COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Dondale (Re)*, 2009 BCCA 10

Date: 20090115
Docket: CA035253

IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF THE JOINT PROPOSAL OF

Ronald Manning Dondale and Lynell Marie Dondale

Before: The Honourable Madam Justice Prowse
The Honourable Mr. Justice Hall
The Honourable Mr. Justice Low

D. Nygard — Counsel for the Appellant

J.I. McLean and S. Pivnick — Counsel for the Respondents

Place and Date of Hearing: Vancouver, British Columbia, 16 October 2008

Place and Date of Judgment: Vancouver, British Columbia, 15 January 2009

Written Reasons by:
The Honourable Mr. Justice Low

Concurred in by:
The Honourable Madam Justice Prowse
The Honourable Mr. Justice Hall

VANCOUVER
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COURT OF APPEAL
REGISTRY

Reasons for Judgment of the Honourable Mr. Justice Low:

[1] Lynda Vogt, an official receiver, acting on behalf of the Superintendent of Bankruptcy under the ***Bankruptcy and Insolvency Act***, R.S.C. 1985, c. B-3 ("the ***Act***"), invoked her power under s. 66.22(1) of the ***Act*** to require the administrator to apply to the court for review of a joint consumer proposal made by Ronald Manning Dondale and Lynell Marie Dondale pursuant to Division II of Part III of the ***Act***. The Superintendent now appeals the order of Mr. Justice Burnyeat approving the proposal. At issue is the legality of clause 7(b) of the proposal. We are told that the clause is in common use and that a decision at the appellate level will serve to guide administrators in the preparation and approval of proposals made under Division II.

[2] Clause 7 of the Dondale proposal reads:

> (a) the creditors may appoint up to three inspectors responsible for the Consumer Proposal of the consumer debtor. The inspectors may have, in addition to any powers of inspectors under the Act, the power to
>
> > (i) receive any notice of default in the performance of a provision of the Consumer Proposal and waive any such default, and
> >
> > (ii) approve any amendment to the Consumer Proposal without calling a meeting of creditors, if the amendment would alter the schedule for and the amount of the payments to be made by the consumer debtor, but would not change the total amount to be paid; and
>
> (b) <u>in the absence of appointed Inspectors the Administrator of this Consumer Proposal shall have the power to extend the time for the making of any payment required to be made pursuant to this Proposal provided that no such extension shall extend beyond the five years following the approval of this Proposal by the court.</u>
>
> [Emphasis added]

[3] The Superintendent contends that clause 7(b) overrides a provision in the ***Act*** that mandates the consequences of default by a debtor in making payments under the proposal, and that it permits the administrator of the proposal to amend it without resort to the proposal amendment provision in the ***Act***.

[4] Division II creates a summary process for an insolvent person to make a proposal to creditors to retire debt by making payments over time. It is not necessary to describe this statutory scheme in complete detail to determine the narrow point at issue. It will suffice to observe that the scheme applies to non-corporate debtors whose aggregate debt does not exceed $75,000, excluding debt on the debtor's principal residence. The debtor may make a proposal to his or her creditors generally. Section 66.13(1)(a) of the ***Act*** requires the debtor to obtain "the assistance of an administrator in preparing the consumer proposal". An earlier section designates trustees in bankruptcy as administrators. In the present case, Abakhan & Associates Inc. is the administrator and is the respondent in this appeal.

[5] On 1 February 2007, the Dondales made a consumer proposal that they pay $400 per month for sixty months to retire their joint unsecured debt. They had assets of $173,786.74, secured debt of $136,300 and unsecured debt of $54,409. The proposal went to their fourteen creditors. All the creditors who voted approved the proposal. They represented unsecured debt of $43,244.61. Under the payment schedule, the debtors would pay off $24,000 of their unsecured debt, less administrative costs.

[6] On 8 February 2007, the administrator reported to the creditors as follows:

> 4. That we are of the opinion that the cause or causes of the consumer debtor's insolvency are as follows:
>
> > The debtors advise that their debt load has been slowly mounting over the course of the last few years. In January of 2006 Mr. Dondale was forced to take time away from work at a reduced income due to heart problems leaving less money to service their debt. The situation was further compounded by the fact that Mrs. Dondale is a casual LPN, whose work schedule is irregular and infrequent due to her being in school. As a result of these factors and poor financial management the debtors now find themselves in a position where they can no longer continue to service their debt obligations as they come due and feel that their creditors will be better off if they make a consumer proposal rather than an assignment in bankruptcy.
>
> 5. That we are also of the opinion, for the following reasons, that the consumer proposal is reasonable and fair to both the consumer debtor and the creditors, and that the consumer debtor will be able to perform it:
>
> > As noted in Appendix A in a bankruptcy, the unsecured creditors may receive approximately a $0.08 recovery for every dollar they are owed. This proposal provides a better return for all the unsecured creditors of approximately $0.30 for every dollar they are owed.

[7] Under ss. 66.15(1) and (2)(b) of the ***Act***, a meeting of the creditors can be required by the official receiver or by creditors holding 25% of the proven debt claims. At such a meeting, the creditors can appoint inspectors from among their number. Otherwise, under s. 66.18, the proposal is deemed to have been accepted by the creditors. In the present case, no meeting was required so no inspectors were appointed. This seems to be the norm under the consumer proposal provisions of the ***Act***. In most cases, the administrator becomes the ongoing connection between the debtor and the creditors.

[8] Because no inspectors were appointed, clause 7(b) of the Dondale proposal became operative.

[9] Court approval of a proposal is required only if "requested by the official receiver or any other interested party within fifteen days after the day of acceptance or deemed acceptance ..." (s. 66.2(1)). Otherwise the proposal is deemed to have been approved by the court (s. 66.22(2)).

[10] Under s. 66.24, the court can either approve or refuse to approve the proposal. Subsection 66.24(3) provides that the court shall refuse approval if the proposal does not comply with ss. 66.12(5) and 66.12(6) of the ***Act*** (reproduced below at para. 15). Under s. 66.24(2), the court shall refuse approval where it "is of the opinion that the terms ... are not reasonable or are not fair to the consumer debtor and the creditors ..."; and the court may refuse approval if the debtor has committed any of certain offences under the ***Act*** or was not eligible to make the proposal when it was filed.

[11] In the present case, the Superintendent argues that the chambers judge should have refused approval of the proposal on the basis that it does not comply with the ***Act***. It is not clear to me whether this argument is based on the assertion that clause 7(b) of the proposal renders the proposal unreasonable or unfair to the creditors; or on the assertion that the court should have rejected the proposal under a residual discretion in s. 66.24(4), which reads: "subject to subsections (1) to (3), the court may either approve or refuse to approve the consumer proposal." It seems

to me that if a proposal is in conflict with the legal requirements of the ***Act***, it ought to be rejected as being unreasonable or unfair.

[12] The official receiver required the administrator to apply for court review of the proposal. In an earlier letter to the administrator, the official receiver set out a number of concerns about the proposal. The principal concern related to clause 7 and was expressed in the letter as follows:

> - It is not reasonable to expect creditors to recognize that paragraph (7) bypasses the requirement to send the Notice of Deemed Annulment when payments are not made. As a result, the Administrator may (or may not) send notice when payments are not made – for up to five years.
>
> ...
>
> - It appears the purpose of paragraph #7 is to bypass the Notice of Deemed Annulment when payments are in arrears in excess of 3 months; which diminishes the integrity of Bankruptcy and Insolvency Act and compromises the credibility of the proposal process.

[13] No creditor appeared at the hearing of the administrator's application to the court for approval of the proposal.

[14] Two trustees in bankruptcy employed by the administrator swore affidavits amplifying the reasons for the content of the proposal in general and for clause 7 in particular. At para. 9 of his reasons, the chambers judge set out the crux of their evidence:

(a) Richard Robinson:

The family income is sufficient to allow for the payment of $400.00 per month but with little room for error. However, Mrs. Dondale is currently attending school to become a fulltime nurse and currently earns $375.00 per month. It is anticipated that when she completes her schooling in September of 2009, the family income should increase by approximately $2,500.00 per month. ....

Paragraph 7 of the Proposal allows the creditors flexibility in whether or not to terminate the Proposal and induce a bankruptcy. In the absence of inspectors, the Trustee is given the ability to defer payments and avoid a default under the Proposal.

The Trustee would only rely on that provision if:

> (a) the Debtor had a valid reason for missing payments, such as loss of employment or illness, and that the Debtor was confident that he or she still had the ability to complete the terms of the Proposal; and
>
> (b) the Trustee was satisfied that the creditors as a whole would be better off allowing the Proposal to continue than they would be were the Debtors to become bankrupt.

In this case, it is possible that the Debtors could miss payments before Mrs. Dondale achieves fulltime employment as a nurse. It may well not be in the creditors' interest to terminate this Proposal were the Debtors to miss three payments if that were to occur at a time when it still appears that Mrs. Dondale would become a fulltime nurse with the resultant substantial increase in the family income.

(b) George Abakhan:

The Office of the Superintendent of Bankruptcy has expressed concern with the inclusion of paragraph 7 in the Consumer Proposal filed by Mr. and Mrs. Dondale.

This provision is a term that is used by Abakhan & Associates Inc., and other Trustees, as a common practice in consumer proposals.

Consumer proposals typically involve individuals with relatively modest incomes.

Consumer proposals usually call for regular payments to be made by the consumer debtor ("the Debtor") over a period of three to five years.

It is difficult for this type of Debtor to predict the future with precision what the Debtors' income will be over a three to five year period. The flexibility that paragraph 7 of the proposal provides allows the Debtor to be confident that he or she will not be in default under their proposal should there be a temporary interruption in their employment or unanticipated expenses over the term of the proposal.

Temporary employment interruption is fairly common in the resource sectors of the British Columbia economy.

The flexibility allowed to a Debtor under paragraph 7 of the Proposal allows the Debtor to make proposals to his or her creditors so that the Debtor would pay more in a proposal than in a bankruptcy.

Our experience with consumer proposals is that only about 5% to 10% of them have defaults. Many of these catch up payments in arrears during the course of the proposal.

In the typical consumer proposal the creditors will consist almost exclusively of financial institutions, credit card companies and Canada Revenue Agency.

These creditors will each have either an internal department that specializes in dealing with loans that are in default or will outsource this to a third party who specializes in administering default loans.

It is the policy of our firm to advise Debtors of their respective rights and costs in a bankruptcy situation and in a settlement proposal situation to ensure Debtors understand the alternatives and the costs relating thereto.

The advocacy of our firm is to encourage the Debtors to consider proposals to maximise the return to Creditors which invariably would receive NIL in a bankruptcy. Therefore, the need for Clause 7 referred to above is to allow flexibility in the successful completion of the proposal.

In the vast majority of the consumer proposals, there is never a meeting of the creditors.

It is also rare to ever have inspectors appointed by the creditors in a consumer proposal.

[15] Parliament has seen fit to give sparse direction under the ***Act*** *as* to the form and content of consumer proposals. The ***Act*** states:

66.12(5) A consumer proposal must provide that its performance is to be completed within five years.

(6) A consumer proposal must provide

(a) for the payment in priority to other claims of all claims directed to be so paid in the distribution of the property of the consumer debtor;

(b) for the payment of all prescribed fees and expenses

(i) of the administrator on and incidental to proceedings arising out of the consumer proposal, and

(ii) of any person in respect of counselling provided pursuant to paragraph 66.13(2)(b); and

(c) for the manner of distributing dividends.

[16] Section 66.2 of the ***Act*** provides that the creditors may include in the proposal, subject to the consent of the debtor, "such provisions or terms ... with respect to the supervision of the affairs of the consumer debtor as they may deem advisable" [emphasis added]. In my opinion, whether it was initiated by the debtors or by the creditors, clause 7(b) in the subject proposal is such a provision. Supervision must be seen to include adjustment of the payment schedule.

[17] Just as s. 66.12 is sparse, so s. 66.2 is very broad. Together they evince an intention of Parliament to permit creditors to consent to, and to permit the court to approve, consumer proposals containing flexible provisions. These two sections of the ***Act*** permit the parties to structure the payment provisions and the supervision of payment in such manner as they see fit.

[18] The Superintendent contends that clause 7(b) of the proposal in question cannot be approved because it provides for an amendment of the proposal unilaterally and without compliance with the legal requirements for amendment found in the statute. The Superintendent says that the clause forestalls the effect of default as dictated by the statute. The sections in question are ss. 66.3(1), 66.31(1), 66.31(2), and 66.37(1). These provisions read:

> 66.3(1) Where default is made in the performance of any provision in a consumer proposal, or where it appears to the court
>
> > (*a*) that the debtor was not eligible to make a consumer proposal when the consumer proposal was filed,
> >
> > (*b*) that the consumer proposal cannot continue without injustice or undue delay, or
> >
> > (*c*) that the approval of the court was obtained by fraud,
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> the court may, on application, with such notice as the court may direct to the consumer debtor and, if applicable, to the administrator and to the creditors, annul the consumer proposal.
>
> . . .
>
> 66.31(1) Independently of section 66.3,
>
> > (*a*) where payments under a consumer proposal are to be made monthly or more frequently and the consumer debtor is in default to the extent of three months payments, or
> >
> > (*b*) where payments under a consumer proposal are to be made less frequently than monthly and the consumer debtor is in default for more than three months on any payment,
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> the consumer proposal shall thereupon be deemed to be annulled unless the court has previously ordered otherwise or unless an amendment to the consumer proposal has previously been filed, and

the administrator shall forthwith so inform the creditors and file a report thereof in the prescribed form with the official receiver.

(2) Where an amendment to a consumer proposal filed before the deemed annulment of the consumer proposal by virtue of subsection (1) is withdrawn or refused by the creditors or the court, the consumer proposal shall thereupon be deemed to be annulled.

...

66.37 (1) Where an administrator files an amendment to a consumer proposal

> (a) before the withdrawal, refusal, approval or deemed approval by the court of the consumer proposal, or
>
> (b) after the approval or deemed approval by the court of the consumer proposal and before it has been fully performed or annulled or deemed annulled,

the administrator shall call a meeting of creditors to be held within twenty-one days after the amendment is filed, to consider the consumer proposal as amended.

[Emphasis added]

[19] The chambers judge correctly stated the law of statutory interpretation as it applies to the ***Act*** by quoting the following passages from the judgment of Levine J.A. in ***Port Alice Specialty Cellulose Inc. (Bankruptcy) v. ConocoPhillips Co.*** 2005 BCCA 299; 41 B.C.L.R. (4th) 259:

> [25] There is no dispute that the proper approach to the interpretation of s. 81.1 [of the Act] is that described in E.A. Driedger's *Construction of Statutes* (2nd ed. 1983), at p. 87:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of

> the Act, the object of the Act, and the intention of Parliament.
>
> [26] This approach has been approved by the Supreme Court of Canada in numerous cases. The Supreme Court has also said that this approach is confirmed by s. 12 of the *Interpretation Act*, R.S.C. 1985, c. I-21, which provides that every enactment "is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects": see *Barrie Public Utilities v. Canadian Cable Television Assn.*, [2003] 1 S.C.R. 476 at para. 20; *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559 at para. 26.
>
> [27] In interpreting the *BIA*, courts have noted that it is a commercial statute used by business people and should not be given an overly narrow or legalistic approach: see *Re McCoubrey*, [1924] 4 D.L.R. 1227 at 1231-32 (Alta. S.C); *Mercure v. Marquette & Fils,* [1977] 1 S.C.R. 547 at 556; *Re Maple Homes Canada Ltd.*, 2000 BCSC 1443 at para. 21.

[20] The judge also referred to conflicting decisions on the point in question. In ***Bankruptcy of Williams***, 2005 BCSC 108, Master Baker, sitting as a Registrar, considered a term in a proposal identical to clause 7(b) in the present case. He concluded his analysis with the opinion that there is "a great deal of flexibility in crafting a Consumer Proposal, the only limitation being that the proposed terms not offend or violate the terms of the ***Act***" (para. 8). He found no conflict between the clause and the provisions of the ***Act***. In Ontario, Registrar Nettie reached the opposite conclusion in ***Re Sztojka***, [2005] O.J. No. 5551 (S.C.J.). Although he agreed that there is a great deal of flexibility in crafting a consumer proposal, he was of the opinion that "creditors cannot cure a default in payment under a Division II proposal, except by acceptance of a properly filed amended proposal in accordance with [s. 66.37] of the Act ..." (at para. 15). For the reasons that follow, I prefer the conclusion on the point reached by Master Baker.

[21] The chambers judge described the issue before him as follows:

> [32] . ... the question which arises is whether I should refuse to approve this consumer proposal on the basis that it is not reasonable or not fair to the consumer debtor and the creditors (s. 66.24(2) of the *Act*) or whether, in interpreting the Act in a way which is not "overly narrow or legalistic", I should approve or refuse to approve the Consumer Proposal (s. 66.24(4) of the *Act*).

He considered the reasonableness and fairness clause and the residual discretion clause.

[22] The chambers judgment concludes with nine paragraphs containing ten reasons why the court should approve the proposal. In these paragraphs, the judge conflated the issues of legality and reasonableness. It seems to me that those two issues should be considered separately. If the proposal in question does not comply with the ***Act***, it cannot be approved because it is presumptively unreasonable. If it does comply, there should then be a subjective consideration of its reasonableness.

[23] The Superintendent contends that the Dondale proposal is not legal because clause 7(b) has the effect of permitting the debtors to miss three monthly payments with the administrator then having the power to effectively override the legal effect of those missed payments under s. 66.31(1). In other words, says the Superintendent, a deemed annulment under that section can be excused by the administrator. The Superintendent argues further that clause 7(b) conflicts with the proposal amendment provision, s. 66.37(1).

[24] I do not agree with these submissions. The purpose and effect of clause 7(b) is not to override the annulment provision in the ***Act***. Rather, it is to avoid it before it

becomes operative. If the Dondales have legitimate difficulty in meeting the payment schedule at any time during the five-year period because their income flow is erratic, the administrator can rearrange the payment schedule from time to time to make the monthly payments correspond more closely to the flow of their income. However, if they miss three payments in a row before the schedule can be adjusted by the administrator, or if they miss three payments in a row under the adjusted schedule (or if the adjusted payment schedule provides for payments less frequently than monthly and one payment falls in arrears for more than three months), s. 66.31 will become operative and there will be a deemed annulment.

[25] In my opinion, s. 66.31(1) does not purport to dictate the content of proposals and how they are to be administered. It only provides that a proposal is automatically annulled if the debtor is in default for three months, except as provided therein. It does not define default and is not specific as to how default may come about. In the present case, the creditors have agreed that the administrator can alter the payment schedule to create flexibility to meet changing conditions during the term of the proposal. The provision would likely reduce administration costs that otherwise might be incurred. It does not give the administrator the power to forgive any part of the debt payment. Nor does it offend s. 66.12(5) by permitting the debtor to make payments beyond the five-year term.

[26] Section 66.31(1)(a) requires default under a consumer proposal for three months before there is an automatic annulment of the proposal. Clause 7(b) of the subject proposal permits a summary and efficient rearrangement of the payment schedule by the administrator. It seems to me that this does not offend

s. 66.31(1)(a) because there can be no default under the consumer proposal until the debtors have missed three months of payments or have been in default for three months under the payment schedule as modified by the administrator under his delegated authority. This is what the creditors and the debtors agreed to and I see no reason under the statutory scheme to reject the proposal as being in conflict with the ***Act***. To the contrary, it seems to me that it builds into the proposal flexibility that is administratively efficient and potentially less costly.

[27] I do not see clause 7(b) as being in conflict with s. 66.37(1) of the ***Act***. Empowerment of the administrator to adjust the payment schedule during the five-year term of the proposal is simply designed to make the payment schedule flexible, to make it adjustable to future exigencies. If such an adjustment is properly viewed as an amendment of the proposal and not just its implementation (which I am inclined to think is the case), there is nothing in the ***Act*** that says that the procedure under s. 66.37(1) is the only way that an amendment can be brought about. That section is concerned with the filing of an amendment by the administrator. It does not provide that its procedure is the only available mechanism for adjustment of a payment schedule. The creditors and the debtors can agree to a procedure that is more efficient administratively and is less costly.

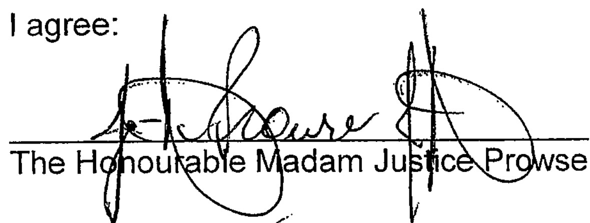
[28] The above is in keeping with Parliament's overall purpose in enacting Division II of Part III. If Parliament had intended to restrict the way consumer proposals are to be worded and administered, it would have used more specific and restrictive language in ss. 66.12(5) and (6), and in s. 66.2.

[29] I do not understand the Superintendent to argue that if clause 7(b) of the proposal is not in conflict with the ***Act***, the proposal is nonetheless unreasonable. Therefore, it is not necessary for us to consider that issue.

[30] I would dismiss the appeal.

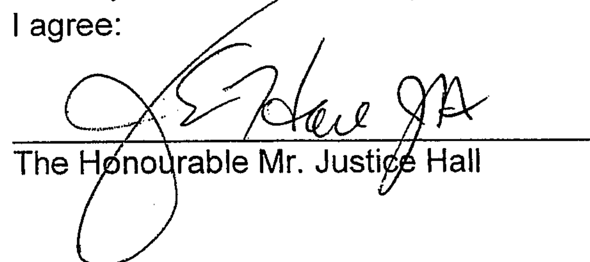
The Honourable Mr. Justice Low

I agree:



The Honourable Madam Justice Prowse

I agree:



The Honourable Mr. Justice Hall