

IN THE MATTER OF THE BANKRUPTCY OF GERALD THOMAS REGAN OF SAINT JOHN IN THE  
PROVINCE OF NEW BRUNSWICK

Regan (Re)

File No. NB 8564

New Brunswick Court of Queen's Bench (Trial Division)

2001 A.C.W.S.J. LEXIS 23528; 2001 A.C.W.S.J. 690723; 109 A.C.W.S. (3d) 685

November 13, 2001, Decided

KEYWORDS:

[\*1]

BANKRUPTCY AND INSOLVENCY -- Courts and procedure -- General --Order gave leave to creditor to examine bankrupt and others, including trustee and bankrupt's former accountants -- Accountants were misnamed by corporate name of trustee, which was wholly-owned subsidiary of accountancy partnership -- Creditor was entitled to production of all relevant documents held by accountancy

COUNSEL: R. Gary Faloon, Q.C., on behalf of KPMG Inc. and KPMG LLP  
Bruce Russell for The Society of Lloyds

JUDGES: Registrar Bray

Michael Bray , Registrar

INTRODUCTION

This matter arises in the course of an examination of the bankrupt, the Trustee and others pursuant to subsection 163 (2) of the Bankruptcy & Insolvency Act ("the Act") as authorized in an Order of the Registrar dated July 13, 2001 ("the enabling Order").

The creditor conducting this examination, The Society of Lloyds ("Lloyds"), has requested disclosure by the Trustee of documents that are in the possession of KPMG LLP. At the scheduled hearing on September 17, 2001 counsel for KPMG objected to the request on grounds that KPMG LLP is a separate entity from the Trustee, KPMG Inc., and that the language of the enabling Order which specifically [\*2] mentions KPMG Inc., is not sufficiently large to bind KPMG LLP. Counsel for KPMG further states that a request to tender documents relating to Gerald T. Regan Professional Corporation is beyond the scope of the enabling order because this corporation is not specifically mentioned therein.

Counsel for Lloyds argues that the enabling Order should not be read microscopically and that the clear intent in paragraph 11 of the said order is that it was intended to capture documentation concerning any conveyance to non-arm's length parties.

The arguments raised on September 17, 2000 were canvassed more completely during a telephone conference call conducted on October 17, 2001.

FACTS

On July 11, 2000, Gerald Thomas Regan ("the bankrupt") made an assignment in bankruptcy and KPMG Inc. was duly appointed, as Trustee of his estate. The date of eligibility for the bankrupt's automatic discharge was April 12, 2001.

The Bankrupt suffered medical problems and the discharge hearing was postponed until March 16, 2001. Lloyds opposed the discharge, stating that the Bankrupt was responsible for the fact that his assets were not of a value equal to fifty cents on [\*3] the dollar and that he had not made adequate disclosure concerning property dealings prior to bankruptcy.

An adjournment was granted to allow a further exchange of documents and the bankrupt was examined, under oath, by counsel for Lloyds at the continuation of the hearing on March 30, 2001.

Counsel for Lloyds posed questions concerning the Bankrupt's interest in Parrtown Place Ltd. ("Parrtown") and Gerald T. Regan Professional Corporation, the value of his RRSP investments and whether a corporation named Sheradave Ltd., ("Sheradave") the shares of which are held by the spouse of the bankrupt, operates as a "family trust account".

The evidence concerning Sheradave being uncertain, the Trustee having determined that any property transfer to Sheradave predated the bankruptcy by more than five years, and the discharge hearing not being the appropriate forum to undertake a detailed examination of whether the Bankrupt had any beneficial interest therein, a discharge was granted on April 24, 2001, conditional upon the Bankrupt's vesting with the Trustee the sum of \$6,564.00. The condition was fulfilled and the Bankrupt received an absolute discharge on May 31, [\*4] 2001.

On June 15, 2001 counsel for Lloyds's appeared in the Court of Queen's Bench of New Brunswick, Judicial District of Moncton, before Landry J., to present a motion for relief pursuant to section 38 and subsection 163(2) of the Act. The motions judge ordered that the matter be heard before the Registrar.

The Registrar set the hearing on June 29, 2001 in Moncton but, at the request of counsel for Lloyds and with the consent of the Trustee, agreed to decide the matter on the written submissions only.

The primary document in support of the Order requested was the affidavit of Bernard F. Miller, counsel for Lloyds, dated April 23, 2001. Paragraphs 6 to 12 of this affidavit outline his concern that the assets of Sheradave during the six years prior to the bankruptcy appeared to have increased in value to an extent that could not be explained by relying on only market factors. Correspondence from Mr. Miller to the Trustee and counsel for the bankrupt which is attached as exhibits to the affidavit indicates his postulate that the augmentation may be explained by a transfer of funds from the bankrupt to Sheradave prior to the bankruptcy but after the transfer [\*5] of the company shares to his spouse in April 1993.

The Trustee on June 22, 2001, confirmed that she did not oppose the motion nor the draft order presented for her review. The order, the applicable paragraphs of, which read as follows, was signed by the Registrar without substantial modification on July 13, 2001.

1. The Applicant may and it is hereby authorized pursuant to section 38 of the Act to commence and prosecute proceedings in its own name and at its own expense and risk, for the purpose of setting aside the settlement and, or conveyance of shares in Sheradave Ltd. made by the bankrupt upon and to his spouse, Shirley E. Regan, and to either or both of his children Sharon Regan and David Regan in or about 1993;

2. AND IT IS FURTHER ORDERED that the Applicant may and it is hereby authorized pursuant to section 38 of the Act to commence and prosecute proceedings in its own name and at its own expense and risk, for the purpose of challenging the settlement of any assets of the bankrupt upon Sheradave Ltd. between January 1, 1994 and July 11, 2000 being the date of bankruptcy;

3. AND IT IS FURTHER ORDERED that notice of the granting of this order upon the other creditors [\*6] of the said bankrupt shall be deemed to be sufficiently served by mailing this said notice in a prepaid addressed envelope by registered mail to each of the said creditors who have proved claims against the bankrupt estate at their place of business or address as shown in the bankrupt's statement of affairs filed;

4. AND IT IS FURTHER ORDERED that service of notice granting this order shall be deemed to be made on the day following the date on which the same is mailed as aforesaid;

5. AND IT IS FURTHER ORDERED that all benefits to be derived from the proceedings authorized by this order together with the costs of same, shall belong exclusively to the applicant, and to such other creditors of the said bankrupt who may within seven days of the service upon them of the notice of the granting of this order as hereinafter provided, agree to contribute pro rata according to the amount of their respective claims to the expense and risk of such proceedings, and who within the like time in writing directed to McInnes Cooper, solicitors for the Applicant herein, signify their agreement;

6. AND IT IS FURTHER ORDERED that the costs of the Applicant and of such others as may join with it [\*7] in the said proceedings shall be paid, and after paying the said costs, the balance, if any, shall be divided between the said Applicant and any creditors who may contribute under paragraph 4 hereof pro rata according to the respective amounts of their claims in addition to any dividends that they may be entitled to out of the said bankrupt's other assets but only to the extent of their said claims;

7. AND IT IS FURTHER ORDERED that in case there be a surplus after paying the Applicant its said claim and costs and the costs of the bankruptcy proceedings herein and the claims of such other parties, if any, entitled to participate, according to the priority of the same respectively as determined by paragraph 5 hereof, such surplus shall be paid to the Trustee in augmentation of the said bankrupt's estate;

8. AND IT IS FURTHER ORDERED that if any creditor or creditors shall fail to join in the said agreement provided for in paragraph 4 within the time hereby limited, they shall be thereafter excluded from participating in the benefits to be derived from the said proceedings

9. AND IT IS FURTHER ORDERED that the Trustee shall provide the Applicant within four days of service of this [\*8] order upon him with a list of the names and addresses of all creditors who have proven claims against the said estate;

10. AND IT IS FURTHER ORDERED that the Trustee shall within four days of service of this order upon him, execute an assignment assigning all his right, title and interest in the subject matter of the proceedings and shall transfer and make available, all books and documents in support thereof or relevant thereto and that such assignment shall vest in The Society of Lloyd's and such other creditors as may join in these proceedings all the right, title and interest which the said Trustee has, had or shall have in the subject matter of the proceedings by virtue of his office as Trustee; and

11. The said creditor be and is hereby authorized pursuant to subsection 163(2) of the Act to examine the bankrupt, the bankrupt's spouse and Sheradave Ltd. shareholder, Shirley E. Regan, the bankrupt's two children, Sheran Regan and David Regan, who are also Sheradave Ltd. shareholders, the bankrupt's former accountants at KPMG Inc. and the Trustee in Bankruptcy, Ms. Susan Reidpath of KPMG Inc., for the purpose of investigating the administration of the bankrupt estate in connection [\*9] with the apparent settlement and conveyance of certain assets of the bankrupt upon or to his spouse and, or, upon or to Sheradave Ltd. and, or upon or to other persons with whom the bankrupt dealt on a non-arm's length basis, within the period January 1, 1990 to the date of bankruptcy herein; and in connection therewith to require the production of any books, documents, correspondence or papers relating to any such settlements or conveyances as are in the possession or power of the particular person being so examined.

September 17, 2001 was the date established for the examination of the Trustee pursuant to subsection 163(2) of the Act.

On September 10, 2001, counsel for Lloyds wrote to the Trustee requesting that she make available at the examination the following documentation:

1. all files and all contents thereof and other documentation whatsoever of KPMG Inc. or of personnel thereof that relate in any way to the work of KPMG Inc., within the period January 1, 1990 to the date of bankruptcy, as accountants for Gerald Thomas Regan and as accountants for any companies, including particularly, Sheradave Limited [sic] and Gerald T. Regan Professional Corporation, [\*10] with respect to which Gerald Thomas Regan operated on a non-arm's length basis at any time within the said period;

2. each and every file and document whatsoever (originals or copies) (including financial and corporate records, correspondence, etc.) held or controlled by KPMG Inc. that addresses, evidences or that otherwise relates in any way to each and every transfer of shares of Sheradave Limited [sic] and/or of shares of Gerald T. Regan Professional Corporation from Gerald Thomas Regan to any member of his family or to any entity at the time operating on a non-arm's length basis with Gerald Thomas Regan or with any member of his family, occurring within the period January 1, 1990 to date of bankruptcy, and also all documentation whatsoever relating to what consideration, if any, was received for each and every such transfer;

3. each and every file and document whatsoever (originals or copies) (including financial and corporate records, correspondence, etc.) held or controlled by KPMG Inc. that addresses, evidences or that otherwise relates in any way to each and every transfer of any assets whatsoever of Gerald Thomas Regan to any member of his family or to any entity at the [\*11] time operating on a non-arm's length basis with Gerald Thomas Regan or with any member of his family, occurring within the period January 1, 1990 to date of bankruptcy, and also all documentation whatsoever relating to what consideration, if any, was received for each and every such transfer.

The Trustee refused to produce documents from January 1, 1990 to the date of bankruptcy, documents related to Gerald T. Regan Professional Corporation and documents in possession of KPMG LLP, in their capacity as former accountants of Gerald T. Regan. The grounds for the objection generally were that these documents were not mentioned in the enabling order and specifically that KPMG LLP is an entity distinct from KPMG Inc. which acted as Trustee.

#### QUESTION

What documents related to the Estate of Gerald T. Regan must be produced by the Trustee pursuant to the Order of July 13, 2001?

#### DECISION

Paragraph 11 of the enabling order permits examination of the Trustee, Ms. Susan Reidpath of KPMG Inc., the bankrupt and three other individuals: the bankrupt's spouse, Shirley E. Regan and his two children, Sheran Regan and David Regan. These persons are obliged by the clear [\*12] terms of this document to produce "any books, documents, correspondence or papers relating to ... settlements or conveyances "... "of certain assets of the bankrupt upon or to his spouse and, or, upon or to Sheradave Ltd. and, or upon or to other persons with whom the bankrupt dealt on a non-arm's length basis." Two corporate entities besides the Trustee are also subject to the same provisions of this order, Sheradave Ltd. and "the bankrupt's former accountants at KPMG Inc."

The primary presenting problem at the examination was the latter incorrect designation of the accountants being at KPMG Inc. rather than being at KPMG LLP.

It is obvious that this was an oversight on the part of the moving party's counsel who drafted the order. The intent was clear but the written designation was wrong according to the Trustee who clearly has knowledge of the internal structure of KPMG LLP and its wholly owned subsidiary KPMG Inc.

The relief requested in part 2 of the Notice of Motion filed with the Court in the Judicial District of Moncton, on April 23, 2001 was tracked closely in the language of paragraph 11 of the Draft Order presented for signature. Susan Reidpath [\*13] of KPMG Inc. by letter dated June 13, 2000 informed Mr. Miller, counsel for Lloyds, of the difficulty in accessing files of KPMG LLP. Although she did not specifically state that these two were separate corporate entities, the letter should have triggered some enquiries that would have led to clarity in the Order. I note further, however, that no evidence has been presented on behalf of either division of KPMG to elucidate the corporate structure other than a standard note on correspondence that KPMG Inc. is a "wholly owned subsidiary of KPMG LLP". That having been said, if KPMG LLP, accountant to the bankrupt, is a distinct corporate entity from KPMG Inc., the Order should be amended to reflect this. An order binding the accountant will require the production of books, documents, correspondence or papers in connection with the settlement and conveyance, if any, of assets of the bankrupt upon or to his spouse and upon or to Sheradave Ltd. for the period of January 1, 1990 to the date of bankruptcy. The order also requires such documents for settlements or conveyances to "other persons with whom the bankrupt dealt on a non-arm's length basis". How should these latter persons be defined? [\*14]

Because evidence obtained from a section 163 examination can be filed with the Court and become thus public documents, some consideration must be given to setting boundaries on the extent of the search. The term "other persons" cannot be read large to include anybody nor to require the accountant to make the determination of which individuals in an undefined group might be categorized as non-arm's length. One might also note that the language of paragraph 11 does not precisely track that of ss. 163(2) which speaks of "any other person [Emphasis start] named [Emphasis end] in the order" (emphasis added). The term "other persons" must be read ejusdem generis. Reference may be made to the third recital in the commencement of the Order which makes clear that the basis for the remedy sought is the 1993 transfer by the bankrupt of his shares in Sheradave to his wife and an alleged transfer of assets to Sheradave between January 1994 and the date of the bankruptcy ("the indicated time period"). It is on this basis that the scope of the examination must be framed. For convenience these will be referred to hereafter as the "subject transactions". Questioning of the bankrupt's wife [\*15] is an obvious necessity and the questioning of his children, Sheran Regan and David Regan, who are currently shareholders in Sheradave is equally appropriate. The Trustee and the accountants are obliged to furnish documentation relating to transfers of assets from the bankrupt directly to Sheradave or to his wife and children during the indicated time period. Documentation of transfers of assets from the bankrupt to the named family members or to Sheradave in the period of January 1, 1990 to the date of bankruptcy that relate to or in any way

elucidate the circumstances of the subject transactions, shall also be disclosed. Documentation of settlement or conveyances between the bankrupt and persons other than the named family members will be required only if they are related to the transactions already mentioned and if these individuals fall within the definition of “related persons” found in subsection 4(2) of the Act. Transactions involving Gerald T. Regan Professional Corporation and Paratown, corporations not named in the Order, will be subject to disclosure if they relate to the subject transactions and provided that these corporations meet the test of relatedness found in subsection [\*16] 4(2), paragraphs (b) and (c) of the Act.

The request of counsel for Lloyds for disclosure asked for “all files and all contents thereof”. Only those documents which fit the criteria indicated in the last paragraph are subject to disclosure.

KPMG LLP shall have twenty-one days to furnish a list to counsel for Lloyds of all the documentation that is in their possession or power, and arrangements may thereafter be made for a viewing of those items listed and copying as required prior to the resumption of the examination.

If there is further disagreement between the parties concerning the disclosure of documentation, decisions will be made on a specific basis once the items have been particularized.

There will be no order as to costs on this motion.