IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***In the Matter of the Bankruptcy of Martin Wirick,*** 2006 BCSC 1273

Date: 20060627
Docket: 228901 VA02
Registry: Vancouver

In Bankruptcy

In the Matter of the Bankruptcy of

Martin Keith Wirick

Before: The Honourable Mr. Justice Sigurdson

Oral Reasons for Judgment

In Chambers
June 27, 2006

Counsel for the Bankrupt, Martin Keith Wirick	P.D. Le Dressay
Counsel for Vancity Savings Credit Union	J.L. Harry
Counsel for the Law Society of British Columbia	D.P. Ramsay, Q.C.
Place of Hearing:	Vancouver, B.C.

[1] **THE COURT:** This is an application by Martin Wirick for a discharge from bankruptcy.

[2] Mr. Wirick made an assignment into bankruptcy on July 10, 2002, and on September 19, 2003, I adjourned Mr. Wirick's application for a discharge for the earlier of ten months or the date upon which the Law Society completed its investigation into the affairs of the bankrupt.

[3] The matter came on for hearing again and on August 3, 2004, I gave oral reasons (which are attached as Schedule A to these reasons), in which I set out the circumstances leading to the bankruptcy. I found that the creditors opposing the discharge were entitled to a finding that Mr. Wirick was guilty of a fraudulent breach of trust.

[4] Because of that finding, Mr. Wirick was not eligible for an absolute discharge of bankruptcy and the question became whether, having regard to sections 172(1) and 172(2) of the ***Bankruptcy and Insolvency Act***, R.S.C. 1985, c. B-3, the appropriate order was to: (a) refuse the discharge of the bankrupt, (b) suspend the discharge for such a period of time as the court thinks proper, or (c) require the bankrupt as a condition of his discharge to perform such acts, pay such monies, consent to such judgments, or comply with such other terms as the court may direct.

[5] In my reasons of February 2, 2005 (attached as Schedule B to these reasons), I set out Mr. Wirick's circumstances, as well as some of the other circumstances and consequences of the bankruptcy. I also set out the authorities that were referred to me on the question of whether and in what circumstances a discharge should be refused.

[6] I note in passing, my reference to the Supreme Court of Canada's judgment in ***Industrial Acceptance Corporation Ltd. v. Lalonde,*** [1952] 2 S.C.R. 109 at 120 said:

> The purpose and object of the ***Bankruptcy Act*** [R.S.C. 1927, c. 11] is to distribute equitably the assets of the debtor and to permit of his rehabilitation as a citizen, unfettered by past debts. The discharge,

> however, is not a matter of right and the provisions of ss. 142 and 143 [now essentially ss. 172 and 173] plainly indicate that in certain cases the debtor should suffer a period of probation. The penalty involved in the absolute refusal of discharge ought to be imposed only in cases where the conduct of the debtor has been particularly reprehensible, or in what have been described as extreme cases.

[7] I note as well from the statement in ***Re Crowley*** (1984), 66 N.S.R. (2d) 390, [1984] N.S.J. No. 52 (S.C.) at ¶47:

> ... in considering the application for discharge, the court must have regard to not only the interests of the bankrupt and his creditors but also to the interest of the public ... The court must always balance the public interest in commercial morality with its interest in the re-establishment of the debtor.

[8] Mr. Le Dressay, counsel for Mr. Wirick, argues that this is not one of those cases where a discharge should be absolutely refused. Rather, he argues that I should simply suspend the discharge for three months.

[9] The Law Society and one of Mr. Wirick's creditors oppose the discharge and say that it should be absolutely refused on the basis that the conduct of the bankrupt has been so extreme and reprehensible that the ultimate penalty of a refusal of a discharge should be imposed. In the alternative, they seek an order that the bankrupt consent to judgment in a particular form and suspend the bankruptcy for a period of time.

[10] The circumstances of Mr. Wirick's bankruptcy are detailed in the two judgments that I referred to that are attached as Schedules "A" and "B" to these reasons, and I will try not to repeat them unnecessarily. I should note that when this matter was last before the court in February 2005, I dismissed the application with

liberty to reapply after the Law Society had completed their global audit. I felt that it was necessary to have all the information before the court, particularly any evidence as to the extent that Mr. Wirick had benefited, if at all, from his fraudulent breach of trust. I am told by Mr. Ramsay, counsel for the Law Society, that this global audit has now been done.

[11] The significant finding is that there is no evidence that Mr. Wirick, in the fraudulent breach of trust he committed in his affairs in dealing largely with his client, Mr. Tarsem Singh Gill, did not receive any personal benefit, other than the legal fees for work that he has done. In other words, there is no evidence that Mr. Wirick misappropriated any funds for his personal benefit.

[12] Is this one of those cases that is so extreme that a discharge from bankruptcy should be absolutely refused? This is an unusual case because of the manner in which the liabilities giving rise to the bankruptcy arose. What are the circumstances and what is the public interest?

[13] Mr. Wirick, a lawyer in a position of trust, participated in fraudulent breaches of trust. The claims against the special fund of the Law Society that have been resolved and approved apparently total over $34 million and there are still 108 claims pending. The exact amount of money the Law Society will pay, apart from insurance coverage that it may have, is not clear, but it appears to be well in excess of the amount for which proofs of claim in the bankruptcy of Mr. Wirick have been filed. The proofs the Law Society has filed slightly exceed $4 million. I described this briefly some time ago in my earlier reasons.

[14] Given Mr. Wirick's description of how the breach of trust began and continued, which was not challenged, and given that he did not personally benefit, other than from the receipt of legal fees, it appears, unless there are facts that have not been brought to my attention, that Mr. Wirick's fraudulent breach of trust was more a product of weakness in his character than it was greed on his part. However, this debacle certainly demonstrates the significance of the trust that the public places in lawyers when the breach of that trust by one practitioner can cause such dramatic harm to members of the public.

[15] Mr. Le Dressay argues that the refusal of the discharge is more in the nature of a punishment than any proper application of principles underlying the ***Bankruptcy and Insolvency Act***. He points out that Mr. Wirick has suffered in terms of his ability to practice law, his assets, his marriage, and his reputation. Even at the present time, it appears that Mr. Wirick is not even earning a salary from a pet store business, according to the information that I received from Mr. Le Dressay.

[16] Given the finding that I have made of a fraudulent breach of trust, Mr. Wirick will not be discharged of his debts that relate to that fraud. That is an enormous liability that will remain regardless of the order that I make.

[17] Mr. Le Dressay argues that a conditional order or an order for a consent judgment as a condition for discharge would be meaningless, as Mr. Wirick has no prospect of paying anything to his creditors, and all creditors have had years to investigate Mr. Wirick. According to Mr. Le Dressay, Mr. Wirick has cooperated fully

with his Trustee, the Trustee of Tarsem Gill, the Law Society, and the RCMP, and there was no suggestion to the contrary.

[18] Mr. Le Dressay says, and this is where the parties disagree, that this is not one of the extreme or rare cases where the ultimate punishment of a refusal of an order for discharge should be made. I am mindful of the unique circumstances of this bankruptcy, and I am also mindful of the serious harm that has occurred, and the fact that the members of the bar will no doubt have to contribute substantially to the Law Society to make good the losses caused by Mr. Wirick's breach of trust.

[19] However, I have concluded, on consideration of all the circumstances, it is appropriate to grant a discharge on terms.

[20] Given the substantial losses incurred by the major creditor, the Law Society of British Columbia, I see no reason why in the future the Law Society must sue Mr. Wirick if it wishes to attempt to recover monies arising from their loss from his fraudulent breach of trust. Perhaps the only way that Mr. Wirick will ever pay anything to the Law Society is if he wins the lottery, but in the circumstances of this case, I do not see why the Law Society should have to take further legal proceedings in the future to obtain a judgment against Mr. Wirick.

[21] Is this simply a symbolic matter? Perhaps it could be viewed that way, but I think the public interest in the trust of lawyers in conveyancing matters is against a discharge without such a term. The number of times that Mr. Wirick breached his undertaking is astounding.

[22] What is the appropriate amount that he should be required to consent to judgment? I found this to be a difficult question, as almost any amount, given Mr. Wirick's circumstances and prospects, is beyond his reach. The Law Society's counsel suggested a figure of about $4 million, which is the amount of the filed proofs of claim in that bankruptcy. I have decided, however, to fix the amount of the judgment that the bankrupt must consent to at $500,000. Although the indebtedness of Mr. Wirick that will survive his bankruptcy is much greater than that amount, I do not think that in these unique circumstances that the public interest is served by granting a discharge unless the bankrupt is prepared to consent to a judgment in that amount.

[23] After a consideration of all the evidence and the factors and the authorities to which I have referred in this and the earlier judgments, I have decided that I am prepared to grant a discharge on the condition that Mr. Wirick consent to a judgment in the amount of $500,000 in favour of the Law Society and that his discharge be suspended for a period of three further months.

[24] If Mr. Wirick will not consent to judgment within 45 days in the terms that I have set out, the discharge will be refused.

[25] In the circumstances, that is the order that I will make.

"J.S. Sigurdson, J."
The Honourable Mr. Justice J.S. Sigurdson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20040803
Docket: 228901/VA02
Registry: Vancouver

In the Matter of the Bankruptcy

of

Martin Wirick

Before: The Honourable Mr. Justice Sigurdson

Oral Reasons for Judgment

August 3, 2004

Counsel for Martin Wirick:	P.D. Le Dressay
Counsel for HSBC Bank of Canada:	J. Bateman
Counsel for Law Society of British Columbia:	C. Ramsay
Place of Hearing:	Vancouver, B.C.

[1] **THE COURT:** The issue in this case is whether, for the purposes of a hearing under s. 172 of the ***Bankruptcy and Insolvency Act***, R.S.C. 1985, c. B-3 ("the ***Act***"), I should make a finding that "the bankrupt has been guilty of any fraud or fraudulent breach of trust" as referred to in s. 173(1)(k) of the ***Act***, absent an independent civil action or criminal prosecution, and if so, whether such a finding should be made here.

[2] By way of background, Mr. Wirick, the bankrupt, who had made an assignment into bankruptcy on July 10, 2002, applied on September 15, 2003 for a discharge from bankruptcy which was opposed by the Law Society of British Columbia, HSBC Bank of Canada, and Vancouver City Savings Credit Union, as well as others. The position that they took was that the question of whether Mr. Wirick should be discharged, and if so on what terms, was a question that should be dealt with after the Law Society has completed its investigation, the Special Fund Committee of the Law Society has completed its work, and the full circumstances of the bankruptcy and its impact are known.

[3] On that application, I discussed, but did not decide, the question of whether the bankrupt had been guilty of fraud or fraudulent breach of trust could be determined on a discharge application or whether it had to be decided independently of the discharge hearing by a conviction or civil judgment. What I did do was adjourn the discharge application to a time to be reset by Mr. Le Dressay, either when the Law Society completes its special fund hearings or ten months had passed, whichever should first occur.

[4] The application that is before me is for an order making a finding or a declaration that the bankrupt has been guilty of fraud or fraudulent breach of trust, or in the alternative, to lift the stay to allow the Law Society, Mr. Wirick's major creditor, to commence an action in fraud against the bankrupt under s. 69.4 of the ***Act***.

[5] From the Law Society's perspective and the position of two other creditors, they seek to have the finding for the purposes of opposing the bankrupt's application for an unconditional discharge.

[6] The Law Society's position is that if such a finding is made at the discharge hearing or before, the court cannot grant an absolute discharge and must either refuse a discharge, make it conditional, or suspend the discharge for a period the court thinks proper under s. 172(2) of the ***Act***.

[7] The creditors, represented by Mr. Bateman and Ms. Harry, as I noted, support the Law Society's position, as on behalf of the other two creditors on this application. They wish to oppose the bankruptcy on the ground that the bankrupt has committed a fraud or been guilty of fraudulent breach of trust. They say that on the material before me, where the facts are not contested, I am able to make the appropriate finding.

[8] Mr. Le Dressay, counsel for Mr. Wirick, says there is no provision in the ***Act*** to make a declaration or a finding of fraud or fraudulent breach of trust, but instead there must be a separate civil or criminal proceeding. He says that is the decided legal position in British Columbia. Secondly, he says that if he is wrong on the jurisdictional question the court should not, on Mr. Wirick's uncontradicted evidence, make a declaration of fraud because Mr. Wirick has sworn that, in effect, he did not act with malicious intent and never intended to deprive the various creditors of their monies. Alternatively, Mr. Le Dressay says that a stay should not be lifted absent a draft claim as to how he may have defrauded the Law Society. Finally, he says that an order made at this stage, where there is a potential for criminal proceedings, could act gravely to his client's prejudice.

[9] I will discuss the facts briefly, then I will deal with the issue of law, and then turn to the question of whether on the evidence before me it is proven on a balance

of probabilities that the bankrupt has been guilty of fraud or fraudulent breach of trust. I should note that I am seized of Mr. Wirick's discharge application.

[10] The applicable provisions of the ***Act*** are as follows:

> **172**(1) On the hearing of an application of a bankrupt for a discharge, the court may either grant or refuse an absolute order of discharge or suspend the operation of the order for a specified time, or grant an order of discharge subject to any terms or conditions with respect to any earnings or income that may afterwards become due to the bankrupt or with respect to his after-acquired property.
> (2) The court shall on proof of any of the facts mentioned in section 173
>
> (*a*) refuse the discharge of a bankrupt;
> (*b*) suspend the discharge for such period as the court thinks proper; or
> (*c*) require the bankrupt, as a condition of his discharge, to perform such acts, pay such moneys, consent to such judgments or comply with such other terms as the court may direct.

[11] Section 173 of the ***Act*** provides as follows:

> **173**(1) The facts referred to in section 172 are:
>
> (*a*) the assets of the bankrupt are not of a value equal to fifty cents on the dollar on the amount of the bankrupt's unsecured liabilities, unless the bankrupt satisfies the court that the fact that the assets are not of a value equal to fifty cents on the dollar on the amount of the bankrupt's unsecured liabilities has arisen from circumstances for which the bankrupt cannot justly be held responsible;
> (*b*) the bankrupt has omitted to keep such books of account as are usual and proper in the business carried on by the bankrupt and as sufficiently disclose the business transactions and financial position of the bankrupt within the period beginning on the day that is three years before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included;
> (*c*) the bankrupt has continued to trade after becoming aware of being insolvent;
> (*d*) the bankrupt has failed to account satisfactorily for any loss of assets or for any deficiency of assets to meet the bankrupt's liabilities;

(*e*) the bankrupt has brought on, or contributed to, the bankruptcy by rash and hazardous speculations, by unjustifiable extravagance in living, by gambling or by culpable neglect of the bankrupt's business affairs;

(*f*) the bankrupt has put any of the bankrupt's creditors to unnecessary expense by a frivolous or vexatious defence to any action properly brought against the bankrupt;

(*g*) the bankrupt has, within the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included, incurred unjustifiable expense by bringing a frivolous or vexatious action;

(*h*) the bankrupt has, within the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included, when unable to pay debts as they became due, given an undue preference to any of the bankrupt's creditors;

(*i*) the bankrupt has, within the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included, incurred liabilities in order to make the bankrupt's assets equal to fifty cents on the dollar on the amount of the bankrupt's unsecured liabilities;

(*j*) the bankrupt has on any previous occasion been bankrupt or made a proposal to creditors;

(*k*) the bankrupt has been guilty of any fraud or fraudulent breach of trust;

(*l*) the bankrupt has committed any offence under this ***Act*** or any other statute in connection with the bankrupt's property, the bankruptcy or the proceedings thereunder;

(*m*) the bankrupt has failed to comply with a requirement to pay imposed under section 68;

(*n*) the bankrupt, if the bankrupt could have made a viable proposal, chose bankruptcy rather than a proposal to creditors as the means to resolve the indebtedness; and

(*o*) the bankrupt has failed to perform the duties imposed on the bankrupt under this ***Act*** or to comply with any order of the court.

[12] The issue before me is whether the court sitting in bankruptcy hearings can make a finding that the bankrupt has been guilty of fraud or fraudulent breach of trust under section 173(1)k) for the purposes of an application for a discharge either

on or before the actual hearing of the application for discharge, or whether such a finding can only be made in a civil action (or criminal proceeding) independent of the ***Bankruptcy and Insolvency Act***.

[13] In ***Re Horwitz*** (1984), 52 C.B.R. (N.S.) 102, [1984] O.J. No. 1018 (Q.L.)(Ont. H.C.J.), aff'd (1985), 53 C.B.R. (N.S.) 275, [1985] O.J. No. 1402 (Q.L.)(C.A.), in an oral judgment dealing with an application for a discharge that was opposed, Osborne J. said that the application for discharge was intended to be a summary hearing, and that matters such as fraudulent representations leading to the extension of credit were not to be explored on the discharge application, but rather were matters to be weighed and considered on the application for discharge after they had already been established (¶10). The court referred to ***Re Kemper*** (1961), 2 C.B.R. (N.S.) 130, [1961] O.W.N. 288 (Ont. H.C.J.), where Smily J. said at 134:

> … I do not think the ***Bankruptcy Act*** contemplates that on an application by the debtor for his discharge an issue might be directed to determine whether he was guilty of fraud. I think there has to be a conviction or a finding by a judgment of the Court in a civil proceeding indicating fraud or fraudulent breach of trust before the bankrupt can be considered to be guilty of fraud or fraudulent breach of trust so as to make clause (k) of s. 130 [now 173(1)(k)] applicable on the application for the bankrupt's discharge.

[14] Osborne J. endorsed the record and stated at ¶27 that, for reasons stated in ***Re Kemper***, these issues, namely fraud, if not determined by a court of competent jurisdiction before the bankrupt's discharge hearing, "should not be aired and determined at the discharge hearing". Osborne J. in ***Re Horwitz*** however went on to decide the issue. The justice considered evidence and determined the matter in the bankrupt's favour and found no proven fraud. At ¶14 he said:

> … the finding as to fraud must be made by at least a court of competent jurisdiction. . . . I do not think the bankrupt acted in a fraudulent way in obtaining credit.

[15] The appeal in ***Re Horwitz*** was dismissed. The Court of Appeal said:

> The issues in this appeal are all ones of fact alone and particularly with respect to the respondent Horwitz's state of mind at the time of the representations to the banks were made of credibility. The trial judge was impressed with Mr. Horwitz and accepted his evidence. He concluded that he committed no fraud.

[16] Mr. Le Dressay relies on the decision in ***Re Herd*** (1988), 71 C.B.R. (N.S.) 92, [1988] B.C.J. No. 1924 (Q.L.)(S.C.), aff'd (1989), 77 C.B.R. (N.S.) 209, [1989] B.C.J. No. 2368 (Q.L.)(C.A.) for the proposition that the factors in s. 173, including fraud or a breach of trust, can only be found on a discharge application where there has been a conviction or finding of fraud in a criminal or civil court, as opposed to a summary finding under the ***Act***. That was stated to be the law in ***Re Abou-Rached*** (2002), 35 C.B.R. (4th) 165, 2002 BCSC 1022.

[17] ***Re Herd*** was an application for an absolute discharge that was heard by Mr. Justice Catliff. The application for discharge was opposed by two large creditors, the bankrupt’s former girlfriend and her sister, who advanced monies to the bankrupt to buy shares.

[18] In ***Re Herd***, there were conflicting affidavits between the two creditors and the bankrupt over the terms of the advances to buy shares. It appears that the circumstances of the transactions between the bankrupt and his former girlfriend were in dispute.

[19] The judge in bankruptcy, Catliff J., said in relation to s. 143(1)(k) (the fraud and breach of trust section):

> I deal first with (k) which can easily be disposed of. An allegation of fraud or breach of trust can only be found when there has been a conviction or a finding of fraud by a judgment in a criminal or civil court: ***Re Horwitz*** …. No such conviction or finding has been made against the bankrupt.

[20] The matter went to the Court of Appeal. There, the court set out S. 143(1)(k) as "the bankrupt has been guilty of any fraud or fraudulent breach of trust".

[21] With respect to (k), Legg J.A. for the Court of Appeal said at 215:

> … the Chambers judge concluded that an allegation of fraud or breach of trust could only be found where there had been a conviction or a finding of fraud by a judgment in a criminal or civil court. He relied upon ***Re Horwitz*** …. As there had been no finding or conviction for fraud or breach of trust against the respondent in a criminal or civil court, he rejected this ground. [my emphasis]

[22] Mr. Justice Legg's comment was that there had been no finding of fraud or breach of trust in a criminal or civil court. After setting out the position below, Legg J.A. simply said with respect to that ground that the learned trial judge had reached a correct conclusion with respect to whether the bankrupt was guilty of any fraud or fraudulent breach of trust, and correctly applied the principles in ***Re Horwitz***. I do not read ***Re Herd*** as foreclosing the finding by the court on a summary basis of fraud or fraudulent breach of trust on the part of the bankrupt. It simply held that as there had been no such finding in a civil court, the ground for opposing the discharge, subsection (k) was rejected.

[23] I do not believe that ***Re Herd*** stands for the proposition that a finding for the purposes of s. 173(1)(k) cannot be made in a summary way in a bankruptcy court where the essential facts are not in dispute.

[24] ***Re Hashem*** (1984), 54 C.B.R. (N.S.) 156, 36 Sask. R. 179 (Q.B.) considered ***Re Kemper*** in an application by a bankrupt for discharge that was opposed by a creditor who said that the statement of affairs was false. MacLeod J. said at ¶10-12:

> … By s. 142(2) of the ***Bankruptcy Act*** the court is required "on proof of any of the facts mentioned in section 143" to take one of the steps thereafter set forth. Proof means proof to this court.
> ***Re Kemper*** suggests that this court can act only if a decision has been made by some other court or some other judge at some other place or some other time.
> It would be an intolerable burden to the creditors to require them to pursue the bankrupt in a criminal court (a troublesome exercise in this case because the bankrupt has removed himself to another country) or to sue, in advance, before arguing on the discharge that the bankrupt has been guilty of the type of misconduct referred to in s. 143(1)(k). Does this mean that the bankruptcy must await the determination of the civil (or criminal) case, perhaps with appeals, until the court can know whether or not these matters have been established?

[25] The court went on to say at ¶19-20:

> If the court is entitled to hold a hearing with respect to matters in s. 143(1)(b), (e) and (i), it is equally entitled to hold a hearing with respect to the matters referred to in s. 143(1)(k). In my view it is inappropriate for the court to deal with facts under s. 143(1)(k) in one way and the remaining facts in another.
> If the ***Kemper*** idea is to maintain a summary procedure and to avoid a full hearing notwithstanding those things to which the court is required to have regard, then the procedure controls the purpose; the tail wags the dog. It is like suggesting that we may have regard to any fact in s. 143 as long as we do not look too deeply or thoroughly or take too long about it.

[26] ***Re Pratchler*** (2001), 26 C.B.R. (4th) 293, 2001 SKQB 302, was a case where fraud was determined on a summary basis in the bankruptcy proceedings on an application for a discharge. There, the registrar said (at ¶5-6):

> I am satisfied that every aspect of this definition [the classic definition of fraud as set out in ***Derry v. Peek*** (1889), 14 App. Cas. 337 (U.K.H.L.)] has been proved on a balance of probabilities. See ***Re Aby*** (1995), 37 C.B.R. (3d) 259 (Sask. Q.B.). Therefore, the objecting creditor has proved a fact under s. 173(1)(k) of the ***Bankruptcy and Insolvency Act***.
> I should mention that since this is one of those rare cases where the undisputed evidence so clearly establishes fraud, I do not have to determine whether the Bankruptcy Court, on an application for discharge, is the appropriate forum to deal with the matter of fraud. I note that in ***Re Brookes*** (1969), 13 C.B.R. (N.S.) 206 (Ont. S.C.), the Court found that the bankrupt had committed fraud where the undisputed evidence clearly established fraud.

[27] I think that when the court in bankruptcy is presented with essentially undisputed facts, it can make a finding whether or not the bankrupt has been found guilty of any fraud or fraudulent breach of trust. When there are disputed facts, unless they can be resolved, the court of course must await the determination of that issue in a civil or criminal proceeding. Presumably it can order a trial of that issue, if appropriate, or grant a creditor or the trustee leave to start an action against the bankrupt. Where the issue can be determined on the evidence that is not in dispute, I do not see why parties must go to the expense and trouble of another proceeding, particularly when the purpose is simply to determine whether the bankrupt is not eligible for an absolute discharge and some other type of order on his discharge application is appropriate. Given that the facts are not in dispute, only their legal effect, I can decide whether I should make the finding sought by the applicants.

[28] What is the evidence before me? The facts are not in dispute, only its legal effect.

[29] Mr. Wirick, according to his affidavit, is a 48-year-old man who was called to the British Columbia Bar in 1979. He worked primarily as a conveyancing solicitor. He was disbarred on December 16, 2002, not having practiced as a lawyer since May 2002. According to his affidavit, he presently works as a baker for a small pet food company, earning $12 per hour and lives in a small home with equity he shares with his wife of about $90,000.

[30] He and his wife are presently living off his wife's RRSPs, which are now worth $13,000.

[31] In his affidavit sworn September 9, 2003, which notes that he has taken protection of section 13 of the ***Canadian Charter of Rights and Freedoms***, Schedule B; ***Constitution Act***, 1982 [enacted as Schedule B to the ***Canada Act*** 1982 (U.K.) 1982, c.11]; section 5(2) of the ***Canada Evidence Act***, R.S.C. 1985, c. C-5; and section 4(3) of the British Columbia ***Evidence Act***, R.S.B.C. 1996, c. 124, Mr. Wirick described the circumstances that led to his bankruptcy this way:

> 7. I had a long time client named Tarsem Singh Gill. In the summer of 1999 I was doing a conveyance for Mr. Gill. I made an error in my calculations of the statement of adjustments on that conveyance. As a result of my error I did not have sufficient funds to pay both the first mortgage and a second mortgage on a property Mr. Gill was selling.
> 8. I contacted Mr. Gill and told him that I was about $20,000.00 short of funds necessary to close the transaction and I asked him to provide me with those funds. Mr. Gill told me that he did not have those funds. He asked me not to pay the second mortgage. He told me that he had a second property that he was completing that he would use to pay the second mortgage. He asked me to hold the

> funds that I did have to pay the second mortgage in trust and to wait until the second property was finished to pay the second mortgage.
> 9. I trusted Mr. Gill to do what he said he would do and I did not pay the second mortgage.
> 10. A few weeks later Mr. Gill attended at my office and asked to borrow some of the funds I held in trust for the second mortgage to pay for construction of the second property. I agreed to release these funds to Mr. Gill because I wanted the second property to complete so that I could clear up the problem with the second mortgage. I believe I released about $60,000.00 to Mr. Gill.
> 11. When the second property was finished there was not enough money to pay off all the mortgages on the second property. I used the funds from the second property to pay off the second mortgage on the first property but this left some mortgages owing on the second property. Mr. Gill assured me that he had other properties nearing completion and that if he could borrow some of the funds from my trust account that were for the mortgages he could finish those properties.
> 12. After that matters just snowballed. Mr. Gill kept buying properties and building properties. I kept telling Mr. Gill to stop and to settle off all the mortgages. Mr. Gill kept assuring me that he had sufficient equity to pay off all the mortgages.
> 13. Mr. Gill's scheme became larger and larger. I felt there was no way out for me but to keep going along with the scheme in the hope that at the end of the day Mr. Gill would pay off all the mortgages.
> 14. The money simply did not come in fast enough from the sales of property to pay off the mortgages on Mr. Gill's old properties. Purchasers were continually asking for discharge particulars. In order to raise money Mr. Gill began arranging new "first" mortgages on property in his name and in the names of family members and associates. The old first mortgages were not paid off. This was done in order to raise money to pay off mortgages on the old properties that had been sold.
> 15. This cycle continued for about three years. By the week of May 13, 2002 it became clear to me that this matter could not continue any longer as the banks were beginning to determine what was going on. I then sat Mr. Gill down and asked him to figure out exactly what he owed. To my absolute horror I discovered that Mr. Gill owed over $30,000,000.00. On May 18, 2002 Mr. Gill and I sat down and went over all the transactions and I discovered that Mr. Gill owed over $40,000,000.00.

[32] Mr. Wirick says that he has only earned legal fees, did not profit from these machinations, and has no assets for his creditors and no prospect of earning income.

[33] Later in the affidavit Mr. Wirick deposed:

> 18. I never intended to defraud or cheat anyone. I always intended that all the mortgages would be paid and I trusted Mr. Gill implicitly that in the end he would have enough money to pay the mortgages.

[34] In Mr. Wirick's sworn statement relating to his bankruptcy, he gave reasons for his financial difficulty as "failing to pay out mortgages pursuant to my undertakings, but instead paying monies to my client on his promise to pay out the mortgages, but who failed to do so".

[35] The Law Society of British Columbia, at Mr. Wirick's disbarment hearing in connection with a particular transaction for purchase and sale, in the "Facts and Verdict" portion of the decision, set out the agreed Statement of Facts, and with respect to the transaction in question said this:

> (l) On September 11, 2001, [another solicitor] forwarded the sum of $467,320.13 to Wirick & Company on behalf of [the purchaser] on Mr. Wirick's undertaking to pay out and discharge all of the Encumbrances.
> (m) None of the funds received by Mr Wirick from [the purchaser's solicitor] was used to pay out any of the Encumbrances.
> (n) On June 4, 2002, [the purchaser's solicitor] wrote to the Law Society to advise that Mr. Wirick had breached his undertaking by failing to discharge the Encumbrances.
> (o) Contrary to the undertaking, the funds were paid out of trust primarily to [Wirick's client] by payments to [X] and [Y], both companies owned by [Wirick's client].
> (p) Mr. Wirick acknowledges that his failure to pay out the Encumbrances constitutes a breach of undertaking and is professional misconduct.
> (q) Mr. Wirick acknowledges that the payment out of trust by him of the funds for purposes other than payment of the Encumbrances, which he knew were forwarded to him on his undertaking to pay out and discharge the Encumbrances, constitutes professional misconduct.

[36] Mr. Wirick deposed at ¶19 of his affidavit:

> I do not really know why I let myself get into the trouble that I did with Mr. Gill. I made an innocent mistake in one conveyance and I trusted a long time client and from there things got completely out of control. Once I was caught up in Mr. Gill's scheme the only way that I could see out was to hope that Mr. Gill had enough money in the end to pay all the mortgages.

[37] At the hearing on penalty before the Law Society, counsel for the respondent Mr. Wirick acknowledged that:

> … this matter is one of as many as 300 similar circumstances involving the Respondent that could be before us today. It is before us in the form of a two count citation for administrative convenience. The Respondent has acknowledged and we have found that he has professionally misconducted himself.

[38] The Law Society's submission on this application is that Mr. Wirick took funds from third parties on express undertakings and representations that the funds would be utilized in the specific way and regardless of how he characterizes his actions as being duped by Mr. Gill and not intending to harm anyone, his conduct fits clearly within the classic definition of fraud as set out in ***Derry v. Peek***, *supra*.

[39] Mr. Le Dressay on the other hand argues that for fraud there must be an element of wilful deceit or an intention to defraud. He describes Mr. Wirick as making a naïve but innocent mistake that led to a dreadful result, and that absent cross-examination on his evidence of intent, there is no evidence that Mr. Wirick set out to defraud anyone and that such a finding cannot be made on the evidence on this application.

[40] Mr. Wirick was provided monies by parties on numerous occasions. For example, let me refer to one particular creditor's circumstances. Ms. Randall, on behalf of HSBC said at ¶7-8 of her affidavit dated September 9, 2003:

> … I have determined that there are approximately 82 mortgages which have been negatively affected by the Bankrupt's actions. In some circumstances, the Bankrupt represented HSBC in preparing and registering a first mortgage on properties owned by a third party. In approximately 20 of those instances, the Bankrupt registered a new mortgage in favour of HSBC but failed to secure the discharge of prior registered mortgages. Accordingly, instead of obtaining a first mortgage, HSBC now holds a second, third, or in some instances a fifth mortgage.
>
> In other circumstances, the Bankrupt represented a vendor of a given property and HSBC financed the purchase of the property by a third party. My review of HSBC's records, indicates that in approximately 19 such circumstances, the Bankrupt received purchase monies from the solicitor/notary for the purchasers, who in virtually all circumstances was also the solicitor/notary for HSBC, on an undertaking to payout and obtain a discharge of prior financial charges on the property. HSBC records indicate that despite the delivery of the purchase monies to him, the bankrupt did not payout the prior financial encumbrances. Accordingly, instead of obtaining a first mortgage on the property, HSBC obtained only a second or subsequently ranked mortgage.

[41] While Mr. Wirick may have hoped that eventually the parties by whom he was entrusted with monies and documents on his undertakings would not be hurt, he accepted those monies and documents in trust and made those representations, on the evidence, without belief in their truth, or, at the very least, recklessly. He continued to make undertakings intending them to be acted on by the parties that he dealt with as a solicitor and they were acted on and in the circumstances that clearly amounts to a fraudulent breach of trust as that term is used in the ***Bankruptcy and Insolvency Act***.

[42] Perhaps the first time Mr. Wirick breached his undertaking it could be characterized as an innocent mistake but here it has occurred as many as 300 times. The decision that Mr. Le Dressay referred to me, ***R. v. Zlatic***, [1993] 2 S.C.R. 29, 79 C.C.C. (3d) 466, describes the mental element of fraud as proof of (1) subjective knowledge of the prohibited act and (2) subjective knowledge that the prohibited act could have as a consequence the deprivation of another (which deprivation may consist in knowledge that the victim's pecuniary interests are put at risk)(¶26).

[43] Mr. Wirick's undertakings were representations that the monies and document would be used in the manner entrusted to him. Clearly he was in breach of trust. At best, Mr. Wirick's representations were reckless, as he was careless whether they were true or false. That is a fraudulent breach of trust. As Lord Herschell said in ***Derry v. Peek***, *supra*:

> … [I]f fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made.

[44] The opposing creditors are entitled to a finding that the bankrupt was guilty of fraudulent breach of trust for the purposes of opposing Mr. Wirick’s application for an absolute discharge from bankruptcy, which application I will hear when it is set down by Mr. Le Dressay in due course.

“J.S. Sigurdson, J.”
The Honourable Mr. Justice J.S. Sigurdson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20050202
Docket: 228901/VA02
Registry: Vancouver

In the Matter of the Bankruptcy

of

Martin Wirick

Before: The Honourable Mr. Justice Sigurdson

Oral Reasons for Judgment

February 2, 2005

Counsel for Martin Wirick:	P.D. Le Dressay
Counsel for HSBC Bank of Canada:	J. Bateman
Counsel for Vancity Credit Union:	J. Harry
Counsel for Law Society of British Columbia:	C. Ramsay
Place of Hearing:	Vancouver, B.C.

[1] **THE COURT:** This is an application by the bankrupt, Martin Wirick, for an order for a discharge from bankruptcy. Mr. Wirick is not eligible for an absolute discharge of bankruptcy because of a finding that I made on August 3, 2004 that he was guilty of fraudulent breach of trust under s. 173(1)(k) of the ***Bankruptcy and***

Insolvency Act, R.S.C. 1985, c. B-3 ("the ***Act***"). Having made that finding, the applicable provisions of the ***Act*** are:

> **172**(1) On the hearing of an application of a bankrupt for a discharge, the court may either grant or refuse an absolute order of discharge or suspend the operation of the order for a specified time, or grant an order of discharge subject to any terms or conditions with respect to any earnings or income that may afterwards become due to the bankrupt or with respect to his after-acquired property.
> (2) The court shall on proof of any of the facts mentioned in section 173
> (*a*) refuse the discharge of a bankrupt;
> (*b*) suspend the discharge for such period as the court thinks proper; or
> (*c*) require the bankrupt, as a condition of his discharge, to perform such acts, pay such moneys, consent to such judgments or comply with such other terms as the court may direct.

[2] I will not repeat the circumstances leading to my finding that the bankrupt was guilty of fraudulent breach of trust, although I will refer to them in passing later in these reasons.

[3] Counsel for the bankrupt, Mr. Le Dressay, submits that as there is no hope of Mr. Wirick paying any money as a condition of his discharge, the only reasonable order is a suspension of three months before he is discharged.

[4] The Law Society opposes Mr. Wirick's discharge, and asks that the application be dismissed with liberty to reapply down the road. The basic reason for the position is that the global audit of the Law Society has not been completed, and although there is presently no evidence that Mr. Wirick has personally profited from his fraud, the Law Society says that in the circumstances the investigation should be allowed to complete.

[5] The two creditors appearing on this application oppose the discharge on the ground that this is an extreme case and this is one of those extreme cases where the application for a discharge should be simply refused. Ms. Harry for Vancity points out that not only has there been fraud, but there has been a culpable neglect of business affairs by the bankrupt.

Circumstances

[6] Mr. Wirick, as I noted earlier, is now a 50 year old man who had been called to the bar in 1979 and resigned on May 23, 2002 when a custodian was appointed over his practice.

[7] He was disbarred on December 16, 2002.

[8] He presently works in a pet food store. He has been divorced by his wife and he earns $2,000 per month as manager of retail sales in that store. He lives in a rented apartment, paying $700 per month, drives a 1992 motor vehicle, and has no possessions or apparent prospects of greater income. He appears to have cooperated with the Law Society in their investigation and has cooperated with the Trustee in bankruptcy for Tarsem Gill and his own Trustee in bankruptcy.

[9] Counsel referred me to a number of authorities on the issue of whether I should refuse a discharge: ***Re Crowley*** (1984), 66 N.S.R. (2d) 390, [1984] N.S.J. No. 52 (S.C.); ***Re Gaklis*** (1984), 62 N.S.R. (2d) 52 (S.C.); ***Industrial Acceptance v. LaLonde***, [1952] 3 D.L.R. 348 (S.C.C.).

[10] The Supreme Court of Canada decision in ***Industrial Acceptance v. LaLonde***, *supra*, appears to be the leading decision. There Estey J said for a unanimous court at p. 356:

> The purpose and object of the ***Bankruptcy Act*** … is to equitably distribute the assets of the debtor and to permit of his rehabilitation as a citizen, unfettered by past debts. The discharge, however, is not a matter of right and the provisions of ss. 142 and 143 [now essentially 172 & 173] plainly indicate that in certain cases the debtor should suffer a period of probation. The penalty involved in the absolute refusal of discharge ought to be imposed only in cases where the conduct of the debtor has been particularly reprehensible, or in what have been described as extreme cases.

[11] L.W. Houlden & G.B. Morawetz, *The 2005 Annotated Bankruptcy and Insolvency Act*, (Scarborough, Ont.: Carswell, 2004) provides a summary of some of the general principles relevant where there has been no automatic discharge of a bankrupt at p. 729, and I now paraphrase some of them:

1. A discharge is not a matter of right: ***Industrial Acceptance Corp. v. LaLonde***;
2. Every application must be determined on its own particular facts by due exercise of judicial discretion: ***Re Crowley***. One of the prime objects of the ***Act*** is to enable an honest but unfortunate debtor to obtain a discharge from his or her debts, subject to such reasonable conditions if any as the court may see fit to impose, so that the debtor can make a fresh start: ***Re Posner*** (1960), 3 C.B.R. (N.S.) 49 (Ont. S.C.).

I also adopt the following statement from ***Re Crowley***, *supra*, at ¶47:

> [I]n considering the application for discharge, the court must have regard to not only the interests of the bankrupt and his creditors but also to the interest of the public (***Re Sceptre Hardware Co.*** (1922), 3 C.B.R. 734). This concept was well stated by Judge Wetmore in ***Re Abbott: Abbott v. Royal Bank of Canada*** (1984), 50 C.B.R. (N.S.) 182, where he said, "The court must always balance the public interest

> in commercial morality with its interest in the re-establishment of the debtor."

[12] The alternatives available to me appear to be: (1) grant the discharge with a period of suspension, given that it does not appear that Mr. Wirick will be able to make any payment of any consequence to his creditors; (2) dismiss the application with liberty to reapply after the Law Society audit has been completed (the audit, according to the lead auditor, Donald Terrolin, will be completed no earlier than June 2005); or (3) dismiss the application outright.

[13] I have considered the inconvenience to Mr. Wirick for remaining in bankruptcy where he has been for the last 2½ years, as well as the harm caused by his bankruptcy that arose out of his fraudulent behaviour. In brief terms, the affidavit of Ms. Cummings of the Law Society indicates that the Special Compensation Fund has received 551 claims of which 383 have been considered and 293 been decided, 90 have been adjourned and 33 have been withdrawn. Apparently the committee has authorized payments in the amount of $27,162,109.47 and to date approximately $19,100,000 has been paid. Apart from some insurance that the Law Society has, the shortfall after some possible realization from the Trustee of Mr. Gill will be borne by the members of the Law Society of British Columbia. It is unclear what that amount will be, but it will be substantial.

[14] Is this an extreme case where the conduct of the debtor has been particularly reprehensible? Is it one of those extreme cases where there should be an absolute refusal?

[15] Given the relevance of the factor of public interest in this case, I have concluded that it is particularly important to have all the relevant information before this decision is made. In the circumstances, given the amount of the claim of the Law Society and the impact of Mr. Wirick's bankruptcy on the members of that Society, I think that it is not unreasonable in balancing the public interest and commercial morality, or the public interest in the proper operation of a legal system in which residential and commercial real estate transactions take place on the one hand and the bankrupt's interests on the other, to defer a final determination on whether to grant the bankrupt a discharge and if so on what terms.

[16] I appreciate that there are parties opposing Mr. Wirick's discharge that say the material before me is sufficient to refuse the discharge absolutely but I think that decision should not be made until all the evidence is in. It is not unreasonable given the circumstances and the cause of the bankruptcy for Mr. Wirick to have to wait that long for the court's ultimate determination.

[17] Notwithstanding the apparent cooperation of Mr. Wirick since his bankruptcy and his apparent present circumstances, I dismiss the application with liberty for him to reapply once the audit is complete.

[18] The application for discharge is therefore dismissed with leave to reapply when the audit is complete or after December 31, 2005, whichever should first occur.

"J.S. Sigurdson, J."
The Honourable Mr. Justice J.S. Sigurdson