

CANADA / JUDGMENT

Hutton v. Bitten, Kosiancic

2003 BCSC 1704

COURT

Supreme Court of British Columbia

DECIDED

10 November 2003

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2003BCSC1704

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Hutton v. Bitten, Kosiancic,

2003 BCSC 1704

Date: 20031110

Docket: 9136

Registry: Nelson

Between:

Richard L. Hutton

Plaintiff

And

Hilary Bitten, Shirley Kosiancic

Defendants

Before: The Honourable Mr. Justice McEwan

Reasons for Judgment

Counsel for the Plaintiff:

D.W. Skogstad

Counsel for the Defendants:

M. Kew

Date and Place of Trial/Hearing:

May 27-30, 2003

Nelson, B.C.

I

- [1] The plaintiff resides on a rural property near Nelson, British Columbia. He holds a judgment against one Bradley Morehouse related to a logging trespass committed by Mr. Morehouse on his property (see: *Hutton v. Morehouse*, [1998] B.C.J. No. 668, (March 25, 1998)).
- [2] Mr. Morehouse made an assignment in bankruptcy on July 7, 1998.
- [3] On June 9, 2000 the plaintiff, as a judgment creditor in the Morehouse bankruptcy, obtained a court order authorizing him to take these proceedings.
- [4] The defendant Shirley Kosiancic is Bradley Morehouse's mother.
- [5] The defendant Hilary Bitten had, since 1984 and at times material to this action, lived with Shirley Kosiancic in a same-sex relationship.
- [6] The plaintiff's action is for recovery of money he alleges was paid to the defendants contrary to section 91(1) and (2) of the Bankruptcy and Insolvency Act R.S.C. 1985 c. B-3 and the Fraudulent Conveyance Act R.S.B.C. 1996 c. 163. He seeks the payments over of that money to satisfy his judgment.

II

- [7] Bradley Morehouse is 47 years old. He is separated and is the father of four children, the youngest of whom is 5. He has some university education and experience in various aspects of the logging industry. He seems not to have thrived in those endeavours, but to have made ends meet, occasionally with help from other family members. He presently works as a realtor.
- [8] Two real estate transactions are at issue in this case. The first was the purchase by Bradley Morehouse of a property at Kieran Road near Nelson, adjacent to the property owned by the plaintiff. In order to do this he turned to the defendants for assistance. Ms. Bitten testified that she and Ms. Kosiancic wanted to help Mr. Morehouse out. They advanced \$63,000 for the purchase, \$50,000 of which came from Ms. Kosiancic and \$13,000 of which came from Ms. Bitten. Ms. Bitten handled the money, however, and it appeared to all come from her. The understanding was that the purchase would provide Mr. Morehouse with a place to live with his family and that he would be able to repay the defendants out of proceeds he would obtain from logging the property. On August 30, 1996 Mr. Morehouse paid Hillary Bitten \$54,500. She was later paid another \$3679.85. The shortfall of \$4820.50 was never made up.

- [9] On June 24, 1996 Ms. Bitten contracted to purchase a second property at 2615 Slocan Valley Road for \$140,000. The completion date was August 30, 1996. The defendants say this land was, once again, purchased to create employment for Mr. Morehouse. As before, the understanding was that Ms. Bitten would be repaid out of logging revenues. The cash portion of this sale (\$51,774) was paid out of the \$54,500 received from Mr. Morehouse from the Kieran Road logging.
- [10] Ms. Bitten paid the mortgage on this property until she set up a joint account with Mr. Morehouse, and into which Mr. Morehouse deposited money. There was at lodge at 2615 Slocan Valley Road which was rented out at times. Hilary Bitten dealt with the rents.
- [11] The logging on the Slocan Park property proved to be more difficult than expected and it was ultimately necessary to use helicopters. This was, needless to say, expensive. There was also less timber on the property than had originally been anticipated.
- [12] Ms. Bitten dealt with the joint account while Ms. Kosiancic kept the books related to the money that came in from logging and the rentals.
- [13] Mr. Morehouse was, at the time, also logging a property near Salmo, British Columbia, and some of the money that was deposited in the joint account came from the proceeds of logging at that site.
- [14] The evidence of Ms. Bitten is somewhat vague in detail but it appears that what started primarily as a means of helping Mr. Morehouse to make a living by financing properties he could log for profit, began to evolve, from her perspective, into an arrangement that had the potential to return a profit on a kind of joint venture basis.
- [15] The Slocan Park property was sold November 13, 1998 for \$122,000. The loss, taking account of adjustments (including a commission to Mr. Morehouse on the re-sale) was \$28,199 (\$142,783 - \$114,584).
- [16] This loss was not unexpected. The property was worth less with its timber removed. The accounting that ran between the parties within the joint-account shows that net of some minor expense reimbursements Hilary Britton personally received \$26,839 from that account.
- [17] Over the time she held the Slocan Park property Ms. Bitten made payments of \$744.19 per month (principal, interest and taxes) on the \$90,000 mortgage she had taken out to buy it. The mortgage had been paid down to \$84,186.58 by the time the property was sold. The monthly payments (net of principal) were calculated at one point by Ms. Bitten at \$14,403.06.
- [18] Ms. Bitten and Mr. Morehouse operated the joint account between December 1996 and September 1997. In addition to the money drawn out by Ms. Bitten, Ms. Kosiancic received \$32,000 from the account, over and above some minor expense recoveries and some small payments for "bookkeeping". In the mingling of money that occurred between Ms. Bitten

and Ms. Kosiancic the funds she received have been variously accounted. Ms. Bitten has at times acknowledged receiving some \$25,000 of the money and to receiving \$18,000 in \$2000 monthly instalments for a total recovery of \$43,000 against her cash outlay of \$51,774.46 in the Slocan Park property.

[19] Counsel for the defendants characterized this series of transactions as follows:

Item Debit Credit

Loan to Brad <63,000>

Bank Draft from Brad 54,500-

Unrecorded payment from Brad 3,680-

From J&A account to Hilary Bitten

less reimbursement (\$73+\$74+\$306) 26,839-

From Joint Account to Shirley Kosiancic

less pay (\$250x3) and

reimbursement (266+440) \$32,000.00

Rental Income (per D.S.) \$7,713.00

Loss on property

142783 - 114584 <\$28,199>

Principal, Interest

and Taxes Mortgage

744.19 x 26.5 mos <\$19,721>

<\$110,920> \$124,732

Balance 13,812

Revenue Canada Assessment <\$18,000>

<Balance> <\$4,188>

[20] I think this may mischaracterize the entire mortgage payment as a debit when the principal repayment should appear as a credit. It nevertheless demonstrates that between Ms. Bitten and Ms. Kosiancic there was a modest net recovery of money from the investments in the two properties taking account of their draws against the logging revenue from those two properties and the other near Salmo, in which the defendants had no direct investment.

[21] At some point, this series of transactions came to the attention of the Canada Customs and Revenue Agency. The Agency apparently first viewed the payments of \$54,500 (in September 1998) and \$43,000 (between September 1996 and August 1997) as transfers of assets for less than fair market value. On October 30, 2000, counsel for Ms. Bitten explained:

The two amounts referred to in your letter are the result of separate transactions as follows:

1. \$54,500 - In August, 1996 Shirley and Hilary lent Brad a total of \$63,000 to buy the property legally described as Sublot 58, District Lot 1237, Kootenay District Plan X70, except Part included in Plan 11817 (PID # 016-317-262). Brad, his wife and children used this property as their residence and Brad immediately commenced logging operations. The deal that he made with Hilary and Shirley was that he would immediately log the property to repay the loan they had made to him. He repaid one lump sum of \$54,500, to which you refer, plus an additional payment of \$3,679.85 for a total of \$58,179.85. He never repaid the balance of \$4,820.15. Hilary claimed the entire loan and loss in her 1996 Income Tax Return. Her four page statement of Business Activities from that return are enclosed herewith for your reference.
2. \$43,000 - On August 3, 1996 Hilary acquired the property legally described as Lot A, District Lots 8777 and 16983, Kootenay District Plan NEP22722. A photocopy of the Purchaser's Statement of Adjustments is attached herewith for your reference. This was a property that Brad wished to acquire and log for a profit. As it turned out, conventional cable logging was impossible and helicopter logging was required. Besides the more expensive method of harvesting, only about 50% of the volume originally contemplated prior to the purchase was eventually harvested. The sole purpose of Hilary acquiring the property was to enable Brad to make some money for himself. After the logging was concluded Hilary sold the property for \$122,000. The total loss on the property transaction itself, (excluding logging proceeds) including mortgage payments, insurance, real estate fees and legal expenses was \$43,565.14. She did, however, receive \$25,000 from the proceeds of the logging on her property directly from Slocan Forest Products, the log purchaser. This left a net loss of \$18,000. As the entire venture was for Brad's benefit and Brad's responsibility, Brad made arrangements to pay Hilary the sum of \$2,000 per month for nine months to pay off the remaining \$18,000. In other words, with the \$25,000 payment from the proceeds of sale of logs plus Brad's nine payments of \$2,000 each, Hilary considered herself repaid. Brad, of course, handled the entire logging project and Hilary played no part in it whatsoever.

[22] In a Notice of Objection filed May 21, 2003 a similar explanation was offered. There was no mention of Ms. Kosiancic's contribution by Ms. Bitten, who seems to have treated these transactions, between herself and Mr. Morehouse, as entirely her business. The issue with C.C.R.A. over time seems to have modulated to a question of whether the taxation of Mr. Morehouse's logging income had been calculated without deduction of expenses. The Notice of Objection followed a reassessment on February 17, 2003 which brought Ms. Bitten's liability down to \$18,000. Ms. Bitten paid the money on February 24, 2003. When it is accounted into Ms. Bitten's dealing with Mr. Morehouse she is in a loss position, over-all.

III

[23] It has been necessary, in order to describe the facts, to use the figures that have arisen on the evidence. The state of affairs as between Ms. Kosiancic and Ms. Bitten may well require some accounting, between them. Because of the manner in which they mingled their affairs, however, I do not think it necessary to deal with them, for purposes of these reasons, separately. If the sums of money paid to Ms. Bitten, Ms. Kosiancic or either for the other offend the provisions of the Bankruptcy and Insolvency Act or the Fraudulent Conveyance Act, nothing will turn on distinctions between them except as to the allocation of the losses between themselves.

IV

[24] The specific provisions of the Bankruptcy and Insolvency Act the plaintiff relies on are:

91(1) Any settlement of property made within the period beginning on the day that is one year before the date of the initial bankruptcy event in respect of the settlor and ending on the date that the settlor became bankrupt, both dates included, is void against the trustee

(2) Any settlement of property made within the period beginning on the day that is five years before the date of the initial bankruptcy event in respect of the settlor and ending on the date that the settlor became bankrupt, both dates included, is void against the trustee if the trustee can prove that the settlor was, at the time of making the settlement, unable to pay all the settlor's debts without the aid of the property comprised in the settlement or that the interest of the settlor did not pass on the execution thereof.

[25] When Mr. Morehouse declared bankruptcy on July 7, 1998, the precipitating cause was the plaintiff's judgment for \$60,134.63. Mr. Morehouse did not defend the action. The trespass occurred in the course of his logging on the Kieran Road property that the defendants had helped him purchase. The impugned transactions are the payments August 30, 1996 of \$54,500 to Hilary Bitten and the \$43,000 or so paid back between December 1996 and September 1997.

[26] Obviously both parts of section 91 turn on the issue of whether these transactions qualify as "settlements" of property. There is no question that money is "property" (Act S. 2). Elsewhere in S. 2 of the Act "settlement" is defined:

"settlement" includes a contract, covenant, transfer, gift and designation of a beneficiary in an insurance contract, to the extent that the contract, gift, transfer, gift or designation is gratuitous or made for merely nominal consideration.

[27] Clearly the intention behind these provisions of the Act is to negate the effect of "settlements" of property that reduce the estate of a bankrupt to the detriment of creditors.

[28] The transactions in this case were advances of money by the defendants to assist the plaintiff to purchase the Kieran Road property, with the money paid back from the logging of that property largely going into the Slocan park property. The arrangement thereafter

amounted, in essence, to the logging proceeds from Slocan Park going back to the defendants, together with some additional money from the Salmo property owned by Mr. Morehouse, but this did no more than approximately cover the defendants' investment. There is no sense in which these transactions were gratuitous or for nominal consideration. There is no sense in which the defendants have been shown to be retaining this property on behalf of Mr. Morehouse: they simply got their money back, more or less.

[29] The action is also brought under the Fraudulent Conveyance Act, 1996 c 163. S1, which reads as follows:

A disposition of property, by writing or otherwise, and a bond, proceedings and order, at any time made, to delay, hinder, or defraud creditors and others of their just and lawful remedies, shall be void and of no effect as against a person, his personal representative and assignee whose rights and obligations by collusion, guile, malice or fraudulent devices are or might be, in any way, disturbed.

[30] The Act is broader than the Bankruptcy Regulation in that there is no reference to insolvency. Again, however, there is no evidence that the payments made by Mr. Morehouse were dispositions to delay, hinder or defraud Dr. Hutton. The initial advance on the Kieran Road property was before the Morehouse claim came into being. The reinvestment of the proceeds from the logging occurred August 30, 1996, at a time when the Kieran Road property was still being logged, and before at least some of the logging giving rise to the Hutton claim had occurred (see *Hutton v. Morehouse* (supra) at paragraphs 17-21).

[31] Thereafter the payments that were received from Mr. Morehouse, depending on how they are accounted, return either a small profit or a larger loss on the joint logging enterprise into which the parties' relationship had begun to evolve. Although there is considerable evidence that Mr. Morehouse was not in a good financial position, which is why the defendants were motivated to help him, the bankruptcy appears to have been completely unanticipated and to have interrupted the sort of business relationship Ms. Bitten, at least, had come to envisage.

[32] As I have noted, Mr. Morehouse did not defend the Hutton claim. It was not for a liquidated amount and its magnitude may have been difficult to gauge. It is not at all clear that Mr. Morehouse anticipated the size of the claim at times material to this action, or that the defendants had any idea of it. While it was clearly the event that precipitated the bankruptcy, there is a dearth of evidence leading to any inference that, relative to the Bitten and Kosiancic transactions, Mr. Morehouse was ordering his affairs to avoid the consequences of his logging incursion on the Hutton property.

[33] One aspect of the evidence that has raised a question for this court is whether, and to what extent, the defendants benefited directly from the proceeds of the logging that took place on the Hutton property. Dr. Hutton's action against Mr. Morehouse did not establish the value of the trees taken as a specific head of damage. It does appear, nevertheless, that some portion of the proceeds received on account of the Kieran Road logging may have reflected trees

taken from the Hutton lands. It may be that counsel have considered this. I will simply say that if an issue arises in this regard further submissions may be made to the court.

[34] Apart from that specific reservation, which does not touch upon the issues framed by the pleadings, the plaintiff has failed to establish that the payments made were "settlements" or "preferences" under the relevant Bankruptcy and Insolvency Act provisions, or fraudulent conveyances under the Fraudulent Conveyance Act, and the action is dismissed.

[35] Costs shall follow unless counsel seek leave to address that issue.

"T.M. McEwan, J."

The Honourable Mr. Justice T.M. McEwan

November 13, 2003 - Corrigendum to the Reasons for Judgment issued by Mr. Justice T.M. McEwan advising that on the cover page the Date of the Trial/Hearing should be "May 27-30, 2003" rather than "January 27-29, 2003".

And on page 2, paragraph 6, the citation of the Bankruptcy and Insolvency Act should be "R.S.C. 1985 c. B-3" not "R.S.C. 1985 C.B. 3".

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Prepared on 29 October 2026 · Esheria