
CANADA / JUDGMENT

Michie (Re)

2020 BCSC 1611

COURT

Supreme Court of British Columbia

DECIDED

29 October 2020

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2020 BCSC 1611 Michie (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Michie (Re),

2020 BCSC 1611

Date: 20201029

Docket: B150483

Registry: Vancouver

Estate No. 11-1955575

In Bankruptcy and Insolvency

In the Matter of the Bankruptcy of

Dawn Lanelle Michie

Between:

Jodie Lynn Guthrie, formerly Jodi Lynn Waters, formerly Jodi Lynn Michie

Appellant

And

Grant Thornton Limited, formerly Abakhan & Associates Inc.

Respondent

In Chambers

Before: The Honourable Mr. Justice Gomery

Reasons for Judgment

Counsel for the Appellant:

J.R. Shewfelt

Counsel for the Respondent:

J. Williams

Counsel for James Michie:

G. Hooper

Place and Date of Hearing:

Vancouver, B.C.

September 29, 2020

Place and Date of Judgment:

Vancouver, B.C.

October 29, 2020

Introduction

- [1] Dawn Michie became bankrupt in January 2015. Her estate consisted of a single asset, namely, her interest, if any, in a fund of approximately \$108,000 held in court to the credit of a foreclosure proceeding. On the application of her trustee in bankruptcy (the "Trustee"), this money was paid to the Trustee.
- [2] Soon after the money was paid to the Trustee, it was claimed by Jodie Guthrie as property to which she was legally entitled to have access in connection with a costs award in her favour. Ms. Guthrie made her claim pursuant to s. 81 of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 [BIA]. The Trustee disputed Ms. Guthrie's claim.
- [3] Ms. Guthrie and the Trustee litigated Ms. Guthrie's claim through an application to this Court and on up to the Court of Appeal. Ms. Guthrie won. The Court of Appeal ordered the Trustee to make the funds available to Ms. Guthrie to satisfy her judgment for costs. The Court granted the Trustee its costs out of the bankrupt's estate on a solicitor and client basis and remitted all other matters to this Court.
- [4] The difficulty is that the \$108,000 held by the Trustee is not nearly sufficient to satisfy Ms. Guthrie's claim and the Trustee's claims on a taxation of its accounts pursuant to ss. 151-152 of the BIA. Ms. Guthrie is owed approximately \$91,000. The Trustee claims more than \$90,000, including remuneration of \$29,253.50 and legal fees incurred of \$61,096.54. The Trustee maintains that its claims take priority over Ms. Guthrie's entitlement. After satisfying these claims and paying miscellaneous expenses, it proposes to remit to Ms.

Guthrie approximately \$14,000, less costs incurred in fighting this application.

- [5] In effect, both parties have spent more litigating entitlement to the fund than is justified by the amount in issue. Ms. Guthrie maintains that it is unjust that she should be deprived of the fruits of her ultimately successful appeals in order that the Trustee may be compensated in large part for time and legal expenses incurred in unsuccessfully contesting her claim. The Trustee says that it was obliged to defend Ms. Guthrie's claim and maintains that it should be compensated for costs incurred in the administration of the estate, including assets not divisible among the creditors. It is possible that both are right, but one's right must take priority over the other's. The question is, which one?
- [6] The question comes before the Court on cross-applications brought by the Trustee and Ms. Guthrie. Ms. Guthrie applies for an order that the Trustee deliver to her \$90,808.31 pursuant to s. 81 of the BIA. The Trustee applies for orders: (1) taxing its final statement of receipts and disbursements or, alternatively, referring its accounts to the Registrar for taxation; and (2) determining its priority to the amount it is owed.
- [7] The costs Ms. Guthrie is entitled to recover are payable both from the fund held by the Trustee and personally by James Michie. At the hearing before me, Mr. Michie appeared by counsel to support Ms. Guthrie's position. He would rather that her judgment against him were satisfied from the funds held by the Trustee.
- [8] Mr. Michie further submits that the quantum to Ms. Guthrie's entitlement to costs has not yet been finally determined. Ms. Guthrie says that it has. I deal with this issue in a post-script at the conclusion of these reasons.

Background

- [9] Ms. Guthrie was formerly married to Mr. Michie. The bankrupt, Ms. Michie, was married to Mr. Michie after Ms. Guthrie. Ms. Michie and Mr. Michie are now also divorced.
- [10] Ms. Guthrie sued Mr. Michie after the breakdown of their marriage. At the time, Ms. Guthrie was known as Jodi Lynn Waters. That action was tried before Justice Humphries of this Court. Her reasons for judgment are reported as *Waters v. Michie*, 2012 BCSC 639. On May 3, 2012, Humphries J. made the following order (the "Entitlement Order"):
10. The transfer by James Alexander Michie to Dawn Lanelle Michie of the lands and premises located at 1104 Alderwood Avenue, Port Coquitlam, British Columbia (the "Alderwood Property") was a fraudulent conveyance within the meaning of the Fraudulent Conveyance Act and is void and of no force and effect insofar as it affects the rights of the Claimant Jodi Lynn Waters [Ms. Guthrie] as judgment creditor of the Respondent James Alexander Michie.

11. The Claimant [Ms. Guthrie] is entitled to pursue her just and lawful remedies as a judgment creditor against the Respondent James Alexander Michie as if he were still the legal and beneficial owner of the Alderwood Property to the same extent as he was before the transfer of the Alderwood Property, including that the Claimant is entitled to register judgments against James Alexander Michie on Dawn Lanelle Michie's title to the Alderwood Property.
- [11] On December 21, 2012, Humphries J. ordered that Mr. Michie pay Ms. Guthrie's costs of the proceeding (the "Costs Order"). Justice Humphries' reasons for the Costs Order are indexed at 2012 BCSC 1942. The Costs Order states:

The Respondent James Alexander Michie shall pay to the Claimant Jodi Lynn Waters the costs of this proceeding to be assessed on the scale of ordinary difficulty under Appendix B of the Supreme Court Family Rules.

- [12] Ms. Guthrie appealed the Costs Order, seeking special costs. Mr. Michie cross-appealed. In reasons indexed at 2013 BCCA 441, both appeal and cross-appeal were dismissed. Mr. Michie subsequently applied to the Court of Appeal to reopen his appeal. On March 23, 2015, the Registrar of the Court of Appeal advised that Mr. Michie's request to re-open would be held in abeyance until the assessment of costs was concluded in the Supreme Court.
- [13] Ms. Michie held title to the Alderwood Property described in the Entitlement Order. Pursuant to the declaration contained in the Entitlement Order, Ms. Guthrie registered the Costs Order against title to the Alderwood Property on May 17, 2013.
- [14] Ms. Michie had mortgaged the Alderwood Property to lenders who commenced foreclosure proceedings. By court order, the Alderwood Property was sold and net proceeds of sale of \$108,029 were paid into court.
- [15] Ms. Michie filed a notice of bankruptcy on January 30, 2015.
- [16] On notice to Ms. Guthrie and other judgment creditors, the Trustee applied to court for an order that the funds in court be paid to the Trustee. The application was unopposed. On March 12, 2015, Justice Bowden ordered that the \$108,029 together with accrued interest be paid to the Trustee.
- [17] On April 22, 2015, Ms. Guthrie filed with the Trustee a proof of claim for the reclamation of property pursuant to s. 81 of the BIA. Pursuant to s. 81(2), the Trustee was required to either admit the claim and deliver the property or provide written reasons for disputing the claim within 15 days.
- [18] Section 81 of the BIA provides, in part:

Persons claiming property in possession of bankrupt

81 (1) Where a person claims any property, or interest therein, in the possession of a bankrupt at the time of the bankruptcy, he shall file with the trustee a proof of claim verified by affidavit giving the grounds on which the claim is based and sufficient particulars to enable the property to be identified.

How claim disposed of

(2) The trustee with whom a proof of claim is filed under subsection (1) shall within 15 days after the filing of the claim or within 15 days after the first meeting of creditors, whichever is the later, either admit the claim and deliver possession of the property to the claimant or send notice in the prescribed manner to the claimant that the claim is disputed, with the trustee's reasons for disputing it, and, unless the claimant appeals the trustee's decision to the court within 15 days after the sending of the notice of dispute, the claimant is deemed to have abandoned or relinquished all his or her right to or interest in the property to the trustee who may then sell or dispose of the property free of any right, title or interest of the claimant.

[19] On April 28, 2015, the Trustee delivered a written notice disputing the claim.

[20] Ms. Guthrie appealed the Trustee's decision to this Court. In written reasons dated November 3, 2016 and indexed at 2016 BCSC 2030, Justice Skolrood dismissed the appeal.

[21] Ms. Guthrie appealed to the Court of Appeal. In written reasons dated March 2, 2017 and indexed at 2017 BCCA102, Justice Newbury gave judgment for the Court allowing the appeal.

[22] The Court of Appeal's order states:

AND THIS COURT FURTHER ORDERS THAT the Notice of Dispute of Abakhan & Associates Inc., in its capacity as trustee in bankruptcy of Dawn Lanelle Michie, and the decision therein, made on April 28, 2015, pursuant to section 81(2) of the Bankruptcy and Insolvency Act, is set aside.

AND THIS COURT FURTHER ORDERS THAT the trustee make the remaining proceeds from the sale of [the Alderwood Property], being \$108,029.76, plus accrued interest, available to the Appellant to the extent necessary to enforce her costs order and any other judgment she may have against James Alexander Michie.

AND THIS COURT FURTHER ORDERS that the Appellant is entitled to her costs of this appeal payable by the trustee out of the bankrupt estate and not by the trustee personally.

AND THIS COURT FURTHER ORDERS that the trustee may recover its costs out of the bankrupt estate on a solicitor and client basis.

AND THIS COURT FURTHER ORDERS all other matters, including those relating to the foreclosure proceedings are to be determined by the Court below.

- [23] On March 14, 2017, the Trustee was served with a garnishing order after judgment attaching \$7,489.30 of any funds payable by the Trustee to Ms. Guthrie.
- [24] On November 3, 2019, Ms. Guthrie obtained a certificate of the costs owing to her under the Costs Order. It stated that the costs were \$74,808.58.
- [25] On December 3, 2019, Ms. Guthrie delivered the costs certificate to the Trustee and demanded payment of \$90,808.31, which includes accrued post-judgment interest.
- [26] On April 13, 2020, the Trustee delivered to Ms. Guthrie and other creditors its proposed Final Statement of Receipts and Disbursements, pursuant to which the Trustee would be paid fees of \$29,253.50 and its counsel would be paid fees of \$58,371.98 plus GST. Following payment of other disbursements, Ms. Guthrie would be paid \$13,888.75, but the Trustee noted:

The Trustee's accounts including its fees and costs, including legal costs, are subject to any further costs related to taxation of its accounts. Should the Trustee's accounts be subject to a taxation hearing, its further costs will result in a corresponding reduction of the funds available to be paid under the Court Directed Payment.

- [27] On April 28, 2020, Ms. Guthrie filed a notice of objection to the remuneration claimed by the Trustee and its Final Statement of Receipts and Disbursements.

Analysis

- [28] Ms. Guthrie claims the benefit of her successful appeal. The Court of Appeal's order directs the payment of the funds in issue to her, to the extent necessary to enforce her costs order.
- [29] It is worth noting that Ms. Guthrie's claim is not grounded in equity. She does not maintain that the Trustee received or holds the funds in trust for her. Her claim is one of legal, not equitable, entitlement. She says that she was legally entitled to receive the funds held in court to Ms. Michie's credit in the foreclosure proceeding, to the extent of her (then unquantified) claim for costs, and that the Trustee was legally obliged to account to her for the funds in its possession to the extent of her entitlement pursuant to s. 81 of the BIA.
- [30] Ms. Guthrie's claim to the funds having been established by the Court of Appeal, the question is whether the Trustee has a prior claim to the funds.
- [31] Accepting that the funds claimed by Ms. Guthrie are not divisible among Ms. Michie's creditors, the Trustee says they nevertheless are property that it was obliged to administer. The funds came into the Trustee's possession on notice to Ms. Guthrie and without objection from her. The Trustee was obliged to address Ms. Guthrie's claim to the funds and her appeals to this Court and the Court of Appeal. Having done so, the Trustee claims a charge on the funds for the expenses of the estate administration.

- [32] The Trustee relies on *Re Residential Warranty Company of Canada Inc.*, 2006 ABQB 236, *aff'd* 2006 ABCA 293 [Residential Warranty], and *Re Sangha*, 2018 BCSC 1049. The significance of these cases in the context of the present dispute lies less in what they decided than in the general principles applied in coming to a decision.
- [33] The issue in *Residential Warranty* and *Sangha* concerned the ongoing administration of estates in bankruptcy where the estates were subject to undetermined trust claims of creditors. These were claims to constructive trusts advanced by the creditors in outstanding litigation. In each case, the question was whether the trustee should be able to defend the claims and have access to estate assets to secure the payment of its fees notwithstanding the claimants' claims that the assets were held in trust for them and might not constitute property divisible among the creditors. In each case, the court secured the trustees' fees and disbursements against the assets in question. Giving judgment for the Alberta Court of Appeal in *Residential Warranty*, Paperny J.A. concluded, at para. 41:
- [41] There is inherent jurisdiction to permit trustee's fees to be paid from property that is subject to undetermined trust claims in appropriate circumstances. The case management judge recognized the power must be used sparingly and did not err in exercising jurisdiction in this case.
- [Emphasis added]
- [34] As I have already noted, the present case does not involve fees and disbursements incurred by the Trustee for the resolution of an undetermined claim to a constructive trust. The legal right underlying Ms. Guthrie's claim has been determined by the Cost Order.
- [35] It is important to consider the source, extent, and justification of the jurisdiction identified in *Residential Warranty* and *Sangha*. Justice Topolniski addressed this question in careful and fully considered reasons at first instance in *Residential Warranty*. She identified a general rule with two exceptions. The general rule is that the trustee does not have access to trust assets to fund its own work. The two exceptions are therefore critical. She stated:
- [41] Ordinarily, a trustee in bankruptcy will not be funded from trust assets unless it shows that its work was necessary to preserve or otherwise benefit the trust assets, [footnote omitted] or the work was required for resolution of the trust claim or to sort out beneficiaries.
- [42] The first exception developed as a result of the court's exercise of inherent jurisdiction in ordinary trust cases, a topic reviewed in some depth by Sigurdson J. in *Re Gill* [2002 BCSC 1401 at para. 23] and Tysoe J. in *Re Eron Mortgage Corp.* [(1998), 53 B.C.L.R. (3d) 24 (S.C.)]. The court's inherent jurisdiction in this regard has been exercised sparingly and generally in circumstances where the beneficiary would have had to hire someone else to do the work performed by the trustee. [footnote omitted] The second exception flows from the trustee in bankruptcy's duty under the BIA to approve or disallow of claims. [footnote omitted]

[Emphasis added]

- [36] The first exception is not available to the Trustee in this case. The work performed by the Trustee was not necessary to preserve, manage, or otherwise benefit the assets held in trust; *Re Gill* at para. 23. Had the Trustee succeeded on appeal, it would have been otherwise, but the Trustee lost and the estate gained nothing from its efforts. The Trustee's case rests on the second exception.
- [37] Justice Topolniski cites the following authorities as authority for the second exception: *Re Rideout Real Estate Ltd.* (1957), 36 C.B.R. 111 (Ont. H.C.J.); *Re NRS Rosewood Real Estate Ltd.* (1992), 9 C.B.R. (3d) 163 (Ont. Ct. (Gen. Div.)); *Re Nakashidze* (No. 2), [1948] O.R. 254; *Re Walter Davidson Ltd.* (1957), 10 D.L.R. (2d) 77 (Ont. H.C.J.).
- [38] These cases are far from extensively reasoned. They all involve situations in which a trustee in bankruptcy had to address claims that assets that had come into the trustee's possession from the bankrupt belonged to third party claimants. In *Nakashidze*, the bankrupt was a stockbroker who had pledged shares belonging to his clients to a bank to secure a loan for himself. In *Walter Davidson*, the funds in question were the remains of a statutory hold-back and were held in trust for the benefit of persons who supplied material and services to the bankrupt. In *Rideout Real Estate* and *NRS Rosewood*, the bankrupts were real estate brokers and the funds were deposits held in trust by the brokers. In each case, the court held that the third party claimants were entitled to recover the funds or assets but declared a charge over the funds or assets to secure the trustee's remuneration and legal fees.
- [39] Notably, in *Nakashidze* and *NRS Rosewood*, the court held that only a part of the trustee's fees and costs should be secured against the assets in question. In *Nakashidze*, Urquhart J. stated:

In regard to the securities awarded herein to Schaeffer and the Chafes, I am of the opinion that they should bear some portion of the trustee's cost of administration and therefore I direct that the trustee shall have a lien for 5 per cent of the value of the securities as of the date of the bankruptcy.

[40] In *NRS Rosewood*, Austin J. stated:

As the question had to be settled one way or another, and as the Trustee took the initiative, it is only reasonable that some part of the Trustee's fees be paid out of the property in issue. Counsel for the Trustee suggested \$25,000 to cover both the Trustee's and legal fees [sic]. Having regard to the nature of the questions and the number of parties, this does not strike me as unreasonable.

[41] I take from these cases and Residential Warranty the following propositions:

- a) The general rule is that the trustee does not have access to trust assets to fund its own work.
- b) As an exception to the general rule, the court has jurisdiction to grant a trustee in bankruptcy a charge over assets administered by the trustee, even where they do not form part of the estate divisible among creditors, to secure payment of the trustee's fees and reasonable disbursements.

- c) Whether a charge should be granted and, if so, its extent is discretionary.
- d) In exercising its discretion, the court may consider:
 - i. Whether the trustee was required to address the ownership of the assets in the course of the administration of the estate;
 - ii. Whether the trustee took the initiative or otherwise positively contributed to the resolution of an uncertain situation;
 - iii. The work done by the trustee and the public interest in the orderly administration of bankrupt estates;
 - iv. The interests of the persons entitled to the assets in question and their actions; and
 - v. the interests of justice.

[42] In this case, several considerations favour the Trustee's claim to a charge over the funds in issue. The initial steps taken by the Trustee to secure the funds held in court in the foreclosure proceeding were clearly justified and contributed to the orderly administration of the bankrupt's affairs. Because the Trustee came into possession of the funds in issue before Ms. Guthrie asserted her claim, it was obliged to address the ownership issue when she raised it. Ms. Guthrie's claim for costs was initially unquantified. Even today, it is only a claim to a part of the funds the Trustee had received. Even if it had recognized Ms. Guthrie's claim as valid, the Trustee would not have been in a position to satisfy it until Ms. Guthrie's costs were assessed.

[43] Pointing in the other direction is the nature of the dispute raised by the Trustee to Ms. Guthrie's claim. It was a dispute on a question of Ms. Guthrie's legal entitlement pursuant to the order of Humphries J. It is obvious from the fact that the Trustee succeeded at first instance that the point was an arguable one. It is equally obvious from the decision of the Court of Appeal that the Trustee's position was legally mistaken. In my view, it is not in the interests of justice that the Trustee should obtain a full indemnity for fees and costs incurred in taking a position that was legally misconceived, where the burden of that indemnity would fall substantially on the party that got the law right.

[44] Reconciling these competing considerations as best I can, in my view, the Trustee should obtain a charge over the funds in its possession to the extent necessary to permit it to recover 50% of its reasonable fees and disbursements.

[45] There is no issue as to the amount of the Trustee's reasonable fees and disbursements. All creditors were notified of the Trustee's application to pass its accounts. Only Ms. Guthrie objected and her objection raised what she maintained was her prior claim to be paid pursuant to s. 81 of the BIA. That objection is resolved by my decision in this case. In its Final Statement of Receipts and Disbursements, the Trustee listed receipts of \$109,334.81 and, inclusive of its fees but excluding the proposed payment of \$13,888.75 to Ms. Guthrie, disbursements of \$95,445.06. I grant it a priority over Ms. Guthrie's claim to the extent

necessary to permit it to recover one-half of \$95,445.06 or \$47,722.53.

The quantum of Ms. Guthrie's claim

- [46] Ms. Guthrie holds a costs certificate quantifying the amount owing under the Costs Order. The costs certificate is itself an entered order of the Court. It has not been appealed. The amount owing, including post-judgment interest, is \$90,808.31.
- [47] Mr. Michie maintains that the costs certificate could be undermined if the Court of Appeal were to re-open its dismissal of his cross-appeal of the underlying Costs Order. Mr. Michie's request to re-open has been held in abeyance by the Court of Appeal for more than five years, since March 2015. At this stage, re-opening is a purely theoretical possibility. Mr. Michie has not applied for a stay of enforcement of the costs certificate since it was obtained in November 2019.
- [48] If at some future time, the cross-appeal were to be re-opened and to succeed, then it might follow that Ms. Guthrie would have to repay money she had been paid pursuant to the Costs Order. Until that occurs, the Costs Order, and the costs certificate quantifying the amount payable under the Costs Order, are valid orders with immediate legal effect.
- [49] It is clear that Ms. Guthrie's claim exhausts the funds available. She is entitled to be paid all the funds in the Trustee's possession following satisfaction of the Trustee's prior claim.

Disposition

[50] For these reasons:

- a) The Trustee is entitled to be paid \$47,722.53 on account of its fees and disbursements;
- b) Subject to the garnishing order attaching \$7,489.30 of the funds payable by the Trustee to Ms. Guthrie, the balance of the funds held by the Trustee on account of this estate will be paid to Ms. Guthrie.

[51] As success has been divided, there will be no order as to costs.

"Gomery J."

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