

CANADA / JUDGMENT

Young (Re)

2022 BCSC 1126

COURT

Supreme Court of British Columbia

DECIDED

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2022 BCSC 1126 Young (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Young (Re),

2022 BCSC 1126

Date: 20220510

Docket: B194896

Registry: Victoria

Estate No.: 11-1775717

In the Matter of the Bankruptcy of Benson Young

- and -

Docket: B201627

Registry: Victoria

Estate No.: 11-1775718

In the Matter of the Bankruptcy of Alana Diane Young

Before: The Honourable Mr. Justice Veenstra

(appearing via videoconference)

Oral Reasons for Judgment

In Chambers

Counsel for the Applicant Trustee, C.E. Craig & Associates Inc.:

S.R. Andersen

Counsel for the Respondents, Benson Young and Alana Diane Young:

M.J. Vellella

Place and Date of Hearing:

Victoria, B.C.

May 4, 2022

Place and Date of Judgment:

Victoria, B.C.

May 10, 2022

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- [1] THE COURT: The applicant, C.E. Craig & Associates Inc. (the "Trustee"), applies for orders that the absolute discharges from bankruptcy of Alana Young and of Benson Young on May 7, 2015, be annulled. The Trustee also seeks orders for solicitor/client costs.
- [2] The basis for the applications is an allegation that neither Alana Young nor Benson Young disclosed their interest in real property in Victoria that was registered in the name of Alana Young's mother (the "Victoria Property") and that prior to bankruptcy they had given her the proceeds of sale of their North Vancouver townhouse, which were subsequently used to purchase the Victoria Property.
- [3] Because both Benson Young and Alana Young have the same last name, I will refer to them in these reasons by their first names. I mean no disrespect in doing so.
- [4] The Trustee relies on both ss. 180(1) and 180(2) of the Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3 [BIA], which state:

Court may annul discharge

180 (1) Where a bankrupt after his discharge fails to perform the duties imposed on him by this Act, the court may, on application, annul his discharge.

Annulment of discharge obtained by fraud

- (2) Where it appears to the court that the discharge of a bankrupt was obtained by fraud, the court may, on application, annul his discharge.

Background Facts

- [5] Benson and Alana are schoolteachers. In 2005, they purchased a townhouse in North Vancouver.
- [6] In 2007, Benson and Alana became involved in some sort of investment scheme. After having attended a series of investment "courses" put on by a group known as Whitney Canada, they were persuaded to incorporate corporations to invest in real estate in British Columbia and Ontario. Included among these for each of them was a corporation established to purchase condominium units in Ontario to renovate and rent. Whitney Canada made all the arrangements for this to happen. After the real estate market dropped in 2008 and 2009, the corporations were assigned into bankruptcy.
- [7] Benson and Alana both deposed that they were unaware that they had provided personal guarantees in respect of those investments.
- [8] In about 2009, Alana's mother, Judith MacKenzie, advanced \$113,000 to Alana and Benson, of which \$104,960 was applied to the existing mortgage on the townhouse. Benson and Alana granted to her a third mortgage. The face value of the third mortgage was \$163,000, although it appears that only \$113,000 was advanced.
- [9] Also in 2009, Benson and Alana decided to move to Victoria. It was decided that Ms. MacKenzie would move there with them. Shortly after they moved, Benson and Alana had their first child.
- [10] The North Vancouver townhouse was sold in July 2010. The net sale proceeds after payment of the first two mortgages was \$256,544.35. Although only \$104,960 was owing to Ms. MacKenzie, the parties directed their lawyer to pay the entire amount to her. Benson and Alana each deposed in identical language that:

The proceeds of \$256,544.35 from the sale were deposited into Judith's account at Judith's insistence because of her fears about my corporate bankruptcy. I did this to avoid Judith causing problems within the family and to avoid arguments

- [11] What happened next is described by Benson as follows:

In or about November 2010, Judith, Alana and I used the proceeds from the sale of the townhouse as a down payment to purchase the Property. Judith, Alana and I could not have purchased the Property without Judith's contribution from the Proceeds because of our financial circumstances.

The Property was registered in Judith's name, and Judith was the mortgagor. I was the guarantor for the mortgage on the Property.

[12] Alana's affidavit used virtually identical language.

[13] The evidence indicated that the down payment for the Victoria Property was \$249,089.12, which was paid from Ms. MacKenzie's account. The purchase price was \$770,000. The purchase closed on January 17, 2011. Benson and Alana gave evidence that on January 20, 2011, Benson and Ms. MacKenzie signed a document stating:

Upon possession of the property on January 18th, 2011, the following reside in the property ...

Although Ms. Judith MacKenzie the sole registered name on title, ownership of the property is clearly the responsibility of Benson Young. He manages all financial affairs and maintenance with regards to the property. Both Judith MacKenzie and Benson Young are co-mortgagees on the above property.

At some future date, with the agreement of all parties, Ms. Judith MacKenzie will transfer title to Alana Young and Benson Young.

[14] Each of Benson and Alana made a second affidavit shortly before the hearing providing further details. In his affidavit, Benson explained that:

As a family, we joined our resources and purchased the Property. We never had any formal agreement regarding ownership of the Property, and we never intended that purchasing the Property would be for financial gain. Judith, in 2010, was told by her doctors that she wasn't going to live much longer ...

Judith, Alana and I purchased the Property in Judith's name so that Judith would have a secure place to live out her remaining days. Judith was going to will the property to Alana and me when she died, and we also discussed that Judith would sell us her share when Alana went back to work and we could afford to purchase Judith's share if Judith lived longer than expected, so Alana and I were not concerned about title to the Property.

Judith wanted me to act as owner and take care of everything related to the Property so she wouldn't have to worry about anything, which I did. The arrangement was informal and based on our family relationships, and we all combined our money to purchase the Property. Purchasing the Property was not a business arrangement but a solution to the family's accommodation problems.

In exchange for Alana's and my contribution to the purchase of the Property, Judith was to let us live there as long as we acted as owners, and Judith would have the right to live there until she died.

[15] Alana's affidavit used virtually identical language.

The Bankruptcy

[16] Each of Benson and Alana was served with a statement of claim from the Ontario courts in July 2013. Each deposed that:

This was the first time that I became aware that I was a personal guarantor of my Ontario corporation's debts.

[17] Each of Benson and Alana made a voluntary assignment into bankruptcy on August 6, 2013.

[18] In advance of doing that, each met with the Trustee in bankruptcy and prepared and signed an information form dated July 28, 2013.

[19] The form included a section where each was required to list all "Real Property". The instructions on the form provided that "Details of any real property / residential property, must be remitted with the forms". Each of Alana and Benson put "NA" on that part of the form.

[20] The form also asked "Are you a co-sign for the debts of another person(s)?", for which Benson ticked "Yes." The form asked for details, to which he responded:

Guarantor for mortgage on mother-in-law's house - Coast Capital Savings.

[21] One part of the section on disposition of prior assets asked the following:

Within the last 5 years and more than 12 months ago, while being indebted/insolvent, have you ...

Sold, disposed of or redeemed property, assets in excess of \$5,000? No.

Sold or disposed of, or transferred Real Estate/bare land? Yes.

Made any gifts, transferred property to relative or others (over \$5,000)? No.

[22] When asked to provide details of the yes response to the second of these questions, the response referred to the North Vancouver townhouse and stated "See lawyer docs - no net proceeds."

[23] The "lawyer documents" that were provided identified that the proceeds of sale of the North Vancouver townhouse, after legal costs, were distributed as follows:

a) ING Bank of Canada @ June 16, 2010, \$195,897.95.

b) Toronto Dominion Bank @ June 15, 2010, \$60,154.40.

c) Judith MacKenzie \$256,544.35.

[24] The documents did not identify Ms. MacKenzie as a relative. Nor did they indicate that the amount paid to her was substantially greater than the amount due under the third mortgage.

[25] On August 6, 2013, each of Benson and Alana provided a sworn statement of affairs attesting that:

this statement, is to the best of my knowledge, a full, true and complete statement of my affairs on the 6th day of August, 2013, and fully discloses all property and transactions of every description that is or was in my possession or that may devolve on me in accordance with the Bankruptcy and Insolvency Act.

[26] In the list of assets, each listed the Victoria Property but identified their interest as having a dollar value of \$179,000, secured charges of \$170,835 and zero dollars net realizable value.

[27] In response to the questions as to actions in the five years preceding bankruptcy, the sworn statement said:

Within five years prior to the date of the initial insolvency event have you, either in Canada or elsewhere:

10A. Sold or disposed of any property? Yes.

10B. Made any gifts to relatives or others in excess of \$500? No.

[28] When asked to provide details of the yes answer, the document stated with respect to the North Vancouver property:

2010/June/14: [the address of the property]; no net proceeds per vendor statement.

[29] In their initial affidavits sworn for purposes of this application on March 25, 2022, each of Benson and Alana deposed that:

I did not declare that I held any beneficial interest in the Property to the Trustee during my personal bankruptcy because of poor decisions on my part and because of pressure exerted by Judith to protect Judith's interest in the Property.

[30] Each of Benson and Alana swore further response affidavits on April 19, 2022, asserting in identical language that:

- a) The Trustee did not provide instructions or guidance on what sort of property should be disclosed; and
- b) Each of them had asked an unidentified "trustee's representative" whether they had filled in the form correctly and told that person about the townhouse proceeds comprising some of Judith's money and some of their own money and were told the Trustee would "get back to me if anything further was needed."

[31] The Trustee objected to the admissibility of this evidence, as the person allegedly spoken to was not identified. The Trustee deposed that she meets personally with all bankruptcy applicants to confirm their obligations to provide information on property transfers and gifts made within five years prior. Her evidence with respect to Benson was that:

Nobody in the trustee's office would have told Mr. Young that he could just keep \$140,000+ for himself, as that would be contrary to the provisions of the [BIA].

Her evidence with respect to Alana was the same.

[32] The Trustee further deposed that:

- a) Her practice was where the information provided indicated no net proceeds of sale of real property, to ask for the statement of adjustments to confirm the statement to be true;
- b) Neither Benson nor Alana advised her that any portion of the net sale proceeds from the North Vancouver townhouse belonged to them;
- c) Neither of them advised that the person who appeared on the face of the documents to be the holder of a registered third mortgage (Ms. MacKenzie) was the mother of one of them; and
- d) If that relationship had been disclosed, it would have prompted a further investigation into the sale proceeds.

[33] In May 2015, each of Benson and Alana was automatically discharged from bankruptcy pursuant to s. 168(1) of the BIA.

[34] With respect to Benson's estate, there were proven unsecured claims totalling \$2,426,420.34. The receipts in the estate to the time of discharge were \$7,864.45, resulting in a dividend paid to the unsecured creditors of \$2,826.68.

[35] With respect to Alana's estate, there were proven unsecured claims totalling \$2,462,420.34. The receipts in the estate to the time of discharge were \$1,792.72, leaving only \$109.33, all of which was paid as levy to the Superintendent of Bankruptcy. No dividend was paid to the unsecured creditors.

The Victoria Property Litigation

[36] The relationship between Alana and Benson on the one hand and Ms. MacKenzie on the other deteriorated. On February 27, 2017, Alana and Benson commenced Victoria action no. S181115 in the Supreme Court of British Columbia alleging that:

9. At a certain point in time the parties agreed to purchase the Property together due to their desire to mutually support each other and their respective financial circumstances.
10. The Plaintiffs desired to own a Property in a certain residential neighbourhood where their children would attend school. They could not afford it on their own due to the high cost and insufficient credit.
11. The Defendant desired supports from her family and desired to acquire affordable accommodation but could not afford to do so independently.

12. The Parties agreed it would be desirable to purchase the Property together according to the following terms:
- a. the Property would be registered in the Defendant's name;
 - b. the Plaintiff, Benson Young, would guarantee the mortgage on the Property;
 - c. the Parties would establish a joint bank account whereby they would each provide money towards joint occupational expenses;
 - d. the Defendant would live in the Property during her life time and hold title to the Property in Trust for the Plaintiffs until the Plaintiff, Alana Young, returned to work;
 - e. the Defendant would then gift the Property to the Plaintiffs.

(the "Agreement")

15. The Plaintiffs paid \$152,000 towards the purchase price of the Property.

16. The Defendant paid \$113,000 towards the purchase price of the Property.

[37] The notice of civil claim went on to assert an interest in the property:

19. At all material times it was the intention of the Plaintiffs and the Defendant that the Defendant was holding the Property in trust for the Plaintiffs.

21. At all material times the Property is owned beneficially by the Plaintiffs, but notwithstanding repeated requests by the Plaintiffs, the Defendant has refused to transfer the Property into the names of the Plaintiffs.

[38] Benson and Alana thus sought an order vesting title to the Victoria Property in their names.

[39] In Part 3 (Legal Basis), Benson and Alana asserted that:

The Plaintiffs are entitled to a declaration of resulting trust and associated remedies because all times since the purchase, the property has belonged and belongs beneficially to the Plaintiffs but notwithstanding repeated requests by the Plaintiffs, the Defendant has refused to transfer the property into the name of the Plaintiffs.

[40] The Trustee upon learning of this action applied to the court and was reappointed effective June 15, 2020. On February 3, 2022, the Trustee obtained an order from Justice Steeves requiring Benson and Alana to provide the transcripts of their examinations for discovery in action S181115, as well as all documents they produced in those actions.

[41] Benson in his examination for discovery in that action gave evidence that the reason for the third mortgage on the North Vancouver property was that "during this time that my corporation went bankrupt, Ms. MacKenzie was very fearful, and she did not trust the fact that the corporation would protect us from any personal liability", and that she "wanted to safeguard the possibility of us living together in a home together in the future."

[42] When asked about amounts that Ms. MacKenzie paid toward the mortgage, he responded:

She told us we were the owners from the outset, so she agreed that that month was deemed rent. Her monies was put into the joint account, and we pay the mortgage through the joint account as well. We topped up the amount to cover the mortgage every month.

[43] He also gave evidence on discovery that:

It was always an understanding, to us, she said we would be the owners. She would take title. As the ownership letter shows, that was the agreement. And when we were financially more, I guess, stable when Alana returned to work when we had raised our children back to school, which is, kind of, around now, title would be transferred back to us.

The discussion was that we were the owners, and she wanted a place where she could guarantee secured rent; control her finances. Because she knew that rents were rising, and she knew she was going to retire.

[44] Alana's evidence on discovery was similar. She gave evidence that "Benson and I are the owners" and that her mother:

... was to be in the suite and rent the suite, the basement suite, and we owned the house.

[45] Action S181115 was settled in May 2019. The parties to the action entered into a written settlement agreement, which included recitals confirming that:

- c. the parties purchased the Property in January of 2011, and since then have lived together in the Property, with Judith occupying the downstairs in-law suite ... and the Youngs occupying the main suite with their two children ...
- d. legal title to the Property was put into Judith's sole name ...

[46] The text of the agreement included the following:

- 1. Each of Judith, Benson and Alana confirm that the recitals to this Agreement are true and correct ...
- 2. The parties agree that their respective interests in the Property at the time of its purchase were, and remain today, as follows:
 - a) Judith: 43%; and
 - b) the Youngs: 57%.

[47] The settlement agreement went on to provide for the Youngs to purchase Ms. MacKenzie's interest in the property for \$375,000. I understand that subsequently occurred such that the Youngs now own the Victoria Property, subject of course to mortgage financing.

Issue

- [48] The issue is whether the Trustee on this application has established that either of the grounds for annulment set out in s. 180(1) or 180(2) has been made out and if so, whether annulment is the appropriate remedy in the circumstances.

Positions of the Parties

- [49] The Trustee argues that the bankruptcy discharge should be annulled so that the Youngs' respective interests in the Victoria Property can be realized for the benefit of their creditors and the administration of the bankrupt estate can be properly completed.
- [50] The Trustee argues that by failing to disclose their interests in the Victoria Property to the Trustee upon their assignments into bankruptcy and thereafter, each of Benson and Alana breached subsections (a), (b), (d), (e) and (k) of s. 158 of the BIA, the statement of affairs that was sworn by each of them was not, as sworn, a "full true and compete statement" of their respective affairs and did not "fully disclose all property and transactions of every description that is or was in my possession or may devolve on me" as required by the BIA.
- [51] The Trustee relies on a series of cases applying s. 180(1) to annul a discharge in circumstances where a bankrupt failed to disclose assets, including *Lannigan (Re)*, 2008 NSSC 348; *LeBlanc (Re)*, 2007 NSSC 18; and *Re Faust (Bankrupt)*, 2005 ABQB 447.
- [52] The Trustee also relies on a series of cases applying s. 180(2) where there had been non-disclosure in circumstances the court concluded amounted to fraud, including *Carlson v. Carlson*, 2012 ABCA 173; *Bankruptcy of James Albert Hogg*, 2005 MBQB 109; *Re Faust*; and *Re Clark* (2005), 55 CBR NS 106. The Trustee argues that both Benson and Alana, by failing to disclose their largest and most significant asset, title to which was held in trust for them by a relative, misled the Trustee and thus obtained a discharge "by fraud."
- [53] The Trustee also seeks costs on a solicitor/client basis relying on *Thow (Re)*, 2010 BCSC 1534, at paras. 14-15 and 17.
- [54] The Youngs sought to tender in evidence excerpts from the transcript of their examination for discovery of Ms. MacKenzie in action S181115. Ms. MacKenzie advanced at that discovery a position that the Youngs had no interest other than a hope that they would eventually inherit the Victoria Property. The Youngs argued that based on that transcript, the court should conclude that the Youngs did not actually have a real property interest that was disclosable in the bankruptcy.
- [55] The Youngs argue that the language of both s. 180(1) and 180(2) is discretionary, that annulment should be reserved for exceptional circumstances, and that it is contrary to the purpose of the BIA (i.e., to allow the rehabilitation of a bankrupt as a citizen unfettered by past debts) to annul a discharge unless the circumstances are, in fact, extraordinary. They cite for these propositions *Kiamanesh (Re)*, 2008 BCSC 398, at para. 55, and *Nagy v. Canada (National Revenue)*, 2010 SKQB 124, both of which on review appear to be about contested

discharges rather than annulment.

[56] The Youngs argue that:

The effect of annulment of the Youngs' discharge would be to place the Youngs back into bankruptcy and would severely negatively affect the Youngs' financial rehabilitation. The punitive effect outweighs any benefit to society where arrangements, other than annulment of the application respondent's discharge, can be made.

[57] They argue that the effect of an annulment would be that the Trustee and the creditors would have not only the value of the Youngs' equity in the Victoria Property from May 2015, which is the most they should be entitled to, but also the additional equity in the Victoria Property that has accrued over the past seven years due to a mix of increases in market value, payment down of the mortgage principal and the resolution of Ms. MacKenzie's competing claim.

[58] Rather, the Youngs argue that the appropriate remedy in the circumstances is to order that each of them pay the Trustee a certain amount by a certain date, and point to Bankruptcy of Walls, 2005 BCSC 1775 [Walls], at para. 19, as an example of this approach.

[59] The Youngs also argue that the Trustee has provided no clear, cogent and compelling evidence of fraud, relying on South Holly Holdings Ltd. v. Daramola, 2010 ONSC 460 at para. 101. They argue that any failure in their disclosure arises from their appropriate reliance on advice from the Trustee's representatives and thus is not fraudulent.

[60] The Trustee in response to the Youngs' arguments asserts that annulment is the appropriate remedy for non-disclosure, and the fact that it took so many years for that non-disclosure to be discovered is something for which the consequences are appropriately visited on the Youngs. The Trustee also argues that the evidence as to alleged reliance on unnamed staff of the Trustee should not be accepted given the Trustee's evidence as to her practice and what is said in the documents themselves.

Provisions of the BIA

[61] The Trustee applies pursuant to s. 180 of the BIA, which provides:

Court may annul discharge

180 (1) Where a bankrupt after his discharge fails to perform the duties imposed on him by this Act, the court may, on application, annul his discharge.

Annulment of discharge obtained by fraud

(2) Where it appears to the court that the discharge of a bankrupt was obtained by fraud, the court may, on application, annul his discharge.

Effect of annulment of discharge

- (3) An order revoking or annulling the discharge of a bankrupt does not prejudice the validity of a sale, disposition of property, payment made or thing duly done before the revocation or annulment of the discharge.

[62] The duties of the bankrupt referenced in s. 180(1) are set out in s. 158 of the BIA, which requires that:

Duties of bankrupt

158. A bankrupt shall

- (a) make discovery of and deliver all his property that is under his possession or control to the trustee or to any person authorized by the trustee to take possession of it or any part thereof;
- (a.1) in such circumstances as are specified in directives of the Superintendent, deliver to the trustee, for cancellation, all credit cards issued to and in the possession or control of the bankrupt;
- (b) deliver to the trustee all books, records, documents, writings and papers including, without restricting the generality of the foregoing, title papers, insurance policies and tax records and returns and copies thereof in any way relating to his property or affairs;
- (c) at such time and place as may be fixed by the official receiver, attend before the official receiver or before any other official receiver delegated by the official receiver for examination under oath with respect to his conduct, the causes of his bankruptcy and the disposition of his property;
- (d) within five days following the bankruptcy, unless the time is extended by the official receiver, prepare and submit to the trustee in quadruplicate a statement of the bankrupt's affairs in the prescribed form verified by affidavit and showing the particulars of the bankrupt's assets and liabilities, the names and addresses of the bankrupt's creditors, the securities held by them respectively, the dates when the securities were respectively given and such further or other information as may be required, but where the affairs of the bankrupt are so involved or complicated that the bankrupt alone cannot reasonably prepare a proper statement of affairs, the official receiver may, as an expense of the administration of the estate, authorize the employment of a qualified person to assist in the preparation of the statement;
- (e) make or give all the assistance within his power to the trustee in making an inventory of his assets;

- (f) make disclosure to the trustee of all property disposed of within the period beginning on the day that is one year before the date of the initial bankruptcy event or beginning on such other antecedent date as the court may direct, and ending on the date of the bankruptcy, both dates included, and how and to whom and for what consideration any part thereof was disposed of except such part as had been disposed of in the ordinary manner of trade or used for reasonable personal expenses;
 - (g) make disclosure to the trustee of all property disposed of by transfer at undervalue within the period beginning on the day that is five years before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included;
 - (h) attend the first meeting of his creditors unless prevented by sickness or other sufficient cause and submit thereat to examination;
 - (i) when required, attend other meetings of his creditors or of the inspectors, or attend on the trustee;
 - (j) submit to such other examinations under oath with respect to his property or affairs as required;
 - (k) aid to the utmost of his power in the realization of his property and the distribution of the proceeds among his creditors;
 - (l) execute any powers of attorney, transfers, deeds and instruments or acts that may be required;
 - (m) examine the correctness of all proofs of claims filed, if required by the trustee;
 - (n) in case any person has to his knowledge filed a false claim, disclose the fact immediately to the trustee;
 - (n.1) inform the trustee of any material change in the bankrupt's financial situation;
 - (o) generally do all such acts and things in relation to his property and the distribution of the proceeds among his creditors as may be reasonably required by the trustee, or may be prescribed by the General Rules, or may be directed by the court by any special order made with reference to any particular case or made on the occasion of any special application by the trustee, or any creditor or person interested; and
 - (p) until his application for discharge has been disposed of and the administration of the estate completed, keep the trustee advised at all times of his place of residence or address.
- [63] In *Re Faust*, the bankrupt made an assignment in August 2003 and was discharged in October 2004. Before his discharge, he received an inheritance which he did not disclose to the trustee. Registrar Alberstat concluded at para. 18 that:
- [18] In failing to disclose the inheritance, the bankrupt has failed to perform his duties and I conclude that the bankrupt has offended section 180(1) ...

- [64] Registrar Alberstat also concluded that it was acceptable for a court to draw a conclusion as to fraud without a trial, and that by failing to advise the trustee of the inheritance, the bankrupt had violated s. 180(2) as well.
- [65] In Lannigan (Re), Ms. Lannigan had made an assignment in bankruptcy in August 2006 and received an automatic discharge in May 2007. In the interim in October 2006, she had received the commuted value of her late mother's pension. Ms. Lannigan did not mention the pension money to the trustee, who applied in November 2008 to have the discharge annulled. Registrar Cregan concluded at para. 20 that:
- [20] Mrs. Lannigan had the right to apply for the pension money in December 2004. However, I accept her evidence that she did not receive the letter of December 22, 2004, respecting it until it was copied to her with the letter of September 26, 2006. She cannot be faulted in not reporting it at the time of her assignment. But she clearly knew of it when she acquired it or had it devolve on her on the date of the deposit to her account, October 16, 2006, when she was undischarged. She had a duty then to advise the Trustee and provide for its delivery to the Trustee. This duty under paragraph (a) is a continuing duty, until fulfilled, notwithstanding her discharge.
- [66] With respect to the latter point, Registrar Cregan relied on L.W. Houlden, G.B. Morawetz, J.P. Sarra, *The 2008 Annotated Bankruptcy and Insolvency Act*, paragraph H, § 2.1, which states:
- Even after a discharge from bankruptcy, the bankrupt must continue to perform the duties imposed by s. 158, and if the bankrupt fails to do so, the court may annul the discharge: s.180(1).
- [67] Registrar Cregan went on to conclude at para. 23 that:
- [23] I find therefore that she has failed to perform the duties described in paragraph (a) and (n.1) of Section 158. This failure is greatly to the prejudice of her creditors and demands that I exercise the authority in Subsection 180(1) and grant an annulment of her discharge.
- [68] Dealing with the application under s. 180(2), Registrar Cregan stated at para. 25:
- [25] There is evidence which has the potential for a finding of fraud on Mrs. Lannigan's part. However, having found that her discharge should be annulled under the first subsection, no purpose would be served by me discussing this evidence and considering whether fraud has been proved or not.
- [69] Carlson is an unusual case. The bankrupt, Jack, had previously owned a property, which he transferred voluntarily to his brother and sister-in-law (Jane) in 1997. His brother subsequently died, leaving Jane as the sole registered owner. The terms of the agreement between Jack and Jane were disputed, although they signed a promissory note and security agreement in January 2001.

- [70] In April 2003, Jack made an assignment in bankruptcy. He made no mention to his trustee of the property registered in Jane's name or his agreement with her. He was discharged in May 2004.
- [71] In August 2007, Jack commenced an action against Jane to recover the amount he said she owed him in respect of the property. His bankruptcy came to light, and both Jack and Jane negotiated with the trustee. The trustee tentatively agreed to convey to Jack an assignment of the right to pursue the claim against Jane in return for a payment of \$140,000. Jane opposed this. The chambers judge refused to approve this arrangement; the Court of Appeal allowed the appeal and permitted it to go ahead.
- [72] In the course of its analysis, the court commented at para. 26 that:
- [26] In my view, the failure to disclose constitutes an "abuse" of the bankruptcy process and runs afoul of the policy concern that the integrity of bankruptcy proceedings be jealously guarded. A cause of action that had been concealed should not, without more, be assigned to a defalcating bankrupt notwithstanding s. 144.
- [73] Both *Lannigan (Re)* and *Re Faust* were considered by Justice Griffin (as she then was) in *Briant (Re)*, 2016 BCSC 1575. In that case, one of Mr. Briant's creditors, the Canada Revenue Agency, sought to annul his bankruptcy on the basis that he had failed to comply with his obligations in s. 158(o) by not paying a consent judgment entered as a condition of his discharge.
- [74] At paras. 67-73, Griffin J. reviewed the purposes of the BIA in the context of the extent to which duties under s. 158(i) apply subsequent to discharge:
- [67] This interpretation is supported by the purpose of the Act and the bankruptcy scheme. In *Industrial Acceptance Corp. v. Lalonde*, [1952] 2 S.C.R. 109 at 120, the Supreme Court of Canada said that the purpose and object of the then Bankruptcy Act, R.S.C. 1927, c. 11 was to "equitably distribute the assets of the debtor and to permit of his rehabilitation as a citizen, unfettered by past debts".
- [68] As held by Fitzpatrick J. in *Montalban, Re*, 2013 BCSC 683 at para. 13 [Montalban]:
- Fundamentally, the [Act] is social policy legislation in a commercial context. It allows an insolvent debtor who is overburdened by debt to employ a process by which he or she can shed those debts and obtain a "fresh start".
- [69] In *Montalban*, the Court recognized that the obligations imposed on a bankrupt during bankruptcy, and before discharge, create a state of "financial purgatory", at para. 16:

Between the date of bankruptcy and the date of discharge, the bankrupt is, in a sense, in a state of "financial purgatory". During that period of time, the bankrupt is required to act in a certain fashion. In particular, the bankrupt is required to fully disclose details of assets and transactions so as to assist the trustee in collecting assets for the benefit of the creditors. The duties required of a bankrupt during this period are set out in s. 158 of the [Act].

[70] Importantly, in *Montalban* the Court recognized that the "financial purgatory" and obligations imposed by s. 158 of the Act only apply during the period between bankruptcy and discharge (at paras. 16, 18, 124). In other words, these obligations and the financial purgatory end after absolute discharge.

[71] Finally, in *Smith v. Clarke*, 2004 BCCA 353 at para. 9, our Court of Appeal referred to the scheme of the Act as seeking to:

strike a balance between holding individuals to their financial obligations and permitting them to emerge from bankruptcy and move on with their lives. It is a balance that in some circumstances may not be easily justified. .

[72] All of these statements recognize that the Act and the procedures and obligations that arise from bankruptcy are intended to distribute the available assets of a bankrupt debtor to his or her creditors. However, bankruptcy is also intended to rehabilitate the bankrupt and allow the bankrupt to move on.

[73] In my view, if the obligations under s. 158 continued to apply to a bankrupt after receiving an absolute discharge, it would equate to leaving the former bankrupt in "financial purgatory", never leaving the grasps of the Act.

[75] She then turned to a consideration of *Lannigan (Re)* and *Re Faust*, distinguishing them at paras. 82-83:

[82] I find that both *Lannigan* and *Faust* are distinguishable. In those cases the application was made under s. 180(1) when the trustee discovered that the former bankrupt had failed to disclose assets that the bankrupt was required to disclose pursuant to s. 158 prior to discharge. The bankrupt's failure was learned post-discharge but the conduct related to performance of pre-discharge duties.

[83] I do not disagree with the effect of *Lannigan* that an absolute discharge does not absolve a bankrupt from any failures to meet obligations that should have been performed under s. 158(o) when it was operative, and that s. 180(1) can apply in circumstances when a pre-discharge breach of the Act is discovered post-discharge. The point is that a bankrupt cannot ignore the bankrupt's obligations or mislead creditors or the trustee or a court during the operating stage of the bankruptcy, and then expect to be absolved of any as yet undiscovered wrongdoing once the bankrupt receives an absolute discharge.

- [76] I turn now to Walls, relied upon by the Youngs. In that case Mr. Walls made an assignment in bankruptcy in March 2002. The majority of his assets were comprised of two retirement savings plans, which were disclosed to the trustee. The trustee collapsed one of the two plans but inadvertently failed to collapse the other. The bankrupt was discharged in December 2002. The bankrupt subsequently learned from his investment advisor that the second RSP had not been redeemed or paid into the estate and thus it was available for reinvestment. He did so and claimed tax credits on the basis thereof.
- [77] In April 2003, the trustee realized his error and applied under s. 180 to annul the discharge. Master Baker noted at para. 12 that:
- [12] I can sympathize with Mr. Walls' frustration. As I said above, he has been given erroneous or incomplete advice and service, possibly, by three advising professionals. Mr. Hagen or his office overlooked the second WOF RSP; there is no dispute about that. Saeja recommended re-investment of it after the bankruptcy. Mr. Punko cannot explain why Mr. Walls seems to have received less than the full federal tax credit on the re-investment. I do not see any one of these instances as particularly egregious, however, it is their cumulative and synchronous effect, one suspects, that is so frustrating.
- [78] He concluded that:
- [16] The fact that the WOF RSP was omitted by error does not change the law. It is analogous to a bank erroneously depositing funds into a client's accounts; those funds, by the mistake, do not become the property of the client and, should the client use those funds, he or she is obviously obliged to return them. So it is with Mr. Walls.
- [79] The evidence indicates that the recovery, net of taxes, that the trustee had missed out on or would have obtained had the trustee taken appropriate steps to collapse the RRSP prior to discharge was \$2,389. The result ordered by Master Baker is set out at para. 19:
- [19] The disposition of Mr. Hagen's motion causes some concern. Mr. Walls made it clear and explicit during the hearing that, if the court's decision is that the \$2,389.00 must be repaid, he will do so. It seems reasonable to rely on that assurance, in the peculiar circumstances of this case, and permit Mr. Walls a short period to repay. The annulment of a discharge can have very serious effects. My order therefore is that in the event Mr. Walls has not repaid, to Mr. Hagen, the sum of \$2,389.00 by January 5th, 2006, Mr. Walls' discharge will be annulled effective January 6th, 2006.

Analysis

- [80] I begin by noting that there is a significant difference between the situation of the Youngs and that faced by Mr. Walls. In Walls, the amount missed out on by the trustee was \$2,389, a small net amount that it appeared Mr. Walls was going to be able to reimburse the estate. The evidence accepted by Master Baker allowed him to draw conclusions as to errors made by several professionals upon whom Mr. Walls reasonably relied. There was no issue of non-disclosure.
- [81] In the present case, I conclude that there has been significant non-disclosure. The pleadings from action S181115, the admissions made by both Benson and Alana on discovery and the provisions of the settlement agreement all consistently reflect an intention that they had an ownership interest in the Victoria Property and that the money provided to Ms. MacKenzie on the sale of the North Vancouver townhouse was their money.
- [82] That view is not altered by what was said by Ms. MacKenzie on her examination for discovery. That evidence, of course, advanced her particular interests during the currency of the lawsuit. It is contradicted by the settlement she eventually signed. Even if that evidence was admissible, my conclusion based on the other evidence would not be altered.
- [83] In my view, there has been a clear breach by each of Benson and Alana of the duty imposed by s. 158(a) of the BIA.
- [84] Briant (Re) confirms that s. 180(1) can apply in circumstances when a pre-discharge breach of the BIA is discovered post-discharge and that a bankrupt cannot ignore the bankrupt's obligations or mislead creditors or the trustee or the court during the operating stage of the bankruptcy and then expect to be absolved of any as-yet undiscovered wrongdoing once the bankrupt receives an absolute discharge.
- [85] In light of that conclusion, I determine that the conditions for application of s. 180(1) have been made out.
- [86] With respect to s. 180(2), facts have been tendered that could well ground a finding of fraud. At the same time, I struggle to understand the reference to the Victoria Property in the parties' sworn statements of affairs and the value of \$179,000 and associated charge of \$170,835 attached thereto. It appears that there was at least some disclosure with respect to the Victoria Property, albeit with indication of a zero-dollar net value. The Youngs have also raised issues as to whether they believe they were following the instructions of the Trustee in what they did disclose.
- [87] If it were necessary to make a finding pursuant to s. 180(2), I would consider at this point whether an order should be made for cross-examinations on affidavit in order to determine whether the evidence is sufficient for the court to make a finding of fraud. However, in my view, such steps are unnecessary given the conclusion I have reached with respect to s. 180(1).

- [88] Rather, I would follow the approach of Registrar Cregan in *Lannigan (Re)* and make no determination with respect to s. 180(2) given that the application can be decided without such determination.
- [89] I turn to the question of remedy. In my view, the failure of the Youngs to disclose their interest in the Victoria Property and the funds used to acquire it - being by far the major asset of either of them - is greatly to the prejudice of their creditors and brings into play serious concerns about the integrity of the bankruptcy process. Given the nature of the non-disclosure and the amounts in issue, it is my view that the course of action followed in *Walls* is neither adequate nor appropriate. In my view, the appropriate order in the circumstances of this case is to order that the discharge of each of the Youngs from bankruptcy be annulled pursuant to s. 180(1).
- [90] I recognize that there is a certain harshness in this result given that the Youngs have presumably made regular mortgage payments of principal and interest, property values have increased and their equity in the Victoria Property is likely substantially more than it would have been had their interest been dealt with in the course of the bankruptcy in 2015. Ultimately, however, this is the unfortunate result of their own failure to make proper disclosure to the Trustee.
- [91] With respect to costs, I have reviewed the circumstances in the *Thow* case relied upon by the Trustee. They are particularly egregious to a degree far beyond that found in the present case.
- [92] Section 197(2) of the BIA provides that:

How costs awarded

- (2) The court in awarding costs may direct that the costs shall be taxed and paid as between party and party or as between solicitor and client, or the court may fix a sum to be paid in lieu of taxation or of taxed costs, but in the absence of any express direction costs shall follow the event and shall be taxed as between party and party.
- [93] In my view, the circumstances are not egregious to the degree that would motivate a departure from what is provided for in s. 197(2) - that is, costs to follow the event and taxed as between party and party.

"Veenstra J."

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