Chambre de la sécurité financière v. Thibault, 2016 QCCA 1691

December 14, 2016

Key Issue in Dispute

Does a fine imposed on a debtor by the disciplinary committee of the *Chambre de la sécurité financière* after the date of the debtor's bankruptcy constitute a provable claim pursuant to section 121(1) of the *Bankruptcy and Insolvency Act* (the "BIA")?

Introduction

The Appellant, the *Chambre de la sécurité financière* ("Appellant"), sought leave to appeal the decision rendered by the Court of Québec Justice, Diane Quenneville, who dismissed the motion to enforce the decision (*motion to homologate*[1]) rendered by the disciplinary committee of the Appellant ("Motion").

In her reasons, Justice Quenneville notes that although the decision rendered by the disciplinary committee constitutes a provable claim in the bankruptcy of Jacques-André Thibault (the "Debtor") as it arose prior to the insolvency filing, it is also a claim for which the Debtor can be discharged pursuant to section 178(2) of the BIA. Therefore, as the Debtor was discharged on November 24, 2014, Justice Quenneville dismissed the Motion.

Justice Schrager, for a unanimous Court, granted the motion for leave to appeal, but dismissed the appeal despite the fact that Justice Quenneville erred in her interpretation of section 121(1) of the BIA.

Background

On March 14, 2011, the Syndic of the *Chambre de la sécurité financière* ("Syndic" — the person responsible to deal with disciplinary and ethical matters) filed a written complaint against the Debtor.

The charges filed by the Syndic were based on alleged violations to, namely, *An Act Respecting the Distribution of Financial Products and Services*, CQLR, c D-9.2, the *Regulation respecting the pursuit of activities as a representative*, CQLR c D-9.2, r 10

and the *Code of Ethics of the Chambre de la sécurité financière*, CQLR c D-9.2, r 3. The alleged violations included not having conducted a thorough analysis of some clients' needs before making them subscribe to a life insurance policy, having placed himself into a conflict of interest and having provided false information regarding an insurance proposal.[2]

On the first day of the hearing in October of 2014, the Debtor's legal counsel submitted a plea of guilty to certain of the counts, but on the condition that other counts be withdrawn. This plea of guilty was refused by the Appellant based on the Court of Appeal's decision in *Duquette* v. *Gautier*[3], as he did not "admit the facts alleged and that gave rise to the complaint."[4] On the second day, the Debtor appeared with the intention of pleading guilty, which was again refused by the disciplinary committee as he did not admit to the essential facts giving rise to the complaint.

On November 1, 2012, the Debtor filed a voluntary assignment in bankruptcy.

On October 15, 2013, the disciplinary committee rendered its decision finding the Debtor guilty of certain counts.

On February 26, 2014, the disciplinary committee heard the parties for the sanction to be imposed and on July 2, 2014, rendered its decision imposing a fine of $18,000.00 in addition to the costs and suspending the Debtor's professional activities (collectively, "Sanction").

On November 24, 2014, the Debtor was discharged from bankruptcy.

The Debtor having failed to pay the Sanction, the Appellant filed the Motion. The Motion was heard by Justice Quenneville on June 3 and dismissed on July 6, 2015.

In her decision, Justice Quenneville first stated that the unpaid Sanction did constitute a claim provable in bankruptcy pursuant to section 121 of the BIA as (i) the hearing took place before the date of the voluntary assignment and (ii) the monetary part of the Sanction was imposed before the Debtor was discharged.[5] However, because the Sanction does not qualify as an exception pursuant to subparagraph 178(1)a) of the BIA, it falls under section 178(2) of the BIA and has been discharged.

Analysis

Justice Schrager, writing for the Court, explains that although Justice Quenneville erred in her interpretation of section 121 of the BIA, the motion for leave to appeal was granted and the appeal was nonetheless dismissed.

First, Justice Schrager reasoned that none of the exceptions outlined at section 178(1) of the BIA are applicable to the present case. More specifically, Justice Schrager referenced the decision *Québec (Chambre des notaires du) v. Dugas*[6] where the Court of Appeal ruled that fines imposed by disciplinary committees, such as the disciplinary committee of the Appellant, are not covered by the exceptions outlined at section 178(1)a) of the BIA.

Secondly, as Justice Quenneville did in her decision, Justice Schrager distinguishes the present case to decisions submitted by the Appellant:

> The situation presented by the case at bar is significantly different from the fact patterns in *Harton* and *Fuoco*. As set forth above the facts giving rise to the complaint, the commencement of the disciplinary proceeding, the hearing and the offer to plead guilty all occurred before the date of the bankruptcy. That the committee chose not to accept the guilty plea because it felt that Respondent had not sufficiently acknowledged the facts alleged, **does not change the fact that the plea could have been accepted and the penalty could have been imposed prior to bankruptcy so that Respondent could have been subject to the claim as at the date of the bankruptcy**, or could have become subject to the claim prior to his discharge, to borrow the wording of Section 121 *BIA*. **It was not hypothetical but rather, probable in October 2011 (at the commencement of the hearing) that Respondent would be found guilty given his plea and absence of contestation**. Thus, the imposition of **some penalty was not hypothetical or remote at the date of the bankruptcy** so that the monetary penalties are a claim provable. [...][7]
>
> (our emphasis)

Furthermore, Justice Schrager explains that the present case is similar to cases where the debtor's liability from pending litigation exists prior to bankruptcy, but becomes definite after the date of the bankruptcy.[8] Justice Schrager then notes that the moment at which the obligation was incurred or created is key in determining whether we have a provable claim or not.[9] To that effect, the Court reasoned that the moment the Debtor indicated his intention to plead guilty is the date of reference in the present file, but adds that even if it would not be the case, the delay the disciplinary committee took before rendering the decision and imposing the Sanction are the relevant pieces of information in order to confirm the presence of a provable claim.

As such, Justice Schrager concludes that the Supreme Court's decision in *Newfoundland and Labrador* v. *AbitibiBowater Inc* .[10] confirmed the necessity of conducting a factual inquiry in order to determine the presence (or not) of a provable claim.[11] In other words, the inquiry must allow to determine if, as "at the date of the bankruptcy, the conditions were met in order to affirm that a sanction would probably be imposed."[12] Therefore, in the present case, the conditions were met as (i) the hearing occurred before bankruptcy and (ii) the Debtor expressed his intention of pleading guilty, making himself likely to be sanctioned.[13] Consequently, the Debtor was then and there making himself liable to the Sanction and it became probable or more than hypothetical that he could face a monetary fine.[14]

Justice Schrager concludes his analysis by mentioning that the Debtor "should not be deprived of his discharge because the disciplinary committee delayed conviction and sentencing for a period exceeding two years in a matter which was not contested on the facts and where at the outset [the Debtor] indicated that he would plead guilty."[15] As such, the matter could and should have been decided much more rapidly by the Appellant.[16]

Conclusion

The Court granted the motion for leave to appeal, but dismissed the appeal, as the obligation "was incurred before bankruptcy and the fines were imposed prior to discharge".

[1]*Chambre de la sécurité financière v. Thibault* 2015 QCCQ 6059 [*Thibault QC*].

[2] See paragraphs 21 *et seq* of the July 2, 2014 decision on the sanction of the disciplinary committee of the *Chambre de la sécurité financière* bearing docket number CD00-0860 for the rest of the conclusions.

[3] 2007 QCCA 863 at para 33.

[4] *Chambre de la sécurité financière v. Thibault* 2016 QCCA 1691 at Para 8 [*Thibault QCA*].

[5]*Thibault QC*, *supra*, note 1 at para 18.

[6] [2003] R.J.Q. 1 (Q.C.A.).

[7]*Thibault QCA*, *supra*, note 4 at para 23.

[8]*Thibault QCA*, *supra*, note 4 at para 24.

[9]*Thibault QCA*, *supra*, note 4 at para 26.

[10] [2012] 3 S.C.R. 443 (S.C.C.) [*Abitibi*].

[11]*Thibault QCA*, *supra*, note 4 at para 27 referring to *Abitibi*, *supra*, note 9 at para 37.

[12]*Thibault QCA*, *supra*, note 4 at para 26.

[13]*Ibid*.

[14]*Ibid*.

[15]*Thibault QCA*, *supra*, note 4 at para 28.

[16]*Ibid*.

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