtor "with a view to giving that creditor a preference over the other creditors", in the words of the statute.

> ¶ 14 If elements (1) and (2) are established and the Trustee proves that the creditor received a preference in fact over other creditors, s. 95(2) then raises a presumption in the absence of evidence to the contrary that the preference in fact was made with a view to giving that creditor a preference over the other creditors, and was thus a fraudulent preference within s. 95(1).

[34] Based on the evidence I am not satisfied that the respondents have rebutted the presumption. Dr. Neil Grant was given preference by Grant Bros. at the expense of other company creditors, secured and unsecured.

[35] I therefore order the repayment of the sum of $25,680.47 by Dr. Neil Grant. Trustee shall have judgment against Dr. Grant for this amount.

Section 100

[36] Section 100 of the *Act* states:

> 100. (1) Where a bankrupt sold, purchased, leased, hired, supplied or received property or services in a reviewable transaction within the period beginning on the day that is one year before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included, the court may, on the application of the trustee, inquire into whether the bankrupt gave or received, as the case may be, fair market value in consideration for the property or services concerned in the transaction.
>
> (2) Where the court in proceedings under this section finds that the consideration given or received by the bankrupt in the reviewable transaction was conspicuously greater or less than the fair market value of the property or services concerned in the transaction, the court may give judgment to the trustee against the other party to the transaction, against any other person being privy to the transaction with the bankrupt or against all those persons for the difference between the actual consideration given or received by the bankrupt and the fair market value, as determined by the court, of the property or services concerned in the transaction.
>
> (3) In making an application under this section, the trustee shall state what in his opinion was the fair market value of the property or services concerned in the transaction and what in his opinion was the value of the

> actual consideration given or received by the bankrupt in the transaction, and the values on which the court makes any finding pursuant to this section shall be the values so stated by the trustee unless other values are proven.

[37] The Trustee requests the Court to grant judgment against both Dr. Neil Grant and the Professional Corporation for the full amount of $110,207.49. The respondent admits that Dr. Grant, the Professional Corporation, Grant Bros. and Kevin Grant constitute a "related group" pursuant to subsection 4(1) of the *Act*. Subsection 3(3) of the *Act* states that:

> 3. (3) Persons related to each other within the meaning of section 4 shall be deemed not to deal with each other at arm's length while so related.

Subsection 3(1) of the *Act* states:

> 3. (1) For the purposes of this Act, a person who has entered into a transaction with another person otherwise than at arm's length shall be deemed to have entered into a reviewable transaction.

[38] Given the relationship between the parties, this is clearly a reviewable transaction and hence falls within section 100 of the *Act*. Under this section the court may give judgment to the Trustee against the other party to the transaction where it finds that the consideration given or received by the bankrupt in the reviewable transaction was "*...conspicuously greater or less than the fair market value of the property or services concerned in the transaction...*" (Reference s. 100(2)).

[39] Grant Bros. simply handed over a cheque for $110,207.49 to Dr. Neil Grant who in turn arranged for its deposit to the credit of the Professional Corporation — a company owned and controlled by Dr. Grant and his wife. Actually it was Dr. Grant's wife who made the deposit based on his instructions. There was no consideration given to Grant Bros. by the Professional Corporation nor did Dr. Grant provide a release or other form of acknowledgement for the money he ultimately received from the Professional Corporation.

[40] I find that Dr. Grant had actual knowledge of the financial problems facing Grant Bros. Although he might not have been aware of the Bank's action to appoint a receiver under the GSA when Kevin Grant handed over the cheque from DOT, he certainly knew the company was experiencing financial troubles. As well, alarm bells should have gone off when the cheque was endorsed by his brother on behalf of Grant

Bros. and handed over to him. If I am mistaken and Dr. Grant was truly an innocent pawn, then based on the decision in the case of **Claubert Products Corp. (Trustee of)** v. **Textiles LaBelle Ltee**, [1983] O.J. No. 3 (S.C., Bankruptcy Div.), it is Dr. Grant and his Professional Corporation who should bear the loss, not other innocent creditors who have been deprived of the right to share in the distribution of these funds based on the *Act*. In **Claubert**, *supra*, Registrar O'Connor quoted from Broom's Legal Maxims, stating "*... as a broad general principal.... whenever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must suffer it*." The Registrar, at paragraph 18, wrote:

> Therefore, even if we assume that the personal respondent was innocent of any fraud, she still must sustain the loss rather than the other innocent party (i.e., the creditors of the bankrupt represented by the trustee) because she enabled her related defrauders to occasion the loss.

[41] Dr. Grant may not have intended to defraud the creditors of Grant Bros. but by his actions he enabled his brother, Kevin Grant, to divert funds away from the Trustee and hence away from the various other creditors of the company. Additionally, he benefited directly by repaying the loan he had earlier given to Grant Bros.

[42] Accordingly judgment is awarded to the Trustee against both the Professional Corporation and against Dr. Neil Grant personally for the full amount of $110,207.49. Dr. Grant should not be permitted to escape personal liability for the acts of the company he controls. He is, after all, the Professional Corporation's controlling mind. It could not have carried out these transactions without his knowledge and direction.

Sections 165, 91 and 98

[43] Given that I have already determined that the Trustee should have judgment against both the Professional Corporation and Dr. Grant personally for the full amount of the DOT cheque — $110,207.49 — I do not feel it is necessary to carry out a full analysis of the Trustee's application under sections 165, 91 and 98 of the *Act*.

[44] Suffice it to say that I do not believe subsection 165(2) has any application to this case.

[45] I do, however, find merit in the Trustee's argument that there was a settlement as it is defined in section 2 of the *Act* and hence void against the Trustee in accord with subsection 91(1) of the *Act*. Consequently I would give judgment to the Trustee

against the Professional Corporation for the full amount of $110,207.49 under this provision.

[46] Finally, with regard to section 98 of the *Act*, the property of Grant Bros. was acquired by the Professional Corporation under a void or voidable transaction. It was subsequently disposed of, however, none of the funds were ever returned to Grant Bros. or the receiver or Trustee. Subsection 98(2) says that where a person has acquired property of the bankrupt and has transferred the property to a third party,

> (2) The trustee may recover the property or the value thereof or the money or proceeds therefrom from the person who acquired it from the bankrupt or from any other person to whom he may have resold, transferred or paid over the proceeds ....

[47] In this particular case the respondents suggest that of the money deposited to the account of the Professional Corporation, $84,522.02 can be directly traced to Kevin Grant. They further suggest that based on cheques written from Kevin Grant's personal account he used the money to pay other unsecured creditors of Grant Bros. While this might be the case, I do not interpret subsection 98(2) as placing an obligation on the Trustee to trace the funds. It simply authorizes the Trustee to recover the property either from the person who acquired it from the bankrupt or from any other person to whom he may have resold, transferred or paid over proceeds of the property. The Trustee is not obligated to track down the ultimate recipient of the funds. The DOT cheque was improperly handed over for deposit to a company controlled by the brother of Grant Bros.' president. The brother, Dr. Neil Grant, was shown a preference.

[48] Furthermore, Dr. Grant not only directed his Professional Corporation to pay himself $25,680.47 to cover the personal loan (plus interest) made to Grant Bros. but he also directed the Professional Corporation to pay the $84,522.02 balance to his brother, Kevin Grant, thereby enabling him to divert funds away from the Trustee.

[49] The application of any rules of equity would require repayment of the total amount of the DOT cheque as ordered herein.

J.