IN THE SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY
Citation: Lewer (Re), 2010 NSSC 98

Date: March 15, 2010
Docket: B 34328
Registry: Halifax

District of Nova Scotia
Division No. 01 - Halifax
Court No. 34328
Estate No. 51-1180275

In the Matter of the Bankruptcy of Ian George Lewer

D E C I S I O N

Registrar: Richard W. Cregan, Q.C.

Heard: January 22, 2010

Present: Ian George Lewer, the bankrupt, representing himself.

Joseph Wilkie, representing the Trustee, WBLI Inc.

Mike Chisholm, representing the Office of the Superintendent of Bankruptcy.

[1] This is an application by the bankrupt, Ian George Lewer, for his discharge from bankruptcy.

[2] Mr. Lewer and his wife, Cynthia May DeBlois, made an assignment in bankruptcy on March 20, 2009. The Superintendent of Bankruptcy has filed an objection to Mr. Lewer's discharge. Various grounds for objection are stated, but the material one is:

> the bankrupt listed a Locked-In Retirement Account (LIRA) on his Statement of Affairs, dated March 20, 2009, with a value of $11,000.00. The bankrupt, during the administration of the estate, unlocked the LIRA and received a cash payment.

[3] Prior to his bankruptcy Mr. Lewer's employment with a financial institution had been terminated. It was convenient to transfer his pension credits of approximately $11,000 from that employment to a LIRA. Such was done under the laws of Ontario, where he lived at that time.

[4] A website of the Financial Service Commission of Ontario includes:

> **What is a locked-in retirement savings account?**
>
> If you were entitled to a deferred pension at the time you

> terminated your membership in a registered pension plan, one of your options was to transfer the value of your pension benefit into a locked-in retirement savings account. This type of account is exclusively for money earned in a registered pension plan, and generally speaking, any money transferred into it must remain "locked in". This means that the money payable to you from this account can be used only to provide retirement income, which normally means that you must wait until you reach age 55. Also, while your money is locked in, it cannot be seized by creditors.

[5] The Ontario legislation under which this LIRA was created provides that the funds in a LIRA are normally "locked in" until one takes them as retirement income after age 55. However, there are special circumstances which allow the holder access to the LIRA. One of them is low income. Mr. Lewer qualified under this heading and after having made his assignment withdrew all the funds in his LIRA. These proceeds were used to cover routine family expenses. They are income to him for the tax year 2009.

[6] The first question which must be considered to complete the administration of Mr. Lewer's bankruptcy and provide for the conditions of his discharge is whether the proceeds of his LIRA are exempt from seizure and thus not property available to his creditors under Section 67 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (*BIA)*, or are not exempt and thus available to his creditors.

[7] The second question is, regardless of the answer to the first question, should the proceeds ultimately be classified as income under Section 68.

[8] Let me review some of the cases relevant to the first question. *Gruber, Re* (1993), 22 C.B.R. (3d) 262 (Alberta, Q.B.) considered whether a bankrupt who claimed as exempt his interest in his home under legislation in Alberta respecting exemption for a debtor's home was entitled to claim the exemption for the proceeds when, while still bankrupt, he voluntarily sold the home.

[9] Paragraph 67(1)(b) provides that any property of a bankrupt that is exempt from execution under the laws of the province where the property is situate and where the bankrupt resides is not available to creditors under the *BIA*. This case holds that the determination of whether a given item is exempt from being property available to creditors is to be made as of the date of the assignment in bankruptcy and the exemption continues to apply notwithstanding that its character may change. In this particular situation the home was sold during the currency of the bankruptcy. It was held that the exemption continues for the proceeds. The decision reviews several

cases some going one way, others the other way.

[10] *Re Neuls and Neuls: Touche Ross Limited* v. *First City Trust Company et al* (1985), 56 C.B.R. 132 (Sask., C.A.), concerned a bankrupt who had an exempt profit sharing plan which was terminated by his employer and was distributed to the bankrupt who voluntarily elected to use it to acquire a non exempt RRSP. The following at page 145 is the analysis the court made in finding that the RRSP was non-exempt property:

> This takes us to the second proposition, namely, that the bankrupt voluntarily chose to purchase non-exempt property with the proceeds of the plan. The general principle, set out in *Higgns Co* v *McNabb* is that when exempt property is sold for money the money received is not exempt: see *Regal Distributors Ltd.* v. *Freele,* [1931] 1 W.W.R. 299 at 300, 25 Alta. L.R. [1931] 1 D.L.R. 943 (C.A.) *Slater* v. *Rodgers* (1897), 2 Terr. L.R. 310. There can be no doubt that if the money of the bankrupts in the profit sharing plan has been paid out to them that money would have been exigible. Instead of being paid out to them it was, at their request, transferred into an R.R.S.P. which we have found to be non-exempt property. In the result, the exemption was lost.

[11] The Supreme Court of Canada in 1999 spoke to this problem in *Gilles Poulin* v. *Serge Morency et Associes Inc.*, [1999] 3 S.C.R 351. The bankrupt on termination of his employment from government service directed that the funds held to his credit in the Government and Public Employers Retirement Plan which were exempt in that form be paid into his self directed RRSP.

On his bankruptcy his trustee sought these funds as property of the bankrupt under Section 67. The bankrupt disagreeing sought a declaration that they were exempt. He submitted that, as they were the same sums that he received from the pay out of his pension which by the terms of the underlying legislation were said to be exempt, the exempt status should have continued to apply.

[12] The court rejected this submission. It observed that the pension legislation gave a certain nature to the funds. Upon them being distributed and reinvested in the RRSP their nature and the bankrupt's rights were then changed. "As of that moment, and from then on the appellant's rights, and the sum invested, were governed by the contract." (Paragraph 29). The following language from Paragraph 31 expands this point.

> Once the right to payment or to reimbursement has been extinguished, that is, once the sums have in fact been paid or reimbursed, their inalienable and unseizable nature has been permanently lost. It goes without saying, however, that sums paid or reimbursed that are transferred into another unseizable "vehicle" acquire the unseizable nature of their new "vehicle". Consequently sums reimbursed that are directly transferred into an unseizable "vehicle" remain sheltered from any seizure. Moreover, the appellant could have asked that the sums reimbursed be transferred into an unseizable plan, both at the time of reimbursement and later before his assignment into bankruptcy, but he did not do so, choosing instead a seizable RRSP.

[13] *Gruber* is supportive of the bankrupt's hope that the proceeds are exempt. However, it must be noted that it deals with the substantial exemption allowed in Alberta for a home occupied by a debtor, an exemption not available elsewhere in Canada, but one arising from social and economic policies developed long ago in that province, which are not relevant in the present application.

[14] *Neuls*, decided eight years earlier, based on several authorities takes the opposite approach and clearly asserts "that when exempt property is sold for money the money received is not exempt".

[15] *Poulin* considers several side issues, but in the final analysis it stands for the approval of this proposition by the Supreme Court of Canada. I am satisfied that, when Mr. Lewer took the proceeds of his LIRA in cash, they ceased to be exempt property.

[16] However, this is not the end of the matter. I must consider whether Section 68 applies to these proceeds.

[17] I reviewed the history of the interaction between Section 67 and Section 68 in *Ford (Re)*, 2009 NSSC 124.

[18] Let me summarize this review. One begins with *Marzetti* v. *Marzetti*, [1994] 2 S.C.R. 765, 26 C.B.R. (3d) 161. It held that a tax refund received after discharge flowing from income earned in the bankruptcy period, the return for which had been filed after discharge, should be considered as property of the bankrupt under Section 67. It then considered the question of whether the treatment of the refund as property is overridden by Section 68.

[19] The court established that Section 68 must be taken as a complete code with respect to what happens to "any salary, wages or other remuneration" a bankrupt receives or is entitled to receive and must be dealt with in accordance with the scheme laid out in that section and not treated as property would otherwise be treated under Section 67, namely as divisible among the creditors. It concluded that the tax refund should be considered as "wages".

[20] Section 68 was amended in 1997. Instead of speaking of "salary, wages and

other remuneration", it spoke of "total income" which is defined to include "all revenues of a bankrupt of whatever nature or source". This would appear to widen the scope of Section 68, certainly not to narrow it. Applying this language in *Landry, Re* (2000), 21 C.B.R. (4th) 58 (Ont. C.A.) the court held that the part of an award for unjust dismissal relating to lost wages earned before bankruptcy, and not received until after discharge, was income under Section 68. The thrust of the discussion in these cases is that "income" must be given a wide and generous meaning.

[21] In the *Bankruptcy of Daniel Albert Ruelland*, 2005 NSSC 207, I determined that surplus pension monies to which the bankrupt was entitled before his bankruptcy, but not finally calculated nor disbursed until after his discharge, was income. I saw it as just another payment of income from his pension.

[22] Although it is not relevant to the disposition of this application, as the assignment was made before September 2009, I should note that the amendments to the *BIA* which became effective in that month refine the definitions. I particularly note that in the definition of "total income" in Subsection 68(1)(a), it is said to include:

> . . . a bankrupt's revenues of whatever nature or from whatever source that are earned or received by the bankrupt between the date of the bankruptcy and the date of the bankrupt's discharge . . . .

[23] If Mr. Lewer had either taken the proceeds from the LIRA by way of periodic payments rather than a lump sum, or, if Mr. Lewer had transferred the proceeds to an exempt vehicle such as an RRSP, and then started taking periodic payments from it, there is no doubt that such payments would be treated as income. I fail to see that taking them in one payment is any different. They had been earned during his previous employment. They were withheld and put in his pension plan over time with a view to providing him in his retirement with income in its ordinary meaning. Upon termination of his employment they were transferred to the LIRA again to be kept to provide for his retirement.

[24] They are a small amount in the context of the income Mr. Lewer has made and expects to make as he reestablishes himself. Income is a more appropriate description of these proceeds than capital or property. He used them for the living expenses of his family. They were soon exhausted. As well lump sums which can be broken down as having been earned over a

period of time should be treated as income. This is what happened with the award of lost wages in *Landry, Re*.

[25] Accordingly I find that these proceeds are to be treated as income under Section 68. They after allowance for income tax will enter the calculation of the surplus income which will be required of Mr. Lewer as a condition of his discharge.

R.

Halifax, Nova Scotia
March 15, 2010