

June 2010

CRIMINAL

In addition to some federal and provincial laws dealing with criminal acts, the Bankruptcy and Insolvency Act (BIA) has its own provisions governing bankruptcy offences. These offences mostly deal with the bankrupt's conduct during the bankruptcy. How does the BIA deal with offences under the Act? This was discussed in *Re White*, a 2010 decision of the Bankruptcy Registrar.

Bad Boy

Creditors of the bankrupt had forced him into bankruptcy. It seems that he ran a Ponzi scheme and cheated investors out of \$19 million. The chief creditor, one extended family, was bilked out of \$17 million.

The evidence revealed sordid tales of fraud, asset dissipation, untraceable movements of funds to the Caribbean, and high rolling gambling trips.

Once the family knew it had been cheated, it moved civilly by way of a Mareva injunction to freeze the bankrupt's assets before he could dissipate them further. The family then petitioned the bankrupt into bankruptcy. The civil proceedings netted about half of the money that the estate collected; the trustee in bankruptcy netted the other half. The report does not tell us how much was recovered, but, we assume, it was nowhere near the bankrupt's total debts.

Report

Section 205(1) of the BIA imposes a duty on the trustee to report to the court and to

the Superintendent of Bankruptcy if the trustee believes that a bankrupt has committed an offence under the BIA or under any other legislation.

Section 205(3) allows the court to authorise the trustee to initiate proceedings to prosecute the bankrupt. Section 205(4) states that the trustee shall deliver a copy of any such order to the local Crown Attorney for prosecution.

Limited

The Registrar interpreted the section to apply only to offences committed with respect to an estate - except in rare circumstances such as forgery. Based on this interpretation, acts committed before bankruptcy would not result in the court authorising a prosecution because these acts were not connected to the estate. The Registrar reasoned that pre-bankruptcy acts should be left to the usual criminal processes because the pre-bankruptcy acts did not offend the Bankruptcy Court or the insolvency process.

Consequently, the Registrar refused to exercise his discretion to authorise a prosecution. The actual fraudulent scheme was effected before the bankruptcy and, although massive, did not offend the bankruptcy process.

What was especially unfortunate was that the family had attempted to have the RCMP investigate the fraud and the RCMP had refused to do so. This is not surprising - at least to us. The RCMP and the local police fraud departments are incredibly stretched and do not have the resources to investigate many of the

frauds that occur. Accordingly, when we see that the federal government wishes to increase criminal sanctions for fraud, we take this with more than a grain of salt. Until police forces increase their complements to investigate and prosecute the frauds, there will continue to be few convictions to which the increased sanctions can be applied.

More

The bankrupt had not only defrauded his creditors before bankruptcy, he also continued his nefarious ways during bankruptcy by failing to pay his surplus income payments, failing to file financial statements with the trustee, and failing to notify the trustee of his whereabouts. His failures were in themselves offences under the BIA.

Interestingly, the trustee wanted to commence the prosecution, but the family, the major creditor, did not. To do so would cost money and therefore there would be less money available to the creditors from the estate.

The family pointed out, correctly, that the bankrupt's BIA offences were not major. Many estates have bankrupts who fail to co-operate. The usual remedy is to refuse or defer the discharge from bankruptcy or to obtain an order for costs to be collected outside of the usual bankruptcy stay of proceedings.

The Registrar was not moved by these arguments. He reasoned that the creditors had availed themselves of the BIA and obtained half of the recovered money through the remedies available under the BIA. They should therefore shoulder some financial costs to maintain the integrity of the insolvency proc-

ess. They well knew the risks of the bankrupt's non-cooperation and his character when they decided to use the process.

The Registrar was equally unmoved by the arguments regarding the relatively minor nature of the offences. He felt that the bankrupt had thumbed his nose at the criminal law and continued his improper behaviour during bankruptcy. Accordingly, it would be offensive to the public to allow the bankrupt's behaviour to continue unchecked.

The Registrar allowed the trustee to initiate the prosecution of the bankrupt for his offences under the BIA.

JAIL

On a related theme, but outside the bankruptcy process, debtors sometimes thumb their noses at court collection processes. For example, debtors can be forced to undergo judgment debtor examinations and supply information regarding their assets and past dealings. A debtor's failure to co-operate can result in costs orders, which may be meaningless, and in jail sentences.

Unfortunately, before a judge will actually order that an uncooperative debtor be jailed, the debtor must repeatedly ignore court orders. One such occasion arose in Telehop Communications v. Chamberlain, a 2009 decision of the Ontario Superior Court of Justice.

Catch Me

The judgment was issued out of the Small Claims Court for a grand total of \$2,964. Under Small Claims Court rules, judgment debtor examinations take place in court before a judge of that court.

A notice of examination was issued for a return date of July 4. The debtor failed to attend. The judge issued an order that the debtor attend. The debtor was served, but not personally, with the order and a notice for a new examination date of October 14. The debtor failed to attend. The presiding judge adjourned the examination to ensure that the debtor was personally served with the order. The creditor could not serve the debtor and obtained an order for substituted service on March 17. The debtor was served with all of the endorsements by way of substituted service. The debtor failed to appear on the May 6 return date. The judge adjourned the examination and granted leave to apply to the Superior Court for a contempt hearing. The notice of contempt hearing was personally served on the debtor on July 13. The hearing took place on Sept 26 and the debtor did not appear.

The judge found the debtor in contempt and ordered that the debtor "be jailed for a period of no more than seven days or until such time as (he pays, sic) the amount of \$5,722.68 owing as of today's date plus \$500.00 for the costs of this motion plus \$42.00 for disbursements for service, for a total of \$6,264.68." It would seem that each time the debtor did not appear, the court ordered further costs.

The judge also held that once the debtor completed his jail sentence, he was liable to attend a judgment debtor examination.

Pity

This jail sentence was all very nice, but it did not necessarily ensure that the creditor collected on its judgment. It may be that the debtor has no assets and that when he is finally examined, there will be no pot of gold at the end of the rainbow.

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Speigel Nichols Fox LLP

30 Eglinton Ave. W., Suite 400
Mississauga, Ontario L5R 3E7
Tel: 905-366-9700
Fax: 905-366-9707
www.ontlaw.com

Jonathan Speigel*+
Brian Nichols
Irving Fox*
Ian Latimer*
Robert McIntyre
Susanne Balpataky*
Jeffrey Tighe*
Shahan Khan*
Paul Roth

- * members of litigation/collection group
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