SUPREME COURT OF NOVA SCOTIA
Citation: *Gaum v. Grant Thornton Limited*, 2021 NSSC 339

Date: 20211207
Docket: Hfx. No. 488807
Registry: Halifax

Between:

Errol Franklyn Gaum

Appellant

v.

Grant Thornton Limited

Respondent

DECISION

Judge:	The Honourable Justice Glen G. McDougall
Heard:	July 7, 2021 in Halifax, Nova Scotia
Written Decision:	December 7, 2021
Counsel:	John O'Neill for the Appellant Tim Hill, Q.C. for the Respondent Jonica Stingl, President of Zion II, Inc. Robert MacKeigan and Sara Scott for Issam Kadray

McDougall, J.

[1] Grant Thornton Limited (the "Trustee"), Trustee of the Estate of Errol Franklyn Gaum ("Dr. Gaum"), moves for an order for directions, pursuant to s. 34 of the *Bankruptcy and Insolvency Act* (the "BIA" or simply the "Act"), regarding the following:

(a) On the facts of this proceeding, can a creditor make application pursuant to section 50(12) of the Bankruptcy and Insolvency Act to have the Court declare the Proposal of Errol Gaum to be deemed to have been refused by the creditors; and, if so

(b) Should the Court declare the Proposal of Errol Gaum to be deemed to have been refused by the creditors;

(c) Such other matters as the evidence may require.

[2] The suggestion to proceed with a Motion for Directions came from counsel for the Trustee. It was prompted by notice from one of the creditors Zion II, Inc. ("Zion"), whose personal representative, Jonica Stingl, is the company's President.

[3] Ms. Stingl provided an informal notice of Zion's decision to withdraw it's support for a proposal made by Dr. Gaum to his creditors. Initially, Zion voted in favour of the proposal at a meeting of creditors held on May 7, 2019. It was joined by one other creditor Canadian Imperial Bank of Commence ("CIBC"), which also voted in favour of the proposal. However, two other creditors Canada Revenue Agency and Issam Kadray both voted against the proposal. Since the proposal

failed to gain the support of a majority of creditors it was rejected. The BIA, at s.54 provides the following:

> 54(1) The creditors may, in accordance with this section, resolve to accept or may refuse the proposal as made or as altered at the meeting or any adjournment thereof.
>
> Voting system
>
> (2) For the purpose of subsection (1),
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> (a) the following creditors with proven claims are entitled to vote:
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> (i) all unsecured creditors, and
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> (ii) those secured creditors in respect of whose secured claims the proposal was made;
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> (b) the creditors shall vote by class, according to the class of their respective claims, and for that purpose
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> (i) all unsecured claims constitute one class, unless the proposal provides for more than one class of unsecured claim, and
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> (ii) the classes of secured claims shall be determined as provided by subsection 50(1.4);
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> (c) the votes of the secured creditors do not count for the purpose of this section, but are relevant only for the purpose of subsection 62(2); and
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> (d) the proposal is deemed to be accepted by the creditors if, and only if, all classes of unsecured creditors — other than, unless the court orders otherwise, a class of creditors having equity claims — vote for the acceptance of the proposal by a majority in number and two thirds in value of the unsecured creditors of each class present, personally or by proxy, at the meeting and voting on the resolution.

[4] Then, in accordance with s.57(a) of the BIA, the insolvent person was deemed to have made an assignment in bankruptcy.

[5] If the proposal had gained acceptance by a majority in numbers holding two-thirds in value of the outstanding debt, the Trustee would have had to apply, within

five days, to the court for an appointment for a hearing to have the proposal approved. According to subsection 59(2) of the BIA, "Where the court is of the opinion that the terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors, the court shall refuse to approve the proposal, and the court may refuse to approve the proposal whenever it is established that the debtor has committed any one of the offences mentioned in ss. 198 to 200.

[6] Immediately following the meeting of creditors, another meeting took place at which the Trustee was confirmed as trustee of the bankrupt estate. No inspectors were appointed prior to the meeting being adjourned.

[7] Subsequently, on June 4, 2019 Dr. Gaum appealed the Trustee's decision to allow the claim of Mr. Kadray in the nominal amount of $1.00 for voting purposes. The appeal was made pursuant to ss. 37 and 135(4) of the BIA.

[8] A preliminary issue to decide whether the appeal should proceed as a true appeal based on the record before the Trustee or as a trial *de novo* was heard on August 28, 2020. In a ruling released on the 10th day of November, 2020 it was decided that the matter should take a hybrid, so-called, approach and allow the introduction of additional affidavit evidence pertaining to the proceeds of sale of property located at 1095 Bedford Highway, Bedford, Nova Scotia. This property

was vested in the name of 1195 Bedford Highway Limited, a company jointly owned by Dr. Gaum and Mr. Kadray. The proceeds of sale are being held in trust by a local law firm pending a resolution of a court action commenced by Dr. Gaum against Mr. Kadray on June 7, 2012.

[9] In addition to defending Dr. Gaum's claim, Mr. Kadray also filed a counterclaim. That lawsuit remains unresolved. There does not appear to have been any activity related to that matter since May of 2015, except for the sale of the property that is at the core of the dispute, on May 31, 2018. Mr. Kadray's claims as a creditor of Dr. Gaum emanate from their fractured business relationship as shareholders and owners of this company.

[10] As stated previously, the President of Zion II, Inc. initially supported the consumer proposal made by Dr. Gaum. With the elapse of time since the meeting of creditors on May 7, 2019, and the launch of the appeal by Dr. Gaum on June 4, 2019, Miss Stingl, on behalf of the company, has given notice of a change in position. Zion no longer supports the proposal. An affidavit of Jonica Stingl as President of Zion was filed with the court on June 2, 2021. In it she provides further particulars of what she claims is owed to Zion arising from a legal action brought against Dr. Gaum in the Supreme Court of the State of California, United States of America.

[11] In addition to the original judgment of USD $1,311,772.14, a sum of USD $13,650.00 was awarded in costs. If this latter amount is factored in, the total amount claimed by Zion would represent considerably more than 50% of the total amount of unsecured debts owed by the debtor.

[12] What then should the court make of Zion's stated intention to now oppose the proposal of Dr. Gaum to his creditors? Should it be left to be dealt with after the appeal is heard and decided or should it be considered now, knowing that to do so would likely render the appeal moot.

Assistance of the Trustee

[13] Counsel for the Trustee was careful not to take a position, but rather provided an overview of the Division 1 proposal process while leaving it to the court to decide if it should entertain an application for directions under s. 34 of the BIA. Subsection (1) of s. 34 reads:

> 34(1) A 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.

[14] The court could then entertain submissions from the creditors and the debtor on how s.50(12) should be interpreted. Section 50, subsection (12) reads:

> 50(12) Court may declare proposal as deemed refused by creditors – The court may, on application by the trustee, the interim receiver, if any, appointed under section 47.1 or a

> creditor, at any time before the meeting of creditors, declare that the proposal is deemed to have been refused by the creditors if the court is satisfied that
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> (a) the debtor has not acted, or is not acting, in good faith and with due diligence;
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> (b) the proposal will not likely be accepted by the creditors; or
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> (c) the creditors as a whole would be materially prejudiced if the application under this subsection is rejected.

[15] As Mr. Hill points out in his written submissions to the court, a great deal of time will likely be expended on the present appeal in a case where the court may ultimately refuse to approve the proposal given Zion's decision to withdraw its support.

[16] As previously indicated, the proposal made by Dr. Gaum to his creditors failed to gain the support of a majority of creditors and in accordance with s.57(a) he was deemed to have made an assignment in bankruptcy. This however, resulted from the Trustee's acceptance of Mr. Kadray's claim as a creditor thus allowing him to register his vote in opposition to the proposal.

Position of Dr. Gaum

[17] Counsel for Dr. Gaum argues that the appeal should be allowed to proceed and, in the event his client is successful, then the result of the meeting would favour acceptance of the proposal. Zion's original vote in favour of the proposal

when combined with CIBC's affirmative vote would meet the threshold requirements for acceptance set out in s.54, subsection (2)(d) of the BIA.

[18] In order to be deemed to be accepted, the proposal must be approved "by a majority in number and two thirds in value of the unsecured creditors of each class present, personally or by proxy, at the meeting and voting on the resolution". According to Dr. Gaum's counsel, Zion's subsequent decision to withdraw its approval of the proposal should not be considered, at least, not at this stage in the proceedings.

[19] Counsel for Dr. Gaum further argues that since there are no allegations suggesting his client has committed any of the offences mentioned in ss. 198 to 200 the court would not refuse the proposal on these grounds when presented with the trustee's application for approval pursuant to s.58 of the Act.

Other Relevant Provisions of the BIA

[20] Sections 58 and 59 of the BIA requires a trustee to apply to the court for approval of an accepted proposal. These sections provide:

> 58 On acceptance of a proposal by the creditors, the trustee shall
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> (a) within five days after the acceptance, apply to the court for an appointment for a hearing of the application for the court's approval of the proposal;
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> (b) send a notice of the hearing of the application, in the prescribed manner and at least fifteen days before the date of the hearing, to the debtor, to every creditor who

> has proved a claim, whether secured or unsecured, to the person making the proposal and to the official receiver;
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> (c) forward a copy of the report referred to in paragraph (d) to the official receiver at least ten days before the date of the hearing; and
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> (d) at least two days before the date of the hearing, file with the court, in the prescribed form, a report on the proposal.
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> 59 (1) The court shall, before approving the proposal, hear a report of the trustee in the prescribed form respecting the terms thereof and the conduct of the debtor, and, in addition, shall hear the trustee, the debtor, the person making the proposal, any opposing, objecting or dissenting creditor and such further evidence as the court may require.
>
> (2) Where the court is of the opinion that the terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors, the court shall refuse to approve the proposal, and the court may refuse to approve the proposal whenever it is established that the debtor has committed any one of the offences mentioned in sections 198 to 200.

[21] For Dr. Gaum to have any chance of success in avoiding further bankruptcy proceedings, he has to win the appeal and satisfy the twin requirements of s.54(2)(d). If successful on these two fronts the trustee would then be obliged to seek court approval pursuant to s.58 of the Act. Then, what!

[22] It is clear from the case of **Eagle Mining Ltd., Re 1999** Carswell Ont 1291, [1999] O.J. No. 5731, 42 O.R. (3d) 571, 9 C.B.R. (4th) 34 that a creditor can change its position from the one taken at a meeting of creditors prior to the application in court. At para. 8 of the **Eagle** decision, it is stated:

> TD Bank is not bound by its approval given at the November 20 meeting. In my view, even if there had been no change in circumstances, there is no impediment to a creditor taking different positions. If one who favours a proposal at the creditors meeting is estopped from opposing approval by the Court, then one would have to say that one who opposes at the creditors hearing would not be allowed to favour approval by the Court. As the Court has no obligation to form an opinion whether the terms of the proposal are

> reasonable and calculated to benefit the general body of creditors, the Court is bound to hear and evaluate the concerns of interested creditors. In doing so the Court will also consider any other positions taken by a creditor at another time.

[23] Zion has clearly stated its decision to now vote against the proposal made on Dr. Gaum's behalf to his creditors. The affidavit of the company president provides reasons for doing so. The decision in **Eagle**, supra, indicates there does not have to be a change in circumstances but Miss Stingl provides the rationale for the company's reconsideration of its initial approval.

[24] Counsel for the Trustee filed a brief that, if accepted, paved a path for the court to interpret s. 50, subsection (12) to "fill" a "functional" gap in a statute citing the case of **Re Portus Alternative Management Inc.** (2007) 88 O.R. (3d) 313 (SCJ) in support.

[25] Counsel for the trustee also set out the modern approach to statutory interpretation as adopted by the Nova Scotia Court of Appeal in the case of **R. v. Anand** 2020 NSCA 12. Where at para. 34, Beveridge, J.A., wrote:

> 34 The guiding principles of statutory interpretation are well-known. In *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, the Supreme Court gave clear direction that the starting point for statutory interpretation is the "modern rule" espoused by Professor Driedger. Iacobucci J., for the Court, wrote of this rule as follows:
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> > [21] Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "*Construction of Statutes*"); Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991)), Elmer Driedger *in Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I

prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[26] At para. 35 of **Anand**, supra, the court went on to state:

35 This was later reinforced in *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, where Iacobucci, again for the Court, elaborated:

> [26] ... Driedger's modern approach has been repeatedly cited by this Court as the preferred approach to statutory interpretation across a wide range of interpretive settings: see, for example, *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536, at p. 578, per Estey J.; *Québec (Communauté urbaine) v. Corp. Notre-Dame de Bon-Secours*, [1994] 3 S.C.R. 3, at p. 17; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21; *R. v. Gladue*, [1999] 1 S.C.R. 688, at para. 25; *R. v. Araujo*, [2000] 2 S.C.R. 992, 2000 SCC 65, at para. 26; *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2, at para. 33, per McLachlin C.J.; *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, 2002 SCC 3, at para. 27. I note as well that, in the federal legislative context, this Court's preferred approach is buttressed by s. 12 of the *Interpretation Act*, R.S.C. 1985, c. I-21, which provides that every enactment "is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects".
>
> [27] The preferred approach recognizes the important role that context must inevitably play when a court construes the written words of a statute: as Professor John Willis incisively noted in his seminal article "Statute Interpretation in a Nutshell" (1938), 16 *Can. Bar Rev.* 1, at p. 6, "words, like people, take their colour from their surroundings". This being the case, where the provision under consideration is found in an Act that is itself a component of a larger statutory scheme, the surroundings that colour the words and the scheme of the Act are more expansive. In such an instance, the application of Driedger's principle gives rise to what was described *in R. v. Ulybel Enterprises Ltd.*, [2001] 2 S.C.R. 867, 2001 SCC 56, at para. 52, as "the principle of interpretation that presumes a harmony, coherence, and consistency between statutes dealing with the same subject matter". (See also *Stoddard v. Watson*, [1993] 2 S.C.R. 1069, at p. 1079; *Pointe-Claire (City) v. Quebec (Labour Court)*, [1997] 1 S.C.R. 1015, at para. 61, per Lamer C.J.)

[27] Section 50, subsection (12) allows the court "on application by the trustee, the interim receiver, if any, appointed under s.47.1 or a creditor, at any time before the meeting of creditors" (emphasis mine), to declare that the proposal is deemed to have been refused by the creditors if the court is satisfied that:

(a) the debtor has not acted, or is not acting, in good faith and with due diligence;

(b) the proposed will not likely be accepted by the creditors; or

(c) the creditors as a whole would be materially prejudicial if the application under this subsection is rejected.

[28] The BIA does not provide for the specific situation that has occurred in the case that is now before me. The question then becomes; Is it necessary to proceed with the appeal to first determine if the trustee was mistaken in allowing Mr. Kadray to vote on the proposal presented at the creditor's meeting? This would only add to the delay that has already occurred and for what purpose. Even if successful on the appeal, what is the likelihood of the court approving the proposal now that the majority creditor has clearly indicated that it no longer supports it. Even if the other creditor - Canada Revenue Agency, - which voted against the proposal, at the meeting of creditors is somehow persuaded to alter its position to

now favour the proposal it does not change the reality that the one creditor which is owed in excess of 50% of the outstanding debt is no longer supportive of the proposal. The court would have to ignore the best interests of the general body of creditors which according to s.59(2) obligates it to refuse approval where it "is of the opinion that the terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors, …." (emphasis added). It would be virtually impossible for the debtor, Dr. Gaum, to show why the proposal should be approved. (See **Houlden & Magrawetz and Sarra in Bankruptcy and Insolvency Law of Canada** (4th ed.) at E§49 Approval of Proposals:)

[29] It would also be a waste of court resources to allow the appeal to continue given the inevitable outcome. It only adds to the inordinate delay that has already occurred. It amounts to an abuse of process that prejudices the general body of creditors.

Ruling

[30] In so far as there is a gap in the legislation, specifically in regard to s.50(12), the gap should be filled to allow for an application by the trustee or a creditor to request the court to deem the proposal to have been refused by the creditors for failing to meet the two requirements set out in s.54(2)(d).

[31] This ruling results in the debtor's appeal of the trustee's decision to accept Issam Kadray's claim as an unsecured creditor (which then qualified him to vote on the proposal) being dismissed.

[32] I ask that counsel for the trustee prepare an order for circulation to other counsel and Miss Stingl (in her capacity as President and representative for Zion II, Inc.), so that it can be presented to the court for issuance after which the bankruptcy process may continue.

McDougall J.