



COURT FILE NUMBER

1903-04121

COURT

COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE

EDMONTON

IN THE MATTER OF THE TRUSTEE ACT, RSA
2000, C T-8 SECTIONS 43 AND 46

APPLICANTS

WESTPOINT INVESTMENT TRUST BY ITS
TRUSTEE MUNIR VIRANI AND MARNIE KIEL

RESPONDENTS

WESTPOINT CAPITAL CORPORATION,
WESTPOINT CAPITAL MANAGEMENT
CORPORATION, WESTPOINT CAPITAL
SERVICES CORPORATION, WESTPOINT
SYNDICATED MORTGAGE CORPORATION,
CANADIAN PROPERTY DIRECT
CORPORATION, WESTPOINT MASTER LIMITED
PARTNERSHIP, RIVER'S CROSSING LTD.,
1897869 ALBERTA LTD., 1780384 ALBERTA
LTD., 1897837 ALBERTA LTD. *Capital*

DOCUMENT

SUPPLEMENTAL BENCH BRIEF FILED ON
BEHALF OF THE RECEIVER

ADDRESS FOR SERVICE AND
CONTACT INFORMATION OF
PARTY FILING THIS DOCUMENT

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June 18, 2019

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I. INTRODUCTION

1. This Supplemental Brief of Law is submitted on behalf of BDO Canada Limited (the "Receiver") of, *inter alia* Westpoint Capital Corporation ("WCC").
2. This Supplemental Brief is filed in response to the Application filed on behalf of Star Pre-Built Homes Ltd. ("Star").

II. BACKGROUND

3. The background of the Star matter, as we understand it, is as follows:
 - (a) On December 5, 2012, Tri-State Signature Homes Ltd. ("Signature") entered into a Builder Master Sales and Credit Agreement ("Master Agreement") with Igloo Prebuilt Homes Ltd. ("Igloo") to purchase modular homes and site construction work from Igloo on an ongoing basis subject to the terms and conditions of the Master Agreement.
 - (b) The principal behind Signature is an individual named Arash Vahdaty. He is also the principal behind two other companies: Tri-State Community Homes Ltd. ("Community") and Trend Aurora Ltd. ("Aurora").
 - (c) Signature obtained Letters of Credit ("LOCs") from WCC listing Signature as the "Customer" and Igloo as the "Beneficiary" to secure obligations owed by Signature to Igloo under the Master Agreement.
 - (d) On January 31, 2014, Signature, Igloo and Star entered into an Assignment, Assumption and Consent Agreement as part of the sale of Igloo's business to Star. As part of that agreement, Igloo assigned to Star all of its rights and obligations under the Master Agreement, and the terms of the Master Agreement were otherwise not modified.
 - (e) All of the LOCs issued by WCC (after they were amended to show "Star" as the Beneficiary) had the following common characteristics:
 - The Customer is Signature;
 - The Beneficiary is Star;
 - Each LOC states: "This Letter of Credit is to be retained by the Beneficiary and used in respect of obligations owed by the Customer to the Beneficiary pursuant

to the terms of the Star Prebuilt Homes Ltd. Master Agreement between the Customer and the Beneficiary”;

- (f) On May 31, 2016, Signature, Community, Aurora, Star and Qualico Developments West Ltd. (“Qualico”) entered into a Dispute Resolution Agreement (the “DRA”).
- (g) WCC was not a party to the DRA.
- (h) The DRA purports to make Signature, Community and Aurora jointly liable for each other’s debts to Star, and states that the LOCs were intended to secure the entire Debt of all three parties, effectively unilaterally expanding the potential liability of WCC beyond what was intended by the LOCs, without the agreement of WCC.
- (i) Star’s position appears to rest on an exchange of email correspondence with Marnie Kiel at WCC, initiated by current counsel for Star, Richard Cotter and counsel for the three Tri-State entities (Jeff Fixsen at Duncan Craig) at the time the parties to the DRA were negotiating its terms.
- (j) Star’s position appears to be that WCC, through this exchange of emails, agreed to expand its liability to that of all three entities, despite the fact that WCC was not party to the DRA.

III. ISSUES

4. There are two issues to be determined by this Honourable Court:
 - (a) whether this Honourable Court should hear the application filed on behalf of Star, as Star is not a creditor of WCC; and
 - (b) whether this Honourable Court should direct further questions to be asked of the former director of WCC by way of Written Interrogatory or otherwise.

IV. ARGUMENT

A. Standing

5. It is submitted that Star does not have standing in these proceedings to apply for the relief of the nature being sought.
6. We submit that Star, absent a judgment, is not a creditor of WCC, and as such has no claim against the assets of WCC.
7. At best, Star is a contingent claimant but the relief it is seeking is to direct the Receiver to do take certain steps that have no benefit to the creditors of the estate of WCC, per se, but serve only to benefit Star.
8. The consequence of the relief sought is that it will cause the receiver to expend resources to benefit one party that is not a creditor at the expense of the creditors of the estate in receivership, which is not just and equitable, as suggested in the application materials filed on behalf of Star.
9. The decision of the Saskatchewan Court of Queen's Bench in *Re Cooke*¹ considered the standing of a contingent claimant in a bankruptcy discharge application, and determined that a party that is not a creditor but merely a contingent claimant did not have standing.
10. Although not on point, the principles in our submission are analogous.

¹ *Cooke, Re*, 2018 SKQB 329, 2018 CarswellSask 578

B. Further Questioning Not Required

11. The Receiver has completed its review of the Star litigation, and as counsel for Star has been advised, the Receiver intends to address the issues raised by Star in a Report to the Court that provides a general up date of the various litigation matters.
12. Hence, what Star is seeking in terms of a direction to the Receiver is not required for purposes of the within proceedings.

C. Issues Raised More Properly Addressed in the Star Litigation

13. There are a long list of questions set out in the Written Interrogatories attached as Exhibit "G" to the Affidavit of Sandra Gonzalez, and we submit that a review of these questions suggests it would be more appropriate to address these in the Star litigation.
14. The questions proposed serve no useful purposes in these proceedings, even if answered, and even if addressed in these proceedings, could not be used in the Star litigation as evidence in any event.
15. Counsel for Star had every opportunity in the lead up to setting the Star matter down for trial to ask all the questions that were considered necessary and material to those proceedings.
16. In setting the Star matter down for trial, counsel for Star certified that all of the questioning required in those proceedings was complete, and we submit that it is not appropriate for counsel for Star to address perceived deficiencies in his questioning in the Star litigation in these proceedings.

D. Order of April 10, 2019 Complied With

17. The April 10, 2019 Order of The Honourable Justice K. Nielsen relating to Questioning of Marnie Kiel had two primary provisions:
 - (a) the questioning was "...for the limited purpose of determining her knowledge of any security granted or guarantees provided in support of Standby Letters of Credit referenced in Court of Queen's Bench Action number 1703 20883"; and
 - (b) the Receiver "...shall have full discretion in the conduct of the Questioning...".

18. The Receiver initially agreed to do the questioning because the Receiver had limited knowledge of the facts and circumstances in regard to this litigation matter.
19. The questions at issue were addressed, as is clear from transcript of the questioning. The Receiver exercised its discretion in the conduct of the examination and while it is acknowledged that the questioning may not have been as rigorous as might be the case in a cross examination or an examination for discovery conducted by a party adverse, the Receiver's questioning achieved the purpose it intended to achieve, namely to learn if there was any security or guarantees in place securing the Letters of Credit.
20. The questioning was never intended to be a cross examination or examination for discovery.
21. As time has passed, the Receiver has engaged in its own investigation, as it would in regard to any matter in receivership proceedings, and does not require further questioning or investigation.

V. RELIEF CLAIMED

22. The Application of Star should be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 18ND DAY OF June, 2019

MILLER THOMSON LLP

Per:



TERRENCE M. WARNER
Legal Counsel for the Applicant,
BDO Canada Limited in its
capacity as Receiver of
Westpoint Capital Corporation
et al

TABLE OF AUTHORITIES

TAB

1. *Cooke, Re*, 2018 SKQB 329, 2018 CarswellSask 578

2018 SKQB 329
Saskatchewan Court of Queen's Bench
Cooke, Re
2018 CarswellSask 578, 2018 SKQB 329, 299 A.C.W.S. (3d) 463

**IN THE MATTER OF THE BANKRUPTCY OF MAJKEN COOKE OF THE CITY OF
REGINA IN THE PROVINCE OF SASKATCHEWAN**

Reg. C. Elaine Thompson

Judgment: November 28,
2018
Docket: BKY 136/
2018

Counsel: Ron McLean, for Applicant
Jasmin Calyniuk, for Trustee, BDO Canada Ltd.

Subject: Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
XV Discharge of bankrupt
XV.13 Practice and procedure
XV.13.h Miscellaneous

Headnote

Bankruptcy and insolvency --- Discharge of bankrupt — Practice and procedure — Miscellaneous
M's claim against bankrupt was disallowed by bankruptcy trustee — Bankrupt sought discharge — M objected to bankruptcy discharge — Objection dismissed — Other than trustee in bankruptcy, only bankruptcy creditor had ability to oppose bankrupt's discharge — M did not have status of creditor as his claim against bankrupt was disallowed — M did not appeal disallowance of claim with requisite appeal period, and disallowance was final — M had no standing to be heard in matter of bankrupt's discharge from bankruptcy.

Table of Authorities

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 2 "claim provable" — considered

s. 121(2) — considered

s. 132 — considered

s. 135 — considered

s. 135(1) — considered

s. 135(1.1) [en. 1997, c. 12, s. 89(1)] — considered

s. 135(2) — considered

s. 135(3) — considered

s. 135(4) — considered

s. 178(1)(d) — considered

OBJECTION to bankruptcy discharge.

Reg. C. Elaine Thompson:

1 Ron McLean has objected to the bankruptcy discharge of Majken Cooke based on allegations of fraud that were filed with this Court in February 2018. This decision concerns the issue of Mr. McLean's standing to object to discharge. It has arisen because there is a related question about whether Mr. McLean is a creditor in this bankruptcy. Other than a Trustee or the Superintendent of Bankruptcy, only a bankruptcy creditor has the ability to oppose a bankrupt's discharge. The problem for Mr. McLean is he does not have the status of a creditor because his claim against Ms. Cooke was disallowed by the bankruptcy trustee, BDO Canada Limited [Trustee].

2 For the following reasons, I find that Mr. McLean does not have standing to be heard in the matter of Ms. Cooke's bankruptcy discharge.

3 The term "creditor" is defined in the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [*BIA*] as "a person having a claim provable as a claim under this Act" (at s. 2).

4 The term "claim provable" is also defined in s. 2 of the *BIA*. The terms "claim provable in bankruptcy", "provable claim" or "claim provable" includes any claim or liability provable on proceeds under this Act by a creditor.

5 Section 121(2) of the *BIA* governs the provability of a contingent claim and directs that provability is to be ascertained in accordance with s. 135 of the *BIA*. The term "contingent" is not defined in the *BIA*. At common law, courts consider a contingent claim to include a claim for a debt that has not yet been established and determined by a court of law. Mr. McLean's fraud claim is a claim for a debt and it has not yet been proven in terms of validity or amount in a court of law.

6 Section 135 of the *BIA* governs the process the trustee is to use when determining whether to admit or disallow a claim. Under s. 135, the bankruptcy trustee is, thus, responsible to determine whether a contingent claim, such as Mr. McLean's, is a provable claim as defined in the *BIA*.

7 The Trustee disallowed Mr. McLean's claim as a creditor in the bankruptcy in July 2018. The effect of the Trustee's determination was that the claim is not provable. The Trustee served Mr. McLean with a Notice of Disallowance which identifies the right of a creditor with a disallowed claim to appeal the disallowance to the court within 30 days. The Notice of Disallowance states as follows:

As trustee acting in the matter of the bankruptcy of Majken Cooke, we have disallowed your claim (or your right to a priority or your security on the property) in whole, pursuant to subsection 135(2) of the Act, for the following reasons:

The information provided as evidence in support of the claim is not source documentation, and does not identify the debtor as Majken Cooke in their personal capacity and, furthermore, there is no evidence of a personal guarantee on a corporate debt. Accordingly, it is the position of the Trustee that this claim, if any, is not a provable claim in the bankruptcy estate of Majken Cooke.

And further take notice that if you are dissatisfied with our decision in disallowing your claim in whole (or a right to

rank or your security or valuation of your claim), you may appeal to the court within the 30-day period after the day on which this notice is served, or within any other period that the court may, on application made within the same 30-day period, allow.

[Emphasis added]

8 The Notice of Disallowance makes reference to s. 135(3) of the *BIA*. Section 135 is the section that governs the disallowance process, including appeals. The relevant portions of section 135 state that:

Trustee shall examine proof

135(1) The trustee shall examine every proof of claim or proof of security and the grounds therefor and may require further evidence in support of the claim or security.

Determination of provable claims

(1.1) The trustee shall determine whether any contingent claim or unliquidated claim is a provable claim, and, if a provable claim, the trustee shall value it, and the claim is thereafter, subject to this section, deemed a proved claim to the amount of its valuation.

Disallowance by trustee

135(2) The trustee may disallow, in whole or in part,

- (a) any claim;
- (b) any right to a priority under the applicable order of priority set out in this Act; or
- (c) any security.

Notice of determination or disallowance

(3) Where the trustee makes a determination under subsection (1.1) or, pursuant to subsection (2), disallows, in whole or in part, any claim, any right to a priority or any security, the trustee shall forthwith provide, in the prescribed manner, to the person whose claim was subject to a determination under subsection (1.1) or whose claim, right to a priority or security was disallowed under subsection (2), a notice in the prescribed form setting out the reasons for the determination or disallowance.

Determination or disallowance final and conclusive

(4) A determination under subsection (1.1) or a disallowance referred to in subsection (2) is final and conclusive unless, within a thirty day period after the service of the notice referred to in subsection (3) or such further time as the court may on application made within that period allow, the person to whom the notice was provided appeals from the trustee's decision to the court in accordance with the General Rules.

[Emphasis added]

9 Mr. McLean admitted that he received the Notice of Disallowance in July 2018 and there is no evidence that he contacted the court to initiate an appeal of the disallowance within the 30 day appeal period. Mr. McLean admitted that he had not appealed the disallowance of his claim to the court.

10 The registrar's authority to render decisions is limited by s. 132 of the *BIA*. Among other powers, the registrar has authority to:

1. Hear and determine matters relating to proofs of claims whether or not opposed;
2. To grant orders of discharge; and
3. To hear and determine any matter relating to practice and procedure in the courts.

11 There is nothing in the authority conferred to registrars that allows a registrar to waive the statutory limitation period for appealing a disallowance, which is the only way for Mr. McLean to become a creditor with a provable claim with standing to oppose Ms. Cooke's bankruptcy discharge. The language in s. 135(4) clearly states that a disallowance is final and conclusive unless an application is made within a 30-day period after service of the notice of disallowance.

12 I have sympathy for Mr. McLean's frustration with the process. It is technical and there are consequences associated with a missed limitation period. Mr. McLean is of the view that he ought to have the merits of his case heard in bankruptcy court. Unfortunately, that option was legally foreclosed upon when the statutory limitation period for appeal of this disallowance ended. The Notice of Disallowance was served in July 2018. It is now November 2018. The right to appeal disallowance is no longer available to Mr. McLean. For this reason I find that he is not able to avail himself of the right of a creditor to oppose the bankruptcy discharge.

13 Mr. McLean is alleging fraud. I explained to Mr. McLean that a debt created by fraud survives bankruptcy pursuant to ss. 178(1)(d) of the BIA and, if established in a court, will be enforceable after the bankruptcy discharge. Of course, while Ms. Cooke is bankrupt Mr. McLean is stayed from pursuing his claim without a court order lifting the bankruptcy stay.

14 Mr. McLean does not have standing to oppose Mr. Cooke's bankruptcy discharge.

Objection dismissed.