SUPREME COURT OF NOVA SCOTIA

Citation: *Mutual Transportation Services Inc. v. Saarloos*, 2020 NSSC 198

Date: 20200624
Docket: *Hfx.* No. 215409
Registry: Halifax

Between:

Mutual Transportation Services Inc.

Plaintiff

v.

Rodi Saarloos, Bransam Enterprises Inc. and Bransam Logistic Services Inc.

Defendants

Judge:	The Honourable Justice Robin Gogan
Heard:	September 6, 2019, in Halifax, Nova Scotia
Final Written Submissions:	September 12, 2019
Counsel:	Richard Norman, for the Plaintiff David Green, for the Defendant

By the Court:

Background

[1] This is a proceeding with a long and complicated past. It began in 2004 when the plaintiff, Mutual Transportation Services Inc. ("**Mutual**"), commenced an action alleging breach of contract and breach of fiduciary duties against the various defendants.

[2] In 2008, Mutual sought production of documents. A production order was issued in April 2008 requiring disclosure of certain documents within thirty days. There was non-compliance. In January 2010, Mutual applied for leave to bring a contempt motion. A contempt citation against all defendants followed in June of 2011 along with an order to make further production. Once again, there was non-compliance. Subsequently, it was discovered that some of the records being sought were destroyed in the period between court orders. In 2016, Mutual moved for another contempt finding.

[3] The most recent history of this proceeding is set out in the decisions of Arnold, J. reported as ***Mutual Transportation Services v. Saarloos***, 2016 NSSC 164 and ***Mutual Transportation Services Inc. v. Saarloos***, 2017 NSSC 26. In

May 2016, the defendant, Rodi Saarloos ("**Saarloos**"), was found guilty of contempt of court a second time. In February 2017, Justice Arnold ordered Saarloos to pay Mutual costs in the amount of $20,100.00 plus HST, and disbursements of $2,350.00. Saarloos was also ordered to pay Mutual a civil fine in the amount of $2,500.00. The award of costs was payable by November 3, 2017. Saarloos did not pay. Rather, he made an assignment in bankruptcy on November 7, 2017. He was discharged on August 14, 2018.

[4] Mutual now seeks an order lifting the stay of proceedings resulting from the bankruptcy proceeding. Saarloos says that the real issue is whether the cost award survives his discharge from bankruptcy.

Issue

[5] In my view, the main issue to be determined is whether the award of costs resulting from the contempt proceeding survived Saarloos's discharge from bankruptcy.

Position of the Parties

Mutual

[6] Mutual acknowledges that an assignment in bankruptcy results in a stay of proceedings. It argues however, that it is appropriate to lift such a stay in certain circumstances. Mutual relies on ss. 69.4 and 178(1) of the ***Bankruptcy and Insolvency Act***, R.S.C. 1985, c. B-3 (the "***BIA***"), as well as the decisions in ***Jenkins, Re***, 2005 NSSC 234, ***CIBC Mortgages Inc. v. Touchie***, 2011 NSSC 228, ***Gaunt v. Hawes***, 2012 NSSC 305 (as upheld at 2013 NSCA 40, leave to appeal to SCC refused at 2014 CarswellNS 186 (SCC)), ***Moudry v. Moudry***, 2013 ONSC 7362, and ***Walker v. Walker***, 2013 ABCA 213. Mutual says that contempt sanctions survive bankruptcy and that it will be materially prejudiced if the stay is not lifted.

Saarloos

[7] Saarloos concedes that the civil fine ordered by Arnold, J. survives his discharge from bankruptcy. He contests the remainder of the motion. He says that the matters now raised were matters for the determination of the bankruptcy court and do not survive his discharge. He relies on ***R. v. MacIntosh***, [1995] 1 S.C.R. 686 and submits that a plain reading of s. 178(1)(a) of the ***BIA*** does not support Mutual's position that the cost award survives his discharge.

[8] Saarloos relies upon several of the same authorities cited by Mutual.

Analysis

[9] The facts supporting this motion are set out in the affidavits filed and are uncontested. Arnold, J. found Saarloos in contempt and granted an Order on May 11, 2017 directing Saarloos to pay the following to Mutual:

(a) Disbursements in the amount of $2,350.00 by June 2, 2017;

(b) Costs in the amount of $20,100.00 plus HST of $3,015.00 by November 3, 2017; and

(c) A civil fine in the amount of $2,500.00 by May 3, 2018.

[10] Saarloos did not pay Mutual the amounts as ordered.

[11] Saarloos made an assignment in bankruptcy on November 7, 2017. On November 8, 2017, Mutual obtained a Subpoena in Aid of Execution and filed an Appearance Day Notice seeking an Order compelling Saarloos to attend discovery. Both the subpoena and the notice were delivered to counsel for Saarloos on November 9, 2017. The Trustee in Bankruptcy issued a stay of proceedings on November 14, 2017.

[12] Saarloos was automatically discharged from bankruptcy on August 14, 2018 under s. 168.1(1)(a) of the ***BIA***. The Certificate of Discharge released Saarloos

from all debts "except those matters referred to in subsection 178(1) of the Act". This is in keeping with ss. 168.1(5) and (6) of the ***BIA*** which provides that bankrupts subject to automatic discharge are the same as those receiving an absolute discharge and are discharged from all debts except those in s. 178(1). The focus then becomes the nature of the cost award against Saarloos and the scope of the exceptions provided by s. 178(1).

[13] Section 178(1) of the ***BIA*** is comprised of a number of exceptions to a full release from all debts provable in the bankruptcy proceeding. The most relevant is s. 178(1)(a) which provides:

> Debts not released by order of discharge
>
> 178.(1) An order of discharge does not release a bankrupt from
>
> (a) any fine, penalty, restitution order or other order similar in nature to a fine, penalty or restitution order, imposed by a court in respect of an offence, or any debt arising out of a recognizance or bail;
>
> (emphasis added)

[14] A full reading of s. 178(1) provides some context for an interpretation of s. 178(1)(a). The intention of Parliament was clearly to ensure that certain classes of debts or obligations survived bankruptcy. Broadly speaking, the exceptions involve the financial consequences of intentionally bad conduct, ongoing support

of dependants, or repayment of public obligations. The point here is that the exceptions represent deliberate and specific choices about the types of obligations that cannot be discharged. In ***Martin v. Martin***, 2005 NBCA 32, the Court of Appeal observed:

> But even viewed as an exception to the general principle, and thus as a legislative provision to be interpreted restrictively, the object and clear purpose of the exceptions set out in section 178 must be respected. The exceptions … are based upon an overriding social policy that certain claims should be protected against the general discharge obtained by a bankrupt because of the class of claimants involved … and because of the reprehensible nature of the bankrupt's conduct … for example, the types of debt which survives bankruptcy are any debts arising out of fraud, dishonesty, or misconduct while acting in a fiduciary capacity. Parliament has clearly made a policy decision that a bankrupt should not be allowed to raise the shield of his or her general discharge against judgement creditors who hold judgments grounded on such reprehensible conduct. As the court in Simone [(1999), 1999 CanLII 3208 (ONCA), 43 OR (3d) 511 (Ont CA)] stated, "[t]hose kinds of conduct are unacceptable to society and a bankrupt will not be rewarded for such conduct by a release of liability." (Emphasis in original)

[15] See also ***Alberta Securities Commission v. Hennig***, 2020 ABQB 48 at paras 13 – 19.

[16] In Nova Scotia, s. 178(1) has been given some consideration. In ***Gaunt v. Hawes***, Gass, J. dealt with an application to discharge a contempt order under *Civil Procedure Rule* 89.14. The applicant had been found in contempt for failing to comply with a Corollary Relief Judgement. He was ordered to pay a fine or serve thirty days in custody. He declared bankruptcy and a stay of proceedings followed.

He argued that his bankruptcy extinguished his debts. Justice Gass held that the amount payable was not a debt or an order to pay money *per se*. It was a penalty for contempt and the offence was the breach of a court order. The obligation was an exemption under s. 178(1)(a) of the ***BIA*** and survived bankruptcy.

[17] The appeal from the decision of Gass, J. was dismissed. Beveridge, J.A. gave succinct reasons at para. 5:

> … The fact of his bankruptcy was, and is, irrelevant to the issue of his failure to comply with a lawful, direct, and simple order of a judge of the Nova Scotia Supreme Court. I agree with the conclusions by Justice Gass that the original order was not a debt. It was an order to do something. It could not be extinguished by filing for bankruptcy, not to mention that the contemptuous behaviour by Mr. Gaunt was his failure to comply with the order for close to two years prior to his filing for bankruptcy. Furthermore, the fine of $11,200 imposed by the formal order of April 19, 2011 is not a debt but a penalty for breaching a court order.

[18] An application for leave to appeal to the Supreme Court of Canada was dismissed. (For similar reasoning see paras. 18-28 in ***Walker v. Walker***, 2013 ABCA 213. ***Gaunt***, *supra,* was more recently considered with approval in Alberta ***Securities Commission v. Hennig***, *supra*, at paras 28 - 31.)

[19] Saarloos takes the position that his case is distinguishable from ***Gaunt v. Hawes***. He argues that the word "offence" in s. 178(1)(a) is not defined and its meaning cannot reasonably be extended to exclude a costs award flowing from a

contempt finding. He says that there was no "offence" in his case to trigger the exception in s. 178(1)(a). In my view, this ignores the conclusion upheld in ***Gaunt*** that the "offence" was a failure to comply with a court order. The very same offence exists in the present case. The distinguishing feature of the present case is that the "offence" took place repeatedly.

[20] The interpretation of "offence" for the purpose of s. 178(1)(a) was also addressed briefly in ***Recycling Worx Solutions Inc. v. Hunter***, *supra*, at para 199. The question there was whether an award of solicitor and client costs resulting from litigation misconduct, but unrelated to a contempt proceeding, could survive discharge. The answer was no, "litigation misconduct is offensive and attracts punitive costs, but it is not an offence under subsection 178(1)(a) unless and until the Court finds contempt and awards costs in connection with that." This interpretation provides a bright line between offensive conduct resulting in costs and an offence for the purpose of s. 178(1)(a). I find the analysis in ***Recycling Worx*** instructive.

[21] Both Mutual and Saarloos rely on the decision in ***Moudry v. Moudry***, 2013 ONSC 7362. Saarloss argues for a very narrow interpretation of ***Moudry***. I disagree with his submission on this point.

[22] ***Moudry*** involved a family dispute over custody of a child. In a protracted and litigious proceeding, the mother was found in contempt of multiple court orders. On the issue of penalty, the presiding judge concluded at para. 28 - 31:

> Incarcerating Ms. Abraham will not assist this family in attempting to move and look forward. If, however, Ms. Abraham in future disregards Court orders that may be the appropriate response. I am not going to impose a civil fine. Given the parties had the expense of two trials, I am going to order … that the costs of the contempt motions be paid by Ms. Abraham on a substantial indemnity basis… and so I award $18, 846.36. in relation to the contempt motions… I did not … impose a fine for contempt on Ms. Abraham. The $18,846.36 costs order is, however, a sanction of sorts for the contempt and should be paid within 60 days.

[23] When Mr. Moudry attempted to collect the cost award, Ms. Abraham declared bankruptcy. The question then became whether the costs order was discharged under the bankruptcy. After reviewing a number of conflicting authorities, Price, J. found that the costs order was the sanction for the contempt. The contempt related not to an order for the payment of money, but to non-compliance with a court order. The cost award was not a claim, like that of an ordinary creditor, but a sanction for failing to obey a court order. Such a sanction cannot be extinguished by a discharge in bankruptcy. The rationale was explained at para. 47:

> The integrity of the administration of justice, including the enforcement of court orders, requires that the court not permit its power to impose and enforce sanctions for contempt to be undermined by permitting contemnors to seek refuge in bankruptcy.

[24] In the end, Mr. Moudry was free to pursue collection of his cost award. This was consistent with the outcome in ***Mgrdichian v. Mgrdichian***, 2006 CanLii 13773 (ONSC), a case where a husband was found in contempt for failing to disclose. The costs of the action, and penalties for contempt, survived his discharge pursuant to the interpretation of s. 178(1)(a).

[25] Similarly, see ***Walker v. Walker***, 2013 ABCA 213 where the husband breached various orders for disclosure and then made an assignment in bankruptcy on the eve of a contempt hearing. On appeal, it was argued that bankruptcy erased the duty to comply with the order to disclose and erased any penalty for non-compliance. The Alberta Court of Appeal disagreed saying that the bankruptcy was irrelevant:

> 19 That cannot make the appellants contempt, or any penalty for it, evaporate, for a number of reasons.
>
> 20 First, the breaches of court orders were old: some had gone on for six years before the bankruptcy proceeding.
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> …
>
> 22 Bankruptcy is about property, and is not a dispensation from all general duties and liabilities, such as the laws relating to contempt: *Turkawski v. 738675 Alberta Ltd.*, 2005 ABQB 339, 388 A.R. 187 (Alta. Q.B.) (paras 14-16).

[26] Finally, the more recent decision in ***Recycling Worx***, *supra*, is compelling. That case involved a private contractual dispute. Hunter breached a number of court orders, declared bankruptcy, and was discharged. He argued that his bankruptcy excused his conduct and its consequences. In analyzing the bankruptcy regime, the court emphasized its nature and purpose as financial rehabilitation for the debtor. The court cautioned at paras. 109-112:

> 109 In considering these questions, it is useful to remain mindful of the purpose of the BIA. It is a mechanism for financial rehabilitation of the debtor (Alberta (Attorney General) v. Maloney, 2015 SCC 51, [2015] 3 SCR 327 at paras 36-38, 77, 79 (not cited by counsel).
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> 110 Consistent with the financial rehabilitation goal, a claim provable in bankruptcy must be of a financial nature. The point of bankruptcy is mainly to ascertain financial claims, value them, pay them to the extent the estate generates dividends, and discharge them….
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> 111 Consequently, bankruptcy is not a shower that washes off the consequences of all past misconduct. In ***Maloney***, the Court stated:
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> > …bankruptcy does not purport to erase all the consequences of a bankrupt's past conduct. However, by ensuring that all provable claims are treated as part of the bankruptcy regime, the BIA gives debtors an opportunity to rehabilitate themselves financially. While this does not amount to erasing all regulatory consequences of their past misconduct, it certainly is meant to free them from the financial burden of past indebtedness.
> >
> > ***(Maloney*** at para 83)
>
> 112 This policy is party reflected in subsection 178(1)(a) of the BIA, which exempts from discharge: "any fine, penalty, restitution order or other order similar in nature to a fine, penalty, or restitution order, imposed by a court in respect of an offence, or any debt arising out of a recognizance or bail".

[27] Returning to the present case, Saarloss submits that s. 178 (1)(a) is not "broad" enough to capture a civil debt for costs. Put differently, it is argued that the section does not permit an award of "civil" costs to be exempted from discharge. The preceding authorities suggest otherwise. However, not all those cases had the issue squarely before them. And conflicting authority exists as to whether the stay available under the ***BIA*** captures contempt proceedings.

[28] After examining the various decisions touching on the issue, Eamon, J. in ***Recycling Worx***, *supra*, concluded at para. 122 that "contempt proceedings are not subject to the section 69.3 stay under the ***BIA***, and the debtor's responsibility for pre-bankruptcy breaches of Court orders is not extinguished by a bankruptcy discharge of the underlying claim".

[29] Flowing from these conclusions, the Court went on the determine whether various forms of cost awards were discharged by bankruptcy. Eamon, J. reasoned at paras 193 – 199:

> [193] The parties dispute whether the solicitor and client costs award of Mme Justice Anderson in the August 2013 Order and the party and party costs award of Mr. Justice Poelman on March 3, 2014 are released by the bankruptcy.
>
> [194] The costs were awarded and quantified before the bankruptcy. Although they arose only in connection with the injunctions, which were not provable claims, they nevertheless constituted discrete debts existing before bankruptcy and are being collected merely as a financial obligation. Like traffic fines in

> ***Maloney***, they were discharged by the bankruptcy unless they fall under an exception.
>
> [195] The Plaintiff bears the onus, on the balance of probabilities, to establish that the costs debts fell within the subsection 178(1)(a) exception (***Canada (Attorney General) v. Bourassa (Tusutees of***), 2002 ABCA 205 at para 47). The subsection requires that the fine, penalty, restitution order or similar order be imposed by a Court in respect of an "offence".
>
> [196] I agree with the Plaintiff that an award of solicitor and client costs of a contempt hearing are probably not discharged by bankruptcy as they would be part of the sanction for the offence of contempt (***Security Bancorp Inc v. Faria***, ABQB 61 at para10) and contempt sanctions are excepted under subsection 178(1)(a) of the BIA (***Gaunt*** (NSSC) at para 8, (NSCA) at para 5).
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> [197] However, the costs were not awarded in consequence of contempt findings.
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> …
>
> [199] Solicitor and client costs awards are often awarded in cases of litigation misconduct. Litigation misconduct is offensive and attracts punitive costs, but it is not an offence under s. 178(1)(a) unless and until the Court finds contempt and awards costs in connection with that.

[30] I adopt the foregoing reasoning. (See also ***Alberta Securities Commission v. Hennig***, *supra*, at para 79, ***Re McAteer***, 2007 ABCA 137, leave to appeal to SCC refused, [2007] S.C.C.A. No. 342 (SCC) at para 18, ***Re Kronewitt***, (1986), 183 AR 221 and ***Re Mehr***, 1989 CarwsellBC (SC)).

[31] In the present case, the assessment of costs flowed from a contempt finding and was fully quantified before bankruptcy. The rationale for the cost award was fulsomely explained by Arnold, J. at 2017 NSSC 26 who began by noting that his

decision addressed the penalty following a finding of civil contempt. He then considered the available penalties for contempt under *Civil Procedure Rules* 89.13 and 88.02 and imposed a civil fine, the quantum of which was set with reference to his assessment of costs. He explained:

> [45] … I am mindful that contempt of court, with the element of ignoring or flouting orders of the court, has a special status that demands something more than a purely nominal fine. In this case the contempt was serious, but it only directly impacted the parties. In addition, the lack of urgency Mutual showed in pursing the matter should not be encouraged.
>
> [46] Saarloos ignored two direct orders by judges of this court. Some records sought by Mutual may have been destroyed as a result. Once new counsel became involved with Saarloos, diligent (although unsuccessful) efforts were made to purge the contempt. Most significant to my analysis on the quantum of a fine is the fact that Saarloos has little current ability to pay. But for his bleak financial situation a significant fine would be in order. Nonetheless, it must be brought home to Saarloos that he is required to comply with court orders. That being said, considering the costs order that I will also impose, a civil fine payable directly to Mutual in the amount of $2,500.00 is sufficient.

[32] The assessment of costs that followed the imposition of the civil fine recognized that Saarloos was "guilty of misconduct", but Mutual delayed dealing with the contempt issue resulting in some duplication of effort and cost. Doing justice in the circumstances resulted in costs "on an accelerated basis but not on a solicitor and client basis" (at para 61). In my view, the award of costs was part of the overall sanction for the offence of contempt. Justice Arnold exercised his

considerable discretion to fashion an appropriate penalty by integrating the fine and award of costs to reflect all of the circumstances presented.

[33] I conclude that the costs awarded against Saarloos is a sanction for the offence of contempt, and exempt from discharge under s. 178(1)(a) of the ***BIA***.

Conclusion

[34] Saarloos concedes that the civil fine in the amount of $2,500 was not discharged by bankruptcy.

[35] I find that the cost award of Arnold, J. at 2017 NSSC 26 was not discharged by the Saarloos bankruptcy.

[36] The cost award of $20,100.00 plus HST plus disbursements of $2,350.00 remain payable to Mutual along with the civil fine in the amount of $2,500.00.

Gogan, J.