IN THE SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY
Citation: O'Toole (Re), 2006 NSSC 382

Date: December 19, 2006
Docket: 29295
Registry: Halifax

District of Nova Scotia
Division No. 1 - Halifax
Court No. B-29295
Estate No. 51-122499

In the Matter of the Bankruptcy of Dennis Patrick O'Toole O/A
Bubba's Truck & Trailer

D E C I S I O N

Registrar: Richard W. Cregan, Q.C.

Heard: October 18, 2006

Counsel: Andrew Inch representing Liquid Capital Exchange Corporation

Michael O'Hara representing Dennis Patrick O'Toole

[1] The Applicant, Liquid Capital Exchange Corp., made an application *ex parte* in July for an order under Section 163(2) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, the "*Act*", requiring the Bankrupt, Dennis Patrick O'Toole, to appear for an examination. The application was granted.

[2] Upon being served with the order, Mr. O'Toole sought counsel from his solicitor, Mr. O'Hara, who then made application to have me review the order pursuant to Subsection 187(5) of the *Act*.

[3] Mr. O'Toole had been in the trucking business. It was financed through arrangements with the Applicant, a financial institution in Toronto. He had provided security for his borrowings by way of a factoring agreement, an assignment of book debts, and a general security agreement.

[4] Mr. O'Toole made an assignment in bankruptcy on December 15, 2005. The Applicant filed a proof of claim asserting a secured claim of $96,679.81 and valuing its security in that amount.

[5] The statement of affairs dated December 14, 2005 shows that there were three fully encumbered assets, namely a house, accounts receivable of $46,088.43, to which it attributed a zero net realizable value, and a camper valued at $18,000.00. There were no unencumbered assets.

[6] The affidavit of Sol Roter, the Applicant's president, has as an exhibit the balance sheet of Mr. O'Toole's business as of July 31, 2005.

[7] Included in the assets which total $222,927.62 are accounts receivable of $108,534.17 and capital assets of $56,080.81.

[8] The Applicant wants to know what happened to these assets between the date of the balance sheet, July 31, 2005, and the date of the assignment four and one half months later, when of these only the receivables of $46,088.43 and the camper remained.

[9] Throughout its submissions the Applicant has emphasized its need to have Mr. O'Toole examined for the purpose of obtaining information which would be helpful to it in realizing its security. As will be explained later,

this is not enough. The cases will show that being primarily concerned with one's private rights does not necessarily qualify one for this remedy of examination unless it can be shown that there is also a chance of benefit to creditors generally.

[10] Section 163(2) of the *Act* reads as follows:

> 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.

[11] I had occasion to review the use of this provision in *Re G.W. Holmes Trucking (1990) Limited*, 2005 NSSC 179. The following points were noted:

> The examination is for the general benefit of creditors and not for the pursuit by a creditor of a private remedy. *Assaf (Re)* (1976), 23 C.B.R. (N.S.) 14 (Ont. Registrar Ferron)
>
> The court must have confidence that the applicant will use the power of examination for a proper purpose. *Bradford (Re)* [2003] O.J. No. 1299 (Ont. Deputy Registrar Nettie).

> The court must be satisfied that the applicant has "something more than a desire to go on a fishing expedition". *NsC Diesel Power Inc., (Re)* (1998), 6 C.B.R. (4th) 96 (N.S. Hallett, J.A.).

I said the following at paragraph [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.

[12] My decision to confirm the order for an examination was upheld by Justice Robertson in *G.W. Holmes Trucking (1990) Ltd., Re,* 2005 NSSC 290, where she said at paragraph [37]

> The law is clear; the question that the court should ask is whether the estate of the bankrupt can benefit from the examinations. It is a diversion . . . ; it is a diversion to focus on other than this question, by raising the issue of future litigation that may follow this disclosure process. The question to focus on is: Does the discovery benefit the estate of the bankrupt . . . .

[13] If follows from this case and the others mentioned above that having a private agenda does not disqualify a creditor from obtaining an order, if the examination could be of benefit to creditors generally.

[14] Can the applicant being granted an order for examination of Mr. O'Toole do

something for the benefit of creditors generally?

[15] Mr. O'Toole's counsel thinks not. The Applicant has a secured claim for $96,679.81. The house and the camper are fully encumbered. The remaining asset is the accounts receivable of $46,088.43, which the applicant's security covers. He says for there to be any advantage to the creditors generally additional assets of at least $50,591.38 must be found to first answer the balance of the secured claim. He says that although this is theoretically possible, it is not very probable.

[16] The Applicant's submission takes a wide view of what may be of benefit to creditors generally. Its counsel cites Justice Hood in her decision which was the subject of the appeal in *NsC Diesel Power Inc.* and is quoted in paragraph 35:

> There must be some demonstrated connection between the evidence, if any, of something being amiss and the ability of the named person to shed some light on it as it relates to the administration of the Estate.

[17] He says that the present circumstances meet this test. Mr. O'Toole is the bankrupt. It was he who submitted the balance sheet and had power over its

assets until he made the assignment in bankruptcy declaring then substantially diminished assets. It is to be presumed that the Trustee would have asked the proper questions and made the proper inquiries, but would have soon concluded further inquiry was not likely to yield anything significant, and that creditors were not wanting to fund such inquiry. Regarding this presumption Mr. Roter said in paragraph 11:

> THAT I have been informed by my counsel and do verily believe that numerous attempts have been made by counsel, through inquiries to the office of the Trustee, to obtain an explanation for these discrepancies and that while the Trustee has made limited inquiries he has either not been willing or able to conduct a thorough inquiry into the location of these missing assets.

[18] This still leaves the question of what happened to the assets during this short period. There is some evidence of something being "amiss". Who better to explain than Mr. O'Toole?

[19] Justice Hood's comments were adopted by Hallett, J.A. He also confirmed that the standard or bar for obtaining an order is a low one. They are often issued as a matter of course, but they still must meet the established tests. The main concern following from this decision is that it must be shown that there is a connection between the person sought to be examined and what appears to be amiss. The connection between Mr. O'Toole and what

happened to his assets during this short period is very close. It is very different from the situation in *NsC Diesel Power*. There the person sought to be examined had been an officer of a bank having dealings with the bankrupt as well as an inspector of the estate. The evidence of his being able to shed light on the bankrupt's affairs was sparse. The connection was not adequately established. To have allowed the examination would have been to allow it to be used as a "fishing expedition".

[20] I think this metaphor means that in the course of examination where there is no clear idea of what is being sought, the examiner draws from his imagination random questions that might or might not have some possible connection with the case in hope that something useful might be accidentally said by the person being examined. Examining Mr. O'Toole would not be a fishing expedition. He can be expected to know what happened to his assets.

[21] As mentioned, the examination, being primarily for the private advantage of the Applicant, may still have some at least theoretical benefit to others. It would result in a thorough point by point examination of the dispersal of the assets, which presumably the Trustee did not do. For this there is no reason

to fault the Trustee. The probability of finding anything of concrete value to the creditors is very low, nevertheless at worst they will know for what comfort it may be that a thorough review has been done. I think it not unreasonable that the Applicant should be allowed to examine him. There is a possibility of learning something significant from Mr. O'Toole, not likely to be of great concrete value, but of theoretical value or comfort.

[22] I would look at the matter even wider. Bankrupts are relieved of responsibility for their debts. But the tenor of the *Act* is that in return they must respond to their trustees and creditors with candor and honesty about their affairs.

[23] Section 158 of the *Act* imposes several duties on them including:

> (k) aid to the utmost of his power in the realization of his property and the distribution of the proceeds among his creditors;

[24] I think then the bar for requiring a bankrupt to be examined regarding the dispersal of substantial assets is even lower than what was stated by Hallett, J.A. in *NsC Diesel Power*. A bankrupt should not be allowed to avoid the duties imposed by the *Act* and the principles governing it. Having circulated

four and a half months before making his assignment a balance sheet showing substantial assets which are not accounted for in his statement of affairs, it is not unreasonable that a creditor, be it ordinary or secured, should want to know more of what happened than the Trustee found reason to pursue.

[25] A thorough examination should result in at least some clarification of what happened. This could be of some benefit, if only comfort, to all creditors. Considering the obligation of Mr. O'Toole to deal with his creditors with candor, I think the bar is not so high as to release him from being examined. There does appear to be something amiss. What happened to these assets? He should be able to answer this question and should be required to do so.

[26] Accordingly, I confirm my order that Mr. O'Toole submit for examination. I shall be available to preside over the examination, if requested.

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

R.

Halifax, Nova Scotia
December 19, 2006