
CANADA / JUDGMENT

McKibbon v. BDO Canada Limited

2020 BCCA 7

COURT

British Columbia Court of Appeal

DECIDED

7 January 2020

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2020 BCCA 7 McKibbon v. BDO Canada Limited

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

McKibbon v. BDO Canada Limited ,

2020 BCCA 7

Date: 20200107

Docket: CA46145

IN THE MATTER OF THE BANKRUPTCY OF

William Edward McKibbon

Between:

William Edward McKibbon

Appellant

(Bankrupt)

And

BDO Canada Limited, Dustin Joslin, and Stewart Rennie

Respondents

(Trustee)

Before:

The Honourable Madam Justice Garson

(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated May 30, 2019 (McKibbon (Re), 2019 BCSC 848, Vernon Docket 52581).

Counsel for the Appellant:

A. Calvert

Counsel for the Respondents:

S.D. Dvorak

Place and Date of Hearing:

Vancouver, British Columbia

November 22, 2019

Place and Date of Judgment:

Vancouver, British Columbia

January 7, 2020

Summary:

The applicant applies for leave to appeal pursuant to s. 193(e) of the Bankruptcy and Insolvency Act on the question of whether fraudulent intent is required to revoke the discharge of a trustee under s. 41(8) of the Act. Held: Application granted. The applicant raises an arguable case on the question of statutory interpretation.

Reasons for Judgment of the Honourable Madam Justice Garson:

- [1] Mr. McKibbon applies for leave to appeal pursuant s. 193(e) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 [BIA]. He also seeks an order that the time to file and serve the notice of motion for leave to appeal and the motion book be extended to September 18, 2019. The respondents consent to the application for an extension of time but oppose the application for leave to appeal.
- [2] The underlying appeal is a challenge to an order discharging a trustee in bankruptcy. Mr. McKibbon submits that to revoke the discharge of a trustee in bankruptcy under s. 41(8) of the BIA, proof of fraudulent intent is not required to establish suppression or concealment of a material fact. His application was denied by a Supreme Court judge.

I. Background

- [3] Mr. McKibbon made an assignment into bankruptcy on July 2, 2013. He was discharged from bankruptcy on February 24, 2016, after successfully fulfilling the terms of a conditional discharge order pronounced on January 4, 2016. The trustee in bankruptcy was discharged on November 5, 2016.

- [4] Mr. McKibbon proposes to file a civil claim against his former trustee in bankruptcy, the respondent BDO Canada Limited. Mr. McKibbon says that as a result of the conduct of his trustee he has been required to pay additional income taxes that should have been paid from the surplus funds in the bankruptcy, and, further, that owing to the misconduct of the trustee there was a delay in his discharge that resulted in his suffering a significant loss of income. He alleges that the trustee's conduct amounts to suppression or concealment of a material fact.
- [5] The steps he must follow to commence a civil suit against his former trustee in bankruptcy are somewhat procedurally complex. On discharge of the trustee, s. 41(8) of the BIA provides for a release of all liability unless the discharge is revoked. Therefore, Mr. McKibbon must first satisfy the requirements of s. 41(8) in order to revoke the discharge. Absent a court-ordered revocation, s. 41(8) is an absolute bar to civil liability of the trustee. If Mr. McKibbon is successful in obtaining an order revoking the discharge, he may then apply pursuant to s. 215 of the BIA for leave to commence an action against the trustee. In this case, Mr. McKibbon has commenced a proceeding under s. 41(8) and also one pursuant to s. 215. Counsel have agreed to proceed first under s. 41(8) as it may be dispositive of Mr. McKibbon's proposed claim against his former trustee. It is the s. 41(8) application that is before me by way of an application for leave to appeal the dismissal of his s. 41(8) application before a Supreme Court chambers judge.

A. Proceedings in the Court Below

- [6] Mr. McKibbon sought to revoke the discharge of his trustee pursuant to s. 41(8) in a hearing before Justice Hori in chambers. On May 30, 2019, in reasons indexed as McKibbon (Re), 2019 BCSC 848, Justice Hori dismissed Mr. McKibbon's application to revoke the trustee's discharge.
- [7] As to the factual allegation underlying the claim, the chambers judge said:
- [13] The applicant submits that when the trustee applied for a discharge it should have disclosed to the court the following facts but instead concealed and suppressed them for the purposes of obtaining a discharge:
- a) that the surplus income had been incorrectly calculated by the trustee;
 - b) the method by which the trustee calculated the surplus income; and
 - c) that the trustee had erroneously prepared the applicant's pre- and post- bankruptcy income tax returns.

(the "Alleged Material Facts")

- [8] At paras. 18 and 19 the chambers judge found there was no evidence of intentional conduct:

- [18] Finally, there is no evidence from which I can conclude that the trustee's failure to disclose the Alleged Material Facts was intentional. The applicant suggests that the failure to disclose was motivated by the trustee's desire to avoid civil liability under the protection of section 41(8) of the Act. However, the evidence falls short of establishing this theory. There is no evidence that the trustee was concerned about civil liability before it applied for a discharge. There is no evidence that the trustee was put on notice that it should be concerned about civil liability before it applied for a discharge. The evidence is that the trustee had proceeded through this bankruptcy with the view that the surplus income calculations were done in the proper manner and that the income tax issues, which had been created by the Canada Revenue Agency, were corrected.
- [19] Accordingly, I have concluded that there is no basis upon which any fraudulent intention that can be inferred on the part of the trustee in failing to disclose the Alleged Material Facts in its discharge application. Therefore, the application to revoke the trustee's discharge is dismissed.
- [9] As for the legal test to revoke a discharge under s. 41(8), the chambers judge concluded that an applicant is required to establish that any suppression or concealment of facts by the trustee was done fraudulently: at paras. 8-10.
- [10] The chambers judge dismissed the application. Mr. McKibbon appeals this order.

II. The Legislation

[11] Section 41 of the BIA provides:

41 (1) When a trustee has completed the duties required of him with respect to the administration of the property of a bankrupt, he shall apply to the court for a discharge.

- (7) Nothing in or done under authority of this section relieves or discharges or shall be deemed to relieve or discharge a trustee from the results of any fraud.
- (8) The discharge of a trustee discharges him from all liability
- (a) in respect of any act done or default made by him in the administration of the property of the bankrupt, and
- (b) in relation to his conduct as trustee,

but any discharge may be revoked by the court on proof that it was obtained by fraud or by suppression or concealment of any material fact.

Section 193 of the BIA provides:

193 Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:

- (e) in any other case by leave of a judge of the Court of Appeal.

III. Positions of the Parties

- [12] Mr. McKibbon submits that in order to revoke the discharge of a trustee in bankruptcy under s. 41(8), proof of fraudulent intent is not required to establish suppression or concealment of a material fact. Rather he submits that actual knowledge of an undisclosed material fact is sufficient to meet the test under s. 41(8). He suggests that s. 41(8) should be read in a somewhat bifurcated manner. The first part of the section provides that a discharge may be revoked if it was obtained by fraud. He says the second part of the section, "or by suppression or concealment of any material fact," may be met by a lesser standard.
- [13] Mr. McKibbon acknowledges that a mere allegation of negligence would not meet the statutory test. But he says the fraud requirement does not modify the words "suppression or concealment of any material fact."
- [14] He contends that at issue in the proposed appeal is a question of statutory interpretation: is proof of fraudulent intent required to establish "suppression or concealment of a material fact" for the purpose of s. 41(8) of the BIA? If it is not, should this Court revoke BDO's discharge on the basis of the correct legal test or order a new hearing?
- [15] The respondents submit that leave should not be granted. The respondents argue that motivating the application to revoke the discharge is a civil claim against the trustee that is now time barred (though Mr. McKibbon says it is not time barred because he has already filed the s. 215 application.) As a result, the trustee contends, there is no live controversy between the parties and the appeal has become moot. On this application, I am not able to reach any conclusion about whether the claim is barred by the effluxion of time and I would not decide the application on this basis.
- [16] The respondents further submit that the proposed appeal raises no issues of general importance to bankruptcy practice. They say the chambers judge followed law that has been settled for many years.
- [17] The respondents submit that the appeal has no merit because the decision of the chambers judge involved the exercise of discretion. The respondents also contend that there is nothing in the record to show that the discharge was obtained by fraud, suppression, or concealment of a material fact.
- [18] In a new argument not raised in the court below the respondents rely on s. 62 of the Bankruptcy and Insolvency General Rules, C.R.C., c. 368, for the proposition that because this was a summary administration (meaning that no court appearance was required to effect the discharge), any knowledge that Mr. McKibbon imputes to the trustee is not material. The respondents say that only two criteria are required to obtain the discharge, namely:

62 The trustee of the estate of a bankrupt under summary administration shall apply for taxation of the trustee's accounts and for the discharge of the trustee by sending to the Division Office

- (a) the trustee's final statement of receipts and disbursements, in prescribed form; and
- (b) the dividend sheet, showing the dividends paid or to be paid to the creditors of the bankrupt.

[19] I would not decide the application on the basis of s. 62.

IV. The Test for Leave

[20] In *Farm Credit Canada v. Gidda*, 2015 BCCA 236 at para. 11 (Chambers), Justice Goepel citing *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONCA 282 articulated the test for granting leave under s. 193(e) of the BIA. The test inquires whether the proposed appeal:

- a) raises an issue that is of general importance to the practice in bankruptcy/insolvency matters or to the administration of justice as a whole, and is one that this Court should therefore consider and address;
- b) is *prima facie* meritorious, and
- c) would unduly hinder the progress of the bankruptcy/insolvency proceedings.

[21] Justice Goepel noted that these criteria are functionally identical to the general test for leave to appeal set out in *Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp.* (1988), 19 C.P.C. (3d) 396 (B.C.C.A.), which direct an inquiry into:

- [1] whether the point on appeal is of significance to the practice;
- [2] whether the point raised is of significance to the action itself;
- [3] whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and
- [4] whether the appeal will unduly hinder the progress of the action.

[22] In the general test for leave to appeal, the overarching concern is the interests of justice: *Hanlon v. Nanaimo (Regional District)*, 2007 BCCA 538 (Chambers) at para. 2. As per Justice Goepel in *Farm Credit Canada*, the two tests above are functionally identical, and this includes the requirement that I consider the interests of justice in an application for leave to appeal under s. 193(e) of the BIA.

V. Analysis

[23] I accept that the appeal is of significance to the parties and will not hinder the progress of the action as the bankruptcy is completed. The significance to Mr. McKibbin is that he says that not only was he required to pay additional income tax as a consequence of the conduct of the trustee, but additionally he lost significant income also attributable to the trustee's conduct.

- [24] Mr. McKibbon submits that, due to uncertainty in the law, the proposed appeal is significant to the practice generally and provides this Court with an opportunity to offer an authoritative interpretation of s. 41(8) of the BIA. He submits that only two appellate decisions have considered s. 41(8) or its predecessors, and neither discusses the issue of interpretation raised in this proceeding: *Lachapelle c. Verdier* (1990), A.C.W.S. (3d) 286 (C.A.Q.) and *Mann v. KPMG Inc.*, 2001 SKCA 45. Mr. McKibbon argues that the interpretation of the chambers judge is based on a line of only three cases from the Superior Court of Quebec that adopt the reasoning in *Re Harris: Ex parte Hasluck*, [1899] 2 Q.B. 97, an English case that required an element of fraud: *Delorme, (Sindic de)*, 2011 QCCS 236; *Denis, (Faillite de)*, J.E. 99-1919, 1999 CanLII 11481 (Q.C.C.S.); and *Leclair c. Ginsberg, Gingras et associés Inc.*, J.E. 88-925, 1988 CarswellQue 1057 (C.S.Q.). Two other Canadian lower court decisions simply refused to find suppression or concealment without any discussion of the provision: *Rodd v. Welton*, 104 A.C.W.S. (3d) 626 (Ont. Sup. Ct.) and *Alec Smith Decorating Ltd. v. Parkland School Division No. 63* (1982), 16 A.C.W.S. (2d) 154 (Sask. Q.B.).
- [25] The respondents submit that because the law has been settled for over a century, this proposed appeal raises no issue of general importance.
- [26] I turn to the evidentiary record in order to clarify the nature of the allegations that Mr. McKibbon proposes to advance.
- [27] In support of the application, Mr. McKibbon relies on his own affidavit and those of his wife. Mrs. McKibbon looked after Mr. McKibbon's business and financial affairs. She recounts a difficult bankruptcy with many miscalculations and mistakes by the trustee concerning Mr. McKibbon's tax liability. She alleges the trustee did not inform the court that there was a \$10,000 discrepancy and further that the trustee was aware of this issue but failed to advise the court the taxes were in dispute. At paras. 74, 81, 82, and 83 of her second affidavit she says:
74. Mr. Joslin also knew at the time of the hearing on January 4, 2016 that the estate was not realized or complete because there was still a \$10,000 discrepancy in the 2013 taxes that has not been corrected. It is clear that if Mr. Joslin had been correct in his opinion that the amount owed to the 2013 post-bankruptcy taxes was approximately \$2,000 then this may not have made much difference in the final reconciliations, but he was not correct. The amount owed was closer to \$10,000 and Mr. Joslin and BDO were responsible for the errors, the delays and the allocation of funds from the pre-bankruptcy to the post-bankruptcy.
81. I understood that based on my correspondence and conversations with Mr. Joslin that he was at all times aware of the 2013 tax issues and discrepancies involved in the estate.
82. To the best of my knowledge, and upon a review of the trustees' Form 82 Report, and the Statement of Receipts and Disbursements, the trustee did not inform the court that there was a \$10,000 discrepancy in the 2013 taxes that had not yet been corrected.

83. Mr. Joslin was aware of this issue and he knew that a final calculation remained. Mr. Joslin reported to the court [t]hat this estate was realized and complete on the Form 82 even though the amount of the post-bankruptcy taxes was still in dispute.
- [28] The chambers judge considered this evidence and held that there was no evidence from which he could conclude that the trustee intentionally failed to disclose material facts.
- [29] Mr. McKibbon raises an issue of statutory interpretation. He submits that if Parliament had not intended suppression or concealment to offer an alternative to fraud, it could have omitted the phrase as it did in s. 180(2) of the BIA, which provides for the annulment of a bankrupt's discharge if "obtained by fraud." Mr. McKibbon submits that, in his proposed test, suppression or concealment requires only that the applicant show that the trustee had actual knowledge of the material facts at issue. Mr. McKibbon says that here the trustee had actual knowledge of undisclosed material facts, namely that the surplus income was incorrectly calculated and that income tax returns were erroneously prepared. Further, he says this is evidence of intentional conduct sufficient to meet the statutory test.
- [30] In saying that the trustee's knowledge of the inaccuracy of the tax calculation is sufficient evidence to ground his legal argument that intentional conduct, even in the absence of fraud, he raises an arguable point.
- [31] I conclude that there is a prima facie argument on this basis and accordingly grant leave to appeal.

VI. Disposition

- [32] The application to extend the time to apply for leave to appeal and to file the motion book to September 18, 2019 is granted. Pursuant to s. 193(e), leave to appeal is granted.

"The Honourable Madam Justice Garson"

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