SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY

Citation: *Ongo (Re)*, 2018 NSSC 326

Date: 20181221
Docket: No. 41842
Registry: Halifax

In the Matter of: The bankruptcy of Gerard Francis Ongo

Judge: Raffi A. Balmanoukian, Registrar

Heard: December 17, 2018, in Sydney, Nova Scotia

Counsel: Leonard M. Shaw, for the Trustee, BDO Canada Limited
Gerard Francis Ongo, personally

Balmanoukian, Registrar:

[1] First and second-time summary bankrupts who comply with all of their duties are eligible to receive automatic absolute discharges, pursuant to section 168.1 of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3, as amended (the "BIA"). A third and subsequent bankruptcy, regardless of circumstances, must come before the Court for disposition.

[2] In *Re Kusch*, 2007 BCSC 618, Master Young referred to a fourth bankruptcy as "a highly unusual situation indeed."

[3] As of 2014, there appears only to have been only one reported case of a fifth-time bankruptcy: Thomas G.W. Telfer, "Repeat Bankruptcies and the Integrity of the Canadian Bankruptcy Process," 2014 Canadian Business Law Journal 231.

[4] This is presumably the second.

[5] Mr. Ongo's prior bankruptcies, in 1998, 2000, 2005, and 2011 (when Mr. Ongo was approximately 34, 36, 41, and 47 years old) were described by the Trustee as "due to business failures." Indeed, in reviewing the public Court

files from the third and fourth insolvencies, I found a combination of tax and other debt that appears to be mostly business related.

[6] Mr. Ongo has remained in the food industry, but is now an employee. The current bankruptcy consists entirely of consumer debt – credit cards, a payday lender, and a car loan – totalling $37,750. He does not have, nor has a meaningful prospect of having, surplus income within the meaning of Section 68 and Directive 11R2.

[7] The Trustee recommends submission of income and expenses by the bankrupt until February 2020 and a suspension until February 2023, being some five years after the assignment. In its submission, Mr. Ongo's current situation is distinguishable from his prior bankruptcies due to the changed nature of the debt from commercial to consumer.

[8] So what is to be done?

[9] In *Re Boivin*, 2008 BCSC 221, Registrar Blok, while recognizing as do I that "each case….turns on its own facts," summarized the caselaw as follows:

> A fourth bankruptcy is a very serious matter. Indeed, even for applications involving third-time bankrupts the courts have expressed reluctance in ordering a bankrupt's discharge, at least not without a lengthy suspension or similarly onerous terms. The reasons for this are aptly captured in ***Re Willier*** (2005), 14 C.B.R. (5th) 130, 2005 BCSC 1138 (CanLII), at paras. 12 and 13:

> By the time an individual has entered a third bankruptcy, the purpose and intent of the ***Act*** shifts from its remedial purpose of assisting well-intentioned but unfortunate debtors to one of protecting society, and in particular unsuspecting potential creditors. The best intentions and hopes of such bankrupts become subordinated to the need to protect others from the bankrupt's demonstrated financial incompetence, negligence, and carelessness. If there can be a concept of debtors' recidivism, it is demonstrated in stark relief by a third-time bankrupt.
>
> To even consider a discharge for a third time bankrupt the court must be satisfied that the bankrupt has gained sufficient insight and made sufficient changes in his or her life that it is not reasonably possible that further bankruptcy will occur.

To similar effect is the following, found in ***Re Hardy*** (1979), 30 C.B.R. (N.S.) 95 (Ont. S.C.) at para. 3:

> In my view, a third bankruptcy is one too many. The well-recognized principle underlying bankruptcy law is that a debtor may, in proper circumstances, be relieved of his obligations and enabled to re-establish himself financially. I do not consider that he should be enabled to do so on a recurring basis. The process of the Act and of the court should not be considered to bestow a licence to incur debts and be purged of them at periodic intervals.

I am aware of only two other recent cases in this province involving fourth-time bankrupts, both decided by Master Young. In ***Re Kusch*** (2007), 33 C.B.R. (5th) 208, 2007 BCSC 618 (CanLII), the bankrupt was refused a discharge and was denied leave to reapply for a discharge for a period of two years. The learned master commented that on a reapplication she expected that there would still not be an unconditional discharge granted. In ***Re Mulligan***, 2007 BCSC 1784 (CanLII), the bankrupt's discharge was suspended for 15 years, the master emphasizing that society needed to be protected from the bankrupt's incompetent use of credit.

[emphasis added]

[10] In bankruptcy freemasonry, this is usually called the "clearing house for debt."

[11] Rephrased for modernity, in *Re Legault*, 1994 CanLII 2996 (BCCA) at para. 31 Madam Justice Southin referred to this as the need to avoid using the

insolvency process as a "fiscal carwash". While she was in dissent, the majority agreed with this sentiment at para. 51.

[12] So what of Mr. Ongo? There is no indication, despite the meaningful tax and public debts of his prior bankruptcies, to suggest he is a rogue or dishonest, characteristics which appear in many of the bankruptcy cases in which discharges are refused or subject to stringent conditions. I do note in passing, however, that his 2005 assignment was only discharged in 2011, presumably to pave the way for his fourth assignment the same year.

[13] I interpret the Trustee's assertion that "the other bankruptcies were commercial and this one is not" in a somewhat different fashion than does the Trustee. I interpret it to mean that not only is Mr. Ongo unable to operate within his business' means, but is also unable to operate within his own. The current bankruptcy, as I have said, consists entirely of consumer credit – credit cards, a payday lender, and a (secured) car loan.

[14] In this regard, I have considered the decision of Master Young in *Re Mulligan*, 2007 BCSC 1784, a decision which in turn applied *Willier*. The Court was dealing with Ms. Mulligan's fourth bankruptcy, all of which were for comparatively modest amounts. She had health issues and at least some of her

financial woes came from providing assistance to family members. Despite this lack of moral default, the Court, after quoting the same passage in *Willier* I have repeated above, stated:

> Society does need to be protected from Mrs. Mulligan's incompetent use of credit. I believe her bankruptcies have been for small amounts because it was all that was available to her. I know she does use the credit for family reasons and because of illnesses. I know that she has not lived an exotic lifestyle at all. She said in court before me that she had not had a vacation in recent memory. She has not been cavalier about her credit but still, in all likelihood, her expenses will exceed her meagre income.
>
> She has repeatedly shown that she cannot budget within her means, and so I am accepting the recommendation of the Superintendent, and I am suspending the discharge for 15 years. This bankruptcy is unavailable to her now, and she will be forced to live within her financial means.

[15] I accept this reasoning as authority for the proposition that moral taint may be an aggravating factor in determining the circumstances of one's discharge, but the lack of such taint does not preclude the Court from its role in balancing creditor interests with those of the debtor.

[16] *Re Hiebert* 2008 SKQB 153 involved four bankruptcies over 31 years with a 67 year old "kind, generous, and well-intentioned man." Registrar Schwann said:

> As noted above, the test to be applied on a third or fourth bankruptcy shifts from rehabilitating a well-intentioned but unfortunate debtor to one of protecting society generally and unsuspecting creditors in particular. Can society be protected from this bankrupt? Has he gained any insight or committed to change sufficient to forestall a subsequent bankruptcy? Unfortunately, although a seemingly kind, generous and well intentioned man, Hiebert's attitude displayed no remorse, and more to the point, shed no light or insight gained concerning appropriate use of credit and financial management.

> Quite the contrary, I sense a measure of justification borne of necessity and desperation, that is, credit cards could and should be used to augment income regardless of ability to re-pay.
>
> Having regard to the facts, I am not satisfied that Hiebert has gained sufficient insight into proper financial management, budgeting and use of credit, nor am I persuaded that he has made appropriate changes in his life to prevent another bankruptcy from occurring. Regrettably, I conclude that the protection of society and unsuspecting creditors can only be achieved by refusing his discharge application.

[17] Professor Telfer's article, *supra*, reports that in 2012 there were 12 fifth-time bankruptcies nationwide. Most of the cases I have cited of fourth-time bankruptcies involve assignments over a period of many years and, by the time of the fourth discharge application, often involve persons of advanced years.

[18] Here, we have five bankruptcies over 20 years.

[19] Mr. Ongo is 54. All of his assignments have been after the very useful tool of debtor counselling became mandatory in 1992. This has apparently borne little fruit.

[20] From all of this I must conclude, as I commented at the hearing, that enabling – I use the word deliberately – Mr. Ongo to have access to credit would be akin to providing a firearm to a child.

[21] I have given careful consideration to the appropriate remedy. I do not believe an order for payment into the estate would be appropriate here, given Mr. Ongo's current and expected level of income. What is more important, I

think, is that the disposition of this case provide meaningful protection against "unsuspecting creditors."

[22] I have, in reviewing the above and in exercise of my discretion, decided to refuse the application for discharge. Having done so, the question is then whether I should provide leave to re-apply and if so, at what point in time.

[23] When an application is simply refused, the only way the bankrupt can attain a discharge in the future is to apply to vary the order under s. 187(5): Houlden, Morawetz & Sarra, *Annotated Bankruptcy and Insolvency Act* at section H37(2). I do not believe that, either, would be appropriate in this case.

[24] Neither is a suspension for three years as suggested by the Trustee. I believe all that does is provide a period of purgatory in which the bankrupt will spend his time earning indulgences. I am not convinced that at the end of such a process he would, fiscally, sin no more.

[25] I am refusing the application for discharge with leave to re-apply in 10 years from the date of this decision. That will interrupt the two-to-seven year pattern Mr. Ongo has had for the last 20 years, and bring him to the edge of his senior years. Hopefully, that will do what the prior procedures and counselling have not done, namely instill the necessary habits to live within his cash flow. I

remind him that it is an offence under s. 199 of the BIA to engage in trade, or obtain credit from any person of $1000 or more without disclosing that he is an undischarged bankrupt.

[26] I am, as recommended by the Trustee, ordering the Bankrupt to submit income and expense statements, and any surplus income pursuant to Directive 11R2, on a monthly basis to and including February 29, 2020.

[27] Lastly, am also ordering the Bankrupt to pay the balance of $1,750 remaining under his voluntary payment agreement. This was described in the Trustee's affidavit as being the balance payable under a fee agreement, for a total of $2,400. Although I am ordering the balance under the agreement to be paid, for certainty, the Trustee's fees in this summary administration shall be governed by Rule 128.

Balmanoukian, R.