IN THE SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY
Citation: Byrne (Re), 2012 NSSC 23

Date: January 18, 2012
Docket: B 35420
Registry: Halifax

District of Nova Scotia
Division No. 03 - Sydney
Court No. 35420
Estate No. 51-1397618

In the Matter of the Bankruptcy of Christopher James Byrne

D E C I S I O N

Registrar: Richard W. Cregan, Q.C.

Heard: November 17, 2011

Counsel: Joe McNally representing The Facility Association

Rita Anderson representing the Trustee, PricewaterhouseCoopers Inc.

[1] Background

This is an application by Christopher James Byrne for discharge from bankruptcy. It is opposed by one of his creditors, The Facility Association (Association).

[2] On May 11, 2002, Mr. Byrne, who was then fifteen years old, was driving a Kana Four Wheeler, owned by his cousin. Justin Yates, of similar age, was a passenger. He lost control of the vehicle. As a result, Justin Yates was seriously injured. There was no liability insurance in place for the vehicle.

[3] An action was brought against him by Mr. Yates which resulted in a judgment being entered against him in 2007 for $180,000.

[4] The Association administers an uninsured automobile fund, supported by premiums on each auto insurance policy issued within Nova Scotia, to provide compensation to persons injured by the negligence of uninsured drivers. It takes assignments of judgments against such drivers obtained by persons so compensated.

[5] The Association paid the judgment amount to Mr. Yates and Mr. Yates assigned the judgment to it.

[6] Through its solicitor the Association advised Mr. Byrne of the judgment and endeavored to have him agree to a repayment arrangement. He failed to respond with the result that his driver's license was suspended.

[7] In 2009 while in Alberta he contacted the Association's solicitor asking that his driver's license be restored. The Association advised that it would be forthcoming, if he agreed to a repayment arrangement. He did not respond. An execution order was issued against him on July 15, 2010. He made an assignment in bankruptcy on August 25, 2010.

[8] His debts total $213,973.57 of which $210,744.11 is the Association's claim.

[9] His wife suffers severely from Crohn's disease. They have a daughter born this year. They live in Port Morien. He works as a fisherman's helper. He reports earnings of $1,600.00 per month. Little more was learned of his

circumstances.

[10] The Trustee's Form 82 of November 2, 2011 reports that he had not provided financial information nor paid administration costs and that the Trustee had tried to contact him on several occasions to no avail.

[11] Pursuant to the notice of the application for discharge the Association responded in two ways, first with an application pursuant to Section 181 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (*BIA*) for the annulment of the assignment in bankruptcy and second with a notice of opposition to his discharge under Section 168.2 of the *BIA*.

[12] Annulment

The authority of the court to annul a bankruptcy is found in Subsection 181(1) of the *BIA*, which I quote:

> If, in the opinion of the court, a bankruptcy order ought not to have been made or an assignment ought not to have been filed, the court may by order annul the bankruptcy.

[13] One must consider what would be the circumstances where an order ought

not be to be obtained or an assignment made. Obviously, if the person was not actually insolvent at the time, the *BIA* would have no application to the person's situation. An annulment would be appropriate. But one must go beyond that limited use. This is done in the following passage from *Wale, Re* (1996), 45 C.B.R. (3d) 15, paragraph 24:

> Numerous cases conclude that the debtor's motive in making an assignment is not generally relevant. There is nothing unlawful in declaring bankruptcy for the sole purpose of defeating the claims of one's creditors. *Irving Oil Co. v. Murphy* (1962), 5 C.B.R. (N.S.) 203 (P.E.I. S.C.). One of the objectives of bankruptcy legislation is to permit the debtor, in the words of Evershed M.R. "to protect himself from the evils which he might otherwise suffer". *Re Dunn*, (1949) 2 All E.R. 388 (C.A.). However, this general principle must always be tempered by the caveat that fraud or abuse of the process will permit a court to annul the assignment. In *Bankruptcy and Insolvency Law of Canada*, by Holden and Morawetz, Third Edition, Vol 2, at page 6-107, the learned authors say:
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>> The court must consider the rights not only of the debtor and of the creditors but also the rights of the public. A bankrupt should not be permitted to benefit from his own turpitude.

[14] Mr. Byrne was insolvent at the time of his assignment. There was a judgment in excess of $200,000 against him which he could not pay. What started it all was a negligent act in his past, resulting in this judgment. What could he do about it? He could have worked with the Association as it requested him. He chose not to communicate with it most likely because of

fear of impecuniosity, or just plain not knowing what to do with his predicament and having no close person to help him. So he eventually did the right thing, he consulted a trustee in bankruptcy whose advise was to make an assignment in bankruptcy. Bankruptcy is not an escape from responsibility, rather it is a procedure for persons in circumstances as Mr. Byrne was in to deal with their obligations in a controlled way. To give such assistance is what trustees are for. I cannot see how in these circumstances Mr. Byrne was engaging in any fraud or abuse of process.

[15] I do not see that the provisions for annulment are applicable to him. There are people who for various devious or manipulative reasons become bankrupt whose bankruptcy should well be annulled. Mr. Byrne is not one of them.

[16] His circumstances are similar to many others who have become bankrupt because of accidents for which there was no indemnity through insurance. Their bankruptcies are not annulled, rather the courts have worked to provide conditions of discharge which recognize the special circumstances. This will be discussed as I consider Mr. Byrne’s discharge application.

[17] The application for annulment is denied.

[18] Discharge

The Notice of Intended Opposition lists three grounds, namely those in Paragraphs (a) (n) (o) of Subsection 173(1) which I quote:

> (a) the assets of the bankrupt are not of a value equal to fifty cents on the dollar on the amount of the bankrupt's unsecured liabilities, unless the bankrupt satisfies the court that the fact that the assets are not of a value equal to fifty cents on the dollar on the amount of the bankrupt's unsecured liabilities has arisen from circumstances for which the bankrupt cannot justly be held responsible;
>
> (n) the bankrupt, if the bankrupt could have made a viable proposal, chose bankruptcy rather than a proposal to creditors as the means to resolve the indebtedness; and
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> (o) the bankrupt has failed to perform the duties imposed on the bankrupt under this Act or to comply with any order of the court.

[19] Once one of these facts is proved the terms of discharge are governed by Subsection 172(2).

[20] As to Paragraph (n), the Trustee reports that he could not make a proposal. I do not see that this has been rebutted. He is of very limited means. No doubt that is the main reason for his not responding to the correspondence sent him on behalf of the Association. A proposal requires more structure in

his financial affairs than he would be capable of handling.

[21] As to Paragraph (o), he has clearly failed to perform in a timely way the duties imposed on him.

[22] However, it is Paragraph (a) that requires careful consideration. It asks whether he can convince the court that his financial situation has arisen from circumstances for which he cannot justly be held responsible.

[23] Can he prove that he should not justly be held responsible for what he did which resulted in the judgment? I commented on this question in *George, Re*, 2008 NSSC 304. I quote paragraphs 20 to 25:

> [20] Clearly, his assets are not of a value equal to fifty cents on the dollar. The burden is then on him to show that this situation "has arisen from circumstances for which the bankrupt cannot justly be held responsible". *Samson* v *Alliance nationale* (1935), 17 C.B.R. 304 (Que, CA)
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> [21] What have the courts said about justly being held responsible for debts? The leading case in this context is *Kozack* v *Richter*, 20 C.B.R. (N.S.) 223, a decision of the Supreme Court of Canada. The debt of approximately $14,000.00 resulted from a motor vehicle accident caused by the "wilful and wanton misconduct" of the bankrupt.
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> [22] Pigeon J. adopted the following position expressed in a number of earlier cases, namely that:

> . . . the *Act* was never intended to enable a judgment debtor to get rid of a judgment for damages and with no other purpose to serve than the convenience and comfort of the debtor. (paragraph 6)

[23] The court determined that the bankrupt would have to pay approximately half the judgment before being discharged, notwithstanding that he was a wage earner with a family with limited income. In paragraph 5, Pigeon J. said, referring to Section 172:

> . . . I cannot agree that the proper application of the provisions above quoted should result in a plaintiff making no recovery for personal injuries caused by gross negligence. It would mean that motorists in respondent's situation would be able to tell such a claimant: "There is no use suing me, if you lose you will have to pay the costs, if you win I will make an assignment in bankruptcy and you will get nothing."

[24] A number of cases have followed *Kozack*. *Phillips, Re*, 32 C.B.R. (4th) 294 (N.S., Registrar Hill) concerned a bankrupt who was involved in an accident while driving without insurance. Judgment Recovery (N.S.) Limited paid the claim and took judgment against him. Two years later he was involved in an accident causing serious injury to a passenger. He then had neither license to drive nor insurance. Again Judgment Recovery paid the claim and took judgment against him.

[25] In this decision Registrar Hill noted a decision of Goodfellow J. of this court, *Diamond, Re*, 2002 NSSC 31, which confirmed the applicability of *Kozack* in Nova Scotia for circumstances of this nature. Registrar Hill also referred to an earlier case he had decided, *Re Edwards*, [1992] N.S. J. No. 294 and quoted in paragraph 8 the following from his earlier case:

> It seems that some of the cases state that where the bankrupt does not have the means to pay or some future prospects of meeting the terms of a conditional order such an order should not be made. The proposition is that the Court should not focus entirely on the bankrupt's tortuous conduct, but must consider his financial and other relevant circumstances. There are other cases that might be said to stand for the proposition that a conditional order should be made even absent the ability to pay where an assignment has been made to avoid payment of a judgment or debt arising from tortuous conduct.

and added in paragraph 9 the following:

> In my view, I should not allow the statute to be used as a mechanism to avoid responsibility for what clearly was irresponsible conduct. At the same time, it is appropriate to keep in mind the rehabilitative purpose of the legislation. No two cases will be identical, and the court will need to find a correct balance between these competing principles in each case.

[24] There are certain debts resulting from a bankrupt's behavior which the *BIA* makes undischargeable. I am thinking of those listed in Subparagraph 178(1), for example, damages for intentionally inflicted injury. However, the passage from *George, Re* quoted above, recognizes that there are other debts which are discharged but which require special recognition in framing discharge conditions. They are not characterized by the turpitude found in the Subparagraph 178(1) debts, but their nature is one which society rightly demands a recognition of responsibility. Such demand that one's discharge be conditional on making a payment into one's estate which might well be beyond the bankrupt's means at the time of discharge.

[25] In the *Kozack* case the accident was the result of wilful and wanton misconduct. In *Phillips* the bankrupt caused an accident while driving without insurance and then two years later caused another again without insurance.

[26] Mr. George was responsible for an accident with an automobile. Insurance coverage was denied because he was driving the automobile without the owner's permission, having bullied the owner's daughter to allow him to use it, knowing that she had no authority to authorize his use.

[27] All of these defendants were required as conditions of discharge to pay significant amounts into their estates, notwithstanding their limited means.

[28] In *Kozack* the judgment was about $13,000. He was required to pay $7,200. In *Phillips* the judgment was $200,000. He was required to pay $24,000. In *George* the judgment was $1,931,290. He was required to pay $100,000.

[29] There are two points I draw from these cases. The debtors each acted with obvious irresponsibility, and each was only required to pay as a condition of discharge a small fraction of the debt, yet it was for each a significant amount to pay which each would find difficult to pay.

[30] The question is whether Mr. Byrne should be similarly treated. He was driving the vehicle without insurance. There is nothing to suggest anything

wilful on his part. Boys fifteen years of age no doubt take advantage of any opportunity to drive such a vehicle. The issue of insurance most likely was beyond him. He had the use of the vehicle, his cousin's. There is no suggestion of having bullied anyone to have its use.

[31] Mr. Byrne was young. Only so much responsibility can be attributed to him, but he caused serious injury to his friend. The friend was compensated by the Association, which indirectly is compensation by all who carry insurance on their vehicles. This is not a mitigating factor.

[32] However, there is not the degree of moral turpitude on his part as was found in these cases. One should not drive vehicles without insurance. The cases make it clear that responsibility cannot be escaped by those who cause injury while driving uninsured vehicles.

[33] What should one expect of a fifteen year old? In these circumstances, probably not much. But this should not relieve him of responsibility. It is only a mitigating factor. What he did is something for which he can be justly held responsible. His discharge is governed by Subsection 172(2).

He should be required to pay something to acknowledge his responsibility.

[34] The conditions of his discharge shall be:

1. That he consent to judgment in favour of the Trustee in the amount of $5000;

2. That he pay the Trustee the balance of outstanding fees of $1250.00;

3. That he report his income and expenses so that the Trustee may determine whether he has surplus income and, if so, pay it for 21 months; and

4. That he attend his second counselling session.

R.

Halifax, Nova Scotia
January 18, 2012