COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Braich v. Clarke,*
2023 BCCA 305

Date: 20230728
Docket: CA48686

Between:

Herkenn Singh Kenny Braich

Appellant
(Respondent)

And

Scott William Clarke

Respondent
(Applicant)

Before: The Honourable Madam Justice Fenlon
The Honourable Mr. Justice Voith
The Honourable Justice Marchand

On appeal from: An order of the Supreme Court of British Columbia, dated November 18, 2022 (*Braich (Re)*, 2022 BCSC 2370, Vancouver Docket B220185).

Counsel for the Appellant: B. La Borie

Counsel for the Respondent: K.M. Jackson
T.A. Posyniak
M. Gill

Place and Date of Hearing: Vancouver, British Columbia
May 30, 2023

Place and Date of Judgment: Vancouver, British Columbia
July 28, 2023

Written Reasons by:
The Honourable Justice Marchand

Concurred in by:
The Honourable Madam Justice Fenlon
The Honourable Mr. Justice Voith

Summary:

The chambers judge adjudged the appellant to be bankrupt and made a bankruptcy order against him. He appeals the judge's decision alleging she erred by (1) finding that he owed the respondent an unsecured debt of at least $1,000; (2) finding that he had committed two acts of bankruptcy; and (3) failing to find that he had sufficient assets to pay his debts. Held: Appeal dismissed. The judge made no reversible errors. She relied on well-established legal principles and her conclusions were supported by the evidence and were available to her.

Reasons for Judgment of the Honourable Justice Marchand:

Introduction

[1] On November 18, 2022, the chambers judge ordered that the appellant, Herkenn Singh Kenny Braich, be adjudged bankrupt and made a bankruptcy order against him. The judge's reasons for judgment are indexed at 2022 BCSC 2370.

[2] Mr. Braich alleges the judge erred by:

1. finding that he owed Mr. Clarke an unsecured debt of at least $1,000;
2. finding that he had committed two acts of bankruptcy; and
3. failing to find that he had sufficient assets to pay his debts.

[3] These are challenges to the judge's findings of fact or mixed fact and law. They are subject to a deferential standard of review and will not be overturned absent palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33.

[4] For the reasons that follow, I see no error in the judge's findings. I would dismiss the appeal.

Background

[5] On February 27, 2019, the respondent, Scott William Clarke, sold a parcel of land in Mission (the "Property") to Mr. Braich for $4,325,000. Mr. Braich financed the purchase with a first mortgage of $2,800,000 to a group referred to by the chambers judge as the "Sangha Creditors" and a vendor take back mortgage of $1,650,000 in favour of Mr. Clarke.

[6] Mr. Braich defaulted on both mortgages. On October 17, 2019, the Sangha Creditors obtained an order *nisi*, including judgment for $2,999,996.04 with interest accruing. On July 23, 2020, Mr. Clarke obtained an order *nisi*, including judgment for $1,868,492.30 with interest accruing (the "Judgment").

[7] On September 10, 2020, Mr. Clarke registered the Judgment against a number of parcels of land apparently owned directly or indirectly by Mr. Braich, including lands held pursuant to an *inter vivos* alter ego trust settled by Mr. Braich's mother (the "Trust Lands"). In May 2021, Mr. Braich made a single payment of $180,000 to Mr. Clarke on the Judgment.

[8] On January 28, 2021, Justice Baker dismissed Mr. Clarke's application for the appointment of an equitable receiver and granted Mr. Braich's application to discharge the Judgment against the Trust Lands. In making the discharge order, Baker J. accepted Mr. Braich's evidence that he directly or indirectly owned other property of sufficient value to satisfy his obligations to Mr. Clarke.

[9] A year later, on January 27, 2022, Justice Taylor adjourned the Sangha Creditors' application for an order absolute and approved an agreement for the purchase and sale of the Property for $15.75 million to close on June 14, 2022. Despite being granted several extensions, that sale did not complete and an order absolute granted on July 7, 2022 took effect on October 15, 2022. The title to the Property then vested in the Sangha Creditors free and clear of Mr. Clarke's mortgage.

[10] In the meantime, on February 3, 2022, Mr. Clarke obtained a writ of seizure and sale (the "Writ") to be executed against Mr. Braich's assets. The bailiff retained by Mr. Clarke was unable to find any assets to seize and returned the Writ marked "Unable to Locate Exigible Assets."

[11] On May 10, 2022, Mr. Clarke filed his application for a bankruptcy order against Mr. Braich and a supporting affidavit. In his affidavit, Mr. Clarke largely set out uncontroversial details of the relevant background. He also swore that Mr. Braich

had not made any payments on Mr. Braich's indebtedness to him and that he held no security on Mr. Braich's property.

[12] On June 6, 2022, Mr. Braich swore an affidavit: (1) disputing some of Mr. Clarke's evidence; (2) providing a list of properties owned directly or indirectly by him; (3) asserting that the proceeds from the pending sale of the Property would be sufficient to satisfy his debt to Mr. Clarke; (4) providing a copy of a listing for the sale of certain of his other property for $90 million; (5) asserting that he was expecting to receive funds from his father's estate (which had apparently sold lands for $13 million about seven months previously); (6) providing marketing literature for lands owned by the alter ego trust; and (7) attaching the decision of Baker J. However, Mr. Braich did not provide detailed financial information, property appraisals or any evidence regarding his liabilities.

[13] On June 27, 2023, Mr. Clarke swore a second affidavit to correct some information provided in his first affidavit. In particular, he acknowledged that Mr. Braich had paid him $180,000 in May 2021 and that he (Mr. Clarke) held a mortgage over the Property. He explained that the errors in his first affidavit were inadvertent. He swore that he was unaware that the $180,000 payment had not been accounted for in his first affidavit. He also swore that he mistakenly believed the Sanghas had obtained an order absolute and that his mortgage had been discharged. He explained that "[c]onsidering the history of this matter," he had "long given up putting any value" in his mortgage and valued his mortgage "at $0".

[14] After two adjournments, Mr. Clarke's bankruptcy application was heard on November 2, 2022. As indicated, on November 18, 2022, the chambers judge adjudged Mr. Braich to be bankrupt and made a bankruptcy order against him.

Reasons for Judgment of the Chambers Judge

[15] The chambers judge began her judgment by setting out the background and stating a number of relevant legal principles. She then recognized that Mr. Clarke's first affidavit contained errors. She found, however, that the errors were corrected by his second affidavit.

[16] Based on the corrected record, the judge accepted that Mr. Clarke valued his mortgage as "worthless" and found that he was therefore "entitled to be admitted as an unsecured applicant creditor" for the full amount outstanding on his mortgage. In doing so, she rejected Mr. Braich's argument that Mr. Clarke's estimate of his security was "absurdly small". In her view, Mr. Braich had ample opportunity to respond to Mr. Clarke's second affidavit but had chosen not to do so. She concluded that Mr. Braich had "not contested in any meaningful manner Mr. Clarke's valuation of his security."

[17] The judge next concluded that Mr. Braich had committed two acts of bankruptcy within the preceding six months.

[18] First, the judge found that the bailiff "could find no property on which to levy, or to seize, or to take, contrary to s. 42(1)(e) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 [*BIA*]." In making this finding, she held that Mr. Braich had not met his onus to prove "by clear and independent evidence" that he was able to meet his liabilities as they became due. Specifically, she rejected that Mr. Braich met his onus by listing assets, asserting his direct or indirect interest in those assets or relying Justice Baker's finding that there was equity and specific assets of Mr. Braich available for execution by Mr. Clarke.

[19] Second, given the unpaid judgments in favour of the Sangha Creditors and Mr. Clarke, the judge found that Mr. Braich was not meeting his liabilities generally as they became due, contrary to s. 42(1)(j) of the *BIA*.

[20] As a result of her findings, the judge adjudged Mr. Braich to be bankrupt and made a bankruptcy order against him.

The Relevant Provisions of the *BIA*

[21] For the purposes of this appeal, the relevant provisions of the *BIA* are not hard to identify.

[22] Section 2 of the *BIA* defines a “secured creditor”. It provides:

> **secured creditor** means a person holding a mortgage, hypothec, pledge, charge or lien on or against the property of the debtor or any part of that property as security for a debt due or accruing due to the person from the debtor, or a person whose claim is based on, or secured by, a negotiable instrument held as collateral security and on which the debtor is only indirectly or secondarily liable …

[23] Section 42(1) defines what amounts to an act of bankruptcy. In this case, ss. 42(1)(e) and (j) are in issue. Section 42(1)(e) provides, in part, that a debtor commits an act of bankruptcy if a writ of execution is returned with an endorsement that the executing officer could “find no property on which to levy or to seize or take”. Section 42(1)(j) provides that a debtor commits an act of bankruptcy “if he ceases to meet his liabilities generally as they become due.”

[24] Under s. 43(1) of the *BIA*, the onus is on a creditor applying for a bankruptcy order to prove that: (1) the debt owed to them is at least $1,000; and (2) the debtor committed an act of bankruptcy within six months preceding the filing of the application.

[25] Under s. 43(2), a secured creditor (including a mortgage holder like Mr. Clarke) is obliged to state in their application either that they are willing to give up their security for the benefit of the debtor’s creditors or “give an estimate of the value of [their] security” for the purpose of satisfying the court that the debt owed to them by the debtor exceeds the value of their security by at least $1,000.

[26] Under s. 43(6), if the court is satisfied with the proof of the facts alleged in the bankruptcy application, it is empowered to make a bankruptcy order.

[27] On the other hand, under s. 43(7), if the court is not satisfied with the proof of the facts alleged in the bankruptcy application, is satisfied by the debtor that they are able to pay their debts, or is satisfied “that for other sufficient cause no order ought to be made”, it is obliged to dismiss the application.

Analysis

Did the judge err in finding that Mr. Braich owed Mr. Clarke an unsecured debt of at least $1,000?

[28] Mr. Braich makes a number of technical arguments in support of his submission that the judge erred in finding that Mr. Braich owed Mr. Clarke an unsecured debt of at least $1,000. Specifically, he argues that:

- Mr. Clarke's estimate that the value of his security was "$0" was "demonstrably false, or at a minimum, unreasonable or 'absurdly small'";
- The judge impermissibly relied on Mr. Clarke's opinion as to the value of his security;
- The judge erred by relying on the subsequent order absolute in favour of the Sangha Creditors to value Mr. Clarke's security and did so as of the date of the hearing instead of the date of the application; and
- In his affidavits, Mr. Clarke failed to disclose that he had registered his judgment against the title to other properties owned or controlled by Mr. Braich.

[29] In my respectful view, none of these arguments has merit.

[30] First, it is well-established that "the court will not review a creditor's estimate of the value of its security unless the estimate is a sham or absurdly low": *R Home Supply Centre Ltd. (Re)*, 2014 BCSC 2430 at para. 26, citing *Re Hugh M. Grant Ltd.* (1982), 41 C.B.R. 28 (Ont. S.C.), aff'd 2015 BCCA 500. In this case, the judge was entitled to permit Mr. Clarke to correct his first affidavit and she reasonably relied on his explanation as to why he concluded that his security had no value. Despite having had ample opportunity to do so, Mr. Braich provided no objective evidence to persuade the judge that Mr. Clarke's estimate was a "sham or absurdly low."

[31] Second, Mr. Clarke was not required by s. 43(2) of the *BIA* to provide independent expert appraisal evidence regarding the value of his security interest.

He was only required to provide a reasonable estimate that was not a sham or absurdly low: *CIBC Mortgages Inc. (Firstline Mortgages) v. Chartrand*, 2010 ONCA 456 at para. 9; *Sultan Management Group (Re)*, 2022 ABQB 262 at paras. 45–47. The judge accepted that is what he did.

[32] Third, the judge did not rely on the subsequent order absolute to value Mr. Clarke's security nor did she value his security as of the date of the hearing. Rather, having accepted Mr. Clarke's estimate of the value of his security as of the date of his application, the judge reasonably considered subsequent events to satisfy herself that Mr. Clarke's estimate was accurate. It was not improper for the judge to rely on the evidence of subsequent events to test the reliability of Mr. Clarke's estimate of the value of his security.

[33] Finally, Mr. Braich is simply incorrect to suggest that Mr. Clarke was obliged by s. 43(2) of the *BIA* to disclose that he had registered his judgment against other properties owned or controlled by Mr. Braich. Section 43(2) is specifically concerned with determining whether a secured creditor has an unsecured debt of at least $1,000. The registration of Mr. Clarke's judgment against other properties was irrelevant to this task because it did not create a security interest in those properties.

[34] I would not accede to this ground of appeal.

Did the judge err by relying on the bailiff's endorsement of the Writ?

[35] Mr. Braich submits that the judge erred by relying on the bailiff's endorsement of the Writ to establish that he had committed an act of bankruptcy under s. 42(1)(e) of the *BIA*. He says that the judge erred by failing to consider: (1) his "uncontested" evidence that he had informed the bailiff of his interest in various exigible assets; (2) whether Mr. Clarke had an obligation to provide an explanation from the bailiff; and (3) whether the bailiff made a *bona fide* attempt to locate exigible assets.

[36] Mr. Braich's submission rests on the premise that the judge was required to look behind the bailiff's endorsement based on Mr. Braich's bare assertions that he had other exigible assets. In my view, that premise is false.

[37] In the context of proceedings under s. 42(1)(j) of the *BIA*, once an applicant establishes that the debtor has ceased meeting their liabilities as they become due, the onus shifts to the debtor under s. 43(7) to prove by "clear and independent" evidence that they are solvent. Typically, that involves providing a full and transparent outline of the financial position of the debtor supported by such things as financial accounts, financial statements, and/or information regarding the debtor's total indebtedness, revenues, profits, assets, liabilities and/or cash flow: *Forjay Management Ltd. v. 0981478 B.C. Ltd.*, 2018 BCSC 1409 at para. 30; *Sultan* at paras. 108–110; *Medcap Real Estate Holdings Inc.(Re)*, 2022 ONCA 318 at paras. 14–15. I see no reason in principle why a different approach should apply regarding the Writ endorsed by the bailiff under s. 42(1)(e).

[38] Here, Mr. Braich did not provide the judge with a good reason to question the validity of the bailiff's endorsement of the Writ. Mr. Braich relied on a two-and-a-half-year-old determination by Baker J. and made a number of assertions regarding his interest in various properties, the value of those properties and his ability to satisfy his debt to Mr. Clarke. However, things can change in two-and-a-half years and he did not provide any current supporting documentation to fully and transparently outline the true state of his finances. Most importantly, he provided no objective information regarding his liabilities and whether he had any equity at all in the various properties he claimed to have an interest in.

[39] In these circumstances, it was open to the chambers judge to rely on the bailiff's endorsement of the Writ and find that Mr. Braich had committed an act of bankruptcy under s. 42(1)(e).

[40] I would not accede to this ground of appeal.

Did the judge err by finding that Mr. Braich had ceased to meet his liabilities generally as they became due?

[41] Mr. Braich submits that the judge erred in concluding that he had ceased to meet his liabilities generally as they became due and had therefore committed an act of bankruptcy under s. 43(1)(j) of the *BIA*. In particular, he submits that the

judgment in favour of the Sangha Creditors was not sufficient evidence of a second unpaid creditor because, at the time Mr. Clarke filed his application, there was a pending court approved sale that would generate sufficient proceeds to pay both the Sangha Creditors and Mr. Clarke in full.

[42] He also says that the judge erred by relying on the consequences of the court approved sale "to prove [Mr.] Clarke's valuation 'correct'" while not considering that the same consequences resulted in the full satisfaction of the debt to the Sangha Creditors. Finally, he argues the judge erred by failing to consider "whether Mr. Clarke had personal knowledge of whether the Sangha Creditors had or had not been paid."

[43] In general, the existence of more than one unpaid creditor is sufficient to establish that a debtor has ceased to meet their liabilities generally as they became due: *Mastronardi (Re)*, 195 D.L.R. (4th) 631 at para. 24, 2000 CanLII 17002 (O.N.C.A.), citing *Re Giusto* (1994), 1994 CanLII 7463 (ON SC), 25 C.B.R. (3d) 227 (Ont. Gen. Div.) and *Re Joyce* (1984), 51 C.B.R. (N.S.) 152 (Ont. S.C.). The relevant inquiry was therefore whether the Sangha Creditors were unpaid at the time Mr. Clarke filed his application, not whether they might be paid at some point in the future.

[44] Here, Mr. Clarke attached a copy of the judgment in favour of the Sanghas to his affidavit. Mr. Braich could not and did not contest that the Sangha Creditors were unpaid at the relevant time. There being two unpaid creditors (the Sangha Creditors and Mr. Clarke) at the time Mr. Clarke filed his application, it was open to the judge to conclude that Mr. Braich had ceased to meet his liabilities generally as they became due. In other words, it was open to the judge to conclude that Mr. Braich had committed an act of bankruptcy under s. 42(1)(j).

[45] I would not accede to this ground of appeal.

Did the judge err by failing to find that Mr. Braich had sufficient assets to pay his debts?

[46] Mr. Braich submits that the judge erred by failing to find that he had sufficient assets to pay his debts. Absent this error, Mr. Braich says the judge should have dismissed Mr. Clarke's application under s. 43(7) of the *BIA*.

[47] The parties disagree on whether Mr. Braich raised s. 43(7) before the chambers judge. While she did not mention the section in her judgment, she is presumed to know the law: *R. v. G.F.*, 2021 SCC 20 at para. 74. On reading the judge's reasons as a whole, there is no reason to think she was unaware of s. 43(7). She referenced a number of other subsections of s. 43 and must be taken to have reviewed the entire section. Further, on the judge's findings, it is clear she concluded that Mr. Braich was insolvent.

[48] Mr. Braich accepts the proposition stated above that, once the judge found he had committed acts of bankruptcy, the onus was on him under s. 43(7) to prove by "clear and independent" evidence that he was solvent. For the reasons already provided, he did not do so.

[49] It may well be that Mr. Braich owned or had an interest in a number of valuable properties. But, as noted, he did not provide any current supporting documentation to fully and transparently outline the true state of his finances. In particular, he provided no objective information regarding his liabilities and whether he had any equity in the properties identified in his affidavit. Given the passage of time, the judge was not bound by the findings made by Baker J. two-and-a-half years previously.

[50] On the record before her, it was open to the judge to conclude that Mr. Braich did not have sufficient assets to pay his debts. There was therefore no reason for her to dismiss Mr. Clarke's application under s. 43(7).

[51] I would not accede to this ground of appeal.

Conclusion

[52] The judge relied on well-established legal principles and the record to conclude that Mr. Braich owed Mr. Clarke at least $1,000 and had committed two acts of bankruptcy within six months preceding the filing of Mr. Clarke's application. It was, therefore, open to her to adjudge Mr. Braich to be bankrupt and to make a bankruptcy order against him.

[53] Mr. Braich has not established that the chambers judge committed any legal errors or palpable and overriding errors of fact or mixed fact and law. In the absence of reversible error, I would dismiss his appeal.

"The Honourable Justice Marchand"

I AGREE:

"The Honourable Madam Justice Fenlon"

I AGREE:

"The Honourable Mr. Justice Voith"