IN THE SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY
Citation: Avery's Trucking Inc. (Re), 2013 NSSC 302

Date: September 26, 2013
Docket: B-37255
Registry: Halifax

District of Nova Scotia
Division No. 04 - Yarmouth
Court No. 37255
Estate No. 51-1742614

In the Matter of the Bankruptcy of Avery's Trucking Incorporated

And

In the Matter of the Appeal of WBLI Inc., in its capacity as Receiver of Avery's Trucking Incorporated ("Avery's") of the dispute or disallowance by Haley & Associates Inc., as Trustee of the Estate of Avery's in Bankruptcy (the "Trustee") of WBLI's claim pursuant to Section 81 of the *Bankruptcy and Insolvency Act* (Can) to property of Avery's in the possession of the Trustee.

BETWEEN:

WBLI Inc. in its capacities as Receiver of Avery's Trucking Inc. appointed by Canadian Imperial Bank of Commerce ("CIBC") and Business Development Bank of Canada ("BDC")

APPLICANT

- And -

Haley & Associates Inc. in its capacity as Trustee of the Estate of Avery's Trucking Inc. in Bankruptcy

RESPONDENT

D E C I S I O N

Registrar: Richard W. Cregan, Q.C.

Heard: July 26, 2013

Present: Carl Holm, Q.C. representing the Trustee, WBLI Inc.

Shawn O'Hara representing the Trustee, Haley & Associates

Facts

[1] There are two applications before me respecting the estate of Avery's Trucking Incorporated ("the Bankrupt") which made an assignment in bankruptcy on May 1, 2013. One is that of the Trustee, Haley & Associates, for the taxation of its Final Statement of Receipts and Disbursements (Final Statement). The other is the appeal of WBLI Inc., the Receiver appointed by two secured creditors of the Bankrupt, namely Canadian Imperial Bank of Commerce (CIBC) and the Business Development Bank of Canada (BDC), of the disallowance by the Trustee of their respective claims to property under Section 81 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (*BIA).*

[2] BDC has a secured claim of $77,579.64 and an unsecured claim of $18,509.35. CIBC has a secured claim of $242,934.79. Proofs of Claims for these respective amounts were filed by BDC on May 6, 2013 and by CIBC on May 15, 2013. The Trustee accepts the quantum of these claims. The Trustee has declined to turn over to the Receiver the property it has realized subject to these securities. It advised the Receiver to file a Proof

of Claim Property. The Receiver did so on June 14, 2013. The Trustee responded with a Notice of Disallowance of Claims on June 27, 2013. These secured claims far exceed the value of the assets realized by the Trustee, namely $185,928.80.

[3] There is also a Deemed Trust Claim by the Federal Crown of $75,294.98. CIBC and BDC do not dispute the priority of this claim over their claims. Also the Trustee admits that the Crown is entitled to be paid but it has refused to pay, pending the taxation of the Final Statement.

[4] The Trustee says that the Final Statement should be approved thereby allowing its fees and expenses as claimed therein to be paid in full in priority to the secured claims of CIBC and BDC.

[5] CIBC and BDC say that their respective secured charges on the assets constitute prior charges which must be satisfied before anything can be available for the Trustee's fees and expenses. They say that, as the amounts secured by these prior charges exceed the receipts, the Trustee is not entitled to anything towards its fees and expenses.

Law

[6] The legal analysis may conveniently start with the following two provisions in the *BIA:*

Section 71

> On a bankruptcy order being made or an assignment being filed with an official receiver, a bankrupt ceases to have any capacity to dispose of or otherwise deal with their property, which shall, subject to this Act and to the rights of secured creditors, immediately pass to and vest in the trustee named in the bankruptcy order or assignment, and in any case of change of trustee the property shall pass from trustee to trustee without any assignment or transfer. (underlining added)

Subsection 128(3)

> The trustee may redeem a security on payment to the secured creditor of the debt or the value of the security as assessed, in the proof of security, by the secured creditor.

[7] These provisions make it clear that the rights of secured creditors stand and are unimpeded by proceedings in bankruptcy. The property over which they hold security does not become part of the property in bankruptcy and is never available to ordinary creditors, unless it is redeemed according to Section 128(3).

[8] The point is authoritatively made in the 2012-13 *Annotated Bankruptcy and*

Insolvency Act, Houlden, Morawetz and Sara at page 497, Paragraph 5.

> The effect of ss. 70(1) and 71 with respect to secured creditors is that the interest of a secured creditor in the property of the bankrupt never loses its priority over the claims of other creditors, never passes into the hands of the trustee and never becomes a part of the property in the hands of the trustee to be divided among the creditors proving in bankruptcy, unless the trustee redeems the property by paying out the claim of the secured creditor as permitted by s. 128(3).

[9] The point is refined and deals specifically with the situation in the present case in Paragraph 31 of *Agriculture Credit Corp. of Saskatchewan* v. *Featherstone (Trustee of)*, [1996] S.J. No. 319 as follows:

> Monies owing to a bankrupt, when collected by the trustee continue to be the property of the bankrupt and continue to be subject to existing security interests. This includes monies realized through the efforts of the trustee.

[10] A similar conclusion is found in *Re Stadnick* (1991) 2 C.B.R. (3d) 7 (Sask. Q.B.). In Paragraph 13 reference is made to Subsection 136(1) of the *BIA* which begins with:

> Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows . . .
>
> (ii) the expenses and fees of the trustees . . . .
>
> (underlining added)

Paragraph 16 summarizes the discussion as follows:

> On principle, therefore, unless legislation provides otherwise, the rights of a trustee in bankruptcy are postponed to those of secured creditors.

[11] In answer to the submissions of the secured creditors, the Trustee refers to the provisions of Section 39 of the *BIA* by which the fees of a trustee are to be determined.

[12] I quote from it the following Subsections:

> (1) The remuneration of the trustee shall be such as is voted to the trustee by ordinary resolution at any meeting of creditors.
>
> (2) Where the remuneration of the trustee has not been fixed under subsection (1), the trustee may insert in his final statement and retain as his remuneration, subject to increase or reduction as hereinafter provided, a sum not exceeding seven and one-half per cent of the amount remaining out of the realization of the property of the debtor after the claims of the secured creditors have been paid or satisfied.
>
> (5) On application by the trustee, a creditor or the debtor and on notice to such parties as the court may direct, the court may make an order increasing or reducing the remuneration.

[13] In the present situation there is no creditors' resolution regarding fees; there is nothing left on which to make the 7½ per cent calculation, the receipts being exhausted by the secured claims of CIBC and BDC; and there is no set remuneration to be increased or decreased.

[14] I do not see that Section 39 provides any basis whereby the Trustee can claim any priority over the secured creditors for its fees.

[15] The Trustee's counsel submits that, the Trustee having conscientiously administered the estate should be allowed by me, acting within my discretion, compensation for the services provided.

[16] Reference is made to *Re Maybank Foods Inc.* (1990), 78 C.B.R. (N.S.) 79, a decision of Saunders J. of the Ontario Supreme Court, In Bankruptcy. This decision is very brief. However, it appears that the issue in it was whether a trustee who took initiative to sell certain assets on which the respondent held security was entitled to fees for its efforts. The respondent objected to the trustee being paid fees. This parallels the present case except that the trustee had acted under authority of a court order which had authorized the payment of its fees.

[17] In the present case no such order had been sought or granted. Accordingly I do not see that this case helps the Trustee.

[18] This decision refers to four cases. Note of two of them is germane to this discussion. The first is *Robert F. Kowal Investments Ltd. et al* v *Deeder Electric Ltd* (1975), 59 D.L.R. (3d) 492, (Ont., Holden J.A.). It contains a very extensive review of the law respecting the remuneration of receivers. No mention is made of trustees under the *BIA*. The principles involved are summarized in the following paragraph quoted from the head note:

> A receiver has, in general, no priority for his expenses over a prior secured creditor unless the receiver is appointed with the consent of the secured creditor or for his benefit, or unless the expenses are necessary for the protection of the property for the benefit of all creditors including the secured creditor.

[19] In the present case the secured creditors do not see that they have received any benefit from the trustee's efforts. Quite apart from this, the case says nothing of trustees in bankruptcy.

[20] The second is *P.A.T. Local 1590* v *Broome* (1986), 61 C.B.R. (N.S.) 233 (Ontario, Master Browne). It considers only the right of trustees to remuneration for dealing with trust funds which are not property of the bankrupt. It is made clear that apart from any arrangements made with the administrator or beneficiary of a trust, there is no entitlement to fees.

[21] I do not see that these cases assist the Trustee in any way.

[22] The following passage from Holden, Morawetz & Sarra, at page 667 is quite decisive in the point:

> G§100 - Frequently a secured creditor will agree to pay the trustee for taking conservatory measures, such as maintaining heat, surveillance, *etc.* If, however, the secured creditor does not agree to pay for such measures and the trustee incurs expenses incurred in conserving assets covered by the claim of a secured creditor in the hope that there will be a surplus for unsecured creditors, the secured creditor will not be liable for such expenses: *Re Joly-Sac Inc.* (1991), 12 C.B.R. (3d) 182, 42 Q.A.C. 140 (C.A.).

So also is the following from Paragraph 17 of *Re Stadnick* :

> Occasions may arise, as here, where no compensation is available for a trustee. This is a contingency which he ought to anticipate and take precautions. He cannot be extricated by pleading some equitable principles to place his claim ahead of secured creditors.

[23] The Trustee should have known when to stop. It took the risk that there would be no surplus to cover its fees and expenses.

[24] There is an entry in the Final Statement under Receipts for a “Retainer” of $5,000.00. Since the hearing I have noted this to counsel. It seems to me that, if this retainer came from funds of the bankrupt company, it should be simply treated as property of the bankrupt just as any other receipt.

However, if it was provided by a third party to induce the Trustee to take on the file, I think it could be proper for the Trustee to apply it against its fees. If the parties cannot agree as to how this amount should be characterized, I shall hear the parties and decide the matter.

Conclusion

[25] The Trustee has not presented me with any authority or legal theory on which I can allow its fees and expenses in priority to the secured claims. The Receiver is entitled to the assets realized by the Trustee subject to the payment of the Deemed Trust Claim.

[26] An order will issue:

1. Directing that the property in the hands of the Trustee be transferred to the Receiver after the Deemed Trust Claim is paid,

2. Disallowing the Trustee's Final Statement, and

3. Directing the Trustee to pay the Receiver's costs.

[27] If the parties cannot agree on such costs I shall hear them.

R.

Halifax, Nova Scotia
September 26, 2013