

**Ontario Superior Court of Justice
Bradford (Re)
Date: 2003-03-18**

Docket: Estate No. 32-129162

Justin Robinson for CIT Financial Ltd.

Robert M. Forbes, Q.C. for John Philip Bradford, Deborah Bradford

Deputy Registrar Nettie:

[1] This motion was for an Order pursuant to s. 163(2) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, (the "Act"), permitting the examination by CIT Financial Ltd. ("CIT") of the Bankrupt and his wife, Deborah Bradford ("Deborah").

[2] CIT is a secured creditor, and holds apparently perfected security over the Bankrupt's medical practice. The Notice of Motion indicates that CIT wishes to examine Deborah and the Bankrupt in order to obtain financial information to assist it in the realization of its security. However, the affidavit of William D. Dunlop tendered in support of the motion goes further. That affidavit sets out three grounds for examining Deborah and the Bankrupt. Those include the reasons relating to realization upon CIT's security, but also include investigating the transfer by the Bankrupt to Deborah of certain real estate, and determining if the Bankrupt is required to make surplus income payments to the Trustee. As the Bankrupt has been discharged, the last is moot.

[3] Section 163(2) of the Act requires the applicant to show "sufficient cause" to warrant an Order by the Court permitting an examination which will be very broad in scope by someone other than the Trustee. What will constitute "sufficient cause"? This will, necessarily, vary from case to case, but in *NsC Diesel Power Inc., Re* (1997), 49 C.B.R. (3d) 213 (N.S. S.C. [In Chambers]) it was held that "There must be some demonstrated connection between the evidence, if any, of something being amiss and the ability of the named person to shed some light on it as it relates to the administration of the Estate." The evidence must show that something more than a fishing expedition is being sought. This is consistent with the principle that, as the applicant, usually a creditor, is seeking to exercise a power usually reserved to the Trustee, there must be some level of confidence by the Court that the applicant seeks to exercise that power for a proper purpose. It has been held, and I certainly agree, that an examination under s. 163(2) is not intended to be used to further the private interests or proceedings of the applicant. In this regard see: *Assaf, Re* (1976), 23 C.B.R. (N.S.) 14 (Ont. S.C.) . The threshold is also a fairly low one: see *Hartland Pipeline Services Ltd. (Trustee of) v. Bennett Jones* (2000), 18 C.B.R. (4th)

28 (Alta. Q.B.), at 33 . However, it exists, and the evidence must surpass it in order for the Court's discretion to be properly exercised in favour of the applicant.

[4] Does the evidence of CIT meet the threshold? I find that it does, with respect to the Bankrupt.

[5] Clearly, the evidence relating to the refusal by the Bankrupt and by Deborah to provide financial statements does not assist, as that is, equally as clearly, linked to CIT's desire to enforce its security. Sufficient cause is not made out on that ground, as I find that CIT is seeking solely to further its private interests, and not those of the creditors generally or of the administration of the Estate. However, the evidence relating to the transfer by the Bankrupt of 1275 Derry Road to Deborah does, in my view, make out sufficient cause to warrant the examination of the Bankrupt by CIT. While Mr. Robinson, in his submissions, argued that no evidence that the transfer was improper or at less than fair value was tendered, the very fact of a transfer from the Bankrupt to his spouse raises proper questions to be answered by the Bankrupt regarding same. I am aware from the evidence that the Trustee seems satisfied with the transaction, and, apparently, is content to rely upon a letter from William Thatcher dated March 1, 2000, as support for this. However, in *Hartland Pipeline Services Ltd. (Trustee of)*, reference is made to a decision of Registrar Ferron, of this Court, in *R.L. Coolsaet of Canada Ltd., Re* (1996), 45 C.B.R. (3d) 30 (Ont. Bkcty.), wherein the Master held that a creditor is not bound by an opinion received by the Trustee, but is entitled to make his own reasonable and supplementary inquiries, so long as they are not frivolous or oppressive. In the case at bar, the Thatcher letter is not even an opinion. I find it reasonable and appropriate for CIT to desire to examine the Bankrupt as a result of this issue.

[6] With respect to the Order sought to examine Deborah, can she even be the subject of such an Order? While it seems clear from *Worldidge, Re*, [1983] O.J. No. 946 (Ont. S.C.), a decision of Registrar Ferron of this Court, that the phrase "or any other person named in the order" found in s. 163(2) should be construed as meaning any other person interested in the administration of the Estate, I believe that it includes any other person connected with the administration of the Estate. This construction is, I believe, faithful to the *ejusdem generis* rule used by the learned Master, while recognizing that the practice of orders under s. 163(2) is to permit creditors to conduct examinations where the Trustee fails or refuses to act under s. 163(1). It is, at the same time, a more restrictive class of examinee than provided for in s. 163(1) of the Act, as befits the difference in wording between the two sections. Parliament must be taken to have intended non-trustees to have at least

slightly fewer rights than trustees, else it would not have used different language in the two sections. On this construction of the phrase, Deborah would certainly be a person connected with the administration of the Estate, as a transferee of the Bankrupt's property. In my view, *Gervais, Re*, [1993] O.J. No. 1911 (Ont. Bkcty.) also supports this conclusion. There, Justice F.G. Carter, of this Court, sitting on appeal from a decision of Deputy Registrar DeBoice recited, at length, the Deputy Registrar's reasons in finding that it was not an appropriate case to exercise his discretion in favour of a s. 163(2) Order to examine that bankrupt's spouse. At no point in determining that the Deputy Registrar properly refused to make the Order respecting the spouse does F.G. Carter J take issue with the proposition that a bankrupt's spouse may properly be the subject of such an Order for examination. Therefore, if the threshold is met, I find that she may properly be the subject of a s. 163(2) Order.

[7] With respect to the desired Order to examine Deborah, I find, however, that the motion fails. The evidence does not show sufficient grounds to warrant her examination by CIT, at this point. While the evidence does show more than mere ownership of the property by her, an important consideration for the Deputy Registrar in *Gervais*, I find it premature to exercise my discretion and authorize her examination. No evidence was led to support the inference being sought that the transfer was at less than market value or was otherwise reviewable. CIT did not even tender the Land Transfer Tax affidavit which would have been filed with the transfer. I do not find that the evidence tendered, with respect to Deborah, meets the test set out in *NsC Diesel Power Inc.*, that Deborah is able to shed light on that which is amiss. Even the affidavit of Mr. Dunlop only goes so far as to say that it is "possibly" necessary to examine Deborah for the purposes set out therein.

[8] It was indicated at the motion that the Bankrupt has been discharged. Although not argued by Mr. Robinson, I wish to make it clear that I have considered the decision in *Salloum, Re* (1988), 69 C.B.R. (N.S.) 255 (B.C. S.C.), and agree therewith. The right to examine in s. 163 is that of the examiner, and continues to exist so long as the Estate is being administered. Accordingly, the Bankrupt's discharge herein is no bar to an Order under s. 163(2).

Conclusion

[9] As a result, an Order shall issue authorizing CIT to examine the Bankrupt under s. 163(2) of the Act, and requiring the Bankrupt to produce the books, documents, correspondence or papers referred to in that section. With respect to the Order sought to

examine Deborah, the motion is dismissed. If counsel cannot agree on costs, I may be spoken to.

Motion granted in part.