

CANADA / JUDGMENT

446697 B.C. Ltd. (Re)

2023 BCSC 2146

COURT

Supreme Court of British Columbia

DECIDED

6 December 2023

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2023 BCSC 2146 446697 B.C. Ltd. (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

446697 B.C. Ltd. (Re),

2023 BCSC 2146

Date: 20231206

Docket: B093640

Registry: Victoria

In Bankruptcy and Insolvency

In the Matter of the Joint Proposal of

446697 B.C. Ltd. - Estate No. 11-1228456

451438 B.C. Ltd. - Estate No. 11-1228664

477730 B.C. Ltd. - Estate No. 11-1228519

Blanshard Manor Holdings Ltd. - Estate No. 11-1228446

Central Manor Holdings Ltd. - Estate No. 11-1228437

City Centre Manor Holdings Ltd. - Estate No. 11-1228661

Esquimalt Manor Holdings Ltd. - 11-1228517

Express Manor Holdings Ltd. - Estate No. 11-1228660

Field Manor Holdings Ltd. - Estate No. 11-1228659

High-End Properties Ltd. - Estate No. 11-1228658

In Town Manor Holdings Ltd. - Estate No. 11-1228515

Oceanfront Grand Resorts & Marina Holdings Ltd. - Estate No. 11-1228444

Queens Manor Holdings Ltd. - Estate No. 11-1228514

Rock Bay Manor Holdings Ltd. - Estate No. 11-1228655

1. Skyline Estates Ltd. - Estate No. 11-1228653

Tally-Ho Motor Hotel Victoria Ltd. - Estate No. 11-1228650

Traveller's Inn Hotels & Resorts Ltd. - Estate No. 11-1228425

Traveller's Inn (Canada) Ltd. - Estate No. 11-1228419

Vancouver Island Entertainment Centre Holdings Ltd. - Estate No. 1228555

Vancouver Island Entertainment Inc. - Estate No. 1228550

Worldwide Directories Corporation - Estate No. 1228419

Before: The Honourable Mr. Justice Blok

Reasons for Judgment

Counsel for the Trustee:

A. Faulkner-Killam

Counsel for the Toronto-Dominion Bank:

A. Butler

Place and Date of Hearing:

Victoria, B.C.

May 19, 2023

Place and Date of Judgment:

Victoria, B.C.

December 6, 2023

I. Introduction

- [1] This is an application by the Toronto-Dominion Bank ("TD Bank") to set aside an order dated October 13, 2022, made in favour of Glover-Drennan Inc. (the "Trustee"). The Trustee is the trustee in bankruptcy for the 21 companies that are named in the style of cause of this proceeding (the "Bankrupt Companies").

- [2] TD Bank was not given notice of the application that led to the order and it argues this is a case in which notice ought to have been given.
- [3] There are two principal Rules applicable here. The first is Rule 22-7(2):
- (2) Subject to subrules (3) and (4), if there has been a failure to comply with these Supreme Court Civil Rules, the court may
- (a) set aside a proceeding, either wholly or in part,
- (b) set aside any step taken in the proceeding, or a document or order made in the proceeding,
- (c) allow an amendment to be made under Rule 6-1,
- (d) dismiss the proceeding or strike out the response to civil claim and pronounce judgment, or
- (e) make any other order it considers will further the object of these Supreme Court Civil Rules.
- [4] TD Bank takes the position that the Trustee was obliged to give it notice as it was a person who "may be affected by the orders sought", as per Rule 8-1(7):
- (7) The applicant must serve the following, in accordance with subrule (8), on each of the parties of record and on every other person, other than a party, who may be affected by the orders sought:
- (a) a copy of the filed notice of application;
- (b) a copy of each of the filed affidavits and documents, referred to in the notice of application under subrule (4) (d), that has not already been served on that person;
- (c) if the application is brought under Rule 9-7, any notice that the applicant is required to give under Rule 9-7 (9).
- [5] The Trustee argues that TD Bank is not a party that "may be affected by the orders sought" because an earlier judgment of the Court had already determined the issue.

II. Background

- [6] The background facts may be briefly stated.
- [7] The Bankrupt Companies are related companies which, as a group, operated a hotel chain called Traveller's Inns. In June 2009, the Trustee acted for the companies pursuant to an intended proposal under the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 [BIA]. As part of the intended proposal, one of the bankrupt companies, Worldwide Directories Corporation ("Worldwide"), entered into an agreement (the "August 2009 Agreement") with Travellers Hotel Holding Corporation ("THHC") whereby THHC would collect revenues from properties owned by the Bankrupt Companies and deposit those monies into its TD Bank account (the "Account").

- [8] Under the intended proposal, THHC was to report to the Trustee and TD Bank would then be instructed to transfer excess funds (after operating expenses) from the Account to Worldwide.
- [9] Although THHC was a corporation that was related to the Bankrupt Companies, it was not itself one of the Bankrupt Companies and was never bankrupt.
- [10] On September 1, 2009, Master McCallum made an order deeming the BIA proposal to have been refused. The result was that the 21 companies were deemed assigned into bankruptcy.
- [11] That same order required that the assets and bank accounts of THHC at the TD Bank, including the Account, "be detained and preserved" for the benefit of the Bankrupt Companies (the "Preservation Order").
- [12] At that point, the source of the monies in the Account was not clear. In an affidavit sworn August 28, 2009, the Trustee himself deposed that it was his opinion the funds in the Account derived from deposits made by both THHC and the Bankrupt Companies.
- [13] On that same date, the president of THHC (Sharon Kobe) wrote to TD Bank confirming that the August 2009 Agreement was terminated and that no funds were to be transferred from the Account to the Bankrupt Companies without her consent. On September 2, 2009, Ms. Kobe told the Trustee that any authority for him to transfer funds out of the Account had been revoked.
- [14] On December 20, 2017 - more than eight years after the Preservation Order was made - Ms. Kobe directed TD Bank to pay the balance of the Account to a law firm, in trust, by way of a bank draft. TD Bank did so. The amount paid was \$73,575.83. At the hearing of this application there was no further information or evidence concerning this transaction and so it is unclear how or why it took place. The Account was subsequently closed. It appears the monies were subsequently disbursed from the law firm's trust account.
- [15] The Trustee was unaware that the monies in the Account had been paid out until May 2020, when it learned of that fact in response to an inquiry concerning the current balance in the Account.

Application Before Justice Norell

- [16] In November 2021, the Trustee applied to Court for:
- a) a declaration that the sum of \$73,575.83 held in the Account (the "Funds") was "rightfully the property of the Trustee"; and
 - b) an order that TD Bank deliver up the Funds to the Trustee pursuant to ss. 16 and 67(1)(c) of the BIA.
- [17] Notice of that application was given to both TD Bank and THHC.

- [18] The matter was heard by Justice Norell. At the hearing of that application, the Trustee argued: (a) the Preservation Order had determined the issue of ownership of the Funds; (b) TD Bank did not have standing to make submissions on that issue; (c) the Funds had been shown to derive exclusively from the Bankrupt Companies; and (d) the Trustee was not obliged to bring an action to establish its entitlement because its entitlement to the Funds had already been determined.
- [19] For its part, TD Bank argued: (a) the Preservation Order did not determine the ownership of the Funds, noting in particular that the Preservation Order was made without notice to either TD Bank or THHC; (b) the Trustee had given conflicting evidence as to whether any portion of the Funds belonged to THHC; (c) it had standing because it would be affected by the order sought; (d) the Trustee, having stepped into the shoes of the Bankrupt Companies, had at most a claim for the Funds and was obliged to bring a civil action to determine that claim; and (e) the Trustee was out of time for such an action as the limitation period had now expired.
- [20] In reasons given on February 28, 2022 (2022 BCSC 307), Norell J. identified the issues as follows:
- a) Is TD Bank bound by the Preservation Order?
 - b) Did the Preservation Order decide the ownership of the Funds?
 - c) Has the Trustee established ownership of the Funds?
- [21] Justice Norell concluded:
- a) TD Bank was bound by the Preservation Order. She concluded the Funds represented the contract debt owed by TD Bank to its depositor, THHC, and the Preservation Order bound TD Bank to preserve the Funds;
 - b) The Preservation Order did not determine ownership of the Funds; instead, it did no more than preserve the Funds for future determination as to ownership and disposition (para. 46); and
 - c) There was an open question concerning the proper procedure for determining the ownership of the Funds, but "[e]ven if this [current procedure] is the appropriate procedure to determine ownership of the Funds", the evidence concerning ownership of the Funds "is not sufficient to make that determination" (at para. 46).
- [22] In the result, Norell J. dismissed the Trustee's application for a declaration that it was the rightful owner of the Funds, "with leave to bring further proceedings upon a fuller evidentiary record" (at para. 51). Justice Norell added:
- [49] I make no determination whether the appropriate procedure is a motion within the bankruptcy proceeding as alleged by the Trustee, or a civil action against THHC, as alleged by TD.

The October 2022 Application

- [23] On September 29, 2022, the Trustee filed a notice of application for orders: (a) declaring the Funds to be the property of the Trustee; and (b) requiring that TD Bank pay the Funds to the Trustee.
- [24] The Trustee did not give notice of that application to TD Bank.
- [25] The application came before me on October 13, 2022 (the "October 2022 Application"). A transcript of that hearing confirms that counsel for the Trustee informed the Court that:
- a) the current application had a "better evidentiary record" than the prior application (p. 5);
 - b) the matter was proceeding on an unopposed basis (p. 5);
 - c) an earlier application had proceeded before Justice Norell. Both TD Bank and THHC's principal had been served with that application (p. 8);
 - d) Justice Norell had determined that the TD Bank was holding funds as a debt obligation to the rightful holder, and that obligation was frozen, meaning the bank had paid out its own money (p. 9);
 - e) at the earlier application, the Trustee had taken the position that the Preservation Order had determined ownership and so they were now seeking payment, but Norell J. said "come back with better evidence" and gave the Trustee leave to appear again and "here we are today" (p. 9);
 - f) the Trustee's new evidence addressed the source of the money in the Account and the Trustee had now confirmed "there is no other source of the money" other than from the Bankrupt Companies (p. 10);
 - g) there were no other claimants to the Funds (p. 10);
 - h) "everybody with anything to say about it [in the insolvency process] is okay with this", meaning the order sought (p. 11);
 - i) the application had not been brought on notice to TD Bank because "the substance of their position [has] been answered" (p. 12); and
 - j) when the Court asked whether who owns the Funds is irrelevant to TD Bank, counsel said "it should be" (p. 12).
- [26] As a result of these submissions, I signed the draft order on the bench. This is the order that TD Bank seeks to set aside (the "October 2022 Order").

III. Positions of the Parties

A. TD Bank

- [27] TD Bank argues that it had a direct pecuniary interest in the outcome of the October 2022 Application, and a corresponding right to be heard at the hearing of that application. The Trustee's failure to give notice to the TD Bank renders the October 2022 Order a nullity or, alternatively, it justifies an order setting it aside.
- [28] TD Bank says the authorities support its submission that where the Rule 22-7 noncompliance alleged is a failure to give notice of an application to a person entitled to be heard, the order is a nullity, citing *Bache Halsey Stuart Shields Inc. v. Charles* (1982), 140 D.L.R. (3d) 378 (B.C.S.C.); *Faulkner v. Duncan (City)*, 2015 BCSC 825; and *Naderi v. Naderi*, 2012 BCCA 16.
- [29] TD Bank says the Trustee breached Rule 8-1(7) by failing to serve it with the October 2022 Application materials, because TD Bank was a "person, other than a party, who may be affected by the orders sought". TD Bank was affected by the order sought because the October 2022 Order required TD Bank to pay money to the Trustee. Because the monies in the Account are gone, what the Trustee sought (and obtained) was judgment against TD Bank for the monies that had been in the Account. For that reason, TD Bank had a direct pecuniary interest in the outcome of the October 2022 Application, it was therefore "affected" by the October 2022 Order and was entitled to be served with the materials for that application.
- [30] TD Bank argues, in the alternative, that the October 2022 Order ought to be set aside pursuant to Rule 22-7(2)(b). TD Bank says that although that subrule has received "scant judicial consideration", guidance is available by looking at the factors applicable to applications under Rule 22-7(2)(d), which has to do with dismissing a proceeding or striking a response to civil claim and pronouncing judgment: *Ficocelli v. Henderson*, 2017 BCSC 2024, which in turn referred the considerations discussed in *Besic v. Kerenyi*, 2012 BCCA 187, at para. 17.
- [31] Those considerations include: (a) whether non-compliance with the court order was wilful or intentional; (b) whether the offending party had an explanation for his or her non-compliance, and (c) whether the scope of the remedy is disproportionate or excessive to the "delict".
- [32] Dealing with those considerations in turn, TD Bank says: (a) the Trustee's failure was wilful, given its knowledge of the bank's position taken in the immediately preceding application; and (b) setting aside the October 2022 Order would not be disproportionate to the "delict" of the Trustee given the wilful nature of the Trustee's failure and the Trustee's misleading representations to the Court.
- [33] TD Bank also argues that it has moved expeditiously to set aside the October 2022 Order and there is no prejudice caused by the passage of time since the making of that order.

- [34] TD Bank also made submissions as to the merits of the position it would have taken had it been given notice of the Trustee's application. First, TD Bank argues that the Trustee's manner of proceeding was misconceived, as the Trustee had to first obtain an order establishing its entitlement to the Account, or against TD Bank for the value of the account, and the Trustee was out of time to do so. In this regard, TD Bank emphasizes that it was THHC that was the owner of the Account, not any of the Bankrupt Companies. All that vested in the Trustee on bankruptcy was a claim by the Bankrupt Companies against THHC for the monies in the Account.
- [35] While the evidence now available indicates the monies in the Account derived from the Bankrupt Companies, this does not make the Funds "property of the bankrupt" within the meaning of the BIA.
- [36] On the matter of costs, TD Bank argues that the actions of the Trustee warrant an award of special costs in its favour. TD Bank submits the Trustee made representations to the Court at the without notice hearing on October 13, 2022 that the Trustee knew were not true.

B. Trustee

- [37] The Trustee notes the impugned order is one of three orders dealing generally with the Account, those being Preservation Order, the Order made by Norell J. on February 28, 2022, and the October 2022 Order. The Trustee says the present application is a "re-argument of previously unsuccessful positions", from which TD Bank did not appeal.
- [38] The Trustee notes TD Bank has not at any time made an application as a creditor in the bankruptcy and so it has no entitlement to service of documents under the Rules. TD Bank is neither a party, nor a person whose interest is affected by the order sought. Rule 22-7 does not provide a means by which TD Bank can interplead into the administration of the bankruptcy, given that it is not a claimant.
- [39] The Trustee lists five "central errors" in the bank's application:
- a) Rule 22-7 does not apply in a case where the applicant was not entitled to notice of the original application;
 - b) Alternatively, TD Bank is not a person affected by the order sought. The bank has no pecuniary interest in the outcome as it was a mere bailee of the Funds;
 - c) Rule 22-7 cannot be invoked where the applicant has taken a fresh step after knowledge of the irregularity, and must be invoked in a reasonable time. Here, TD Bank filed a notice of appeal of the October 2022 Order, which was eight months after the order of Norell J.;
 - d) The current application is essentially an application to set aside the two earlier orders made in this matter. Those issues are res judicata and the Court is functus officio with respect to them; and

- e) TD Bank "sat on any right of appeal" from the order of Norell J. and must be taken to have accepted the legitimacy of it.

[40] The Trustee says TD Bank has not advanced any evidence with regard to its own conduct (in terms of paying the Funds in breach of the Preservation Order) or a legal theory by which THHC might own the money in question. The actions of the bank in taking an appeal and then launching this application is an attempt to "outspend the Trustee" and amounts to an abuse of process.

C. Reply by TD Bank

[41] In reply, TD Bank repeats that the Trustee is in error in contending that the Funds in the Account vested in the Trustee when the bankruptcy order was made. The property at issue here was not money held in any account of the Bankrupt Companies, but rather were monies held in an account owned by a non-bankrupt party, THHC. All that vested in the Trustee at the time of bankruptcy was a claim against THHC for the Funds.

[42] The Funds paid out by TD Bank satisfied the debt it owed to its customer, THHC. However, this did not eliminate any of the bank's other arguments against the claim of the Trustee and does not change the fact that the Trustee's claim is against THHC, the holder of the Account.

[43] In answer to the Trustee's argument that TD Bank failed to appeal the order of Norell J., TD Bank notes there was no reason to do so as the Trustee's arguments about the Funds being vested in the Trustee were rejected by Norell J.

[44] In answer to the Trustee's argument that the bank has no standing because it never made a claim in the bankruptcy, TD Bank says it was never a creditor of the Bankrupt Companies and so there was never any question of submitting a claim in the bankruptcy. Instead, its position is that the effect of the October 2022 Order was to make the bank a judgment debtor, in a case in which any claim to do so was statute-barred. As a result, TD Bank submits it is a person affected by the order and entitles it to relief under Rule 22-7(2).

IV. Discussion

[45] The Trustee's position appears to be based on a misapprehension of the effects and scope of the orders made by Master McCallum and Justice Norell. Neither order made any determination of the ownership of the Funds. Master McCallum's order preserved the Funds and Norell J.'s order confirmed that TD Bank was bound by that earlier order.

[46] While it is certainly true that TD Bank seems to have paid out the Funds to the account holder in breach of Master McCallum's order, an event that might give rise to liability on the part of TD Bank for breach of an order, this did not mean that any funds vested in the Trustee. Justice Norell's judgment did not make any liability determination against the bank for breach of an order, or otherwise. Her judgment made it clear that other proceedings would have to be brought for that purpose.

- [47] The hearing that gave rise to the disputed order took place on October 13, 2022. It was a chambers hearing that lasted 30 minutes. The submissions of the Trustee were to the effect that: (a) the issue of entitlement had now been determined or resolved in favour of the Trustee; (b) the uncertainty about the source of the Funds in the Account had now been addressed with further and better evidence; and (c) the matter was now unopposed. Only item (b) was correct. I can say without hesitation that had I been fully and correctly informed about both the hearing before Norell J. and her subsequent decision, and of the position taken by the TD Bank at that earlier hearing, I would not have made the order in question and I would have required that the bank be served with notice of the application.
- [48] I am satisfied that TD Bank was and is a "person who may be affected by the orders sought", and thus the Trustee was obliged to give it notice pursuant to Rule 8-1(7). The October 2022 Order required that TD Bank "deliver up the possession" of \$73,575.83, plus interest. It was, in the circumstances of this case, effectively a pecuniary judgment against the bank. It is beyond question that this order affected the bank.
- [49] I am also satisfied that the October 2022 Order ought to be set aside. On the authority of Bache, Faulkner and Naderi, three cases cited by TD Bank, I am satisfied the October 2022 Order is a nullity, having been made in circumstances where TD Bank was deprived of its right to be heard, contrary to the rules of natural justice.
- [50] Although it is perhaps not necessary to also address the setting aside of the October 2022 Order pursuant to Rule 22-7(2)(b), I am satisfied that it should also be set aside on that basis. Even if the Trustee held the view that its legal position was correct, the level of disclosure made at the hearing that led to the impugned order was not at all satisfactory. The magnitude of the "delict" is considerable and the remedy sought is proportionate. I am also satisfied that the filing of a notice of appeal by TD Bank on November 10, 2022 was not a further step in the proceeding, since an appeal is a different proceeding. There was a delay on the part of TD Bank in bringing this application, but I am satisfied the delay is explained by both its initial decision to challenge the order through an appeal and by the delay in obtaining a transcript of the subject chambers proceedings. In any event, I am satisfied the Trustee has not been prejudiced in any way by the delay.
- [51] Balancing all the necessary considerations, I am satisfied it is in the interests of justice to set aside the October 2022 Order.
- [52] I will now address costs. TD Bank seeks special costs against the Trustee on the basis that the Trustee made representations to the Court knowing them to be untrue. While this is a close call, I am not fully satisfied the Trustee knew the representations made were untrue. It is possible the Trustee held a genuine belief in the soundness of its legal position, which led to its incorrect view that there was no longer any issue concerning the bank's liability. Given that possibility, I decline to award special costs. Instead, TD Bank shall have costs against the Trustee on the ordinary scale.

V. Conclusion

[53] The order made in this matter on October 13, 2022 is set aside as a nullity.

[54] Costs on the ordinary scale to TD Bank.

"Blok J."

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