CITATION: Castle Building Centres Group Limited v. Parkes, 2024 ONSC 3705
COURT FILE NO.: BK-24-00208667-OT31
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ONTARIO

SUPERIOR COURT OF JUSTICE

(IN BANKRUPTCY AND INSOLVENCY)

IN THE MATTER OF THE BANKRUPTCY

OF STEVEN D. PARKES

AND IN THE MATTER OF THE BANKRUPTCY OF JEFF A. PARKES

BETWEEN:

Castle Building Centres Group Limited, Applicant	*Mark Freake* for the Applicants
– and –	
Steven Parkes and Jeff Parkes, Respondents	*Chris Besant* for the Respondents
	HEARD: June 26, 2024

PENNY, J.

Overview

[1] In these proceedings, Castle Building Centres Group Ltd. applies under s. 43(1) of the *Bankruptcy and Insolvency Act* for a bankruptcy order against each of Steven D. Parkes and Jeff A. Parkes. The Parkes are jointly and severally indebted to Castle as a result of a judgment against them personally in the amount of $2,229,710.06 (plus interest and costs).

[2] The Parkes oppose the requested bankruptcy order on essentially four grounds. They submit:

(1) there is no debt owing, such that it would be a miscarriage of justice to grant bankruptcy orders against them;

(2) the debt alleged is a bilateral dispute, there are no other creditors alleging non-payment and there has been no general failure to pay creditors – there is no demonstrated benefit to creditors from granting the order;

(3) Castle has no serious interest in recovery for itself or other creditors and is using this proceeding for an improper purpose -- to intimidate its other members from challenging Castle’s rebates and other business practices; and

(4) Jeff Parkes is too medically infirm to be subjected to the bankruptcy process.

[3] As I will explain in the reasons set out below, the requirements for an order under s. 43(1) of the BIA have been met. I do not find the Parkes’ arguments persuasive. There is no basis for the exercise of the court’s discretion under s. 43(7) of the BIA. The applications for bankruptcy order against Jeff and Steven Parkes are granted.

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Background

Origins of the Debt

[4] Castle is an Ontario company that carries on business as a not-for-profit building materials buying group with over 300 member locations across Canada.

[5] Jeff and Steven Parkes are the sole shareholders of The Rehill Company Limited. Until 2020, Rehill was a building supplies retailer in Peterborough and a member of the Castle buying group. Jeff started working for Rehill in 1965 and bought the company in 1993. In 1994, Jeff executed a guarantee of Rehill’s indebtedness to Castle. Jeff sold the voting shares of Rehill to his son Steven in 2010. He retained $3 million of preference shares. After the sale, Steven ran the Rehill business.

[6] In 2015 Rehill ran into financial difficulty. It was in default to its primary lender, Toronto-Dominion Bank. At about the same time, Rehill’s accounts with Castle became delinquent. Rehill was never able to bring them current again, despite Castle’s numerous concessions and forbearances. In 2017, Rehill obtained financing from a new lender, Waygar Capital Inc., which replaced TD as Rehill’s senior lender. Castle agreed to subordinate its position to Waygar in the expectation that the Waygar re-financing would be used, among other things, to pay Rehill’s indebtedness to Castle. This did not happen.

[7] In the fall of 2017, Castle agreed to a payment plan to allow Rehill to repay its account over time. Rehill immediately defaulted under the repayment plan. An amended payment plan was negotiated in the spring of 2018. Steven executed a personal guarantee of Rehill’s indebtedness to Castle. Again, Rehill defaulted. Between May and November 2019, Castle made repeated demands on Rehill for payment of the indebtedness. Castle also advised the Parkes it would be enforcing their guarantees unless payment was received in full.

[8] Rehill also defaulted on payments owed to Waygar. On May 14, 2021, following seven forbearance agreements between Waygar and Rehill, Waygar sought and obtained an order from the Ontario Superior Court of Justice (Commercial List) appointing a receiver over Rehill. That order stayed all claims against Rehill. The Receiver subsequently liquidated Rehill's assets and, in November 2021, Rehill was adjudged bankrupt.

[9] As of March 15, 2022, Rehill was indebted to Castle in the amount of $2,229,696.50 in respect of goods, supplies and commodities that Rehill (i) ordered through Castle's buying programs on credit, (ii) received and sold through its retail operations in the ordinary course of business, but (iii) never paid for.

The Litigation and Judgment

[10] In April 2020, Castle commenced an action against Rehill, Steven and Jeff claiming the full amount of its indebtedness. The Parkes responded with a defence and counterclaim against Castle, claiming damages of $4 million for breach of contract and other things arising out of alleged breaches of: a) the subordination agreement with Waygar; and, b) Castle's obligation to pay rebates to Rehill under the membership agreement.

[11] In 2021, both parties brought and responded to motions for summary judgment based on their respective claims. The proceedings by and against Rehill were stayed by virtue of the May 14, 2021 receivership order. The balance of the motions for summary judgment were argued on May 18, 2022 for a full day before Justice Vallee. In a decision released July 6, 2022, the motion judge granted summary judgment against the Parkes in the amount of $2,229,696.50 owed under their personal guarantees and granted an order dismissing their counterclaims against Castle. She awarded costs against the Parkes of $50,000. By this point, Rehill's assets had already been liquidated and it was bankrupt. The Rehill trustee in bankruptcy advised that he did not intend to pursue Rehill's counterclaim.

[12] The Parkes appealed the Judgment against them to the Court of Appeal for Ontario. In a decision released April 6, 2023, the Court of Appeal unanimously dismissed the appeal and ordered the Parkes to pay Castle's costs of the appeal in the amount of $20,000.

[13] In June 2023, the Parkes sought leave to appeal the Court of Appeal's decision to the Supreme Court of Canada. On December 14, 2023, the Supreme Court of Canada dismissed the Parkes' application with costs.

Events Leading to the Present Applications

[14] Castle has attempted to enforce the Judgment by:

(a) asking Steven and Jeff to deliver sworn statutory declarations regarding their assets and liabilities. The Parkes have never provided such declarations;

(b) registering writs of execution against Steven and Jeff; and

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(c) scheduling examinations in aid of execution for May 10, 2023, which the Parkes failed to attend.

[15] It is not in dispute that, to date, the Parkes have not paid anything towards the Judgment and Castle has not otherwise been able to collect any amount through enforcement.

The Bankruptcy Applications

[16] Castle filed its applications for bankruptcy orders against the Parkes in January 2024. The applications were supported by the affidavit of Shawn Winters, who is the director of credit and risk management with Castle. In February 2024, the Parkes filed notices of dispute. Steven delivered an affidavit in support of his notice of dispute in April 2024. Jeff has not filed any evidence in support of his notice of dispute. Mr. Winters and Steven were cross examined on their affidavits.

[17] The notices of dispute advanced a wide range of grounds upon which the bankruptcy order was being opposed, including:

- locality jurisdiction (Toronto versus Central East)
- no act of bankruptcy within 6 months
- no demand within 6 months
- no general failure to pay creditors
- no debt owed
- no valid purpose to the bankruptcy applications
- bankruptcy applications brought for an improper purpose, and
- Jeff Parkes' age and failing health.

The Issues

[18] As noted earlier, in their respective factums and in oral argument, the focus of the objections coalesced around four issues. These were:

A. the power of the court to look behind the Judgment in a bankruptcy application

B. whether any debt is owing as a result of:

1. waiver

2. guarantees inapplicable to CBS debt, or

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3. set off and accounting of Rehill counterclaims.

C. the discretionary power of the court to dismiss a bankruptcy application even when a debt is owing on the basis of:

1. the bilateral nature of the debt and the absence of a valid purpose to be served by making the requested order;

2. an alleged improper purpose; and

3. the age and infirmity of Jeff Parkes.

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Analysis

The Jurisdiction of the Court to "Go Behind" the Judgment

[19] Section 43 (1) of the BIA provides that:

…one or more creditors may file in court an application for a bankruptcy order against a debtor if it is alleged in the application that

(a) the debt or debts owing to the applicant creditor or creditors amount to one thousand dollars; and

(b) the debtor has committed an act of bankruptcy within the six months preceding the filing of the application.

[20] Section 42(1)(j) of the BIA provides that a debtor commits an act of bankruptcy: "if he ceases to meet his liabilities generally as they become due."

[21] Castle submits that Castle's bankruptcy application satisfies the prerequisites under s. 43(1) of the BIA. The first part of the test, i.e. indebtedness in excess of $1,000, is satisfied by the Judgment in the amount of $2,229,710.06 (excluding costs and post-judgment interest). Castle says the second part of the test, i.e., the act of bankruptcy, is established through Mr. Winters' sworn evidence that the Parkes have failed to pay any amount towards the Judgment let alone to satisfy it. Further, Steven admitted in his affidavit in this proceeding and during cross-examination that he and Jeff have no means nor intention of satisfying the Judgment. In his affidavit, Steven states: "Castle has no reasonable expectation of any recovery from me nor of meaningful recovery from Jeff." During his cross examination, Steven admitted that he and Jeff "don't have the means to pay the judgment" and are "financially…busted"; that he has "no gainful employment" and dealing with the Castle litigation "is [his] job now"; and, that he and Jeff have no assets of value to be seized under the writs of execution to satisfy the Judgment.

[22] The Parkes submit that I have the jurisdiction to "go behind" the Judgment in a bankruptcy application under s. 43(1) where it is necessary to prevent a miscarriage of justice. They submit that there is no debt owing because:

a) Castle waived rights and obligations under Jeff's guarantee when Steven took over management Rehill and when he provided Castle with his own guarantee;

b) the Rehill debt was owed to CBS, a subsidiary of Castle, not to Castle itself. The guarantees, however, were only in respect of obligations owed to Castle; and

c) they and Rehill have valid counterclaims against Castle for alleged non- or under-payment of rebates owed to Rehill.

[23] The governing authority on the status of a final judgment qualifying as a "debt" under s. 43(1) is *EnerNorth Industries Inc. (Re)*, 2009 ONCA 536 (CanLII), at para. 49. In that case, Blair J.A. (writing for the court) held that the doctrine of *res judicata* applies in bankruptcy proceedings. In the absence of fraud, collusion or some legitimate concern that there has been a genuine miscarriage of justice, a judgment of a court of competent jurisdiction should almost invariably qualify as a debt under the BIA if, in awarding the judgment, the court has considered the merits of the claim.

[24] In *EnerNorth*, Oakwell sued EnerNorth in Singapore to recover outstanding amounts under a settlement agreement. EnerNorth counterclaimed, alleging that certain licence agreement payments had to be set-off against any payments made to Oakwell under the settlement agreement. Oakwell's action was successful and the counterclaim against it was dismissed. The Singapore Court of Appeal dismissed EnerNorth's appeal. EnerNorth did not pay the Singapore judgment. Oakwell commenced enforcement proceedings in Ontario. Those proceedings were successful. EnerNorth filed an assignment in bankruptcy. Oakwell made a claim in that bankruptcy which was based entirely upon the Singapore judgment. Other creditors of EnerNorth moved for an order challenging the proof of claim filed by Oakwell on the basis that EnerNorth had valid claims for payment under the licence agreement which set off the amount of the judgment. Oakwell brought a "cross-motion" to dismiss the creditors' motion on the ground that this issue had been finally determined in the Singapore proceedings. Oakwell's cross-motion was granted. The other creditors appealed.

[25] The Court of Appeal considered certain decisions from the English courts from the 1800s, which appeared to have taken a very broad view of the discretion available to the court when considering whether to grant a bankruptcy order based on a prior judgment of the court. Essentially, Blair J.A. rejected the broad approach. Although *EnerNorth* involved expunging or reducing a proof of claim under s. 135(5) of the BIA, the reasoning of the Court of Appeal is equally applicable here.

[26] The reasoning and conclusion of the Court on this point are summarized in para. 49:

> I agree that the trustee's power to allow or disallow a proof of claim, and the court's power to expunge or reduce it on an application under s. 135(5) of the BIA, is wide. However, to say that the attacking creditor or debtor has an "unqualified" right to challenge the proof of claim where the claim is based upon a valid and enforceable judgment that is no longer subject to appeal is going too far. The appellant's submission goes beyond the proposition that a judgment

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> creditor is precluded from making a "double recovery", that is, that the Bankruptcy Court may examine whether the amount claimed in the proof of claim is the true amount remaining to be paid under the judgment. The Bankruptcy Court may make such an enquiry. *But, in the absence of fraud, collusion or some legitimate concern that there has been a genuine miscarriage of justice, a judgment of a court of competent jurisdiction should almost invariably satisfy a trustee or a court regarding the legitimacy of a claim under s. 135 if, in awarding the judgment, the court has considered the merits of the claim*: see *Canada Asian Centre Developments Inc. (Re)*, as cited in Lloyd W. Houlden, Geoffrey B. Morawetz and Janis P. Sarra, The 2009 Annotated Bankruptcy and Insolvency Act (Toronto: Thomson Carswell, 2008), at G67.1 [emphasis added].

[27] Blair J.A. reviewed the doctrine of *res judicata* at paras. 53-54. *Res judicata* is a common-law doctrine that prevents the re-litigation of issues already decided. It is founded on two central policy concerns: finality (it is in the interest of the public that an end be put to litigation); and fairness (no one should be twice vexed by the same cause). The doctrine is part of the general law of estoppel and is said to have two central branches, namely, "cause of action estoppel" and "issue estoppel".

[28] Cause of action estoppel refers to the determination of the cause or causes of action before the court. Issue estoppel prevents a litigant from re-litigating an issue that has been clearly decided by a court of competent jurisdiction in a previous proceeding between the same parties or their privies even if the new litigation involves a different cause of action.

[29] The Court of Appeal unambiguously found that *res judicata* applies in the context of claims in a bankruptcy proceeding: paras. 55-57.

[30] In *EnerNorth*, the Court of Appeal concluded that the other creditors who objected to the Oakwell claim in the bankruptcy were seeking to litigate "precisely the issue that was before the Singapore Court, namely, the entitlement of Oakwell to receive funds from VBC and at the same time pursue its entitlement under the Settlement Agreement against EnerNorth": paras. 65-75.

Whether There is a Debt Owing

[31] Here, the Parkes say that allowing Castle to rely on the Judgment would give rise to a genuine miscarriage of justice. This is because, they say, Rehill and the Parkes had three valid defences to the Castle claims in the motion for summary judgment that they were not permitted to advance on a proper record following discovery and a trial. They say, in light of these defences, there is no debt owed to Castle.

[32] I will review each of these defences in turn.

<u>The Waiver Argument</u>

[33] This issue surrounds the Jeff Parkes written guarantee of 1994. The Parkes argue that Jeff's guarantee was waived when he retired from Rehill in 2010 or that it was replaced when

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Steven signed a guarantee of Rehill's indebtedness in 2018. While the summary judgment decision as affirmed on appeal ruled the Jeff Parkes guarantee had not been waived by an agreement in writing, the Parkes argue that the motion judge did not consider the issue of whether the guarantee had been waived by conduct/promissory estoppel. The Parkes say the guarantee was waived by conduct and that there was a promise made giving rise to an estoppel. Moreover, the Parkes claim there is fresh evidence available on the issue of whether it was Castle's policy to waive the guarantee upon a change of control when Jeff Parkes retired in 2010. The Parkes claim to have "located" the credit manager of Castle in 2010, John Griffin, and seek to examine him as a witness on a pending application.

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[34] These arguments are addressed at paras. 38 to 44 of the motion judge's decision. The motion judge found that Jeff Parkes' guarantees was a continuing guarantee. She found that the so called "practice" of Castle releasing individuals from their guarantees of member indebtedness relied on by the Parkes misconstrued the nature of those other arrangements. After the reins were handed over, Jeff continued to hold Rehill shares and maintained his shareholder loan. He was still involved in Rehill. He did not simply sell to an arms length third party and walk away. Nor was Jeff's guarantee "replaced" when Steven signed a guarantee in 2018. Steven's guarantee was in addition to, not in replacement for, the original guarantee signed by Jeff.

[35] The Court of Appeal agreed with the motion judge's determination that Jeff's guarantee was continuing and enforceable and that Castle had not waived Jeff's guarantee when Steven took over management in 2010. The Court of Appeal expressly found no error in the motion judge's rejection of the argument that there had been waiver by conduct, either in relation to other third party member sales and transfers or when Steven signed his own guarantee in 2018: paras. 41 to 44.

[36] The Parkes' argument about so-called new evidence on these applications requires some context.

[37] The timetable for the motion for summary judgment required the Parkes evidence to be filed by February 4, 2022. Just 30 minutes before the scheduled cross examination of Castle's witness, Mr. Winter, counsel for the Parkes delivered a 34 megabyte zip file of documents not previously identified by the Parkes or attached to any affidavit. The motion judge found, at para. 86 of her decision, that these documents were:

> …not evidence that is properly before the court. Castle had no sworn evidence from the defendants on this issue so it could not respond. If the defendants believed that the Trustee [the trustee in bankruptcy of Rehill] had important documents which they could not obtain, they could have requested an adjournment of this motion for summary judgment on terms. They could have requested an order requiring the Trustee to provide the documents. They could have requested leave to serve and file a further affidavit setting out their position and attaching the documents as exhibits. They could have agreed to a further cross-examination on the new affidavit. They did none of this.

[38] Similarly, on the eve of the appeal to the Court of Appeal, the Parkes brought a motion to file fresh evidence. The motion record was served on the respondent on February 17, 2023, and filed with the court on February 21, 2023, one day before the hearing. The Court of Appeal dismissed the Parkes' motion. The Court of Appeal found that the Parkes had plenty of notice to organize and search for relevant documents before the Rehill receivership and bankruptcy. The Parkes were aware of the allegations against them. The lack of organization on Steven's part did not excuse the late filing of the proposed new documents. Further, the Court of Appeal held that the admission of this fresh evidence would not have changed the outcome. The *Palmer* test for the admission of new evidence was not met: paras. 24 to 26.

[39] The Parkes argue that the *Palmer* test for the admission of new evidence does not apply to a s. 43(1) application under the BIA. Although the "debt" in this case arises from a final judgment (successfully upheld on appeal and in respect of which leave to appeal was denied by the Supreme Court of Canada), counsel for the Parkes submits that a s. 43(1) application is a new proceeding and that opens the door to a reconsideration of the issues.

[40] That is not how I read the decision of the Court of Appeal in *EnerNorth*.

[41] The passage from *EnerNorth* relied upon by the Parkes is the sentence from para. 49 quoted earlier: "But, in the absence of fraud, collusion *or some legitimate concern that there has been a genuine miscarriage of justice*, a judgment of a court of competent jurisdiction should almost invariably satisfy a trustee or a court regarding the legitimacy of a claim under s. 135 if, in awarding the judgment, the court has considered the merits of the claim" (emphasis added).

[42] Here, the Parkes argue there is a "legitimate concern that there has been a genuine miscarriage of justice" because the motion for summary judgment was conducted on a "incomplete" record and because there is "new evidence" available which shows the judgment was wrong. As I understand this argument in relation to the waiver issue, the new evidence "available" is that the Parkes have "located" the credit manager of Castle in 2010, John Griffin, and seek to examine him as a witness on a pending application. I do not accept this argument.

[43] On these applications, the very arguments that were rejected by the courts in Castle's successful motion for summary judgment are sought to be raised again in opposition to the s. 43(1) order being sought. In substance, the Parkes are saying that the legitimate concern about a miscarriage of justice is that the courts on the motion for summary judgment got it wrong. Where the underlying "debt" for purposes of s. 43(1) is the final judgment of a court, it cannot be that a collateral attack on that final judgment is sufficient to constitute a legitimate concern there has been a miscarriage of justice. Where the alleged "miscarriage" arising out of a final judgment is said to be revealed by so-called new evidence, the proper course to address this is by way of a motion to set the judgment aside. That has not been done. The final Judgment in this case cannot be collaterally attacked in a s. 43(1) proceeding. At the very least, where "new" evidence is said to reveal that the final judgment does not constitute a debt within the meaning of s. 43(1), the test for the introduction of

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new evidence in *Palmer* must apply. Here, the Parkes' have made no effort to explain why they could not have sought to examine Mr. Griffin in 2022 or to show why that evidence would likely change the outcome. The Parkes offer nothing beyond pure speculation.

[44] The Parkes argument that the bankruptcy order should be refused because there is no debt owed by Jeff (because enforcement of his guarantee was "waived") is dismissed.

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The CBS Argument

[45] The Judgment, as upheld on appeal, rejected the Parkes' defence that the guarantees were inapplicable on the basis the debt alleged was owed to CBS not Castle, whereas the guarantees were only of debts owed to Castle, not CBS. In doing so, both the motion judge and the Court of Appeal rejected last minute attempts to file "new" evidence.

[46] The motion judge carefully reviewed the evidence on this issue. She accepted Castle's evidence that there was no separate "CBS system" for finance, accounts receivable or credit purposes. Members either signed a membership agreement with Castle or with CBS but not both. Rehill signed a membership agreement with Castle, never with CBS. To try to help Rehill through its financial difficulties and chronically delinquent accounts, Castle permitted Rehill sometimes to purchase through certain CBS buying programs so that it could receive higher rebates. Although the motion judge ultimately rejected the late filed documents tendered by the Parkes, she did review them. She concluded that Rehill was never transitioned to CBS membership and that Rehill's two accounts were only with Castle, never with CBS: paras. 76 - 86.

[47] The Court of Appeal held that the motion judge did not err when she rejected the argument that the debt was owed to CBS, not Castle. There was no evidence showing that Rehill had any membership agreement with CBS. None of the documents the Parkes put before the motion judge showed that a transition to full CBS membership actually happened. The motion judge accepted that the respondent permitted Rehill to purchase some CBS products because it was trying to assist Rehill. However, all of the invoices were rendered by Castle, not CBS. There was no basis to interfere with these findings: para. 37.

[48] As discussed above, the Parkes say that the rejected new evidence showed that Rehill was a member of the CBS buying group. They also submit new "new" evidence on these applications, purportedly going to the same issue. The Parkes argue that *res judicata*/estoppel does not apply precisely because the motion court and the Court of Appeal rejected the new evidence. Rather than continue with enforcement of the Judgment under the orders obtained, Castle elected to start a new proceedings (i.e., these bankruptcy applications). As a result, the Parkes argue that this court has a discretion in this proceeding to admit previously excluded evidence and fresh evidence without constraint.

[49] This argument stands the law on its head. The Parkes' argument constitutes a clear collateral attack on the Judgment and its upholding by the appellate courts. To the extent there is any jurisdiction to reconsider whether the Judgment is a debt in the context of a s. 43(1) application, it is limited to circumstances where there is a legitimate concern that

there has been a miscarriage of justice. Here, the alleged miscarriage of justice is that the motion judge and the Court of Appeal erred by refusing to admit new evidence and by granting summary judgment against the Parkes. That simply cannot, and does not, qualify as a legitimate concern that there has been a miscarriage of justice in the circumstances of this case.

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[50] The Parkes further submit that there is additional "new" evidence that has come to light. The centerpiece of this "new" evidence is a 2021 decision of the Federal Court Trial Division in an HST rebate case involving Castle and CBS: *Castle Building Group Ltd. and Commercial Builders Supplies Inc. v. The Minister of National Revenue*, 2021 FC 947. This case involves whether Castle and CBS were permitted to late file a joint election pursuant to which taxable supplies made between them are deemed to be made for nil consideration. The result of a valid election is that no goods and services tax or harmonized sales tax need be collected on the supplies. In that case, the applicants' request to late file this election was denied.

[51] In particular, the Parkes point to a sentence in para. 6 of this decision which says that "Castle also acts as billing agent for and provides management and administrative services to CBS." The Parkes wish to rely on this finding in the Federal Court to support their argument that Rehill's debt was owed to CBS, not Castle, because Castle was allegedly just a "billing agent" for CBS.

[52] I am unable to accept this argument for essentially the same reasons articulated in the analysis of the waiver issue above. The Judgment is the debt relied upon under s. 43(1). The new evidence is in support of a collateral attack on the Judgment. To the extent there is new evidence, it cannot be admitted as of right in this context. If permissible at all, it can only be admitted if it meets the *Palmer* test. There has been no explanation for why this Federal Court case, published in September 2021, could not have been discovered at the time of the motion for summary judgment in May 2022. Further, I have reviewed the decision and the Parkes' submissions about it. Whether, in certain circumstances, Castle acted as CBS' billing agent is not determinative of whether Rehill's membership contract was with Castle or CBS. The motion judge found that Rehill's membership was with Castle and that Rehill's obligation to pay for building supplies was to Castle, not CBS. Thus, the "new" evidence does not meet either the first or the fourth parts of the *Palmer* test.

[53] The issue of whether the Rehill debt guaranteed by the Parkes was owed to Castle or CBS was squarely before the motion judge and before the Court of Appeal. That issue is *res judicata*. There is no legitimate concern over a possible miscarriage of justice in respect of this issue.

[54] The Parkes' argument that there was no debt owed because the obligations were in fact owed to CBS, not Castle, and therefore not covered by their guarantee, is dismissed.

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The Rebate/Set Off Arguments

[55] Under this head of argument, the Parkes claim that there was no debt is owing by Rehill for two reasons:

i. Rehill was not fully credited with the rebates it earned between 2010 and 2018; and

ii. Rehill has an equitable set off for damages cause by a) withholding rebates and b) Castle's breach of the subordination agreement.

[56] Neither the motion judge nor the Court of Appeal were satisfied there was sufficient evidence to support either defence. However, the Parkes claim there is "additional" evidence available that was not before the courts on summary judgement:

i. Castle has failed to produce or preserve its own records;

ii. the Parkes seek to examine Ron Craighead, the CBS National sales director as they believe his evidence would corroborate the Parkes position. Castle opposed that examination;

iii. the Parkes seek to examine Amrik Singh, the former principal of BC-based Coast Building Supplies, a CBS member who counterclaimed against the Castle Group over withholding rebates. The allegations are strikingly similar and suggest that what the Parkes raised was a systematic practice; and

iv. the decision of the Alberta Court of Kings Bench in the *Alberta Drywall* case. Alberta Drywall was a Castle member sued by Castle for unpaid supply invoices. Castle's request for summary judgment was dismissed because Castle refused to produce the underlying documentation to establish how the alleged debt was calculated. Alberta Drywall alleged it was entitled to certain credits based on the prices which Castle purchased goods from suppliers before reselling them to Alberta Drywall under its membership contract. The court drew an adverse inference against Castle because of its refusal to produce the underlying documentation showing the prices at which it purchased product which it resold to Alberta Drywall. The Parkes seek to examine Richard Cunningham, the principal of Alberta Drywall, as it is "anticipated" he will have relevant similar fact evidence.

[57] The motion judge found that Castle's agreement to subordinate its rights as a creditor of Rehill to the rights of the secured creditor, Waygar, did not affect Castle's rights to enforce the personal guarantees of the Parkes. Castle took no steps against Rehill. The Parkes were not "third party beneficiaries" of the subordination agreement. Waygar acknowledged that enforcement of the Parkes' personal guarantees was not a breach of the subordination agreement.

[58] The motion judge also found that the allegation of rebates owing to Rehill was not supported by the evidence. Among other things, she found that:

- the receiver/trustee held all rights and claims of Rehill and was not prepared to advance any claim for unpaid rebates;
- the "evidence relied on by the Parkes was a seven year old spreadsheet. Most of Castle's invoices were over two years old. The Parkes failed to address how they would overcome limitations issues;
- the Parkes did not raise any question of unpaid rebates during the Rehill payment plan discussions. They never took the position that Rehill was entitled to rebates and that nothing, therefore, was owed to Castle. Rather, Steven acknowledged Rehill's indebtedness of over $2 million and that Rehill had to make the payments owed; and
- the Parkes had "ample opportunity" to present evidence regarding the alleged rebates owing in the lead up to the motions for summary judgment but failed to do so: paras. 52 - 59.

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[59] The Court of Appeal found no error in the motion judge's conclusions on this issue. The Court of Appeal agreed with the motion judge that Castle's action against the Parkes' on their personal guarantees was not a breach of the subordination agreement. The Court of Appeal also found that the motion judge's rejection of the argument that Rehill was entitled to rebates from Castle which would set off the claimed debt "was firmly grounded in the record": paras. 38 – 40.

[60] In these applications, the Parkes seek to relitigate these very issues. Further, they now want to pursue additional avenues of evidentiary enquiry based on claims made by other customers in other jurisdictions, apparently based on a theory of similar fact evidence. Again, these arguments are a clear collateral attack on the Judgment and the upholding of that Judgment by the appellate courts. There has been no motion to vary or set aside the Judgment. There has been no effort to meet the *Palmer* test for the admission of the so-called "new" evidence. Indeed, on its face this evidence could not possibly meet that test. There is no "evidence" at all – there is only the Parkes' rank speculation about what additional documents (if they exist) might show and what additional examinations of third party witnesses might reveal. These claims are nothing more than a speculative fishing expedition calculated to further delay these proceedings.

[61] At the time of the summary judgment motion, Rehill was bankrupt; its assets had already been liquidated. Castle's claim against Rehill was stayed. Rehill's trustee in bankruptcy advised that he did not intend to pursue Rehill's counterclaim at the motion for summary judgment or at all. Rehill's counterclaim raised identical issues as the Parkes' counterclaim which has now been dismissed with costs. The Rehill counterclaim is, for the reasons outlined above, is subject to issue estoppel. The Parkes remain the sole shareholders of Rehill. Rehill had counsel – indeed the same counsel as the Parkes – throughout the entire civil litigation/summary judgment process. If the Parkes genuinely intended to pursue Rehill's counterclaim, they could have taken steps to take it out of the trustee's hands and have it heard together with their own counterclaim at the motion for summary judgment.

They failed to do so. Instead, they are now using the potential of an outstanding Rehill counterclaim to create a false sense of uncertainty around the Judgment. This, in the circumstances, they cannot do.

[62] The Parkes' argument that there in no debt owing because Rehill has possible damage and rebate claims against Castle is dismissed.

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The Residual Discretion of the Court Under Section 43(7) of the BIA

[63] Even where a debt has been proven, a court has a discretion not to make a bankruptcy order. Section BIA s 43(7) provides:

> 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. [emphasis added]

[64] The protection of creditors is central to Canada's insolvency legislation and is therefore a legitimate reason for courts to refrain from exercising their discretion under s. 43(7) of the BIA. A debtor who has (a) committed an act of bankruptcy consisting of not paying debts as they generally come due, and (b) failed to lead evidence to satisfy the court that it has the ability to pay its creditors, bears a very heavy onus to show that a bankruptcy would nonetheless serve no [legitimate] purpose: *Medcap Real Estate Holdings Inc. (Re)*, 2022 ONCA 318, paras. 23 - 24.

[65] Creditors are not required to exhaust all other remedies available to collect the debt owing to them before proceeding with an application for a bankruptcy order. A creditor may initiate bankruptcy proceedings against a debtor to limit its expenses and focus its efforts. There is a meaningful role for a trustee to assess litigation between the parties and to abandon, settle or pursue each of them as is objectively reasonable: *Tarasenko (Re),* 2018 BCSC 285 at para. 58.

[66] Factors which have been held to represent improper conduct or purpose disentitling a petitioner to a receiving order include:

> (a) the filing of a petition to get rid of a business competitor or to gain a business advantage;
>
> (b) using the bankruptcy court as a collection agency, not with the intent of obtaining the benefit of an equal distribution of the debtor's assets for all creditors, but with the intent of forcing the debtor to make some special arrangement for the payment of the petitioning creditor's debt, regardless of what is done for other creditors;
>
> (c) using the bankruptcy court for extortion, that is, threatening bankruptcy unless the debtor pays something beyond what is legally due;
>
> (d) filing a petition in order to harass a debtor;

(e) filing a petition in order to terminate a contract;

(f) filing a petition in order to settle a dispute between shareholders;

(g) purchasing a debt in order to be able to file a petition; and

(h) filing a petition to prevent the debtor from defending itself against a disputed claim:

Houlden and Morawetz, *Bankruptcy and Insolvency in Canada* (Toronto: Carswell, 1993) at pp. 2-65 to 2-66); *Buth-Na-Bodhiaga v. Lambert*, 2002 CanLII 45022 (ON CA) at para 40.

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[67] It is also relevant whether there is a valid purpose for the order, such as where there is, or is not, property for the trustee to administer: *Re Benson*, 1936 CarswellOnt 86.

[68] As noted earlier, in this case the Parkes' arguments under this issue boil down to three:

1. the bilateral nature of the debt and the absence of a valid purpose to be served by the requested order;

2. an alleged improper purpose; and

3. the age and infirmity of Jeff Parkes.

Bilateral Debtor-Creditor Relationship/Valid Purpose Served

[69] The Parkes argue that they have no other relevant creditors. Castle has already started enforcement proceedings and can continue them. There is no evidence of fraud or suspicious circumstances. And, there is no evidence of any likelihood of meaningful recovery for creditors through either application.

[70] Since *Valente v. Courey,* 2004 CanLII 8018 (ONCA), it has been clear that failure to pay a single creditor can constitute an act of bankruptcy. Before the court can be satisfied that the failure to pay one judgment debt is tantamount to failing to meet liabilities generally as they become due, the court must examine and consider all of the circumstances, including:

- the size of the judgment - a small unpaid judgment is less likely to indicate an act of bankruptcy than a very large one

- how long the judgment has been outstanding - there may be reasons why a recently obtained judgment has not been paid as yet, including a potential appeal, the need to arrange for the marshalling of funds, the intent to make arrangements for payment over time or in the case of a default judgment, knowledge of the judgment

- if a judgment has been outstanding for a long time, it may be that the debtor believes that the creditor is willing to wait for payment, and is paying his or her other debts as they fall due

- whether the judgment creditor has conducted a judgment debtor examination and the results of that examination - if the judgment creditor can collect without invoking the mechanism of the bankruptcy process, a petition ought not to be granted, and

- what steps the judgment creditor has taken to determine whether the debtor has other creditors and the results of those inquiries.

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[71] In this case, there have been repeated demands within the six months preceding these applications. Indeed, the court has held that a debt that has been pursued to judgment, as in this case, constitutes a “continuing demand for payment” for the purposes of s. 43 of the BIA. The Judgment is in excess of $2.2 million dollars and is large in the context of the Parkes’ current financial circumstances (retired and unemployed, respectively). The Parkes have admitted in the notices of dispute, Steven’s affidavit and during Steven’s cross examination that they have no source of income and no ability to pay anything towards the Judgment. Steven has also admitted that he has failed to pay other creditors without specifying who they are. The Judgment has been outstanding for approximately two years.

[72] In addition, the Parkes have had ample time to marshal funds and present a payment plan. They have not done so. Indeed, they have stated that they do not accept the finality of the Judgment, despite the clear findings of the Ontario Superior Court of Justice, Court of Appeal and Supreme Court of Canada. Castle has always been clear in its intention to enforce the Judgment. There is no credible reason for the Parkes to believe Castle is or was willing to wait for payment.

[73] Further, Castle scheduled examinations in aid of execution immediately following the release of the Court of Appeal decision. The Parkes failed to attend and Castle obtained certificates of non-attendance. The Parkes’ counsel indicated he would bring a motion to challenge Castle’s notices of examination but never did so. Castle has filed writs of execution but has been unable to identify any property of value to seize and sell. Finally, Castle has requested sworn statements of affairs from the Parkes which have not been delivered.

[74] In these circumstances, the Parkes cannot credibly assert there is no valid purpose to the requested bankruptcy order. By their own lack of co-operation and disclosure through normal debt collection procedures, it is not known what property there may or may not be to administer.

[75] However, the evidence does establish that Rehill commenced a counterclaim against Castle which was stayed because of Rehill’s receivership and subsequent bankruptcy. Rehill’s trustee has made it clear he has no intention of pursuing the counterclaim. The Parkes could have, but to date have not, sought an assignment of Rehill’s claim under s. 38 of the BIA. As noted above, while it seems clear that Rehill’s counterclaim would be subject to the doctrine of *res judicata* (because it is based on exactly the same allegations as the Parkes’ counterclaim, which was dismissed by the Judgment), Steven has indicated he wishes to take that assignment now and ‘continue the fight’ against Castle, since he does not accept

the finality of the Judgment or its binding nature. Steven's affidavit in support of his opposition to the bankruptcy applications is almost entirely a repeat of the arguments he made before the motion judge and to the Court of Appeal. During his cross-examination Steven: (a) would not "agree that a judgment has been issued yet"; b) is "still waiting for [his] day in court"; (c) stated that the Parkes "did not lead with [their] best foot forward" in the summary judgment motion; and, (d) does not believe the Judgment is final.

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[76] The Rehill counterclaim, whatever its merits or value, is a form of property. Likewise, the Parkes' shares in Rehill, whatever their value, are a form of property. Given Steven's evident disposition to continue his dispute with Castle by any and all means, no matter how tenuous, the stayed Rehill counterclaim and the Parkes' Rehill shares are loose ends that should be resolved. There is nothing sinister in Castle's desire to bring an end to what has all the hallmarks of hopeless litigation. It is perfectly legitimate for Castle to seek to limit ongoing exposure to what are almost certain to be unrecoverable legal costs that will be incurred as a result of the Parkes' refusal to accept the final orders of the Court: *Tarasenko (Re)*, 2018 BCSC 285 at paras. 59 – 61.

[77] The mere fact that Castle is the only proven creditor is not a bar to the bankruptcy applications. There is, in my view, a valid purpose to the bankruptcy order.

Alleged Improper Purpose

[78] The Parkes argue that Castle has improper motives in bringing these applications – as a way of intimidating its members from inquiring into Castle's rebate administration and other business practices. There is not one iota of evidence to support this argument. Even the Parkes' factum calls this an "assertion" and cites no evidence.

[79] As noted in the preceding section, it is not improper for Castle to seek to bring an end to the Parkes' delaying tactics and refusal to accept that their claims have all been finally dismissed at the highest level.

Age and Infirmity

[80] No case was cited for the proposition that age and/or infirmity constitute an independent ground for the refusal to grant a bankruptcy order. However, I do not doubt that, in appropriate circumstances, that may be so. For example, if it were shown that illness was interfering with a debtor's willingness to pay, that might constitute reasonable grounds to deny an application. What is lacking here, however, is any evidence to support the contention being made on Jeff's behalf. Medical evidence is required to be proven by an independent expert, usually in the form of an attending physician. That evidence must meet the *Mohan* requirements, just like any other expert testimony. Here, there is no swore affidavit or report from a qualified medical practitioner providing an opinion, justified by underlying facts and analysis, that would enable the court to properly weigh the prejudice to Jeff of granting the order requested against the benefits to the applicant.

[81] In summary on the issue of the court's discretion under s. 43(7), I am unable to accept the Parkes' arguments that there is any basis to refuse to issue the bankruptcy orders being sought.

Conclusion

[82] For the forgoing reasons, the bankruptcy orders are granted.

Penny J.

Released: July 31, 2024

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ONTARIO

SUPERIOR COURT OF JUSTICE

(IN BANKRUPTCY AND INSOLVENCY)

IN THE MATTER OF THE BANKRUPTCY

OF STEVEN D. PARKES

AND IN THE MATTER OF THE BANKRUPTCY OF JEFF A. PARKES

BETWEEN:

Castle Building Centres Group Limited, Applicant

– and –

Steven Parkes and Jeff Parkes, Respondents

REASONS FOR JUDGMENT

Penny J.

Released: July 31, 2024