

CANADA / JUDGMENT

Shoker (Re)

2021 BCSC 2396

COURT

Supreme Court of British Columbia

DECIDED

9 December 2021

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2021 BCSC 2396 Shoker (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Shoker (Re),

2021 BCSC 2396

Date: 20211209

Docket: B190443

Estate No.: 11-2437017

Registry: Vancouver

In Bankruptcy

In the Matter of the Bankruptcy of

Gurpreet Singh Shoker

Before: Master Harper

Reasons for Judgment

Counsel for the Applicant, Royal Bank of Canada, appearing via telephone conference:

K.O. Labelle

Counsel for the Bankrupt, Gurpreet Singh Shoker, appearing via telephone conference:

B. La Borie

Counsel for the Trustee, Boale Wood & Company Ltd., appearing via telephone conference:

G. Dabbs

Place and Date of Hearing:

Vancouver, B.C.

October 27, 2021

Place and Date of Judgment:

Vancouver, B.C.

December 9, 2021

Introduction

- [1] The bankrupt, Gurpreet Singh Shoker, made an assignment into bankruptcy on October 29, 2018 and has recently obtained his discharge. The Royal Bank of Canada ("RBC") is a major creditor of Mr. Shoker. RBC filed a proof of claim in the amount of approximately \$508,518 which amounts to more than half of Mr. Shoker's total debts of about \$933,000.
- [2] Mr. Shoker owns a one-sixth interest in real property located in Surrey, British Columbia (the "property"). RBC seeks an order pursuant to s. 38 of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 ("BIA"), allowing it to commence and prosecute an action against Mr. Shoker under the Partition of Property Act, R.S.B.C. 1996, c. 347 ("PPA") to have the one-sixth interest sold.
- [3] The property is a 6,900 square feet home with eight bedrooms and four bathrooms. The other co-owners are members of Mr. Shoker's family. In his sworn Statement of Affairs dated October 29, 2018, Mr. Shoker stated that the value of the property was \$1,400,000.
- [4] In keeping with common practice, the Trustee in bankruptcy, Boale Wood & Company Ltd. (the "Trustee") agreed that Mr. Shoker (or any of the co-owners of the property) could purchase the non-exempt portion of the one-sixth interest from the estate. Until January, 2019, Stephen Boale was the responsible trustee, following which David Wood took over. Rather than obtaining a professional appraisal of the property, Mr. Boale invited Mr. Shoker to obtain a comparative market analysis ("CMA") from a realtor of Mr. Shoker's choosing. The Trustee came to an agreement with Mr. Shoker that he could purchase the one-sixth interest for \$32,000. The Trustee based this amount on the range of values set out in the CMA of \$1,300,000 to \$1,375,000, after taking into account notional real estate commission, the mortgage, and the exempt portion of Mr. Shoker's interest.
- [5] The BC Assessment for 2019 set the value of the property at \$1,675,000.
- [6] RBC obtained a curbside appraisal in October, 2021 setting the current value of the property at \$2,000,000 to \$2,500,000.

- [7] RBC's position is that the agreement the Trustee asserts whereby Mr. Shoker could buy back his one-sixth interest for \$32,000 was not properly concluded because any agreement between the Trustee and Mr. Shoker, including the final agreement as to price, had to be approved by RBC because RBC was an inspector. RBC argues that the final agreement as to price was made after it became an inspector and without its approval, and is therefore invalid.
- [8] RBC does not oppose Mr. Shoker buying back the one-sixth interest from the estate, but says that the price should be based on a current expert opinion on fair market value.
- [9] The Trustee's position is that although the final price was not agreed to until after RBC became an inspector, the Trustee reached a final agreement with Mr. Shoker for "market value" before RBC became an inspector, and therefore the agreement is valid.
- [10] Mr. Shoker filed an application response and a supporting affidavit. As a general rule, a bankrupt is not entitled to notice of a s. 38 application and has no standing to appear and oppose it unless doing so necessary to safeguard the integrity of the process.
- [11] For the reasons that follow, I have determined that:
- a) RBC has leave to commence and prosecute a proceeding under the PPA in accordance with the detailed form of order attached to the notice of application;
 - b) the appropriate date for valuing the property will be determined in the proceeding;
 - c) RBC will be required to pay the Trustee the sum of \$32,000 within 21 days of the release of these reasons; and
 - d) Mr. Shoker does not have standing on this application.

Applicable Law

- [12] Section 38 of the BIA provides a mechanism for a creditor to proceed with an action where the trustee refuses or fails to act, thereby ensuring that assets of the bankrupt, which may otherwise go unrecovered, are available to a creditor who is willing to finance the litigation: *Toyota Canada Inc. v. Toronto-Dominion Bank*, 1994 ABCA 261.
- [13] Section 38 states:

Proceeding by creditor when trustee refuses to act

38 (1) Where a creditor requests the trustee to take any proceeding that in his opinion would be for the benefit of the estate of a bankrupt and the trustee refuses or neglects to take the proceeding, the creditor may obtain from the court an order authorizing him to take the proceeding in his own name and at his own expense and risk, on notice being given the other creditors of the contemplated proceeding, and on such other terms and conditions as the court may direct.

Transfer to creditor

- (2) On an order under subsection (1) being made, the trustee shall assign and transfer to the creditor all his right, title and interest in the chose in action or subject-matter of the proceeding, including any document in support thereof.

Benefits belong to creditor

- (3) Any benefit derived from a proceeding taken pursuant to subsection (1), to the extent of his claim and the costs, belongs exclusively to the creditor instituting the proceeding, and the surplus, if any, belongs to the estate.

Trustee may institute proceeding

- (4) Where, before an order is made under subsection (1), the trustee, with the permission of the inspectors, signifies to the court his readiness to institute the proceeding for the benefit of the creditors, the order shall fix the time within which he shall do so, and in that case the benefit derived from the proceeding, if instituted within the time so fixed, belongs to the estate.

[14] To obtain an order under s. 38(1), an applicant must satisfy the court that four criteria are met:

- a) the applicant must be a creditor of the bankrupt estate;
- b) the applicant must have requested that the trustee undertake the proceeding that the applicant now seeks permission to undertake itself;
- c) the trustee must have refused or neglected to undertake the requested proceeding; and
- d) there is threshold merit to the proposed proceeding, i.e., it is not obviously spurious.

See *Smith v. Pricewaterhousecoopers Inc.*, 2013 ABCA 288

[15] A trustee has broad statutory authority to settle claims involving the estate. Where there are inspectors, the trustee's power is circumscribed. Section 30(1)(a) provides that the trustee may, with the permission of the inspectors, sell property of the bankrupt for a price the inspectors approve. If there are no inspectors, the trustee may sell the property of the bankrupt: BIA, s. 30(3).

[16] Although s. 30(1) is silent as to whether the permission of the inspectors must be in writing, there is judicial authority for the proposition that permission must be in writing: "The trustee has no power, without the consent of the inspectors in writing, to sell property belonging to the estate": *Jones v. McClean*, [1931] 2 D.L.R. 244 (Man. C.A.) at 252 (emphasis added).

[17] If there are no inspectors, the trustee may sell the property of the bankrupt: BIA, s. 30(3).

- [18] Mr. Shoker filed an application response and affidavit, but, as a general rule, a bankrupt does not have standing to be heard on this type of application: *Re Coroban Plastics Ltd.* (1994), 34 C.B.R. (3d) 50 (B.C.C.A.).

Issues

- [19] There is no question that the first three criteria of Smith are met. Only the fourth criterion is at issue: is there threshold merit to the proposed proceeding, i.e., is it not obviously spurious? This question turns on whether there was a binding agreement between the Trustee and Mr. Shoker on all terms, including price, before RBC became an inspector on June 5, 2019.
- [20] A further issue arises if I find that there was a final and binding agreement before RBC became an inspector. In this scenario, RBC takes issue with the Trustee's agreement to accept \$32,000 as that amount was based on a lack of due diligence and is far too low. A creditor is permitted under the BIA to take issue with a trustee's act or decision. Section 37 provides: "Where the bankrupt or any of the creditors or any other person is aggrieved by any act or decision of the trustee, he may apply to the court and the court may confirm, reverse or modify the act or decision complained of and make such order in the premises as it thinks just."
- [21] The creditor's remedy is to apply under s. 37 of the BIA for an order reversing or modifying the act or decision: *Re Constantini* (1991), B.C.J. No. 2684 (S.C.) at page 3. RBC could apply under s. 37 of the BIA for an order setting aside the agreement and directing the Trustee to seek the fair market value of the one-sixth interest, failing which to take steps to list the one-sixth interest for sale: *Re Brisco* (2006), 21 C.B.R. (5th) 207 (Ont. S. Ct. J.).
- [22] RBC cites *Re Brisco* in support of its argument that the Trustee's lack of due diligence favours a s. 38 order. However, *Re Brisco* is not a case involving a s. 38 application; rather, it is a s. 37 case and therefore not relevant for this application. Therefore, the second issue of the reasonableness of the Trustee's decision (if I find that there was a concluded agreement before RBC became an inspector), can only be resolved on a further application under s. 37.

Discussion

- [23] Mr. Boale's note dated November 27, 2018 says "we need to know the equity to pay". This note implies that the price for the one-sixth interest had not been ascertained yet.
- [24] Mr. Boale advised Mr. Shoker to obtain an appraisal or other form of market analysis so that the Trustee could consider the amount to be paid. There was no explanation as to why Mr. Boale allowed Mr. Shoker to obtain a CMA from a realtor Mr. Shoker chose despite Mr. Shoker's obvious conflict of interest (the lower the value, the lower the price Mr. Shoker would have to pay) and a CMA not qualifying as expert evidence. The realtor states in the CMA: "I would list the home at \$1,375,000 and see how the market reacts". This is not an expert opinion as to fair market value. A trustee should exercise caution in accepting a real

estate valuation produced by the bankrupt: Re Pelkey, 2006 ABQB 814 at para. 25.

- [25] I take from the submissions of counsel for the Trustee that Mr. Boale's thinking was that a fractional interest is difficult to value because it is difficult to sell and, therefore, some compromise on the amount payable by Mr. Shoker was in order. Mr. Boale also seemed to want to save the cost of a professional appraisal, a decision that turned out to be false economy given the cost of this litigation. In my view, if a fractional interest is indeed worth less than one-sixth of the value of the property, the first step should have been to properly value the property, and then ascertain the value of the one-sixth interest. The Trustee could then have approached the co-owners of the property directly (with the permission of RBC if the approach was after June 5, 2019) to see what price any of them, singly or collectively, would be willing to pay. Failing a satisfactory offer, Mr. Shoker's interest could have been put for sale on the open market. Although the Trustee's position is that a fractional interest is difficult to sell, RBC says there is such a market.
- [26] Rather than taking any of the above steps, Mr. Boale accepted the range of values set out in the CMA.
- [27] The Trustee's first s. 170 report dated July 26, 2019 prepared by Mr. Wood, includes the following statement: "The trustee will be determining the value of the bankrupt's portion of equity in the property ". The report goes on to state that the Trustee will be recommending Mr. Shoker's discharge be adjourned until the outstanding items have been dealt with and the results of the examination of Mr. Shoker by RBC have been obtained. I conclude from these statements that by July 26, 2019, no final and binding agreement on price was reached.
- [28] On August 7, 2019, counsel for RBC examined Mr. Shoker.
- [29] Mr. Shoker's application for discharge from bankruptcy was adjourned on November 20, 2019. RBC objected to Mr. Shoker's discharge. By that point, the Trustee was still negotiating with Mr. Shoker on the price of the one-sixth interest.
- [30] Mr. Wood calculated the amount Mr. Shoker should pay as between \$20,849.67 and \$33,185.60, with a mid-point of \$27,017.64. I understand from the evidence that this calculation was done around July, 2020. By this time, of course, RBC had been an inspector for over one year.
- [31] The Trustee prepared a second s. 170 report dated July 30, 2020. In that report, the Trustee states "the Trustee has determined the value of the bankrupt's portion of equity in the property located at [address] to be \$27,000. The bankrupt has paid \$6,500.00 towards this amount, leaving an outstanding balance of \$20,500.00."
- [32] On August 14, 2020, the solicitors for RBC requested that the Trustee take proceedings against Mr. Shoker under the PPA to have Mr. Shoker's interest in the property sold.

[33] In a letter dated August 19, 2020, Mr. Wood, on behalf of the Trustee, declined RBC's request. The CMA was enclosed with the letter. Mr. Wood stated that he saw no need to incur the expense of an unsuccessful action and that RBC had not provided any evidence that the amount offered was deficient in any way. (As an aside, I do not think there is any obligation on a creditor to provide to the trustee evidence of the value of property contained in a bankrupt's estate--it is the trustee's obligation to determine value based on due diligence). Mr. Wood said he used the approach set out in the CMA and that "we then came to a final agreement with the bankrupt at \$32,000." However, Mr. Wood contradicts himself in the next sentence: "We would be open to discussing further should evidence of a much higher value be proffered." Mr. Wood seems to acknowledge by being "open to discussing further", that RBC had the right as an inspector to approve the price and that a final agreement on price had not been reached.

[34] I cannot conclude from this letter that Mr. Wood entered into a binding agreement with Mr. Shoker as to price even as late as August 19, 2020, which is well after RBC became an inspector.

[35] Mr. Wood says at paragraph 26 of his July 9, 2021 affidavit:

I spoke to Mr. Poulsen about the proposed figure of \$27,000.00 as the Trustee's proposed balance owing and we discussed the bankrupt paying an addition of \$5,000. Whilst our recollections of that discussion may vary, I acknowledge that there was no specific agreement on the part of RBC. Nevertheless, I told Mr. Poulsen that I would suggest that figure to Mr. Shoker.

[36] There can be no binding agreement prior to the price being agreed upon. RBC did not give its permission (let alone in writing as required by the ruling in Jones) for the Trustee to sell the one-sixth interest for \$32,000.

[37] My conclusion is that the Trustee made an agreement in principle with Mr. Shoker that he could buy back the one-sixth interest at a price to be agreed upon. There was no conclusion as to price before RBC became an inspector and, therefore, the Trustee had no authority to make a final agreement with Mr. Shoker on price.

What is the proper date for the valuing of Mr. Shoker's one-sixth interest in the property?

[38] The Trustee takes the position that the valuation of the property should be as at the date of bankruptcy. RBC says the value should be the current appraised value, or probably more accurately, the value as of the date of the trial of the future proceeding. A third option is the value as at the date of Mr. Shoker's discharge from bankruptcy.

[39] There are conflicting case authorities on this point. In *ICI Paints v. Gazelle*, 2001 ABQB 233, the registrar in bankruptcy determined that the increase in value from the date of the assignment into bankruptcy to the date of discharge from bankruptcy is to be considered exempt property and therefore belongs to the bankrupt. The court on appeal, overturning the registrar's decision, held that the value should be as at the date of discharge: para. 20. Therefore, the increase in value of the property was available for the creditors. In *Re*

Lepage, 2016 ONCA 403, the Ontario Court of Appeal made a similar determination with respect to the growth in equity in the bankrupt's home.

- [40] In *Re Gwizd*, 2017 BCSC 1975, Master Taylor, sitting as a registrar in bankruptcy, distinguished *Re Lepage*, calling it a "one-off": para. 43. In *Re Gwizd*, the bankrupt got the benefit of the increase in equity: para. 44. It does not appear from the reasons for judgment that ICI Paints was brought to Master Taylor's attention.
- [41] In my view, the fairest solution to the dispute on valuation date is to leave the issue to be determined in the future proceeding. A judge of our Court, being in a superior position to a registrar, will be best able to reconcile the contradictory authorities.

Should Mr. Shoker be granted standing on this application?

- [42] In order to determine whether to grant Mr. Shoker standing, I have provisionally considered Mr. Shoker's application response and affidavit, and counsel's submissions. (The Trustee explicitly adopted certain paragraphs of Mr. Shoker's application response as its own and I have therefore considered those paragraphs as part of the Trustee's case).
- [43] A s. 38 order merely puts the creditor in the shoes of the trustee to take proceedings against a bankrupt. Of course, the trustee would be able to take those proceedings itself without the bankrupt being afforded the opportunity to object.
- [44] On a s. 38 application, neither the bankrupt nor any other proposed defendant in the intended action has a right either to notice or to be heard on the application because their rights are not affected by a s. 38 order. "The effect of the order is to transfer from trustee to creditor whatever right or action may exist--much, no doubt, as a chose in action may be contractually transferred from one party to another, without adversely affecting the debtor. The order in this case imposes no liability on the appellant which did not previously exist, and leaves it free to assert in the action every defence it ever had": *Re Coroban Plastics Ltd.*, para. 8.
- [45] The evidence of Mr. Shoker is not necessary to safeguard the integrity of this process because the Trustee's case is not reliant on Mr. Shoker. The Trustee did not find it necessary or relevant to seek to tender any evidence of Mr. Shoker.
- [46] Because a s. 38 order puts the creditor in the shoes of the Trustee, if Mr. Shoker takes the position that he and the Trustee reached a binding agreement which in turn binds RBC, he may raise that argument in the future proceeding in the same way that he could if the Trustee had taken the proceeding itself.

Should RBC be required to pay \$32,000 to the Trustee as a condition of being granted leave to bring proceedings against Mr. Shoker under the PPA?

- [47] In *W. Hanson Holdings Ltd. v. Wolrige Mahon Limited, Trustee in Bankruptcy of Intercoast Lumber Inc.* (1995), 65 B.C.A.C. 150 (C.A.), the applicant creditor was ordered by the chambers judge (upheld on appeal) to pay \$20,000 to the trustee as a term of the s. 38 order. That was the amount of the offer made earlier by the intended defendant to the trustee to purchase the claim against the intended defendant.
- [48] RBC's position is that I should only order it to pay the Trustee \$32,000 if I find that there was a binding agreement between the Trustee and Mr. Shoker. If I do not make that finding (as is the case), RBC should not be required to make the payment because the Trustee obtained it from Mr. Shoker through its own misunderstanding. Further, RBC says that requiring it to pay the \$32,000 to the Trustee is an "odd exercise" because RBC is owed more than half of Mr. Shoker's total debts, and as a result, more than half of the \$32,000 would go back to RBC in any event.
- [49] In my view, the reasoning of *W. Hanson Holdings Ltd.* applies to the present case. If RBC is not required to pay the Trustee \$32,000, there would be a potential windfall to RBC since it would receive both its share of the \$32,000 plus the proceeds of sale of the one-sixth interest. RBC, therefore, will be required to pay the Trustee \$32,000 within 21 days of the release of these reasons. RBC has the right to recover \$32,000 as a first charge against any recovery flowing from the proceedings taken by RBC against Mr. Shoker.

Costs

- [50] Costs of the application were not addressed at the hearing. Counsel may make a request through Supreme Court Scheduling to appear to address costs if the parties are unable to reach an agreement.

"Master Harper"

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