IN THE SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY
Citation: MacNeil (Re), 2008 NSSC 285

Date: September 30, 2008
Docket: B 27053
Registry: Halifax

District of Nova Scotia
Division No. 03 - Sydney
Court No. 27053
Estate No. 51-112754

In the Matter of the Bankruptcy of Robert Benedict MacNeil

D E C I S I O N

Registrar: Richard W. Cregan, Q.C.

Heard: September 4, 2008

Counsel: Ralph W. Ripley representing Mercer Fuels Limited

Rita Anderson representing the Trustee, PricewaterhouseCoopers Inc.

Robert Benedict MacNeil, the Bankrupt, representing himself

[1] On May 11, 2006 there was a hearing in which the Bankrupt, Robert MacNeil, sought his discharge. It was opposed by Mercer Fuels Limited, one of his two creditors.

[2] In the evidence before me there were suggestions that there may have been some improprieties on his part in dealing with the Trustee. For the most part these suggestions were quite inconclusive. The Trustee had elected not to pursue them because it was thought not to be cost effective.

[3] However, the evidence did clearly prove two matters relevant to his discharge. Firstly it was clear that he had been less than helpful to the Trustee in providing information regarding his financial affairs. This attitude repeated itself in his response to cross examination at the hearing.

[4] Secondly, it was established that a part of an agreement, whereby he had sold his oil distribution business to Sydco Fuels Limited, provided he be paid for its goodwill, 5 cents per litre of fuel sold in the first twelve month

period to a maximum of $25,000.00 and as well similar payments in the second twelve month period. Pursuant to this provision he, prior to his bankruptcy, had received $8,852.86. He failed to report this agreement and this money to the Trustee upon making his assignment.

[5] He considered these payments as income.

[6] However, the law is clear that goodwill payments even those which are periodic should be characterized as property of a bankrupt in Section 67 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, (the *BIA).*

[7] I filed a written decision (2006 NSSC 190) on June 16, 2006, in which I determined that Mr. MacNeil would be entitled to his discharge after a suspension of two years provided he had completed his second counselling session and paid the Trustee the $8,852.86 in question. An order to this effect was issued on June 16, 2006.

[8] Two years have passed. The second counselling session was completed, but nothing has been paid against the $8,852.86.

[9] I said in my decision that his repeated lack of candour in dealing with his responsibilities and in his cross examination at the hearing dictated that he be given a lengthy suspension. I recognized that at the time he had no surplus income, was not likely ever to have any and it would be difficult for him to pay the $8,852.86.

[10] In the present application he asks the court to relieve him of the need to pay this sum and grant him a discharge.

[11] At the hearing the Trustee and counsel for Mercer Fuels strongly opposed giving any relief to him.

[12] Mercer Fuel's counsel in some detail reviewed the case law related to Subsection 172(3) of the *BIA* which gives the court power to modify terms of a discharge order where "there is no reasonable probability of his being in a position to comply with the terms of the order." In essence he said that one was expected to provide extensive affidavit evidence of his circumstances to show that they have deteriorated since the terms have been set. This is all quite relevant where the terms of the order relate to surplus

income and in the meantime the bankrupt's income has diminished or new burdens have been imposed on him. There are frequent applications in these circumstances. The fact is that two years ago it was quite doubtful he would ever be able to pay the money . His position in this regard has not changed. Nevertheless there was good reason to impose the requirement of paying this sum. Section 158(a) of the *BIA* directs that a bankrupt deliver his property to his trustee. This he failed to do. Barring extenuating circumstances it should continue to be a term of his discharge.

[13] Considering Mr. MacNeil's conduct, I think it is premature to consider relieving him of the requirement to pay this sum. Although it is unlikely he will be in a position to pay it, the Trustee and counsel for Mercer, considering his past behavior, have good reason to want to keep the requirements in place. There just might be something in the reasonable future which might come to light which would result in the estate being entitled to something of value.

[14] *Pranke, Re* (Bankrupt), 1999 CanLII 12788 (SK Q.B.), a case presented at the hearing by counsel for Mercer, provides an interesting suggestion.

Registrar Herauf, as he then was, dealing with a similar situation noted that he had not given the bankrupt in the conditional order the option of consenting to judgment. Although he was not sure whether he had authority under Section 172(3) to now give that opportunity, he was satisfied as an alternative that he could under Section 187(5) “review, rescind or vary” the order to allow the bankrupt to be discharged upon his consenting to judgment to the amount in issue.

[15] This procedure has the advantage to the bankrupt of his being discharged and the advantage to the trustee of having the procedural benefits of a judgment should exigible property be discovered.

[16] As said above, it is premature to now relieve Mr. MacNeil of the requirement to pay this sum. However, I am prepared to grant his discharge in bankruptcy, if he consents to judgment for the amount of $8,852.86.

[17] I am not prepared to award any costs.

R.

Halifax, Nova Scotia
September 30, 2008