CITATION: Baigel Corp. (Trustee of Kolenc) v. Di Francesco, 2024 ONSC 5923
COURT FILE NO.'s: 31-2642914 and CV-23-00700492-00CL
DATE: 20241025

SUPERIOR COURT OF JUSTICE – ONTARIO (COMMERCIAL LIST)

RE: IN THE MATTER OF THE BANKRUPTCY OF VESNA KOLENC

BAIGEL CORP., LICENSED INSOLVENCY TRUSTEE OF THE ESTATE OF VESNA KOLENC, a bankrupt **Plaintiff**

AND:

MARCELLO DI FRANCESCO and GABRIELA PIERANTONI and GORDANA MIHAILOVIC and MICHAEL KOLENC and VESNA KOLENC, UGO CRESCENZI and UGO CRESCENZI CONSULTANTS LIMITED and NORCREST INVESTMENTS INC. **Defendants**

BEFORE: KIMMEL J.

COUNSEL: *Melvyn L. Solmon and Rajiv Joshi* for the Defendants Marcello Di Francesco, Gabriela Pierantoni, Gordana Mihailovic and Michael Kolenc ("Moving Parties", Marcello Di Francesco and Gabriela Pierantoni)

Ian Klaiman, for the Plaintiff (Responding Party), Baigel Corp., Licensed Insolvency Trustee of the Estate of Vesna Kolenc ("Trustee")

Ranjan Das, for the Estate of Vesna Kolenc (the "Bankrupt")

Gregory Gryguc, for Ugo Crescenzi, Ugo Crescenzi Consultants Limited and Norcrest Investments Inc.

HEARD: October 8, 2024

ENDORSEMENT
(DI FRANCESCO AND PIERANTONI SECTION 37 BIA APPEAL)

The Appeal: Overview and Summary of Outcome

[1] Under s. 37 of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 ("BIA"), the bankrupt, a creditor or any other person who is aggrieved by any act or decision of a trustee, may apply to the court and the court may confirm, reverse or modify the act or decision complained of and make such order as it thinks just.

[2] The Moving Parties, Marcello Di Francesco ("Marcello") and Gabriela Pierantoni ("Gabriela"), are spouses. They seek a declaration under s. 37 of the BIA that they were aggrieved by the s. 163 BIA Examination that the Trustee conducted of Marcello on November 30, 2022 (the "s. 163 BIA Examination") in the Kolenc bankruptcy (Court File No. 31-2642914). They also seek a declaration that they were aggrieved by the Trustee's decision not to disclose to either Marcello or Gabriela that the Trustee had commenced actions against Gabriela (and others, but not Marcello) in September of 2022 (the "Actions"), prior to Marcello's s. 163 BIA Examination.

[3] After the s. 163 BIA Examination and following a motion heard in March 2023, the original Actions were superseded by this action, which also names Marcello as a defendant (the "Omnibus Civil Action").

[4] Some of what Marcello testified to under oath at his s. 163 BIA Examination is contradicted by other evidence. The Moving Parties seek an order striking select portions of the transcript of Marcello's s. 163 BIA Examination and permitting Marcello to correct and supplement select answers he gave during that examination and answers he gave by way of follow up answers to undertakings. They propose to create a "fresh" corrected transcript to be used for all purposes going forward, without reference to any of the original answers given by Marcello that have been corrected or supplemented. Alternatively, the Moving Parties seek to expunge (strike out entirely) Marcello's s. 163 BIA examination transcript and for the Trustee to conduct a fresh examination for discovery of Marcello in this Omnibus Civil Action and/or a fresh s. 163 BIA examination without reference to Marcello's previous testimony during the first s. 163 BIA Examination.

[5] The relief sought on this motion is unprecedented. Section 37 comes under a hearing in the BIA titled "Appeal to court against Trustee". The s. 37 challenge in this case has been brought before the court as a motion. Whether referred to as a motion or an appeal, the test is the same and has been applied in this decision with regard to the applicable authorities that the parties both referred the court to and relied upon.

[6] Marcello and Gabriela claim to be aggrieved because the Trustee should have disclosed the existence of the pending Action against Gabriela before conducting an examination under s. 163 of the BIA. According to the jurisprudence they rely on, the party being examined is entitled to know about the existence of a civil action against them and has the right to require that their examination be conducted by way of discovery in the civil action rather than as a s. 163 BIA examination, at least insofar as the subject matter of the examination is relevant to the claims in the civil action.

[7] However, the disclosure requirement established by this jurisprudence does not apply to the circumstances of this case: Marcello was the person who was examined and there was no action pending against him at the time of his s. 163 BIA Examination; Gabriela was not examined under s. 163 of the BIA. There is no evidence to support their assertion that Marcello was examined in Gabriela's place. Nor does the record support any suggestion that the Trustee was intentionally seeking to circumvent the obligation to disclose the action by not naming Marcello in the prior action until after his examination. Neither of the Moving Parties are aggrieved persons within the meaning of s. 37 of the BIA.

[8] The Trustee has explained why the original action was commenced: to preserve a limitation period in respect of claims that had come to light at the time against the then named defendants in the Action. They included the Bankrupt and the parties on title to the properties that the Trustee was asserting the Bankrupt had an interest in (one of whom was Gabriela). The Trustee is entitled to use information obtained on a s. 163 BIA examination to support a subsequent decision to commence an action against the person examined, which is what occurred in this case, in the Omnibus Civil Action that was later commenced naming Marcello among the defendants.

[9] Further, a request for relief under s. 37 of the BIA must be brought within a reasonable time. In this case, this appeal/motion was not brought until after the transcript from Marcello's s. 163 BIA Examination had already been put before the court, considered and relied upon in a decision rendered in March 2023.

[10] Finally, I do not consider the requested relief, for an order expunging Marcello's evidence given under oath, to be just. There are procedures available within the court's processes for correcting evidence previously given under oath and for explaining the circumstances which led to the erroneous or incomplete evidence having been given. The Trustee does not object to Marcello availing himself of those procedures to correct and supplement his prior evidence given on the s. 163 BIA Examination. The implications of doing so will be left to the discretion of the court when asked to consider the entirety of Marcello's testimony.

[11] For the above reasons, and the more detailed reasons that follow, this appeal/motion is dismissed with costs awarded to the Trustee.

[12] The Trustee also raised an argument that the court should not grant a discretionary order under s. 37 of the BIA in favour of Marcello because he does not have "clean hands". I do not need to decide the appeal/motion on that ground given the Trustee's success on the other grounds. The lack of clean hands argument requires a more complex analysis and consideration of alleged misconduct that could not be fully addressed based on the nature of the record and time scheduled for the hearing. I have not made any decision on that ground of opposition by the Trustee, one way or the other.

[13] Just prior to the hearing, the Moving Parties served a motion seeking leave to amend their Statement of Defence and Counterclaim. There was insufficient time booked to address that motion and it was agreed that the s. 37 BIA appeal/motion could proceed independently of that request. If that pleading amendment motion is not resolved beforehand, the Moving Parties may request that their pleading amendment motion be scheduled and timetabled at the next case conference that will take place on November 19, 2024.

Factual Background

[14] The following summary of facts is taken from the factum of the moving parties:

a. On September 16, 2020, Baigel Corp. was appointed as the licensed insolvency trustee of the Estate of Vesna Kolenc (the Bankrupt).

b. In September of 2022, the Trustee commenced three Actions involving the following properties (1) 7803 Kipling Avenue, (2) 40 Lansdowne Avenue, and (3) 15 Burwick Avenue, a property legally owned by Marcello's wife, Gabriela.

c. The three Actions were not served. Gabriela was not told about, and was not aware of, their existence. Marcello was also not told about the existence of the Actions and was not aware that his wife Gabriela was being sued.

d. On October 12, 2022, the Trustee's lawyer wrote a letter to Marcello advising him that the inspectors of the Bankrupt's estate had directed that Marcello be examined under s. 163 of the BIA "in respect of the business and affairs of the bankrupt".

e. Marcello spoke to the lawyer for the Trustee, Mr. Gertler about the examination. One of the issues they discussed was whether or not Marcello's wife, Gabriela should be examined. Marcello advised Gertler that Marcello could offer more information on the examination than his wife Gabriela.

f. Marcello says he considered retaining a lawyer but decided not to. Marcello says that he was not aware that there was a risk of attending the examination without counsel, and without knowing the relevant issues and documents.

g. The Trustee did not advise Marcello or Gabriela that they should retain counsel.

h. The s. 163 notice advised Marcello to bring documents "in any way relating to the business and the affairs of the bankrupt" and copies of all the documents relating to "any and all properties real or personal held directly or indirectly or in any manner whatsoever for or on behalf of the bankrupt".

i. The examination took place on November 30, 2022. At the time Marcello was not feeling well and was still suffering from symptoms of COVID-19. He attended without counsel. He was away in Florida and had no access to any documents.

j. The Trustee did not provide any particulars in advance of which properties would be the subject matter of the cross-examination.

k. The Trustee did not provide Marcello with a copy of the Affidavit of Michael Kolenc (the Bankrupt's son) sworn on July 7, 2020.

[15] The Trustee outlines the following additional facts in its factum:

a. The Bankrupt's initial Statement of Affairs on May 29, 2020, and her amended (proposal) statement of affairs on July 7, 2020 made no reference to the three properties that were the subject of the Actions, described in paragraph 14(b) above.

b. The Trustee had received the affidavit of Michael Kolenc, the Bankrupt's son, dated July 7, 2020 (the "Michael Affidavit"). The Michael Affidavit stated that the

Bankrupt had no interest in certain properties, including two of the properties that were the subject of the Action (15 Burwick and 40 Lansdowne) and a third contiguous property located at 36 Lansdowne) and stated that those properties were beneficially owned by him and Marcello and that they were in a partnership to develop them.

c. However, by the fall of 2022, the Trustee had obtained bank records, through a court order, revealing that the Bankrupt may have made financial contributions to three properties, 15 Burwick, 40 Lansdowne and 7803 Kipling (the "Properties"), and had obtained information from a creditor that the Bankrupt had represented that she was an owner of these Properties.

d. The Properties are held in the names of (legally owned by) Gabriela and a cousin of the Bankrupt.

e. The Trustee had limited and conflicting information, based on the testimony of the Bankrupt and her son Michael that was not consistent with the banking records and the creditor's information. Out of an abundance of caution while it continued to investigate the nature and extent of the Bankrupt's interest in the Properties, and to preserve its limitation standing with the approaching two year anniversary from the date of the Bankrupt's deemed assignment in bankruptcy on September 15, 2020, the Trustee issued the Actions on September 8, 2022, pleading that the Bankrupt had made financial contributions to, and was therefore entitled to a beneficial interest in, the Properties.

f. The legal owners of the properties identified in the Actions were named as defendants to the Actions. Marcello was not on title to any of the properties and was not named as a defendant. The Trustee asserted in the Action against Gabriela that she was either holding the legal title to the Property at 15 Burwick in trust for the Bankrupt or that she had been unjustly enriched by Gabriela's financial contributions to that Property.

g. The Trustee did not serve the Actions after they were issued. The Trustee says that it did not want to precipitously commit to proceeding with the Actions, and potentially provoke defences or attract cost consequences to the estate, before more fully investigating the nature and extent of the Bankrupt's interest in the Properties and determining whether the Actions were indeed meritorious and cost effective to pursue, on behalf of the estate.

h. On October 25, 2022, the Trustee's lawyer, Mr. Gertler, spoke with Marcello about the intended s. 163 BIA examination. In that conversation, Marcello stated that he would decide if he needed counsel, and would speak to a lawyer, Michael Simaan, about his availability.

i. Marcello was not a practicing lawyer at the time of his s. 163 BIA Examination but he had previously practiced law for over twenty years.

j. On November 15, 2022, Gertler again spoke with Marcello over the phone and confirmed the examination would proceed on November 25, 2022.

k. On November 16, 2022, a Notice of Examination was served on Marcello, requiring his attendance, by zoom, at an examination pursuant to s. 163 of the BIA on November 25, 2022 and directing him to produce any documents in his possession or under his control in any way relating to the business and affairs of the Bankrupt.

l. On November 22, 2022, the Trustee's litigation counsel served an amended Notice of Examination on Marcello by email, requiring him to attend the examination in person, rather than by zoom and to produce any documents in any way relating to the business and affairs of the Bankrupt including without limitation copies of all documents relating to (i) loans Marcello had made to the Bankrupt and the repayment of loans made to the Bankrupt; and (ii) any and all properties real or personal held directly or indirectly or in any manner whatsoever for or on behalf of the Bankrupt.

m. The examination was switched back to zoom and rescheduled to November 30, 2022 at Marcello's request on November 24, 2022 because he was feeling sick and thought he had COVID-19.

n. Marcello's evidence on the s. 163 BIA Examination was consistent with what was stated in the Michael Affidavit, that he and Michael were partners and the Properties were beneficially owned by them, not the Bankrupt and not the individuals on title, who were said to be holding the Properties in trust for the two partners. Marcello denied any partnership involving a fourth adjacent property owned by Crescenzi Ugo (the "Ugo Property") or involving the Bankrupt.

o. Ugo was subsequently examined under section 163 of the BIA on December 8, 2022 (the "Ugo Examination"). In direct contradiction to Marcello's and Michael's evidence (described above), Ugo testified that there was a written Joint Venture Agreement ("JVA") among himself, Marcello, Michael and the Bankrupt to develop all four properties, with each holding a 25% interest. A copy of the JVA (contained in an April 19, 2017 Amending Agreement) was sent to the Trustee on January 26, 2023.

p. After discovering the JVA, the Trustee registered cautions on title to the Properties on January 10, 2023, pursuant to s. 74(3) of the BIA (the "Cautions").

q. A motion was heard on March 23, 2023 to permit the Trustee to preserve the Cautions or to register Certificates of Pending Litigation in connection with the Properties (the "Caution Motion"). Among other material, the transcripts from Marcello's and Ugo's s. 163 BIA examinations were relied upon by the Trustee in support of this motion and filed with the court.

r. Marcello filed an affidavit in response to the Caution Motion sworn on March 13, 2023, stating that he did not recall the JVA at the time of his s. 163 BIA Examination and attesting that on October 22, 2017, three of the joint venturers, the Bankrupt, Michael Kolenc, and Gabriela, entered into a full and final mutual release among them (the "Release"), in connection with the Properties (15 Burwick Avenue, 40 Lansdowne Avenue, and 7803 Kipling Avenue). Marcello also attested that it was agreed that the Bankrupt would receive commissions for a townhouse project, which was expanded after the Release to include 88 proposed condominium units in a development involving these three Properties and the Ugo Property.

s. Marcello stated in his March 13, 2023 affidavit that he would not have agreed to the s. 163 BIA Examination, or attended without his counsel, if he had known about the Actions at the time.

t. No motion or appeal under s. 37 of the BIA to strike or exclude the transcript from Marcello's s. 163 BIA Examination was brought at the time of the Caution Motion.

u. The court released an endorsement in respect of the Caution Motion dated March 29, 2023 in which it was determined that the Trustee had not acted improperly in registering the cautions, relying in part upon the fact that there was conflicting evidence (in part based on the s. 163 BIA Examination of Marcello) about the relationship between the various stakeholders claiming interests in the Properties, and about the existence of the partnership and the status of the JVA and the Release. The court directed the Trustee to collaborate with the stakeholders to agree on a procedure in which the Trustee's claims could be advanced, converting the various proceedings into an action or application and consolidating them with the Actions, and to then apply for certificates of pending litigation.

v. Following the court's endorsement, the Trustee eventually commenced this Omnibus Civil Action on June 2, 2023, seeking, among other things, a declaration of the Bankrupt's 25% interest in the partnership created by the JVA, the winding up of the partnership, and a declaration that the purported Release signed by the Bankrupt is null and void. Marcello is named as one of the defendants.

The Issues

[16] The test for the court to interfere with the actions or decisions of a trustee under s. 37 of the BIA is grounded in the general language of that section: an "aggrieved party" may apply to the court to confirm, reverse or modify the act or decision complained of and make such order in the premises as it thinks just. This section has been interpreted and applied by the courts creating a body of jurisprudence. Having regard to the language of s. 37 of the BIA and the jurisprudence relied upon by the parties, the following issues have been identified for the court to consider on this motion:

a. What is the scope of a trustee's discretion when conducting a s. 163 BIA examination and what are its obligations with respect to the disclosure of the existence of an action it has commenced?

b. Do the Moving Parties have standing to challenge the Trustee's actions or decisions as "aggrieved parties" under s. 37 of the BIA?

c. Have the Moving Parties brought their s. 37 challenge within a reasonable time?

d. Can the Moving Parties meet their burden to succeed in a s. 37 challenge of the Trustee's actions or decisions in connection with the s. 163 Examination of Marcello?

e. Are the Moving Parties precluded from obtaining relief dependent upon the exercise of the court's discretion by the equitable "clean hands" doctrine?

Analysis

[17] The issues will each be addressed in turn.

Section 163 of the BIA and the Trustee's Disclosure Obligations

[18] Section 163(1) of the BIA permits a trustee, as of right (with inspector approval where applicable), to examine under oath "any person reasonably thought to have knowledge of the affairs of the bankrupt ... respecting the bankrupt or the bankrupt's dealings or property."

[19] Examinations conducted under s. 163 of the BIA are one of the investigative tools available to the trustee to collect information to assist the trustee in performing its duties in administering the Bankrupt's estate: see *SHS Services (Re)*, 2015 ONSC 2674, 30 C.B.R. (6th) 291, at paras. 14 and 15, citing *Re Rieger Printing Ink Co.* (2009), 94 OR (3d) 440 (S.C.), at para. 10, and *Re 303687 Ontario Ltd.* (1986), 58 C.B.R. (N.S.) 198 (Ont. S.C.), at p. 200, CarswellOnt 166 (S.C.), at para. 6.

[20] The trustee is afforded a wide discretion in the use of its investigative powers in furtherance of the ultimate goal of the orderly and fair distribution of the property of the Bankrupt among her creditors. The authority of a trustee is broad, and "ought not . . . to be unduly fettered or restricted": see *Re Leard* , 1993 CanLII 9431, at para. 20 (also cited at (1993), 110 DLR (4th) 691 at para. 17), citing *Re Long* (1978), 29 C.B.R. (N.S.) 225 (Ont. H.C.), at pp. 227.

[21] While the purpose of a s. 163 BIA examination is to investigate the property and affairs of the Bankrupt, the trustee is entitled to investigate contemplated litigation that might involve the property and affairs of the Bankrupt. This is a tool that enables the trustee to do so thoroughly, before expending estate money in court proceedings. It is proper for the Trustee to obtain as much information as possible before recommending to the inspectors that the bankrupt estate should, or should not, pursue an action, including by conducting a s. 163 BIA examination of a defendant in a potential civil action: see *Re Leard*, at para. 19 (CanLII) citing *Re S.P. Paint Factory Ltd.* (1980),

39 C.B.R. (N.S.) 12 (Man. Q.B.). It is well established that: "A trustee need not wait until the legal proceedings are initiated to obtain the equivalent of discovery via a s.163 examination": see *Re Canadian Triton International Ltd.* (1998), 3 CBR (4th) 231 (Ont. S.C.), at para. 11.

[22] That said, courts have historically recognized that competing interests can arise between a trustee's right to examine to facilitate the administration of the estate and avoiding the power being used to promote litigation: see *Re Franks; Ex parte Gittins*, [1892] 1 QB 646 (Queens Bench).

[23] As a general rule, a s. 163 BIA examination should not be used as a form of discovery for contemplated litigation: see *Re Harris*, 2018 ABQB 1038, at para. 14: "The distinction that emerges from the cases is that the section 163 examination generally must relate to administration of the estate. Questions pertaining to the discovery process and the action are generally dealt with in the context of the normal discovery and production rules in the action."

[24] Much of the jurisprudence arises in circumstances where there is an existing civil proceeding, commenced either before the s. 163 BIA examination or in the midst of the s. 163 BIA examination:

a. Once an action has been commenced by a trustee, the normal rule is that the trustee should examine the defendant for discovery in the civil action rather than conducting a s. 163 BIA examination of that person: see *Re Harris*, at para. 14, citing *Re Franks*; *Ex parte Gittens*, [1892] 1 Q.B. 646.

b. A trustee may be permitted to conduct a s. 163 BIA examination after the commencement of an action if the trustee was forced to commence the action, for example to obtain an urgent interlocutory injunction to prevent the dissipation of assets: see *Re Harris*, at para. 14, citing *Re Aarons*, (1914), 111 LT 411 (KB).

c. Where there is an existing civil action by a trustee against a person who the trustee wishes to examine under s. 163 of the BIA, one of the primary objectives in determining which examination should take precedence is avoiding duplication in the examinations: see *SHS Services (re)*, at paras. 20-24.

d. Where practicable, the broader protections and limitations on scope (based on relevance determined by pleadings) and use of transcripts (limited by the deemed undertaking rule) may be employed by requiring the trustee to conduct the examination of a party other than the bankrupt who is named as a defendant in a civil proceeding as an examination for discovery (with permission to use the transcript for the dual purpose of a s. 163 examination as well): see *Re Harris*, at 14.

e. However, in appropriate cases, the examination may be ordered to proceed as a s. 163 BIA examination with the transcript serving the dual purpose of an examination for discovery. In *SHS Services*, at paras. 21-24, 26, the shareholders (against whom the trustee had already commenced an action) were compelled to attend a s. 163 examination, which was found to properly be conducted "to obtain information

about the administration of the Bankrupt's estate." The court directed the portion of the s. 163 examination dealing with the issues in the action to be applied as discoveries in the action, so they were not duplicated.

f. There are other examples of situations where the bankrupt had commenced an action at the time of the bankruptcy and the trustee was not foreclosed from examining the defendants who had been named in the action under s. 163(1) to obtain as much information as possible before recommending to the inspectors that the bankrupt estate should or should not continue with the action: see *Re Long*, at paras. 5-6. Similarly, in *Re Tomkinson* (1971), 14 C.B.R. (N.S.) 245 (Ont. S.C.), a creditor had, prior to bankruptcy, commenced legal proceedings against a third party arising out of dealings between the third party and the bankrupt and the trustee was authorised to use a s. 163(1) examination of the third party inquire into those dealings.

[25] These cases establish some general guidelines that can be applied to the decision by a Trustee about whether to conduct a s. 163 BIA examination or examination for discovery where that choice is available. If the Trustee chooses to conduct a s. 163 BIA examination of a witness who is a defendant in a civil proceeding commenced by the Trustee or by the bankrupt, that witness might challenge that decision if they disagree with it and maintain that the Trustee should proceed by way of examination for discovery. The challenge presupposes that the party being examined knows about the existence of the civil action.

[26] In this case, the Trustee was effectively forced to commence the Actions against the Bankrupt and the legal title holders of the Properties to protect against the potential expiry of a limitation period in respect of any claims regarding the Bankrupt's interest in those Properties. The Trustee did what it believed was necessary for that purpose, while it continued to investigate the Bankrupt's interest in the Properties that were the subject of the Actions.

[27] Part of the Trustee's investigation was to conduct the s. 163 BIA Examination of Marcello to determine what information he had about the Bankrupt's interest in the Properties. That was very much the focus of the s. 163 BIA Examination. Marcello's interest in the Properties, if any, was unclear based on the evidence available to the Trustee at the time.

[28] The fact that the s. 163 BIA Examination ultimately led to the Omnibus Civil Action in which Marcello is named as a defendant does not offend any of the established principles or guidance regarding the conduct of s. 163 BIA examinations. He was properly questioned by the Trustee about his knowledge of the Bankrupt's financial affairs including, but not limited to, her apparent financial contributions to the Properties. It was only after the Trustee later discovered the JVA through the Ugo Examination and ensuing investigations, notwithstanding Marcello's sworn evidence to the contrary, that the Trustee commenced the fresh Omnibus Civil Action against him and others, related to the JVA and the alleged Release that was later referred to by Marcello.

[29] The Moving Parties complain that the existence of the Actions was not disclosed in advance of the s. 163 BIA Examination. However, they point to no authority for the proposition

that the Trustee had an obligation to make this disclosure to Marcello, who was not a defendant to the Actions and who the Trustee did not have the option to examine for discovery. Marcello was identified as someone who might have information about the affairs and property of the Bankrupt. The s. 163 BIA Examination was the only right of examination of Marcello that was available to the Trustee at the time.

[30] The Moving Parties further complain that Marcello was not told in advance which properties or dealings with the Bankrupt he would be asked about on the s. 163 BIA Examination and was not provided with a copy of the Michael Affidavit. However, there is no obligation on the Trustee to disclose documents or provide information to a witness prior to a s. 163 BIA examination: see *Chaban, Re (Bankrupt)* (1998), 4 CBR (4th) 210 (Sask. Q.B.), at paras. 38 and 39. Section 163 of the BIA is an investigative process that allows an examination of anyone who might have knowledge about the property and affairs of the Bankrupt.

Are the Moving Parties "Aggrieved Parties" within the meaning of s. 37 of the BIA?

[31] The Moving Parties are neither the Bankrupt nor creditors of the Bankrupt, so they must establish that they are aggrieved parties in order to come within s. 37 of the BIA.

[32] An "aggrieved person" is someone who has suffered a legal grievance, a person against whom a decision of the trustee has wrongfully deprived him of something, wrongfully refused him of something, or wrongfully affected his title to something: see *David Brook (Re)*, 2016 ONSC 6277, 41 C.B.R. (6th) 228, at paras. 13 and 14; *YG Limited Partnership and YSL Residences Inc*., 2022 ONSC 6548, at paras. 30 and 31, citing Holden & Morawetz, *The 2022 Annotated Bankruptcy and Insolvency Act*, (Toronto: Thomson Reuters, 2022), at pp. 102-103.

[33] Gabriela was not examined. She was not legally aggrieved by the Trustee's s. 163 BIA Examination of Marcello.

[34] Marcello is not legally aggrieved. Marcello was, at the time of his examination, compellable under s. 163 of the BIA and had no right to refuse to attend or to be questioned. At that time, Marcello was not a party to any of the Actions commenced by the Trustee. As discussed in the previous section of this endorsement, Marcello did not have a "right" to any advance disclosure of information or documents from the Trustee.

[35] The Moving Parties baldly assert that Marcello was examined by the Trustee in the place of Gabriela who was a defendant to one of the Actions and who might have had the right to ask the court to review the Trustee's decision to examine her under s. 163 of the BIA rather than examine her for discovery. There is no evidence to support this assertion.

[36] Marcello was examined by the Trustee under s. 163 of the BIA because he was thought to have information about the property and affairs of the Bankrupt. He represented to the lawyer for

the Trustee that he did. His statement that he would know more than his wife would know does not establish that the Trustee examined Marcello in Gabriela's place.

[37] The Trustee had independent information (from the Michael Affidavit) to indicate that Marcello was part of a partnership involving properties that, according to the banking records obtained by the Trustee, the Bankrupt had made financial contributions to. Therefore, the Trustee had a justifiable reason for examining Marcello under s. 163 of the BIA about the property and affairs of the Bankrupt. The fact that placeholder Actions had been commenced to preserve limitation periods against the registered legal owners of properties (including Gabriela, the owner of 15 Burwick) while the Trustee continued its investigation of the Bankrupt's property and affairs does not detract from this legitimate purpose of the s. 163 BIA Examination of Marcello in his own right.

[38] As the Trustee points out, Marcello is only "aggrieved" now because the veracity of the evidence he provided under oath on his s. 163 BIA Examination has been called into question by subsequent evidence that has come to light, for example, from the Ugo Examination.

[39] The Trustee has not wrongfully deprived Marcello of something, wrongfully refused him of something, or wrongfully affected his title to something. Nor has the Trustee wrongfully deprived Gabriela of anything, wrongfully refused her of anything, or wrongfully affected her title to anything.

[40] Neither of the Moving Parties are aggrieved persons within the meaning of s. 37 of the BIA and they have no standing to challenge the Trustee's conduct of the s. 163 BIA Examination of Marcello or the Trustee's decision not to disclose the existence of the Actions in advance of that examination. That alone is grounds to dismiss this appeal/motion.

Was this s. 37 BIA Motion Brought Within a Reasonable Time?

[41] Even if the Moving Parties had standing to bring a s. 37 BIA challenge, they did not do so within a reasonable time and that is another reason to dismiss this appeal/motion.

[42] While s. 37 of the BIA does not set any time limit for bringing the challenge, it should be brought within a reasonable period of time: *Re Cynar Dry Co. (Bankruptcy)* (2005), 8 CBR (5th) 46, at para. 33.

[43] What constitutes a "reasonable time" depends on the circumstances of each case.

[44] The Moving Parties have known about the Actions since March 2023, and Marcello specifically complained about the use of his s. 163 BIA Examination in his responding material on the Caution Motion. Despite his complaints at the time of the Caution Motion, and despite the reliance placed by the Trustee the transcript of Marcello's s. 163 BIA Examination on the Caution Motion, Marcello brought no motion to strike or exclude the transcript at that time. The s. 163 BIA Examination was considered by the court in reaching the decision to uphold the Cautions.

[45] Although the concerns raised on this motion were first identified at a case conference on May 29, 2024, that was more than a year after the Caution Motion was heard and decided. They were only formally raised in a notice of motion dated August 1, 2024.

[46] In the circumstances of this case, it is not reasonable for the Moving Parties to launch an attack that seeks to preclude evidence that the Trustee and this court have already relied upon. They waited more than a year after discovering their alleged complaint (about the non-disclosure of the Action that had been commenced against Gabriela prior to the s. 163 BIA Examination of Marcello) to bring their appeal/motion. The time to raise this would have been at or prior to the Caution Motion.

[47] This appeal/motion was not brought within a reasonable time and that is another ground upon which it should be dismissed.

Can the Moving Parties Meet Their Onus on this Motion?

[48] Even if the Moving Parties had standing to bring a s. 37 BIA challenge and even if they had done so within a reasonable time, they still would not have met their onus on this appeal/motion. It is well recognized that a trustee's exercise of discretion (in this case to conduct the s. 163 BIA Examination of Marcello and not first serve or disclose the existence of the Actions) should not be interfered with unless there is a demonstrated fraud, lack of bona fides or good faith, or it is shown that the trustee's acts and decisions were unreasonable from the standpoint of the administration of the Bankrupt's estate: see *JD Irving Ltd. v. Grant Thornton*, 2018 NBQB 185, 64 C.B.R. (6th) 212, at para. 10, citing *Engels v. Richard Killen & Associates Ltd*., [2002] CarswellOnt 2453 (S.C.) at paras. 42, 43, 49, and 51-53; *Re Giambattista* (2009), 50 CBR (5th) 51 (Ont. S.C.), at para. 20, citing *Groves-Raffin Construction Ltd. (No.2) Re* (1978), 28 C.B.R. (N.S.) 104 (B.C.S.C.).

[49] The power conferred on the court by s. 37 is discretionary and is to be exercised judicially in such manner as to do justice to all parties: see *Cynar Dry Co. (Bankruptcy), Re*, at para. 36; *Krespil c. Nathalie Brault Syndic Inc*., 2017 QCCA 523, 48 C.B.R. (6th) 1, at para. 35.

[50] The Moving Parties appeal to the court's general oversight of the conduct of the Trustee as a court officer. A trustee must be fair and appear fair as officer of the court: see *Dugas, Re*, 2003 NBQB 197, 261 NBR (2d) 315.

[51] The Moving Parties argue that it would be fair and reasonable for the court to require the Trustee to disclose to the person being examined that in separate litigation, the Trustee is asserting that the Bankrupt has an interest in property that the person being examined claims he beneficially owns. No authority is cited for this proposition. This assertion strikes me as being far too general, and having the potential to carry broad reaching implications for the conduct of s. 163 BIA examinations. Such examinations are generally considered to afford a trustee wide and broad authority that "ought not . . . to be unduly fettered or restricted" by the court. see *Re Leard*, at para. 20 (CanLII).

[52] There is the added problem in this case (which I expect would not be uncommon) that the Trustee only learned that Marcello was himself asserting that he had an interest in the Property during the s. 163 BIA examination. Prior to that time, the Trustee had no direct information from Marcello, and had conflicting information from the Michael Affidavit and from the Bankrupt, and from other sources, only some of which suggested that Marcello might assert that he had an interest in the Property. The Trustee, with the approval of the inspectors, decided to examine Marcello to seek information about the Bankrupt's potential interest in the Property in light of the information available at the time.

[53] Further, there was nothing untoward about the manner in which the s. 163 BIA Examination was arranged and conducted. The examination was arranged and re-scheduled in consultation with Marcello and to accommodate his needs at the time: that it be conducted on zoom and that it be delayed due to his illness. Marcello had plenty of time to consult with a lawyer beforehand and talked about doing so.

[54] The Trustee had no obligation to disclose any documents to Marcello in advance of is s. 163 BIA examination, nor did Marcello ask to be provided with documents in advance. He did not advise the Trustee that he did not have access to his own documents beforehand. The Notice of Examination clearly disclosed the potential scope of the examination, to include any matter relating to the property and affairs of the Bankrupt.

[55] Furthermore, while the remedy that the court can grant under s. 37 of the BIA is discretionary and very broad, Marcello is seeking a complete "do over" of his testimony on the s. 163 BIA Examination that would allow him to sidestep the issue of his credibility entirely: either permitting him to immutably correct and supplement his prior testimony, or to fully strike the transcript from his s. 163 BIA Examination, barring it from any use in this proceeding.

[56] This relief is broad sweeping and unconnected to the acts of the Trustee which did not cause Marcello to give evidence under oath that was incorrect or incomplete. The Trustee indicated at the hearing that it has no objection to Marcello correcting and supplementing his prior evidence given on the s. 163 BIA Examination in the normal course, as any witness is obligated to do, and leaving it to the discretion of the court what to do with his previous testimony.

[57] For all of these reasons, I do not consider this to be an appropriate case in which to exercise my discretion under s. 37 of the BIA to grant the requested relief.

The Clean Hands Doctrine

[58] Discretionary remedies invoke the "clean hands" doctrine: see *Khan v. Taji*, 2020 ONSC 6704, at para. 90. "[T]he court will not assist a suiter to obtain relief from the consequence of his own unlawful act". *Khan*, at para. 94, citing: *Krys v. Krys*, [1929] SCR 153, at p. 164.

[59] "He who comes into equity must come with clean hands". *2324702 Ontario v. 1305 Dundas*, 2019 ONSC 1885, 100 RPR (5th) 223, at para. 17. To determine whether a person has "unclean hands" for the purposes of a claim in equity, the impugned conduct must have "an immediate and necessary relation" to the equity sued for: see *1305 Dundas*, at para. 20, citing *Toronto (City) v. Polai* (1969), 8 D.L.R. (3d) 689 (Ont. C.A.) aff'd [1973] S.C.R. 38. at para. 46 and into equity *Peleshok Motors Ltd. v. General Motors Ltd.* (1977), 2 B.L.R. 56 (Ont. H.C.), at p. 63. The court is concerned with bad conduct in the transaction before the court. *1305 Dundas*, at paras. 21-24.

[60] The Trustee relies on this doctrine, and the discretionary nature of the s. 37 BIA statutory remedy, as a further ground for asking the court to dismiss this appeal/motion, in which the Moving Parties are asking the court to assist Marcello in expunging his false testimony given under oath on his s. 163 BIA Examination. The Trustee argues that is itself a sufficient reason to deny the relief sought, as the court's discretion should not be exercised to assist someone from cleansing themselves from perjury.

[61] The Moving Parties argue that the s. 37 BIA statutory remedy is discretionary but not equitable (because it is statutory), so the clean hands doctrine does not apply and the court need not be concerned that Marcello seeks to expunge his false testimony under oath.

[62] As noted at the outset of these reasons, I do not need to decide this appeal/motion on the basis of the "clean hands" doctrine given the Trustee's success on the other grounds of opposition that it has raised. Given the complexity of the analysis and the alleged misconduct that could not be fully addressed based on the nature of the record and time scheduled for the hearing of this motion, I have not made any decision regarding the availability or application of this equitable doctrine, one way or the other.

Costs and Final Disposition

[63] The request by the Moving Parties for relief under s. 37 of the BIA is denied. As the successful party, the Trustee is entitled to costs.

[64] In its Costs Outline filed for this motion, the Trustee has certified its all-inclusive partial indemnity costs to be $10,910.72 and substantial indemnity costs to be $16,366.07. It seeks a higher scale of costs because of the allegations made against the Trustee that are an attack on its

professionalism, for example, the suggestion that the Trustee failed to comply with the *Code of Ethics for Trustees*, found in sections 34-52 of the *Bankruptcy and Insolvency General Rules*.

[65] The Moving Parties requested that they be awarded their partial indemnity costs if successful. The Costs Outline filed by the Moving Parties is comparable, albeit slightly higher, than the costs claimed by the Trustee, on all scales ($22,311.29 for substantial indemnity costs and $14,987.19 for partial indemnity costs).

[66] Thus, the quantum of costs claimed by the Trustee is not in dispute. Despite the references to the *Code of Ethics for Trustees*, the focus of the Moving Parties was not an attack on the professionalism of the Trustee. There is nothing about this case that has been brought to the court's attention that would justify an award based on the higher scale of substantial indemnity costs.

[67] In the exercise of my discretion under s. 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43, and having regard to the applicable factors under r. 57, the Trustee is awarded its partial indemnity costs of this appeal/motion fixed in the all-inclusive amount of $10,910.72.

[68] The Trustee's motion for certificates of pending litigation against the properties that are the subject of the Omnibus Civil Action (the "CPL Motion") was scheduled to be heard on November 19, 2024. The November 19, 2024 hearing date has been converted to a one hour case conference (by zoom). At the October 8, 2024 hearing of this motion, the CPL motion was adjourned to a date to be set (with pre-hearing steps to be timetabled) at the November 19, 2024 case conference.

[69] The parties are directed to confer about possible new hearing dates and a timetable for pre-hearing steps for the CPL Motion in advance of the November 19, 2024 case conference. If the parties require further directions or assistance from the court regarding the pre-hearing steps for the CPL Motion, those may be addressed at the November 19, 2024 case conference.

[70] At that time, the most recent motion to amend the Statement of Defence and Counterclaim may be considered if time permits and if the interested parties have received sufficient notice of the proposed amendments and an opportunity to respond. There is already a pending motion by the Trustee to strike the counterclaims (for which leave of the court was not sought) and a cross-motion by the plaintiffs by counterclaim for leave to be granted retroactively for them to assert those counterclaims. It is possible that the motion to strike will become moot if leave is now being sought for a proposed new amended Statement of Defence and Counterclaim.

[71] To the extent not rendered moot and if no agreement has been reached, the remaining pleadings motions may be scheduled and timetabled at the November 19, 2024 case conference, together with what remains to be briefed in advance of the CPL Motion.

Kimmel J.

Date: October 25, 2024