

CANADA / JUDGMENT

Sellathamby (Re)

2020 BCSC 1567

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1567 Sellathamby (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Sellathamby (Re),

2020 BCSC 1567

Date: 20201023

Docket: Victoria

Registry: 180017

IN THE MATTER OF THE CONSUMER PROPOSAL OF VIREINDRA

CHRISTOPHER SELLATHAMBY

Before: The Honourable Mr. Justice Steeves

Reasons for Judgment

Counsel for the applicant David Lofthaug:

S. Dvorak

Counsel for Vireindra Christopher Sellathamby:

C. Reedman

Place and Date of Hearing:

Victoria, B.C.

July 23, 2020

Place and Date of Judgment:

Victoria, B.C.

October 23, 2020

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INTRODUCTION

- [1] This is an application by a creditor, David Lofthaug, under the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 ("BIA") and the Bankruptcy and Insolvency General Rules, C.R.C., c. 368 ("General Rules"), for orders related to a consumer proposal. A Notice of Intention to Make a Proposal was filed by the debtor, Vireindra Christopher Sellathamby, in December 2015.
- [2] For clarification, unlike the style of cause, the spelling used in this decision reflects the correct spelling of Mr. Sellathamby's first name, as was done by Master Bouck in 2019 BCSC 2061.
- [3] The specific orders sought by the creditor in this application (by means of a Notice of Motion filed August 14, 2018) are as follows:
1. That the consumer proposal (the "Consumer Proposal") of Vereindra Christopher Sellathamby (the "Debtor"), be annulled.
 2. That G. Moroso & Associates Inc., Licensed Insolvency Trustee (the "Substituted Trustee"), be appointed as Trustee in connection with the Consumer Proposal.

3. A declaration that the Notice of Disallowance of the Applicant's Proof of Claim, issued by Abakhan on December 5, 2017 (the "Notice of Disallowance"), is a nullity and of no force or effect, and that the Notice of Disallowance be vacated.
4. That the Applicant have its costs of and incidental to this application, assessed as special costs, or alternatively at such scale as this Honourable Court may deem just and appropriate, payable forthwith and in any event of the cause, pursuant to Supreme Court Civil Rule 14-1 and the Bankruptcy and Insolvency General Rules.
- [4] The applicant creditor relies on s. 135 of the BIA to support his position that the proposal trustee did not value his claim or decide it in a timely manner and this prevented him from exercising his rights under the consumer proposal. The principal argument of the applicant is that the Notice of Disallowance issued in 2017 is a nullity because the trustee was discharged from his duties as a trustee at the time and did not have the authority to issue the notice. It is submitted that if I find the 2017 Notice of Disallowance is a nullity, then a new trustee should be appointed to examine and evaluate the applicant's claim.
- [5] The respondent is the debtor under the consumer proposal and he opposes the subject application. His principal argument is that the applicant should not be permitted to challenge the Notice of Disallowance in this forum. Rather, the applicant had an opportunity to appeal the Notice of Disallowance but he missed the deadline of which he was clearly aware. It is submitted that it would be an abuse of process to allow the applicant to circumvent the deadline by seeking relief in this manner. The respondent also argues that the trustee was permitted to issue the Notice of Disallowance after being discharged. This was "incidental" and thus permitted by s. 41(10) of the BIA.
- [6] In the event I find the December 2017 Notice of Disallowance is a nullity, the respondent opposes the substitution of a new trustee and, in the alternative, says if a new trustee is appointed that trustee should be located in Victoria, where the respondent debtor resides.
- [7] The trustee is not participating in this application other than providing an affidavit.
- [8] Submissions by counsel focused entirely on the relief sought in orders 2 and 3 in the Notice of Motion. It appears from reading the Notice of Motion that, according to the applicant, in the event I grant the relief sought in orders 2 and 3, this matter will be returned to the "Substituted Trustee." And depending on that trustee's findings, counsel for the applicant will apply again to this Court and seek the relief sought in order 1. This was the same approach counsel took when arguing this application before a Registrar in Bankruptcy of this Court in November 2019 in which the Registrar declined jurisdiction.

A. BACKGROUND

- [9] In 2008 a consent judgment involving the parties was issued by the Alberta Court of Queen's Bench. It decided the respondent debtor had liability for the debts owed but quantum was not determined. There is an order from 2014 stating that a trial will be held to determine damages but that trial has never occurred.
- [10] On December 9, 2015 the respondent debtor filed a Notice of Intention to Make a Proposal under s. 66 (Division II) of the BIA. The proposal was administered by Abakhan and Associates as the Proposal Trustee.
- [11] On January 22, 2016 the applicant creditor filed a Proof of Claim with the trustee relating to outstanding damages from Alberta. The Proof of Claim included an expert report setting out a valuation of the applicant's losses from investments and commissions. The value of those losses was described as \$1,144,000-\$1,239,000. There were two heads of damages: loss of investment value and loss of potential commissions. The respondent debtor also filed an expert report on the same subject. It concluded that the losses were substantially less than the valuation in the applicant's expert report.
- [12] Sometime between February 2016 and September 2016 there was a meeting of the creditors and they voted in favour of the consumer proposal. The applicant creditor was not at the meeting. He says he never received notice of the meeting and he did not receive any communication from the trustee until a Notice of Disallowance was sent to him in December 2017. In his affidavit, the trustee deposes that a Notice of Disallowance was prepared in February 2016 and he believed it had been sent by registered mail to the applicant at that time (or, perhaps, a previous trustee had sent it).
- [13] In September 2016, the trustee certified that the consumer proposal had been fully performed and approved by the eligible creditors, and the money had been paid out in accordance with the proposal. In December 2016, the trustee obtained a discharge under s. 41 of the BIA.
- [14] In December 2017, approximately one year after his discharge, the trustee learned there was no record of mailing the Notice of Disallowance in February 2016 to the applicant, and he executed another copy of the Notice of Disallowance, dated December 5, 2017.
- [15] In an affidavit sworn by the trustee, these events are explained as follows:
5. Attached as Exhibit "A" to this Affidavit is a true copy of the statement of affairs of Mr. Sellathamby provided by to me by Four Pillars [a debt consultant].
 6. I discussed Mr. Sellathamby's statement of affairs with him. After my discussion with Mr. Sellathamby, I had no reason to believe that the statement of affairs was anything but accurate.

7. On behalf of Abakhan [name of trustee's company], I received and considered the proof of claim of Mr. Lofthaug [applicant creditor]. Shortly after he submitted it to Abakhan, I noted that the claim was with regard to a court action in Alberta which had been under way since no later than 2008. I also noted that the court in Alberta, in the intervening period, had not made a determination as to the quantum owing to the plaintiffs in that action.
 8. The trustee was not in any better position than the Court to make a determination as to the value, if any, of the claim. In the circumstances where the trustee is unable to place a value on a claim, it is the practice of the Trustee to disallow the claim.
 9. Accordingly, I prepared a Notice of Disallowance in February, 2016 that was signed by [name omitted] at our Vancouver office. I believed at that time that the disallowance had been sent from our Vancouver office by registered mail to Mr. Lofthaug's mailing address.
 10. When I learned, in 2017, that Abakhan had no record of mailing the Notice of Disallowance, I executed a second copy and delivered the executed second copy of the Notice of Disallowance to Mr. Lofthaug by registered mail.
 11. Abakhan did not receive notice of an appeal from Mr. Lofthaug within 30 days of serving the Notice of Disallowance in 2017.
- [16] There is no documentary evidence before me of any registered mail as described above and there is no Notice of Disallowance dated February 2016 before me. The applicant deposes that he never received a Notice of Disallowance in 2016.
- [17] The applicant did receive a Notice of Disallowance dated December 5, 2017 and this is in evidence. Among other things it stated:

I [the trustee] have disallowed your claim in whole, pursuant to subsection 135(2) of the Act, for the following reasons:

You have not provided the documentation quantifying the amount of your claim as per the Consent Judgement dated September 2, 2008.

- [18] The applicant sought an extension of time for appealing the December 2017 Notice of Disallowance. An order of this court dated January 4, 2018 granted an extension to February 5, 2018. A Notice of Motion was then filed on February 7, 2018. The respondent raises this appeal as a problem with the subject application.

B. ANALYSIS

[19] As above, among other things, the applicant creditor seeks to have the December 2017 Notice of Disallowance declared a nullity. The applicant also says that the trustee was required to value his claim but did not do so. In these circumstances, according to the applicant, a new trustee should be appointed. The respondent says that, if the applicant had a remedy, it was through the appeal system but the applicant has now missed the time period for any appeal.

[20] The applicable parts of the BIA are:

Trustee shall examine proof

135 (1) The trustee shall examine every proof of claim or proof of security and the grounds therefor and may require further evidence in support of the claim or security.

Determination of provable claims

(1.1) The trustee shall determine whether any contingent claim or unliquidated claim is a provable claim, and, if a provable claim, the trustee shall value it, and the claim is thereafter, subject to this section, deemed a proved claim to the amount of its valuation.

Disallowance by trustee

- (2) The trustee may disallow, in whole or in part,
- (a) any claim;
 - (b) any right to a priority under the applicable order of priority set out in this Act; or
 - (c) any security.

Determination or disallowance final and conclusive

(4) A determination under subsection (1.1) or a disallowance referred to in subsection (2) is final and conclusive unless, within a thirty day period after the service of the notice referred to in subsection (3) or such further time as the court may on application made within that period allow, the person to whom the notice was provided appeals from the trustee's decision to the court in accordance with the General Rules.

[Emphasis added.]

[21] Subsections 135(3) and (5) relate to, respectively, notice of determination or disallowance and "expunge" or reduce a proof.

[22] I will address the following issues:

- (a) Is the December 2017 Notice of Disallowance a nullity?

(b) Should a new trustee be appointed?

(a) Is the December 2017 Notice of Disallowance a nullity?

[23] The chronology of events for this issue is that the applicant filed his Proof of Claim in January 2016 (the respondent had filed a Notice of Intention to Make a proposal in December 2015). Some time after that there was a meeting of the creditors (but without the applicant) and they voted in favour of the consumer proposal. In September 2016 the trustee certified that the consumer proposal was fully performed and he obtained a discharge from his duties in December 2016. Then, in December 2017, a Notice of Disallowance was sent to the applicant.

[24] I will discuss these events as sub-issues.

(i) Notice of Disallowance

[25] The trustee deposes that a previous Notice of Disallowance was prepared and signed in February 2016 and it had been sent to the applicant. But he also deposes that he learned in 2017 that his office had no record of mailing the notice and a "second copy" was executed and delivered. There is no evidence of the 2016 document or any evidence it was sent such as, for example, records of registered mail. On the evidence before me I can only conclude that, if this notice was prepared in 2016, it was not sent to the applicant creditor.

[26] The result was that the applicant had no knowledge of what occurred with his claim. Specifically, the evidence supports the applicant's contention that he received no notice of the creditors' meeting or had any opportunity to participate in the meeting. I make that finding.

[27] It follows that the only Notice of Disallowance that can be considered is the one prepared and issued in December 2017, after the meeting of the creditors and after the trustee was discharged from his duties. It is that Notice that the applicant seeks to have declared as a nullity.

[28] The December 2017 Notice of Disallowance stated that the reason for the disallowance was that the applicant had not provided documentation quantifying the amount of his claim (pursuant to the Alberta consent judgement). However, the applicant has provided sworn evidence that he did provide that documentation in the form of the July 2012 expert report. In addition, the respondent creditor provided a counter expert report. The result was that the trustee had something of a full record before him concerning the applicant's claim.

[29] I conclude that the lack of documentation could not be a reason to disallow the subject claim, as relied on in the December 2017 Notice. Instead the trustee erred when he stated there was no documentation of the claim and he made a decision to disallow the applicant's claim without any evidence to support that decision.

(ii) Valuation

[30] The trustee was required to value the applicant's claim. This is set out in the following provisions of the BIA which I set out again:

Trustee shall examine proof

135 (1) The trustee shall examine every proof of claim or proof of security and the grounds therefor and may require further evidence in support of the claim or security.

Determination of provable claims

(1.1) The trustee shall determine whether any contingent claim or unliquidated claim is a provable claim, and, if a provable claim, the trustee shall value it, and the claim is thereafter, subject to this section, deemed a proved claim to the amount of its valuation.

[Emphasis added.]

[31] In the subject application, the applicant's claim related to the 2008 Alberta Court of Queen's Bench consent judgment, where liability was admitted by the respondent, but quantum had not yet been determined. The claim was clearly unliquidated as a specific value of the claim had not yet been determined.

[32] In his affidavit the trustee explained that he "received and considered" the applicant's claim. I accept that this complies with the requirement in s. 135(1) to "examine" every Proof of Claim.

[33] However, the trustee also noted that the Alberta court made no determination on the quantum owing. This was apparently significant because in the next paragraph of his affidavit he relies on it as the reason for disallowing the applicant's claim and then preparing a Notice of Disallowance:

8. The trustee was not in any better position than the Court to make a determination as to the value, if any, of the claim. In the circumstances where the trustee is unable to place a value on a claim, it is the practice of the Trustee to disallow the claim.

[34] This paragraph is enigmatic and problematic. The thrust of it appears to be that, because the Alberta court did not make any determination of quantum, the trustee was not in any better position to do so. Further, when a claim cannot be valued the "practice" is to disallow the claim as was done here. This is apparently a reference to the 2016 Notice of Disallowance that was not provided to the applicant. The effect was to deny him important rights of participation in the proceedings before the trustee.

[35] In any event, a trustee under s. 135(1.1) of the BIA, has a responsibility to value a claim (after examining it). If the reasoning of the trustee includes some deference to the court in Alberta on the valuation issue then that is not exercising the duties of a trustee under the BIA. Similarly, the trustee appears to have concluded that he was unable to place a value on the claim because the Alberta court had not made any determination on it. There is no evidence that the court declined to make a determination on quantum or otherwise rejected or

dismissed anyone's interests on quantum. I do not agree that the fact that the court in Alberta made no determination of quantum means that the trustee was somehow unable to place a value on the claim submitted to him.

- [36] The trustee was required by s. 135(1.1) of the BIA to value a claim before disallowing (or allowing) it and there is no basis for concluding the Alberta proceeding somehow decided, pre-empted or superseded the proceeding before the trustee. Any reliance on the Alberta court for a decision for the trustee under the BIA would have been a fettering of the statutory responsibility of the trustee.

(iii) Provable claim

- [37] The trustee was also required to determine if the claim was a "provable claim" as set out in s. 135(1.1) above. Section 2 of the BIA is also applicable:

Definitions

2. In this Act,

claim provable in bankruptcy, provable claim or claim provable includes any claim or liability provable in proceedings under this Act by a creditor;

- [38] Again, the applicant creditor is a holder of a consent judgment from the Alberta Court of Queen's Bench for liability in connection with a commercial contract. The parties agree that a holder of a judgment for liability in connection with a commercial contract has a provable claim for the purposes of s. 2 of the BIA. I agree with that interpretation: that it is clearly a liability provable by the applicant creditor under the BIA and meets the definition in s. 2. I also note that it meets the requirement for a provable claim as emphasized in *Re Wiebe* (1995), 30 C.B.R. (3d) 109 (Ont. Gen. Div.) that such a claim must be recoverable by legal process. And, while it was not fully argued, this result appears to be consistent with s. 121(1) and (2) of the BIA.

- [39] As the two prerequisites were clearly met on the facts before him, the trustee was required by s. 135(1.1) to value the unliquidated, provable claim. I note the use of the word "shall" demonstrates that the trustee was required to value the claim where the prerequisites were met and he had no discretion not to value it. He may value a claim at zero.

- [40] The trustee here disallowed the applicant's claim because the trustee did not have the documentation required. As above, the evidence is that there was a full record before the trustee.

(iv) Discharge of trustee

- [41] There is then the fact that the December 2017 Notice of Disallowance was issued by the trustee after he applied for and was discharged in December 2016.

[42] The provisions of the BIA set out what is to be done by a trustee with a Notice of Disallowance. Section 135(3) of the BIA states:

- (3) Where the trustee makes a determination under subsection (1.1) or, pursuant to subsection (2), disallows, in whole or in part, any claim, any right to a priority or any security, the trustee shall forthwith provide, in the prescribed manner, to the person whose claim was subject to a determination under subsection (1.1) or whose claim, right to a priority or security was disallowed under subsection (2), a notice in the prescribed form setting out the reasons for the determination or disallowance.

[Emphasis added.]

[43] In my view, the delivery of a Notice of Disallowance one year after the decision to disallow is not providing it "forthwith." There was apparently a belief within the trustee's office that it had been sent in February 2016 but, as above, the evidence is that it was not provided until December 2017.

[44] Similarly, the General Rules state as follows:

Code of Ethics for Trustees

36 Trustees shall perform their duties in a timely manner and carry out their functions with competence, honesty, integrity and due care.

[Emphasis added.]

[45] I conclude that provision of the Notice of Disallowance one year after the trustee was discharged and almost two years from the applicant's Proof of Claim is not a timely discharge of the trustee's duties. Certainly, providing the Notice after the meeting of the creditors and after the vote to approve the proposal cannot be considered timely.

[46] It is true, as emphasized by the respondent, that the trustee has some residual authority following his discharge. This is set out in s. 41(10) of the BIA:

Application to court

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Trustee remains

(10) Notwithstanding his discharge, the trustee remains the trustee of the estate for the performance of such duties as may be incidental to the full administration of the estate.

[Emphasis added.]

[47] In a previous judgement Master Patterson discussed what duties are "incidental" (Re Sindaco, 2003 BCSC 1396):

[17] In considering the effect of s.41(10), the court must consider what is meant by the words "such duties as may be incidental" to the administration of the estate. The Shorter Oxford Dictionary defines incidental as "occurring or liable to occur in fortuitous or subordinate conjunction with something else."

[18] It is my view that the legislation contemplates the trustee being able to complete minor matters and tie up loose ends pursuant to s.41(10)

[Bold in original, underlining added.]

[48] In my view, issuing a Notice of Disallowance to a creditor after the consumer proposal is fully performed does not constitute "tying up loose ends" or "completing minor matters." By that time the creditors' meeting was completed and the proposal had been voted on without the applicant being able to exercise important rights of participating. For example, he could not speak on the proposal because he did not know about it and he could not vote at the meeting of the creditors because he did not know about the meeting and, therefore, exercise his rights as a creditor.

(v) Conclusion: Is the 2017 Notice of Disallowance a nullity?

[49] In the circumstances here the trustee did not value the applicant's claim as he was required to do under the BIA. Instead he wrongly concluded that the claim was not supported by any documentation. He also appears to have deferred to the Alberta court regarding the valuation of the applicant's claim; a matter he was required to decide. And he was required to prove the claim but did not do so.

[50] In the usual course these matters would be legitimate issues for an appeal under s. 135(4) of the BIA. I agree with the respondent's submission to that extent and disagree with the applicant that, taken by themselves, they do not amount to a nullity.

[51] The problem here is that there is no dispute that the trustee issued the December 2017 Notice of Disallowance after he requested and was granted discharge from his duties in December 2016. Section 41(1) of the BIA states that an application to court for a discharge is made when a trustee "has completed the duties required of him." A trustee may perform duties incidental to the full administration of the estate after his discharge but issuing a Notice of Disallowance is not an incidental duty or otherwise tying up loose ends.

[52] In my view the December 2016 discharge of the trustee is significant because at that point he did not have the authority or jurisdiction to make determinations under s. 135 of the BIA. That is, assuming the trustee properly valued the applicant's claim (without, for example, deferring to the Alberta court) and he assessed the full record before him, he could not have made a decision to disallow (or allow) the claim because his authority to make those decisions ended with his discharge as trustee. His option at that point was to request a re-appointment as trustee (Re Sindaco, at para. 18). The respondent submits that, as a practical matter, a trustee cannot always be re-appointed and he or she should have the discretion to determine and value proofs of claim after discharge. However, s. 41(10) of the BIA is very

clear that a trustee can only decide "incidental" matters after discharge.

- [53] It follows that the trustee's Notice of Disallowance in December 2017 was made without any legal force or effect. That is, I agree with the applicant creditor that it is a nullity.
- [54] Returning to the issue of an appeal under the BIA, s. 135(4) states that an appeal is available for a "determination under subsection (1.1) or a disallowance referred to in subsection (2)." The respondent says that the applicant should have appealed the trustee's decision but he has missed the time period for any appeal and that is the end of the matter. The respondent also submits that what the applicant is seeking here amounts to a collateral attack on the trustee's decision and in the wrong forum (*Garland v. Consumers' Gas Co.*, 2004 SCC 25, at para. 71). The subject application should be dismissed on that basis as well, according to the respondent. I disagree.
- [55] Section 135(4) states that a right to appeal is available for a "determination under subsection (1.1) or a disallowance referred to in subsection (2)." But there was no determination of a provable claim or disallowance of a claim because the authority of the trustee to make those decisions had ended some time after his discharge (and they were not incidental issues). I have some difficulty accepting that there can be an appeal of a null decision. I also am unable to find that there was a binding order that could be the subject of a collateral attack.
- [56] As for the reference in s. 135(4) to "a disallowance referred to in subsection (2)" that is a statement of the remedial authority available to a court. In my view it is to be read with, for example, s. 135(1.1) and it would be anomalous to describe a decision made solely under subsection (2); some substantive basis for a decision under subsection (2) is required.
- [57] In summary, as the trustee's decision in December 2017 was a nullity the applicant was not limited to his right of appeal under the BIA to challenge that decision. Nor can the subject application be dismissed as a collateral attack on the December 2017 decision.
- (b) Should a new trustee be appointed?
- [58] Having decided above that the December 2017 decision of the trustee was a nullity the next issue is what remedy follows from that decision.
- [59] As a starting point, the fact that the original proposal has been approved and implemented raises obvious difficulties. And yet the fact remains that the applicant's claim was not considered by a trustee with the authority to value it. In the circumstances here I conclude that a new trustee should be appointed and I turn to how that can be done. I note that the applicant has not plead s. 37 of the BIA which authorizes a court to "confirm, reverse or modify the act complained of and make such order in the premises as it thinks just."
- [60] Section 14.04 of the BIA provides for the removal and appointment of a trustee:

Removal and appointment

14.04 The court, on the application of any interested person, may for cause remove a trustee and appoint another licensed trustee in the trustee's place.

[Emphasis added.]

[61] This provision was discussed in a previous judgement relied on by the respondent (Re Herman, 1930 2 D.L.R. 471 (Ont. S.C. (A.D.)) at 477, leave to appeal ref'd 11 C.B.R. 318 (S.C.C.)):

Counsel for the trustee contends that under s. 37(2) [a predecessor to s. 14.04] there is power to appoint a new trustee and in any event the Act contemplates a trustee continuing to be a trustee notwithstanding his discharge and that he had authority as such to apply for directions.

In my opinion Rose, J., was right in holding that s. 37 (2) had no application to the present case. That section means that creditors may by resolution at any time, and for reasons that may appear to them proper, remove a trustee, and if the removal is not made at the instance of creditors by resolution, then it may be effected on an application to the Court for cause, such as, I take it, that a trustee has been guilty of misconduct or fraud or dishonesty or has become bankrupt or otherwise incapable of acting as a trustee.

[Emphasis added.]

[62] Counsel for the applicant did not put any authority before me on this point and did not dispute this interpretation of s. 14.04.

[63] On the evidence before me, while there are certainly problems in the December 2017 decision of the trustee, I cannot conclude that he is guilty of misconduct, fraud or dishonesty, has become bankrupt or is otherwise incapable of acting as a trustee. The trustee exceeded his authority by incorrectly interpreting s. 135 of the BIA and by not acting in a timely manner but that does not rise to the level of "cause" for the purpose of s. 14.04. Nor has the applicant proven his specific allegation of fraud against the respondent.

[64] There is then s. 41(11) of the BIA which permits the appointment of a trustee when assets have not been realized or distributed:

41

(11) The court, on being satisfied that there are assets that have not been realized or distributed, may, on the application of any interested person, appoint a trustee to complete the administration of the estate of the bankrupt, and the trustee shall be governed by the provisions of this Act, in so far as they are applicable.

[Emphasis added.]

[65] In Re Sindaco, Master Patterson discussed this provision in the following terms:

[18] It is my view that the legislation contemplates the trustee being able to complete minor matters and tie up loose ends pursuant to s.41(10) but that does not extend to taking possession of after-acquired assets. The correct procedure is for an application to be made to re-appoint the trustee or to appoint a new trustee to take possession of the after-acquired assets pursuant to s.41(11) BIA

[Emphasis added.]

[66] A prerequisite of appointing a trustee to complete the administration of the estate under s. 41(11) is a finding that there are assets that were not realized or distributed. I am not making findings with respect to fraud, as this was not argued before me and presumably will be addressed in a subsequent application for annulment of the consumer proposal, the relief sought under order 1.

[67] The following are assets that were not realized or distributed, according to the applicant's materials:

- (a) various patents;
- (b) "hidden assets," including overseas funds and land; and
- (c) an outstanding claim in damages against the debtor's former legal counsel in Alberta, of which former counsel has admitted negligence. The Alberta Lawyers' Insurance Association has indicated it is prepared to indemnify the debtor for any amount owing from that negligence.

[68] On the evidence before me, I am not satisfied that the patents are an asset of the debtor. The only evidence I have on this point is the applicant's assertion that patents were invented by the debtor on his own and under his former company and I have a copy of a print-out from the website "Justia Patent Searches." This states "Christopher Sellathamby has filed for patents to protect the following inventions" and then provides details with relation to each patent application and grant. Counsel did not take me through this document to establish that, for instance, the debtor is in fact the holder of the patents.

[69] There is also affidavit evidence of the debtor that the patents were irrevocably assigned to the company he previously worked for. He attached one assignment of invention form to his affidavit as an example. In looking at the Justia Patent Searches print-out, it is clear that each patent except one has the name of a company as an assignee of the patent. With respect to the one exception, without further evidence and explanation I am not satisfied that the debtor is in fact the current holder of the patents. I again note that the debtor has deposed he irrevocably assigned the patents to the company he worked for, and this would presumably include this one patent.

[70] I cannot conclude that the patents are in fact assets of the debtor rather than of his former company. Thus the patents are not "assets that have not been realized or distributed" under s. 41(11).

- [71] The debtor categorically denies the existence of the "hidden assets" comprised of the land and overseas funds. I am asked to find otherwise solely on the basis of the applicant's assertions that there are hidden assets. However, without more evidence, I am not satisfied that the alleged "hidden assets" are "assets that have not been realized or distributed" under s. 41(11).
- [72] With respect to the outstanding Alberta Lawyers' Insurance Association claim, I am also not satisfied that an outstanding insurance claim against former legal counsel is, at this point in time, an asset. The details of this claim are few and, for example, there is no evidence before me about the amount of damages that will be paid out on the insurance claim. I do not agree that what appears to be the prospect of insurance proceeds amounts to an after acquired asset and, therefore, it is not a basis for appointing a new trustee under s. 41(11).
- [73] Finally, I note that I have jurisdiction under s. 183 of the BIA to do "what is right and equitable in the circumstances of a case" (*Sellathamby (Re)*, 2019 BCSC 2061, at para. 5; citing *Bennet on Bankruptcy*, 15th Edition, at 594 and s. 183 of the BIA). In my view it is necessary here to have a timely resolution of the applicant's claim to the trustee. It has been outstanding since 2016 and the intervening events have made it more complicated, to perhaps understate the situation. It was submitted by the applicant that, if the December 2017 Notice of Disallowance is a nullity, the remedy should be the appointment of a different trustee (the respondent emphasized that their first position is that the December 2017 Notice of Disallowance is not a nullity).
- [74] In these exchanges during argument the applicant proposed an order that reinstates Grant Thornton (formerly Abakhan) to adjudicate on the claim, subject to Grant Thornton providing a consent to act within 14 days (in its Notice of Motion the applicant sought the appointment of a new firm of trustees). I adopt that change in the applicant's position and add that the reinstated trustee be located in Victoria, British Columbia.
- [75] I exercise my authority under s. 183 of the BIA to do "what is right and equitable in the circumstances" and make that order.

D. SUMMARY

- [76] The applicant seeks orders that, among other things, would nullify the trustee's December 2017 Notice of Disallowance.
- [77] At the time of the 2017 Notice the trustee had applied for and had been granted discharge from his duties. As well, the consumer proposal had been presented at a meeting of creditors in 2016 and voted on. The applicant was not part of these proceedings because he was not told about them, although he had submitted a claim to the trustee with an expert report (and the debtor had submitted a counter expert report). There is no evidence of a Notice of Disallowance sent to the applicant in 2016.

- [78] Since the trustee was discharged of his duties at the time, the trustee was without authority to issue the 2017 Notice of Disallowance under s. 135 of the BIA. Section 41(10) permits a trustee to perform incidental duties after discharge but issuing a Notice of Disallowance is not an incidental matter. It is, therefore, a nullity. There was no determination of the applicant's claim and, therefore, no appeal could have been made under s. 135(4) and the subject Notice of Motion is not a collateral attack on the 2017 notice. The notice also failed to value the applicant's claim and it was not done in a forthwith or timely manner as required by s. 135(1.1) and (3) of the BIA.
- [79] The firm of Grant Thornton (through offices in Victoria, British Columbia) is reinstated pursuant to the broad, equitable authority under s. 183 of the BIA to value the applicant's claim and make the orders necessary to complete the respondent's consumer proposal. I make no comment on the validity or value of the applicant's claim.
- [80] I appreciate that the issues discussed above were for the most part out of the control of the respondent. However, the problem of the applicant's unrecognized claim was clear and the respondent has opposed resolving that problem except through litigation. The applicant has been substantially successful and is entitled to his costs from the respondent under Scale B. The applicant's application for special costs is based on an assertion of fraud by the respondent, but that has not been proven and is denied.

"The Honourable Mr. Justice Steeves"

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