IN THE SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY
Citation: Bevin (Re), 2014 NSSC 88

Date: March 5, 2014
Docket: 37796
Registry: Halifax

District of Nova Scotia
Division No. 01
Court No. 37796
Estate No. 51-1793850

In the Matter of the Consumer Proposal of Lisa Dawn Bevin

D E C I S I O N

Registrar: Richard W. Cregan, Q.C.

Heard: February 5, 2014, in Halifax, Nova Scotia

Counsel: Edward MacDonald, Trustee, for the Bankrupt
Stephen Kingston for the Bank of Nova Scotia

Background

[1] This is an application respecting a Consumer Proposal made by Lisa Dawn Bevin under the provisions of the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3 (*"BIA"*).

[2] The proposal was submitted and filed with the Office of the Superintendent of Bankruptcy on September 30, 2013. Notice of it was mailed to creditors on October 4, 2013. This gave the creditors 45 days from the date of filing, that is to November 15, 2013, to file their Proofs of Claim, Proxies, and Voting Letters. The Bank of Nova Scotia (the "Bank") through its solicitor, Stephen Kingston, filed a Proof of Claim, Proxy and a Voting Letter on November 8, 2013. The Bank's claim is for $85,090.00 and is unsecured.

[3] Certain portions of the Voting Letter (Form 37.1) are very material to this application. I quote them:

> 1. I, , creditor (or I, Stephen Kingston representative of Bank of NS, creditor), of , a creditor in the above matter for the sum of $85,090.00 hereby understand that:

....

2. I hereby request
(Check and complete the appropriate section)

☐ the administrator acting with respect to the consumer proposal to record my vote FOR the acceptance of the consumer proposal as made on the day of ,

☑ the administrator acting with respect to the consumer proposal to record my vote AGAINST the acceptance of the consumer proposal as made on the 30th day of September, 2013

☐ the administrator acting with respect to the consumer proposal to record my vote AGAINST the acceptance of the consumer proposal as made on the 30th day of September, 2013 and REQUEST THAT A MEETING OF THE CREDITORS BE CONVENED.

Mr. Kingston followed up with a letter on November 12, 2013 to Ed MacDonald of Grant Thornton Limited, the Administrator of the Proposal. I quote the text of this letter:

As indicated previously, the Bank of Nova Scotia is voting against Ms. Bevin's proposal as currently presented.

The Bank would, however, be prepared to support the Proposal in the event that it was revised to include:

1. The full amount of Ms. Bevin's "retro pay", once received, will be paid to the Proposal Trustee to be included in funds to be distributed to unsecured creditors;

2. Ms. Bevin's monthly payments during the Proposal period are to be increased to $700.00.

I look forward to your reply on these points.

[4] Mr. MacDonald replied by email the next day stating:

> Thanks Stephen, obviously there will be a creditor meeting, I will advise you the meeting date refer to Ms. Bevin the banks counter offer. Ed.

[5] Mr. Kingston did not hear anything further from Mr. MacDonald nor anyone else on behalf of the Administrator until November 19, 2013 when he received an email from Mr. MacDonald stating:

> Hi Stephen, with respect to the above-noted, I am advised the proposal was deemed accepted by the creditors. A meeting was not requested per Section 66.15(2).
>
> Ms Bevin has since contacted me requesting an amendment to the CP. She wants to surrender the vehicle and include the deficiency in the CP. She will offer $500 per month over 60 months plus ½ the net proceeds of the retro pay. This will provide creditors a 19% return before the retro pay. A bankrupt would provide a 12% return. Please advise if your client is willing to accept these terms.

On receipt of this email Mr. Kingston attempted to call Mr. MacDonald but was unsuccessful. He sent him an email later in the day as follows:

> I refer to your message below, which clearly indicated that a Meeting of Creditors was being scheduled. I do not believe that you can now take the position that a Meeting is not tom (sic) be held and that the Proposal is somehow deemed to be accepted despite your email and the clear Voting Letter of the Bank, the largest creditor.
>
> Please confirm and clarify your position ASAP, as I anticipate making a Motion to the Court if the Trustee maintains its position.

and followed it with another email a few minutes later as follows:

> I refer to my email to you of several minutes ago, attaching a copy of your email message to me of November 13, 2013.
>
> Please accept this email as the Bank's request to the Administrator to schedule a Motion pursuant to BIA s.66 for review of the Proposal by the Court. The Bank will appear and oppose the approval of the Proposal by the Court, and will reference both its Voting Letter and the Administrator's email response.
>
> I will leave it to the Court to determine whether the Administrator was entitled to consider the Proposal had deemed approval - but will certainly argue that it is both unfair and improper for the Administrator to adopt the position that a Creditor's Meeting was not requested after having previously advised creditor's counsel that a Meeting was "obviously" required and that the Administrator would contact the Creditor regarding a date.
>
> The Bank's position was clearly stated - and was clearly understood by the Administrator, as indicated in the November 13 email. I am surprised and disappointed that the Administrator is now attempting to say otherwise.

[6] In response to this request the Administrator initiated this Application.

[7] It is to be noted that Mr. Kingston checked off the second box on the Voting Letter. This said to the Administrator that the Bank requested that its vote be against the acceptance of the proposal. He should have checked off the third box which requested that its vote be against the acceptance of the proposal and requested a meeting of the creditors be convened.

[8] Simply recording the vote as against acceptance is of no practical effect as to the status of the proposal unless a meeting is called. Thus to assert one's objection to the proposal one must be sure that a meeting where the negative vote may be cast is called. As the third box was not checked, the system maintained by the Administrator automatically let the approval go through. Mr. MacDonald was unaware of this and actually did not see the Voting Letter. He only learned of this from someone in his staff who advised him on November 19, 2013 that the proposal was deemed approved.

[9] He considered that he was powerless to do anything about it. However, he complied with Mr. Kingston's request to bring the problem before the Court, thus this present application.

[10] The situation then simply is that Mr. Kingston mistakenly checked off the wrong box. No one else sought a meeting. Mr. MacDonald did not monitor the process so the proposal went through to deemed approval without regard to the understanding reached in the communication with Mr. Kingston that there would be a meeting. As Administrator he has a responsibility to all the stakeholders and thus by himself had no power to compromise what the system had done.

[11] On the one hand Ms. Bevin has her proposal deemed accepted, but the Bank is denied the benefit which its counsel and proxy, Mr. Kingston, thought he had obtained, namely, an acknowledgement from the Administrator there would be a creditor's meeting where there would be the opportunity to negotiate acceptable terms or failing that the opportunity to vote down the proposal.

[12] Subsection 66.15(2) of the *BIA* obliges an administrator to call a Creditor's Meeting as follows:

> (2) The administrator shall call a meeting of creditors
>
> > (a) forthwith after being so directed by the official receiver under subsection (1), or
> >
> > (b) at the expiration of the forty-five day period following the filing of the consumer proposal, if at that time creditors having in the aggregate at least twenty-five per cent in value of the proven claims have so requested.
>
> and any meeting of creditors must be held within twenty-one days after being called.

[13] The Bank's claim constitutes far in excess of twenty-five percent of the proven claims. Thus it had standing to require the Administrator to call a meeting. The question then is whether the form of the request is proper. If Mr. Kingston had checked the third box, there would be no question that the request had been perfected. He did not, rather he had communication with Mr. MacDonald whereby he understood that a meeting would be called. I think that Mr. Kingston had good grounds to assume all was in order. Mr. MacDonald's simple position is that the system took over, the deemed acceptance went through, it was not the practice to check further, there is nothing he could do about it. I do not fault Mr. MacDonald in this regard.

[14] Mr. Kingston submits that the Administrator is estopped from denying its obligation to call a meeting.

[15] He relies on what Warner, J. of this Court said in **Kings County v. Berwick (Town)** (2010), 290 N.S.R. (2d) 171 at para 60:

> The proper approach to the estoppel issue is that explained by Chaisson, J.A. for the British Columbia Court of Appeal in *Dunn v. Vicars.* He adopts the broad approach consistent with the English case law, primarily enunciated by Lord Denning. Lord Denning's conclusion in *Amalgamated Investments v. Texas Commerce* at p. 584 is the modern law of equitable estoppel. He wrote:
>
> > The doctrine of estoppel is one of the most flexible and useful in the armoury of the law. ... It has evolved during the last 150 years in a sequence of separate developments: proprietory estoppel, estoppel by representation of fact, estoppel by acquiescence and promissory estoppel. At that same time, it has been sought to be limited by a series of maxims: ... All these can now be seen to merge into one general principle shorn of limitations. When the parties to a transaction proceed on the basis of an underlying assumption (either of fact or of law, and whether due to misrepresentation or mistake, makes no difference), neither or them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the court will give the other such remedy as the equity of the case demands.
>
> (emphasis added)

[16] Mr. Kingston was proceeding on the basis that there would be a meeting. This is clearly what Mr. MacDonald, as Administrator, represented to him. To allow him to go back on this would be unfair or unjust. A remedy should be available.

[17] A request for a meeting was made in the communication by November 15th. Clearly the form was defective, but I do not think in the context of the communication it would be reasonable to expect that defect to cancel out the understanding made in the communication. Mr. MacDonald, if he had seen the defective form, would have called Mr. Kingston for clarification before letting the form go into effect in the system.

[18] This submission is persuasive, but I think I must also consider other approaches, particularly specific provisions in the *BIA* and the jurisprudence regarding formal defects and irregularities.

[19] The form which Mr. Kingston completed was the "prescribed" form mentioned in Paragraph 66.14(b)(iii): "a form of proof of claim as prescribed ...". Submitting the form is the normal way for a creditor to make a request for a

meeting. However, there is nothing in Section 66.15 which has the effect of saying that the request can only be made with this form and not with some other mode of communication. I am not aware of any general provision in the *BIA,* its Rules, or accepted practices that the completion of forms overrides what may be communicated in covering letters, etc. I am satisfied that a request for a "meeting of creditors" was effectively made by the 45th day. Thus the obligation to call a meeting was created. The process under Section 66.18 should have been stopped so that the automatic acceptance would not have been effected.

[20] I base this conclusion on Subsection 187(9) of the *BIA* which gives the court authority to grant relief from the adverse effects of formal defects or irregularities. I quote it:

> 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.

[21] The following is commentary on this Subsection in Houlden, Morawetz & Sarra, The Annotated Bankruptcy and Insolvency Act, at paragraph I§28 at page 7-73:

> Section 187(9) gives the court power to remedy any formal defect or irregularity unless the court is of the opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of the court. Section 187(5), *supra*, gives the court power to review, rescind or vary any order made by it under its bankruptcy jurisdiction. The two subsections give the court a wide power to excuse or remedy errors so that bankruptcy proceedings will not be defeated by formal and technical objections.
>
> The large powers given by s. 187(9) enable the court to correct defects of a technical nature so long as it can be done without injustice: *Re Holdengraber* (1927), 8 C.B.R. 411 (N.B.S.C.)

[22] *Re Holdengraber* was an application by a creditor to set aside the appointment of a trustee because of certain irregularities in the proofs of claim of certain creditors who had voted for this trustee. Also in issue was whether sufficient notice of the application under the Rules had been given.

[23] I quote from paragraph 7 of this case:

> Failure to comply with the Rules of Court is not a fatal matter, if without injustice, the oversight is susceptible of correction ...; and the large powers given to the Court in regard to the extension of the time for the doing of anything ... enables the Court to correct such a defect as is here complained of.

[24] Although this commentary relates to Rules of Court, I think it applies with equal force to Section 187(9) of the *BIA*. It confirms that I have power to grant an

appropriate remedy to rectify what has happened as long as it can be done without injustice to any of the other stakeholders.

[25] The only possible injustice is that Ms. Bevin and her other creditors will not have the benefit of the automatic approval of her proposal. But is this a real injustice? I think not. Mr. MacDonald clearly represented to Mr. Kingston that there would be a meeting. What happened was clearly inconsistent with the communication between them. When the problem was discovered, Mr. Kingston acted immediately. In the circumstances I do not think justice permits Ms. Bevin and her other creditors to take advantage of this formal defect or irregularity. If they could, the real injustice would be to the Bank.

[26] I note comments of Hall, J. of the Supreme Court of Newfoundland and Labrador in **Nautical Data International, Inc**. **In Re the Bankruptcy and Insolvency Act**, 2005 NLTD 141. In this case a creditor had filed the proper documentation, but its voting letter did not indicate whether it was for or against the proposal. The Trustee could not vote the claim, being unable to contact the creditor to obtain instructions. It became apparent that this creditor's vote would be a swing vote. In allowing the vote to be counted, Hall, J. said at paragraph [67]:

> To disallow the vote of CCL in this matter in my view constitutes a triumph of technicalities over substance. I am in general agreement with the sentiment expressed by Farley, J. That there is a point in time at which the voting must be considered to be over and after which no supplementing or coopering up the information to support the vote should be permitted. However, in these unusual circumstances brought about by reason of the *ex parte* Order suspending the counting of the vote, I am satisfied that to disallow the vote of the CCL would be to allow technicalities to triumph over substances and to defeat the rehabilitative purposes espoused by the **BIA**.

I think that this comment is similarly applicable to the present matter. Not giving the Bank a remedy I think would also be a "triumph of technicalities over substance".

[27] In order to correct the situation, the Bank is entitled to a remedy which will put it in the same position it would have been in, if the correct box on the Proof of Claim had been checked. I am satisfied that this is the kind of formal defect or irregularity that Subsection 187(9) is intended to remedy.

[28] An Order will be granted:

1) annulling the deemed acceptance of the proposal, and

2) directing the Administrator to call a meeting of the creditors which will be conducted according to the provisions of the *BIA* beginning with Section 66.15.

[29] There will be no costs.

R.

Halifax, Nova Scotia

March 5, 2014