Insolvency insights: Lack of transparency through the court's lens

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The case of *Anderson v. Westmount Projects Inc.*, 2023 ABKB 619, dealt with the financial challenges of Westmount Projects Inc. (Westmount), a Calgary-based real estate developer, which led to an insolvency dispute.

Westmount's preexisting financial challenges were exacerbated when a rift ensued between its principal, Mr. Sattar (Sattar), and its primary financial backer, Mr. Anderson (Anderson). This conflict led to substantial creditor claims, notably from Anderson and his entities, reaching a sum of $24 million. The situation escalated into bankruptcy proceedings, which resulted in a detailed examination of Westmount's finances by the Court of King's Bench of Alberta (the Court). Anderson sought a bankruptcy order against Westmount under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3, as amended (BIA), alongside a receivership order designating Deloitte Restructuring as the trustee for the purposes of liquidation.

The issues before the Court were whether Westmount owed Anderson an amount exceeding $1,000, and whether it had committed an act of bankruptcy. Westmount refuted the claims, asserting set-off against Anderson and denying any act of bankruptcy.

Background

In the midst of financial challenges, Sattar partnered with Anderson, who assumed the nominal role of the sole shareholder of Westmount, holding shares in trust for Sattar. Despite this arrangement, Sattar continued to oversee day-to-day operations while Anderson provided personal guarantees for Westmount's obligations. Anderson received compensation in the form of a fee. The partners' relationship started to strain in mid-2022, when Anderson ceased providing guarantees and registered mortgages against select Westmount properties. On March 29, 2023, shares of several properties were transferred to the Westmount Family Trust.

The transfer of shares triggered a dispute wherein Anderson initiated legal action to enforce mortgages and recover on certain indemnities. Anderson also asserted that the transfer of properties to the Westmount Family Trust constituted a fraudulent preference. Westmount countered by contesting the validity of the mortgages, denying

indemnification, and claiming breaches of fiduciary obligation. Westmount argued that the amount sought in Anderson's claim should be set off against Westmount's counterclaim.

Issues

The case presented substantial legal issues:

1. **Complex debt evaluation**: The Court grappled with deciphering an extensive list of creditor claims. The key was to distinguish between liquidated claims and disputed claims, necessitating a precise understanding of Westmount's financial intricacies.
2. **Alleged acts of bankruptcy**: The Court scrutinized three distinct acts of bankruptcy: (i) fraudulent preference, (ii) permitted seizure of property, and (iii) ceasing to meet liabilities generally as they became due.
3. **Validity of Anderson's mortgages**: The Court had to comprehensively evaluate the contested mortgages, requiring a thorough examination of their potential impact on the financially distressed company.

Analysis of the insolvency proceedings

The Court ruled that Anderson's evidence of bank statements and ledgers to support his debt claim was valid. It was established that Westmount owed more than $1,000 in liquidated debt, thereby meeting the BIA requirements. However, the Court clarified that this finding did not negate Westmount's claimed set-off.

On the matter of fraudulent preference, the Court highlighted that the Westmount Family Trust, under Sattar's father's control, lacked evidence of consideration in return. Westmount failed to dispute this lack of consideration or provide an explanation for the transfer. The Court concluded that Westmount's refusal to answer questions about the share transfers permitted an adverse inference, ruling the transfer as prima facie fraudulent preference pursuant to section 42 of the BIA.

On the issue of the permitted seizure issue, the Court noted that Westmount received demand letters from Canadian Western Bank (CWB) concerning a debt guaranteed by Anderson, and included security over certain vehicles and other chattels. Sattar sold the secured vehicles and paid CWB almost half of their outstanding amount. CWB obtained an order to auction the secured vehicles or to allow civil enforcement agents to seize them. The Court stated that there was insufficient evidence as to the events following the order, making it unable to rule on whether Westmount permitted seizure under section 42 of the BIA. However, Sattar's acknowledgement of the debt to CWB supported Westmount's inability to meet liabilities generally as they become due.

On the issue of meeting liabilities as they generally become due, the Court emphasized that the payment of utilities, insurance, and taxes was insufficient to demonstrate the ability to meet liabilities amidst a line of secured creditors. Westmount's failure to provide details about its financial condition led the Court to rule that it had not met its onus to show its ability to meet liabilities as they become due.

Conclusion

The Court declared Westmount bankrupt and appointed Deloitte Restructuring as trustee in bankruptcy. With respect to Westmount's counterclaim, the Court determined that the validity of Anderson's mortgages was best left to the trustee to determine.

Takeaway

This case underscores the importance of prioritizing transparent financial practices and maintaining robust financial transparency, especially during periods of financial distress. Courts do not respond well to a lack of transparency during insolvency proceedings. A debtor who provides ambiguous details about debt obligations and financial transactions faces considerable challenges.

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