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on

Insolvency Law

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THE SUPREME COURT OF BRITISH COLUMBIA DETERMINES THAT SECTION 215 OF THE BANKRUPTCY AND INSOLVENCY ACT APPLIES TO EXTRA-TERRITORIAL PROCEEDINGS

In *Re Braich* (2007), 2007 CarswellBC 2660 (B.C.S.C.) the Supreme Court of British Columbia found that section 215 of the Bankruptcy and Insolvency Act (the “BIA”), which requires a party obtain leave of the Court before bringing an action against a Trustee, applies to actions brought in foreign jurisdictions.

Mr. Braich was declared bankrupt in 1999, with KPMG Inc. being appointed trustee. Mr. Braich had not been discharged. On February 2, 2007, without complying with s. 215 of the BIA, Mr. Braich filed suit in United States District Court, Western District of Washington at Seattle (the “Washington Claim”) against KPMG and two KPMG employees, as well as legal counsel who represented KPMG in the bankruptcy proceedings (the “Applicants”).

Relying on s. 215 of the BIA, the Applicants, KPMG and its legal counsel applied for a declaration that Mr. Braich was required to obtain leave from the British Columbia court before bringing any proceedings, including the Washington Claim, against the Applicants, whether in the State of Washington or elsewhere. The Applicants earlier obtained a stay of the Washington Claim to allow them to bring this application.

Section 215 of the BIA provides:

Except by leave of the court, no action lies against the Superintendent, an official receiver, an interim receiver or a trustee with respect to any report made under, or any action taken pursuant to, this Act.

The first question analyzed by the court was whether the

Washington Claim could be characterized as “any action taken pursuant to the Act” as those words are used in s. 215.

The Court found the Washington complaint was quite clear that the claims against the KPMG partners arose while the individuals were acting within the scope and course of their employment with KPMG. The complaint contained no allegations against the KPMG partners or KPMG for anything unrelated to KPMG’s capacity as trustee of Mr. Braich under the BIA. All of these allegations clearly fell within the ambit of the activities enumerated in s. 215.

The next question considered by the court was whether s. 215 was intended to apply to foreign proceedings.

The Court stated that the purpose of s. 215 is to protect officers of the court, including trustees who are charged with administering the BIA, from baseless, frivolous or vexatious lawsuits which would otherwise interfere with the due administration of the bankrupt’s estate by the trustee so that the purposes of the BIA will not be frustrated. To obtain leave, the petitioner must demonstrate that the proposed action is not frivolous or vexatious and that the evidence discloses a cause of action.

In considering whether s. 215 is intended to apply outside Canada, Brenner C.J.B.C. noted that the relevant provisions of the Act must be read in context of the legislation. Section 215 is intended to protect a trustee against frivolous and vexatious actions, to protect both the creditors and the public interest in the proper administration of a bankrupt estate, to ensure that the bankruptcy process is not made unworkable and to preserve the ability of trustees and receivers to discharge their duties flexibly and efficiently. Brenner C.J.B.C. was of the view that these objectives would be severely constrained

if protection under s. 215 was limited to domestic actions in Canada (the BIA provides that a trustee's power is not restricted and extends worldwide).

Given that the purpose of s. 215 is to protect trustees from frivolous and vexatious lawsuits pertaining to actions taken pursuant to the BIA, and given that the BIA requires trustees to perform duties outside Canada where required, Brenner C.J.B.C. was of the view that it would be anomalous if a trustee's s. 215 protection was to be confined to actions commenced within Canada. He concluded that s. 215 confers on a trustee the statutory protection such that leave must be obtained from the Canadian bankruptcy court before any action, whether foreign or domestic, is commenced against the trustee.

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