IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Bankruptcy of Gaffney,***
2006 BCSC 1710

Date: 20061117
Docket: B 052161
Registry: Vancouver

IN THE MATTER OF THE BANKRUPTCY AND INSOLVENCY ACT

In the Matter of the Bankruptcy of

Sheila Frances Gaffney

Before: The Honourable Mr. Justice Meiklem

Reasons for Judgment
In Chambers

Counsel for the bankrupt: R. K. Oliver

Counsel for the Trustee, A. Farber & Partners Inc.: D. W. Donohoe

H.C. Gaffney appearing In Person and by Agent G. Zanetti

Date and Place of Hearing: August 31, 2006
Vancouver, B.C.

[1] This was the hearing of an application by the Trustee of the estate in bankruptcy for a declaration that Harold Gaffney, the estranged husband of the bankrupt Sheila Frances Gaffney, has no legal standing to ask for an order annulling the order for discharge of the bankrupt, or alternatively, an adjournment of Mr. Gaffney's pending notice of motion dated and filed in this proceeding on May 10, 2006. Mr Gaffney's notice of motion seeks an order that Mrs. Gaffney's bankruptcy discharge of May 5, 2006 be annulled, together with various other relief which I will refer to as I set out some of the facts.

[2] At the conclusion of the hearing I informed the parties that I was likely persuaded that Mr. Gaffney should not have legal standing to ask for the order annulling the discharge, but in view of the amount of material and the fact that Mr. Gaffney was not being represented by counsel I wished to consider the material most carefully. I therefore reserved my decision. I have in fact concluded that Mr. Gaffney does not have standing in respect of his application to annul the discharge of the bankrupt.

[3] The former bankrupt, Sheila Frances Gaffney, and Mr. Harold Gaffney were married in December 1978. They separated on April 29, 2005. Mrs. Gaffney assigned into bankruptcy on May 13, 2005. On June 16, 2005 the Trustee applied to be registered as owner of the bankrupt's undivided one-half interest in the condominium property jointly owned by the bankrupt with Mr. Gaffney. On July 15, 2005 the Trustee wrote to Mr. Gaffney advising him that he intended to "realize" on the half-interest of the bankrupt. He also advised that he intended to forego any

claim for occupational rent against Mr. Gaffney and invited Mr. Gaffney to make an offer for the bankrupt's interest.

[4] The Trustee has sworn in an affidavit that the transfer was for the purpose of protecting the interest of creditors. Mr. Gaffney takes great issue with this action because at a point shortly after the assignment in bankruptcy the unsecured creditors were all, in fact, paid by himself and he advised the Trustee of this in early July 2005. It is certainly a curious circumstance that the Trustee was corresponding with Mr. Gaffney in mid-July expressing an intention to realize on the interest in the property after he had been informed that the unsecured creditors listed in the statement of affairs had in fact been paid. (There was one other debt listed as unsecured but this was an error because the amount was in fact secured by the mortgage charging the condominium.)

[5] Notwithstanding those circumstances, Mr. Gaffney offered, through counsel, to pay $4,000 to the Trustee for the undivided half-interest in the Trustee's name, after allowing for an equitable setoff for one-half of the debts that he had paid. This offer was withdrawn when the Trustee counter-offered with a minor variation. The bankrupt's discharge hearing was held on April 5, 2006 at which time the Trustee in bankruptcy suggested an annulment of the assignment because none of the unsecured creditors who had been informed of the assignment had filed a proof of claim. Mrs. Gaffney did not accept that suggestion and the discharge was granted on May 5, 2006.

[6] Mr. Gaffney's motion was filed on May 10, 2006.

[7] On May 30, 2006 the Trustee in bankruptcy sent a Form 17 to the bankrupt's solicitor intending to re-convey to the former bankrupt Mrs. Gaffney her undivided half-interest in the condominium property. This was of course the wrong form and the proper Form A to affect the transfer was belatedly signed August 21, 2006 and delivered to Mrs. Gaffney's solicitor.

[8] Mr. Gaffney's motion seeks the following relief in addition to annulment of the discharge of the bankrupt:

1. That the Trustee's interest be permanently removed from title to the property.
2. That the Trustee cease and desist any and all claims on behalf of the former bankrupt.
3. That the former bankrupt's interest not be returned on title.
4. That the bankrupt "signs a form to release in full the mortgage and property to Harold C. Gaffney".
5. That the court initiates criminal proceedings.
6. That the former bankrupt be restrained and enjoined from disposing, encumbering, assigning or in any similar manner dealing with family assets.

[9] I note that there is conflict between some of the various items of relief sought. Query what the court is being asked to order in respect of the undivided interest of the former bankrupt Mrs. Gaffney if the court deprives the Trustee of the interest and also denies it to Mrs. Gaffney. It seems that Mr. Gaffney, by seeking an order that Mrs. Gaffney sign a form of "release" is effectively seeking a reapportionment of family assets in this bankruptcy proceeding or perhaps seeking to obtain performance of an offer made by Mrs. Gaffney that I will refer to later.

[10] Mr. Gaffney's submission on the issue of standing is that he is an interested party by virtue of being a spouse and "due to the fact that the real property is in great jeopardy due to the Trustee in bankruptcy's improper action". Mr. Gaffney has alleged it was fraudulent of the Trustee in bankruptcy to facilitate Mrs. Gaffney's bankruptcy when she was not insolvent because her assets exceeded her liabilities.

[11] Mr. Gaffney does not claim that he is a creditor and as will become evident later in these reasons his concerns in respect of jeopardy to his interest in the property as a result of Mrs Gaffney's discharge from bankruptcy are moot.

[12] It is not clear what great jeopardy Mr. Gaffney perceives in respect of the condominium property. Ms. Zanetti, a non-lawyer who appeared as Mr. Gaffney's agent at this chambers hearing, may also be rendering him advice. Ms. Zanetti's written submission contains the following paragraphs, intended to illuminate Mr. Gaffney's perceived prejudice:

> [21] Hunter J. in the decision of *Pigeon v. Pigeon* stated:
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> > [i]t is a settled law that the spouse of a bankrupt is simply another creditor under the *BIA*. A reapportionment under s. 51 of the *Family Relations Act* cannot occur after an assignment in bankruptcy.
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> *Pigeon v. Pigeon* (1993), 18 C.B.R. (3d) 100, 81 B.C.L.R. 100 (S.C.)
>
> [22] Further, in B.C. there is no subsequent ability for the Court in the family law proceedings to re-apportion the one half interest vested in the trustee to the non-bankrupt spouse, unless there is a restraining order in effect prior to bankruptcy, restraining disposition of or dealing with all assets, thus this is to say in the case at bar, due to the recklessness of the trustees' deliberate action, the Applicant is greatly prejudiced.
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> *Re Beninger (2003), Carswell BC 3011*
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> [23] In *Pigeon v. Pigeon supra* Hunter, J. says that the spouse of a bankrupt does not have a preferential right over other creditors against the bankrupt and he relies on *Walters v. Walter*, *supra,* to make such determination.

> [24] In British Columbia permanent separation itself is not a triggering event; it is the judicial declaration of separation that triggers spousal entitlement. Therefore, in British Columbia the trustee in bankruptcy for the non-titled husband acquires a vested one-half interest in the family assets provided a triggering event has occurred before bankruptcy or at any time before the husband has been discharged.
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> Robert A. Klotz Bankruptcy, Insolvency and Family Law Second Edition
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> *Gray, Re* (1988), 67 C.B.R. (N.S.) 161 (Ont. S.C.)
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> [25] In most provinces, the triggering event is a permanent separation without reasonable prospect of reconciliation. (Note the different treatment in B.C. where the triggering event is a separation agreement or judicial declaration that the spouses have no reasonable prospect of reconciliation: Re. FRA, s. 56)
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> Robert A. Klotz *Bankruptcy, Insolvency & Family Law* Matrimonial Property Claims. [Ch. 5]
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> [26] A triggering event which occurs after the date of bankruptcy does not give rise to a provable claim. The rule suggests that in British Columbia, a claim arising out of separation will not be provable if the bankruptcy occurs after separation (not itself a triggering event under the B.C. FRA) but before a s. 57 declaration of permanent separation has been granted by the court. In such circumstance, the matrimonial property claim will survive the bankrupt's discharge. Therefore prudent counsel in this situation may well advise the insolvent spouse to obtain a s. 57 declaration before declaring bankruptcy, something that neither the trustee and Mrs.. Gaffney's counsel; Mr. Keith Oliver have done. In effect counsel for Mrs. Gaffney, who saw no money for himself last year, directed Mrs. Gaffney to declare bankruptcy, as oppose to file for divorce.
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> Robert A. Klotz *Bankruptcy, Insolvency & Family Law* Matrimonial Property Claims. [Ch. 5]
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> *Re Beninger* (2003), *supra*

[13] The majority of para. 26 just quoted is a verbatim quotation from footnote number 7 at p. 5.1 of the cited text. The preamble to that chapter makes it clear that "In this chapter, the matrimonial property claim is being pursued by the solvent spouse against the bankrupt spouse or the Trustee".

[14] Mr. Gaffney and/or his agent Ms. Zanetti are possibly confused about the author's prescription of what may be prudent advice to an insolvent spouse in particular circumstances. The author's rationale for such advice is that the insolvent

spouse facing a claim or potential claim by a solvent spouse may wish to have the solvent spouse's interest triggered by a s. 57 declaration and dealt with in the bankruptcy rather than have the solvent spouse's claim survive the bankruptcy.

[15] Even though both spouses in this case already have vested one-half interests in their former matrimonial home without the necessity of a Section 57 declaration, it would have been arguable that the vesting of Mrs. Gaffney's interest in the Trustee prior to a triggering event would have frustrated any claim by Mr. Gaffney to a greater than 50% reapportionment in his favour because of the case law in ***Biedler*** and ***Pigeon***. However, Mr. Gaffney has made no such claim and the retransfer of Mrs. Gaffney's interest from the Trustee makes the argument moot. At the time of hearing this application the retransfer may not have been registered but it is established that it was delivered to Mrs. Gaffney's counsel. The condominium is obviously a family asset and any potential claim for reapportionment still exists.

[16] Given that Mr. Gaffney disputes that Mrs. Gaffney was insolvent, or should have assigned in bankruptcy at all, and now that she is once again the legal owner of an undivided one-half interest, I do not see any prejudice that could possibly accrue to him as a result of the fact that his potential claim has survived the bankruptcy.

[17] I have delved into the merits of Mr. Gaffney's motion as part of the inquiry as to whether Mr. Gaffney has a sufficient stake in the outcome of any challenge to the bankruptcy discharge to give him standing to make an application for an annulment.

[18] Of significance is that Mr. Gaffney applies to annul only the discharge, not the assignment into bankruptcy. I find this significant in light of Mr. Gaffney's argument and extensive affidavit evidence (much of which objectionably incorporates argument) focused on the point that Mrs. Gaffney had no unsecured creditors and was not insolvent at the time she assigned into bankruptcy. The basis of his application is the allegation that her assignment was fraudulent and should not have been facilitated by the Trustee. It is difficult to understand how Mr. Gaffney's interests or any other interests of justice are advanced by returning Mrs. Gaffney to a state of un-discharged bankruptcy which Mr. Gaffney says should not have occurred in the first place.

[19] I note that after Mrs. Gaffney received Mr. Gaffney's May 10, 2006 notice of motion her counsel wrote to Mr. Gaffney advising him of Mrs. Gaffney's willingness to transfer any remaining interest that she had in the condominium property in exchange for a full and final release and an agreement of no costs payable by either party. Although Mr. Gaffney's affidavit does not exhibit his reply to Mrs. Gaffney's counsel, his letter of May 18, 2006 to Mr. Donohoe, counsel for the Trustee, implies that Mr. Gaffney wished to accept Mrs. Gaffney's offer and he was pressing Mr. Donohoe to "remove" the Trustee's undivided half interest in the property. This was necessary at the time because of course the Trustee had not yet returned title to Mrs. Gaffney. The Trustee's first unsuccessful attempt to do that was on May 30, 2006.

[20] The items of relief sought in Mr. Gaffney's notice of motion, other than the annulment of the discharge, surely should not require a hearing before the court, in light of the subsequent events. Unless Mrs. Gaffney has resiled from her prior position, she is now in a position to convey her interest in the property to Mr. Gaffney on terms that he previously found acceptable. If she does not wish to do so, Mr. Gaffney could pursue a re-apportionment remedy in a matrimonial proceeding.

[21] I am persuaded that an annulment of the bankruptcy discharge could not advance Mr. Gaffney's legal rights. It appears to me that he has assumed the role of an enforcer out of frustration at his estranged wife's seemingly unnecessary bankruptcy and the facilitation thereof by the Trustee and he wishes to make the Trustee accountable for perceived procedural irregularities. However, he does not have a direct legal stake in an application to annul the discharge.

[22] There was no reasonable explanation provided to me as to why the Trustee took so long to deliver a valid transfer of title to Mrs. Gaffney after it became apparent that there were no creditors to be protected, and knowing, not only of Mr. Gaffney's long-standing frustration, but also of Mrs. Gaffney's settlement offer in May 2006 to release her interest in the property to Mr. Gaffney. The value of the property may apparently have increased significantly during the period of delay, and Mr. Gaffney may well have been prejudiced in various ways by the trustee's actions or inaction, but even if Mr. Gaffney has an actionable claim against the Trustee in that connection, such a claim would not be dependent on annulment of the discharge.

[23] I conclude that Mr. Gaffney does not have standing to make an application to annul the discharge because he does not have sufficient stake in the outcome of such an application. His legal rights do not stand to be advanced. That portion of his notice of motion is struck out. In the circumstances, I make no order as to costs.

"I.C. Meiklem, J."
The Honourable Mr. Justice I.C. Meiklem