

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Holly C. Beard
Mr. Justice Marc M. Monnin
Madam Justice Karen I. Simonsen

BETWEEN:

<i>LEO KAI YEN WONG</i>)	<i>L. K. Y. Wong</i>
)	<i>on his own behalf</i>
)	
<i>(Plaintiff) Appellant</i>)	<i>W. S. Gange and</i>
)	<i>T. K. Reimer</i>
<i>- and -</i>)	<i>for the Respondent</i>
)	
<i>DYKER LAW CORPORATION</i>)	<i>Appeal heard:</i>
)	<i>September 30, 2019</i>
<i>(Defendant) Respondent</i>)	
)	<i>Judgment delivered:</i>
)	<i>February 12, 2020</i>

SIMONSEN JA

[1] The plaintiff (Wong) appeals a decision of a motion judge dismissing his action on the basis that it is a nullity due to his lack of capacity. The motion judge concluded that, because the statement of claim was filed when Wong was an undischarged bankrupt, he had no capacity to commence the action as the cause of action was vested in his trustee in bankruptcy (the trustee) (see section 71 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the *BIA*)).

[2] In the statement of claim, Wong seeks damages from the defendant law corporation (Dyker), in breach of contract or a duty of care, for providing

allegedly negligent professional advice in connection with a personal injury claim.

[3] The parties agree that a bankrupt's claim for damages for personal injury is exempt from the vesting provisions of the *BIA* and may be pursued by the bankrupt. On appeal, Wong asserts that the motion judge erred by concluding that his claim against Dyker does not fall within that exemption.

[4] In his notice of appeal, Wong suggested the alternate position that, if the claim did vest in the trustee, the motion judge erred by failing to consider the possibility of regularizing the statement of claim on the basis that the cause of action has since been returned to Wong as unrealisable property under section 40(1) of the *BIA* (the assignment). However, Wong did not pursue this argument. Instead, he maintained that there was no need for the trustee to provide the assignment because the claim was exempt from vesting.

[5] I need not deal with Wong's alternate position because, for the reasons that follow, I am satisfied that the motion judge erred in concluding that Wong lacked capacity to bring the claim.

The Statement of Claim

[6] Although the statement of claim is somewhat unclear, it alleges that Dyker provided negligent advice to Wong in connection with a settlement offer made by Wong's former employer (Manitoba Hydro) and union (CUPE) that was intended to resolve his claim for damages for personal injuries caused by Manitoba Hydro. Wong alleges that Manitoba Hydro caused those personal injuries, "with full knowledge and concurrence of CUPE", inflicting

years of “severe psychological harm” “which resulted in him being unable to work from February 25, 2007 until this present day”. Manitoba Hydro is said to be “wholly responsible for ruining the plaintiff’s mental health”.

[7] The statement of claim also asserts that, relying on Dyker’s advice, Wong accepted the settlement offer which “was a far cry” from his total claim against Manitoba Hydro and CUPE. It is alleged that, rather than recommending that he accept the settlement offer of \$105,000, “The prudent advice [Dyker] should have given [Wong] was . . . to negotiate a much better settlement” or “vigorously get Manitoba Hydro and CUPE . . . to pay [Wong] the \$1.2M+ worth of damages”.

The Motion Judge’s Reasons for Decision

[8] In oral reasons dismissing the action, the motion judge stated:

The action relates to a contract that you, Mr. Wong, entered into with the Dyker Law Corporation. You entered into a contract. Your damages flow from that contract. This is not a [tort]. This is not a wrongful dismissal. This is not an employment contract. This doesn’t fall within the exceptions specified in the Bankruptcy Act. This is a matter that was subject to the estate -- to the trustee governing your estate. You commenced an action while you were an undischarged bankrupt in respect of a matter that you had no authority to do so. That’s why I was asking, under what authority did you commence the action? You indicated your position was, well, it’s pain and suffering. [Defence counsel] has pointed out no, those are the damages that you say flow from a breach of contract, and the contract is a matter that falls within the estate of the bankrupt, and there is no exception to it.

[9] The motion judge concluded that the action was a nullity and that “[t]he actions of the trustee cannot revive it”.

Motion for Fresh Evidence

[10] Wong brings a motion to admit as fresh evidence the transcript of his appearance before a judge of the Court of Queen's Bench on July 13, 2018, in connection with his appeal of a master's decision dismissing his application to annul his bankruptcy. Wong had brought the application for annulment (which he has since abandoned) in order to address the assertion that he lacked capacity to bring the claim against Dyker. At the appearance on July 13, there was discussion about whether annulment was necessary given that, after the issuance of the statement of claim, the trustee had provided the assignment.

[11] I am not satisfied that the transcript, as part of the court record, constitutes fresh evidence that requires a motion for admission. In any event, it is not relevant to the issue raised on appeal as it has no bearing on the character of the claim and whether it vested in the trustee.

The Positions of the Parties

[12] Wong asserts that his cause of action against Dyker assumes the characteristics of the underlying personal injury claim in respect of which Dyker provided the allegedly negligent advice and is therefore exempt from the vesting prescribed by the *BIA*. He contends that the issue is not whether the action sounds in contract or tort, but whether the claim is fundamentally a personal one.

[13] Dyker maintains that the motion judge was correct in concluding that Wong lacks capacity to bring the action. In the statement of claim, Wong does not allege that Dyker caused him personal injury. Rather, the substance

of his action is for breach of contract which does not fall within any of the exemptions to the general vesting rule, the result of which is that an undischarged bankrupt has no capacity to prosecute the claim.

Standard of Review

[14] Dyker's motion for dismissal of the action was brought by way of a motion for summary judgment. The standard of review applicable to a decision on summary judgment was summarised in *Joyce et al v Government of Manitoba*, 2018 MBCA 80 (at para 23):

. . . Questions of law (including the interpretation and application of the law) are reviewed on the standard of correctness, while questions of fact or mixed fact and law are reviewed on the standard of palpable and overriding error. If, from a question of mixed fact and law, there is an extricable question of law, that question of law is reviewed on the standard of correctness. The granting or denying of a motion for summary judgment is an exercise in discretion, and that discretion should not be overturned unless the judge has misdirected himself or his decision is so clearly wrong as to amount to an injustice. . . .

[15] The fundamental issue on this appeal is whether, at law, a claim against a lawyer for professional negligence in providing advice with respect to a personal injury claim is a claim for personal loss, such that it is not vested in the trustee. This question of law is reviewable on a standard of correctness.

[16] As an aside, although Dyker moved to dismiss the claim on summary judgment (see r 20 of the Manitoba, *Court of Queen's Bench Rules*, Man Reg 553/88 (the *QB Rules*)), in my view, the more specific and, therefore, appropriate rule would have been r 21.01(3)(b) which provides that

a defendant may move to have an action dismissed on the ground that “the plaintiff is without legal capacity to commence or continue the action”.

Discussion

[17] Section 71 of the *BIA* prescribes that, once a bankruptcy order is made, subject to the *BIA* and the rights of the secured creditors, the bankrupt’s property passes to the trustee in bankruptcy named in the order. Property is defined in section 2 of the *BIA* to include “things in action”.

[18] A long-standing foundational principle is that, where a cause of action vests in a trustee in bankruptcy, it may not be pursued by an undischarged bankrupt as any such action is a nullity, void *ab initio* (see *Long v Brisson*, 1992 ABCA 184 at paras 3-5; *Wright v Guardian Insurance Co of Canada*, 1995 CarswellBC 890 (SC); *Wallace v United Grain Growers Ltd*, [1997] 3 SCR 701; and *Cairns v Dewis*, 2009 MBQB 186 at paras 42-43).

[19] Certain exceptions are prescribed by the *BIA* and the jurisprudence. The jurisprudence provides that, although claims for proprietary loss vest in the trustee, claims for personal loss do not (see Roderick J Wood, *Bankruptcy and Insolvency Law*, 2nd ed (Toronto: Irwin Law, 2015) at 96-99; and Halsbury’s Laws of Canada (online: Lexis Advance Quicklaw <www.advance.lexis.com>), *Bankruptcy and Insolvency*, “Property of the Bankrupt and Scheme of Distribution: Property of the Bankrupt: Property of the Bankrupt Vesting in the Trustee and Divisible Among Creditors: Rights of Action” (IV.1.(2)(e)) at HBI-72 “General Principle” (Cum Supp – current to June 1, 2018)).

[20] Choses in action for personal loss that are exempt from vesting include claims where the damages are to be estimated by reference to injury to the bankrupt's person, namely, for pain and suffering or mental distress or reputational damage. In such cases, the cause of action does not vest in the trustee in bankruptcy and may be advanced by the bankrupt.

[21] In the oft-cited case of *Re Hollister*, [1926] 3 DLR 707 (Ont SC (Bank)), the Court stated (at p 709):

. . . It is only actions which relate directly to the bankrupt's property and can be converted into assets for the payment of creditors that pass to the debtor's trustee. Causes of action arising from bodily or mental suffering, such as actions for assault, seduction, criminal conversation, and damages for personal injuries, remain in the bankrupt (*Howard v. Crowther* (1841), 8 M. & W. 601, 151 E.R. 1179).

[22] In *Clement v AG of Canada and Mark Gallant*, 2012 ONSC 5823—citing *Stoneman v Gladman*, 2005 CarswellOnt 3343 at para 27 (Sup Ct J), which quoted WB Williston & RJ Rolls, *The Law of Civil Procedure* (Toronto: Butterworths, 1970) vol 1 at 173—the Court stated (at para 39):

Not all causes of action vest in the trustee, but only those which belong to the bankrupt's estate and which may be applied for the purpose of distribution amongst his creditors. . . . Consequently, the right of action does not vest in the trustee where the damages claimed are to be 'estimated by immediate reference to pain felt by the bankrupt in respect of his body, mind or character, and without immediate reference to his rights or property.' . . .

[emphasis added]

[23] Similarly, in *Meisels v Lawyers Professional Indemnity Company*, 2015 ONCA 406, the Court wrote (at para 13):

Certain exceptions to s. 71 have been carved out by the jurisprudence. One of the exceptions is where the claim or loss is personal in nature rather than proprietary, such as where the damages claimed are to be estimated by reference to injury to the bankrupt's person, i.e. for pain and suffering or mental distress or reputational damage. In such cases, the cause of action does not become the property of the trustee in bankruptcy and may be pursued by the bankrupt in his or her own right: *Wallace v. United Grain Growers Limited*, [1997] 3 S.C.R. 701, at paras. 38 and 150; *Clement v. A.G. of Canada and Mark Gallant*, 2012 ONSC 5823, 82 E.T.R. (3d) 270, at paras. 39-40.

[24] The underlying policy for the exemption for personal injury claims was articulated in *Egan v Grayson* (1956), 8 DLR (2d) 125 (Alta SC), citing *Sibley v Nason*, 196 Mass 125 at 130 (Sup Jud Ct 1907), in terms of not “coin[ing] into money”, for the profit of creditors, the personal injuries of the bankrupt (at p 127):

... “It is not, and never has been, the policy of the law to coin into money for the profit of his creditors the bodily pain, mental anguish or outraged feelings of a bankrupt. None of the federal or English bankruptcy acts nor our own insolvency statutes, have gone to that length.”

[25] As the Supreme Court of Canada explained in the leading decision of *Wallace*, a purposive approach must be adopted when interpreting the scope of the exemptions to the vesting provisions of the *BIA*. The Court addressed the scope of the exemption for wages prescribed by section 68(1) of the *BIA* (as it then read).

[26] In *Wallace*, the appellant was fired from his job and made claims in both tort and contract. In addition to a claim for wrongful dismissal, he sought damages for mental distress, loss of reputation and prestige, and punitive damages. The parties agreed that the claim for mental distress and

loss of reputation would be personal in nature and, thus, would not form part of the appellant's property divisible among creditors (see para 38). The issue was with respect to damages claimed for wrongful dismissal and whether they constituted a claim for "wages" that was exempt from vesting. Iacobucci J, for the majority, held that such a claim, although awarding damages, was still exempt as being a claim for wages. He stated (at para 66):

. . . The fact that this sum is awarded as damages at trial in no way alters the fundamental character of the money. An award of damages in a wrongful dismissal action is in reality the wages that the employer ought to have paid the employee either over the course of the period of reasonable notice or as pay in lieu of notice. Therefore, in accordance with the exception which is carved out in s. 68(1) for "salary, wages or other remuneration", this money is not divisible among a bankrupt's creditors and does not vest in the trustee. The right of action is the means of attaining these damages and is similarly exempt.

[27] He stated further (at para 69):

. . . In my opinion, to remain true to the spirit of the Act, the words "salary, wages or other remuneration" in s. 68(1) must include an award of damages for wrongful dismissal. The same policy rationales that exempt salary, wages and other remuneration from automatically vesting in the trustee surely must operate in the wrongful dismissal context as the function of such damages is equivalent to wages or salary earned in the course of ongoing employment. To hold otherwise would run contrary to Parliament's intention to put the needs of families ahead of those of creditors.

[28] *Wallace* was applied in *Landry (Re)* (2000), 192 DLR (4th) 728 (Ont CA) (at para 20):

. . . What is of relevance to the question presently under consideration is the finding by the Court that *Wallace*, an

undischarged bankrupt, could maintain his action against his former employer for damages for wrongful dismissal not because of the timing of the acquisition of the property “but rather, because of the nature of the property in question” (para. 59) which the court equated to “wages”. . . .

[emphasis added]

[29] The comments in *Wallace* and *Landry* focus on the nature of the property, namely, its fundamental character, in order to achieve the objective of the exemption.

[30] As I have explained, the objective of the exemption for personal injury claims is to ensure that a bankrupt’s creditors do not profit from his pain and suffering. I must determine the fundamental character of Wong’s claim against Dyker in the context of that objective.

[31] To do so, I turn to the specific allegations in the statement of claim and the nature of the damages claimed. Given that there is an allegation that Dyker was negligent for not recommending that Wong pursue his claims against Manitoba Hydro and CUPE, the action against Dyker will necessitate a “trial within a trial” (John A Campion & Diana W Dimmer, *Professional Liability in Canada* (Toronto: Thomson Reuters, 2016) vol 1 (loose-leaf updated 2016, release 4), ch 4 at para 4.3(c)(iii)). To succeed against Dyker, Wong must establish not only that Dyker was negligent, but that his claims against Manitoba Hydro and CUPE would probably have succeeded, and the amount of the damages lost by his not pursuing those claims.

[32] A representative decision in this area is *Fisher v Knibbe*, 1992 ABCA 121. In *Fisher*, a lawyer missed a limitation period and the Court

discussed the measure of damages and the notion of a “trial within a trial” (at para 12):

After conducting the “trial within a trial” to determine what damages, if any, [for which] a negligent solicitor is liable for missing a limitation period, three results are possible. First, the trial judge could find that had the case gone to trial the plaintiff would have been successful and in such case 100% of the lost damages would be awarded against the solicitor. Second, the trial judge could find that the plaintiff would not have been successful therefore only nominal damages may be awarded against the solicitor. Finally, where time has passed to such an extent that a “trial within a trial” would be impossible, then the court must to the best of its ability calculate the value of the opportunity lost to the plaintiff and award damages against the solicitor on that basis.

[33] Therefore, the quantum of damages found to be caused by Dyker’s negligence will not necessarily correspond with the amount Wong would have recovered from Manitoba Hydro and CUPE were he successful in his personal injury claims against them. However, the “trial within a trial” makes clear that the damages recoverable from Dyker would be estimated by reference to the amount recoverable by Wong on his personal injury claims. His claim against Dyker would, in effect, operate to compensate him for those injuries.

[34] Accordingly, to attain the objective of ensuring that Wong’s creditors do not benefit from his pain and suffering, his claim against Dyker must be exempt from vesting in the trustee.

[35] Therefore, the motion judge erred in concluding that Wong’s cause of action against Dyker vested in the trustee and that he therefore lacked capacity to bring the claim. Wong retained the capacity, as an undischarged

bankrupt, to commence an action for negligent legal advice provided in connection with a claim for damages for personal injury.

Disposition

[36] For the reasons outlined, I would allow the appeal.

[37] I would order costs in favour of Wong in the Court of Queen's Bench in the amount of \$1,500 (plus disbursements) and in this Court in the amount of \$1,000 (plus disbursements).

Simonsen JA

I agree: _____
Beard JA

I agree: _____
Monnin JA