CITATION: John Trevor Eyton (Re), 2021 ONSC 3646
COURT FILE NO.: 31-244477545
DATE: 20210519

SUPERIOR COURT OF JUSTICE – ONTARIO
(In Bankruptcy and Insolvency)

RE: IN THE MATTER OF THE BANKRUPTCY OF JOHN TREVOR EYTON, of the City of Toronto, in the Province of Ontario

BEFORE: S.F. Dunphy J.

COUNSEL: *Sam Babe*, for the Appellant Forty-One Peter Street Inc.

J. Ross Macfarlane, for the Trustee Harris & Partner Inc.

Jacqueline Dais-Visca and Adrian Scotchmer, for the Superintendent in Bankruptcy

HEARD at Toronto: May 11, 2021

REASONS FOR DECISION

[1] This case comes by way of an appeal from a decision of Master Mills (as she then was) upholding the Trustee's decision disallowing the appellant's unsecured claim. The appeal raises a rarely-considered but narrow point: is a claim which is statute-barred under the *Limitations Act, 2002,* S.O. 2002, c. 24, Sched. B provable in bankruptcy?

[2] I dismissed the appeal from the bench with reasons to follow. These are those reasons.

Background facts

[3] The bankrupt was deemed to have filed an assignment on April 3, 2019 and Harris & Partners Inc. was named trustee in bankruptcy of his estate at that time. The bankruptcy followed the failure of a proposal.

[4] The Form 79 Statement of Affairs filed by the debtor with his proposal listed a claim of $600,000 in the name of the appellant creditors Forty-One Peter Street Inc.

[5] Forty-One Peter Street Inc. filed an unsecured proof of claim dated July 27, 2020 in the amount of $888,620.67 including interest calculated at the "CIBC prime rate plus 1% or 12%".

[6] The following is a brief history of this claim:

a. The debtor gave the appellant a promissory note in the amount of $250,000 dated April 10, 2001 due on October 10, 2001 such note bearing simple interest at the rate of 1% per month (no annual rate was stipulated);

b. On September 15, 2009, the bankrupt and Forty-One Peter Street Inc., entered into an agreement where, among other things:

   i. The bankrupt acknowledged his default with respect to certain "indebtedness" and that he had no defence to an action to recover the indebtedness – the document made no specific reference to a promissory note or the date of the original indebtedness;

   ii. The bankrupt acknowledged that the debt in question amounted to $400,000 as of October 1, 2009 including unpaid and accrued interest;

   iii. The bankrupt agreed that commencing October 1, 2009 interest would be calculated at the rate of 12% per year compounded monthly; and

   iv. The bankrupt agreed to make monthly payments of $6,000 beginning October 1, 2009 until the debt was repaid in full;

c. The schedule attached to the Proof of Claim lists the following payments made both before and after the date of the September 15, 2009 agreement:

   i. April 25, 2006 - $10,000.00

   ii. May 24, 2006 - $5,000.00

   iii. June 30, 2006 - $5,000.00

   iv. November 30, 2009 - $18,100.00

   v. December 30, 2009 – $6,000.00

   vi. January 31, 2010 - $6,000.00

   vii. June 10, 2013 - $150,000.00

   viii. October 16, 2013 - $25,000.00

   ix. February 29, 2016 - $25,000.00

   x. April 19, 2016 - $25,000.00; and

d. There were no payments made after April 2016 nor is there any evidence of any written acknowledgement of the debt thereafter.

[7] The foregoing raises a number of factual/legal questions regarding the debt over and above those reviewed on this appeal. The schedule of indebtedness attached to the proof of claim does not show $400,000 owing as of October 1, 2009 and the September 15, 2009 agreement makes no reference to the promissory note or even the fact that the advance was made in 2001. The acknowledgement in the 2009 agreement

that no defence to payment of the "indebtedness" existed would appear incongruous given the promissory note having come due eight years earlier and only one payment attributed to the note 3.5 years earlier. There would at least be an issue as to whether this claim was already statute-barred when acknowledged – if that is what occurred – in 2009. The lack of an annual interest rate in the original promissory note and a proof of claim that uses CIBC prime rate plus 1% prior to October 1, 2009 when no such rate is contained on the face of the promissory note raises questions as to whether the written agreement of September 15, 2009 is even connected to the 2001 promissory note at all.

[8] In light of my decision, these factual questions do not appear to require further inquiry. Whether the 2009 agreement referenced the promissory note indebtedness or some other indebtedness entirely, it contains a written acknowledgement of the principal amount of $400,000 being due as of October 1, 2009 and stipulates a 12 % per year interest rate applicable thereafter. Whether that rate can be enforced for want of an effective annualized rate is academic if the entire claim is invalid as Learned Master and I have both found. I raise these points only to make it clear that I have not decided them because they did not appear to require decision.

[9] The Trustee disallowed the appellant's filed claim because "the last payment was made in April 2016 which is more than two years prior to the bankruptcy, this would result in the claim being statute barred".

[10] The creditor appealed the disallowance of its claim to the Registrar pursuant to s. 135(4) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. On March 8, 2021, the Learned Master rejected that appeal. In her endorsement, the Learned Master noted the concession by the appellant creditor that the debt in question was statute-barred by reason of the *Limitations Act, 2002*. She also referred to the decision of *Re Bankruptcy of Kenneth Temple*, 2012 ONSC 376 (CanLII) where Newbould J. found that a statute-barred debt may nevertheless ground an application in bankruptcy. She found the comments of Newbould J. in *Temple* to be *obiter* and concluded that a debt which is statute-barred is unenforceable at law and therefore not provable in bankruptcy either.

Issue to be decided

[11] Where a claim is barred by s. 4 of the *Limitations Act, 2002* may it nevertheless be proved in bankruptcy:

a. If it has been included by the debtor in the schedule of claims attached to his proposal? or

b. Otherwise by reason of the fact that the debt is barred but not extinguished?

Analysis and discussion

(a) Effect of Form 79 Statement of Affairs

[12] The appellant submits that its claim was listed in the statement of affairs prepared and signed by the bankrupt in the amount of $600,000 and such figure ought therefore to

be accepted without further proof required, citing in support of this argument s. 122(1) of the *BIA*.

[13] It is not clear whether the appellant's argument alleging "proof" of its claim being based on the bankrupt's Statement of Affairs was advanced before the Learned Master. Be that as it may, I am satisfied that this argument has no merit in any event.

[14] Section 122(1) of the *BIA* provides that the "claims of creditors under a proposal are, in the event of the debtor subsequently becoming bankrupt, *provable* in the bankruptcy for the full amount of the claims less any dividends paid thereon pursuant to the proposal" [emphasis added]. It is to be noted that the statute says such claims are prov*able* and not prov*en*. Section 124(1) of the *BIA* requires every creditor to prove his claim and a creditor who fails to do so is not entitled to share in any distribution made.

[15] The Statement of Affairs attached to a proposal does not operate as a proof of claim and every creditor, including creditors with claims listed thereon, is still required to prove their claims, such claims being subject to scrutiny by the Trustee and potentially other creditors as well. The mere fact that the debtor has listed a claim at a particular amount does not absolve the creditor of the need to submit its claim for review and proof in bankruptcy.

[16] The appellant filed its proof of claim as it was required to do in order to be eligible to receive any distributions from the estate. That claim was disallowed by the Trustee and an appeal of that disallowance was dismissed by Master Mills. Whether properly advanced or not, this first ground of appeal has no merit.

(b) Can statute-barred claims be proved in bankruptcy?

[17] The more substantive argument advanced by the appellant may be summarized as follows:

a. Section 121(1) of the *BIA* defines provable claims without any qualification in relation to debts affected by provincial limitation periods;

b. The Supreme Court of Canada in *Schreyer v. Schreyer*, 2011 SCC 35 (CanLII), [2011] 2 SCR 605 interpreted s. 121(1) in the following way (at para. 26): "[i]f the debt exists and can be liquidated, if the underlying obligation exists as of the date of bankruptcy and if no exemption applies, the claim will be deemed to be provable";

c. Section 4 of the *Limitations Act, 2002* is only procedural in effect because it does not purport to *extinguish* a debt subject to its provisions but only provides that "a proceeding shall not be commenced", an analysis applied by Dietrich J. in *Duca v. 2203824 Ontario Inc.*, 2020 ONSC 3119 (CanLII);

d. Newbould J. in *Temple* found that a statute-barred claim could nevertheless ground a bankruptcy application because the debt, even if barred, is nevertheless a "debt owing"; and

e. Contrary views expressed by the Court of Appeal in *Royal Bank of Canada v. Central Capital Corp.*, 1996 CanLII 1521 (ON CA) should be considered *obiter* because the limitation period at issue in that case was under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44.

[18] The argument advanced by the appellant, if followed, would lead to an absurd result. The underlying policy of the *BIA* is to provide for the equitable distribution of the assets of the bankrupt among all creditors of the same rank. A statute-barred claim is *not* of the same rank as an enforceable claim because the creditor cannot enforce payment of it. The appellant's argument would require me to find that a claim that was statute-barred and quite unenforceable one day becomes enforceable the next by virtue of a bankruptcy intervening. Parliament is of course free to prescribe results, even results that run contrary to the underlying policy of a statute, if it expresses its intention in terms of sufficient clarity to enable a court to determine them. However, a sensible interpretation that is consistent with the purpose of the statute will normally be preferred to one that turns it on its head.

[19] This is not a case where Parliament has prescribed a result that runs contrary to the central thrust of the statute. Rather, a careful reading of the applicable provisions of the *BIA* reveals that Parliament's expressed intention runs quite clearly contrary to the position advocated by the appellant. This appears from the following chain of logic:

a. Section 121 of the *BIA* defines as a claim provable in bankruptcy "all debts and liabilities ... to which the bankrupt is *subject*" [emphasis added].

b. While bankruptcy is a matter of federal jurisdiction, federal bankruptcy law must rely upon provincial law in relation to property and civil rights to ascertain what property rights the bankrupt had at the time of bankruptcy and what debts of the bankrupt there were to be satisfied.

c. Section 4 of the *Limitations Act, 2002* provides that "a *proceeding* shall not be commenced in respect of a claim" that is barred [emphasis added]. The term "proceeding" is an intentionally broad term encompassing remedies of all kinds.

d. Section 124 of the *BIA* obliges requires every creditor to prove its claim in order to share in any distributions from the estate. Creditors do not automatically receive a distribution – they must file a proof of claim to be eligible to receive one and that action is a "proceeding" applying the broad and purposive reading afforded this term in, for example applying the stay of proceedings language of s. 69(1)(a) of the *BIA*.

[20] While a statute-barred claim continues to exist in the sense that it has not actually been extinguished, it is not a claim upon which any proceeding to enforce payment may be brought. The bankrupt cannot be said to be "subject" to a claim that cannot be enforced.

[21] There are any number of categories of claim that subsist in the Twilight Zone of being undischarged but unenforceable. Illegal gambling debts or debts arising from the

sale of illegal narcotics come to mind: payment of such a "debt" is not without consideration but the obligation so extinguished can never be enforced and thus exist as a category of right without a remedy. Such debts can never be considered as a debt to which the bankrupt is "subject" enabling them to be proved in bankruptcy and share ratably with other creditors.

[22] I have carefully reviewed the *Temple* case which is the only jurisprudence cited by the appellant that casts significant doubt upon the interpretation I have outlined above. However, I concur with Learned Master that Newbould J.'s comments were ultimately *obiter* in that case because he also found that the claim in question was not in fact statute-barred. His views are of course entitled to deference but the issues in that case were different and I am unable to agree with his analysis for the reasons outlined here.

[23] The *Central Capital* case referred to by the appellant presents with significant analogies to the present case. The issue in *Central Capital* concerned preferred shares that Central Capital was obliged by contract to retract but prohibited from doing so by s. 36 of the *CBCA* due to the insolvency of the corporation. The appellants argued in that case that the claim was nevertheless provable in bankruptcy because the obligation to retract was still extant and even if it could not then be enforced. Weiler J.A. cited the Alberta Court of Appeal in *Farm Credit Corp. v. Holowach (Trustee of),* 1988 ABCA 216 (CanLII), [1988] 5 W.W.R. 87 at p. 90, 51 D.L.R. (4th) 501 (Alta. C.A.), leave to appeal to the Supreme Court of Canada dismissed at [1989] 4 W.W.R. lxx to find (at para. 107) that "[i]nasmuch as there is no right to enforce payment, the promise is not one which can be proved as a claim".

[24] The reasoning in *Central Capital* applies with greater force here. Whereas in *Central Capital* the right to enforce the contractual obligation to retract the shares was only suspended (albeit for a period of time confidently predicted to be eternal), the right to enforce is permanently extinguished by s. 4 of the *Limitations Act, 2002* even if the underlying obligation is not.

[25] Accordingly, I find that the appellant's claim – being one that it was prohibited from enforcing at the time of bankruptcy by reason of s. 4 of the *Limitations Act, 2002* – is not provable in bankruptcy within the meaning of s. 121(1) of the *BIA* because it is not a claim to which the bankrupt was subject.

Disposition

[26] The appeal from the decision of the Learned Master was dismissed from the bench. No order as to costs was sought.

S.F. Dunphy J.

Date: May 19, 2021