

CANADA / JUDGMENT

Baker (Re)

2022 BCSC 1088

COURT

Supreme Court of British Columbia

DECIDED

29 June 2022

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2022 BCSC 1088 Baker (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Baker (Re),

2022 BCSC 1088

Date: 20220629

Docket: B200108

Registry: Vancouver

In the Matter of the Bankruptcy of Geoff Lumir Darcy Baker

- and -

Docket: B200109

Registry: Vancouver

In the Matter of the Bankruptcy of Laura-Lee Annette Normandeau

Corrected Judgment: The text of the judgment was corrected at paragraphs 4, 12, 14, 15, 16, 18 and 31 on July 28, 2022.

Before: The Honourable Justice Duncan

Reasons for Judgment

Counsel for the Creditor,

The Village of Gitwinksihlkw

appearing via videoconference:

R. Millar

Counsel for the Bankrupts,

Geoffrey Baker and Laura-Lee Normandeau appearing via videoconference:

J.R. Pollard

The Attendee for the Trustee for G.B.

and LN. appearing via videoconference:

D. Wood

Place and Date of Hearing:

Vancouver, B.C.

March 11, 2022

Supplementary Written Submissions

of the Applicants Dated:

March 25, 2022

Place and Date of Judgment:

Vancouver, B.C.

June 29, 2022

Introduction

- [1] The applicants, Geoff Baker and Laura-Lee Normandeau, each apply for an absolute discharge from bankruptcy. One of their unsecured creditors, the Nisga'a Village of Gitwinksihlkw (the "NVG"), is opposed. The NVG maintains that the applicants should be ordered to pay a substantial amount of money as part of a conditional discharge.
- [2] The NVG's position is based on the following:
- a) The applicants have not met the burden of satisfying the court that their assets are not of a value equal to fifty cents on the dollar due to circumstances for which the bankrupt cannot justly be held responsible (the "value of assets argument");
 - b) The applicants gave an undue preference to creditors within the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included, when unable to pay debts as they became due (the "undue preference argument"); and
 - c) The bankrupts have been guilty of fraud or fraudulent breach of trust (the "fraud argument").

The Background

- [3] Mr. Baker and Ms. Normandeau are spouses. They were the directors and personal guarantors of Westcoast Outbuildings Inc. ("Westcoast"). Westcoast entered into a contract with the NVG to build a modular building (the "Welcome House").
- [4] In June 2018, the NVG approached Westcoast about building the Welcome Home. In August, the parties entered into a design agreement for Westcoast to provide concept drawings and plans for the Welcome House. In early September, Mr. Baker and his vice president of sales Colin Doylend travelled to the NVG to view the site. Over the next month, the parties had further discussions about the project.
- [5] In anticipation of the contract being awarded, Westcoast retained a firm to produce production/fabrication drawings.
- [6] The build schedule was premised on Westcoast receiving a signed contract by October 31, 2018, but the contract was not awarded until January 11, 2019.
- [7] The NVG wanted Westcoast to act as the prime contractor and oversee the sub-contract for site work. Mr. Baker found this troublesome but Mr. Doylend assured him that the NVG was a fair client and would be open to discussion if there were challenges with the arrangement.
- [8] During the September 2018 site visit, representatives of the NVG raised a desire for the Welcome House to be open for June 21, National Aboriginal Day. This was not, however, reflected in the contract and would have represented a significantly abridged timeline for Westcoast to meet, based on the date the contract was finally awarded. The affidavit evidence is in conflict on this point, but I accept the evidence of Mr. Baker that such a promise was not made.
- [9] On January 22, 2019, Westcoast's accounting department issued an invoice to the NVG for \$153,489.00, a 20% non-refundable deposit. NVG paid the amount on January 23, 2019.
- [10] The project would require some "long lead time items", including for the purchase of custom trusses. Westcoast issued an invoice on February 5, 2019 to the NVG for a 50% at production start draw, \$383,722.50, due on February 22, 2019. The NVG made two payments of \$75,000 and one payment of \$100,000 on February 13, a payment of \$75,000 on February 14 and a payment of \$59,722 on February 15.
- [11] Later in February, the project began to run into some issues concerning occupancy requirements for the Welcome House. Westcoast had never been part of a construction project with "A-2 Occupancy" and in retrospect had not anticipated the issues this would create.

- [12] In early March, the NVG wanted the updated design to be reviewed by the person who would operate a café in the Welcome House. That created difficulties because it resulted in a change to the final location of the building site for the project. This was not resolved until early April.
- [13] Other concerns about the Welcome House were raised by the café operator, including the kitchen layout and the need to comply with Public Health regulations. This was news to Mr. Baker. While the issue was subsequently resolved, it was another indication of confusion at the NVG end of the project.
- [14] Mr. Baker deposes that Westcoast was in very good financial shape in 2018. They had obtained several solid contracts, with promises of more. In early 2019, their operations manager suffered a head injury and was off work for some time, which slowed down operations. Mr. Baker turned away from generating more business to assist in the facility's operation. Mr. Doyle resigned in February 2019, adding to Mr. Baker's duties and taking him away from sales.
- [15] In March, Westcoast's production manager resigned due to stress and a significant contract was cancelled. While Westcoast was awarded more contracts, a significant one required Westcoast to finance the project up front rather than relying on its former business model of taking substantial advance deposits. Mr. Baker tried to get financing, but failed. Other contracts were awarded to competitors. Several suppliers to Westcoast filed claims for unpaid invoices.
- [16] On April 10, 2019, it was clear that the Welcome House project would not be delivered on time. Mr. Baker began weekly conference calls with the NVG in early May to improve communications. At the end of May, Westcoast ordered the trusses for the project at a cost of \$8,618.44, although it was still waiting for the final size and specifications of the main beams. Mr. Baker was concerned about this, because there was a four to six week lead time required for the manufacture of those beams.
- [17] On June 5, the café operator asked for significant design changes again.
- [18] In July, Westcoast experienced a significant cash flow shortage which required them to lay off a number of employees. There were also issues with a WorkSafe complaint which Mr. Baker believed was started by a disgruntled employee; a lot of competition in the industry; and more lost contracts.
- [19] Mr. Baker advised the NVG in July that Westcoast had encountered financial difficulties and had laid off staff. He advised the NVG that the project was on hold pending Westcoast's ability to refinance, obtain investors or sell.

- [20] On August 4, Mr. Baker advised the NVG that Westcoast sought a 30-day reprieve from its creditors to try to refinance. The NVG's response was to file a notice of civil claim ("NOCC") on August 8, 2019. This was the subject of an article in Business in Vancouver, syndicated across multiple news organizations. The claim included allegations of fraud, conversion and misrepresentation which Mr. Baker believes made restructuring or refinancing all but impossible.
- [21] On September 6, Westcoast, Baker and Normandeau filed their response to the NVG's NOCC. The action was stayed as a result of the bankruptcies of Westcoast and Baker and Normandeau.
- [22] In early 2020, another company began construction on the NVG Welcome House, with a building design nearly identical to the one Westcoast had provided. The completed Welcome House opened in December 2020.

The Trustee's Report

- [23] David Wood of Boale, Wood and Company was appointed as the trustee (the "Trustee"). The Trustee filed his Form 82 report pursuant to s. 170(1) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 [BIA] in relation to both applicants on September 27, 2021.
- [24] The Trustee noted that there were no facts, matters or circumstances that would justify the Court in refusing an absolute order of discharge and did not oppose the discharge, but advised that the NVG would oppose the discharge on the three bases summarized in the second paragraph of these reasons:
1. Failure to satisfy why the assets of the bankrupts were not of a value equal to fifty cents on the dollar under s. 173(1)(a);
 2. Undue preference to other creditors under s. 173(1)(h); and
 3. Fraud or fraudulent breach of trust under s. 173(1)(k).
- [25] The Trustee noted that the NVG had a claim against Westcoast and the bankrupts, based on the litigation the NVG had commenced against them. In the NOCC, NVG alleged fraudulent misrepresentation, inducing breach of contract and conspiracy to injury by illegal means against Mr. Baker and Ms. Normandeau. At the hearing of this application, however, the NVG's position was that Mr. Baker and Ms. Normandeau, as directors and guarantors of Westcoast, breached the trust provisions in s. 10 of the Builders Lien Act, S.B.C. 1997, c. 45, and are liable to the NVG in breach of trust, or knowing assistance in breach of trust. Those routes to liability were not pleaded in the litigation and the NVG did not elect to cross-examine the applicants on any of the issues raised in opposition to the absolute discharge.

General Principles Applying to Discharge Applications

- [26] In *Lau (Re)*, 2015 BCSC 2706, Master Cameron conveniently summarized the principles which apply to discharge applications:
- [19] The British Columbia Court of Appeal has summarized the general principles of discharge, whether tax-driven or not, which include the following:
- a) In considering the question of discharge, the Court must have regard not only to the interest of the bankrupt and his creditors, but also to the interest of the public.
 - b) The legislature has always recognized the interest that the state has in a debtor being released from the overwhelming pressure of his debts and that it is undesirable that a citizen should be so weighed down by his debts as to be incapable of performing the ordinary duties of citizenship.
 - c) One of the objects of the BIA was to enable an honest debtor who had been unfortunate in business to secure a discharge so he might make a new start.
 - d) The Court should not be converted into a sort of clearing house for the liquidation of debts, irrespective of the circumstances under which they were created.
 - e) The success or failure of any bankruptcy system depends upon the administration of the discharge provisions of the BIA.
 - f) The Court is not to be regarded as a sort of a charitable institution.
 - g) It is incumbent upon the Court to guard against laxity in granting discharges so as not to offend against commercial morality. It is nevertheless the duty of the court to administer the BIA in such a way as to assist honest debtors who have been unfortunate.
 - h) The discharge is not a matter of right.

Citing *Re Zinkiew*, 2004 BCSC 1831 at para. 55; *Re McRudden*, 2014 BCSC 217 at para. 38, citing *Westmore v. McAfee* (1988), 67 C.B.R. (N.S.) 209 (B.C.C.A.).

The Issues

(a) The Value of Assets Argument

- [27] Both applicants acknowledge that their individual assets were less than 50 cents on the dollar of their unsecured liabilities as a result of personal guarantees granted to creditors of their business. Counsel for the NVG argues that this is not sufficient to discharge the onus on them to satisfy the Court that they were not justly responsible for their bankruptcy.
- [28] Mr. Millar puts significant emphasis on the fact that this was the applicants' second corporate bankruptcy, and that Westcoast was clearly undercapitalized and had to rely on advance deposits on future contracts to continue functioning. He maintains that the business of Westcoast was speculative and its demise foreseeable, particularly given the applicants' previous corporate bankruptcy in 2009.

- [29] For their part, the applicants have explained how they were growing their business and ostensibly doing well. The series of unforeseeable events in 2019 derailed Westcoast and led to its demise.
- [30] The Trustee's s. 170 Report does not include any findings of fact under s. 173(1) of the BIA which could justify the Court in refusing an unconditional order of discharge. The Trustee was satisfied that the cause of the applicants' bankruptcy was the failure of Westcoast. In such circumstances, the onus is on the NVG to prove the existence of those facts: *Burroughs (Re)*, 2010 SKQB 51 at para 21; *Deloitte and Touche Inc. v. Etsell*, 2009 SKQB 226 at para. 37.
- [31] I accept the affidavit evidence of the applicants concerning the reasons behind the rise and fall of Westcoast. They were running and, for a time, successfully growing the business. The failure of Westcoast was not foreseeable. I am not persuaded there is any connection between the failure of a carwash operated by the applicants ten years earlier and the failure of Westcoast. The NVG has failed to meet its onus to persuade me otherwise.
- (b) The Undue Preference Argument
- [32] Mr. Millar's argument is that the applicants gave undue preference to the Canada Revenue Agency (the "CRA"), another creditor, in the three months prior to bankruptcy. What counsel is referencing appears to be the fact that in the Westcoast corporate bankruptcy, the CRA filed proof of claim as an unsecured creditor as well as a property claim and received \$274,153.19 as a creditor of Westcoast.
- [33] Since directors are personally liable for breaches of the trust provisions of the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.), concerning unremitted deductions, counsel for the NVG argue that the applicants in their personal bankruptcy should be made to pay this amount, or something approximating it, before they can be discharged.
- [34] This point was not well developed in either oral or written submissions. I am not persuaded by the NVG that the applicants should be denied an absolute discharge from bankruptcy on this basis.
- (c) The Fraud Argument
- [35] The applicants' position is that in the absence of a conviction or finding of fraud by a judgment in a criminal or civil court, the NVG's argument concerning fraud must fail: *Herd, Re*, 1988 CarswellBC 544 (B.C.S.C.) at para. 10, *aff'd* *Herd, Re*, 1989 CarswellBC 377 (B.C.C.A.) at para. 45. Notwithstanding this authority, I will consider the NVG's argument.
- [36] While the NVG's notice of objection to the applicants' discharge referenced the NOCC as the basis for the allegation of fraud, things took on a different complexion during the course of argument. Mr. Millar drew on principles of builders lien law from Ontario, where the statute imposes liability on personal guarantors for a company's debts. He also relied on *Columere Park Developments Ltd. v. Enviro Custom Homes Inc.*, 2010 BCSC 1248, to support his argument that the applicants committed fraud by depositing NVG's payments into a general

account which was then used to pay the ongoing expenses of Westcoast.

- [37] The facts in Columere involved what Melnick J. found to be an unlawful transfer of funds from one company to another, causing significant loss to beneficiaries of a builders lien trust. The authority is not of assistance on the facts before me, where money from the NVG was deposited into Westcoast's general account and then used to pay bills. It was unclear at the hearing of this matter whether the Builders Lien Act has application to modular homes, but in any event, there was no such lien claim by the NVG against Westcoast. There was a direct contractual relationship.
- [38] Furthermore, the contract between the NVG and Westcoast made no reference to funds advanced being subject to a trust. In the absence of such language, it is not proper to impose a trust: 0409725 B.C. Ltd. (Bankruptcy of), 2014 BCSC 1196 at paras. 13-18. Without a trust, there can be no breach of trust and thus no acts that constitute a fraud.

Summary

- [39] I am satisfied that the applicants should be discharged absolutely from bankruptcy. Counsel should contact Scheduling to make arrangements to speak to costs and other related matters.

"Duncan J. "

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