IN THE SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY
Citation: Cheevers (Re), 2013 NSSC 67

Date: February 22, 2013
Docket: B 35255
Registry: Halifax

District of Nova Scotia
Division No. 01 - Halifax
Court No. 35255
Estate No. 51-1451400

IN THE MATTER OF THE PROPOSAL OF
FRANCIS FREDERICK CHEEVERS

D E C I S I O N

Registrar: Richard W. Cregan, Q.C.

Heard: February 1, 2013

Counsel: David Grant representing Francis Cheevers

Tim Hill representing Elizabeth Caines

Joseph Wilkie representing the Trustee, WBLI Inc.

[1] This is an application by WBLI Incorporated, the Trustee in the Amended Proposal of Francis Frederick Cheevers which was approved by the Court on May 2, 2011, to resolve a dispute between the Trustee and Mr. Cheevers on one side and Elizabeth Caines, the largest unsecured creditor in the Proposal, on the other. Ms. Caines is represented by Tim Hill who is also the sole Inspector in the Proposal. Mr. Cheevers is represented by his solicitor, David Grant.

[2] Mr. Hill, at the beginning of the hearing, asked for confirmation that the Office of the Superintendent and the creditors had been served with notice of this application.

[3] There is on file the affidavit of Nicole Brown, an employee of the Trustee, stating that on January 18, 2013 notice of the application was mailed to the known creditors of the debtor, the debtor and Mr. Hill by prepaid ordinary mail and to the Office of the Superintendent by e-file.

[4] Mr. Hill also asked whether there was compliance with Section 192 of the

Bankruptcy and Insolvency Act, R.S.C. (1985), c. B-3 (*BIA*), specifically Paragraph (j) which states that registrars have power and jurisdiction: "to hear and determine any matter with the consent of all parties".

[5] All who appeared, namely, Mr. Hill on behalf of Ms. Caines, Mr. Wilkie on behalf of the Trustee, WBLI Incorporated, and Mr. Grant on behalf of Mr. Cheevers indicated their consent.

[6] Clause 4 of the Proposal states the obligations of the Debtor. The issue centers around Paragraph (d) of this clause. I quote it:

> That the Debtor shall pay to the Trustee the value of his equity, after secured claims and estimated selling costs, at an amount to be approved by the Trustee and Inspectors in the property at 105 West Lawrencetown Road, Lawrencetown, NS in the following matter:
> • the sum of fifteen thousand dollars ($15,000) within sixty days (60) from the date of court approval of the proposal, and
> • the sum of twenty five thousand dollars ($25,000) within 6 months (6) from the date of court approval of the proposal, and
> • the balance of his equity, after deducting the two previous instalment payments of fifteen thousand dollars ($15,000) and twenty five thousand dollars ($25,000) respectively, within twenty four (24) months from the date of court approval of the proposal.

[7] Mr. Cheevers has only paid the first instalment mentioned in this paragraph, that is $15,000.

[8] His *Statement of Affairs* (Form 79), dated February 7, 2011, which was provided to the creditors by the Trustee along with the notice that Mr. Cheevers had filed a proposal, states that among his assets is:

> "105 West Lawrencetown Road, Lawrencetown, NS (½ interest) (Encumb)"

with an *Estimated dollar value* of $337,500.00, and a *Secured Amount* of $159,197.00, resulting in an *Estimated net realizable dollar value* of $75,000.00. Presumably the last sum was determined by subtracting from $337,500, $159,197, leaving equity of $178,303, from which was subtracted $28,303, being the estimated selling costs, leaving $150,000. Dividing this sum by 2, Mr. Cheevers having only a half interest, leaves as his equity in the property $75,000.

[9] Shortly after the approval by the Court of the Proposal on May 2, 1011, Mr. Cheevers engaged Kempton Appraisals Limited to prepare an appraisal of the property. Its report dated May 27, 2011, opines that the market value of the property as of that date was $194,000.

[10] The Trustee and Mr. Cheevers submit that for purposes of compliance with

Paragraph (d) the equity stated in the *Statement of Affairs* on which the creditors relied when they accepted the Proposal should now be replaced with the equity determined by using the value in the appraisal report. If one subtracts from the appraised value of $194,000 the encumbrance of $159,197, one is left with equity of $34,803, half of which reflecting his half interest is $17,401. Allowing a reasonable amount for selling costs, "the value of his equity" is less than $15,000, the amount he has already paid. Mr. Cheevers and the Trustee say he has paid all that is required of him and has thus discharged his obligation under this paragraph.

[11] Ms. Caines and Mr. Hill, both as her solicitor and as the sole Inspector, reject this construction. They say that the fair construction of this paragraph must be determined by what was presented to the creditors when they were asked to accept the Proposal, namely that there would be an equity after the encumbrances and the selling costs in the vicinity of $75,000, as indicated in the *Statement of Affairs*. Nothing is said about the determination of the equity being subject to an appraisal.

[12] It is the obligation of a trustee in preparing a proposal to follow

Directive #24 issued by the Superintendent of Bankruptcy.

[13] Paragraph E of Appendix A of this Directive is relevant:

> For the purpose of projecting the realization in a bankruptcy situation, attempt to evaluate the assets of the debtor by class and disclose the basis of evaluation. If such evaluation has not been done, mention that such is the case and give the reason for not evaluating the assets. Also, attempt to identify and report to creditors on any encumbrance against the said assets.

[14] This directive has statutory confirmation in Section 50(5) of the *BIA,* which I quote:

> The trustee shall make or cause to be made such an appraisal and investigation of the affairs and property of the debtor as to enable the trustee to estimate with reasonable accuracy the financial situation of the debtor and the cause of the debtor's financial difficulties or insolvency and report the result thereof to the meeting of the creditors.

[15] Creditors are entitled to assume that trustees have complied with these provisions which set the professional standard required and to rely on the statements made in *Statement of Affairs* and other communications prepared by trustees.

[16] Nothing is mentioned in the Proposal that an appraisal would be made after

it is accepted which would govern the amount Mr. Cheevers would be expected to pay pursuant to Paragraph (d).

[17] Simply put, the Proposal which the creditors accepted under the statutory scheme for proposals in the *BIA* provides that Mr. Cheevers would pay his share of the equity in the property by instalments first of $15,000, second of $25,000, and the balance of the $75,000, that is $35,000, subject to adjustment for "estimated selling costs" which the Trustee and the Inspector would approve. There is nothing in this Paragraph or anywhere else in the Proposal which contemplates the use of an appraisal to be subsequently obtained in determining Mr. Cheevers' obligations under this Paragraph.

[18] Mr. Hill draws attention to the *contra proferentem* rule which is stated in *Anson's Law of Contract* (25th ed, 1979), at page 151:

> The words of written documents are construed more forcibly against the party using them. The rule is based on the principle that a man is responsible for ambiguities in his own expression, and has no right to induce another to contract with him on the supposition that his words mean one thing, while he hopes the Court will adopt a construction by which they would mean another thing, more to his advantage.

[19] I do not think that there is any ambiguity in Paragraph (d) when read in its context. It is very clear that certain amounts would be payable, that is, the first payment of $15,000, the second of $25,000, and the balance of the equity of $75,000 given in the *Statement of Affairs* that is, $35,000 subject only to a credit for "estimated selling costs". This is all quite clear, or if not, at least it is clear enough that there is no basis for bringing an appraisal obtained after the acceptance of the Proposal into play.

[20] What the Trustee and Mr. Cheevers are attempting to do is make a substantial amendment to the Proposal after it was accepted. There is a way to amend a proposal, which in substance is putting a new proposal to creditors. A strained construction of a proposal, as they are attempting, will not accomplish that end.

[21] In any event, if there is any ambiguity, it should be resolved against Mr. Cheevers, the maker of the Proposal. Thus there is no place for the appraisal in the administration of this Proposal. This is sufficient to dispose of the application in favour of Ms. Caines.

[22] A declaration in accordance with this decision will be granted.

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

R.

Halifax, Nova Scotia
February 22, 2013