IN THE MATTER OF THE BANKRUPTCY OF SEAN PATRICK MCDONOUGH OF THE CITY OF BURLINGTON, PROVINCE OF ONTARIO, A LLOYD'S OF LONDON SYNDICATE MEMBER
McDonough (Re)
File No. 32-114898
Ontario Superior Court Justice Registrar in Bankruptcy
2001 A.C.W.S.J. LEXIS 16566; 2001 A.C.W.S.J. 614276; 107 A.C.W.S. (3d) 363

August 8, 2001, Decided

KEYWORDS:

[*1]

BANKRUPTCY AND INSOLVENCY -- Courts and procedure -- General --Examination of bankrupt pursuant to s. 163 -- Bankrupt's refusal to answer questions pertaining to financial dealings occurring more than five years before bankruptcy -- Scope of examination not limited except for questions shown to be oppressive -- Bankruptcy and Insolvency Act (Can.), ss. 163(2), 167.

STATUTES -- Interpretation -- General -- Bankruptcy and Insolvency Act (Can.), s. 167.

SUMMARY: Application to compel bankrupt to answer questions on Bankruptcy and Insolvency Act (Can.), ss. 163(2) and 167 examination which were refused. The bankrupt objected to questions dealing with events surrounding his financial dealings, the extent of his assets and the disposal of his assets more than five years before bankruptcy, and the sources of income and disposition of assets of the bankrupt's spouse. The bankrupt contended that questions concerning the extent of his assets and their disposal should be restricted to the five-year period prior to bankruptcy unless such questions referred to some definite and existing state of circumstances.

HELD: Bankrupt was ordered to return to answer questions which had been refused. [*2] Section 167 is clear in its direction, viz "any person being examined is bound to answer all questions relating to the business or property of the bankrupt, to the causes of his bankruptcy and the disposition of his property." If the scope of the examination was meant to be circumscribed by some temporal limit the legislation would have said so. Accordingly, no question asked on examination which relates to the business and property of the bankrupt, the cause of bankruptcy and the disposition of property of the bankrupt whenever acquired or disposed of can be irrelevant and questions cannot be confined to matters for which there are grounds for believing have actually occurred. The investigation is meant to be a searching inquiry, which within the ambit of s. 167 is not to be restricted in its scope save and except for questions shown to be oppressive and which place an undue burden on the person examined.

COUNSEL: Orlando V. DaSilva, Solicitor for the bankrupt
Harvey G. Chaiton and George Benchetrit, Solicitors for The Society of Lloyd's

JUDGES: Ferron

Registrar Ferron

[**1] This is a motion to compel the bankrupt Sean Patrick McDonough to answer a series of questions put to him on a s. 163(2) [*3] examination, which were refused.

[**2] Counsel for the bankrupt objected to the questions in four general categories. The first category comprises questions dealing with events surrounding the bankrupt's financial dealings, the extent of his assets and the disposal of assets which occurred more than 5 years before the initial bankruptcy event; the second category relates to the income, sources of income and disposition of assets of the bankrupt's spouse; the third category asks for details of the assets of Doneden Holdings, a company which is owned by the bankrupt spouse and the final category deals with a question of solicitor-client privilege.

[**3] The bankrupt's position with respect to the first category is that the questions concerning the extent of the bankrupt's assets, his business interests and the disposal of assets are restricted to the 5 year period prior to the bankruptcy unless such questions refer to some definite and existing state of circumstances and are not directed merely to the hope of discovering something of value in some aspect of the recovery process in the

administration of the bankrupt estate which counsel seems to relate to certain provisions in [*4] avoidance legislation.

[**4] The counsel making the submission was unable to refer me to any case which supports his allegation restricting the scope of the examination and I have been unable to discover any such case. Nor does section 163 assist the bankrupt in this contention.

[**5] On the contrary, s. 167 is quite clear in its direction, viz, "any person being examined is bound to answer all questions relating to the business or property of the bankrupt, to the causes of his bankruptcy and the disposition of his property." If the scope of the examination is meant to be circumscribed by some temporal limit, the legislation would have said so.

[**6] My interpretation of the section is that no question asked on examination which relates to the business and property of the bankrupt, the cause of bankruptcy and the disposition of property of the bankrupt whenever acquired or disposed of can be irrelevant and cannot be confined to matters for which there are grounds for believing have actually occurred. In summary, the investigation is meant to be a searching enquiry, which within the ambit of s. 167, is not to be restricted in its scope save and except for questions which [*5] are shown to be oppressive, i.e., which put an undue burden on the person examined.

[**7] Many courts have said that the scope of an examination under s.163 is "quite wide but is not infinite". The scope, in other words of an examination is unlimited so long as the questions deal with the matters and objects of s.167 and are not oppressive.

[**8] In the matter before me it appears that prior to the bankruptcy of Sean Patrick McDonough, he had substantial assets clearly confirmed in a series of letters of credit given by the bankrupt to The Society of Lloyds in order to increase his underwriting activities with that concern. In 1990 Lloyds made a cash call on the bankrupt to cover losses incurred by them. The cash call letter contained a warning that the estimate of the cash call could be understated which was confirmed in the letter of June 25. 1990, from the underwriting agency to the bankrupt (tabs C and D).

[**9] It is argued that those letters together with the acknowledgment of the bankrupt confirms knowledge in the bankrupt as early as 1990 that in connection with this investment the bankrupt was in for a fairly rough financial period. Lloyd subsequently obtained a substantial [*6] judgment against the bankrupt.

[**10] On The basis of that documentary evidence counsel for The Society of Lloyd's alleges that the bankrupt divested himself of a matrimonial home of which he was the owner and other assets and put R.R.S.P. effectively out of the reach of creditors.

[**11] The bankrupt assigned himself into bankruptcy on September 8, 2000 and in that bankruptcy The Society of Lloyds filed a claim for $2,108,675.00. The only other creditors in the estate are the bankrupt's wife and her company to which I have already referred.

[**12] The examination of the bankrupt seeks to discover the extent of his assets and what happened to the assets, and the bankrupt's spouses' source of funds with which to loan substantial funds to him evidenced by a promissory note for $210,000.00.

[**13] Without dealing with the questions and answers seriatim , the questions which are the subject of this motion are all directed to those objects referred to in s.167, that is, they are questions relating to the particulars of the bankrupt's assets prior to bankruptcy, and their disposition in the circumstances which seem to be indicated with reference to the documentary evidence. [*7] The questions asked concerning the assets and income of the bankrupt spouse are meant to be a means of tracing the disposition of the bankrupt's assets and the source of her funds which may or may not be linked with the disposition of the bankrupt's assets. The questions concerning the company owned by the bankrupt's spouse is meant to discover the bankrupt's interest in that company and, in my opinion, are well within the objects and requirements of s. 167.

[**14] Question 444 refers to legal fees paid by the company owned by the bankrupt spouse. The question asks only for the name of the lawyer to whom the funds were paid and this was refused on the ground that, "the answer would require the disclosure of a privileged communication".

[**15] The solicitor-client privilege is not absolute. It is unnecessary to inquire deeply into the limitations of the rule. It is sufficient to observe merely that the privilege protects only communications. Here the question is directed not to discover any communication but merely the name of the solicitor to whom the fees were paid. How the disclosure of the name of the solicitor in question would compel the bankrupt to disclose communications [*8] surrounding the payment was not explained.

[**16] In the result the bankrupt must return to answer all the questions refused (save questions 335 and 336 which have been abandoned) and all questions which reasonably arise out of the answers given.

[**17] Costs may be spoken to.