
CANADA / JUDGMENT

Bankruptcy of Pryde

2008 BCSC 1422

COURT

Supreme Court of British Columbia

DECIDED

23 October 2008

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2008 BCSC 1422 Bankruptcy of Pryde

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bankruptcy of Pryde,

2008 BCSC 1422

Date: 20081023

Docket: 227786

Registry: Vancouver

In the Matter of the Bankruptcy of

Mitchell Bruce Pryde

Before: Master Taylor

as Registrar

Reasons for Decision

Counsel for the Applicants, E. Sands & Associates Inc. and D. Gurney:

M. R. Davies

Counsel for the Bankrupt:

K. Wedel

Date and Place of Hearing:

October 14, 2008

Vancouver, B.C.

- [1] E. Sands & Associates Inc. and Dean Gurney brought an application by way of notice of motion seeking indemnification from the estate of Mitchell Bruce Pryde in bankruptcy, on account of legal expenses incurred with respect to an application filed by Mr. Pryde in this proceeding on May 26, 2004 and of the legal action commenced by Mr. Pryde in Vancouver Registry number S044328 on August 3, 2004. The indemnification being sought from Mr. Pryde by E. Sands & Associates and Dean Gurney is the sum of \$10,663.54 after taxation thereof. As well E. Sands & Associates Inc. and Dean Gurney seek the costs of this application to be paid by either Mitchell Bruce Pryde and/or the estate of Mitchell Bruce Pryde in bankruptcy.
- [2] It is interesting to note that Mr. Pryde has been discharged from bankruptcy but the estate remains because the trustee has yet to be discharged.

The Factual Background

- [3] In or about June 2002 Mr. Pryde met with Dean Gurney in his capacity as a licensed trustee in bankruptcy with the view to assigning himself into bankruptcy. At that time the bankrupt advised Mr. Gurney that among his assets he held a RRSP annuity account in a segregated fund worth approximately \$57,874 and that the RRSP was exempt from seizure by creditors pursuant to the Insurance Act of British Columbia.
- [4] Mr. Gurney asserts that he told the bankrupt to confirm with his insurance company that the RRSP was in fact an asset exempt from seizure by creditors pursuant to the Insurance Act. The bankrupt consulted his insurance broker, Frank Reid, who confirmed to the bankrupt that the RRSP was in fact exempt from seizure. As well, Sands independently inquired of Reid and was also told that the RRSP was exempt from creditors.
- [5] Based upon this information the bankrupt then made an assignment into bankruptcy and declared the RRSP as an exempt asset. E. Sands & Associates Inc. was appointed as the trustee of the bankrupt estate. The bankrupt estate was created as a summary administration since no unusual issues or expenses were anticipated.
- [6] Upon receiving advice that the bankrupt had assigned himself into bankruptcy, Clarica Life Insurance Company collapsed the RRSP and forwarded to Sands the sum of \$41,847.19 which represented the net proceeds of the RRSP after deduction of withholding tax.
- [7] Some time later with this information at hand Gurney discussed with the bankrupt, prior to the bankrupt's second counselling session, the possibility of annulling the bankruptcy.
- [8] In February, 2003, Sands received a letter from lawyers retained by the bankrupt alleging that Sands was at fault either for the collapse of the RRSP, failing to advise the bankrupt to make a proposal or failing to annul the bankruptcy.

- [9] Then on May 27, 2004 the bankrupt filed a motion in the bankruptcy proceedings to apply for leave to file a writ of summons against Sands & Gurney. This application was made pursuant to s.215 of the Bankruptcy and Insolvency Act.
- [10] The bankrupt never proceeded with the application pursuant to s.215 of the BIA but rather commenced an action against Sands, Gurney and Reid as well as the insurance companies involved with the RRSP alleging negligence on the part of Reid and Gurney and claiming damages.
- [11] The action commenced by the bankrupt alleged that Gurney was negligent in the course of his professional duties and that Sands was vicariously liable as Gurney's employer. It did not allege that Sands was itself negligent.
- [12] Sands and Gurney filed a statement of defence completely denying any liability with respect to the allegations of the bankrupt.
- [13] The matter ultimately resolved when Reid made an offer to pay \$15,000 in full settlement of the bankrupt's claims. However the matter was resolved on the payment by Reid of \$20,000 to the bankrupt on the condition the bankrupt executed releases in favour of all defendants, dismissing the lawsuit against the defendants, and all parties agreed that the dismissal of the action would be on a "without costs" basis. Sands and Gurney agreed to enter into the settlement on the advice of legal counsel. Sands and Gurney now claim indemnification for the \$10,662.54 in legal fees they incurred by having to retain counsel throughout these proceedings.

The Issues

- [14] The broad question for the court on this application is whether on the suit by a bankrupt against a trustee and its employee in his personal capacity which is subsequently compromised by payment to the bankrupt by another defendant in the action, the trustee and its employee are entitled to make a claim for indemnity against the estate of the bankrupt.
- [15] A secondary issue is whether it would matter if the bankrupt did not obtain leave pursuant to s.215 of the Bankruptcy and Insolvency Act to sue the trustee in his personal capacity and, lastly, would it matter if the trustee and its personally named employee settled the claim on a without costs basis?

Discussion

- [16] The applicant points out that the statement of claim names Sands as a defendant but the only allegation contained in the statement of claim against Sands is that Sands is vicariously responsible as Gurney's employer for the alleged negligence of Gurney. This, says the applicant, shows there was no basis for which the bankrupt could initiate the lawsuit without seeking leave of the court pursuant to s.215 since the lawsuit did not allege that Gurney was acting independently or outside the scope of his employment.
- [17] The respondent bankrupt however takes the position that while a trustee is entitled to be paid its proper fees and disbursements including legal fees incurred in the administration of the estate and out of the estate, the trustee is not entitled to use the estate as a personal defence fund for litigation that cannot be said to be part of the administration of the estate.
- [18] In that regard the respondent bankrupt says that a trustee is not entitled to indemnity in respect of the costs of an action brought against him if it is a purely personal action against him and not having relation to the estate except so far as the acts complained of were acts done by him while acting in that capacity: *Re Dunn*, [1904] 1 Ch. 648 at 655-657. As well the bankrupt cites *Re Nierenberg* (1979), 30 C.B.R. (N.S.) 267 (Ont.H.C.J.) at paragraphs 10, 16 and 20, for the proposition that legal fees incurred by a trustee to defend an action brought against it personally and seeking damages cannot be paid out of the estate since it cannot be said that a trustee in defending such an action is in any way administering the estate.
- [19] Indeed, says the bankrupt, the proceedings giving rise to the legal fees in question were brought against Sands and Gurney personally and not against the estate or against the trustee in its representative capacity. Accordingly, the bankrupt maintains that the defence of Sands and Gurney in the proceedings was never part of the administration of the estate and points to the statement of claim which does not name the trustee in its representative capacity but seeks only damages from Sands or Gurney personally not any relief against or in respect of the estate. As well, the statement of defence in which Sands and Gurney, recognizing that the action was against them personally pleaded that "The plaintiff's claim should be against the trustee in bankruptcy of the estate".
- [20] The applicants rely upon the proposition that a trustee is entitled to indemnity out of a trust property for all administrative expenses properly incurred as a first charge on the trust property for all costs incurred in administering the trust property and cite *Re General Fireproofing Company of Canada* (1936), 17 C.B.R. 371 (Ont.C.A.) for that proposition. This appears to be trite law however the question is whether in defending the lawsuit against themselves personally, Sands and Gurney were administering the trust property.

[21] During submissions I asked counsel for the applicant what if any effect the consent dismissal order signed on behalf of the applicants had in relation to the claim for indemnification. Counsel for the applicants responded by submitting that his clients were not seeking costs against Mr. Pryde within the lawsuit commenced by Mr. Pryde but rather indemnification against the bankrupt's estate.

Does s.215 of the Bankruptcy and Insolvency Act Apply?

[22] Counsel for the applicant submits that the bankrupt should not have brought the suit without first obtaining the court's approval pursuant to s.215 of the BIA. Section 215 reads as follows:

Except by leave of the court, no action lies against the Superintendent, an official receiver or a trustee with respect to any report made under, or any action taken pursuant to, this Act.

[23] From the pleadings, it is evident that the trustee was sued in his personal capacity, and not that of a trustee. Accordingly, it is not necessary to obtain the court's leave pursuant to s.215: *Canadian Glacier Beverage Corp. v. Barnes & Kissack Inc.* (1999), 6 C.B.R. (4th) 212 (B.C.S.C.). As well, if the trustee is sued personally for something that has nothing to do with the administration of the bankrupt estate, leave under s.215 is not required: *Re: Border Drilling & Sanitation Ltd.* (1983), 45 C.B.R. (N.S.) 252 (Ont.S.C.).

Decision

[24] In my view, Sands and Gurney were sued by the bankrupt in their personal capacities and not in their representative capacities as trustees of the bankrupt's estate. As a result, both Sands and Gurney had the opportunity to seek costs against the bankrupt when this matter was compromised but chose not to do so and instructed counsel to sign a consent dismissal order "without costs". Accordingly, the applicants cannot now make a claim against the estate for indemnification. I therefore dismiss the applicant's notice of motion with costs to the respondent.

"Master G.C. Taylor"

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