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2000 CarswellAlta 1463, 2000 ABQB 938, 21 C.B.R. (4th) 263, 285 A.R. 318

Hover, Re

In the Matter of the Proposal of John Vincent Hover

Alberta Court of Queen's Bench

Registrar Laycock

Heard: November 11, 2000
Judgment: December 13, 2000
Docket: Calgary 069083

Counsel: *Susan Robinson-Burns*, *James R. Farrington*, for Trustee, KPMG

Frank Llewellyn, for Bankrupt, James Hover

Jill Medhurst-Tivador, for Superintendent of Bankruptcy

Richard A. ***Low***, for Pleasure Pool Sales Ltd.

Barry Schurr, for Office of the Official Receiver

Subject: Insolvency

Bankruptcy --- Proposal — Approval by court — Conditions — Reasonable terms

Bankrupt filed notice of intention to file proposal and appointed trustee — Proposal was approved by majority of creditors — Bankrupt brought application for order approving proposal — Certain creditors opposed approval of proposal or requested amendment — Application granted — Cross-application dismissed — Proposal was reasonable and likely to benefit general body of creditors — Court lacked power to grant amendment to proposal whereby seized vehicles would be ordered sold in order to fund proposal — Court's authority with respect to proposals as set out in s. 60(5) of Bankruptcy and Insolvency Act is limited to approving, rejecting, or correcting errors or omissions — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 60(5).

Bankruptcy --- Proposal — Effect of proposal — Effect on other legal processes

Bankrupt filed notice of intention to file proposal and appointed trustee — Bankrupt filed proposal by fax — On same day proposal was filed, execution creditor purported to enforce civil judgment by removing four vehicles

belonging to bankrupt — Trustee advised execution creditor that notice of intention to file proposal had been filed, but did not have documentary evidence of filing — Proposal was approved by majority of creditors — Bankrupt brought application for order approving proposal — Creditors brought cross-application for order requiring return of vehicles seized by execution creditor — Application granted — Cross-application for return of vehicles granted — Execution creditor was ordered to return seized vehicles to bankrupt — Section 69(1) of Act stipulates that filing of notice of intention to file proposal creates automatic stay on all enforcement proceedings, which takes effect whether or not execution creditor is provided with proof or even has notice of filing — Fact that execution creditor was advised of filing and continued to remove vehicles goes to issue of costs of removal of vehicles and possibly damages arising from wrongful removal — Execution creditor was responsible for all costs associated with removal, storage and return of vehicles — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 69(1).

Bankruptcy --- Administration of estate — Trustees — Appointment

Bankrupt filed notice of intention to file proposal and appointed trustee — Proposal was approved by majority of creditors — Bankrupt brought application for order approving proposal — Certain creditors brought cross-application for determination of whether trustee was validly appointed — Other creditors brought cross-application for order requiring return of vehicles seized by execution creditor — Application granted — Trustee should have applied to court for approval before accepting appointment — Trustee was employed by firm which acted as bankrupt's accountant during preceding two years — Restrictive interpretations of "accountant" which would exclude trustee's firm from definition because firm did not act as auditor, were not appropriate — Trustee's firm prepared financial statements for bankrupt's corporation and qualified as "accountant" within meaning of s. 13.3(1) of Act — Trustee's appointment conflicted with s. 13.3(1) of Act — Appropriate to confirm trustee's appointment, since breach was committed in good faith, no evidence existed of prejudice to any party, and majority of creditors supported his continuance as trustee — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 13.3(1).

Bankruptcy --- Administration of estate — Trustees — Removal

Bankrupt filed notice of intention to file proposal and appointed trustee — Proposal was approved by majority of creditors — Bankrupt brought application for order approving proposal — One creditor brought application for order removing trustee for cause — Application granted — Cross-application dismissed — Not appropriate to remove trustee for cause — Majority of creditors supported trustee's continuance — Dissatisfied creditor adduced no persuasive evidence of misconduct or conflict of interest on part of trustee.

Cases considered by *Registrar Laycock*:

Alzeer Holdings Ltd. v. Browning Smith Inc. (1994), 38 C.B.R. (3d) 199 (Alta. Master) — applied

Ethier, Re (1991), 7 C.B.R. (3d) 268 (Ont. Bktcy.) — applied

Planta Dei Pharma Inc., Re (1999), (sub nom. *Planta Dei Pharma Inc. (Bankrupt), Re)* 212 N.B.R. (2d) 143, (sub nom. *Planta Dei Pharma Inc. (Bankrupt), Re)* 541 A.P.R. 143, 14 C.B.R. (4th) 256 (N.B. Q.B.) — considered

R.J. Nicol Homes Ltd. (Trustee of) v. Nicol (1995), 30 C.B.R. (3d) 90, 77 O.A.C. 395 (Ont. C.A.) — referred to

Tannis Trading Inc. v. Camco Food Services Ltd. (Trustee of) (1988), (sub nom. *Camco Food Services Ltd., Re)* 67 C.B.R. (N.S.) 1, 63 O.R. (2d) 775, (sub nom. *Tannis Trading Inc. v. Thorne Ernst & Whinney Inc.)* 49 D.L.R. (4th) 128 (Ont. S.C.) — referred to

United Fuel Investment Ltd. (No. 1), Re (1965), (sub nom. *United Fuel Investment (No. 2), Re)* [1966] 1 O.R. 165, 53 D.L.R. (2d) 12 (Ont. C.A.) — applied

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Pt. III, Div. I — referred to

s. 13.3 [en. 1992, c. 27, s. 9(1)] — considered

s. 13.3(1)(a) [en. 1992, c. 27, s. 9(1)] — considered

s. 14.04 [en. 1992, c. 27, s. 9(1)] — pursuant to

s. 14.07 [en. 1992, c. 27, s. 9(1)] — considered

s. 50.4(1) [en. 1992, c. 27, s. 19] — referred to

s. 59(2) — considered

s. 60(5) — considered

s. 69 — referred to

s. 69(1) — considered

ss. 198-200 — referred to

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)

Generally — referred to

Words and phrases considered:

accountant

Statutory interpretation requires the term accountant [as used in the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, s. 13.3(1)] be given its usual normal and generally accepted meaning. The views of the professional associations in their rules and guidelines which provide a restrictive interpretation to the word "accountant" are not supportable. The function of accountants have expanded over time and the services of accounting firms continues to expand . . . The preparation of a review engagement financial statement is but a small part of work performed by accountants.

APPLICATION by bankrupt for order approving proposal in bankruptcy; CROSS-APPLICATIONS by various creditors for order declaring appointment of trustee invalid or, inalternative, removing trustee for cause, and for

order requiring creditor to return property seized from bankrupt.

***Registrar Laycock*:**

1 On November 12th, 1999, the debtor filed a Notice of Intention to file a proposal under the Bankruptcy & Insolvency Act, Part III. Sandy D. Lyons, a licensed trustee, of KPMG Inc. in Lethbridge consented to act as trustee under the proposal.

2 On November 21st, 1999, KPMG filed with the Official Receiver in Calgary a cash flow statement, the insolvent persons report on the cash flow statement and the trustee's report on the cash flow statement. Subsequently 3 orders were granted extending the time for the debtor and the trustee to file the proposal with the Official Receiver. The proposal was filed with the Official Receiver on April 25th, 2000 and the following day, documents including a notice of a meeting of creditors were mailed out to the debtor, the Official Receiver, and every known creditor. The meeting originally called for May 16th, 2000 was subsequently adjourned and proceeded on June 22nd 2000.

3 On June 22nd, 2000, the required number of proven creditors accepted the proposal subject to an amendment made during the meeting. An application for court approval of the proposal was scheduled for August 31st, 2000 and rescheduled and heard on September 28th, 2000.

4 Prior to filing the notice of intention, the debtor had an ongoing dispute with Canada Customs and Revenue Agency (CCRA) regarding a debtor's ability to claim farm losses on an unrestricted basis. The debtor and CCRA entered into a compromise agreement prior to the meetings of creditors and CCRA voted in favour of the proposal.

5 Four issues emerged from the various applications and cross-applications:

1. Should the proposal be accepted?

2. Should KPMG Inc., have obtained permission from the court pursuant to the Bankruptcy & Insolvency Act, section 13.3 before acting as trustee?

3. Should KPMG be removed as trustee for alleged misconduct?

4. Should vehicles seized by an execution creditor on November 12, 1999 be returned to the debtor?

A short oral decision was given covering all of the issues on November 11th, 2000 and costs were dealt with. These written reasons were to follow.

ONE

6 The statement of affairs filed by the debtor lists secured creditors totalling $711,112.00 and unsecured creditors totalling $1,509,506.40. His statement of assets estimate the gross value at $1,859,000.00. The trustee has prepared a statement of estimated realization under a proposal and a bankruptcy. In a bankruptcy the unsecured creditors would receive approximately $743,000.00 before trustee's fees, legal expenses, levies, commissions, holding and liquidation costs. Under the proposal the unsecured creditors would receive $1,220,240.00.

7 The required number of creditors representing the required portion of debts have approved the proposal.

Several small creditors who voted against the proposal opposed the granting of approval by the court.

8 The Bankruptcy & Insolvency Act, section 59(2) states:

> 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.

19 No argument was made to establish that the debtor had committed any of the offences mentioned in sections 198 to 200, therefore the court must consider whether the terms of the proposal are not reasonable or not calculated to benefit the general body of creditors. The trustee argues that the proposal is reasonable having been accepted by the required number of creditors; it provides for greater benefits then the alternative i.e. bankruptcy; and the proposal has a reasonable possibility of being successfully completed having regard to the debtor's assets and ability to earn an income.

10 The objecting creditors do not trust the debtor and would prefer that he was in bankruptcy so that his assets would be controlled and sold by the trustee. Other than the objecting creditors being suspicious of the debtor, there is no evidence to support their concerns. In the alternative, the objecting creditors ask that the vehicles under seizure be delivered over to a car lot in Lethbridge and sold in order to help fund the proposal. Holden & Morawetz 2001 Annotated Bankruptcy & Insolvency Act at page 209 states:

> The power to make alterations and amendments at the meeting of creditors is very wide; the power of the court to make alterations and amendments, on the other hand, is very limited.

11 The court's authority to approve or refuse a proposal is set out in section 60(5) and rule 92. The court can refuse to approve the proposal, approve a proposal or in making an approval may correct any error or admission that does not constitute an alteration of substance. The change recommended by the objecting creditor is not a correction of a clerical error or omission, it is a change in substance. On an acceptance of a proposal the debtor has control of all of his assets. To take over control of any of his assets of the debtor would be to make a substantial alternation in the proposal.

12 In reviewing all of the material and arguments made by the parties, it appears that the proposal is reasonable and is calculated for the benefit for the general bodies of creditors. The proposal was therefore approved.

TWO:

13 The Bankruptcy & Insolvency Act section 13.3(1) states:

> Except with the permission of the court and on such conditions as the court may impose, no trustee shall act as trustee in relation to the estate of a debtor
>
> (a) where the trustee is, or at any time during the two preceding years was,
>
> (i) a director or officer of the debtor,
>
> (ii) an employer or employee of the debtor or of a director or officer of the debtor,

(iii) related to the debtor or to any director or officer of the debtor, or

(iv) the auditor, accountant or solicitor, or a partner or employee of the auditor, accountant or solicitor, of the debtor; or.....

14 The Official Receiver argues that KPMG should not have acted as trustee of the proposal since they were the accountant of the debtor during the preceding two years. KPMG Inc., argues that they were not the debtor's accountant during the two preceding years and, in the alternative, if they were the accountant they seek leave of the court to act as trustee of the estate of the debtor.

15 KPMG LLP is a firm of chartered accountants with an office in Lethbridge who prepared financial statements for the debtor's professional corporation from its incorporation in May 1976 until the last review engagement report was completed January 30th, 1996. Before the1996, 1997 and 1998 year ends KPMG LLP complied data provided by the debtor, made journal entries, obtained bank confirmations and generated some of the financial statements on the firms computer system. The firm's name did not appear on the financial statements, accordingly the firm argues that they did not do a notice to reader, perform a review engagement, or audit the statements. The firm's address was used as a mailing address on the corporate tax returns but the firm did not sign the returns on behalf of the corporation nor does their name appear as the preparer of the tax return. The firm prepared the T4 payroll returns for the professional corporation based on information received from the Toronto Dominion Bank for the employees of the professional corporation other than the debtor and his wife.

16 KPMG LLP complied personal tax returns for the debtor from 1995 to the present using information supplied by the debtor. No financial statements for the debtor were prepared. The debtor provided his synoptic for his farm affairs and the firm would make journal entries without independent verification and insert the information in the farm income statement for filing.

17 KPMG Inc., is a corporate trustee controlled by KPMG LLP. Sandy Lyons is licensed trustee in bankruptcy who works for KPMG Inc.

18 The official receiver argues that based on these facts KPMG Inc., though not an auditor for the debtor was certainly his accountant. Accountant is not a defined term in the Bankruptcy & Insolvency Act nor have counsel found any cases where the courts have interpreted that term.

19 The solicitors for KPMG Inc. have provided copies of the Canadian Insolvency Practitioners Association Rules of Professional Conduct and Interpretations. In dealing with section 13.3 the association rule 4(4) states:

The term "accountant" means anyone who has prepared unaudited financial statements in accordance with section 8200 of the CICA Handbook.

20 The Institute of Chartered Accountants Association of Alberta in their code of ethics in guideline G204.73 states in part:

For the purpose of this guideline the term accountant means any member who has prepared unaudited financial statements in accordance with section 8200 of the CICA Handbook.

21 Section 8200 of the Canadian Institute of Chartered Accountants (CICA) Handbook deals with review engagement reports issued after January 1st, 1989. That section excludes from its operation any engagements in which the accountant compiles but does not review an unaudited financial statements. KPMG Inc., states that it

is the practice and understanding in the Insolvency practice that the restriction on a trustee acting for the debtor as provided in the Bankruptcy Act section 13.3 only applies if the firm prepares a review engagement report for the debtor. All other work for a client is excluded by definition.

22 Firstly, this definition could only apply to business entities which have financial statements. It could not have been intended to define accountants who do work for individuals who do not need a financial statement.

23 Secondly, statutory interpretation requires the term accountant be given its usual, normal and generally accepted meaning. The views of the professional associations in their rules and guidelines which provide a restrictive interpretation to the word "accountant" are not supportable. The function of accountants have expanded over time and the services of accounting firms continue to expand. Before Canada had an Income Tax Act, accountants would prepare and maintain books and records for businesses and individuals. They have expanded into the area of preparation of income tax returns for individuals, corporations and other business entities. The preparation of a review engagement financial statement is but a small part of work performed by accountants. While the work of KPMG LLP for the debtor and his professional corporation was somewhat restricted after 1995, the firm continued to do accounting work for both the professional corporation and the debtor. No doubt the debtor continued to view KPMG as his accounting firm not as his bookkeeping or data entry clerk. I am equally certain that KPMG continued to charge fees commensurate with their duties as accountants and not as bookkeepers and data entry clerks.

24 The first document filed in a Division I proposal is the notice of intention to make a proposal pursuant to section 50.4(1). The notice of intention names the licensed trustee who has consented to being the trustee under the proposal and the form of consent is attached to the notice. On the filing of the notice of intention on November 12, 1999, KPMG was the trustee of the proposal. Section 13.3 prohibits KPMG Inc. from acting as trustee in relation to the estate of the debtor because the trustees employer KPMG Inc., through its controlling corporation, KPMG LLP, acted as the debtor's accountant. Section 13.3 requires court approval before KPMG could act as a trustee of the estate of the debtor. KPMG Inc. and Sandy Lyons therefore acted contrary to section 13.3.

25 The trustee advises that in accepting the appointment as trustee he was following the practice in the industry as mandated by the professional associations. There is no Canadian authority which interprets the term accountant. Until the official receiver's office raised the issue the trustee had no idea that he might be in breach of section 13.3. The debtor, having been satisfied with the accounting services provided by KMPG LLP, choose Sandy Lyons of KPMG Inc. to be his trustee in the proposal. Prior to the appointment of Mr. Lyons, he had no dealings with the debtor. From the time the debtor approached Mr. Lyons until the date of the hearing Mr. Lyons has expended considerable time and effort in putting together the financial information necessary to complete the proposal to the creditors, has conducted numerous meetings with the creditors and has a intimate knowledge of the issues raised in the proposal.

26 The purpose of section 13.3 is to prevent a conflict of interest, to protect the debtor from an accountant who may have information that could be used to the prejudice of the debtor and to insure that the trustee who may have a close relationship with the debtor does not work to the prejudice of the creditors. There is no evidence that the trustee has or will act in a way that would prejudice the creditors. The debtor and the majority of creditors support the continuation of Mr. Lyons as his trustee.

27 Although the trustee should have obtained court approval before his appointment, his acts done in good faith since his appointment, are not invalid.(BIA s.14.07)

28 In *Re Planta Dei Pharma Inc.* (1999), 212 N.B.R. (2d) 143, 541 A.P.R. 143, 14 C.B.R. (4th) 256 (N.B. Q.B.) the New Brunswick Court of Queen's Bench found the trustee offended s. 13.3 and allowed them to continue as trustee where there were allegations of prejudice but no evidence of real prejudice.

29 Although Mr. Lyons acting as trustee offends s.13.3, I exercised my discretion and gave him leave to continue as trustee. If Mr. Lyons accepted the appointment knowing he was in breach of s. 13.3, approval would not be granted. However when he accepted the appointment he felt that the professional association rules and s.13.3 had been complied with. Additionally he has now spent a considerable amount of time on a difficult proposal which has been accepted by creditors and the court. His future actions will be subject to scrutiny of the inspectors. There is little chance for his future acts to be prejudicial to the creditors or to the debtor. The court should be vigilant to prevent the possibility of prejudice and conflict of interest and ensure that the trustee's Code of Ethics in rules 34 to 53 are not going to be breached.

THREE:

30 The objecting creditor, Pleasure Pool Sales Ltd., applies pursuant to section 14.4 for an order to remove the trustee for cause and appoint another licenced trustee in his place. In *Alzeer Holdings Ltd. v. Browning Smith Inc.* (1994), 38 C.B.R. (3d) 199 (Alta. Master), Master Quinn held that "for cause" meant improper conduct by the trustee. Other cases allow for substitution of trustees where there is a conflict of interest or a perceived conflict of interest (*Tannis Trading Inc. v. Camco Food Services Ltd. (Trustee of)* (1988), 67 C.B.R. (N.S.) 1, 63 O.R. (2d) 775, 49 D.L.R. (4th) 128 (Ont. S.C.)). The court has allowed the trustee to continue where a change would cause delay in the administration in estates and cause additional expense to the estate in changing the trustee (*R.J. Nicol Homes Ltd. (Trustee of) v. Nicol*) (1995), 30 C.B.R. (3d) 90 (Ont. C.A.). The Ontario Court of Justice in *Re Ethier* (1991), 7 C.B.R. (3d) 268 (Ont. Bktcy.) stated at page 273:

> In my view, the fact the inspectors themselves have approved of the trustee's performance thus far suggests not only that the trustee is acting without interest or bias, but is also perceived to be acting in the proper manner. Although the test to be applied is an objective one, it is usual for the courts to defer to the creditors'and inspectors' view on that point as was seen in ***Re Terrace Sporting Goods Ltd.*** (1979), 31 C.B.R. (N.S.) 68 (Ont. S.C.) And ***Re Bryant Isard & Co.*** (1923), 4 C.B.R. 317, 25 O.W.N. 382, [1924] 1 D.L.R. 217 (S.C.) (emphasis added).

31 Other factors for the court to consider include, whether the trustee is guilty of impropriety or misconduct or whether they lack qualifications to discharge their function as trustee. The satisfaction or dissatisfaction of the majority of creditors is also material (*Re United Fuel Investment Ltd. (No. 1)* (1965), [1966] 1 O.R. 165 (Ont. C.A.).

32 Allegations of conflict of interest and misconduct by the trustee are set out in the affidavit of Michael Benison. To the extent that complaints are made about the debtor and not linked to activities of the trustee, the complaints are ignored.

33 The complaints about Mr. Lyon's conduct and potential conflict of interest are more than adequately responded to by Mr. Lyons. In the end I am satisfied that there is no conflict of interest and that Mr. Lyons has acted properly since his appointment as trustee. To replace Mr. Lyons would delay the administration of the proposal and increase the costs of supervising the proposal. The application to have Mr. Lyons removed was therefore dismissed.

FOUR:

34 On instructions from Pleasure Pools, four of the debtors motor vehicles were seized by a civil enforcement agency on February 2nd, 1998 and left with the debtor on a bailee's undertaking. Because of various court ordered stays, the vehicles could not be removed and sold until after noon on November 12th, 1999. The execution debtor instructed the civil enforcement agency to go and remove the four seized vehicles from the debtor's lands. At the same time Mr. Lyons was filing a notice of intention to make a proposal by fax to the Office of the Superintendent of Bankruptcy. Believing that the notice of intention had been faxed and received by the Superintendent's office, Mr. Lyons attended the debtor's premises. There is a dispute between the parties on the exact location of the vehicles when Mr. Lyons attended on the debtor's property. The civil enforcement agent states that one vehicle had already been removed from the property and was going down the road when Mr. Lyons intervened. Mr. Lyons indicates that none of the vehicles had left the debtor's property.

35 The exact location of the one vehicle attached to the tow truck is not relevant. Mr Lyons advised the civil enforcement agency that a stay of proceedings was in effect as a result of a filing of notice of intention. Since Mr. Lyons did not have a copy of notice of intention with a filed stamp, the civil enforcement agency declined to follow the instructions of Mr. Lyons and completed the removal of all four vehicles which remained in storage until this hearing.

36 Section 69(1) creates a stay of all enforcement proceedings on the filing of a notice of intention. Pleasure Pool can not continue the execution on it's judgment for the recovery of a claim provable in Bankruptcy. When Mr. Lyons and the civil enforcement agency were standing toe to toe fighting over the possession of the motor vehicles, Pleasure Pools had no right to continue the execution. Pleasure Pools argues that they can continue the execution until they have satisfactory proof of the filing of the notice of intention. The act does not contain any such wording. The stay does not come into effect when proof of the filing of the notice of intention is provided to the execution creditor. The act states that the stay comes into effect on the filing of the notice of intention.

37 Even if Mr. Lyons had not advised the civil enforcement agent of the filing of the notice of intention, the removal of the vehicles at that precise time was improper as the notice of intention had been received by fax at the office of the superintendent. The importance of the civil enforcement agency being advised of the filing goes to the issue of costs of the removal of the vehicles and possibly damages arising from the wrongful removal of the vehicles. Since the removal of the vehicles was a continuation of the execution which is prohibited by section 69, the vehicles were ordered to be forthwith returned to the debtor. Because the creditor and the civil enforcement agent had knowledge at the time of the removal that a stay was in effect, they must be responsible for all of the costs of the removal, the return of the vehicles and storage of the vehicles in the interim.

Order accordingly.

END OF DOCUMENT