Supreme Court of British Columbia
First Western Capital Ltd. v. Wardle
Date: 1984-09-14

F.G. Potts, for petitioner.

D.R. Clark, for respondent Ronald John Hancock.

(Vancouver No. H821210)

[1] 14th September 1984. BOYLE L.J.S.C.:– This was an application for appointment of a receiver. It arose out of the petitioner's efforts to enforce a personal judgment made in foreclosure proceedings against the respondent Hancock (the "respondent") [[1982] B.C.W.L.D. 1497].

[2] The respondent and others invested in strata property. They were caught by the real estate market collapse. The investment property was foreclosed upon and sold. There was a deficiency of about $205,000.

[3] The personal respondents are jointly and severally liable for this sum under the personal judgments but it is against the sole respondent herein that the petitioner proceeds because only he has immediate potential for payment. Of the other two respondents, one is bankrupt. The other is in a sea of debt.

[4] The respondent to this application is a physician and surgeon. He has filed no current material concerning his income but it is, at a minimum, $15,000 per month. From this he must pay his professional and his family expenses.

[5] The respondent also has assets sufficiently to satisfy the judgment in full, if liquidated. These assets most importantly include real estate. His interest in his matrimonial home and in some investment property is worth a total of somewhere between $200,000 and $250,000.

[6] There has been an order under the Court Order Enforcement Act for sale of the respondent's interest in these properties.

[7] When that order was made the respondent sought to have the sheriffs sale subject to court approval.

[8] That application was denied.

[9] The denial is under appeal. Hearing of the appeal is on the “standby” list. In the meantime, the sale order on the home is stayed [[1984] B.C.W.L.D. 2167]. The order for sale of the investment property (much lesser in value than the home) is not.

[10] Two issues were raised before this court:

(i) Is there jurisdiction to appoint a receiver of *future income*?

(ii) If so, would it be “just and convenient” to do so?

[11] The order is sought under RR. 45(2) and 47. The petitioner also applies under s. 36 of the Law and Equity Act.

[12] I am somewhat doubtful whether or not s. 36 applies but RR. 45(2) and 47 are authority enough, if the claim is good, without determining my doubtfulness concerning s. 36.

[13] Now as to the first issue: although the respondent raised no argument counter to the petitioner, he did not *concede* authority for appointment of a receiver of future income. But he made his *stand* on the second, not the first issue, and, in the event, I have decided the matter on the second issue. Nevertheless I should review the petitioner’s well-prepared argument on the first point.

[14] The petitioner did not dispute that, historically (see *Holmes v. Millage,* [1893] 1 Q.B. 551 (C.A.), the categories of receiver appointment would not have embraced future income but he argued there had been a break away from rigidity. This was illustrated in *B.C. Power Corp. v. A.G.B.C.* (1962), 38 W.W.R. 577, 34 D.L.R. (2d) 2 (C.A.). (The *B.C. Power* case was cited by the petitioner for the contrast it offered in conceptual approach, not for similarity of facts or claim to the matter herein.)

[15] In dissenting judgment in *B.C. Power,* Norris J.A. and Tysoe J.A. observed:

> (Norris J.A., p. 599): “…at the present time the exercise of the equitable jurisdiction is not to be restricted by the strait jacket of rigid rules but is to be based on broad principles of justice and convenience …”
>
> (Tysoe J.A., p. 635): “If nothing is ever done, which has not been done before, the law will stand still whilst the rest of the world goes on; and that will be bad for both.”

[16] The petitioner cited several Ontario cases where receivers had been appointed to take in future income. All are matrimonial: *Paulin v. Paulin,* [1936] 1 W.W.R. 499 (Sask.) (salary); *Martin v. Martin* (1981), 33 O.R. (2d) 164, 24 R.F.L. (2d) 211, 22 C.P.C. 209, 123 D.L.R. (3d) 718 (H.C.) (salary); *Simon v. Simon* (1984), 45 O.R. (2d) 534, 50 C.B.R. (N.S.)

161, 38 R.F.L. (2d) 198, 42 C.P.C. 133, 7 D.L.R. (4th) 128, 2 O.A.C. 299, C.E.B. & P.G.R. 8166 (Div. Ct.) (pension benefits). He cited as well *Goldschmidt v. Oberrheinisch Metallwerke,* [1906] 1 K.B. 373 (C.A.) (garnishment not available; receiver of commercial debts appointed).

[17] This court's jurisdiction for appointment of receivers comes by way of the County Court Act, s. 38(i) and, in this case, under s. 11 of the Supreme Court Act, not through any inherent jurisdiction in equity. For this reason I am wary of making a ringing pronouncement. However, for what it's worth, my inclination, if this were the proper case, would be as is expressed in dissent in the *B.C. Power* case, in the Ontario cases and in *Goldschmidt.*

[18] However, it is not necessary to found this decision upon the first issue.

[19] On the facts, it would not now be just and convenient to appoint a receiver.

[20] Counsel do not disagree that justice and convenience are determinative of the propriety of appointment even though that phrase no longer is included in the Rules, appearing now only in s. 36 of the Law and Equity Act (see *Sign-O-Lite Plastics Ltd. v. Mac-Donald Drugs (Cranbrook) Dd.* (1980), 24 B.C.L.R. 172, 20 C.P.C. 38, 115 D.L.R. (3d) 378 at 379 (S.C.).

[21] The cases direct that, in weighing justice and convenience, the court must consider whether or not "the circumstances are such as to render it practically very difficult, if not impossible, to obtain any fruit of Judgment, unless what has been called equitable execution be granted …" *Goldschmidt,* supra, and *Sign-O-Lite Plastics v. MacDonald Drugs,* supra.

[22] Going to the question of practicality of enforcement by other means, the petitioner raises the very real problems it faces:

(i) The court has ruled [[1984] B.C.W.L.D. 1893] that funds due the respondent through the provincial medical services plan are not subject to garnishment because, although they are a debt, they arise neither out of trust nor contract;

(ii) The respondent, although the investment assets accumulated through his life's work are gone, lives in affluent style. He appears not to have reduced his level of personal expenditure;

(iii) The judgment is two years old but no voluntary payment has been made on it;

(iv) The petitioner can look to only 5 per cent interest on its judgment [see [1984] 3 W.W.R. 476, 52 B.C.L.R. 242, 31 R.P.R. 225, [1984] B.C.W.L.D. 1151];

(v) The petitioner has vigorously pursued enforcement;

(vi) There is no evidence the respondent has voluntarily sought to realize the equity he holds in the matrimonial home or investment property;

(vii) Sale of the respondent's joint interest in the family home after the pending Court of Appeal hearing, may be more "ponderous" than receivership.

[23] Despite these factors, the petitioner's difficulties do not come within the ambit of "practically very difficult, if not impossible".

[24] The petitioner's judgment is secure. It will be satisfied upon sale of the property. The only evidence of impediment to sale is the stay pending appeal which applies to the matrimonial home.

[25] It would be wrong for me to say that waiting for the appeal to be heard raised the kind of practical difficulty that invited appointment of a receiver.

[26] I agree with the petitioner that the respondent has not grasped the nettle of his obligation. Perhaps he is delaying the inevitable but that, if so, is not beyond understanding where he, alone of the three respondents, is called upon to meet the judgment and to do so by sale of his home. It has not been shown that he has done any improper act, only dragged his feet.

[27] True, the respondent chose his partners for this unhappy dance but the delay so far is not such as would call for exercise of the court's discretionary power to appoint a receiver. In the *Simon* case, supra, at p. 168, Henry J. (Ont. S.C.) observes: "I say simply that it is not self-evident that she [the judgment creditor] has other remedies but, if she has, that is a matter that goes only to the exercise of the court's discretion".

[28] Here it is self-evident that the petitioner's remedies at law are far from exhausted.

[29] The application is dismissed. Costs to the petitioner.

Application dismissed