

NO. 1542/90
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA
IN BANKRUPTCY

IN THE MATTER OF THE BANKRUPTCY OF
TIMOTHY MARK FULLER

NO. C890985
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

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| BETWEEN: |) | |
| |) | |
| MICHAEL BLAXLAND and EDWARD |) | REASONS FOR JUDGMENT |
| GEORGE RALFE |) | |
| PLAINTIFFS |) | |
| |) | OF THE HONOURABLE |
| AND: |) | |
| |) | |
| TIMOTHY MARK FULLER |) | MR. JUSTICE DONALD |
| |) | |
| DEFENDANT |) | (IN CHAMBERS)* |
| |) | |

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| Counsel for the Plaintiffs: | Daniel S. Gleadle |
| Counsel for the Trustee in bankruptcy: | Kimberly S. Campbell |
| In person: | Timothy Mark Fuller |
| Date and Place of Hearing: | Vancouver, B.C. October 9, 1990 |

*Oral reasons were pronounced October 9, 1990 but not recorded. Counsel requested written reasons. At the Court's direction, counsel prepared a joint memorandum taken from their notes of the oral judgment. These reasons are an edited form of that memorandum.

There are two applications brought by the Plaintiffs in action no. C890985 (the "civil action"). The first is to cite Timothy Mark Fuller, a Defendant in the civil action and the bankrupt in action no. 1542/90, for contempt. The applicants allege that Mr. Fuller made an assignment in

bankruptcy in the face of an order of Mr. Justice Fraser which forbade his disposing of, encumbering, or otherwise dealing with his interest in his residence pending the outcome of the civil action. In addition, the applicants seek an order to annul Mr. Fuller's assignment in bankruptcy on two grounds. First, they allege that the assignment was made for an improper purpose and that this was contrary to the terms of Fraser J.'s order. Second, they claim the making of the assignment was an abuse of the Court's process.

The second application is one to amend the Statement of Claim in the civil action to include a claim entitling the applicants to trace funds they say they advanced to Mr. Fuller to his interest in the residence. Ancillary to that is a claim that Mr. Fuller's Trustee in Bankruptcy holds Mr. Fuller's interest in the residence in trust for the applicants.

I shall deal with the contempt application first.

I am satisfied that at the time he made his assignment into bankruptcy Mr. Fuller was insolvent and that he remains so. His debts greatly exceed his assets. His affidavit evidence is that he had no ulterior purpose in making his assignment. The applicants have not sought to cross examine Mr. Fuller on his affidavit, nor have they challenged the contention he makes in that regard. It is true that it appears suspicious since the assignment was made so close to the trial date in the civil action. However, the timing of the assignment can be explained by his recent loss of counsel, his feeling overwhelmed by debt, and the pressure of an imminent trial date.

I am unable to find that there is any prejudice to the applicants as a consequence of the bankruptcy apart from the delay of the civil action. The applicants have not shown themselves to be any worse off with the bankruptcy remaining. Mr. Gleadle contends that there are assets remaining to be found which will allow a better realization for the applicants in the ordinary civil

process than they would obtain through the bankruptcy procedure. I find that contention to be mere speculation, unsupported by any material. As for the question of delay, that matter has already been addressed. The applicants have obtained leave under s. 69 of the *Bankruptcy Act* to continue their claim against Mr. Fuller despite the bankruptcy. An early trial date has also been ordered. In addition, the applicants are entitled to seek an order in respect of costs to further compensate them for the delay if the trial judge sees fit.

Mr. Campbell cited authority to me for the proposition that the debtor's motive in making an assignment in bankruptcy is not necessarily relevant unless there is a clear abuse (see *Re Develox Industries Limited* (1970), 14 C.B.R. (NS) 132 (Ont. S.C.), *Re Gasthof Schnitzel House Ltd. and Sanderson*, [1978] 2 W.W.R. 756 (B.C.S.C.), *Re Public's Own Market (Prince George) Ltd.* (1984), 54 C.B.R. (NS) 222 (B.C.S.C.), and *Re Louis & Peter Co. Ltd.* (1988), 67 C.B.R. (NS) 176 (Ont. S.C.)). That may generally be true. If, however, the conduct is tainted by bad motives, then the Court remains able to annul a bankruptcy under s. 181 of the *Bankruptcy Act*.

The question of improper motive does not arise in this application. In my view, Mr. Fuller did not abuse his right to make an assignment, nor did he abuse the Court's process.

The applicants contend that Mr. Fuller breached Fraser J.'s order by making the assignment because the Trustee now has Mr. Fuller's interest in the residence. Mr. Campbell relied on *Neustaeder v. Armitage* (1986), 60 C.B.R. (NS) 173 (Ont. S.C.) for the proposition that the assignment in bankruptcy effects the transfer of the debtor's interest only, not title to the property. Those having a claim against that interest are no worse off inside the bankruptcy. There is no alienation of the interest. It merely passes to the Trustee against whom claims in respect of the interest can still be made. I agree with Mr. Campbell's submission that this analysis applies in these

circumstances to defeat the argument that the simple fact of an assignment alone constitutes a breach of Fraser J.'s order.

The applicants also complain that Mr. Fuller has been tardy in obtaining certain life insurance coverage which Fraser J. directed he obtain for their benefit and that he is still \$50,000.00 short of the amount ordered. I accept as genuine Mr. Fuller's explanation of this matter, namely, that there was a misunderstanding between himself and his insurance agent over the manner in which coverage should be placed and that he is anxious to comply with the order. Hopefully, the Trustee will cooperate with Mr. Fuller in his efforts to correct this matter once and for all.

As for the question of annulment of the bankruptcy, Mr. Gleadle relies the decision of the British Columbia Court of Appeal in *Henfrey Samson Belair Ltd. v. Manolescu* (1985), 58 C.B.R. (NS) 181 in support of his submission that Mr. Fuller's assignment violates Fraser J.'s order. In *Manolescu*, there was a matrimonial dispute in which the husband went about a course of dealings which was clearly contrary to an order of the Court. He declared himself to be insolvent when the merit of that contention was very much open to question. In those circumstances the Court found there had been an abuse of process. It did not hold that the making of an assignment, per se, constitutes a violation of an order restraining the disposition of property. An examination of the full background of the facts surrounding the assignment must be made in order to properly determine whether an annulment should be granted.

Here, there is no question that Mr. Fuller was insolvent at the time he made his assignment. There are no facts showing an intention to frustrate or disobey the order. Accordingly, there is nothing at bar analogous to the circumstances in *Manolescu*.

I find, therefore, that there has been no contempt committed by Mr. Fuller and that there is

no basis for annulling the bankruptcy.

As for the amendment application, I have considered Mr. Campbell's analysis of s. 81 of the *Bankruptcy Act* in respect of his contention that the applicants' tracing claim must be made through the estate, considered by the Trustee, and dealt with according to the summary provisions in the *Act*. I would generally agree with those submissions. However, I cannot ignore the history between the parties. In my view, the applicants' tracing claim is not a fresh matter. It is merely an additional remedy they may claim rather than a new cause of action.

Arkell J. has already given the applicants leave to continue the civil action despite the bankruptcy. It seems to me almost inevitable that the Trustee will be unable to resolve the tracing claim to the applicants' satisfaction. This will result in the matter coming back to the court with the likely outcome that a direction will be made that the issue be tried in conjunction with the civil action. This will generate considerable needless expense for all concerned. I shall therefore exercise the jurisdiction I have under s. 69 of the *Bankruptcy Act* to grant further leave for that additional aspect of the applicants' claim and I allow the amendments sought. That avoids a set of further proceedings in the bankruptcy which, given the nature of this litigation, will be contested and should be resolved by a trial.

Since the success of the parties was divided, costs will be in the cause.

Vancouver, British Columbia

November 29, 1990

