SUPREME COURT OF NOVA SCOTIA
Citation: *Zomar Investments Ltd. (Re)*, 2011 NSSC 104

Date: 20110314
Docket: Hfx. No. 337579
Registry: Halifax

In the Matter of the Bankruptcy of Zomar Investments Limited

-and-

In the Matter of the Application of PricewaterhouseCoopers Inc. as Trustee of the Estate of Zomar Investments Limited in Bankruptcy pursuant to Section 95(1)(b) and 96(1)(b)(I) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3 as amended

Judge:	The Honourable Justice Peter Rosinski
Heard:	March 3, 2011, in Halifax, Nova Scotia
Written Decision:	March 14, 2011
Counsel:	Carl A. Holm, Q.C., for the Trustee Duncan H. MacEachern, for Warren L. Matheson

BACKGROUND

[1] Warren Matheson (“Matheson”) and the Trustee in Bankruptcy for his company, Zomar Investments Limited (“Zomar”) disagree on who is the owner of a parcel of land in Albert Bridge, Cape Breton (“the Property”).

[2] Zomar was incorporated by Matheson in 1992.

[3] The property was transferred to Zomar by deed registered June 4, 1993 and transferred from Zomar (Matheson signed as President and Secretary of Zomar) to Matheson by deed dated July 5, 2010 and registered September 2, 2010.

[4] On October 29, 2010, Zomar was found to be bankrupt and Matheson identified as the “Corporate Officer or Designated Person” in the Certificate of Appointment.

[5] The Trustee alleges that the property was transferred to Matheson to avoid its inclusion in the Bankrupt’s property at the time of a bankruptcy order.

[6] Matheson argues that Zomar held the property in trust for him throughout the years 1993 to 2010.

This Motion is Interlocutory

[7] The Trustee brought a motion in General Chambers, under its original Application for a Receiving Order, seeking a declaration that the transfer of the property in July 2010 is void, and title to the property remains as an asset of the Estate of Zomar, a bankrupt.

[8] That motion in General Chambers has generated two issues for my determination (which counsel agreed I could dispose of without becoming seized with the merits of the motion):

1. Should an adjournment of the matter be granted from the scheduled March 3, 2011, hearing date; and

2. Does the *Land Actions Venue Act* require that the hearing of the motion take place in the Justice Centre area where the property is located (Sydney)?

The Adjournment

[9] Matheson argued that he was not in a position to fully put his position forward as he was still marshalling his evidence. His counsel was only retained February 9, 2011, and in oral submissions he suggested that two weeks more time would be sufficient to have his evidence ready for hearing. He does insist that the hearing be in Sydney pursuant to the *Land Actions Venue Act.*

[10] Mr. Holm, for the Trustee, while not wishing to deny Matheson an opportunity to present his case, was troubled that since the Notice of Motion was served on Matheson (February 4, 2011), a month had passed within which Matheson could have marshalled his evidence.

[11] Moreover, as Mr. Holm argues, the suggested affiants, Mr. Nash and Mr. MacKinlay, may have little to add at a hearing - *See paras. 21 - 32 of Mr. Holm's March 1, 2011 letter.*

[12] Whether to adjourn a matter is a judicial exercise of discretion, and very much fact driven according to the circumstances in each case.

[13] The decision should accord with the interests of justice, after a balancing of the interests of the applicant (Matheson) and the respondent (Trustee). I agreed to adjourn the March 3, hearing. These may be considered my reasons.

[14] In this case, I note:

1. In my view, the briefs and affidavits thus far filed, convince me that this matter should be scheduled as a Complex Chambers matter given it involves a significant factual disputes which likely will require cross examination of affiants (for which the Parties should ensure they give the requisite notice under the CPR):

2. Although Matheson has counsel, he had only formally retained Mr. MacEachern on February 9, 2011, for a hearing set for February 10, 2011, (for which he was served notice on February 4, 2011);

3. It is arguable that Matheson may profit from the opportunity to present further evidence on an adjournment date, than what was available to him March 3, 2011;

4. A Court should be extremely reluctant in the circumstances at Bar to preclude a party from presenting the evidence it wishes, even when it makes an untimely adjournment request to marshall further evidence;

5. The adjournment sought is at least two weeks;

These facts favour the granting of an adjournment

[15] On the other hand, I also note:

1. Matheson could have been more diligent in obtaining counsel and marshalling his evidence given the fact that since October 2010, he was aware that Zomar was bankrupt and only in July 2010, had he received the property from Zomar, after he was aware that the Business Development Bank had called Zomar's loans rendering it insolvent; *(see the June 14, 2010 letter from*

BDC to Zomar - Exhibit F to D. Cramm's affidavit sworn January 26, 2011);

2. Possible witnesses, Mr. Nash and Mr. MacKinley (and Matheson) reside in the Sydney judicial district and would have been easily located had Matheson wished to do so earlier;

3. The original February 10, 2011 hearing date was adjourned at the behest of Matheson as his counsel was unable to attend;

4. Having been granted an adjournment, one would have expected Matheson to be doubly diligent in marshalling his evidence for the rescheduled March 3 hearing date;

5. The Trustee wishes to sell the property and an adjacent Zomar parcel together so as to obtain a greater price for the two parcels combined than if they were sold separately, and delay causes greater costs for the Trustee and denies it (potentially if this motion for declaration is granted) the profits associated with the combined sale.

These facts do not favour the granting of an adjournment.

[16] I should acknowledge that it became necessary, in any event, to have the hearing adjourned from March 3, as there was insufficient General Chambers time available that day to hear the matter. The matter was adjourned *sine die*.

[17] Had there been enough time on March 3, I would have granted the adjournment primarily because I am loathe to prevent Matheson from presenting evidence by refusing to adjourn; and I am convinced this matter should be heard at Complex Chambers (1 full day).

[18] However, before a date is assigned for the hearing in Complex Chambers, I must determine whether the venue should be Halifax or Sydney.

The *Land Actions Venue Act* ("LAVA")

[19] Matheson argues that Cape Breton (Sydney Judicial District or "Justice Centre Area") "is the most convenient forum given the witnesses that should be involved in providing..." *(See para. 31, Matheson's February 24, 2011 brief)*.

[20] The Trustee argues that Halifax is where the main proceeding was started and moreover, the *Land Actions Venue Act* does not apply to the circumstances of this case.

[21] To resolve the dispute regarding whether LAVA is applicable requires a foray into the world of statutory interpretation - for a succinct summary of the applicable principles see *Coates v. Capital District Health Authority* 2011 NSCA 4 per Oland, JA at paras. 35-36.

(I) What is the meaning of the legislative text?

The entirety of the LAVA reads:

> 1. This Act may be cited as the *Land Actions Venue Act*.
>
> 1A. In this Act, "justice centre area" means a justice centre area established by the Minister of Justice pursuant to the *Judicature Act*.
>
> 2. All actions for trespass to lands or in which possession or recovery of lands is sought, and all actions in which title to lands is in issue, shall, unless the Court or a Judge otherwise orders, be tried in the justice centre area in which the lands lie, and if the lands lie in more than one justice centre area, then in any of the justice centre areas in which any part of the lands lie.

[22] Section 26 of the *Judicature Act* R.S.N.S. 1989 c. 240 reads:

> The Minister of Justice may establish justice centres and for each the justice centre area it serves.

[23] For present purposes, the justice centre most local to the property is Sydney - the justice centre where the main proceeding was started is Halifax.

[24] "Lands" is defined in s. 7(1)(n) of the *Interpretation Act* R.S.N.S. 1989 c. 235:

> ...include, respectively, lands, tenements, hereditaments and all rights thereto and interests therein.

[25] Section 9(5) of the *Interpretation Act* is also relevant (particularly to the question of what did the legislature intend) and reads:

> (5) Every enactment shall be deemed remedial and interpreted to insure the attainment of its objects by considering among other matters
>
> (a) the occasion and necessity for the enactment;

(b) the circumstances existing at the time it was passed;

© the mischief to be remedied;

(d) the object to be attained;

(e) the former law, including other enactments upon the same or similar subjects;

(f) the consequences of a particular interpretation; and

(g) the history of legislation on the subject.

(ii) What did the Legislature intend?

[26] In the case at Bar, the key words in dispute in s. 2 of the LAVA are:

> All actions for trespass to lands, or **in which possession or recovery of lands is sought, and all actions in which title to the lands is in issue**... **[Emphasis added]**

[27] Does the motion for a declaration by the Trustee herein fall within s. 2 of LAVA?

[28] In my view, it does not.

[29] The LAVA was first enacted April 6, 1923 S.N.S. 1923 c. 10 and was entitled:

> An Act Respecting the Trial of Actions involving the Title to Lands

[30] Except for the replacement of “County” and “Counties” by “justice centre area” or “areas”, [and section 1A], the wording has remained unchanged since then.

[31] As the original title suggests, the Act is intended to regulate the “Trial of Actions”. This reference suggests that the Act applies to situations where the main/original proceeding is by way of an “action” or “trial” process, and more specifically, that the “Action” must relate to the “Title of Lands”.

[32] In the case at Bar, the main proceeding was commenced as an Application for Receiving Order pursuant to sections 95 and/or 96 of the *Bankruptcy and Insolvency Act* R.S.C. 1985 c. B-3 (“BIA”).

[33] In a bankruptcy proceeding, the focus is not on “title to lands”, but rather the entire collection of the bankrupt’s assets and the deconstruction of its estate.

[34] I do not think the Legislature intended to require that a bankruptcy proceeding must be commenced in a justice centre area merely because the bankrupt had “lands” there. Moreover, a bankruptcy proceeding under the BIA is a process for the distribution of the property of an insolvent person among its creditors and to relieve the bankrupt of the unpaid balance of its liabilities. Thus, it is not a “trial” process, as contemplated by LAVA.

[35] Nevertheless, even if a bankruptcy proceeding could be included under the rubric of “trial” and “action” under LAVA, LAVA is still inapplicable in the case at Bar because the motion involving the title issue is not the “dominant aspect of the proceeding”. If an “action”, which would lead to a trial, involved only “lands”, and the determination of valid title thereto, the LAVA would be applicable. In those cases one would expect, absent extraordinary circumstances, justice to be conducted locally where the lands are situate.

[36] However, if one accepts this “dominant aspect of the proceeding” analysis and rationale, it is difficult to argue that interlocutory hearings, arising from a main action/proceeding in one justice centre area should be diverted to another justice centre area without compelling reasons.

[37] The motion at issue is an interlocutory matter and its presumptive place of hearing is Halifax, since that is where the Trustee has selected “the place of proceeding” to be under CPR 33.02, and that is where “all documents filed in a proceeding must be filed...”.

[38] I note a number of cases here, which in different contexts considered LAVA, and appear to apply a “dominant aspect of the proceeding” perspective:

1. *MacNeil v. MacNeil* [1983] N.S.J. No. 355 (S.C.) - Nathanson, J. found that although real property of a matrimonial property nature was located in Halifax County, that that fact did not require the action for a division of matrimonial property under the *Matrimonial Property Act* S.N.S. 1980 c. 9 to be commenced in Halifax because of the LAVA;

2. *Dawnstar Developments Inc. v. Ross* [1989] NSJ No. 79 (C.A.) - Regarding a dispute over the interpretation of an Agreement of Purchase and Sale of property at Bridgewater, the Court found that the case involved an "action for the recovery of a deposit" (money) and therefore the LAVA was not applicable.

3. *Evengeline Savings and Mortgage Co. v. Barnes* [1994] NSJ No. 184 (S.C.) - In cases where foreclosure actions are commenced (that do not involve title issues) Gruchy, J. found LAVA not applicable since "a foreclosure action is a suit whereby the mortgagor's right to exercise an equity of redemption will be set aside... not one for recovery of lands."

4. *Nova Scotia (Farm Loan Board) v. Ells* [1997] NSJ No. 521 (C.A.) - After the Board acquired title to Ells' real property following his bankruptcy, and sought to sell it, Ells unsuccessfully applied for an injunction to prevent its sale to a third party. His argument that LAVA required the matter to have been heard in Kings County rather than Halifax County was rejected by Moir, J., and that conclusion was affirmed on appeal.

5. *RBC v. Sweeney* [2003] NSJ No. 381 (C.A.) - In a foreclosure proceeding Wright, J. found LAVA inapplicable. His conclusion was affirmed on appeal. Cromwell, JA (as he then was) at paragraph 18 noted that:

> The Act deals with the place of trial, not with the place of commencement of the action, or the hearing of interlocutory applications.

[39] Matheson argues that all these cases are distinguishable as they were argued under the 1972 *Civil Procedure Rules* which allowed interlocutory matters to be heard elsewhere than where a proceeding was commenced - CPR (1972) 37.03. He interprets CPR (2009) 32 as requiring all interlocutory matters to be heard where the proceeding was started, unless the venue of the "place of proceeding" itself is changed.

[40] I disagree. CPR (2009) 32.02(2) reads:

> (2) All documents filed in a proceeding must be filed at the office of the prothonotary in the selected place.

[41] CPR (2009) 32 allows the originating party to select the "place of the proceeding", but also permits "a motion to change the place of the proceeding". CPR (2009) 32 does not expressly say that all interlocutory motions must be heard in the original "place of the proceeding". The Rule requires only that the "filing" be done there. However, CPR (2009) 47 still allows the hearing of trials/applications and interlocutory motions in places other than "the place of the proceeding" and the new Rules are consistent with the old Rules in this respect. To the extent that Matheson relies on a difference between them to distinguish cases decided under the old Rules, his argument is flawed. I say this because CPR (2009) 47, a more specific rule than 32, provides that:

> 47.03 (1) A party who starts a proceeding, **or makes a motion**, must select one of the following places for the trial or hearing:
>
> (a) a courthouse where there is an office of a prothonotary
>
> (b) another courthouse approved by the Chief Justice...
>
> (2) The party must state the selected place of trial or hearing in the notice by which the proceeding is started, **or the motion is made**.
>
> 47.04 (1) A party may make a motion to change the place of trial or hearing [of a motion].

[42] I note that Matheson has offered no cases in support of his position. I find that the new Rules are consistent with the old Rules, allowing choice of venue for motions to moving parties initially, and that finding accords with the purpose of the new Rules, practical considerations, and a contextual interpretation of the Rules.

[43] Effectively, Matheson is asking this Court to change the motion venue without having made a formal motion to that effect. He relies on LAVA and argues implicitly that since the Act is applicable, the onus is therefore on the Trustee to satisfy the Court that the place of proceeding should remain as Halifax.

[44] Perhaps an examination of the *Civil Procedure Rules* regarding changes of venue will be helpful.

(iii) What are the consequences of adopting Matheson's proposed interpretation of LAVA?

[45] What one cannot lose sight of, is that that the issue of who is the valid owner of the property in this case is an interlocutory matter. Matheson's argument is that

the new Rules do not allow a motion to be heard anywhere but the original “place of proceeding”, absent a successful change of venue motion.

[46] To allow the interlocutory matter to determine the “place of proceeding” is to have the “tail wag the dog”.

[47] Moreover, Matheson’s position is at odds with the *Civil Procedure Rules*.

[48] Under the old (1972) *Civil Procedure Rule* we find a good discussion of a change of venue application involving a request for declaratory relief (as in this case) by Oland, J. (as she then was) in *Bowater Mersey Paper Co. v. Queens (Municipality)* 1999 NSJ No. 361 (S.C.).

[49] Although *Bowater* dealt with an originating application (rather than an interlocutory motion as here), I find the reasoning applicable to interlocutory motions such as the one in the case at Bar, especially where Matheson’s interpretation would require the entire proceeding to be changed to Sydney under the new *Civil Procedure Rules* if LAVA applies.

[50] I concede that Justice Oland, under the old (1972) Rules, was comparing an originating action and an originating application process in that case. Nevertheless, I observe *Civil Procedure Rule* (1972) 37.03 applied to both originating and interlocutory applications - see *Civil Procedure Rule* (1972) 37.01, and therefore, her comments are persuasive in the context of interlocutory applications as well. To the extent that her comments are persuasive regarding interlocutory applications, they also are of assistance in the case at Bar involving an interlocutory motion.

[51] Oland, J. (as she then was) concluded in *Bowater* at para. 13:

> 13 The onus will be on the applicant for the change of the place of hearing to demonstrate to the Court that there are such strong and valid reasons for the change requested that the Court should overturn the [originating party's] entitlement to select the location as set out in *Rule* 37.03... an unreasonable choice for the place of hearing, very substantial inconvenience to witnesses, proximity to the physical scene which gave rise to the dispute, and the subject matter being one of great public interest will be among the considerations. **In view of the nature of applications and the applicant's right to control the proceedings, the test cannot be reduced to a simple weighing of conveniences. [Emphasis added]**

[52] The present Rule, *Civil Procedure Rule* 47, reads:

> A party may select the place for the trial of an action, or the hearing of an application... or request a change in the place of the trial or hearing, in accordance

> with this Rule, **unless legislation such as the Land Actions Venue Act provides otherwise**.

[53] The explicit reference to LAVA in *Civil Procedure Rule* (2009) 47 which deals with **originating** methods of proceeding (i.e. The place of trial or hearing an action or application) suggest that in the case at Bar, if he wishes to rely on LAVA, Matheson should be arguing not that the interlocutory motion be heard in Sydney, but that the entire bankruptcy proceeding be heard in Sydney, and therefore the motion must be heard there as well.

[54] Given Matheson's status as a non-party to the bankruptcy proceeding, it would be an undesirable consequence that, as a party only to the interlocutory motion, he could override the Trustee's choice of venue.

[55] Moreover, as Justice Oland noted in *Bowater*, *supra:* "the test [for change of venue] cannot be reduced to a simple weighing of conveniences".

The Discretion to Change the Venue

[56] Whether LAVA is applicable to the case at Bar or not, Matheson is not without redress in either case. Both *Civil Procedure Rule* (2009) 47 and LAVA allow for motions for change of venue.

[57] *Civil Procedure Rule* 47.04(1) permits:

> ...a motion to change the place of trial or hearing [of a **motion**].

[58] Section 2 of LAVA allows a change of venue for **trials** if:

> ... the court or a judge otherwise orders.

[59] A judge would therefore have a discretion, one way or the other, to consider a motion for change of venue in appropriate circumstances.

Conclusion

[60] I conclude that section 2 of LAVA does not apply to the case at Bar.

[61] As suggested by the principles/law of statutory interpretation, and on examining the historical aspect, the consequences of Matheson's suggested interpretation, the interpretation by the Courts in Nova Scotia of LAVA, and the present legislative context, I am driven to the conclusion that LAVA is intended only to apply to cases where title to lands is being determined by trial, and where title to lands is the predominant issue in the main proceeding. Any concerns about a change of venue of the trial or motions can still be addressed under the *Civil Procedure Rules* in any event.

[62] Alternatively, if I am wrong in that interpretation, and LAVA **does** apply and the bankruptcy proceeding ("trial") should presumptively have been started in Sydney, I would be inclined to exercise my discretion under LAVA to order that the bankruptcy proceeding remain located in Halifax, as the originating party has selected that location, and I find, in spite of the lands and some potential witnesses being in Cape Breton, that there are not sufficient grounds (eg. capricious actions by the Trustee, or "strong evidence that the great preponderance of convenience") to warrant the change sought by Matheson.

[63] I have also found that I would have granted the adjournment largely because the hearing will require complex Chambers (1 day), and it would allow Matheson the opportunity to marshall his evidence.

Order

[64] I therefore need only address the setting of the adjourned date and filing dates. Mr. MacEachern advised he needed two weeks to marshall the evidence. To avoid further delay, I will set the filing dates.

[65] I will require that any additional filings meet the following filing requirements:

Matheson will file any further reply affidavits by 4:30 p.m., March 21, 2011, and a (supplemental) brief by 4:30 p.m., April 8, 2011.

The Trustee shall file any rebuttal affidavits by 4:30 p.m., April 1, 2011, and a supplemental brief by 4:30 p.m., April 15, 2011

[66] All Notices of Intention to cross-examine an affiant will be filed (served on the opposing party) as required by the *Civil Procedure Rules*.

[67] The adjourned date for hearing is to be set between the parties through contact with the Halifax Scheduling office as soon as possible.

[68] I will leave any issue of costs to be decided by the Justice hearing the motion.

J.