IN THE SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY
Citation: G. W. Holmes Trucking (1990) Ltd. (Re), 2005 NSSC 179

Date: June 27, 2005
Docket: B26197
Registry: Halifax

District of Nova Scotia
Division No. 02 - Truro-Pictou
Court No. B 26197
Estate No. 51-112665

In the Matter of the Bankruptcy of G. W. Holmes Trucking (1990) Limited

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D E C I S I O N

Registrar:	Richard W. Cregan, Q.C.
Heard:	February 16, 2005 and May 18, 2005
Counsel:	Mr. Arthur von Kursell, Solicitor for A. W. Leil Cranes & Equipment Ltd. Mr. Dennis J. James, Solicitor for David MacDonald Mr. Richard A. Bureau, Solicitor for Jason Jenkins

[1] This is an application by two persons presently subject to orders of examination under subsection 163(2) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended , the "*Act"*, to have the orders cancelled.

Background

[2] The bankrupt, G. W. Holmes Trucking (1990) Limited, ("Holmes"), made an assignment pursuant to the *Act* on December 12, 2003. Holmes is owned 51% by Mr. A. W. Leil, "Mr. Leil", and 49% by his daughter, Karen MacDonald, wife of David MacDonald, "Mr. MacDonald", who had been general manager of Holmes. Mr. Leil is the majority owner of A. W. Leil Cranes & Equipment Limited, "Leil". Holmes specialized in the trucking of oversized loads, such as large components for industrial plants.

[3] The Toronto Dominion Bank (the "Bank") was both a secured and unsecured creditor of Holmes. The Bank's solicitors are Burchells.

[4] The Bank applied to the Court for an order under section 163(2) of the Act for Mr. MacDonald to be examined. I granted the order on April 5, 2004. As Mr. MacDonald did not comply with the order, a further application was made to Justice Moir, who on May 25, 2004, confirmed the order. The examination took

place on June 4, 2004, and July 22, 2004.

[5] The examination was conducted by Arthur von Kursell who was then practising with Burchells.

[6] Sometime after the examination Leil took an assignment of the Holmes' indebtedness to the Bank, both secured and unsecured. Mr. von Kursell terminated his association with Burchells and became house counsel with Leil.

[7] As the examination at this stage had suggested further lines of inquiry which might be instructive regarding the affairs of the Bankrupt, Mr. von Kursell on the instructions of Leil made an application for an order for further examination of Mr. MacDonald. An order for continued examination of Mr. MacDonald was granted October 27, 2004. The examination took place on November 30, 2995, and December 6, 2004.

[8] Also on December 17, 2004, orders were granted for the examination of Bradley Cooley and Jason Jenkins, both former employees of Holmes. Mr. Cooley's examination took place on January 7, 2005. Mr. Jenkins' examination began on January 10, 2005, but was quickly adjourned to allow him to obtain

counsel.

[9] During the course of the examination of Mr. MacDonald, several undertakings were given by him to provide further information. As these undertakings were not being answered to Mr. von Kursell's satisfaction, an application was made on February 16, 2005. I gave direction as to how the disputed matters might be resolved and adjourned the matter *sine die* with the understanding that I would be available should the parties not be able to resolve the disputes.

[10] Meanwhile, Mr. Richard Bureau, who had been engaged as counsel by Mr. Jenkins, wrote to me, copying his letter to Mr. James and Mr. von Kursell, questioning the appropriateness of Leil continuing with the examinations, particularly of his client. This was followed by correspondence among Mr. Bureau, Mr. von Kursell, and myself. There was then a telephone conference on April 26, 2005, among Mr. James, Mr. von Kursell, and me in which I ordered that there be a hearing on May 18, 2005, to continue the application regarding the undertakings from Mr. MacDonald's examination and to hear a new application of Mr. James on behalf of Mr. MacDonald to cancel all further proceedings in Mr. MacDonald's examination. At the commencement of the hearing, it was agreed

that I hear submissions on the new application first. Mr. Bureau appeared for Mr. Jenkins, having filed a letter and an affidavit of Mr. Jenkins the day before. He said he was there to give Mr. Jenkins' support to Mr. MacDonald's application. I directed that he had a choice of either making a formal application to have the order for Mr. Jenkins' examination cancelled or being denied standing. He agreed to perfect his application.

Nature of the Application

[11] What essentially is being sought in these applications is an order cancelling the orders which were issued under subsection 163(2), thereby freeing Mr. MacDonald from having to deal with his outstanding undertakings and to attend further examinations, and freeing Mr. Jenkins from having to appear at all. The applicants contend that the examination is going beyond what is reasonably contemplated by subsection 163(2) and that Leil and its solicitor, Mr. von Kursell are not fit to exercise the powers granted to them in these orders.

[12] They assert further that, to use Mr. James' words, Leil is "in litigation mode", which I take to mean that it is not just doing what is authorized by subsection 163(2), but Leil is also in serious preparation for litigation against them.

Their particular objections are:

1. That Leil is conducting these examinations not in the interest of creditors generally, but for its own best interests;
2. That Mr. von Kursell has a conflict of interest in now acting for Leil against Mr. MacDonald;
3. That Leil had received payments from Holmes in preference to its other creditors, and therefore does not have the clean hands necessary to pursue claims against others on behalf of the creditors when it does not recognize the preferences it has received;
4. That other procedures for investigating the matters in question are available, reference being made to provisions under the *Companies Act* and to the investigative authority of the Office of the Superintendent of Bankruptcy; and
5. That Mr. MacDonald has not had the benefit of the exchange of documentation as is the practice with discoveries under the Rules of Civil Procedure and is therefore at a disadvantage when being examined.

Subsection 163(2) of the *Act*

[13] It is appropriate to quote subsection 163 (2) in its entirety:

> On the application to the court by the Superintendent, any creditor or other interested person and on sufficient cause being shown, an order may be made for the examination under oath, before the registrar or other authorized person, of the trustee, the bankrupt, an inspector or a creditor, or any other person named in the order, for the purpose of investigating the administration of the estate of any bankrupt, and the court may further order any person liable to be so examined to produce any books, documents, correspondence or papers in the person's possession or power relating in all or in part to the bankrupt, the trustee or any creditor, the costs of the examination and investigation to be in the discretion of the court.

[14] The subsection very clearly states that an examination ordered under it is

"for the purpose of investigating the administration of the estate of any bankrupt".

[15] This is further developed in section 167 which I quote:

> Any person being examined is bound to answer all questions relating to the business or property of the bankrupt, to the causes of his bankruptcy and the disposition of his property.

[16] What must be considered is the scope of the examination contemplated by these words and the extent to which the examining party may have wider purposes than those contemplated by this subsection.

[17] These points have been considered in a number of cases:

Registrar Ferron in *Assaf* (Re) (1976), 23 C.B.R. (N.S.) 14 (Ont.), said at paragraph 6:

> It is an examination for the general interest and for the demonstrable general benefit of creditors and not, as I have mentioned, for creditors to pursue a private remedy.

[18] Deputy Registrar Nettie in *Bradford* (Re), [2003] O.J. No. 1299 further developed the point by saying at paragraph 3:

> The evidence must show that something more than a fishing expedition is being sought. This is consistent with the principle that, as the applicant, usually a creditor, is seeking to exercise a power usually reserved to the Trustee, there must be some level of confidence by the Court that the applicant seeks to exercise that power for a proper purpose.

[19] This subsection was considered by the Court of Appeal of Nova Scotia in *NsC Diesel Power Inc.* (Re), [1998] N.S.J. No. 303, 47 C.B.R. (3d) 129. In paragraph 43 Hallett, J.A., speaking of the requirements for making an application under subsection 163(2), said that information must be submitted to show that the

applicant has "something more than a desire to go on a fishing expedition".

[20] In paragraph 61, Cromwell, J.A., speaking of subsection 163(2) examinations said:

> Their purpose is to help ensure that the estate is being administered in the interest of the creditors and in accordance with the law.

In Whose Interest is Leil Acting?

[21] I am satisfied as I was when I originally granted the orders that the requirements were met. I was presented with evidence that there was some question of whether the affairs of Holmes had been properly conducted by Mr. MacDonald, Mr. Cooley, and Mr. Jenkins in accordance with their responsibilities to it as officers and employees. There was something there which in the interest of creditors warranted further investigation. Such investigations were not done by the Trustee because there were no funds in the estate. It was shown that the investigations could possibly provide information which would be the basis for a claim which might result in benefits for the creditors of the estate. Leil as assignee of the Bank is one of those creditors.

[22] But the applicants express concern that Leil has in mind not just the best interest of the creditors, but its own best interest. Does this make any difference?

Put another way, is the notion made very strongly by Mr. James at the hearing that Leil is in "litigation mode" affect the propriety of its continued conduct of these examinations?

[23] If the creditors generally benefit, then Leil company being one of them benefits. I am quite satisfied by the representations made by Mr. von Kursell that his client realizes that the principal purpose of the examinations is to find information which would be put to the Trustee for discussion as to whether the estate can make claims against anyone. The Trustee may elect to pursue them. If it does not, Leil may move to take the action itself. This requires approval of the Court under section 38. If there is something wrong with this, it can be raised at Court at that time.

[24] This point is briefly touched on in *Regent Sea Food Inc.* (Re), [1991] B.C.J. No. 2536 by Fraser J. Here a trustee resisted an order for his being examined pursuant to subsection 163(2). The grounds were that the applicant ’s real purpose was to conduct a fishing expedition, the applicant already being well informed of the affairs of the estate and as well to determine whether the applicant had a basis for a lawsuit against the trustee. This the trustee said was an abuse of the real purpose of s.163(2). Fraser J.’s response to this is:

> It is true, as Mr. Skelly suggests, that examination of a trustee under the subsection may amount to a pre-action discovery examination by a creditor who is a potential plaintiff in an action against the trustee, alleging improper administration. It seems to me that an examination of a trustee at the instance of a creditor almost inevitably would have that character and, if that was in answer to an application such as this, the application could never succeed. The result would be that the provision itself would have been judicially interpreted in meaninglessness. My view is that the only available interpretation of this subsection is that Parliament intended to confer on creditors a right to examine trustees within the bankruptcy, for the purpose of monitoring their stewardship and unearthing any inadequacy during it. The fact that the examination might also supply the fodder for an action against the trustee is subordinated to the interests of all creditors to avoid the detriment to them which might flow from perfunctory performance by the trustee of its duties. This applies especially to unsecured creditors, who often are frozen out after the bite taken by secured creditors.

[25] Although the person ordered to be examined was the trustee, I think the same principles would apply to anyone else ordered to be examined under this provision.

[26] It follows that the results of an examination may ultimately be of particular benefit to the examining creditor is not an issue so long as the examination is conducted with a view to being for the benefit of creditors generally. I think that this answers the applicants' criticism that Leil is "in litigation mode" or has objectives beyond serving the interest of creditors generally.

Conflict of Interest - Mr. von Kursell

[27] Mr. James and Mr. Bureau say that Mr. von Kursell is in a conflict of interest acting as counsel for Leil, by having previously acted for the Bank in the same manner, particularly with the Bank having an outstanding claim against Mr. MacDonald.

[28] The factual background is not laid out in affidavits as in the normal procedure. I have only the representations of counsel at the hearing. I shall summarize these representations.

[29] Mr. von Kursell was an associate of Burchells which was retained by the Bank with respect to its claims, secured and unsecured against Holmes. Mr. von Kursell was assigned the responsibility of arranging and conducting the examination of Mr. MacDonald. Other lawyers were involved in other aspects. Two procedures were outlined.

[30] One is an action by the Bank against Mr. MacDonald. It is not clear what the nature of the claim is. It may be based on a guarantee given by him respecting the Holmes debt. A copy of the pleadings would have been helpful. Little, if anything other than filing of a Statement of Claim and a Defence has been done. It

continues to be in abeyance. Mr. von Kursell represented that his involvement was minimal.

[31] The other procedure is that involved in Leil taking over the position of the Bank. Details were not provided. Mr. von Kursell did say something to that effect that Leil did not have much choice in this matter. .

[32] Conflict of interest problems arise where a lawyer acts for two or more parties and a dispute arises between the parties. Mr. von Kursell has never acted for Mr. MacDonald or Mr. Jenkins in this or any other matter. I do not see that we have this type of conflict.

[33] They also arise where a lawyer has obtained confidential information from a client and then becomes involved with another client in a matter where the confidentiality is or may be compromised to the prejudice of the first client.

[34] There is not another client. Mr. von Kursell acted for the Bank initially and when claims were assigned to Leil he as it were went with them. The assignment was a matter of agreement between the Bank and Leil. Everything went including Mr. von Kursell. Leil is entitled as assignee to the benefit of all that Mr. von

Kursell has respecting the case.

[35] The claim of the Bank against Mr. MacDonald though dormant remains in the Burchell firm. So Mr. MacDonald has the Burchell firm acting for the Bank pressing a claim against him and at the same time has Leil examining him under the *Act* for the benefit of the creditors generally. Neither Burchells nor Mr. von Kursell in his present position has acted for Mr. MacDonald or Mr. Jenkins nor is there any indication they ever received confidential information from them. Also, neither of them are creditors of Holmes. I fail to see that these gentlemen have any complaint against Mr. von Kursell framed in conflict of interest as it is understood and as it might give cause to require Mr. von Kursell to be removed.

[36] The only idea that has occurred to me which might at all be relevant to this allegation would be that, if there had been discovery proceedings in the Bank's action against Mr. MacDonald, information might have been given which it would be improper for Mr. von Kursell to use for other purposes. Nothing has been provided or suggested to show that such information was given. This does not apply to Mr. Jenkins.

[37] In regard to conflicts of interest I have reviewed the leading case in this

area, *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235, and two more recent Nova Scotia cases, *Trans Canada Pipeline Ltd. v. Nova Scotia (Attorney General)*, [1999] N.S.J. No. 409 and *Chapates v. Petro Canada* , [2004] N.S.J. No. 75. Also I reviewed Chapter 6, Impartiality and Conflict of Interest Between Clients, in the Legal Ethics Handbook of the Nova Scotia Barristers' Society.

[38] I am satisfied that it has not been made out that Mr. von Kursell has any conflict of interest which should disqualify him from continuing his present retainer.

Preferences by Leil

[39] The thrust of both Mr. James and Mr. Bureau's submissions is that they do not object to the line of questioning adopted by Mr. von Kursell, so much as they object to Leil conducting the examination and Mr. von Kursell being its counsel. They say that Leil is unworthy or does not have clean hands.

[40] There is evidence that Leil received payment from Holmes within the period prescribed in subsections 95 and 96 of the *Act*, that is within one year back from the initial bankruptcy event. Thus they say that, by its control of Holmes, it caused obligations of Holmes to it to be paid and thereby obtained a preference

against the other creditors. There is a presumption under subsection 95(2) that payments of this nature constitute preferences. But this presumption may be rebutted. All the evidence before me is of the timing of certain payment by Holmes to Leil within the requisite time period. There is no significant evidence as to the surrounding circumstances of the payments nor of whether there are factors which might result in the rebuttal of the presumption.

[41] On what is before me I cannot make any finding as to the propriety of these payments. At most, I have been presented with suspicions. I cannot act on such.

[42] If these payments are improper, it is open to other creditors or other interested persons to take steps similar to what Leil has been doing. They can apply for orders under subsection 163(2) to examine the principals of Leil, or underwrite the Trustee to do the same. The principals of Leil know this.

[43] It may well also be that in the final accounting it may not make much difference whether these payments are preference or not. There is not enough before the Court to come to any conclusion one way or another.

Remedies under the *Companies Act*

[44] Mr. James suggested there might be remedies under the *Companies Act* which might be appropriate alternatives to the present examination. He did not give the Court any particulars of what they may be. I am not aware of them. I need not say anything more of them.

Intervention of the Superintendent

[45] Mr. James suggested as a possible solution to his client's difficulty with the continuation of the examinations that the Office of the Superintendent of Bankruptcy take over further inquiries. He did not provide the Court with any particulars of how the Superintendents could become involved. However, it is open for Mr. James and his client to approach the Superintendent to carry on an inquiry which might or might not accomplish what Mr. von Kursell and his client wish to accomplish in the present examination. If such arrangements were made, the status of the present orders for examination could be reviewed by this Court. However, it is not for me to order that the matter be turned over to the Superintendent. I do not see that I have any authority to tell the Superintendent what to do.

Examination and the *Act* compared to Discovery under the Rules of Civil Procedure

[46] Mr. James took a strong position that the mode of examination was flawed in that the full disclosure practice under the Rules of Civil Procedure requiring discovery of documentation prior to any oral discovery has not been followed and thus he has been disadvantaged.

[47] Although there are some similarities between examinations under subsection 163 and discovery under the Rules, they are very distinct procedures. Each has its own purposes and consequences.

[48] The purpose of an examination under subsection 163(2) is in these circumstances to enable a creditor to investigate the affairs of the bankrupt where the trustee has for one reason or other not seen fit to do. The creditor knows of or is suspicious of circumstances which might give rise to claims by which the estate could recover further assets for the benefit of creditors generally. Before pursuing the matter, prudence dictates that persons who could shed light on the circumstances which might give rise to possible claims should be examined. Once the examination is completed, it is for the creditor to review the results with the trustee. If the trustee is not willing to press the claim, the creditor with leave of the

court under section 38 may press the claim. If successful, the creditor has a preferred claim against the proceeds for the debt owing him.

[49] Pursuing the claim will involve the usual procedures before the Supreme Court under the Rules, including oral discovery and discovery of documents. Discovery under the Rules is a private matter. Confidentiality must be respected.

[50] In contrast examination under the *Act*, if transcribed, are by subsection 163(3) required to be filed with the Court. They become part of the public record and may be used before the Court in proceedings under the *Act* in which the person examined is a party.

[51] In the circumstances, Mr. MacDonald is not subject to the rules whereby discovery evidence can be used in any action. The concerns which go with discovery are not relevant here.

[52] Mr. MacDonald is not a creditor nor a party before the Court. He is simply being asked for what information he may have to help the Trustee and the creditors decide whether there may be a claim against someone for the benefit of the creditors generally. These questions may be uncomfortable to him, but should

action be taken later against him, he will be subject to the obligations and the benefits which attach to regular action in the Supreme Court according to the Rules of Civil Procedure, including discovery proceedings. The same considerations apply to Mr. Jenkins.

Conversations between Mr. Jenkins and Mr.von Kursell

[53] Mr. Jenkins in his affidavit of April 12, 2005 deposes as follows:

4.**That** during the course of discoveries while off the record, Arthur von Kursell offered to go no further with examinations of me if I would provide Mr. von Kursell with all information I had with respect to Mr. MacDonald. I did not agree to strike such a "deal" with Mr. von Kursell for two reasons: 1) I am not aware of anything that David MacDonald did wrong to the detriment of G. W. Holmes Trucking (1990) Limited 2) I do not have any information which I could provide to G. W. Holmes Trucking (1990) Limited.

[54] This conversation, I take from what Mr. von Kursell said in Court, resulted from Mr. Jenkins' objecting to being formally examined. Mr. von Kursell simply put it to Mr. Jenkins that, if he would provide the information Mr. MacDonald said Mr. Jenkins had, there would be no need for the formal examination. This discussion was in the presence of Mr. Jenkins' Solicitor, Mr. Bureau. Mr. Bureau submits that this conversation was improper and should disqualify Mr. Von Kursell from further involvement . I do not see anything untoward about it.

Conclusion

[55] I therefore do not think that the applicants have made out a case that the examinations should be terminated. There remain the resolution of the outstanding undertakings by Mr. MacDonald and the examination of Mr. Jenkins. They are not creditors of the estate. They are simply people who having been employees of Holmes may have some information which could be of use for the benefit of the creditors. If the undertakings and questions are within the scope of what is implicitly allowed by subsection 163(2), they are required to fulfill and answer them.

[56] I give the following directions to resolve this matter:

1. Mr. MacDonald is to fulfill his outstanding undertakings. If there is any confusion about what they are or argument about whether they are proper, I shall hear the parties and give specific directions. This is a matter which should not be delayed.

2. Apart from fulfilling these undertakings, there shall be no further examination of Mr. MacDonald without further direction of the Court.

3. Mr. Jenkins shall comply with the order for his examination. If the

parties cannot agree on a date, I shall set a date. If any party requests it, I shall preside at the examination.

[57] Although it is difficult to give direction in a general way as to what questions are appropriate in examinations, I suggest to Mr. von Kursell that, in framing his questions and dealing with the outstanding undertakings, he be conscious of the specific purpose of examinations under the *Act* as outlined above. In these circumstances it is not to prove a case, but rather to obtain basic information to allow the Trustee or creditors to determine whether to pursue a claim for the benefit of creditors generally.

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

R.

Halifax, Nova Scotia
June 27, 2005