Date: 2008 11 18
Docket: S-1-BK 2006-840650

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF THE BANKRUPTCY OF
RICHARD ERNEST SEELEY

BETWEEN:

BROWNING CROCKER INC. in its capacity as trustee
in bankruptcy for RICHARD ERNEST SEELEY

Applicant

- and -

CANADIAN IMPERIAL BANK OF COMMERCE

Respondent

MEMORANDUM OF JUDGMENT ON COSTS

[1] I have now received written submissions from the parties on the subject of costs. The costs relate to the application I heard by the Trustee for payment by the Bank of the levy under s. 147(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, s. B-3. I ruled that the levy in the amount of $1,232.50 is payable by the Bank: *Re Seeley (Bankruptcy)*, 2008 NWTSC 77.

[2] The Trustee seeks solicitor and client costs, relying on an offer to settle it made to the Bank. Alternatively, it seeks lump sum costs in the amount of $8,000.00 plus $800.00 for the costs application.

[3] The Bank opposes solicitor and client costs, taking the position that the offer to settle made no sense. The Bank's position is that no costs should be awarded, or

alternatively, if the Trustee is to be awarded costs, it should be on a party and party basis only with no costs for certain adjournments.

[4] I have to agree with the Bank that the offer to settle made by the Trustee was poorly drafted to the point of being meaningless. The offer, referring to the Trustee as "the Applicant", states "Pursuant to Rule 193 of the Supreme Court of the Northwest Territories, the Applicant hereby offers to pay to settle the within action in consideration for payment by them to the Applicant in the amount of $1,232.50 representing the levy payable to the Superintendent in Bankruptcy".

[5] The offer to settle then goes on to refer to the costs consequences in Rule 201(2) but misquotes the Rule.

[6] To be valid, an offer to settle must be clear. Neither the party to whom the offer is made nor the Court should have to guess what the offer is, nor should the Court re-write the offer to make it a meaningful one. As the offer in this case is not clear, the costs consequences of Rule 201 are not invoked.

[7] Although the amount of money at stake was not large, the legal issue as to the Bank's liability for the levy was complicated. In light of the minimal amount involved, the Bank could have chosen to pay the levy without acknowledging that it was legally obliged to do so and left argument on the issue for another day in another case with more money at stake. Having chosen to take the position it did, and being unsuccessful, I see no reason why it should not pay costs.

[8] On the other hand, some of the actions taken or not taken by the Trustee are relevant to the extent to which it should receive costs. The affidavit material filed by the Trustee included documents unrelated to this case and had to be corrected at the direction of the presiding Judge on the first date this matter was before the Court; unfortunately, the problem arose again on the second court appearance when extraneous material was attached to another document. The Trustee did not serve the Superintendent in Bankruptcy with notice of the application and indeed resisted doing so until directed to effect service by the Court, which necessitated an adjournment. The Trustee failed, without any explanation, to disclose in its material the letter of release it provided to the Bank after the Bank filed its proof of claim in the bankruptcy. This is especially surprising considering that the Trustee took the position that there was no need for the Bank to file any material as the

matter was so clear-cut; yet only when the Bank filed its material was the Court made aware of the release.

[9] Finally, the Trustee failed to bring to the Court's attention the *Cutting Edge* case referred to in my decision, although the Trustee was involved in that case. The Trustee's explanation that it did not provide a copy of the case because it is under appeal is not persuasive, especially considering the Trustee's opposition to the Bank being given any time to file its own materials. Even though under appeal, *Cutting Edge* is very helpful for its review of cases on liability for payment of the s. 147 levy.

[10] For its part, the Trustee points to the Bank's failure to file its brief within the time set out in the Rules. However, it alleges no prejudice resulting from that and since the application was adjourned in any event so that the Trustee could serve the Superintendent in Bankruptcy, in the end the Trustee had sufficient time to review the Bank's brief.

[11] The parties have made a number of other allegations about each other's conduct of the case which I need not address for purposes of this decision.

[12] I have decided to award costs in a lump sum rather than involve the parties in the expense of a taxation. Having reviewed the tariff under the *Rules of Court* and considering that this application was complex and law-intensive, and taking into account the factors referred to above, I order that the Bank pay the Trustee costs in the amount of $900.00 plus disbursements of $250.00.

V.A. Schuler
J.S.C.

Dated at Yellowknife, NT, this
18th day of November 2008

Counsel for the Applicant: Douglas G. McNiven
Counsel for the Respondent: Austin F. Marshall

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OF THE HONOURABLE JUSTICE V.A. SCHULER
