COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Miceli v. Stagewest Winery Limited Partnership,* 2023 BCCA 357

Date: 20230908
Docket: CA49040

Between:

Giulio Miceli and Miceli Investments Ltd.

Appellants
(Applicant Creditors)

And

Stagewest Winery Limited Partnership doing business as Play Estate Winery

Respondent
(Applicant Respondent)

Before: The Honourable Madam Justice Newbury
The Honourable Madam Justice DeWitt-Van Oosten
The Honourable Justice Skolrood

On appeal from: An order of the Supreme Court of British Columbia, dated April 28, 2023 (*Stagewest Winery Limited Partnership (Re)*, 2023 BCSC 764, Vancouver Docket B230082).

Oral Reasons for Judgment

Counsel for the Appellants (appeared via videoconference on September 8, 2023):	S.R. Anderson
Counsel for the Respondent (appeared via videoconference on September 8, 2023):	V.L. Tickle D. Dipardo
Place and Date of Hearing:	Vancouver, British Columbia September 7, 2023
Place and Date of Judgment:	Vancouver, British Columbia September 8, 2023

Summary:

Bankruptcy judge below did not err in exercising his discretion under s. 43(10) or (11) of the Bankruptcy and insolvency Act ("BIA") to stay the bankruptcy proceedings pending the payment of certain funds into court and the making of enquiries into the subject person's financial affairs. This was a sensible step where it was unclear whether the subject person had failed to pay its liabilities generally as they fell due.

[1] **NEWBURY J.A.**: The applicants seek to appeal an order of Mr. Justice Edelmann staying a petition in which the applicants had sought an order declaring the respondent Stagewest Winery LP ("Stagewest") to be bankrupt. Section 43 of the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B–3, ("*BIA*") states that two conditions must be satisfied before a person may be declared bankrupt: the debtor must be indebted to creditor(s) in an amount exceeding $1,000; and must have committed an "act of bankruptcy" (defined at s. 42 of the *BIA*) within the six months preceding the filing of the creditor's application. In this instance the applicants asserted that the respondent had ceased to meet its liabilities generally as they became due: see s. 42(1)(j) of the *BIA*.

[2] Mr. Justice Edelmann found that on the evidence before him, the applicants had established that Stagewest had indebtedness amounting to more than $1,000 (see para. 3), thus satisfying s. 43(1)(a) of the *BIA*. The judge did *not* make an express finding that Stagewest had ceased to meet its liabilities generally as they became due, but the applicants contend that this may be inferred from the finding at para. 4 of his reasons that on the evidence, "it appears clear that a number of suppliers and other creditors were not being paid" when the petitioner Mr. Miceli was managing Stagewest's winery. (At para. 4).

[3] Instead of making that finding, the judge reviewed the evidence of the respondent, and in particular the affidavit of Mr. Pechet, a director and officer of the former general partner of Stagewest. The applicant Mr. Miceli had been employed as the general manager of the respondent's winery and had invested substantial

funds in the enterprise. In January 2023 his employment was terminated. The judge recounted:

> Since that time, the respondents attest that they have paid or settled with all the alleged creditors with the exception of some disputed debts, of which two are particularly pertinent. One is the debt to Mr. Miceli and his company, the other is to Greyback Construction Ltd., the construction firm that built the winery. Both those debts are disputed. The debt to Greyback has been the subject of litigation since May of 2021.
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> The applicants suggest that the court should not rely on a bare assertion the debts have been paid in assessing the current situation of the partnership. While I accept that there is not a full financial picture before the court, I am satisfied that the respondents have made substantial efforts to inquire into the outstanding debts and to resolve those issues. Far from a blanket assertion, the affidavit of Mr. Pechet sets out the specific debts alleged by the applicants, and the manner in which each was resolved. It appears evident that substantial new money has become available to Stagewest LP now that Mr. Miceli has departed, and that there is motivation on the part of Mr. Pechet and the other partners to resolve the financial issues of the winery, apparently for an eventual sale. In the view of Stagewest LP, a receivership would only add unnecessary costs and likely lower the overall value of Stagewest LP's assets, including those available to creditors. I note that the application is opposed by the senior secured creditor, Peace Hills Trust. [At paras. 5–6; emphasis added.]

He added that no creditors other than the applicants had indicated their support for the bankruptcy petition, and observed that the relationship between the applicants and the respondent was "more complicated" than the usual debtor-creditor relationship.

[4] In these circumstances, the judge found that rather than granting or refusing the petition, it would be "helpful" to stay the proceeding on terms that would "address outstanding concerns" while Stagewest's financial situation was being clarified. Accordingly, he stayed the proceedings, relying on s. 43(10) and alternatively, s. 43(11) of the *BIA*. Those sections provide:

> (10) If the debtor appears at the hearing of the application and denies the truth of the facts alleged in the application, the court may, instead of dismissing the application, stay all proceedings on the application on any terms that it may see fit to impose on the applicant as to costs or on the debtor to prevent alienation of the debtor's property and for any period of time that may be required for trial of the issue relating to the disputed facts.

> (11) The court may for other sufficient reason make an order staying the proceedings under an application, either altogether or for a limited time, on any terms and subject to any conditions that the court may think just. [Emphasis added.]

[5] For the sake of completeness, I also set out ss. 43(6) and (7), which provide:

> (6) At the hearing of the application, the court shall require proof of the facts alleged in the application and of the service of the application, and, if satisfied with the proof, may make a bankruptcy order.
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> (7) If the court is not satisfied with the proof of the facts alleged in the application or of the service of the application, or is satisfied by the debtor that the debtor is able to pay their debts, or that for other sufficient cause no order ought to be made, it shall dismiss the application.

[6] Together, these four subsections provide options to the bankruptcy court on an application such as that before Edelmann J. — the court "*may*" grant the order if satisfied with the proof of the facts alleged and of service under s. 43(6); where it is not so satisfied, it "*shall dismiss*" the application under s. 43(7); if the debtor appears and denies the truth of the facts alleged, the court *may stay* the proceedings on terms under s. 43(10); or the court *may for "other sufficient reason*" *stay* the proceeding under s. 43(11), on terms it thinks just. I believe counsel were in agreement that the discretion provided by subs. 11 is wider than that under subs. 10.

[7] The most important term of the judge's stay order was that Stagewest was to pay into court the sum of $365,375.74 within two business days to secure payment of any amount ultimately determined to be owing by the respondent *to the applicants* (net of all counterclaims; my emphasis). The order also set up a process for ascertaining amounts owing by Stagewest to all other creditors. Specifically the order provided:

> 3. The Petitioners are directed to provide to Stagewest LP on or before May 17, 2023 a list of all individuals, firms, corporations, governmental bodies or agencies, or other entity (collectively, "Persons" and each being a "Person") that the Petitioners believe on reasonable grounds to be creditors of Stagewest LP (the "Petitioners' Creditors List").
> 4. On or before May 24, 2023, Stagewest LP shall send a notice (the "Notice") to all vendors and other potential creditors included in its books

> and records and to all Persons set out in the Petitioners' Creditors List (together, the "Recipients" and each a "Recipient"). The Notice shall:
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> (a) enclose a copy of this Order; and
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> (b) advise that, if the Recipient believes it has a claim in respect of amounts owed to it by Stagewest LP incurred on or before April 28, 2023 (a "Claim"), that Recipient shall notify Stagewest LP in writing of any claims the Recipient may have on or before June 12, 2023 (the "Claims Deadline").
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> 5. On or before June 26, 2023, Stagewest LP wilt notify the Petitioners of each claim received herein pursuant to paragraph 4 and will report in respect of each claim so received:
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> (a) what portion, if any, of the claim Stagewest LP agrees is due and owing; and
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> (b) what portion, if any, of the claim has been paid by Stagewest LP.

Finally, the parties were to appear before the judge again on September 13 — five days from today's date.

[8] We have been advised that the required sum was indeed paid into court and that Stagewest has made the inquiries ordered; the applicants have evidently not yet received any of the information so gathered.

The Appeal

[9] The applicants initiated their appeal in this court on May 1, 2023 (i.e., within the specified 10-day period beginning on the day of the order) and factums and a reply were duly filed. The notice of appeal stated that leave was not required for the appeal. However, after some correspondence between counsel, the applicants applied in chambers on June 21 for an order resolving whether leave was required and if it was required, an order granting leave. Mr. Justice Frankel dismissed the application on the basis that it was ill-conceived and not in keeping with this court's rules or procedures: see 2023 BCCA 296. In particular, he emphasized, a party that is unaware of or in doubt as to whether leave is required is to file a notice of appeal stating that leave *is* required and to apply for such leave: see R. 12 of the *Court of*

Appeal Rules. Section 31(2) of the *Bankruptcy and Insolvency General Rules* C.R.C., c. 368, is to similar effect.

[10] On August 30, the applicants filed a memorandum of argument taking the position that the appeal fell within either subpara. (a) or (c) of s. 193 of the *BIA.* If it did not, they sought leave so that the appeal could be heard and determined on its merits. In their submission, a bankruptcy order "involves the future rights of both the debtor and the creditors" and thus an order refusing to grant a bankruptcy order falls within s. 193(a): see *Dubrofski v. The Viger Company* [1933] S.C.R. 218; *Re Koska* 2002 ABCA 138. The logical result of this argument would seem to be that every order is appealable without leave — an unlikely proposition. This court has ruled that a right that will come into existence if a party succeeds in the litigation is not a "future right": see *Elias v. Hutchison* (1981) C.B.R. (N.S.) 149 (Alta. C.A.) at 100 and *Farm Credit Canada v*. *Kana Farms Ltd*. 2014 BCCA 501. We have not been referred to any legal rights not now in existence but likely to come into existence at a future date that would be affected by the ruling in this case. In my view, then, subpara. (a) is not engaged in this case.

[11] Alternatively, the applicants contended that the appeal falls within s. 193(c). On this point, counsel referred to my decision in chambers in *Crowe Mackay & Company Ltd. v. 0731431 B.C. Ltd.* 2022 BCCA 158, in which I declined to follow the narrow 'three-part' approach described in various older Ontario decisions and in *2403177 Ontario Inc. v. Bending Lake Iron Group Ltd.* 2016 ONCA 225, on the basis that the imposition of such an approach would "overwhelm the simple phrase 'amount involved' with contextual baggage". (One of the three criteria advanced in these cases was that issues that were purely "procedural" could not fall within subpara.193(c): see *Alternative Fuel Systems Inc. v. EDO (Canada) Ltd. (Trustee of)* 1997 ABCA 273 and *Bending Lake*.) I preferred the line of authorities typified by *Orpen v. Roberts* [1925] 1 S.C.R. 364; *McNeill v. Roe, Hoops & Wong* (1996) 39 C.B.R. (3d) 147 (B.C.C.A.) and *MNP Ltd. v. Wilkes* 2020 SKCA 66. In the latter case, the Court wrote that s. 193 should be interpreted in a manner that is *neithe*r

narrow nor expansive. Rather, the provision should be approached in the usual way — i.e., according to the terms of the statute interpreted in their context. (At para. 47.)

[12] In *McNeill*, Mr. Justice Finch, as he then was, referred to *Fallis et al. v. United Fuel Investments Ltd.* (1962) 4 C.B.R. (N.S.) 209 (S.C.C.), in which the Supreme Court of Canada considered the meaning of the phrase "amount involved" in what was then s. 108 of the *Winding-Up Act,* R.S.C. 1962, c. 296. Finch J.A. observed:

> ... The court adopted the test enunciated in *Orpen v. Roberts*, [1925] S.C.R. 364 … namely that: "The amount or value of the matter in controversy, . . . is the loss which the granting or refusal of that right would entail" (*Fallis* at 211). In a comment following the report of this case in the *Canadian Bankruptcy Reports*, it was said that the meaning of "amount involved" in the *Winding-up Act* was substantially the same as the meaning of "property involved" in the *Bankruptcy Act*. That interpretation has been adopted by Mr. Justice Hollinrake in *Ng v. Ng* (3 February 1995), Vancouver CA019800 (B.C.C.A.) [reported at 34 C.B.R. (3rd) 107]; by Mr. Justice Macfarlane in *Re Scott Road Enterprises* (1988), 68 C.B.R. (N.S.) 54 at 58 (B.C.C.A.); and by Mr. Justice Macdonald in *Kenco Developments Ltd. v. Miller Contracting Ltd.* (1984), 53 C.B.R. (N.S.) 297 (B.C.C.A.). I can see no reason to do otherwise. [At para. 11; emphasis added.]

Mr. Justice Finch went on to suggest at para. 13 that in order to determine the "amount involved in the appeal", one should compare the order being appealed with the "remedy" sought in the notice of appeal.

[13] The applicants in this case submit that since the Court ordered Stagewest to pay $365,375 into court, that is the amount in jeopardy, as it were. Obviously, it exceeds $10,000 in value, and technically, money is "property".

[14] Here, the matter in jeopardy is whether the stay order should or should not have been granted. Obviously, the payment into court would not have been ordered if the bankruptcy petition had succeeded; conversely, the funds would *presumably* become part of the estate in bankruptcy if a petition were granted — although I acknowledge the judge's order is not crystal-clear on this point. (The fact that the funds may have been lent to Stagewest by third parties is irrelevant to this result, in my view.) Given the judge's choice of the amount to be deposited by the applicants under the terms of the stay in order to protect their position, however, I am of the

tentative view that the appeal does come within the wording of s. 193(c) and that leave was therefore not required.

[15] I would prefer, however, to consider the merits of the appeal and indeed to decide it on those merits given that there is some time pressure to dispose of the appeal before September 13.

[16] I turn then to the merits of the appeal.

Merits of the Appeal

[17] In their factum the applicants assert the following errors in judgment:

> 1. The judge erred in law by not granting the bankruptcy order in respect of [Stagewest] based on the evidence before him and the factual findings he made.
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> 2. The judge erred in law in finding that there was any discretion available to him pursuant to subsection 43(10) of the *BIA* based on the findings he made.
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> 3. In the alternative, the judged erred in his exercise of discretion pursuant to subsection 43(10) of the *BIA* to stay the bankruptcy application so that the "nature and amounts of the disputed debts can be ascertained".
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> 4. The judge erred in purporting to exercise a discretion under subsection 43(11) of the *BIA* without any evidentiary foundation or credible evidence to ground such a discretion. The judge made palpable and overriding errors by finding that:
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> (a) [Stagewest] had resolved its outstanding debts.
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> (b) [Stagewest] now had substantial new money.
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> (c) No other creditors had indicated support for the bankruptcy application.
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> 5. In the further alternative, the judge erred by giving weight to irrelevant and improper considerations in purporting to exercise a discretion under subsection 43(11) of the *BIA* in the circumstances of this matter.

In their written argument filed in response to the application to quash, the applicants also submitted that:

> The judge made factual findings that each of these [conditions for bankruptcy set forth at para. 43 of the *BIA*] had been satisfied on the evidence, these findings ought to have led to the bankruptcy order being granted. The judge erred by purporting to exercise the statutory discretion that was not available on the facts and evidence before him. [Emphasis added.]

[18] With respect, the latter argument that the court had "*no discretion*" to decline to declare the respondent a bankrupt seems to me to ignore the very existence of ss. 43(10) and (11). As we have already seen, s. 43(10) provides such a discretion where the debtor denies the truth of the facts alleged in the application; subs. 11 allows a stay to be granted "for other sufficient reason", either "altogether" or "for a limited time". The judge here determined that if s. 43(10) was not available to him, then the wider discretion in s. 43(11) was.

[19] With respect to the grounds of appeal set forth in the factum, the errors asserted seem to me to boil down, at best, to two basic and closely-related arguments — that there was no, or no sufficient, evidence before the judge that could have supported the conclusion that a declaration of bankruptcy should not have been made or that a stay should have been granted; and that the judge gave weight to "irrelevant and improper considerations" in purporting to exercise his discretion under s. 43(11).

[20] The first argument ignores the fact that the onus was on the applicants to satisfy the Court that the statutory conditions for a declaration of bankruptcy *were* met. As I read the reasons, the bankruptcy judge was not satisfied that an act of bankruptcy was shown. He commented that a "full financial picture" of Stagewest was not before the Court, and therefore stopped short of making such a finding. In order to succeed on their appeal, the applicants must demonstrate that the conclusion was clearly and palpably wrong. In my opinion this has not been shown.

[21] It follows that I disagree with the applicants' assumption that the two conditions necessary for a bankruptcy order were shown and that therefore the evidentiary onus shifted to the respondent to rebut with evidence of "sufficient reason" to stay the application. (See *MGF v. La Senza Canada Inc.* 2021 ONSC 2310 at para. 31.) *Even* if the judge had found that the two conditions *had* been met, moreover, it is clear that subs. 10 and 11 of s. 43 could still be invoked by the bankruptcy judge. Otherwise, the exceptions would be meaningless or, as Ms. Tickle

submitted, “redundant”. The very purpose of these subsections is to give the court options other than granting the order, in appropriate circumstances of course.

[22] The second argument advanced in the applicants’ factum is that the judge gave weight to improper considerations in exercising his discretion “for other sufficient reason” under s. 43(11). Again, I cannot agree. The bankruptcy judge made an order that was designed to secure the applicants’ position while permitting the respondent to clarify whether it was unable to pay its debts generally, or was in a complex dispute with the applicants that could be resolved by less drastic means than bankruptcy. Certainly the evidence that Stagewest was asserting claims *against* the applicants, that no other creditors supported the bankruptcy, that according to Mr. Pechet, many of the creditors had been paid between the filing of the petition and the hearing, and that Stagewest had apparently succeeded in raising some funds, *could* support an inference that bankruptcy proceedings might be inappropriate or would amount to “overkill”. No authority was cited to us that would suggest that these considerations lay outside the ambit of “sufficient reason” in s. 43(11).

[23] I readily acknowledge that a single creditor can in appropriate circumstances press an application for a bankruptcy order (see *Re Sultan Management Group Inc.* 2022 ABQB 262 at paras. 95–9). I also acknowledge Ontario authorities to the effect that the discretion provided by s. 43(11) should not be exercised freely or generously. (See especially *6123635 Canada Inc. v. Danso Enterprises Ltd.* (2004) O.J. No. 3445, 4 C.B.R. (5th) 316, at paras. 19–20, referring to “exceptional circumstances”). However, the authorities in this area are obviously fact-specific, and again as Ms. Tickle pointed out, many of those were decided under s. 43(7), the purpose of which is different from the discretionary subsections invoked by the judge to order what is essentially an interim stay. Certainly *Re Cheung* 2004 BCSC 1669; *Re Cappe* (1993) 18 C.B.R. (3d) 229 (Ont. Gen. Div.); *Re Medcap Real Estate Holdings* 2022 ONCA 318 and *Re Directors of the Atlantic Winter Fair* (2000) 16 C.B.R. (4th) 159 (N.S.S.C.) were such cases.

[24] The authorities *are* clear that the respondents in a case like this must provide an "evidentiary basis" for the granting of a stay. The judge had evidence from Mr. Pechet before him and did not find that it was not credible. Indeed, in the final analysis, the judge found Mr. Pechet's evidence was sufficiently detailed and believable to show that the relationship between debtor and creditor was not a "usual" one and that further information was required. Contrary to Mr. Andersen's suggestion, the judge did *not* purport to make final findings of fact; presumably that is to await the next hearing. Instead his order gave both parties an opportunity to clarify their financial circumstances before the Court reached a final conclusion concerning the existence of an act of bankruptcy in the form of a failure by Stagewest to pay its liabilities generally as they fall due. Accompanied as it was with the posting of security, this seems to have been a reasonable and sensible response.

[25] This court would be justified in interfering with this exercise of discretion only if the applicants were able to show that the judge had misdirected himself or if his decision was "so clearly wrong as to amount to an injustice": see *Elsom v. Elsom* [1989] 1 S.C.R. 1367 at 1375; *Friends of the Oldman River Society v. Canada (Minister of Transport)* [1992] 1 S.C.R. 3 at 76, both referred to in *R. v. Regan* 2002 SCC 12 at paras. 139–140. In my respectful view, the applicants have shown no such error.

[26] In the result, I would dismiss the appeal on the merits without ruling finally on the application to quash. I understand the parties will be before Mr. Justice Edelmann on September 13.

[27] **DEWITT-VAN OOSTEN J.A.**: I agree.

[28] **SKOLROOD J.A.**: I agree.

[Discussion with counsel re: costs]

[29] **NEWBURY J.A.**: The respondent will have its costs.

"The Honourable Madam Justice Newbury"