

CANADA / JUDGMENT

Braich (Re)

2022 BCSC 2370

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Supreme Court of British Columbia

DECIDED

18 November 2022

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2022 BCSC 2370 Braich (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Braich (Re),

2022 BCSC 2370

Date: 20221118

Docket: B220185

Estate No. 11-254393

Registry: Vancouver

In the Supreme Court of British Columbia

In Bankruptcy and Insolvency

In the Matter of the Bankruptcy of Herkenn Singh Kenny Braich

Before: The Honourable Justice Blake

Oral Reasons for Judgment

In Chambers

Counsel for the Applicant Scott Clarke:

K.M. Jackson

M. Gill

Counsel for Herkenn Singh Kenny Braich:

J.C. McKechnie

Place and Date of Hearing:

Vancouver, B.C.

November 2, 2022

Place and Date of Judgment:

Vancouver, B.C.

November 18, 2022

I. Introduction

- [1] Scott Clarke applies for a bankruptcy order against Herkenn Singh Kenny Braich pursuant to the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 [BIA]. Specifically, he says Mr. Braich has committed two clear acts of bankruptcy in contravention of s. 42 of the BIA:
- a) under s. 42(1)(e) of the BIA, a writ of execution issued against Mr. Braich was returned endorsed nulla bona, in other words, the executing officer could find no property on which to levy, or to seize and take; and
 - b) under s. 42(1)(j) of the BIA, Mr. Braich has ceased to meet his liabilities generally as they become due, including:
 - i. failing to pay Mr. Clarke pursuant to a judgment he obtained for approximately \$2 million on July 23, 2020;
 - ii. failing to pay Bakhshish Singh Sangha, Balbir Kaur Sangha, Kulwant Singh Gosal and Jasbinder Kaur Gosal (the "Sangha Creditors"), in the amount of approximately \$3,216,366.66, plus accruing interest; and
 - iii. failing to pay another creditor, 1055249 BC Ltd. ("Num Co") in an amount in excess of \$10 million.

II. procedural issues

- [2] Before turning to the brief background of this application, there are two procedural issues which arose during the hearing.
- [3] First, counsel for Mr. Braich objected to the admissibility of paragraph 6 of the second affidavit of Ashley Kumar sworn on October 28, 2022. That paragraph attached as an exhibit a chain of emails between counsel for Num Co. and counsel for Mr. Clarke, purporting to confirm outstanding amounts owed by Mr. Braich to Num Co. He took the position that given that quasi criminal aspect of bankruptcy proceedings, a deponent must have first-hand knowledge of the facts stated in the bankruptcy application and that the tendered evidence cannot be based upon information and belief: Bankruptcy of Real Time Fibre Supply Ltd., 2007 BCSC 371 at para. 17. I upheld this objection, and expunged paragraph 6 and Exhibit E of this affidavit from the record.

- [4] Second, in the middle of a hearing, counsel for Num Co. attended and asked for leave to make submissions. Num Co. did not file a response to the application, and counsel for Mr. Braich objected to their standing to make submissions. Again, this objection was upheld, and counsel for Num Co. were not allowed to make any submissions on the application.

III. Background

- [5] To issue a bankruptcy order, the court must be satisfied on the available evidence that Mr. Braich committed one act of bankruptcy within the six months prior to the filing of the application for the bankruptcy order. The application was filed on May 10, 2022.
- [6] By way of brief background, Mr. Clarke's claim arises in relation to a sale by Mr. Clarke to Mr. Braich of certain lands located in Mission, B.C. (the "Lands"), that were owned by Mr. Clarke. As part of the purchase price for the Lands, Mr. Braich granted Mr. Clarke a vendor take-back mortgage. Mr. Braich defaulted in payment under that mortgage, and Mr. Clarke initiated foreclosure proceedings against Mr. Braich November 8, 2019. Mr. Clarke obtained judgment in the foreclosure proceedings from Master Muir in the amount of \$1,868,492.30 on July 23, 2020, plus interest which accrues at a rate of \$125.42 per day (the "Indebtedness").
- [7] On February 3, 2022, Mr. Clarke obtained a writ of seizure and sale (the "Writ") to be executed against the assets of Mr. Braich, and on the same day he engaged Accurate Court Bailiff Services Ltd. to execute the Writ. The bailiff was unable to find any property of Mr. Braich to seize, and on April 14, 2022, returned the Writ marked "Unable to Locate Exigible Assets."
- [8] In addition to the Indebtedness owed to Mr. Clarke, Mr. Braich is also indebted to the Sangha Creditors in the amount of approximately \$2,999,966.04, together with interest and costs, pursuant to an order of Master Baker made October 17, 2019. As of May 5, 2022, when Mr. Clarke swore his first affidavit, he deposed this amount totalled approximately \$3,216,366.66.
- [9] In his affidavit sworn June 6, 2022, Mr. Braich deposed that on January 27, 2022, Justice Taylor pronounced an order approving a sale of the Lands, which sale was set to close on June 14, 2022, and "the proceeds of which will be sufficient to satisfy my indebtedness to Mr. Clarke." However, the sale of the Lands did not complete. On July 7, 2022, Justice Milman granted an order absolute in respect of the Lands to the Sangha creditors, which was effective October 15, 2022. Mr. Braich properly did not object to the admissibility of this evidence on this application.

IV. analysis

- [10] While the burden of proof in a bankruptcy application is that of the civil standard, the alleged act of bankruptcy must be fully and strictly proven due to the serious sequences which flow from a bankruptcy: 0757376 B.C. Ltd. (Re), 2011 BCSC 1268 at paras. 13, 14 [0757376 B.C. Ltd.].

[11] Section 43 of the BIA sets out the relevant procedure for a bankruptcy application, and it reads as follows:

Bankruptcy application

43 (1) Subject to this section, one or more creditors may file in court an application for a bankruptcy order against a debtor if it is alleged in the application that

- (a) the debt or debts owing to the applicant creditor or creditors amount to one thousand dollars; and
- (b) the debtor has committed an act of bankruptcy within the six months preceding the filing of the application.

If the applicant creditor is a secured creditor

- (2) If the applicant creditor referred to in subsection (1) is a secured creditor, they shall in their application either state that they are willing to give up their security for the benefit of the creditors, in the event of a bankruptcy order being made against the debtor, or give an estimate of the value of the applicant creditor's security, and in the latter case they may be admitted as an applicant creditor to the extent of the balance of the debt due to them after deducting the value so estimated, in the same manner as if they were an unsecured creditor.

[12] Section 42 of the BIA sets out the specific cases in which a debtor commits an act of bankruptcy, and the two relevant subsections for the purpose of this bankruptcy application are ss. 42(1)(e) and (j), which read as follows:

Acts of bankruptcy

42 (1) A debtor commits an act of bankruptcy in each of the following cases:

- (e) if the debtor permits any execution or other process issued against the debtor under which any of the debtor's property is seized, levied on or taken in execution to remain unsatisfied until within five days after the time fixed by the executing officer for the sale of the property or for fifteen days after the seizure, levy or taking in execution
- (j) if he ceases to meet his liabilities generally as they become due.

[13] Mr. Braich opposes the bankruptcy application on two technical grounds, that as of May 10, 2022, the date of the bankruptcy application, Mr. Clarke has failed to prove that:

- a) he was owed an unsecured debt of at least \$1,000 by Mr. Braich; and
- b) Mr. Braich has committed an act of bankruptcy within the six months preceding the filing of the bankruptcy application.

A. Unsecured debt of at least \$1,000

- [14] Pursuant to s. 43(6) of the BIA, at the hearing of an application for a bankruptcy order, the court shall require proof of the facts alleged, and if so satisfied, may make a bankruptcy order. The facts in the bankruptcy application must be true as of the date of the filing of the application: *Fred Walls & Son Holdings Ltd. (Re)*, 13 C.B.R. (4th) 60 at 67, 1999 CanLII 6074 (B.C.S.C.). The facts proven must be by "sound and convincing evidence", or "the best evidence of available": *0757376 B.C. Ltd.* at para. 21; *Pro-Lam Industries (1986) Ltd. (Re)*, 75 C.B.R. (N.S.) 239 at 243, 1989 CanLII 2838 (B.C.S.C.).
- [15] Mr. Braich argues that the proper interpretation of s. 43(2) of the BIA is that when a bankruptcy application is brought by a secured creditor, they must prove unsecured indebtedness of at least \$1,000.
- [16] He argues that as of May 10, 2022, Mr. Clarke was a secured creditor, and he failed to both properly value the security he held for the Indebtedness and to assert the existence of any unsecured debt. He says that Mr. Clarke's failure to identify the mortgage he held on the Lands is fatal to this application. He opposes the relief sought by Mr. Clarke on the basis that his affidavit sworn May 5, 2022, fails to prove that as of that date, there is unsecured indebtedness owing to him exceeding \$1,000 as required by s. 43 of the BIA. Mr. Clarke's position is that notwithstanding errors in his initial affidavit, at the time of the application he was an effectively unsecured creditor as the mortgage he held as security was, in his opinion, worthless.
- [17] I will turn first to the alleged errors in the supporting affidavit. Mr. Clarke has acknowledged he made two errors in swearing his initial affidavit in support of this application on May 5, 2022, and he has provided supplemental affidavit evidence correcting these errors.
- [18] The first error Mr. Clarke made in his affidavit sworn May 5, 2022, is that he did not credit Mr. Braich with a payment he made against the Indebtedness on May 19, 2021, in the amount of \$180,000. Accordingly, he inadvertently miscalculated and overstated the amount due and owing to him by Mr. Braich. Upon the error being brought to his attention, Mr. Clarke rectified the matter in his second affidavit sworn June 27, 2022, and deposed that as of the date of the second affidavit, Mr. Braich owed him the amount of \$1,772,936.32, with interest continuing to accrue at the rate of \$115.93 per day (rather than the amount of \$1,948,454.33, plus interest accruing at a rate of \$125.42 per day as deposed to in his first affidavit).
- [19] The second error made by Mr. Clarke was in relation to the mortgage he had secured on the Lands, which Mr. Clarke failed to disclose the existence of in his first affidavit. It is this error Mr. Braich argues is fatal to this application.

- [20] To understand Mr. Clarke's error, it is necessary to consider the foreclosure proceedings brought by the Sangha Creditors. As noted above, the Sangha Creditors ultimately obtained judgment against Mr. Braich in the amount of \$2,999,966.04 pursuant to an order of Master Baker of October 17, 2019.
- [21] The Sangha Creditors then initiated foreclosure proceedings against the Lands in question, and on January 27, 2022, Justice Taylor granted an order approving a sale of the Lands. Mr. Braich initially defended this bankruptcy application, in part, on the basis that the sale of the Lands pursuant to the contract of purchase and sale approved by Justice Taylor, would generate sufficient proceeds to satisfy his obligations to Mr. Clarke. The closing date of the contract of purchase and sale was extended several times, but ultimately the sale did not complete. On July 7, 2022, Justice Milman granted an order absolute to the Sangha Creditors, effective October 15, 2022.
- [22] When Mr. Clarke swore his initial affidavit on May 5, 2022, he did not disclose the mortgage secured against the Lands. He believed the proposed sale of the Lands had fallen through and that the Sangha Creditors had obtained an order absolute for the Lands, thereby vesting his mortgage on the lands off title. He believed his mortgage had been discharged. He explained in his second affidavit sworn June 27, 2022, the reason for this incorrect understanding as follows:
6. In the Braich Affidavit, Mr. Braich states that "Mr. Clarke holds a mortgage over the Ferndale Property". That is, apparently, true. However, when I swore my 1st Affidavit, I believed that my mortgage of the Ferndale Property (the "Mortgage") had been discharged. I say that because:
 - (a) while I was aware of the potential sale of the Ferndale Property as approved by the January 27, 2022 order of Justice Taylor (the "Potential Sale"), I had understood that that sale had fallen through; and
 - (b) as a result, I believed that the Petitioners in the foreclosure proceedings had obtained an order absolute, thereby vesting the Mortgage off title.
 7. It seems now that my understanding was not correct.
 8. In any event, I have now been advised by Mr. Gill that the Potential Sale did not close on June 14, 2022, and that [the] their application for order absolute has [how] now been re-set for July 5, 2022.
 9. Considering the history of this matter, I have long given up putting any value in the Mortgage and, as I say above, I had thought it had been discharged when I swore my 1st Affidavit. Accordingly, for the purposes of my application for a bankruptcy order against Mr. Braich, I value the Mortgage at \$0.

- [23] While counsel for Mr. Braich argues this explanation is not credible and could not have been reasonably held by Mr. Clarke, I disagree. I am satisfied that Mr. Clarke properly corrected the errors in his affidavit evidence. Further, I am satisfied that Mr. Clarke has established that although at the time he swore his first affidavit he had a mortgage registered on title to the Lands, he erroneously believed the mortgage had been discharged, and that in any event, he valued the mortgage as being worth nothing. Pursuant to s. 43(2) of the BIA, Mr. Clarke must have either released the mortgage and so become an unsecured applicant creditor, or valued it so as to be admitted as an applicant creditor to the extent of the balance of the debt due after deducting the value of the security. Mr. Clarke did the latter. He valued the mortgage as worthless, meaning he is entitled to be admitted as an unsecured applicant creditor for the full amount of the Indebtedness remaining due.
- [24] While counsel for Mr. Braich argues that Mr. Clarke's estimate of his security is "absurdly small," as was found by Justice Ruttan in *Columbia Properties Ltd. (Re)*, 41 D.L.R. (2d) 235 at 238, 1963 CanLII 508 (B.C.S.C.), I do not find that to be the case in the circumstances. In fact, Mr. Clarke's belief that the security was worthless was ultimately proven to be correct when on July 7, 2022, Justice Milman granted order absolute over the Lands to the Sangha Creditors effective October 15, 2022. This order effectively vested Mr. Clarke's mortgage off title to the Lands, leading to the inevitable conclusion that his opinion that his mortgage was worthless was accurate.
- [25] I am satisfied that Mr. Clarke promptly and correctly rectified the errors in his affidavit evidence. Further, I am satisfied that Mr. Clarke has established on the evidence that there is at least \$1,000 owing to him, as is required by the BIA. I am not satisfied that the initial inaccuracies in the amount of debt Mr. Clarke claims, and the value and existence of his security, should properly be used to defeat this application: see *Royal Bank v. Georgian Equity Corp.*, 27 C.B.R. (3d) 93 at 96, 1994 CarswellOnt 290 (Gen. Div.).
- [26] As in *Georgian Equity Corp*, Mr. Braich knew of the debt alleged by Mr. Clarke, and has had ample time to respond to Mr. Clarke's second affidavit. He has chosen not to do so. In my view, this application does not fail because of the initial inaccuracies in Mr. Clarke's affidavit, which were addressed. Mr. Braich was at all times aware of the significant amount due and owing to Mr. Clarke pursuant to the Indebtedness, and ultimately, he has not contested in any meaningful manner Mr. Clarke's valuation of his security.

B. Act of Bankruptcy Within Preceding Six Months

- [27] Mr. Braich also argues that he has not committed an act of bankruptcy within the six months preceding the bankruptcy application. He says he has neither permitted the execution for the Indebtedness to remain unsatisfied, contrary to s. 42(1)(e) of the BIA, nor has he ceased to meet his liabilities generally as they become due contrary to s. 42(1)(j) of the BIA. I will address each in turn.

1. Writ Returned Nulla Bona

- [28] Mr. Braich acknowledged that the Writ issued against him was returned, endorsed to the effect that the executing officer could find no property on which to levy, or to seize, or to take, contrary to s. 42(1)(e) of the BIA. However, he says that he has a direct or indirect interest in assets with values sufficient to satisfy his obligations to Mr. Clarke, and that he advised the executing officer attempting to execute the Writ of this.
- [29] The onus is on Mr. Braich to prove "by clear and independent evidence" that he is able to meet his liabilities as they become due: 0757376 B.C. Ltd. at para. 21. A mere assertion that he has a direct or indirect interest in assets sufficient to satisfy his obligations is not sufficient. In a similar fashion, referring to another set of reasons for judgment, that of Justice Baker in *Clarke v. Braich*, 2021 BCSC 121 at para. 63, in which she concluded in a different proceeding that there was equity and specific assets of Mr. Braich available for execution by Mr. Clarke, is also not sufficient. Neither is listing assets that could allegedly be used to satisfy the Indebtedness.
- [30] Since swearing his affidavit on June 6, 2022, almost five months ago, Mr. Braich has adduced no further evidence verifying his ability to satisfy his outstanding debt obligation to Mr. Clarke, nor made any payments to Mr. Clarke. Accordingly, I find that Mr. Braich has committed a clear act of bankruptcy contrary to s. 42(1)(e) of the BIA in the six months before the bankruptcy application was filed May 10, 2022, when the Writ issued against him was returned endorsed nulla bona. This act of bankruptcy would be sufficient to allow the bankruptcy application.
2. Ceasing to Meet His Liabilities Generally as They Become Due
- [31] However, for the sake of completeness, I will briefly turn to the second alleged act of bankruptcy, which is that contrary to s. 42(1)(j) of the BIA, Mr. Braich has ceased to meet his liabilities generally as they become due. Counsel for Mr. Braich argues that failing to meet liabilities generally requires more than proving other creditors remain unpaid: *Glorytown Land Development Corporation (Re)*, 2010 BCSC 656 at para. 43. He stresses that the debt to the Sangha Creditors is proven by way of the order of Master Baker made October 17, 2019, and so is approximately 19 months old. He argues that Mr. Clarke fails to disclose any personal knowledge of this debt.
- [32] I note that the existence of more than one unpaid judgment is sufficient to support the determination that an act of bankruptcy has occurred: *Mastronardi (Re)*, 195 D.L.R. (4th) 631 at para. 24, 2000 CanLII 17002 (O.N.C.A.). There is no need for a judgment creditor to continue to demand payment of a judgment, to satisfy the requirement that an act of bankruptcy occur within the six months preceding the filing of an application. As noted by Justice D.M. Brown "... a judgment operates as a continuing demand for payment by the judgment creditor, just as the failure to satisfy the judgment is a continuing refusal by the judgment debtor": *Daniel Diena (Re)*, 2012 ONSC 5849 at para. 5.

[33] I am satisfied that Mr. Clarke has provided sound and convincing evidence that Mr. Braich has ceased to meet his liabilities generally as they become due, contrary to s. 42(1)(j) of the BIA.

V. Conclusion

[34] In conclusion, Mr. Clarke has established that Mr. Braich is indebted to him in the amount of at least \$1,000, and so s. 43(1)(a) of the BIA is satisfied. Further, I am satisfied Mr. Clarke has established that two acts of bankruptcy have occurred, specifically that:

- a) under s. 42(1)(e) of the BIA, the Writ was returned endorsed nulla bona; and
- b) under s. 42(1)(j) of the BIA, Mr. Braich has ceased to meet his liabilities generally as they have become due.

[35] Mr. Braich is adjudged to be a bankrupt, and a bankruptcy order is made against him.

[36] Mr. Clarke proposes Crowe MacKay & Company Ltd., a licensed insolvency trustee, to be appointed trustee of the estate of Mr. Braich, and they have consented to act in that capacity. Accordingly, Crowe MacKay & Company Ltd. is hereby appointed as trustee of the estate of Mr. Braich, and they are to give security in an amount to be fixed by the official receiver under s. 16(1) of the BIA.

[37] Mr. Clarke is entitled to the costs of this bankruptcy application, to be paid out of the assets of the estate of Mr. Braich, with the costs to be assessed pursuant to the BIA.

"Blake J."

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Prepared on 29 October 2026 · Esheria