IN THE SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY
Citation: Bray (Re), 2006 NSSC 385

Date: December 19, 2006
Docket: B-24157 and B-24150
Registry: Halifax

District of Nova Scotia
Division No. 01
Court Nos. 24157 and 24150
Estate Nos. 51-097354 and 51-097318

In the Matter of the Bankruptcy of John Frances Bray and Sheila Bray

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D E C I S I O N

Registrar: Richard W. Cregan, Q.C.

Heard: September 25, 2006

Counsel: D. Bruce Clarke for the Applicant, Charles Wackett & Associates

Tim Hill for John Frances Bray and Sheila Bray

[1] This is an application to determine the respective interests of the bankrupts and the trustee in a portion of the proceeds from the recent sale of the bankrupts' home.

[2] The bankrupts John Francis Bray and Sheila Bray consulted Charles Wackett of Wackett & Associates Incorporate, Trustees in Bankruptcy, in September 2001 about making assignments in bankruptcy. At that time they owned a home at 26 Beaverbank Road, Lower Sackville, Nova Scotia. They advised the Trustee that the home was worth $80,000 and that it was encumbered with a mortgage of approximately $69,000. The Trustee at the request of the Inspector of Mr. Bray's estate asked for verification of the value of the home. Mr. Bray responded by obtaining an appraisal from Finley Evong, a realtor familiar with properties in the area. Based on a comparative market analysis he said the "Recommended List Price" was $86,900 and the "Expected Sale Price" was $81,000 to $83,000. They made their assignments on October 4, 2001.

[3] As a result of this information an arrangement was made between the

Trustee and Mr. and Mrs. Bray that each would pay their respective estates $2500 by monthly payments of $125 each for the equity in the home. A caveat to preserve the Trustee's interest was registered against the title to the home. Payments were made regularly until the time of their respective discharges in mid 2002. After that each only had made one payment leaving them each with outstanding balances of $1,125.

[4] Subsequent to the discharges, Mr. Wackett had talked to Mr. Bray regarding the unresolved status of the property, but this resulted in no resolution and no further payments. According to Mr. Wackett, Mr. Bray indicated that he had no intention of continuing the payments.

[5] On June 14, 2005 a representative of the Trustee wrote to the Brays stating that each of them owed $1,125 for the equity in their home and asking them to make contact "in order to arrange a payment schedule that would be mutually suitable".

[6] The Brays did not respond, so the Trustee applied to the court, on notice to the Brays for the right to proceed to the Trustee's discharge, but leaving a

caveat in place. The Brays did not oppose this application. An order was issued on November 18, 2005 which provided "that the Trustee be authorized to leave its caveat in place until the equity in such property of the bankrupt is paid in full to the estate", and discharged the Trustee.

[7] On July 18, 2006, a telephone call was received by the Trustee's office from an assistant in the office of James MacLean, a solicitor practicing in Lower Sackville. The assistant advised that the Brays said money was owing by them to the Trustee respecting the home. Apparently the Brays had made an agreement to sell the home. This was followed by Mr. MacLean requesting a Trustee's Deed. In the circumstances, the Trustee was not prepared to settle the amount which should be paid to the estate in return for the Trustee's Deed. To facilitate the sale, the parties agreed that the deed would be delivered, but Mr. MacLean would hold in trust $32,000 to answer to the final determination of what from the proceeds of the sale should be paid to the estate. The sale price was approximately $164,000, a sum about twice what it was understood the property was worth at the time of the Brays' assignment in September 2001, just five years before.

[8] In order to complete this transaction the Trustee was reappointed by order dated August 1, 2006.

[9] The purpose then of this application is to determine how the $32,000 should be split between the Brays and the Trustee.

[10] Mr. Evong's appraisal established a value for the home at the time of the bankruptcy. Nothing has been put in evidence to suggest that this was not a competent appraisal. Three comparables were described. On its face the appraisal is reasonable. There is nothing before me to suggest that the Brays in providing this appraisal did anything untoward.

[11] The Trustee recently engaged Mr. Evong to prepare an updated appraisal. In it he addresses the great increase in values of properties in the area since 2001 and attribute them to the robust economy in Nova Scotia. In particular he notes that in 2004 and 2005 values went up significantly in Sackville, Halifax, Bedford, Dartmouth and Fall River.

[12] The section 170 report indicates that at the date of bankruptcy the Brays had

only a monthly income of $1500 and at the date of the report the available monthly income of the family unit was $2254. No surplus payments were required. It also shows under Amount of Assets entries relating to the home which are consistent with the arrangement made for the equity in it. Mrs. Bray has since 2001 had a number of serious health problems. She is unable to work. They now have very little income, $398 per month Canada Pension Plan, and the money they have from the sale of their home. Presumably Mr. Bray will start receiving the Old Age Pension later this year. I suspect that these facts explain why they did not complete the payments for the equity in the house.

[13] When one becomes bankrupt, his property vests in his trustee for the benefit of his creditors. If the bankrupt has been living in a home which he had owned, the usual practice is, if the bankrupt wants to continue living in it and he can afford to pay the mortgage and maintain it, the bankrupt and the trustee work out an arrangement whereby the trustee registers a caveat against the title to give public notice that the trustee now holds title, the bankrupt continues to live in the home, the value of the equity is determined and a payment schedule is determined. Once the payments are completed,

the trustee removes the caveat and the equity reverts back to the bankrupt. Sometimes this arrangement is incorporated into a conditional discharge order so that the bankrupt does not become discharged until he has paid for the equity in full. Sometimes the payment for the equity is provided for in a side understanding and does not affect the discharge proceedings. Until the equity is paid the trustee maintains the caveat. It is analogous to the security of a mortgage.

[14] Sometimes the parties do not immediately work out an understanding about how the equity is to be returned. The caveat remains on the title. Eventually something happens, for example the mortgage has to be renewed or the bankrupt decides he cannot afford to live in the house. Terms have to be reached or set by the court.

[15] This may happen either before or after the trustee has been discharged. If the trustee is discharged when the bankrupt wants to settle up, the trustee has to apply to the court to be reappointed in order to complete the administration.

[16] The arrangement contemplated that monthly payments of $125 would be made by both Mr. Bray and Mrs. Bray, but it made no provision for the consequence of their ceasing to make these payments. It would have been better had the Trustee objected to their discharge and sought terms of payment as a condition of their discharges. Alternatively, they could have been discharged and the payments could be secured by a mortgage on the property, providing for interest to accrue should there be default.

[17] However, not being able to close its file without this arrangement being concluded the Trustee wrote to the Brays in June 2005 asking them to come in to arrange payment schedules. I think the Trustee by writing this letter was clearly affirming the amount owing on the arrangement and declaring that all that was left was for a new schedule of payments to be prepared and then followed.

[18] The Brays never responded. Rather they left it to their solicitor to solve the problem when a year later they determined the home had to be sold.

[19] I am not sure exactly how one should describe the legal nature of such an

arrangement. One might say that it is a contract between the trustee and the bankrupt. If so, where there is no time given for completion, it is normally implied that completion should be made within a reasonable time. The arrangement, if not a contract, could be described as a procedure in the administration of a bankruptcy, characterized by understandings between the two as to how the various elements of the administration are to be carried out. Each should be able to rely on the commitments made by the other, but each should be able to expect the other to act in a timely manner. If a time limit is not given, there is an implied term that the party to whom the offer is made will respond within a reasonable time.

[20] The Brays were discharged and made their last payments in mid 2002. Three years later they received the letter and shortly thereafter notice of the Trustee's application for discharge. Throughout they completely avoided the matter. Their impecuniosity may explain their behavior, but does not relieve them of their responsibility to respond to the Trustee's request that they address the matter. I think considering the passage of time and their failure to respond to the Trustee, a reasonable time had passed. They were in default under the arrangement before Mr. MacLean called looking for a

trustee's deed.

[21] I think it is now open to the Trustee to reopen the terms under which it released the equity in the home. Having reached this conclusion, I must determine what the bankrupt should be expected to pay for the equity in their home. The first question is when should the home be valued. The cases suggest there are three dates to be considered, the date of the assignment, which is the date which was used in the arrangement, the date of the bankrupt's discharge and the date the trustee effectively deals with the home.

[22] The question was addressed in *Zemlak (Trustee of)* v. *Zemlak* (1987), 42 D.L.R. (4th) 395 by the Court of Appeal of Saskatchewan. It observed that a bankrupt's post discharge earnings are not attachable by the trustee. They belong to the bankrupt who is free to use as seen fit. The bankrupt can place earnings in a bank account or deposit certificate. The bankruptcy creditors can never have access to them. However, if he uses his money to maintain his home, pay the mortgage, make improvements, etc., and if the valuation of the home is set as of a day subsequent to his discharge, it indirectly goes to the trustee who reaps the benefit of it, being still the owner of the home.

I quote from paragraph 34:

> We accept that it is a basic purpose of bankruptcy laws to give debtors a fresh start in life free from creditor harassment and from the worries and pressures of too much debt. Toward this end, certain property is allowed to be claimed by the individual debtor as exempt. Speaking generally, in the case of an absolute discharge, post-discharge earnings and acquisitions are immune from attachment. The ultimate result, if one adopts the respondent trustee's approach, is to attach post-discharge earnings and acquisitions if they have been ploughed back into the family home. We agree that such a result clearly offends the spirit and intent of the Bankruptcy Act.

It therefore concludes that the date of the bankrupt's discharge is appropriate.

[23] I am aware of cases which contend otherwise.

Piraux, Re (2006), ABQB 409, [2006] A.W.L.D. 2424, holds that the date should be that when the trustee effectively deals with the property. This case does not refer to *Zemlak*. It is a decision of a single judge in Alberta where there is an exemption of $40,000 for the bankrupt's home. This is a substantial factor in the balancing act which does not apply in Nova Scotia.

[24] Another case is *Rocher* v. *H.& M. Diamond & Associates* (2003), 43 C.B.R. (4th) 134 (Ont. C.A.). The dominant factor affecting the reasoning in this case is that the bankrupts had provided false information to the trustee

regarding the property resulting in prejudice to the trustee. This is not a factor in this case. I note that *Zemlak* was briefly referred to in paragraph 15 without adverse comment.

[25] A recent decision of G. B. Morawetz J. of the Ontario Supreme Court, *Brisco (Re)*, [2006] O.J. No. 282, concerned a settlement between a trustee and a bankrupt regarding equity in a bankrupt's home. The Court was asked to approve it. First, it establishes that the test is that of whether the trustee acted reasonably in agreeing to the settlement. Second, it describes the standard of behavior expected of a trustee in making settlements. Of particular interest are its criticism of trustees who automatically reduce the fair market value by the full sum of disposal costs and the suggestion that it is improper to only seek the fair market value less the debt and disposal costs. Trustees are expected to do some hard bargaining. This is not the practice in Nova Scotia with property where the equity is small. It would be a waste of time to try to do otherwise unless the property and particularly the equity in issue are substantial.

[26] The cases mentioned above are not binding on me. For the most part

except *Zemlak* they are distinguishable from the present case. I find the reasoning in *Zemlak* attractive. Therefore, the next step in this decision is to determine the value of the property at the time of Mr. Bray and Mrs. Bray's discharges in mid 2002.

[27] The value of the property which resulting in the arrangement whereby the Brays would together pay $5000 of which $2,250 remains unpaid was that of the date of the assignments, $81,000 - $83,000, as determined by Mr. Evong in September 2001. The sale price of the house this summer was $164,000. To use round figures, from 2001 to 2006 the property increased in value by $80,000, an average of $16,000 per year. Looking at Mr. Evong's report of July 24, 2006, one notes his observations that values particularly rose in 2004 and 2005, one may conclude that the rate of appreciation in the year mid 2001 to mid 2002 when the Brays were discharged is not as high as in later years. With what I have before me I can only make an estimate of what the increase in that year was. I set it at $10,000.

[28] Accordingly of the money now held in trust, the Trustee is entitled to the unpaid balance from the arrangement of $2250 and $10,000, for a total of

$12,250. Mr. Bray and Mrs. Bray are entitled to the balance.

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

R.

Halifax, Nova Scotia
December 19, 2006