SUPREME COURT OF NOVA SCOTIA IN BANKRUPTCY
Citation: *Terra Firma Development (Re)*, 2023 NSSC 16

Date: 20230116
Docket: Halifax, No. 499638
Registry: Halifax

IN THE MATTER OF THE BANKRUPTCY OF
TERRA FIRMA DEVELOPMENT CORPORATION LIMITED

Between:

Resort Invest International GmbH

Applicant

v.

MNP LTD., Licensed Insolvency Trustee of
Terra Firma Development Corporation Limited

Respondent

DECISION

Judge: The Honourable Justice John P. Bodurtha

Heard: August 23, 2022, in Halifax, Nova Scotia

Written Submissions: November 23, 2022

Written Decision: January 16, 2023

Counsel: Stephen Kingston, for the Applicant, Resort Invest International GmbH
Patrick Shea, for the Respondent, MNP Ltd.

By the Court:

Introduction

[1] Resort Invest International ("RII") seeks an order pursuant to s 135(4) of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-4 ("BIA"), setting aside the trustee's disallowance of RII's proof of claim filed in connection with the bankruptcy of Terra Firma Development Corporation Limited ("TFDC").

Background

[2] The key facts are not in dispute.

[3] On September 22, 2020, TFDC was adjudged bankrupt by order of the Court upon application of S+C Treuhandgesellschaft mbH ("S+C"). MNP Ltd. was appointed as trustee in bankruptcy.

[4] RII is a secured creditor of TFDC. On May 21, 2021, RII filed a secured proof of claim with the trustee in the amount of $48,214,412. The proof of claim appended various loan agreements between RII and TFDC, together with mortgages granted by TFDC to RII to secure the debt.

[5] On June 8, 2021, S+C filed a proof of claim asserting a claim against TFDC that is based on essentially the same debt as the claim filed by RII.

[6] On May 13, 2022, RII's legal counsel received an electronic copy of a proposal being advanced by MNP Ltd. as trustee for TFDC. The materials stated that the first meeting of creditors to consider the proposal was scheduled for May 25, 2022.

[7] On May 19, 2022, RII's counsel indicated to the trustee that RII would likely be voting against the trustee's proposal.

[8] On May 20, 2022, the trustee disallowed the proofs of claim of both RII and S+C on the basis that they were each claiming the same debt, and the trustee was unable to determine which of them "owned" the claim. At the time of the disallowances, the trustee was aware that S+C had previously filed a notice of action and statement of claim against RII in the Supreme Court of Nova Scotia seeking,

among other things, a declaration confirming that S+C is the rightful mortgagee in respect of each of the mortgages granted by TFDC to RII.

[9] Both RII and S+C appealed from the trustee's disallowance of their respective claims. While it would have been preferable for the appeals to be heard together, a scheduling oversight resulted in RII's appeal being set down for hearing before S+C's appeal.

[10] The two-hour hearing of RII's appeal took place on August 23, 2022.

Legislative provisions

[11] RII's appeal was brought under s 135(4) of the BIA. Section 135 provides:

> **Admission and Disallowance of Proofs of Claim and Proofs of Security**
>
> **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**
>
> (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)

[12] The BIA defines "court" at s 2:

court, except in paragraphs 178(1)(a) and (a.1) and sections 204.1 to 204.3, means a court referred to in subsection 183(1) or (1.1) or a judge of that court, and includes a registrar when exercising the powers of the court conferred on a registrar under this Act;

[13] Section 183(1)(c) states:

Courts vested with jurisdiction

183 (1) The following courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers:

…

(c) in the Provinces of Nova Scotia and British Columbia, the Supreme Court;

[14] The definition of "court" at s. 2 also includes the registrar when the registrar is exercising the powers of the Court conferred on a registrar under the BIA. The powers of the registrar are set out at s 192(1):

Powers of registrar

192 (1) The registrars of the courts have power and jurisdiction, without limiting the powers otherwise conferred by this Act or the General Rules,

(a) to hear bankruptcy applications and to make bankruptcy orders if they are not opposed;

(b) to hold examinations of bankrupts or other persons;

(c) to grant orders of discharge;

(d) to approve proposals where they are not opposed;

> (e) to make interim orders in cases of urgency;
>
> (f) to hear and determine any unopposed or *ex parte* application;
>
> (g) to summon and examine the bankrupt or any person known or suspected to have in his possession property of the bankrupt, or to be indebted to him, or capable of giving information respecting the bankrupt, his dealings or property;
>
> (h) to hear and determine matters relating to proofs of claims whether or not opposed;
>
> (i) to tax or fix costs and to pass accounts;
>
> (j) to hear and determine any matter with the consent of all parties;
>
> (k) to hear and determine any matter relating to practice and procedure in the courts;
>
> (l) to settle and sign all orders and judgments of the courts not settled or signed by a judge and to issue all orders, judgments, warrants or other processes of the courts;
>
> (m) to perform all necessary administrative duties relating to the practice and procedure in the courts; and
>
> (n) to hear and determine appeals from the decision of a trustee allowing or disallowing a claim.
>
> (Emphasis added)

[15] Section 192(2) states that "the powers and jurisdiction conferred by this section or otherwise on a registrar may at any time be exercised by a judge."

[16] Section 192(4) provides for an appeal from an order or decision of a registrar to a judge:

> **Appeal from registrar**
>
> 192(4) A person dissatisfied with an order or decision of a registrar may appeal therefrom to a judge.

[17] As noted earlier, s. 195(4) directs that the person to whom a notice of disallowance is issued by the trustee may appeal the trustee's decision "to the court in accordance with the General Rules."

[18] The *Bankruptcy and Insolvency General Rules* do not specifically address appeals under s 135(4). However, s 9(5) deals with "court proceedings":

> 9(5) Unless the Chief Justice, Associate Chief Justice or Commissioner, as the case may be, referred to in section 184 of the Act otherwise directs , every document that is required to be filed in court must first be filed at the office of the registrar.

Who should hear a s. 135(4) appeal at first instance?

[19] After the hearing, but before making a decision on the merits, I asked the parties to comment on whether RII's appeal under s. 135(4) should have been heard by the registrar at first instance, rather than by a judge. I referred the parties to *Blanchette Estate (Re)*, 2018 BCSC 2085, cited by RII in its appeal materials, where Sewell J stated:

> 48 The BIA provides that appeals from disallowance of claims are to be heard by a registrar**.** However the BIA also provides that a judge of this court may exercise all the powers of a registrar, including hearing an appeal from a trustee's decision on a proof of claim.
>
> 49 I therefore give the applicants leave to bring the Appeal for hearing before me or another judge of this court. I also give them leave to reset this application for hearing at the same time as the Appeal.
>
> (Emphasis added)

[20] I also cited the following statement by Humphries J in *Giorgio Galleria Ltd. (Re)*, [1995] BCJ No 239 (SC):

> 13 Such an appeal would normally come on before the Registrar, pursuant to s. 192(1)(n) of the Act, and the decision of the Registrar could then be appealed to a judge of this Court (s. 192(4)). Neither party raised the issue before me as to whether I should hear the matter at first instance. As the argument took some time, it is expedient that I render a decision which I am satisfied I can do, pursuant to s. 192(2) of the Act.
>
> (Emphasis added)

[21] RII filed a written response on November 1, 2022. RII submits that there is nothing in the BIA which requires an appeal under s. 135(4) to be heard by the registrar at first instance. It further submits that "the prevailing practice in Nova Scotia is that appeals from disallowances may properly be set down for hearing before either a Justice of the Court or the Registrar." With respect to the statement in *Blanchette Estate (Re)*, RII says it "is in error and should not be followed." As for the passage from *Giorgio Galleria Ltd. (Re)*, RII states:

> It is submitted that this passage does not suggest that the *Act* requires that appeals from disallowances be heard from a Registrar in first instance. Rather, the Court merely noted that (in British Columbia, at least), such appeals would "normally" come before the Registrar – while at the same time confirming that the Court also has the power to hear and determine the appeal pursuant to s. 192(2).

[22] According to RII, "while some appeals from disallowances in Nova Scotia are set down to be heard by the Registrar in first instance, others are set down to be heard by a Justice in Chambers – without the requirement that leave be granted to do so." RII cites *Gaum v Grant Thornton Limited*, 2020 NSSC 317, as "a recent example of an appeal being heard by a Justice in Chambers in first instance." RII submits that the Court should proceed to render its decision on the merits of the appeal. In the alternative, it says that any procedural defect as it regards the appeal is an "irregularity" which may be remedied by the Court pursuant to s. 187 of the BIA.

[23] MNP Ltd. filed its written response on November 23, 2022. It states as follows:

> We did not raise the issue identified by Your Lordship in the e-mail of 13 October 2022 because we assumed that a decision had been made by the Bankruptcy Court that the appeal would be heard by a Judge rather than the Registrar.
>
> Our client was not asked whether it would consent to the appeal being heard by a Judge and would, if asked, have suggested that it was more appropriate, and in line with established practice, that appeals under s. 134(5) be heard at first instance by the Registrar.
>
> We do not dispute Mr. Kingston's assertion that the jurisdiction of the Registrar under s. 192(1)(h) [*sic*] of the BIA to hear appeals under s. 135(4) is not exclusive and that a Judge has jurisdiction to hear and determine an appeal in appropriate circumstances. That is, however, the case with all of the matters assigned to the Registrar by s. 192(1). [See s. 192(2)]
>
> As noted by Your Lordship, the general practice is that appeals under s. 135(4) are heard at first instance by the Registrar. This is, in our submission, reflective of the fact that the Registrar is generally assigned jurisdiction to address proceeding [*sic*] involving the day-to-day administration of the BIA, thereby allowing the Judges of the Superior (Or Supreme) Courts assigned jurisdiction under the BIA to deal with the more complex matters that arise in the administration of a bankruptcy or proposal.
>
> We note that the one case cited by Mr. Kingston, *Gaum v Grant Thornton Limited*, 2020 NSSC 317 (CanLII), involved more than just an appeal under s. 135(4). The issues before the Court involved what can fairly be described as a complicated factual matrix concerning voting on a proposal and engaged both s. 37 and s. 134(5) of the BIA. It is also not clear from the reported case whether the parties agreed

> that, as a result of the issue involved, the matter would be dealt with by a Judge or whether the Judge had taken on an oversight role in the proposal proceeding. I note that, based on the facts outlined in paragraph 6 of the reported decision, there had been an interim receiver appointed pursuant to s. 47.1 of the BIA, which is not within the jurisdiction of the Registrar. The case also appears to have involved a situation where the result of the vote on the proposal was the deemed bankruptcy of the debtor such that s. 115.1 of the BIA would presumably be engaged at some point and s. 192(1) of the BIA does not assign the Registrar jurisdiction under s. 115.1.
>
> We note that having appeals under s. 135(4) heard by a Judge at first instance unnecessary [*sic*] ties up judicial resources. Where, for example, an appeal under s. 135(4) is heard and determined by the Registrar, any appeal is to a single Judge. Where, however, the appeal is heard by a Judge, any appeal is to a panel of the Court of Appeal, which, in our respectful submission, is a waste of judicial resources.
>
> Rule 9(5) of the General Rules relates to the administrative role of the Office of the Registrar as opposed to the judicial role of the Registrar. While it does not directly relate to the issue of jurisdiction, the provision emphasizes, in our submission, the central role played by the Registrar in the administration of bankruptcy and proposal proceedings. The Registrars have, much like administrative tribunals, developed a particular expertise in dealing with the matters assigned to them by s. 192(1).
>
> It would, in our respectful submission, be appropriate to have this appeal scheduled to be heard by the Registrar at the same time as the appeal of the parallel claim against the Bankrupt, which your Lordship will recall was not scheduled to be heard at the same time as this appeal as a result of an oversight.

[24] There is no dispute that a judge of the Supreme Court of Nova Scotia has jurisdiction to decide an appeal under s. 135(4), or any other matter assigned to the registrar under s. 192(1), in certain circumstances. Section 192(2) makes that abundantly clear. In my view, however, s. 192(2) cannot be interpreted to mean that parties have an unrestricted choice of forum at first instance. The interpretation proposed by RII would make the registrar redundant and would allow Supreme Court dockets to be overrun with routine bankruptcy matters. It would also accommodate judge shopping. I find that appeals under s. 135(4) are to be heard by the registrar at first instance, unless leave is obtained from a judge. The registrar's decision may then be appealed to a judge.

[25] This appeal was brought and argued before me without leave having been obtained. While it is open to the court to exercise its jurisdiction to decide the appeal notwithstanding this procedural misstep, as the court did in *Giorgio Galleria Ltd.*

(Re), I find that it would be inappropriate to do so in the circumstances of this case. Unlike in *Giorgio Galleria Ltd. (Re)*, the argument in this case was brief, and there would be no significant prejudice to the parties if the matter is transferred to the registrar. More importantly, RII and S+C have each appealed from the trustee's disallowance of their parallel proofs of claim. Both appeals should be heard and decided by the same decision-maker, preferably at the same time. It would be unjust for the Court to decide RII's appeal, while sending S+C's appeal to the registrar.

[26] In addition, the proofs of claim filed by RII and S+C relate to a debt worth more than $40 million. With such a substantial sum at stake, a party who is dissatisfied with the outcome of the appeal at first instance might wish to file a further appeal. If this Court decides the appeal at first instance, allowing RII to bypass the registrar, MNP Ltd will be deprived – without its consent – of one level of appeal available under the BIA (see ss. 192(4) and 193). In my view, the burdens created by this Court deciding the appeal at first instance outweigh the benefits.

[27] As to RII's submission that I treat the procedural defect as an "irregularity" which may be remedied by the court pursuant to s. 187(9) of the BIA, I find that s. 187(9) does not apply here. The section reads:

> **Formal defect not to invalidate proceedings**
>
> (9) No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court.

[28] In LW Houlden, GB Morawetz & Janis Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th ed (Thomson Reuters Proview, 2022), the authors note at §8:48:

> Section 187(9) gives the court power to remedy any formal defect or irregularity unless the court is of the opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of the court. Section 187(5), above, gives the court power to review, rescind or vary any order made by it under its bankruptcy jurisdiction. The two subsections give the court a wide power to excuse or remedy errors so that bankruptcy proceedings will not be defeated by formal and technical objections.
>
> (Emphasis added)

[29] In this case, no bankruptcy proceedings are at risk of being invalidated or defeated. RII's appeal under s. 135(4) will proceed, but it will do so before the registrar.

Conclusion

[30] I order that RII's appeal under s. 135(4) of the BIA be transferred to the registrar's office. Whether the appeal should be heard together with S+C's appeal is a decision for the registrar.

[31] There are no costs awarded.

Bodurtha, J.