SUPREME COURT OF NOVA SCOTIA
Citation: *South Wind Properties Limited (Re)*, 2020 NSSC 197

Date: 20200624
Docket: B-456150
Registry: Halifax

In the Matter of Bankruptcy of South Wind Properties Limited

Decision

Judge:	The Honourable Justice John Bodurtha
Heard:	August 1, 2019, in Halifax, Nova Scotia
Oral Decision:	June 24, 2020
Written Decision:	July 20, 2020
Counsel:	Bruce Clarke, Q.C., Counsel for MNP Ltd., Trustees of the Estate of South Wind Properties Limited, the Bankrupt
	Peter L. Coulthard, Q.C., Counsel for Creditor, Joseph Horne

By the Court:

I. BACKGROUND

[1] This is the matter of the bankruptcy of South Wind Properties Ltd. ("SWPL"). The Trustee, MNP Ltd., filed its application for discharge on June 27, 2018. A creditor, Joseph Horne, opposed the Trustee's discharge. Mr. Horne objects on three grounds:

1. Relevant questions on the Notice of Objection remain unanswered;
2. The Trustee has not complied with the *Bankruptcy and Insolvency General Rules*, CRC, c. 368;
3. The Trustee has not complied with the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 ("*BIA*").

II. FACTS

[2] The relevant facts for determination on this matter are as follows:

1. SWPL made an assignment in bankruptcy on September 28, 2016.
2. SWPL had been a real estate development company and it held several parcels of real estate. All the real estate was encumbered except for one small parcel.
3. The encumbered parcel was sold to a third party.
4. Of the encumbered parcels, the Trustee determined that there was no equity in any of the properties and all secured creditors were offered a Trustee's deed.
5. Mr. Horne is a large creditor of SWPL. Mr. Horne did not agree to the price for a Trustee's deed. Mr. Horne has not acted on a security to date and there is no equity in the property that was invested in the bankruptcy estate.
6. Mr. Horne has chosen not to accept a Trustee's deed from the Trustee for the Horne Lands and has also chosen not to act on his security.
7. The Superintendent of Bankruptcy is not opposed to the discharge of the Trustee
8. No creditor other than Mr. Horne has filed Notice of Opposition to the discharge of the Trustee.

III. ISSUE

[3] Whether this Court should grant MNP Ltd.'s (the Trustee in Bankruptcy of SWPL) motion to be discharged under section 41 of the *BIA.*

IV. LAW & ANALYSIS

[4] The statutory test on an application for discharge of a bankruptcy Trustee is set out under the *BIA* under section 41 which provides that:

> **41 (1)** When a trustee has completed the duties required of him with respect to the administration of the property of a bankrupt, he shall apply to the court for a discharge.
>
> **(2)** The court may discharge a trustee with respect to any estate on full administration thereof or, for sufficient cause, before full administration.

[5] Section 41(4) of the *BIA* explains full administration:

> **When estate deemed fully administered**
>
> **(4)** When a trustee's accounts have been approved by the inspectors and taxed by the court and all objections, applications, oppositions, motions and appeals have been settled or disposed of and all dividends have been paid, the estate is deemed to have been fully administered.

Trustees' Duties

[6] Trustees have a dual role, or dual interests, in representing the bankrupt's estate as well as the interests of the creditors. The Supreme Court of Canada described the dual nature of this role in *Lefebre, Re*, 2004 SCC 63, as follows:

> 36 At any rate, the use of the concept of *dévolution* (vesting) in the French version of s. 71(2) *B.I.A.* does not eliminate the distinction between the two aspects of the trustee's role following the initial bankruptcy event. In *A. Marquette & fils Inc. v. Mercure* (1975), [1977] 1 S.C.R. 547 (S.C.C.), this Court clearly noted this distinction, which serves as a basis for characterizing the legal position of the trustee when exercising the powers and performing the obligations the law ascribes to trustees. Referring to the concept of representation to explain the trustee's twofold responsibility, de Grandpré J. stated that in his view **the trustee is a representative of both the debtor and the creditors** (at p. 553). In order to liquidate the bankrupt's property as directed by the *Bankruptcy and Insolvency Act*, the trustee must take control of it. At this stage, the trustee is the bankrupt's successor or, in a broad sense, his or her representative. However, the trustee's juridical personality is not to be confused with that of the debtor. In fact, as de Grandpré J. noted, the law recognizes that the trustee has the right to sue the debtor if necessary (at p. 553). This power illustrates the importance of the other

> aspect of the trustee's functions, that of representing the creditors in the management and liquidation of the bankrupt's property. The trustee's legal position is therefore more akin to that of a third person in relation to the debtor. **On the one hand, the trustee is subrogated to the bankrupt's rights in the exercise of his or her powers to hold and dispose of property of which he or she has been granted seisin. On the other hand, the law treats the trustee as the creditors' legal mandatary who will liquidate the property entrusted to him or her for the creditors' benefit.** The dual nature of the trustee's duties does not therefore make it possible to regard the trustee as a third person in relation to the bankrupt, given all the powers conferred upon the trustee by law in order to preserve and liquidate the debtor's property. **The nature and legal characterization of the trustee's role will vary depending on the nature of the duties that the trustee's actions will entail.**
>
> [Emphasis added]

[7] The Trustee is also an Officer of the Court, as Deschamps J. later explained, dissenting on other grounds, in *GMAC Commercial Credit Corp – Canada v TCT Logistics Inc*, 2006 SCC 35:

> 89 The trustee is, first and foremost, an officer of the court:
>
> > ...and the Court regards him as its officer, and he is to hold money in his hands upon trust for its equitable distribution among the creditors.
> >
> > (*Condon, Re* (1874), 9 Ch. App. 609 (Eng. Ch. App.), at p. 614)
>
> 90 The basis for the trustee's long-recognized role as an officer of the court is found in s. 16(4) *BIA*; under the *BIA*, the trustee has the same status as the interim receiver: *Sovereign Bank v. Parsons* (1912), [1913] A.C. 160 (Ontario P.C.), at p. 167; L. W. Houlden, G. B. Morawetz and J. Sarra, *Bankruptcy and Insolvency Law of Canada* (3d ed. (loose-leaf)), vol. 1, at C§10 and C§44. This status obliges the trustee to act equitably and prudently, to cooperate with the court and, in a more general manner, to contribute to the proper administration of justice (*L'Heureux, Re*, [1999] R.J.Q. 945 (C.A. Que.), at p. 949; *Caisse populaire de Pontbriand c. Domaine St-Martin Ltée*, [1992] R.D.I. 417 (C.A. Que.); *Eagle River International Ltd., Re*, [2000] R.J.Q. 392 (C.A. Que.); *Reed, Re* (1980), 34 C.B.R. (N.S.) 83 (Ont. C.A.); J. Auger and A. Bohémier, "The Status of the Trustee in Bankruptcy" (2002), 37 *R.J.T.* 57, at pp. 99-100).
>
> 91 The *BIA* protects trustees while they are acting as officers of the court and exercising the powers conferred upon them by law. A trustee is not personally bound by the bankrupt's obligations. In addition to being protected by the provisions that confer immunity upon them (ss. 14.06(1.2), (2) and (4), 50(9) and 50.4(5)), trustees benefit from the screening of the proceedings provided for in s. 215, which is central to the litigation in the case at bar. The provisions that protect trustees against proceedings are a clear indication of Parliament's intent to give

> trustees the flexibility they need to discharge the duties imposed on them by the *BIA*.
>
> [Emphasis added]

[8] The Trustee's duties stem from the *BIA*, the *Bankruptcy and Insolvency General Rules*, which contains the Code of Ethics, and directives issued by the Superintendent. The Saskatchewan Court of Queen's Bench set out a list of these duties in *Dubyk, Re*, 2009 SKQB 426, as follows:

> 19 *Bennett on Bankruptcy*, 11th ed. 2009, by Frank Bennett, provides a very helpful summary of a trustee's duties:
>
> > The duties of a trustee have been summarized as follows:
> >
> > Bankruptcy is a court-supervised process governed by principles of fairness. The trustee in bankruptcy and its counsel are officers of the court. They must act with professional neutrality in the interests of creditors and the bankrupt. The actions of trustees are accorded great deference by the Court. Coincidental with that deference is the responsibility of trustees and their counsel to be evenhanded and dispassionate with all the parties affected.
> >
> > More specifically, the trustee has several duties under the Act. These include:
> >
> > > • taking possession of the debtor's assets immediately after appointment;
> > >
> > > • converting or realizing the assets into cash;
> > >
> > > • assisting the debtor in preparing the bankruptcy documents and setting up the first meeting of creditors;
> > >
> > > • reporting to the creditors;
> > >
> > > • reviewing and finalizing the claims against the bankrupt;
> > >
> > > • preparing a report to the court on the bankrupt's discharge;
> > >
> > > • reporting to the official receiver any violations by the bankrupt and others of any duty under the Act or other law; and
> > >
> > > • reporting to the court on the trustee's discharge.
> >
> > The trustee must act in a reasonable and competent manner in the performance of his or her duties, must exercise reasonable business judgment and act with honesty and integrity. As such, the court will show deference to the trustee's business judgment.
>
> 20 Reference should also be made to Rules 34-53 of the *BIA* which sets out a Code of Ethics for trustees, designed to ensure the maintenance of the public trust and confidence in the administration of the Act. Specifically, trustees must:

> • perform their duties in a timely manner and carry out their functions with competence, honesty, integrity and due care (Rule 36)
>
> • be honest and impartial and shall provide to interested parties full and accurate information as required by the Act (Rule 39)

21 In general terms, there is no debate: trustees must take possession of a bankrupt's property and maximize return for creditors (see: ss. 16(3), 17, 30). That duty, however, must be exercised within the confines of the Act and with reasonable skill and judgment. In the exercise of this and other duties, the trustee has discretion to determine how much reliance to place on bankrupts (*Bank of Montreal v. A.C. Poirier & Associates Inc.* (2008), 42 C.B.R. (5th) 66 (N.B. Q.B.), para.34). Their discretion ought not be lightly interfered with by the courts. In *Graves, Re* (2000), 191 Sask. R. 114 (Sask. Q.B.), Registrar Herauf (as he then was) observed as follows at par. 5:

> In addition to the remarks in the letter as set out above the trustee also indicated that the *Bankruptcy and Insolvency Act* vests broad discretion upon the trustee. This discretion is subject to the professional judgment of the trustee and generally is not interfered with by the courts unless there is an obvious error.
>
> …

23 Trustees are required to act in a reasonable and competent manner (*Hoque, Re* (1996), 38 C.B.R. (3d) 133 (N.S. C.A.)) and to fairly consider alternate information or legal positions even when those opinions differ. They should not simply be dismissed out of hand for the sake of efficiency or because it concerns a summary administration estate. That said, the trustee is under no obligation to bend to the will of a creditor or the creditor's legal counsel merely because the creditor holds a different legal opinion. The mere opinion of a solicitor, untested in court, is an insufficient basis upon which to refuse trustee discharge (*Canadian Keswick Conference, Re* [1979 CarswellOnt 252 (Ont. S.C.)], p. 117)

[9] In *Montreal Trust Company of Canada v. Hoque*, 1996 NSCA 30, a matter that involved a bankrupt's application for discharge, a creditor opposed that discharge, saying the Trustee improperly assigned a potential liability claim back to the bankrupt and not that creditor. The Court of Appeal upheld the trial decision, concluding the Trustee had ample discretion under the *Act* and that the creditor had not proven any wrongdoing. Hallett J.A. wrote:

> 34 There seemed to be an issue before Justice MacDonald as to whether the duties of a trustee in bankruptcy were as set out in *Katz* (*supra*) or those set out in *Re Keppoch Development Ltd.* (1992), 15 C.B.R. (3d) 228 (N.S. T.D.). It is my opinion this ought to have been a non-issue. The tests to be applied by a court reviewing the decision of a trustee appointed under the *Bankruptcy and*

> *Insolvency Act* or a receiver appointed by the court respecting the sale of an asset are substantially the same. Both a trustee under the *Bankruptcy and Insolvency Act* and a receiver appointed by the court must act in a reasonable and competent manner in the performance of their duties to the creditors. A difference between a trustee acting under the provisions of the *Bankruptcy and Insolvency Act* and a receiver appointed pursuant to a court Order, is that the trustee is governed by the *Act* and the receiver by the common law and the terms of the court Order. In addition, the trustee has the benefit of a group of experienced creditors' representatives acting as inspectors who can bring their experience to bear on proposed dispositions of assets by the trustee. These differences do not alter the requirement that both trustees and receivers respectively act with integrity in a competent and reasonable manner.
>
> 35 When it comes to making business decisions relating to the sale of the bankrupt's assets, a trustee, with the authorization of the inspectors, must exercise reasonable business judgment. The trustee must provide advice to the inspectors equivalent to the advice one would expect from a reasonably competent trustee in the circumstances. Both the trustee and the inspectors are entitled to rely on legal advice from counsel for the estate. And, of course, a trustee must act with honesty and integrity. Finally, the courts should show deference to business decisions made by those entrusted by the creditors and authorized by the *Act* to make such decisions.

[10] While the Trustee may rely on their reasonable business judgment, this is not the same "business judgment" standard that would apply to the director of a company. The Court of Appeal went on:

> 45 In an article entitled '*Sale of Assets by a Trustee; The Fundamental Pragmatics*' by Al Lando, C.A., Senior Vice-President of Price Waterhouse Limited, Toronto published in (1991) 3 C.B.R. (3d) 179, the author draws a distinction between what might be a sharp but acceptable practice by businessmen to enhance their "bottom line" with the standard of conduct expected of a trustee in bankruptcy in realizing on assets of the bankrupt. The author states at p. 181:
>
> > The trustee in bankruptcy, however, is governed by standards that go beyond those which determine the business behaviour of the entrepreneur. As an officer of the Court, the trustee must always be concerned about the integrity of the insolvency process. There are times when "reasonable" business principles are not easy to reconcile with the determinants for standards of behaviour that govern an officer of the Court. The businessman is playing in his own game, and must do what is fair and reasonable, no less, but not necessarily more. **The stakes are greater for the trustee; his actions are measured against a higher test, a test of not only being right and fair but that of appearing to be right and fair. The dilemma arises when doing what is right, when conducting an**

> **administration from the 'highest moral ground', does not necessarily produce the best commercial result.**
>
> All of that said, the insolvency process (the *Bankruptcy Act*, the Courts, the office of the superintendent in bankruptcy, members of the Bar who specialize in bankruptcy law, and trustees) manages, for the most part, to satisfy its intended purposes in a practical sense. This paper will talk about basic principles, focusing on the practical considerations that influence the manner in which a trustee wheels and deals with the assets of a bankrupt.
>
> [Emphasis added]

[11] Therefore, a Trustee in a bankruptcy matter has a multifaceted role beyond merely pursuing creditors' interests. The *BIA* conveys broad authority to the Trustee to exercise their judgment flexibly and Courts must show deference to this discretion. This includes where a Trustee has decided to allow a creditor's claim, as the Court in *Yehia, Re*, 2012 BCSC 1467, explained:

> 16 Where a creditor appeals a decision by a trustee to allow a claim, the only question for consideration is whether the claim is indeed legitimate: *Marsuba Holdings Ltd., Re*, [1998] B.C.J. No. 2943, 8 C.B.R. (4th) 268 (B.C. Master) at para. 15. The onus rests with the applicant to establish error on the part of the trustee in finding that the claim was legitimate: *Royal Bank v. Insley*, 2010 SKQB 17, 64 C.B.R. (5th) 105 (Sask. Q.B.) at para. 30.

[12] *Marsuba Holdings Ltd., Re*, 1998 CarswellBC 2792, further explains:

> 16 The trustee's position is also contrary to authority. In *Browne, Re*, [1960] 2 All E.R. 625 (Eng. Ch. Div.), Cross J. said:
>
> > ... if a trustee admits a proof on a view of the law which is generally thought to be right but subsequently turns out to be wrong the proof has been 'improperly' admitted... .
>
> 17 Self-evidently, a trustee would have been acting reasonably if he had admitted a proof on a view of the law which had generally been thought to be right. Thus, simply establishing that the trustee acted reasonably will not preclude a finding that the proof has been improperly admitted. The claim must stand or fall on its merits.

[13] Therefore, the Trustee must have acted honestly and reasonably, but also correctly – which is to say, the Trustee must have come to the right conclusions on the law even if acting reasonably. The Trustee has significant discretion under the *BIA*; however, the burden of proof is on the opposing creditor to show the proof was improperly admitted or that the Trustee otherwise failed to pursue a vital line of inquiry.

Proven Creditors

[14] The *BIA* provides some insight into a Trustee's duties around proven creditors:

> 121 (1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

[15] The common law test for determining whether something is a provable claim is as follows (*Newfoundland and Labrador v. AbitibiBowater Inc.*, 2012 SCC 67):

> 26 These provisions highlight three requirements that are relevant to the case at bar. First, there must be a debt, a liability or an obligation to a *creditor*. Second, the debt, liability or obligation must be incurred *before the debtor becomes bankrupt*. Third, it must be possible to attach a *monetary value* to the debt, liability or obligation. I will examine each of these requirements in turn.

[16] Unsecured creditors must file Proof of Claim in the designated form (s. 124). Secured creditors instead may realize their security and prove the balance remaining but may still be required to provide further evidence upon request of the Trustee (ss. 127-128). A secured creditor may later amend its proof valuation (ss. 131-132).

[17] The Trustee must examine every Proof of Claim or security and may seek further evidence from the creditors:

> 135 (1) The trustee shall examine every proof of claim or proof of security and the grounds therefor and may require further evidence in support of the claim or security.

[18] Of this, *Bennett on Bankruptcy*[1] says the following:

> The trustee, in allowing or disallowing a claim, acts as an administrator, or a quasi-judicial officer of the bankrupt estate. The trustee does not have to conduct any hearing or conduct an examination to determine whether to accept or reject the claim, although the trustee can and should require the creditor to submit more material for consideration.

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[1] Frank Bennett, *Bennett on Bankruptcy*, 21st ed (Toronto: LexisNexis Canada Inc, 2019) at 531-532.

[19] While a Trustee's determination to disallow a claim or security is final according to s. 135(4), there is no equivalent provision for allowing a claim.

[20] A Trustee exercising its discretion in allowing or rejecting a proof does not conduct a hearing and there may be no written reasons for the decision (*Eskasoni Fisheries Ltd., Re*, 2000 CarswellNS 116):

> 19 I note that a trustee in either accepting or rejecting a proof of claim is acting in his or her capacity as administrator of the bankrupt estate. The trustee conducts no hearing when determining whether or not to accept or reject the proof of claim. Thus no record is generated and in order to do justice to the parties it is necessary for a Registrar, or indeed a Judge, to hear the matter *de novo* in order to render an appropriate decision.

Proof of Claim re: Unsecured Creditors

[21] Unsecured creditors must file Proof of Claim in the designated form:

> 124 (1) Every creditor shall prove his claim, and a creditor who does not prove his claim is not entitled to share in any distribution that may be made.
>
> (2) A claim shall be proved by delivering to the trustee a proof of claim in the prescribed form.
>
> (3) The proof of claim may be made by the creditor himself or by a person authorized by him on behalf of the creditor, and, if made by a person so authorized, it shall state his authority and means of knowledge.
>
> (4) The proof of claim shall contain or refer to a statement of account showing the particulars of the claim and any counter-claim that the bankrupt may have to the knowledge of the creditor and shall specify the vouchers or other evidence, if any, by which it can be substantiated.

[22] The Trustee must examine every Proof of Claim or security and may seek further evidence from the creditors (see s. 135).

[23] Any proven creditor is entitled to examine the proofs filed and relied upon by the Trustee:

> 126 (1) Every creditor who has filed a proof of claim is entitled to see and examine the proofs of other creditors.

[24] Section 61(2) of the *Bankruptcy and Insolvency General Rules* provides as follows:

> **(2)** At the time of discharge, the trustee must satisfy the court that:
>
> …

> **(e)** every claim subject to a dividend was properly examined and that
>
> > **(i)** to the best of the trustee's knowledge, the dividend sheet presented to the court contains a true and correct list of the claims of creditors entitled to share in the estate,
> >
> > **…**

[25] Mr. Horne is a secured creditor of SWPL, and the balance of his claim is $260,034. He says the unsecured creditors, Abernathy-Parker Construction Ltd. ("Abernathy-Parker") and Robert Parker, have not filed proof of their claims. Abernathy-Parker claims $144,355 and Robert Parker claims $321,915, (see Horne affidavit sworn July 25, 2019, Ex. C). These claims represent a substantial amount of the outstanding claims against the bankrupt's estate.

[26] Mr. Horne requested Proof of Claims for creditors which he delivered to the Trustee on November 9, 2016 via email. Mr. Horne followed up on November 16, specifically requesting "Proof of Claim (with support) for Robert Parker's claim against South Wind Properties Ltd.". He has since requested these Proof of Claim documents in various other communications and again through his Notice of Objection to the Trustee's discharge. He says no documents have been provided to him showing a properly filed Proof of Claim for either Abernathy-Parker or Mr. Parker.

[27] A letter dated March 9, 2017 (see Horne affidavit sworn on January 28, 2019, Ex. D), from the Trustee to Mr. Horne's counsel, Peter Coulthard, describes the Trustee's review of Mr. Parker's unsecured claim as follows:

> The unsecured claim ($321,915) filed by Mr. Parker was verified by the Trustee per our review of the corporate financial statements of South Wind (copy attached). Joe Horne was previously provided copies of these same financial statements at the Meeting of Creditors on October/16.

[28] The attached balance sheet for SWPL lists advances from Abernathy-Parker as $144,355 in both 2015 and 2016. It also lists "Advances from Shareholder" of $321,915 in 2016 (and $323,715 in 2015). This would appear to be Mr. Parker's claim. This is the extent of the documents filed on behalf of the unsecured creditors and reviewed by the Trustee regarding these claims.

[29] This document is neither in the "prescribed form" (Form 31) nor does it "contain or refer to a statement of account showing the particulars of the claim". It is not signed nor is it certified or sworn by any person as being true. No specific

date is assigned to the debt. That being said, most of the information that would have been contained on Form 31 can be gleaned from other available documents.

[30] There is a general statement of law that: "The practice in respect to proofs of claim has always been liberal and free from technicalities" (*Atlas Acceptance Corp v. Fratkin*, 1978 CarswellMan 7 (MBCA), para 21) which has been "accepted and endorsed" by the Nova Scotia Supreme Court in *Eskasoni Fisheries Ltd. (Re), supra*, at para 22.

[31] This concept is reflected in s. 187(9) of the *BIA*, which provides:

> 187(9) No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court.

[32] The question becomes whether the failure to file a Form 31 Proof of Claim is a "formal defect or irregularity" resulting in substantial injustice that cannot be remedied by Court Order. In my opinion, it is not. The defect is substantive, going to the reasonableness of the Trustee's exercise of discretion.

[33] Form 31[2] requires the following information from an unsecured creditor seeking to prove its claim against the bankrupt:

- forwarding address
- name and location of debtor
- name and location of creditor or representative of creditor
- title or business association of creditor
- affirmation that debtor owed the amount at the time of bankruptcy and still owes the amount
- statement of account or affidavit specifying debt
- whether the unsecured claim is a priority claim and details supporting priority, if any
- affirmation that the creditor named is or is not "related" to the debtor per s. 4 of *BIA*[3]

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[2] <https://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br01894.html>.

[3] Ms. Parker's Form 31, below, does not indicate whether she is or is not related to the debtor although this appears to have been accepted by the Trustee and Mr. Horne.

- list of any payments received by creditor on debt, if debtor is an individual
- dated, signed, witnessed

[34] I note as well that WBLI, predecessor Trustee to MNP in this matter, requested creditors provide "a statement of account or affidavit as evidence in support of [one's] claim" in the letter issued to Mr. Horne on September 28, 2016.

[35] Mr. Horne has not argued that any of the information above cannot be ascertained or that he has suffered any prejudice because of not having a Form 31 for Mr. Parker and Abernathy-Parker's debts. For example, there is no contest over the names and addresses of Mr. Parker and Abernathy-Parker.

[36] There is also nothing to suggest Mr. Parker and Abernathy-Parker have denied or resisted being labelled as "related" to the bankrupt estate (the *BIA* definition at s. 4). Ms. Parker's filled-out Form 31 leaves this section blank entirely. Mr. Horne makes no argument that failing to provide this specific information has hurt his claim in any way.

[37] Obviously, because no Form 31 Proof of Claim was filed for either of the unsecured creditors, neither has sworn nor certified its debt. Section 125 of the *BIA* prohibits providing false information regarding a Proof of Claim. Again, Mr. Horne has not argued that these debts are false.

[38] The most substantial information missing, and of concern to the Court from these unsecured claims, is the lack of particulars regarding the unsecured debts. The Trustee, by letter dated March 9, 2017, says it relied on the Financial Statements of SWLP which Mr. Horne received in October 2016. We may assume the Trustee felt no further particulars were required. The Trustee in this case relied on information from the bankrupt (i.e., through its accountant's financial statements) and the unsecured creditors at face value despite them essentially all being the same person: Mr. Parker.

[39] These unaudited Financial Statements (dated April 30, 2016) are prefaced by a notice to reader, which says:

> On the basis of information provided by management, I have compiled the balance sheet of **South Wind Properties Limited** as at **April 30, 2016** and the statements of income and retained earnings for the year then ended.

> I have not performed an audit or a review engagement in respect of these financial statements and, accordingly, I express no assurance thereon.
>
> Readers are cautioned that these statements may not be appropriate for their purposes.
>
> [bolding in original]

[40] And later:

> These financial statements have been prepared for income tax purposes only and may not include certain disclosures required by Canadian generally accepted accounting policies.

[41] In the five-page document, Mr. Parker's and Abernathy-Parker's debts are referenced once and it simply provides the amount owed and the year - no further particulars are set out. The Financial Statements were not generated for the bankruptcy as they state they are for tax filings. They were produced in April, several months before SWLP was granted its assignment in bankruptcy on September 27, 2016.

[42] The Trustee's reliance on these financial statements is problematic for another reason. Section 124(3) requires that:

> (3) The proof of claim may be made by the creditor himself or by a person authorized by him on behalf of the creditor, and, if made by a person so authorized, it shall state his authority and means of knowledge.

[43] If these Financial Statements can be accepted as "proofs of claim" for both Mr. Parker and Abernathy-Parker, the above requirement is not clearly met. For example, there is nothing to say that the accountant, Marsden J. Anthony, was authorized by either Mr. Parker in his individual capacity or by Abernathy-Parker to file their respective proofs of claim.

[44] That was the issue in *Labarre (Syndic de)*, [2004] QJ No 13895 (QCSC). In that case, the creditor filed a Proof of Claim along with supporting documentation for a debt but did not indicate it received payment from CMHC on that loan. The Trustee disallowed the creditor's claim on that basis, which was upheld by the Court. The Court found that the creditor was attempting to subrogate CMHC's right against the bankrupt estate.

[45] The Court concluded:

> 21 In any case, Petitioner has not complied with the requirement of the law by indicating pursuant to s. 124(3) *BIA* on whose behalf and by what authority it is acting.
>
> 22 This is not a question of a mere technicality or formality, but one of substance. A trustee must be furnished with sufficient accurate information to permit him to evaluate the claim against the bankrupt. The other creditors must have sufficient information to contest those claims. Finally there is the rule against double proof which is designed to assure the distribution of a bankrupt's assets on a pro-rata basis among unsecured creditors by insuring that the trustee does not pay two dividends on what is essentially the same claim: *Re. Olympia and York Developments* Ltd (1998), 4 C.B.R. (4th) 189 (Ont. Gen. Div.).

[46] The Court in that case also provided some comment regarding proofs of claim as follows:

> 11 Form 31 *BIA* provides the form whereby claims must be made. The proof of claim fyled [*sic*] herein, complies with that form. In it, Petitioner affirms the debt due on the date of the bankruptcy, and that the debt is still outstanding on the date of the claim.
>
> 12 Since proof of claims are generally filed by laypersons it is an accepted principle of law that a liberal approach must be used in the examination of these claims: technicalities are to be avoided, and clerical errors to be overlooked. On the other hand, the proof of claim must be as accurate as possible and must provide supporting documents and sufficient details, failing which the claim is deemed not to have any standing.
>
> 13 Amendments of claims should be allowed where an honest error has been made. The Court, in the exercise of its general authority, has the power to excuse formal defects and irregularities under s.187(9) *BIA* which provides that proceedings in bankruptcy should not be invalidated by any formal defect or irregularity, unless a substantial prejudice or injustice, which cannot be remedied by an order of the Court, has been caused.

[47] *Labarre* does not address whether a Trustee accepting a Proof of Claim that is not documented or lacking information is reasonable.

[48] I also note that these Financial Statements cannot possibly show that the respective debts were due to the unsecured creditors at the time of bankruptcy per s. 121 of the *BIA* because they were drafted several months prior. While this was likely true in fact, it was not reasonable for the Trustee to rely on this document from April as proving a claim due in September. This document does not prove

that fact to Mr. Horne who instead must rely on the Trustee's assurances and no doubt the feeling that the Trustee has more information than he is disclosing.

[49] Furthermore, the precise date or nature of the debts cannot be ascertained in these Financial Statements or any other evidence before me. For example, alongside her Form 31 Proof of Claim, Ms. Parker provided her mortgage document, which clearly sets out particulars of the debt. Aside from the year the debt was incurred and the value, no further particulars can be gleaned. This means that Mr. Horne cannot ascertain these particulars either.

[50] In my opinion, when Mr. Horne requested Proof of Claim for the unsecured creditors of Mr. Parker and later Abernathy-Parker, the Trustee ought to have ensured a formal proof was filed. This request would not have cost the estate much, if any, money and would have allayed some of Mr. Horne's fears that still exist today. Mr. Horne's issues are credible insofar as certain steps were not taken by the Trustee and he has requested Proofs of Claim, at least for Mr. Parker, since 2016.

[51] The Trustee in this case was satisfied by assurances at face value from Mr. Parker and Mr. Parker's related entities. However, the requirement of formal Proofs of Claim is not just to satisfy the Trustee that the claim is valid, but also other creditors. Creditors are entitled to request the Trustee show the information it relied on in allowing or disallowing a claim. Furthermore, creditors are entitled to request the Trustee engage in certain investigations, within reason. While the Trustee is entitled to deference on the business judgment standard, accepting large unsecured claims, without any formal proof produced by the creditors or someone authorized by the creditors, cannot be reasonable.

[52] I note that most of the creditors listed in the Form 78 Statement of Affairs appear to be closely held by or otherwise related to Mr. Parker. Only FS Industries and Mr. Horne are at arm's length to the bankrupt company or Mr. Parker and, further, the claim for FS Industries appears to be satisfied with surplus. The fact that it appears that claims were accepted from non-arms length creditors by the Trustee in relation to the above unsecured creditor debts does not sit well with Mr. Horne and it is no wonder that he is the only creditor to have filed an objection. There is also evidence that he pursued this line of inquiry since 2016 and has yet to receive Proof of Claim in the prescribed form.

[53] Mr. Horne is a secured creditor with priority over these unsecured debts and is only asking that the Trustee is not discharged at this time.

[54] In *Canadian Keswick Conference, Re*, 1979 CarswellOnt 252, although the facts are not on all fours with this matter, there are similarities. In it, Registrar Ferron grappled with the various objections raised by a dissatisfied creditor at the discharge stage of a bankruptcy, including failure to ascertain accurate amounts and including a person who is not properly a creditor. The Court found that the Trustee carried out reasonable investigations into the respondent creditor's concerns. Of the persons alleged to be improper creditors of the bankrupt, the Court said, "No inspector replied to the letter, and no instructions have ever been given to the Trustee to disallow the claim. The matter was not raised again until Mr. Bish filed his Notice of Objection" (para. 42). At the discharge stage, three out of five creditors approved the Trustee's discharge. The Court concluded:

> 46(1) The estate of Canadian Keswick Conference has been fully administered.
>
> 47(2) All assets reported or known to the trustee have been brought in and all disbursements as set out in the trustee's statement of receipts and disbursements have properly been disbursed.
>
> 48(3) **The trustee has done all things necessary, reasonable and proper in the administration of the estate and has left undone nothing which could reasonably have been done in the administration.**
>
> 49 (4) The trustee's remuneration has been approved by the majority of the inspectors in accordance with the *Bankruptcy Act*, and I find the same to be reasonable and fair on the basis of the usual principles of taxation.
>
> 50 (5) In my opinion the trustee should be discharged.
>
> [Emphasis added]

[55] Finally, the Court observed that the aggrieved creditor was not wrong in pursuing these objections and was entitled to "full explanation" (para 57). The result was that, thanks to the creditor's objections, "[t]he administration of this estate was the more complete and thorough" (para 53).

[56] *Canadian Keswick Conference, Re*, is distinguishable from the matter before me because the Trustee, MNP Ltd., has not done all things necessary, reasonable and proper in the administration of the estate with respect to two unsecured creditors.

Conflict of Interest

[57] A Trustee in a bankruptcy may also act for a creditor of that bankrupt's estate. According to *Halsbury's Laws of Canada*[4], this is relatively common practice:

> Other. The Code of Ethics requires that trustees avoid any influence, interest or relationship that impairs, or appears in the opinion of an informed person to impair, their professional judgment. The purpose of Rule 44 is to prohibit a licensed trustee from acting in a professional capacity where they or someone known to them on a personal level has an interest adverse to the licensed trustee's duties in the engagement, without fully disclosing that conflict. The intention is to prevent the trustee from being subject to improper influences. **There is, however, no legal impediment to the same licensed trustee acting as trustee of a bankruptcy estate and as trustee of the bankruptcy estate of a creditor. It is relatively common for a single trustee to be appointed as trustee of multiple related bankruptcy estates.**
>
> [footnotes removed]

[58] Where the Trustee acts for both a bankrupt and a secured creditor of the bankrupt, they must obtain a legal opinion that the security is enforceable and deliver this to the Superintendent and the creditors or inspectors. The *BIA* has this to say:

> 13.4 (1) No trustee may, while acting as the trustee of an estate, act for or assist a secured creditor to assert a claim against the estate or to realize or otherwise deal with a security that the secured creditor holds, unless the trustee has obtained a written opinion from independent legal counsel that the security is valid and enforceable against the estate.
>
> (1.1) Forthwith on commencing to act for or assist a secured creditor of the estate in the manner set out in subsection (1), a trustee shall notify the Superintendent and the creditors or the inspectors
>
> (a) that the trustee is acting for the secured creditor;
>
> (b) of the basis of any remuneration from the secured creditor; and
>
> (c) of the opinion referred to in subsection (1).

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[4] Halsbury's Laws of Canada (online), *Bankruptcy and Insolvency*, "Licensed Trustee: Conflicts of Interest" at HBI-440 "Engagements requiring approval".

> (2) Within two days after receiving a request therefor, a trustee shall provide the Superintendent with a copy of the opinion referred to in subsection (1) and shall also provide a copy to each creditor who has made a request therefor.

[59] There is no similar requirement where the Trustee is acting for the estate of an unsecured creditor.

[60] In this case, the Trustee's conduct related to Ms. Parker was inadvertent. The Trustee states they acted for Ms. Parker before being appointed the Trustee for SWPL. Counsel's conflict search did not identify Ms. Parker's estate as a conflict and by the time counsel realized there was a conflict, it was already appointed as Trustee for SWPL.

[61] In this matter, there is an email between the Trustee and Bruce Clarke, the estate solicitor, on October 13, 2016 that purports to be a legal opinion as to the validity of Ms. Parker's mortgage against a SWPL property. It is not clear whether this was filed with the Superintendent, however, this document could not have been generated pursuant to s. 13.4 because the Trustee says it did not become aware of the conflict until it was pointed out by Mr. Horne in his letter dated December 14, 2016.

[62] Regarding a conflict of interest with a secured creditor, all that is required is that the Trustee obtain a legal opinion that the security is enforceable and it appears that the Trustee has done so in this case. The burden is on the applicant to show that the Trustee has not met its duty and Mr. Horne has not satisfied me that this legal opinion does not meet the standard required by s. 13.4 of the *Act*.

Justice Moir's Decision

[63] Justice Moir's oral decision of February 5, 2019 deals with Louise Parker's loan to SWPL and proof regarding that claim. Mr. Horne was seeking an examination pursuant to s. 163(2) of the *BIA* of various individuals.

[64] I agree with Justice Moir when he says at p.12, lines 9-13, referring to Trustees:

> They are obligated to examine the proof and they have discretion to require further evidence. Most of them are professional accountants. The bankruptcy system would collapse if they were obligated to perform audits of debts claimed.

[65] However, in this case, more was required of the Trustee than what was done with respect to the two amounts relating to the two unsecured creditors.

[66] Justice Moir continues, at p. 15, lines 8-12:

> In my assessment, the Trustee has adequately exercised his discretion to investigate the Parker debt and has rightly declined to interfere further. Therefore, I refuse to order examinations of Mr. Leek and Mr. Wilkie …

[67] Justice Moir's decision clearly relates to Ms. Parker's debt and not the claims of the two unsecured creditors upon which this decision is based.

IV. CONCLUSION

[68] Trustees have a dual role, owing duties to the bankrupt's estate as well as duties to the creditors to ensure their debts are repaid. Trustees have broad discretion to act under the *BIA* and Courts generally show deference to their business judgment, although the "business judgment" standard is a higher threshold than that of a company's Director. Trustees are Officers of the Court and are bound by duties of ethics and honesty.

[69] Creditors must provide some evidence of their claim or security and Trustees must examine these proofs. Different rules around proofs apply to secured and unsecured creditors. The Trustee may seek further evidence from creditors and may review in more depth certain issues that are raised by creditors or their inspectors. However, they must do so to the satisfaction of the Court, not the creditor. A Trustee's decision in allowing a claim or security will be upheld if it is both reasonable and correct on the merits.

[70] Upon reviewing the evidence before me, the Trustee has not discharged its duty regarding requiring Proof of Claim in the prescribed form for the unsecured creditors of Mr. Parker and Abernathy-Parker Construction Ltd. pursuant to s. 124 of the *BIA*.

[71] There are fatal flaws in the "proofs" of claim for the unsecured creditors such that it was unreasonable for the Trustee to rely on them conclusively. Specifically, the Trustee relied on financial statements produced by the bankrupt's accountant for tax purposes several months prior to the assignment in bankruptcy. As a result, a creditor cannot ascertain particulars of these debts, whether the debts were still owing prior to the bankruptcy, or the author's authority to produce documents as proof of claim on behalf of the unsecured creditors.

[72] While the Court must show deference to a Trustee's business judgment acting under the *BIA*, Trustees are not immune from review. They must examine proofs submitted by creditors and must only allow claims or securities that are reasonable. The Court may assess Trustees' conduct for both its reasonableness and correctness in fact.

[73] At the end of the day this decision, which is entirely based on the claims of the two unsecured creditors, will probably have little bearing on the eventual bankruptcy of SWPL given that it should take little effort to verify the two unsecured claims, but what is important is the process to arrive at that eventuality. It should be done in a manner where a Trustee's decision to allow a claim is both reasonable and correct on the merits. The accepting of the two large unsecured claims without proof produced by the creditors or someone authorized on their behalf was not reasonable.

[74] The motion is dismissed with costs. With respect to costs, I do not see this as a matter outside of the tariff, but if the parties are unable to agree to costs, I will receive submissions within 30 days of today's date.

[75] I would ask Mr. Horne's counsel to prepare the Order.

Bodurtha, J.