IN THE SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY
Citation: Gardner (Re), 2010 NSSC 393

Date: November 1, 2010
Docket: B 34208
Registry: Halifax

District of Nova Scotia
Division No. 01 - Halifax
Court No. 34208
Estate No. 51-1171299

In the Matter of the Bankruptcy of Audra Grace Gardner

D E C I S I O N ON C O S T S

Registrar: Richard W. Cregan, Q.C.

Counsel: D. Bruce Clarke, Q.C., representing the bankrupt.

Pamela Clarke, representing the National Bank of Canada.

[1] On May 12, 2010 I heard the application of Dr. Audra Gardner for discharge from bankruptcy. She was represented by her counsel, D. Bruce Clarke, Q.C. The National Bank of Canada opposed the application. It was represented by its counsel, Pamela Clarke.

[2] I filed my written decision on July 27, 2010 in which I found that Dr. Gardner was entitled to an absolute discharge. I ended the decision saying that, if costs were sought, I would hear the parties. I have now received a written submission from Mr. Clarke asking that the National Bank pay Dr. Gardner costs of $750. Ms. Clarke has responded with a submission that such costs should not be granted.

[3] I am governed by Section 197 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c B-3, (*BIA*), the relevant subsections of which are:

> (1) Subject to this Act and to the General Rules, the costs of and incidental to any proceedings in court under this Act are in the discretion of the court.
>
> (2) The court in awarding costs may direct that the costs shall be taxed and paid as between party and party or as between solicitor and client, or the court may fix a sum to be paid in lieu of taxation or of taxed costs, but in the absence of any express direction costs shall follow the event and shall be taxed as between party and party.

> (7) If a creditor opposes the discharge of a bankrupt and the court finds the opposition to be frivolous or vexatious, the court may order the creditor to pay costs, including legal costs, to the estate.

[4] Dr. Gardner's total debts exceeded $250,000, $170,000 of which was owed to the Bank.

[5] The Bank filed a Notice of Intention to Oppose Discharge of Bankrupt dated October 8, 2009. It was prepared by a solicitor in Toronto.

[6] It listed the grounds of opposition by tracking the wording of Paragraphs 173 (1)(a), (i),(n),(h),(k),(l),(o), of the *BIA* which deal respectively with assets not being of value equal to fifty cents, the incurring of liabilities to reduce value of assets, making a proposal, making a preference, fraud, offences respecting property, and failure to perform duties.

[7] This was followed by a Statement of Facts and Issues. The initial three paragraphs fairly review the facts of her dealings with the Bank, which were to finance her education through medical school and into residency. It then continues by making allegations that she made false statements in her

Statement of Affairs and was deceptive in other ways, that the "moral efficacy" of her making an assignment should be questioned, and that the affairs of her husband from whom she is separated should be considered. It reserved the right to raise further issues.

[8] I presume that shortly after this Notice was filed, this solicitor turned the file over to Ms. Clarke.

[9] In the course of the hearing it became clear that apart from some suggestion of fraud the only ground in issue was that in Paragraph (a), namely whether the value of her assets being less than fifty cents on the dollar had arisen from circumstances for which she could not justly be held responsible. The thrust of my decision was that her financial situation had not arisen from circumstances for which she could justly be held responsible. I found that no facts under Subsection 173(1) were proved. I granted an absolute discharge.

[10] Mr. Clarke had to prepare to address all the grounds listed, but only the fifty cents ground was pursued at the hearing. The allegations, or at least

suggestions, of fraud on Dr. Gardner's part, made his preparation all the more critical. He submits that his client should be compensated for the preparation respecting these other grounds.

[11] Ms. Clarke's submission is that I should read Section 197 carefully. She says that general statement in Subsection (1) making costs a matter of discretion is overridden by Subsection (7) which she says should be taken as the only authority for granting costs on a discharge application. She quotes *Sullivan and Driedger on the Construction of Statutes*, 4th edition at page 273:

> When two provisions are in conflict and one of them deals specifically with the matter in question while the other is of more general application, the conflict may be avoided by applying the specific provision to the exclusion of the more general one. The specific prevails over the general; it does not matter which was enacted first.

[12] She is saying that the two provisions conflict and that the specific should prevail. I am not convinced that there is a conflict. Subsection (1) affirms the general principle regarding costs that applies to litigation in general. Subsection (7) is a specific application of this principle given for greater certainty to confirm that in certain situations costs may be allowed to the

estate. For it to have the effect Ms. Clarke suggests I think requires language expressly indicating such limitation. There is no conflict.

[13] Ms. Clarke submits that awarding costs in discharge matters is unusual and limited to extra ordinary circumstances. She refers me to two of my decisions, namely *George (Re)*, 2008 NSSC 304 and *Maas, Re*, 2007 NSSC 218, 33 C.B.R. (5th) 272. In the first the objecting creditor obtained a measure of success in that a condition was imposed on the bankrupt's discharge. In the second the objecting creditor was not successful. There were no solicitors involved; costs would not have been appropriate. I do not see that these cases help in the present circumstances.

[14] However, in *Doe, Re* (1992), 15 C.B.R. (3d) 105 I found the following discussion by D. Lane J. of costs against opposing creditors at page 110:

> At the same time, I made a rather unusual order as to costs. I directed that the opposing creditor pay the sum of $500 to counsel for the bankrupts to defray their costs of the hearing. I made that order to show the court's displeasure at certain aspects of the way in which the opposition was conducted. The filing of an opposition which merely tracks the language of sections of the statute without giving the slightest particularity; the refusal to give particularity when it was asked for; the failure to employ the investigative mechanisms of the Act to obtain basic information before the hearing, and the use of the hearing as, in effect, an examination for discovery, taken together, are, in my opinion, an

> abuse of the court's process. The discharge hearing is most emphatically not the place to discover the basic facts upon which opposition to the discharge is based. That should be done outside of court by investigation including, if necessary, examination of the bankrupts themselves. There is ample mechanism for this under the Act and there is no excuse for the waste of time involved and the inconvenience to a large number of applicants with the misfortune to be lower on the list than this case. It is unfair to the court and to all persons involved in this system. Mr. Barrett argued that to order costs against his client would be to send a message to the profession that creditors dare not object to discharge. I think the message is quite different. It is that opposition to discharge from bankruptcy, like every other court proceeding, ought to be prepared in advance and not during the hearing. Discharge from bankruptcy is a summary procedure and elaborate notices of objection and lengthy out-of-court examinations are not appropriate, except in unusual cases. But neither are oppositions bereft of particulars and prolonged examinations for discovery in the courtroom appropriate either.

[15] Some of this passage has no bearing on this matter. However, it does show what one judge said about the need for meaningful particulars in a notice of opposition and for the importance of timely fact finding. I adopt these comments. Costs were awarded against an opposing creditor to be paid to counsel for the bankrupt who received an unconditional discharge.

[16] Mr. Clarke was required to address a number of grounds which were not pursued. They had only been raised in a perfunctory manner by the Bank and its solicitor. The fifty cent matter was the only ground seriously pursued. It was the one issue which I had to consider in detail.

[17] It is understandable that one might initially raise the question of fraud, but no firm evidence of it was established. The Bank's witness admitted that Dr. Gardner had not done anything wrong. Fraud must be strictly proved. Those who allege it and fail to prove their allegations are often severely chastised by the courts. Solicitor - client costs can be awarded. Also the authorities clearly indicate that only in clear situations should fraud be an issue in discharge proceedings.

[18] I am satisfied that it is a proper exercise of discretion to award costs, especially because of the raising of grounds without particularity and abandoning them and alleging fraud or at least suggestion of fraud and not proving it. Such reasons are within the scope of Subsections 197 (1), and (2). There being no specific guidance for me in the *BIA* or its Rules, I think it appropriate to seek guidance in Tariff C of Rule 77 of the *Nova Scotia Civil Procedure Rules*. It suggests $1,000 to $2,000 for a hearing involving more than half day but less than 1 day. Such was the length of this hearing.

[19] Mr. Clarke has asked for $750, much less than that suggested in the Tariff. I think this sum is rather modest, considering the significance of the issues

and amount involved. However, in the circumstances I do not think it is for me to increase the amount.

[20] The Bank shall pay Dr. Gardner's solicitor costs of $750.00.

R.

Halifax, Nova Scotia
November 1, 2010