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COURT OF APPEAL FOR ONTARIO

LASKIN, CHARRON and LANG JJ.A.

IN THE MATTER OF THE BANKRUPTCY OF SIMON MORRIS ROSENFELD, OF THE CITY OF TORONTO, PROVINCE OF ONTARIO

) Fred Tayar
) for the appellant
) Simon Morris Rosenfeld
)
) Robert Muir
) for the respondents
) the Trustee in Bankruptcy,
) Grant Thornton Limited, and
) the United States Securities and
) Exchange Commission
)
) Heard: June 8, 2004

On appeal from the order of Justice Alexandra Hoy of the Superior Court of Justice dated August 14, 2002.

LANG J.A.:

Nature of Appeal

[1] This is an appeal by Simon Rosenfeld from an order both suspending his bankruptcy discharge and making that discharge conditional upon the payment of $250,000.

[2] Mr. Rosenfeld seeks an absolute discharge, or, alternatively, a conditional discharge upon payment of $50,000.

Issues

1. Was the bankrupt entitled to an absolute discharge?

2. Were the terms of the conditional discharge oppressive?

3. Did the motions judge have jurisdiction to order both a suspension of discharge and a conditional discharge?

Facts

[3] Mr. Rosenfeld's discharge from bankruptcy was opposed by his trustee and by his two major creditors. The trustee submitted three reports, which alleged that Mr. Rosenfeld had not properly disclosed his financial affairs, that he likely controlled offshore accounts, and that he had failed to fully or properly disclose information about his income and expenses. Further, the reports alleged that Mr. Rosenfeld failed to answer undertakings given at his bankruptcy examinations. The trustee recommended that Mr. Rosenfeld be granted a conditional discharge upon payment of $250,000.

Standard of Review

[4] The motions judge's findings of fact, together with her credibility findings, and the inferences she drew from those findings, whether made from oral or documentary evidence, cannot be overturned absent "palpable and overriding error". With respect to questions of law, however, the judge must be correct. Deference must also be given to findings of mixed fact and law, absent legal or palpable and overriding error. See *Waxman v. Waxman*, [2004] O.J. No.1765 (C.A.) and *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235.

Analysis

1. Was the bankrupt entitled to an absolute discharge?

[5] A first-time bankrupt would normally be granted an absolute discharge under s. 168 of the *Bankruptcy and Insolvency Act*, R..S.C.1985, c. B-3. However, on proof of any s. 173 fact, a judge is precluded from granting an absolute discharge. In this case, the motions judge accepted the evidence of several s. 173 facts including, under s. 173(1)(a), that Mr. Rosenfeld's estate was not, on the amount of his unsecured liabilities, of a value equal to fifty cents on the dollar, a situation for which Mr. Rosenfeld was responsible. Under s. 173(1)(b), the motions judge found that Mr. Rosenfeld failed to keep proper books and under s. 173(1)(d) that he failed to account for certain assets. In this regard there was clear concern about other assets because Mr. Rosenfeld had apparent access to unknown resources to support his lavish lifestyle, he had not adequately explained a guarantee he gave for a company in which he said he had no interest, and he failed to explain his involvement in another company that offered "asset protection". Under s. 173(1)(m), Mr. Rosenfeld failed to make required monthly payments, while under s. 173(1)(n), he failed to make a viable proposal to resolve his indebtedness. Finally, under s. 173(1)(o), Mr. Rosenfeld failed to perform the duties imposed on a bankrupt by failing to assist the trustee in the investigation of his affairs. Any one of these s. 173 findings – and there was ample evidence for these findings – required the motions judge

to refuse an absolute discharge. Accordingly, Mr. Rosenfeld was not entitled to an absolute discharge.

2. Were the terms of the conditional discharge oppressive?

[6] The trustee sought a conditional discharge with payment by Mr. Rosenfeld of $250,000. The trial judge made that payment a precondition of discharge payable by Mr. Rosenfeld without interest in monthly installments of at least $3,000. The motions judge had jurisdiction to refuse a discharge completely as she might have been inclined to do given the evidence before her. But, in the circumstances of the trustee's request for a conditional discharge, she also had jurisdiction to impose conditions adequate to the circumstances. The only question is whether the quantum of the $250,000 payment was oppressive. In considering this issue, it is important to note that such a condition is not final: a bankrupt is entitled, at the expiration of one year from the order, to seek a modification of its terms on the basis that "there is no reasonable probability of his being in a position to comply with the terms of the order" (s. 172(3)). That avenue has been open to this bankrupt since August 2002 and remains open.

[7] On the basis of the authorities given to us, $250,000 is at the high end of the range. It is argued that this amount is so high as to be inconsistent with giving a bankrupt a "fresh start". However, the provisions for discharge must also be consistent with this court's decision in *Bank of Montreal v. Giannotti* (2000), 51 O.R. (3d) 544, which held that the "fresh start" purpose of the *Act* was intended for an honest but unfortunate debtor and not for a dishonest debtor who has shown himself unwilling to make full disclosure. In this case, the motions judge specifically found Mr. Rosenfeld was "not honest with his creditors" and that he was "unwilling to make full disclosure of his financial affairs."

[8] We were referred to cases involving discharges of professionals and lawyers where similar payments were ordered in significantly lower amounts. See *Re Perlman* (1993), 22 C.B.R. (3d) 248 at 253-254 (B.C.S.C.). But, Mr. Rosenfeld, on the evidence before the motions judge, was more than simply a practising lawyer. He had been actively involved in extensive offshore corporate activities. Given the motions judge's findings and all the circumstances of this case, her disposition is entitled to significant deference. We see no palpable or overriding error in her factual findings or in the inferences that she drew from those findings.

3. Did the motions judge have jurisdiction to order both a conditional discharge and a suspension of discharge?

[9] Upon proof of facts enumerated in s. 173 of the *Act*, s. 172 (2) requires the court to refuse the bankrupt a discharge, to suspend the discharge, or to grant a conditional discharge. Apparently, as part of the conditional discharge, the motions judge suspended the discharge for about four-and-one-half months. Assuming that this is properly characterized as a suspension order and that the judge erred in so ordering, the issue is now moot as the suspension order has long since expired. Further, it was clearly the

motions judge's overwhelming intention to grant a conditional discharge rather than a suspension of discharge.

[10] Accordingly, the appeal is dismissed.

[11] Counsel agreed that partial indemnity costs should be fixed in favour of the successful party, the United States Securities and Exchange Commission (SEC), at $12,000 (inclusive of disbursements and G.S.T.). Counsel queried whether those costs should be paid to the SEC, the opposing creditor, from the $250,000 discharge condition or whether that amount required for discharge should be increased by $12,000. It is our view that the amount required for the conditional discharge should be increased to $262,000. To hold otherwise would mean that the bankrupt suffered no cost consequences as a result of an unsuccessful appeal and that the successful creditor would, in effect, by paying his own costs.

Released: JUN 10 2004

Signed: "Susan E. Lang J.A."
"I agree John Laskin J.A."
"I agree Louise Charron J.A."