

CANADA / JUDGMENT

Tasci (Re)

2020 BCSC 1438

COURT

Supreme Court of British Columbia

DECIDED

29 September 2020

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2020 BCSC 1438 Tasci (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Tasci (Re),

2020 BCSC 1438

Date: 20200929

Docket: B180676

Estate No. 11-2326081

Registry: Vancouver

In Bankruptcy and Insolvency

In the Matter of the Bankruptcy of

Kris Sinan Tasci

- and -

Docket: S124692

Registry: Kelowna

Between:

Roy Sommerey

Plaintiff

(Defendant by Counterclaim)

And

Lynette Dianne Herbert, Just Fish-Inn Inc.,
Stonewater Ventures (No. 179) Ltd., Stonewater Ventures (No. 181) Ltd.

Defendants

(Plaintiffs by counterclaim)

And

Kris Sinan Tasci, Unknown Individual Defendants,
and Unknown Corporate Defendants

Defendants

And

Marnie Whidden

Defendant by Counterclaim

Corrected Judgment: The text of the judgment was corrected at the front page
on September 2, 2021.

Before: The Honourable Mr. Justice Davies

Reasons for Judgment

Counsel for the Applicants Lynette Hebert, Just Fish-Inn Inc., Stonewater Ventures (No. 179) Inc.
and Stonewater Ventures (No. 181) Inc.:

J. Shields

Counsel for Roy Sommerey:

K. Ihas

L. Nykolaychuk

Place and Date of Trial/Hearing:

Kelowna, B.C.

July 17, 2020

Place and Date of Judgment:

Vancouver, B.C.

September 29, 2020

INTRODUCTION

- [1] The applicants, Lynette Dianne Hebert (the personal defendant), Just Fish-Inn Inc., Stonewater Ventures (No. 179) Ltd. and Stonewater Ventures (No. 181) Ltd. (the corporate defendants) are defendants in Supreme Court of British Columbia Kelowna Registry Action No. 124692 (the Kelowna Action) commenced against them (and others) by the plaintiff, Roy Sommerey who is the respondent to this application.
- [2] The Kelowna Action was commenced against the applicants by Mr. Sommerey as a creditor of the bankrupt, Kris Sinan Tasci.
- [3] The Kelowna Action was commenced on the authority of an order pronounced by Master Schwartz on August 20, 2019 (the Order) under the provisions of s. 38 of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 [the Act].
- [4] The applicants now seek to set aside the Order together with 16 Certificates of Pending Litigation filed by Mr. Sommerey against various properties owned by the applicants.
- [5] An alternative application to strike portions of the Notice of Civil Claim in the Kelowna Action has been adjourned.
- [6] The primary bases upon which the applicants seek to set aside the Order are that:
 - 1) Mr. Sommerey, who is a practising lawyer in Kelowna, not only swore the affidavit in support of his application under s. 38 of the Act but also spoke to that application; and
 - 2) the affidavit contains unattributed hearsay and other inadmissible evidence to such an extent that it fails to disclose a cause of action.
- [7] The applicants further submit that because the application was brought on short leave without notice to any of the applicants and with minimal notice to the Trustee of the bankrupt's estate it should be considered as being "in every way an ex parte application" with attendant requirements of full and frank disclosure of all material facts. They submit that Mr. Sommerey failed to comply with those requirements and that the Order must accordingly be set aside.

BACKGROUND

- [8] On February 7, 2013 Mr. Sommerey obtained judgment against Mr. Tasci in foreclosure proceedings.
- [9] On December 14, 2017 Mr. Tasci made an assignment in bankruptcy.
- [10] Sheila Smelt and Associates of Chilliwack, British Columbia (the Trustee) became the trustee of Mr. Tasci's estate.

- [11] On February 21, 2018 Mr. Sommerer filed a proof of claim with the Trustee pursuant to which he is a secured creditor of the bankrupt in the amount of \$1,201,018.91 and an unsecured creditor in the amount of \$548,829.45. He is also an inspector of the bankrupt's estate.
- [12] Mr. Sommerer obtained short leave to proceed with the application under s. 38 of the Act on August 19, 2019 and on August 20, 2019 Master Schwartz granted the now contested Order.
- [13] In his affidavit in support of the Order Mr. Sommerer identified the corporate applicants as entities directed by the personal defendant, Lynette Hebert who is Mr. Tasci's wife.
- [14] Mr. Sommerer further deposed that before Mr. Tasci made his assignment in bankruptcy Mr. Sommerer's own wife, Marnie Whidden, had initiated collection proceedings in an attempt to recover monies owing by Mr. Tasci under a General Security Agreement granted by him to Ms. Whidden.
- [15] Those collection efforts were undertaken by a bailiff identified by Mr. Sommerer as Dustin Heywood of Consolidated Civil Enforcement Inc.
- [16] Information concerning Mr. Tasci's wife, the assets and those of the other applicants that was referred to by Mr. Sommerer in his affidavit was based primarily upon reports provided by Mr. Heywood.
- [17] In addition to that information concerning the reports and actions of Mr. Heywood, Mr. Sommerer deposed at paras. 26 to 28 of his affidavit:
26. I attended at the first meeting of the creditors of the bankruptcy of Mr. Tasci on or about June 1, 2018. I was the only creditor in attendance. The Trustee was present, as was Mr. Mr. Tasci who appeared with legal counsel. Mr. Mr. Tasci blamed me for all his financial troubles and during this meeting I believe he admitted he transferred his fishing boat either to Ms. Hebert, or one of the Stonewater or JFI.
27. Through this bankruptcy process to date, I have learned:
- a) Tasci failed to properly disclose all his creditors to the Trustee;
 - b) Tasci failed to provide information to the Trustee regarding these creditors and how to contact them so I provided whatever information he could to assist the Trustee;
 - c) Tasci has not provided all the regular monthly reports regarding his business activities and income that he is obligated to provide, and those he delivered are in my view, suspect;
 - d) On September 13, 2018, Mr. Tasci was examined by the superintendent under s. 161 BIA. He provided some financial information and stated under oath that he did not have any gainful employment or income earning activity; he did not earn significant income; he was supported by family;

- e) Tasci appears to have been able to have or maintain a more lavish lifestyle than would normally be expected for a man in his financial circumstances. His apparent lifestyle appeared to be very similar, and even more successful to that which Mr. Tasci displayed when I was first induced to loan money to him; and
 - f) The application to have Mr. Tasci discharged was opposed by me, and adjourned at the request of the Trustee, in part because of Tasci's noncompliance with his duties and obligations to the Trustee under the Trustee and he remains an undischarged bankrupt.
28. A copy of the report on that the s. 161 BIA examination of Mr. Tasci which occurred on September 13, 2018 is marked as Exhibit "D" to this Affidavit (ex. pgs. 15 to 52). This report, sworn by Mr. Tasci to be true contains information I believe is incorrect and misleading. One example is that Mr. Tasci attributes his bankruptcy to me. He stated I seized the PET and MRI scanners causing the failure of the scanning business. In fact, it was actually a landlord under a prospective lease arrangement that he participated in which seized and held them. Additionally, I contributed money for legal expenses to help fight the seizure. Eventually the landlord released the scanners and they were moved by Mr. Tasci to 20788 Landstrom Rd. in Hope. Mr. Tasci claims to be unable to work due to undisclosed medical conditions. He denies property transfers and payments to others and other creditors and he does not mention the transfer of his fishing boat.

[Quoted as written.]

[18] At paras. 30 to 31 Mr. Sommerey further deposed that:

30. Notwithstanding Mr. Tasci's statements during the s. 161 BIA examination he cannot work due to medical disability, I have reason to believe that since Mr. Tasci has always been active in business including after his assignment into bankruptcy. He denied any such conduct during his BIA examination. In particular:
- a) During 2018, I had a telephone conversation with realtor Chris Chamberlain of Penticton, B.C. who told me that he was involved as a realtor in a real estate transaction involving a person he believed to be Kris Tasci. Mr. Chamberlain reported Mr. Tasci had been acting as a purchaser but identifying himself as "Kris Hebert". Mr. Chamberlain reported that a significant deposit was paid; that the purchaser failed to complete the purchase; and a significant deposit was forfeited. He also confirmed that Kris Hebert (Tasci) I did not disclose his name as Kris Tasci and that he was an undischarged bankrupt.
 - b) During the fall of 2018, I had telephone conversations with lawyer David Burgess in Kelowna. Mr. Burgess told me he or his family were a second mortgagee lender on a rural/residential property near Casorso Rd. in Kelowna, B.C. which was for sale. Mr. Burgess told me Mr. Tasci had contacted him to advise he was the purchaser of the mortgaged property but that his financing was not enough to pay off all existing financing on the property. Mr. Tasci asked Mr. Burgess if he would be willing to continue carrying part of his mortgage financing. Mr. Burgess told me he believed there was a significant deposit paid on this

pending purchase and that it may have been non-refundable. I presently have no knowledge how this ended. Mr. Burgess stated Mr. Tasci did not disclose he was an undischarged bankrupt.

31. The exact nature of what Mr. Tasci did do and is doing in business, the money these activities made and what he did or directed to be done with it are all unknown to me. It is necessary to commence legal proceedings to obtain this information.

[Quoted as written.]

- [19] In an e-mail sent to the Trustee dated August 9, 2019 that was the genesis of his s. 38 application Mr. Sommerey asked the Trustee to provide updates on the status of Mr. Tasci's bankruptcy. At paras. 5 and 6 of that e-mail Mr. Sommerey wrote:

5. Please commence legal proceedings against Kris Tasci and his spouse and their respective companies under the BIA and the fraudulent preference in the fraudulent transfer act. They have transferred property between themselves and arranged I their financial affairs to hide funds earned by Kris Tasci through his business dealings. I would like these proceedings to be commenced as soon as possible as I became aware of them from the bailiffs report received August 30, 2017 and a two-year limitation period is coming up. If you are not able or willing to commence those legal proceedings please advise immediately so that we can seek leave the bankruptcy court to commence them ourselves. At this time it is very important that you keep this request confidential and that you do not notify anyone who might pass along this information to Mr. Tasci or those who he is not dealing with at arm's length is a preservation of evidence will be critical in our being able to successfully prosecute these proceedings.
6. Please file a report with the Superintendent of bankruptcy regarding all the BIA defences which Kris Tasci has committed with respect to this bankruptcy. This includes failing to disclose creditors and to provide information that you have requested. I have also received information that Mr. Tasci has carried on with business dealings after his bankruptcy without disclosing to others that he is an undischarged bankrupt. This information includes that he has used aliases to hide his identity and his dealings have included paying significant deposits on pending real estate deals some of which have been forfeited because of an inability to complete. All of this should be investigated and he should be prosecuted.

[Quoted as written.]

- [20] Concerning the need for short leave for the hearing of the application to commence the Kelowna Action Mr. Sommerey also deposed (at paras. 34 to 38 of his affidavit) that:

34. Trustee reported she is not able to respond to information requests concerning this bankruptcy until after she returns to work on August 20, 2019. Bankruptcy Court is scheduled for Vernon on August 20, 2019 and it is important that legal proceedings be filed prior to the end of August so it is necessary for me to proceed with this application without providing the Trustee with the advance notice that is normally provided for.
35. I wish to commence and prosecute proceedings to address these matters at my risk and expense.
36. I will deliver notice of the granting of the order for leave to the other creditors of Tasci's bankruptcy for a period within 30 days of the granting of this order and receiving updated proof of claim creditor contact information from the Trustee, as I need to focus on ensuring they be commenced this month. Thereafter the notice can include a copy of the filed Notice of Civil Claim which will assist other creditors who have filed proofs of claim in the bankruptcy to decide if they wish to join me in the prosecution of the proceeding and share its cost, risk, and the proceeds thereof.
37. There may be creditors of Mr. Tasci like Stonewater, who may have participated in transactions, and who will be named as defendants in the legal proceedings. They may be found to be accountable for in the legal proceedings and it would be inappropriate for those creditors to be able to participate in the proceedings as beneficiaries thereof. I ask that they be excluded from the right to participate in the proceedings.
38. I make this affidavit in support of an application for leave to commence proceedings against Mr. Tasci and others (i.e. Ms. Hebert, Stonewater, JFI, and others yet to be identified) with a few to recovering property that belongs to Mr. Tasci and which may have been wrongfully transferred or paid to others or other creditors, or which is held by others effectively in trust for Mr. Tasci's benefit.

[Quoted as written.]

- [21] There are no creditors of the bankrupt who have at any time opposed the granting of the Order under s. 38 of the Act.

APPLICABLE STATUTORY PROVISIONS

- [22] Section 38 of the Act provides that:

38(1) Proceeding by creditor when trustee refuses to act

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.

38(2) Transfer to creditor

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.

38(3) Benefits belong to creditor

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.

38(4) Trustee may institute proceeding

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.

- [23] Although s. 38 states that notice of the contemplated proceeding is to be given to other creditors no such notice is required before an application can be made. The only party to whom notice of an application under s. 38 must be given is the trustee of the bankrupt's estate. See: *Bank of British Columbia v. McCracken et al* (1986), 4 B.C.L.R. (2d) 35 (C.A.) [McCracken] and *Jaston and Co. v. McCarthy* (1998), 59 B.C.L.R. (3d) 168 (C.A.) [Jaston].
- [24] More specifically, there is no requirement that notice be given to the bankrupt or any other proposed defendant. See: *Salloum (Re)* (1990), 51 B.C.L.R. (2d) 336 [Salloum] at para. 27.
- [25] It is also settled law in British Columbia that failure to comply with or incomplete procedural compliance with s. 38 of the Act is to be treated in appropriate circumstances only as an irregularity. See: *Jaston and Culp v. KPMG et al.*, 2006 BCSC 1599 [Culp] at para. 13, leave to appeal refused, 2006 BCCA 462 at para. 20.
- [26] Jaston further establishes that where there is no proof of prejudice caused to a person affected by non-compliance or incomplete procedural compliance with the procedural requirements of s. 38 of the Act such an irregularity can and should be cured by the making of or amending an order made under s. 38 nunc pro tunc.

NOTICE TO THE TRUSTEE

- [27] The applicants' submission that Mr. Sommerey's application under s. 38 of the Act was "in every way an ex parte application" must be considered in light of those statutory provisions and authorities.
- [28] In that regard it must be noted that:
- 1) The Trustee advised Mr. Sommerey on August 9, 2019 that there were no funds in the estate with which to proceed with an action as requested by Mr. Sommerey.

- 2) The Trustee also then told Mr. Sommerer that if he wished to proceed he would either have to fund the litigation or apply under s. 38(1) of the Act to take the proceedings himself at his own expense.
- 3) Although the Trustee was not available to attend at the hearing of the s. 38 application on August 20, 2019 she was well aware of Mr. Sommerer's intention to make the application on that date.
- 4) Short leave to bring the s. 38(1) application on August 20, 2019 was authorized by the order of Mr. Justice Hori the day before the Order was made by the Master.
- 5) Mr. Sommerer satisfied the short leave application conditions required by Justice Hori by delivering notice to both the Superintendent in Bankruptcy and the Trustee by 4:00 pm on August 19, 2019.
- 6) The Order provided that the Trustee assign the Trustee's right title and interest in the contemplated proceedings to Mr. Sommerer within 14 days of its receipt and the Trustee did so.
- 7) In *Shaw Estate v. Nicol Island Development Incorporated*, 2009 ONCA 276 [Shaw Estate] at para. 78 the Ontario Court of Appeal stated:

the Trustee, in effect, consented to the s. 38 Order by inviting the Credit Union to apply for it and by thereafter formally assigning its interest in the proceeding to the Credit Union.

- 8) Neither the Trustee nor the Superintendent in Bankruptcy has applied to set aside the Order.
- 9) The Trustee has taken no position on this application.

[29] In all of those circumstances I do not accept that Mr. Sommerer's s. 38 application was "in every way an ex parte application".

DO THE APPLICANTS HAVE STANDING TO APPEAL THE ORDER?

[30] The applicants' application to set aside the Order was initially erroneously commenced by them in the Kelowna Action. The identical application was later filed in these bankruptcy proceedings.

[31] The applicants have asserted standing to bring this application under both s. 38 of the Act and under s. 187(5) of the Act which provides that:

187(5) Every court may review, rescind or vary an order made by it under its bankruptcy jurisdiction.

[32] In response, Mr. Sommerer submits that the applicants do not have standing to apply to set aside the Order.

- [33] In making that submission Mr. Sommerey relies primarily upon the proposition that because the applicants were not entitled to notice of the s. 38 application they also do not have standing to apply to set it aside.
- [34] Notwithstanding that submission Mr. Sommerey does acknowledge that the general standing restriction that arises because the applicants were not entitled to notice of the s. 38 application can be displaced where necessary to prevent fraud or in other circumstances where the administration of justice is abused or brought into disrepute. See: Shaw Estate at paras. 45 to 46; McCracken at paras. 9 to 10 and Culp (in this Court) at para. 36.
- [35] Also, in Culp, (on Appeal) at para. 21 Smith J.A. opined that a material non-disclosure could undermine the foundation of an order under s. 38 such that if the court had been aware of the undisclosed fact it would not have made the order.
- [36] In addition to the substantive bases upon which a defendant may have standing to appeal an order made under s. 38 of the Act, Jaston has established that a defendant who is subject to a s. 38(1) authorization can have standing to challenge procedural irregularities in the obtaining of that authorization.
- [37] Mr. Sommerey submits that none of the circumstances that could allow standing to allow the applicants to bring this appeal exist in this case.
- [38] The applicants do not accept that submission for the following reasons:
- 1) The applicants included allegations of fraud against Mr. Sommerey in their written application that were not formally abandoned during oral submissions; and
 - 2) The applicants both in writing and orally pursued submissions concerning Mr. Sommerey's alleged breaches of professional conduct as a lawyer in relying upon and speaking to his own affidavit as well as associated allegations of material non-disclosure (on what was alleged to be "in effect an ex parte application") and the "impartation of a sense of urgency" where none existed, all of which the applicants asserted (at para. 203 of their written submissions) "was an attack on the administration of justice and the integrity of the bankruptcy process".
- [39] I have concluded that the issues raised should be determined on the merits of this application rather than upon the disputed issue of whether the applicants have standing to apply to set aside the Order.

LAWYER AS ADVOCATE AND LITIGANT

- [40] The applicants submit that Mr. Sommerey was not only precluded from filing and speaking to his own affidavit but that as a lawyer and as an Officer of the Court he was (on what they have claimed was "in every way an ex parte application"), obligated to make full and frank disclosure of all material facts.

- [41] The applicants also submit that in breach of those obligations Mr. Sommerer not only failed to disclose that he was not entitled to appear and speak to his own affidavit but also failed to identify any of the many cases that would have assisted the Court in determining whether his affidavit was inadmissible.
- [42] They further submit that in breach of his professional obligations Mr. Sommerer wrongfully imparted a sense of urgency in the making of the Order when there was none.
- [43] My conclusion that Mr. Sommerer's s. 38 application was not "in every way an ex parte application" also leads me to conclude that many of the submissions advanced by the applicants about the substance of Mr. Sommerer's affidavit cannot succeed.
- [44] While I agree that Mr. Sommerer was required to provide admissible truthful factual information upon which the Court could rely in determining whether to authorize the Kelowna Action, I do not agree that Mr. Sommerer was not entitled to appear as counsel on the s. 38 application or that he was precluded from relying upon his own affidavit.
- [45] I am also satisfied that Mr. Sommerer's affidavit was not in any way dishonest.
- [46] The many cases relied upon by the applicants in their criticisms of Mr. Sommerer concern situations where a lawyer files and speaks to his or her own affidavit on substantive contested issues in litigation in which the lawyer is acting as advocate on behalf of a client. See: *Simple Pursuits Inc. v. 0842748 B.C. Ltd.*, 2015 BCCA 382 at paras. 36-43 [*Simple Pursuits*] and *Fletcher v. Mitrovic*, 2009 NBQB 240, at para. 22.
- [47] The gravamen of the concerns that arise with lawyers who are advocates swearing and speaking to their own affidavits is well expressed in Chapter IX of the Canadian Bar Association's Code of Professional Conduct (cited by Chaisson J.A. in *Simple Pursuits* at para. 40) which states that:
5. The lawyer who appears as an advocate should not submit the lawyer's own affidavit to or testify before a tribunal save as permitted by local rule or practice, or as to purely formal or uncontroverted matters. This also applies to the lawyers partners and associates; generally speaking, they should not testify in such proceedings except as to merely formal matters. The lawyer should not express personal opinions or beliefs, or assert as fact anything that is properly subject to legal proof, cross-examination or challenge. The lawyer must not in effect become an unsworn witness or put the lawyer's own credibility in issue. The lawyer who is a necessary witness should testify and entrust the conduct of the case to someone else. Similarly, the lawyer who was a witness in the proceedings should not appear as advocate in any appeal from the decision in those proceedings.
- [48] While lawyers acting on their own behalf must conduct themselves with integrity and honesty as witnesses, the institutional and professional concerns that attach to lawyers acting as advocates who file and speak to their own affidavit are attenuated.

- [49] While in this case it would likely have been prudent for Mr. Sommerer to neither swear nor speak to his own affidavit in support of his s. 38 application I am not prepared to find that his doing so is fatal to the granting of the Order.
- [50] The applicants also submitted that there was no real urgency to have the matter heard on August 20, 2019 and that Mr. Sommerer wrongfully imparted a sense of urgency because the application could have "easily proceeded a few days later when the Trustee had returned from out of town and had time to review the Notice of Application and the Plaintiff's Affidavit".
- [51] In making that submission the applicants submitted that rather than proceed in Vernon (the Bankruptcy Registry in which the Order was made and in which Master's Chamber's were scheduled for August 20, 2019) Mr. Sommerer could have applied later in other registries.
- [52] I do not accept those submissions for the following reasons:
- 1) Mr. Sommerer expressed his belief in para. 34 of his affidavit and in para. 5 of his e-mail to the Trustee (quoted at para. 19 of these Reasons) that because he had become aware of information from the bailiff's report received by him on August 30, 2017 he was concerned that "a two-year limitation [to commence an action] is coming up".
 - 2) There is no evidence that those concerns were not honestly held by Mr. Sommerer.
 - 3) The suggestion that other registries of this Court sitting in Bankruptcy may have been able to accommodate the hearing after August 20, 2019 is not substantiated.
 - 4) The authorities relied upon by the applicants in asserting that Mr. Sommerer "alleged an urgency that did not exist" as a basis for setting aside an order (*Money in a Minute Auto Loans v. Price*, 2001 BCSC 864; *aff'd Money in a Minute v. Carter Pontiac Buick*, 2002 BCCA 507) were concerned with situations in which the applicant applied *ex parte* to obtain relief rather than proceeding on short leave. Those cases are of no application on the facts of this case.
 - 5) Given that the Trustee neither opposed the s. 38 application nor applied to set aside the Order there is no evidence that the Trustee's position would have been altered if the matter had proceeded elsewhere at a later date.

"ALL BUT INADMISSIBLE AFFIDAVIT EVIDENCE"

- [53] The applicants assert that the affidavit filed by Mr. Sommerer to the extent that is "all but inadmissible" could not substantially support the making of the Order because the evidence in the affidavit is comprised of inadmissible hearsay, argument, speculation and conclusions.
- [54] Those assertions are contained in extensive and often repetitive submissions concerning not only the contents of the affidavit as a whole but also that of each paragraph.

- [55] Unfortunately, affidavits containing inadmissible evidence regularly find their way into chambers applications.
- [56] Although the Court has the power to strike inadmissible evidence, in many instances chambers hearings must proceed with little time for detailed analysis of the affidavit material filed. Argument about admissibility is on many occasions not addressed by counsel, and does not often become the subject of formal rulings.
- [57] However, notwithstanding a proliferation of inadmissible evidence in affidavits, problems associated with such affidavits are usually addressed by the practicalities and exigencies of decision making by giving offending evidence no weight. See: *McMahon v. Harper*, 2017 BCSC 2328 [McMahon].
- [58] Such exigencies and practical solutions do not, however, excuse a failure by litigants to adhere to the rules of evidence.
- [59] Lawyers have professional obligations as evidentiary gatekeepers that are not reduced when a lawyer acts on his own behalf as a litigant.
- [60] Affidavits should be confined to relevant facts within the knowledge of the affiant. Affidavits should not include opinions (except in the case of qualified experts), argument or legal conclusions. See: *British Columbia Investment Management Corporation v. Canada (Attorney General)*, 2016 BCSC 2554 at para. 7.
- [61] Speculation is also not admissible: *McMahon* at para. 110.
- [62] To the extent that Mr. Sommerer's affidavit contains his opinions or those of others, and also to the extent it contains argument or speculation such inadmissible material must be excised from consideration.
- [63] I do not, however, agree that all of the evidence in Mr. Sommerer's affidavit that the applicants categorize as inadmissible hearsay must also be expunged.
- [64] Mr. Sommerer's s. 38 application was an interlocutory proceeding in which hearsay evidence can be admitted and in his affidavit Mr. Sommerer stated: "I have personal knowledge of the facts and matters deposed to herein, save and except where the same are stated to be on information and belief, when I believe the same to be true."
- [65] While the applicants agree that hearsay evidence was admissible in an interlocutory application under s. 38 of the Act, they also submit Mr. Sommerer's introductory non-specific statement was insufficient to make admissible all of the hearsay statements which he deposed were made to him.
- [66] The applicants submit that in each case the source of any information referred to by Mr. Sommerer had to be specifically identified by him and that also in every instance he had to attest to his belief in the truth of that information.

- [67] They further submitted that those obligations attached not only to any statement of a person referenced by Mr. Sommerey but also to the contents of any document referred to or relied upon by him.
- [68] Those propositions are generally sound in principle. With respect to oral out of court statements see for example: *Laxton v. Coglon et al*, 2006 BCSC 181 at paras. 51 to 53 and *L.M.U. v. R.L.U.*, 2004 BCSC 95 at para. 39 [L.M.U.]. Also with respect to hearsay documents see *L.M.U.* at para. 32 and *Cambie Surgeries Corporation v. British Columbia (Attorney General)*, 2017 BCSC 861 at para. 69.
- [69] It is, however, also necessary to observe that in a recent iteration of the rationale behind the requirement for a deponent to attest to his or her belief in the truthfulness of a hearsay statement our Court of Appeal was primarily concerned with the need for the affiant to identify the source of the hearsay.
- [70] In *Albert v. Politano*, 2013 BCCA 194 the Court said at paras. 19 to 22:
- [19] Further, I must comment on the affidavit of the legal assistant that is sought to be adduced. In the critical paragraph, she deposes that appellants' counsel has told her that the appellants were not aware of the term requiring Mr. Albert to remain in British Columbia. This is hearsay upon hearsay: obviously the legal assistant has no firsthand knowledge of what was known by the appellants, and appellate counsel to whom she refers, also has no firsthand knowledge. The information is said to come from the appellants, but the person who gave the information is not identified. By s. 30 of the Court of Appeal Act, R.S.B.C. 1996, c. 77, and there being no Court of Appeal Rule dealing with the content of affidavits, Rule 22-2(13) of the Supreme Court Civil Rules applies. It is the modern version of the long standing rule laying out the parameters of permitted affidavit evidence:
- (13) An affidavit may contain statements as to the information and belief of the person swearing or affirming the affidavit, if
- (a) the source of the information and belief is given, and
- (b) the affidavit is made
- (i) in respect of an application that does not seek a final order, or ...

[Emphasis in original.]

[20] In *Scarr v. Gower* (1956), 18 W.W.R. 184 (B.C.C.A.) Mr. Justice O'Halloran stated at 188:

... failure to state the source of information and belief in an affidavit usable on motions of this kind is not a mere technicality. If the source of the information is not disclosed in other material on the motion the offending paragraphs are worthless and not to be looked at by the court.

- [21] In *Meier v. C.B.C.* (1981), 28 B.C.L.R. 136 at 137-8 Mr. Justice McKenzie observed that "the word 'source' is equivalent to 'an identified person'". To the same effect is *Trus Joist (Western) Ltd. v. United Brotherhood of Carpenters and Joiners of America, Local 1598*, [1982] 6 W.W.R. 744, wherein Madam Justice McLachlin (now Chief Justice of Canada) said at 747: "The rule permits hearsay evidence, provided the source is given".
- [22] The affidavit of the legal assistant does not meet Rule 22-2(13) because it does not identify the source of the information and does not attest to her belief in it. This is more than a mere technical deficiency; by failing to reveal the source, the reliability of the information is put beyond the reach of the respondent. Any cross-examination on the affidavit, by definition, will not be of the foundational source of the information.
- [71] In considering the applicant's hearsay submissions it must also be noted that if evidence is not adduced to prove the truth of an out of court statement or document but is rather adduced for a non-hearsay purpose, it will not be inadmissible.
- [72] In this case the causes of action against the applicants and Mr. Tasci that are asserted by Mr. Sommerer (as identified by him to the Trustee in the correspondence from which I have quoted at para. 19 of these Reasons) are fraudulent preferences and fraudulent transactions contrary to the provisions of either the Act or of Provincial legislation, or both.
- [73] Those causes of action are not complex.
- [74] The delict in each case is the transfer of an interest in property by an insolvent debtor to avoid recovery from the sale of that property by creditors or in an attempt by an insolvent debtor to advantage one creditor (usually a related party) to the disadvantage of others.
- [75] Mr. Sommerer's affidavit and the information upon which he relied in seeking authorization under s. 38 of the Act must be considered in that context.
- [76] More specifically in relation to admissible evidence related to the causes of action asserted by him, Mr. Sommerer:
- 1) Identified from his own knowledge the assets and apparent wherewithal of the bankrupt when he and his wife loaned significant amounts of money to Mr. Tasci when compared to the bankrupt's similar lifestyle after his assignment in bankruptcy.
 - 2) Identified from his own knowledge the existence of the applicants' corporations involved with or related to the bankrupt and his wife and the fact that Mr. Tasci granted a security interest to one of those corporations in 2014 when Mr. Sommerer and his wife were unsecured judgement creditors due to a shortfall in mortgage foreclosure proceedings against Mr. Tasci.
 - 3) Identified with specificity the bailiff retained by Ms. Whidden to pursue collection proceedings under her GSA who reported upon assets that were seized by him and also identified assets held by either a corporation related to the bankrupt and his wife or by the bankrupt's wife. Although that evidence is not admissible to prove the truth of what the

bailiff determined to be the ownership of individual items seized, it is, admissible to the extent that it records Mr. Sommerey's knowledge of the progress or lack of progress of the collection proceedings.

- 4) Identified from his own knowledge that the security interest granted by the bankrupt to the related company in 2014 was amended by the bankrupt in 2017 (immediately before the bankrupt's assignment bankruptcy) to provide security over two of the assets that had earlier been seized by the bailiff.
- [77] The fact that Mr. Sommerey's wife was later successful in obtaining an order for the disposition of assets seized by the bailiff (a copy of which was appended to Mr. Sommerey's affidavit) notwithstanding the assertions by the related corporation that it held a security interest in some of those assets is not hearsay evidence and also affirms the truth of at least some of the contents of the information related to Mr. Sommerey by the bailiff.
- [78] In all of those circumstances I am satisfied that notwithstanding some of the information contained in Mr. Sommerey's affidavit constitutes inadmissible hearsay because he did not specifically assert his belief in each piece of information to which he referred, sufficient reliable non-hearsay evidence remains after the excising of inadmissible hearsay evidence to preclude the setting aside of the Order
- [79] Any alleged deficiencies in the evidence adduced relating to the substantive merits of a cause of action authorized by the Order or the extent to which the Notice of Civil Claim filed in the Kelowna Action is authorized by the Order should be addressed by application in the Kelowna Action.

CONCLUSION

- [80] The applicants' application to set aside or vary the Order is dismissed.

"Davies, J."

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