CITATION: Re Bankruptcy of Zeev Saban, 2012 ONSC 6700
COURT FILE NO.: No. 31-1127752
DATE: 20121126

SUPERIOR COURT OF JUSTICE - ONTARIO
COMMERCIAL LIST

RE: BANKRUPTCY OF ZEEV SABAN

BEFORE: Justice Newbould

COUNSEL: Mrs. Dora Machtinger in person, for a creditor her husband Marek Machtinger

Paul H. Starkman, for the Bankrupt Zeev Saban

DATE HEARD: November 20, 2012

ENDORSEMENT

[1] This is an appeal under the BIA by a creditor Marek Machtinger from the decision of the Deputy Registrar Mills made November 15, 2001 granting Mr. Saban a conditional discharge from bankruptcy. The discharge from bankruptcy was suspended for 36 months consecutive to (i) Mr. Saban paying $1,500 to the Trustee for outstanding fees, (ii) paying $4,500 to his estate and (iii) banning him from obtaining credit for 5 years.

[2] In his notice of appeal, Mr. Machtinger claims several things, including an order refusing Mr. Saban an "absolute discharge" because of alleged perjury at the hearing before the Registrar, that there be a declaration that fraud was committed by Mr. Saban under the *Criminal Code* and the BIA, that debts incurred by Mr. Saban be declared to survive bankruptcy or that leave be given to lift the stay under the BIA to commence an action against Mr. Saban for fraud, plus other consequential relief.

[3] Mr. Machtinger has filed an affidavit. It refers to many instances of alleged perjury committed by Mr. Saban before the Registrar. Mrs. Machtinger appeared in person on her

husband's behalf as she said he had a medical condition. She said she wishes to set aside the decision of Registrar Mills because of perjury allegedly committed by Mr. Saban at the hearing of his discharge application. It is my view, and I so explained to Mrs. Machtinger, that if an application is to be made to vary a decision of the Registrar on the basis of perjured evidence, it is better made to the Registrar who heard the matter or another Registrar. I declined to hear that application.

[4] Regarding the ground of appeal that leave should be given to lift the stay, Mr. Machtinger did not bring a motion before the Registrar to lift the stay in order to proceed with an action for a debt claimed not to be discharged by reason of section 178(1) of the BIA, and thus the lifting of the stay was not before the Registrar. This kind of an order should not be raised on an appeal from a discharge order. It should be raised on a proper motion brought before the Registrar. I decline to deal with it. I would observe that on the face of it, there may be a serious limitations issue.

[5] So far as the appeal is concerned, an appeal is not a trial *de novo* and a judge can consider only the evidence before the Registrar. Affidavit evidence to prove a fact not before the Registrar is not permissible. The appellant must establish that the Registrar erred in principle, erred in law or failed to take into account a proper factor or took into account an improper factor that demonstrably led to a wrong conclusion. See *Re Borden* (2010), 69 C.B.R. (5th) 251 per Hoy J. (as she then was). If an appeal is based on an alleged error in a finding of fact, the error must be palpable and overriding. See *Clarke v. Caister* (2000), 17 C.B.R. (4th) 49 (B.C.C.A.) and Houlden, Morawetz and Sarra, 2012-2013 *Annotated Bankruptcy and Insolvency Act* (Carswell) at I§61.

[6] I will deal with the errors alleged by Mr. Machtinger to have been made by the Registrar.

[7] Mr. Machtinger contends that the Registrar failed to take into account alleged perjury committed by Mr. Saban during his sworn examination by the Official Receiver. What happened is that at the outset of the discharge hearing before any evidence was called, another opposing creditor named Rand asserted to the Registrar that Mr. Saban had lied in his examination before the Official Receiver. The Registrar pointed out that the Official Receiver's report was not in

itself evidence and so that the information contained in the report needed to come out, i.e. come out in evidence, unless Mr. Saban was prepared to admit that he was examined under oath and relied on the statements made at the time. The Registrar told Mr. Rand that he would have an opportunity to deal with it in due course. I see no error in what the Registrar said, and Mr. Rand or anyone else was entitled to cross-examine Mr. Saban on his examination by the Official Receiver and also to adduce any evidence they wished.

[8] In her reasons for decision, the Registrar stated in paragraph 5 that the creditors failed to do any measure of appropriate due diligence when advancing loans to the bankrupt and had they done so, the fact that the promise of security in various assets was illusory would have come to light. Mr. Machtinger contends that the Registrar thus minimized the fraud committed by Mr. Saban and did not hold it against him. However, I note that the Registrar went on to be quite critical of Mr. Saban in what he had done. I see no error in her statements in paragraph 5 of her reasons.

[9] Mr. Machtinger testified before the Registrar that Mr. Saban had deceived him as to the ownership of his house, which was to be used as security if the loan to Mr. Saban was not repaid. The home was registered in Mr. Saban's wife's name. The grounds to refuse, suspend or grant a conditional discharge in section 173(1) of the BIA include (k), being the fact that the bankrupt has been guilty of a fraud. In her reasons for decision, the Registrar listed several sections of sub-section 173(1) that had been proven, but she did not include sub-section (k).

[10] In her reasons in paragraph 5, the Registrar did state that the promise of security in various assets was in fact illusory and one of the things she said that was illusory was that the matrimonial home was in the name of the bankrupt's spouse. I would say three things to this point.

[11] First, whether to order a conditional discharge rather than refusing a discharge is a discretionary matter for the Registrar as is whether something that has been proven that is listed under section 173(1) should be taken into account. It is quite clear from paragraph 5 of her reasons that the Registrar was of the view that Mr. Saban had misrepresented the ownership of

his house but she was of the view that had the creditors undertaken any due diligence, they would have discovered this. She made no express finding of fraud.

[12] Second, the Registrar did make a finding that section 173(1)(l) had been proven. That section lists as a ground the fact that the bankrupt has committed any offence under the BIA or any other statute in connection with the bankrupt's property. What the basis of this aspect of the decision, however, was not expressly stated by her, but it is possible it referred to the ownership of the house issue.

[13] Third, and perhaps most importantly, in Ontario, unlike some other provinces, the weight of authority is that because an application for discharge is intended to be a summary hearing, issues of fraud are not to be explored and are to be considered only if fraud has previously been established. In *Re Horwitz* (1984), 52 C.B.R. (N.S.) 102, aff'd (1985) 53 C.B.R. (N.S.) 275, Osborne J. (as he then was) in hearing a trial of an issue as to fraud that had been ordered in a bankruptcy discharge hearing stated his concerns regarding the trial of an issue in a discharge hearing:

> 10. An application for discharge was always intended to be a summary hearing. Issues such as settlements or fraudulent preference or fraudulent representations leading to the extension of credit are not to be explored on a discharge application. Those natters are factors to be considered by the court on an application for discharge by the plain wording of Section 143 (1) (h), 143 (1) (k). In that the discharge hearing is a summary hearing, it is not the appropriate forum in which to determine whether there has been a settlement or fraudulent preference or an extension of credit because of the bankrupt's fraud. Those are matters to be weighed and considered on the bankrupt's application for discharge, after they have already been established. The discharge hearing is not the forum in which Section 143 factors are to be established *ab initio*, nor do I think the proper approach to be taken is to adjourn the application for discharge by resorting to the vehicle of a direction of a trial on an issue.

[14] See also *Re Gura* (1989), 73 C.B.R. (N.S.) 250 (Granger J.) for the same principles.

[15] What the Registrar did in this case, therefore, in not making any express finding of fraud appears to be in conformity with the settled law of Ontario regarding the proof of fraud required in a discharge hearing.

[16] The same can be said regarding another contention of Mr. Machtinger that the Registrar erred by not finding that fraud had been proven under section 173(1)(k). The Registrar stated in paragraph 6 of her reasons for decision that the bankrupt had a propensity to write post dated cheques to his creditors for which there were insufficient funds in his bank account and that there were too many occurrences of providing NSF cheques for the bankrupt to suggest it was anything but a premeditated scheme to delay or avoid paying his creditors. Mr. Machtinger contends that this is an offence under section 362(4) of the *Criminal Code*.

[17] It would be inappropriate in my view for the reasons stated in *Re Horwitz* and *Re Gura* for a Registrar on a discharge hearing to get into whether an offence under the *Criminal Code* had been proven. Moreover, section 362(4) makes it an offence to obtain anything by means of a cheque that was dishonoured for insufficient funds unless the accused believed on reasonable grounds that the cheque would be honoured. The Registrar did not say that any of the creditors had given something to Mr. Saban on the basis of a cheque that was dishonoured but rather that the cheques were to delay or avoid paying his creditors. Thus whether on the facts fraud could be proven is speculation.

[18] Mr. Machtinger contends that the Registrar erred in believing Mr. Saban's testimony that he and his wife did not receive any money from a settlement of a car accident insurance claim. In paragraph 5 of her reasons for decision, in listing promises of security that were illusory, she stated that "the personal injury settlement funds were fully committed to pay the legal fees associated with the action". The insurance proceeds totalled $112,449. Only $65,916 was used to pay the fees associated with the action. However, another $29,833.51 was used to pay Mr. Saban's solicitor's fee for previous accounts in other matters that had been undertaken by his solicitor that were outstanding. Another $17,000 was used to repay a loan that had been advanced by his solicitors to him, which had been made for him to pay $8,000 owing to the CIBC, $4,000 owing to his criminal lawyer and $5,000 which had covered a personal cheque he had written. The evidence of this was before the Registrar, and she made a mistake in saying that all of the proceeds were used to pay the fees for the automobile claim. However, this error was trifling and could not be said to be a palpable and overriding error that would constitute grounds to overturn the decision of the Registrar.

[19] Mr. Machtinger contends that the Registrar erred in paragraph 5 of her reasons for decision in stating that the bankrupt's business was in fact established in the name of a personal friend. This was one of the illusory promises that she was critical of Mr. Saban for making. It appears from the evidence that the business name was first registered with the Ministry years after the loan from Mr. Machtinger to Mr. Saban. Whether that means that the business did not exist before, or existed without registering the business name, is not in the evidence. If the statement of the Registrar was in error, and this is by no means clear, it would be an irrelevant error. Whether the business was not owned by Mr. Saban or it commenced some years after the loan by Mr. Machtinger, the result would be the same, i.e. it was not available to secure a loan.

[20] Mr. Machtinger is critical that the Registrar only cited one failure of Mr. Saban to comply with his duties as a bankrupt in that he still owed $1,500 to his Trustee. Mr. Machtinger asserts that Mr. Saban did other things that were not in compliance with his duties as a bankrupt. Whether or not Mr. Machtinger is correct in this, it makes no difference. The Registrar found that s. 173(1)(o), which refers to the bankrupt failing to comply with his duties as a bankrupt, had been proven.

[21] The Registrar stated in her reasons for decision that the family unit income for Mr. Saban was below the Superintendent's standards for surplus income. Mr. Machtinger contends that this was an error as he had told the Trustee that the income of Mrs. Saban was $983 per month higher than contained in the Trustee's statement of income and expenses provided to the Registrar for the discharge hearing. The fact that Mr. Machtinger told the Trustee that Mrs. Saban had a higher income than stated in the Trustee's report is not any evidence of that but only an assertion and although he states in his affidavit that it became apparent at the discharge hearing that Mr. Saban had a greater surplus income, I was pointed to no evidence in the transcript of the discharge hearing to that effect. Even assuming that the affidavit was properly before me, which it was not, I ignore the hearsay statements in Mr. Machtinger's affidavit of what he says he has learned outside of the discharge hearing. The Registrar was entitled to rely on the Trustee's report, and it has not been established that the Registrar made a palpable and overriding error in stating that the family unit income for Mr. Saban was below the Superintendent's standards for surplus income.

[22] Finally, Mr. Machtinger contends that the Registrar erred by not finding that section 173(1)(b) had been proven. That section refers to the fact that the bankrupt has omitted to keep books and records. However, the evidence referred to by Mr. Machtinger does not establish that. It was a letter from Mr. Saban who had been asked by a creditor to provide bank deposit books and cancelled cheques for four months in 2006 in which he stated that all of his documents were not available as he had been evicted from the premises and he understood that "they" had cleaned out and thrown away all paper and furniture that he had left. Whether or not that statement was true, it is no evidence that he failed to keep his bank deposit books and cancelled cheques for the four months in question.

[23] In the circumstances the appeal from the Deputy Registrar's order granting a conditional discharge is dismissed. Mr. Saban has requested an order for costs on a substantial indemnity basis. I heard no argument on costs. Counsel for Mr. Saban may make written submissions of no longer than three pages in length, along with a proper cost outline, within 10 days and Mr. Machtinger shall have 10 days in which to make reply written submissions of no longer than three pages in length.

Newbould J.

DATE: November 26, 2012