SUPREME COURT OF NOVA SCOTIA

Citation: *Gaum v. Grant Thornton Limited*, 2020 NSSC 317

Date: 20201110
Docket: 488807
Registry: Halifax

Between:

Errol Franklyn Gaum

Appellant

v.

Grant Thornton Limited

Respondent

DECISION

Judge: The Honourable Justice Glen G. McDougall

Heard: August 28, 2020, in Halifax, Nova Scotia

Counsel: John O'Neill, for the Appellant
Tim Hill, Q.C., for the Respondent
Sara Scott & Robert MacKeigan, for Issam Kadray
Jonica Stingl, Agent, for Zion II, Inc.

By the Court:

INTRODUCTION

[1] The Appellant, Errol Franklyn Gaum ("Gaum"), filed a Notice of Appeal under Sections 37 and 135(4) of the *Bankruptcy and Insolvency Act* ("BIA") from a decision of the Trustee, Grant Thornton Limited (the "Trustee"). The Trustee allowed a claim of Issam Kadray. This gave him the right to vote on a proposal made by Gaum to his creditors at a meeting of creditors held on May 7, 2019. Mr. Kadray and one other creditor voted against the proposal. As a result, the proposal was defeated.

[2] The Notice of Appeal filed on June 4, 2019, requests an order declaring that the claim of Issam Kadray was not a duly proved claim provable in bankruptcy and should not have been admitted for voting purposes at the meeting. In support of this contention, the following was offered:

- the claim of Issam Kadray is a claim against 1195 Bedford Highway Ltd. and not a claim against the Debtor personally;
- the Trustee should have voted under subsection 105(3) of the Bankruptcy and Insolvency Act (Canada) (the "Act") Act to approve the Proposal;
- that the deemed assignment into bankruptcy of the Debtor under section 57 of the Act be annulled upon recalculation of the creditors' votes after giving effect to the decision in this appeal.

[3] The Grounds of Appeal were set out as follows:

> 1. the claim of Issam Kadray is a claim against 1195 Bedford Highway Ltd. and not a claim against the Debtor personally;
>
> 2. the Trustee should have voted under subsection 105(3) of the Bankruptcy and Insolvency Act (Canada) (the "Act") Act to approve the Proposal;

[4] A preliminary issue arose with respect to the nature of the appeal. Should it be a true appeal based on the record before the Trustee or should it proceed as a trial *de novo* which would allow the court to accept and consider all evidence relevant to the claim? Or, should it adopt a hybrid approach that would allow for the introduction of some additional evidence without opening it up to a full-blown trial.

History

[5] The historical sequence of events are set out in the written submissions of counsel for the Trustee dated March 9, 2020. This factual background was accepted by counsel for Gaum in his correspondence to the court dated March 17, 2020. He reiterated this in his pre-hearing memorandum dated August 10, 2020.

[6] I have taken the liberty of adopting the results of Mr. Hill's efforts, which are as follows:

> On May 2, 2018, the Insolvent filed a Notice of Intention to Make a Proposal pursuant to section 50.4(1) of the *Bankruptcy and Insolvency Act* ("*BIA*"). The Trustee was the Trustee engaged in respect to the Proposal.

On June 13, 2018, upon the Motion of Zion II, Inc. ("Zion"), the Trustee was appointed as interim receiver of the assets, property and undertakings of the Insolvent, pursuant of section 47.1 of the *BIA*.

On June 27, 2018, a Notice of Proposal to Creditors was sent to the creditors of the Insolvent by the Trustee. At that time, the Trustee also sent to the creditors the Trustee's Report to Creditors on the Proposal.

The Trustee recommended that the creditors vote in favour of the Proposal, it being seen to be of more benefit to creditors than a bankruptcy. The meeting of creditors to consider the Proposal was adjourned initially to September 25, 2018. It did not ultimately take place until May 7, 2019.

Prior to the meeting of May 7, 2019 four creditors had filed proofs of claim.

CIBC (carrying on business as Techcom Managed Services Inc.) filed a proof of claim in the amount of $23,886.33, which was accepted.

Zion filed a proof of claim, following by an amended poof of claim. The amended poof of claim was in the amount of $2,091,801.08. The amended poof of claim was accepted.

Canada Revenue Agency ("CRA") filed a Proof of Claim in the amount of $708,491.97. The proof of claim was accepted.

Issam Kadray ("Kadray") filed a proof of claim in the amount of $406,971.37. That proof of claim was opposed by the Insolvent. The Trustee admitted the proof of claim, but valued it as contingent with a value of $1.00.

CIBC filed a second Proof of Claim in the amount of $145,696.17, which was accepted. That proof of claim was not filed until May 14, 2019, which was after the reconvened meeting of creditors.

A meeting of creditors was held on May 7, 2019. In attendance were the Insolvent and his counsel, counsel for Zion, a representative of CIBC, and a representative of CRA. Also attending was counsel for Kadray.

It was noted at the meeting that the primary asset, the value of which would be available to creditors, was still tied up in litigation and it might be years before distribution.

Upon a vote on the Proposal, CRA and Kadray were opposed and Zion and CIBC in favour. The Proposal, having not been approved by a majority of creditors in number, was rejected. The Trustee advised that the Insolvent was deemed to have made an assignment in bankruptcy pursuance to section 57 of the *BIA*.

> Immediately following the meeting on the Proposal, there was a meeting of creditors in the bankruptcy. The Trustee was confirmed as trustee of the bankrupt estate. No inspectors were appointed. The meeting was adjourned.
>
> Subsequently, the Insolvent appealed from the rulling of the Trustee with respect to the Kadray claim.
>
> The Kadray Claim
>
> The Kadray claim consisted of a number of parts. These included:
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> A) Loss of equity in 1095 Bedford Highway Limited, said to be $563,000;
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> B) Insurance claim deductible in the amount of $2,500;
>
> C) Allegedly forged cheques written by the Insolvent in the amount of $9,800;
>
> D) An allegedly forged cheque written by the Insolvent in the amount of $1,000;
>
> E) $20,000 alleged to have been taken by the Insolvent using electronic banking access;
>
> F) $100,000 allegedly missing from rent deposits;
>
> G) $2,300 for materials obtained by the Insolvent from Kent Building Supplies on Kadray's account;
>
> H) Legal fees incurred by Kadray in the amount of $55,371.37.
>
> There was litigation extant between the Insolvent and Kadray over the primary asset which is 1095 Bedford Highway.

[7] In addition to receiving written submissions from counsel for the appellant and counsel representing the Trustee, a memorandum was filed by counsel acting for Mr. Kadray. Mr. Kadray decided not to have his legal representatives appear to offer oral submissions in an effort to reduce costs and, although provided with notice of the hearing and being extended an invitation to participate in person, Mr. Kadray chose not to.

[8] Zion II, Inc. was represented at the hearing by its duly authorized officer, Ms. Jonica Stingl. Ms. Stingl limited her comments to simply say she was surprised that someone without a judgment or evidence of an outstanding debt could be accepted by the Trustee as a creditor.

[9] The remaining two creditors – Canada Revenue Agency and CIBC (carrying on business as Techcom Managed Services Inc.) – chose not to participate although they each had representatives in attendance at the First Meeting of Creditors.

Appellant's Position

[10] Counsel for Gaum takes the position that the appeal should proceed as a hearing *de novo* or, alternatively, in a hybrid format based on the Court's review of the record and after considering additional evidence pertaining to the sale of 1095 Bedford Highway by a company – 1195 Bedford Highway Limited – of which Gaum and Kadray are equal shareholders.

[11] Gaum and Kadray have been locked in a dispute over the alleged mismanagement of the property at 1095 Bedford Highway since 2012. A Notice of Action was filed on behalf of Errol Gaum as plaintiff on June 7, 2012. Isaam Kadray is listed as the sole defendant. In addition to defending the claim, Mr. Kadray brought a counterclaim against Mr. Gaum on July 4, 2012. A defence to the

counterclaim was filed on Mr. Gaum's behalf on July 18, 2012. That lawsuit remains unresolved more than eight years later. It is the reason Mr. Kadray filed a Proof of Claim for $406,971.97 which the Trustee admitted for purposes of voting at the Meeting of Creditors while giving it a contingent value of $1.00. As previously indicated, the insolvent Gaum opposed the claim. Mr. Gaum's counsel suggested that the Kadray claim was advanced for the sole purpose of providing him the opportunity to vote against Mr. Gaum's proposal and to force him into bankruptcy.

[12] Mr. Gaum's counsel further submits that the record provided to the Court includes information that the Trustee should have had prior to deciding to allow the Kadray claim. Furthermore, counsel points to the lack of certain foundation documents pertaining to the initial purchase of the 1095 Bedford Highway property and its eventual sale on May 31, 2018. He also asserts that certain email exchanges between counsel and the Trustee purport to attach some of these foundation documents but they are not included in the disclosure or lack sufficient detail of the transactions and the lawsuits between Mr. Gaum and Mr. Kadray.

[13] In order to have all relevant documentation made available, counsel argues that the appeal of the Trustee's decision to allow Mr. Kadray's claim should proceed as a hearing *de novo* or, at the very least, as a hybrid approach in accordance with existing jurisprudence.

Mr. Kadray's Position

[14] As previously mentioned, counsel for Mr. Kadray did not appear to offer oral submissions on behalf of their client nor did Mr. Kadray attend in person. The Court did have the benefit of a written memorandum setting out both Mr. Kadray's position and his support for the arguments advanced by counsel on behalf of the Trustee. The Brief also pointed out that if the Court was persuaded to accept the Appellant's argument to allow the appeal to proceed by way of a trial *de novo*, the Appellant would be required to call evidence in support of his position. This would add significantly to the length of time needed for the hearing. It would also require certain procedural issues to be resolved such as:

- a list of witnesses, including the identification of factual and expert witnesses, who will provide the factual foundation for the assertions being advance;
- will the evidence be advanced by affidavit on *viva voce* testimony;
- the qualification of witnesses who will be called upon to offer opinion evidence;
- how should the evidence in the seven volumes of documents that make up the record be admitted; and,

- will discovery examinations have to be conducted prior to the hearing.

[15] In supporting the approach suggested by the Trustee, counsel for Mr. Kadray pointed out that a true appeal would be practical and efficient and, should help to avoid any significant delays and expense.

The Position of the Trustee

[16] I earlier adopted the history of events presented by the Trustee's counsel, Mr. Hill. Once again, I thank him for so succinctly setting out the chronology of events that have taken place.

[17] After setting out the relevant provisions of the *BIA* contained in Section 135, subsections (1) to (5), Mr. Hill pointed out that the Trustee followed the procedure laid out in Section 135, subsection (1.1) which states:

> 135 (1.1) Determination of provable claims
>
> The trustee shall determine whether any contingent claim or unliquidated claim is a provable claim, and, if a provable claim, the trustee shall value it, and the claim is thereafter, subject to this section, deemed a proved claim to the amount of its valuation.

[18] In following this procedure, counsel submits that the Trustee found that "although contingent, the claim was provable and valuing (sic) it $1, the Trustee being unable to determine the actual value." Counsel goes on to state that

"Therefore, the issue on appeal is whether or not the Trustee's decision to accept the Kadray claim as being a claim provable in bankruptcy should be upheld."

[19] Counsel for the Trustee suggests the Appellant is seeking to have the Court allow the introduction of additional evidence to adjudicate the outstanding court action commenced by Mr. Gaum in 2012 but which has remained practically dormant since 2013.

[20] Furthermore, counsel for the Trustee responded to the suggestion that Mr. Kadray's claim was made for an improper purpose by pointing out that in *Re Laserworks Computer Services Inc.*, [1997] N.S.J. No. 564 (Reg.), affirmed [1997] N.S.J. No. 340 (SC), affirmed 1998 NSCA 42, the decision recognizes that creditors can vote in their own best interests. They cannot, however, collude with a third party to place a debtor in bankruptcy for an improper purpose. There is no evidence of any collusion in this case let alone collusion for an improper purpose. Nothing more has to be said about this unfounded allegation.

How Should the Appeal Proceed

[21] Reported decisions reveal there is a divergence of opinion in regard to the proper approach that should be taken on appeal.

[22] The 2019-2020 *Annotated Bankruptcy and Insolvency Act* by Houlden, Morawetz & Sarra, Thomson Reuters Canada, at G§109 beginning at p. 762 et seq., provides the following (in part):

> G§109 – Appeal from Disallowance or Determination
>
> (1) – Generally
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> A disallowance of a claim under s. 135(2) or a determination of a contingent or unliquidated claim under s. 135(3) is final and conclusive unless the person to whom the notice was provided appeals to the court from the disallowance of determination within 30 days after service, or such further time as permitted by the court on application made within the 30-day period: s. 135(4).
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> In *Re Galaxy Sports Inc.* (2004), 2004 CarswellBC 1112, 1 C.B.R. (5th) 20, the British Columbia Court of Appeal held that the hearing of an appeal of a trustee's valuation of a claim was not intended under s. 135(4), to be a trial *de novo*, but a true appeal. The court noted that if fresh evidence was adduced in the appeal court as a matter of course, there would be a loss of efficiency in the bankruptcy process; creditors who neglected to file proofs of claim in compliance with s. 124 would suffer no practical consequences, and the business conducted at creditors' meetings would be co-opted by the courts, with attendant expense, delay and formality. The standard of review for a trustee's legal determinations, such as the decision to allow or disallow a proof of claim, is one of correctness. A standard of reasonableness applies to a trustee's decisions of a factual nature, such as the valuation of a contingent or unliquidated claim.
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> The registrar held that the *BIA* must be interpreted in a commercially reasonable manner, having regard to the need to proceed in an expedited fashion. The rights that are afforded to litigants in non-insolvency situations are not automatically available to claimants under the *BIA*. <u>An appeal under s. 135(4) from disallowance of a claim should not be heard *de novo* as a matter of right, but may be heard *de novo* where the circumstances are such that a hearing restricted to the record might result in an injustice</u>: Re San Juan Resources Inc. (2009), 2009 CarswellAlta 98, 52 C.B.R. (5th) 97 (Alta. Q.V.) Registrar: *Aguilar v. Canada (Minister of Citizenship & Immigration)* (2009), 2009 CarswellNat 213, 2009 CarswellNat 542 (F.C.).
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> Registrar Schwann held that an appeal under s. 135 must begin with consideration of whether the appeal is a true appeal, in which case fresh evidence cannot be admitted, or if it is to proceed on a *de novo* basis. The registrar observed that the case law is divided on this point and a number of courts have held that they may determine this issue on a case-by-case basis having regard to the facts and circumstances of each. Registrar Schwann treated the matter as a *de novo* appeal, noting that there had been no loss of efficiency or increased formality:

and although the trustee did not prepare and file a record, several affidavits were filed that effectively served the same purpose. Where the trustee's decision involves a question of law with the interpretation of a statute, the standard of review is correctness. Where the matter under consideration is factual in nature or involves a discretionary element, the standard of review is reasonableness: *Business Development Bank of Canada v. Pinder Bueckert & Associates Inc.* (2009), 2009 CarswellSask 776 (Sask. Q.B.) (Registrar); *Royal Bank v. Insley* (2010), 2010 CarswellSask 47, 64 C.B.R. (5th) 105 (Sask. Q.B.) (Registrar).

The Court permitted a creditor to file a new proof of claim, in order to permit a determination of the claim on the merits, notwithstanding that a disallowance of the claim had previously been made. The previous communications from the trustee to the creditor did not clearly state the effect of the disallowance of the claim would be that the creditor's second mortgage would be void: *Sinnathurai (Trustee of) v. Sabapathipillai* (2010), 2010 CarswellOnt 4959, 69 C.B.R. (5th) 287 (Ont. S.C.J.). For a discussion, see G§109 "Disallowance of Secured Claims".

The British Columbia Supreme Court held that the review process was not in all cases an appeal and that the review or appeal process should not detract from the requirement that parties who choose to engage in the claims process in the first instance must take it seriously. The starting point is that deference must be afforded to the receiver. A review by way of *de novo* is not a matter or right. The integrity of the claims process followed by the receiver would be both maintained and promoted if the review process to be undertaken by the court was carefully determined on a case-by-case basis, having regard to the following factors: the dollar amount involved; relevance of the further evidence proposed to be adduced; historical context, including laches; and the sources of new evidence sought to be adduced: *Coast Capital Savings Credit Union v. Symphony Development Corp.* (2011), 2011 CarswellBC 669, 75 C.B.R. (5th) 221 (B.C.S.C. [In Chambers]).

The standard of review applicable on appeal of the claims officer's determination is that of a true appeal and the court should only intervene in the case of an error of law or a palpable and overriding error in fact. The role of the court is not to conduct a trial *de novo*. The appropriate standard of review for the appeal of the decision of the claims officer with respect to pure questions of law is correctness. With respect to questions of mixed fact and law, the standard of review is that in the absence of inextricable legal error or a palpable and overriding error, a finding of the decision maker should not be interfered with. A damage assessment should not be overturned unless it is based on a wrong principle of law or the damage is so inordinately high or low that it must be an erroneous estimate of damages. By choosing not to request to have the hearing before the claims officer recorded by an official stenographer, the applicant took the chance that the factual determinations and conclusions of the claims officer did not meet the standard of palpable and overriding errors in case the decision was not favourable to it: *Re AbitibiBowater inc.* (2011), 2011 CarswellQue 8946, 2011 QCCS 4284 (Que. S.C.). See also *Oil Lift Technology Inc. v. Deloitte & Touche Inc.*, 2012 CarswellAtla 935, 98 C.B.R. (5th) 77, 2012 ABQB 357 (Alta. Q.B.).

[My emphasis added]

[23] In his written submission on behalf of the Trustee, Mr. Hill, while conceding "there may be some difficulty in reconciling these two approaches, it is not impossible", went on to list four principles which he suggested "may be extracted so as to form one confluent whole":

1. As a starting point, the process should recognize that the BIA is to be interpreted in a commercially reasonable manner, having regard to the trustee's need to proceed in an expedited fashion when determining acceptance or disallowance of proofs of claim;
2. Consequently, the default position with respect of the hearing of appeals from the determination or disallowance of a proof of claim should be that such appeals are true appeals;
3. Where the appeal is a true appeal, the standard of review of the trustee's decision on valuation should be one of "reasonableness" having regard to the record before the trustee, and for a trustee's legal determination as to whether to allow or disallow a proof of claim one of "correctness";
4. An appeal may be heard *de novo* where a hearing restricted to the record might result in an injustice.

[24] I accept Mr. Hill's distillation of what can be learned from a review of the previously decided cases. Generally speaking, an appeal from the determination or disallowance of a proof of claim should proceed as a true appeal. It is not an opportunity to allow for the introduction of additional evidence unless to deny it might result in an injustice. There might be instances when the Court decides to allow for the introduction of some additional evidence without throwing the doors wide open to a full fledged hearing. The, so-called, hybrid approach might best serve the interests of justice while recognizing that the *BIA* is to be interpreted in a

commercially reasonable manner having regard to the Trustee's need to proceed expeditiously when determining acceptance or disallowance of proofs of claim.

Court's Ruling

[25] The Court will allow both Mr. Gaum and Mr. Kadray and, if need be, the Trustee, to introduce additional affidavit evidence pertaining to the proceeds from the sale of 1095 Bedford Highway currently being held in trust by the legal firm of Blois Nickerson pending resolution of the legal action commenced by Mr. Gaum against Mr. Kadray back in 2012. As previously indicated, Mr. Kadray defended the Action and counter-claimed for general and special damages and costs based on an allegation of oppression along with relief based on the *Third Schedule of the Companies Act*, R.S.N.S. 1989, c. 81, as amended.

[26] The affidavit evidence will be restricted to:

- The balance of funds together with any accumulated interest currently being held in trust by the Blois Nickerson law firm. This might necessitate an additional affidavit from someone in the firm who has actual knowledge of the amount involved.

- The respective shareholdings of the two principals of 1195 Bedford Highway Limited (both common shares and preferred shares) and

their respective entitlement to share in the proceeds of sale of 1095 Bedford Highway if not for the outstanding litigation.

- If Mr. Kadray was to succeed in defending the claims advanced against him by Mr. Gaum (in the outstanding litigation) and if his counterclaim against Mr. Gaum was completely successful, are there sufficient funds available from what would otherwise be paid to Mr. Gaum as the owner of shares (both common and preferred shares) of 1195 Bedford Highway Limited to cover Mr. Kadray's total estimated claim for damages and costs?

[27] The affidavits are to be filed no more than fourteen calendar days after the date of release of this interim ruling. If either Mr. Gaum or Mr. Kadray or the Trustee decides to file a rebuttal affidavit, it is to be done no more than seven calendar days after that.

[28] Once the affidavits and any rebuttal affidavits have been filed, the Court will, after discussion with counsel and the other represented parties, set a date and time for the hearing of the appeal.

Glen G. McDougall, J.