CANADA
PROVINCE OF NOVA SCOTIA
COURT NOS. 22427 & 22428
ESTATE NOS. 066050 & 066051

IN THE SUPREME COURT OF NOVA SCOTIA

IN BANKRUPTCY

IN THE MATTER OF THE BANKRUPTCIES OF

BYRON STANLEY MCARTHUR and

EILEEN ELIZABETH MCARTHUR

Cite as: McArthur (Re), 2000 NSSC 308

D E C I S I O N

HEARD BEFORE: Tim Hill,
Registrar in Bankruptcy

DATE HEARD: March 10, 2000

DECISION: April 27, 2000

COUNSEL: Michael J.E. Venner
representing the Trustee,
Venner & Associates Inc.

The Bankrupts, Byron Stanley McArthur, and Eileen Elizabeth McArthur representing themselves

Cecil and Pamela Pettigrew
representing themselves

This is an application for directions made by the trustee of the estates of Byron Stanley McArthur and Eileen Elizabeth McArthur made pursuant to section 34(1) of the Bankruptcy and Insolvency Act which states**:**

> The trustee may apply to the court for directions in relation to any matter affecting the administration of the estate of a bankrupt and the court shall give in writing such directions, if any, as to it appear proper in the circumstances.

The facts are not in dispute.

The bankrupts made an assignment in bankruptcy on June 24, 1997. They received their discharges pursuant to the provisions for first time bankrupts on March 25, 1998.

On January 14, 1999, a decision was rendered by Beryl A. MacDonald, Adjudicator of the Small Claims Court of Nova Scotia, in an action where Cecil and Pamela Pettigrew claimed against the bankrupts for the sum of $2,279.00, which debt arose as a result of dealings between the bankrupts and the Pettigrews which took place prior to the original assignments in bankruptcy.

Both the Pettigrews and the McArthurs were represented by counsel in the Small Claims Court. The written decision of the Adjudicator reveals that counsel for the claimants argued that the debt in question survived the bankruptcy by virtue of section 178(d) of the Bankruptcy and Insolvency Act. The Small Claims Court Adjudicator determined that she did have jurisdiction to determine whether or not the Pettigrew's claim came within the provisions of section 178, and that consequently she did have jurisdiction to adjudicate on the matter. She did so adjudicate and she did find that the money was due and payable, and that the

debt was not discharged by the discharge of the bankrupts as a result of the operation of section 178(d) of the Bankruptcy and Insolvency Act.

The trustee has not yet been discharged. The trustee is apparently concerned that when he takes his discharge, the Pettigrew's will proceed to execution against the McArthur's and that the McArthur's will not be able to live on what may be left to them after a garnishee of their wages. The trustee takes the position that a garnishee cannot proceed until he is discharged, and apparently counsel for the Pettigrew's takes no issue with that.

Counsel for the Pettigrews did not appear on the application. He did however fax a short brief to the court which took the position that neither I nor the bankruptcy court had "jurisdiction over the matters which (the trustee) requests direction". In addition, counsel challenged my jurisdiction on the basis the matter was contested. In this regard I do note that the Pettigrews did appear personally and made representations.

The directions sought by the trustee, as set out in his notice of application, were for directions ....."with respect to the dispute between".... the Pettigrews and the bankrupt. Needless to state, this is most vague. The trustee's accompanying memo did little to pierce the gloom.

An application for directions is only appropriate where the facts are not in dispute. As noted in Houlden & Morawetz, Bankruptcy and Insolvency Law of Canada, 3rd Ed., 1989 (looseleaf), at p. 1-106:

> In an application for directions, the matter should be put to the court on the basis of admitted facts, and the advice and direction of the court should be sought on those facts.

In Re Ward (1987), 66 C.B.R. (N.S.) 164, 84 N.B.R. (2d) 389, 214 A.P.R. 389 (Q.B.), the court stated (at p. 171[CBR]):

> ....it seems well settled in law that in an application under s.16 (34(1)) of the Act a court must confine itself, in giving directions, to matters concerning administration of the estate and has no authority to resolve substantive issues in dispute between a trustee and a third party.

The facts here are not in dispute. However, the issue raised to my mind has nothing to do with the administration of the estate. The trustee appears to have taken upon himself the task of assisting the bankrupts in avoiding in some way a garnishee based on the Small Claims Court order. Where, as here, the bankrupts are discharged, I cannot make the connection between a garnishee after discharge and the “administration of the estate”.

That should be enough to dispose of the matter. However, in deference to the arguments made, and in case I am wrong in dismissing the application on the basis that it does not relate to the administration of the estate, I would comment further.

I have no jurisdiction to determine this matter. It is contested. The Pettigrews clearly have not consented to me assuming jurisdiction (section 92(j)). The application, if it had any merit at all, should have been made before a judge.

I do not accept the submission of counsel for the Pettigrews that the Bankruptcy Court (as distinct from the Registrar) would have no jurisdiction over this controversy.

The order of the Small Claims Court was obtained at a time when the action was stayed by virtue of section 69.3(1) of the Bankruptcy and Insolvency Act:

> Subject to subsection (2) and sections 69.4 and 69.5, on the bankruptcy of any debtor, no creditor has any remedy against the debtor or the debtor's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy, until the trustee has been discharged.

Notwithstanding the allegation that the Pettigrew's claim is such as to survive bankruptcy by virtue of section 178(d), the claim was provable in the bankruptcy. The proceeding in Small Claims Court was heard after the assignment of the bankrupts and before the discharge of the trustee. Leave was never sought of the Bankruptcy Court.

The proceedings taken by the Pettigrews were irregular, and the Small Claims Court Adjudicator was clearly wrong in not considering the effect of the stay under section 69.3. I do note that the bankrupts were represented by counsel at the hearing and there is nothing in the Adjudicator's decision to indicate that the issue of the stay of proceedings was ever raised before her. She would not have had jurisdiction to lift the stay, which jurisdiction resides exclusively in the Bankruptcy Court.

The cases make it clear that where appropriate leave to proceed with an action can be granted by the Bankruptcy Court nunc pro tunc: Bankruptcy and Insolvency Law of Canada (supra), at p. 3-142, and the cases cited therein.

The Pettigrews have not sought leave. The Ontario Court of Appeal in Amanda Designs Boutique Limited v. Charisma Fashions Limited, [1972] 3 O.R. 68, 17 C.B.R. (N.S.) 16, 27 D.L.R. (3d) 392, at p. 19 [C.B.R.] held:

> The object of the Bankruptcy Act is to ensure that the property of an insolvent person or corporation be made available for the benefit of creditors rateably subject only to the priorities established or recognized by the Act. It is inherent for the accomplishment of this purpose that, upon the Act coming into operation with respect to the property of a particular debtor, the rights of a creditor to pursue his own remedy, otherwise than as provided by the Act itself, should be suspended. In my opinion, for the attainment of this purpose, it is essential that, after the Act imposes it's operation on or in respect of the property of the debtor no act or proceeding not recognized by the Act should improve the position of a creditor or confer on him any right not held by him at the time of the Act comes into effect with respect to that debtor.

The court in Amanda Design Boutiques Limited went on to hold that although the proceedings taken by a creditor in violation of the statutory stay were irregular, rather than null and void, those proceedings were ineffective to confer upon the party taking them any rights to property (in particular to property levied by the Sheriff on execution).

In my view, the judgment and execution order the Pettigrews now have do not and will not convey any rights in property until such time as leave to proceed is granted. As noted, only the bankruptcy court can grant that leave, which may, where appropriate, be granted nunc pro tunc.

I also note that the Adjudicator appears to have proceeded in ignorance of the decision of Saunders J. in Hall v. New Breton Homes Ltd. (1994), 131

N.S.R. (2d) 218 (S.C.). In that case a Small Claims Court Adjudicator had held that a particular debt survived bankruptcy, a decision reversed on appeal before the Nova Scotia Supreme Court. In reaching this decision, Justice Saunders commented (at p. 221):

> I am also of the opinion that the learned adjudicator exceeded his jurisdiction. ..... There is nothing in the Small Claims Court Act which entitled an adjudicator to deal with matters touching on bankruptcy. The Registrar in Bankruptcy and the Bankruptcy Court in Nova Scotia have jurisdiction to deal with the conduct and transactions of a bankrupt. Having been advised that Hall had gone bankrupt after the debt had been incurred, the learned adjudicator had no authority to deal with New Breton's claim. By deciding that the debt is still collectable, the learned adjudicator erred in law and exceeded his jurisdiction.

Adjudicator MacDonald made the same error.

I note that the caselaw is clear that an application for discharge the Bankruptcy Court will not make a declaration that a particular claim is not released by the bankruptcy: Re Michaud (1978), 28 C.B.R. (N.S.) 93 (Que.S.C.); Re Kierdorf (1990), 80 C.B.R. (N.S.) 6 (Ont. S.C.); Re Mathieu (1999), 7 C.B.R. (4th) 214, 167 Sask. R.281 (Q.B.). The proper procedure is to bring an action in the ordinary civil courts.

The rationale for seeking a declaration that a debt survives bankruptcy by virtue of section 178 of the Bankruptcy and Insolvency Act in the ordinary civil courts is simple. On an application for discharge, the Bankruptcy Court proceeds summarilly Thus a bankrupt would not enjoy the benefits of a trial of the issue of whether the debt should survive bankruptcy. In particular, the bankrupt would not enjoy the testimonial and documentary discovery available in a trial process.

It seems to me that Justice Saunders in Hall v. New Breton Homes Ltd. must have had this consideration very much in mind in finding a lack of jurisdiction on the part of the Small Claims Court to deal with this issue. That court proceeds in a very summary manner, without any discovery procedures whatsoever. The Small Claims Court would be no better off than the Bankruptcy Court in making a determination on the issue, and perhaps worse off because the practice of the Bankruptcy Court is at least to require that affidavits be filed prior to a hearing.

Had an appeal been taken from the Adjudicator's decision it might well have met with success. No appeal was taken.

Having gone much further than I need and having addressed all the arguments put to me I dismiss the application on the basis that:

(1) it does not relate to the administration of the estate, and

(2) I have no jurisdiction, the application being opposed.

There will be no costs.

Dated at Halifax, Nova Scotia, this day of , 2000.

_____

Registrar in Bankruptcy