

BANKRUPTCY IN THE CHAIN OF TITLE

First of all, I must gratefully acknowledge the work of Roberta J. Clarke of the firm of Blois, Nickerson, Palmetter & **Bryson, who** prepared a paper for and spoke to the Real Property subsection of the Canadian Bar Association (Nova Scotia Branch) in April, 1984. Her paper provided the basis for my presentation.

There are two methods of discovering that there is a bankruptcy affecting the chain of title:

1. An Assignment in Bankruptcy or Receiving Order has

been indexed in the Registry of Deeds under the name of the Bankrupt and the Trustee (Registry Act, R.S.N.S. 1967, c.265, s.10(4) and the Bankruptcy Act, R.S.C. 1970, ch. B-3, s.52(1)).

2. A search of the index of the Bankrupts in the Canada

Gazette located in the offices of the Registry of the Supreme Court and the Official Receiver (Bankruptcy Act, s.181(2)). I would suspect that this is rarely done.

Questions for consideration are:

1. If an Assignment or Receiving Order has been made, how

is the transfer of title, from the Trustee or the Bankrupt to a bona fide purchaser, perfected?

2. What effect does the Assignment or Receiving Order

have on Judgments recorded before filing of the Assignment or Receiving Order and after filing of the Assignment or Receiving Order but before the registration of the conveyance?

1. Perfecting the transfer of title once an Assignment or Receiving Order has been made:

Consider two possible scenarios:

- (a) Transfer of title from a Trustee after filing and registration of an assignment;
- (b) Transfer of title by a Bankrupt.

The rights of the Bankrupt cease **upon the Assignment** or Receiving order being filed with the official Receiver and, subject to the rights of secured creditors, the title is vested in the Trustee (s.50(5)). Note that the Assignment is inoperative until it is filed with the local Official Receiver. (s.31(3)). Usually the copy of the Assignment filed in the Registry of Deeds will have been date stamped by the Official Receiver's office. If not, a call should be made to the local Receiver to ensure that this Assignment has been properly filed. The Assignment or Receiving Order may be filed in the local Registry of Deeds (s.52(1)).

If you become aware that there is a bankruptcy involved and you will be receiving a Deed from a Trustee, you should insist that the Assignment or Receiving order be filed at the Registry of Deeds thereby perfecting the title in the Trustee.

Once you have notice of the Assignment or Receiving Order on the Registry, the next consideration is **whether the** Bankrupt estate will be administered in a summary fashion or otherwise.

If the bankruptcy is administered under Summary Administration authorized by Section 126 of the Bankruptcy Act, the Trustee may act alone without the appointment of inspectors and has the power to sell the property without the permission

;i and approval of inspectors. Therefore, if you are receiving a Deed from a Trustee of an estate which is being administered under a Summary Administration, the Deed should recite that this is being done to permit a deed without the signature of any inspectors.

If the estate is not being administered under Summary Administration, then you will want to ensure that the Deed has a recital indicating who the inspectors are in the administration and that they have approved the transfer. This is normally indicated on the face of the Deed by signatures of the inspectors signifying their consent. ,

If you receive a Deed from a Bankrupt without knowledge of an Assignment or Receiving order having been made, and no Assignment or Receiving Order has been filed at the Registry of Deeds, then Section 53 gives some protection to a bona fide purchaser or mortgagee for adequate valuable consideration. This section **is similar to Section 17 of the Registry Act** and provides as follows:

s.53 Notwithstanding anything in this Act, a deed, conveyance, transfer, agreement for sale, mortgage, charge or hypothec made to or in favour of a bona fide purchaser or mortgagee for adequate valuable consideration and covering any real or immoveable property affected by a receiving order or an assignment under this Act, is valid and effectual according to the tenor thereof and according to the laws of the province in which the said property is situated as fully and effectually and to all intents and purposes as if no receiving order or assignment had been made under this Act, unless the receiving order or assignment or notice thereof, or caution, has been registered against the property in the proper office prior to the registration of the deed, conveyance, transfer, agreement for sale, mortgage, charge or hypothec in accordance with the laws of the province in which the property is situated. It is therefore important that the Trustee ensure that

the Assignment in Bankruptcy or Receiving Order is recorded at the Registry of Deeds as early as possible, where there is real property involved in the estate.

2. What effect does the Assignment or Receiving Order have on Judgments recorded before filing of the Assignment or Receiving Order and after

the Assignment or Receiving Order but before the registration of the conveyance?

Section 50 (1) of the Bankruptcy Act provides as follows:

Every receiving order and every assignment made in pursuance of this Act takes precedence over all judicial or other attachments, garnishments, certificates having the effect of judgments, judgments, certificates of judgment, judgments operating as hypothecs, executions or other process against the property of a bankrupt, except such as have been completely executed by payment to the creditor or his agent, and except also the rights of a secured creditor.

This, in effect, indicates that a Receiving Order and Assignment takes precedence over Judgments against the Bankrupt except the right of secured creditors. It would appear that Judgment Creditors are not secured creditors as set out in Section 50(1) (see Canadian Credit Men's Trust Association v. Beaver Trucking Limited (1959), 38 C.B.R. 1; 17 D.L.R. (2d) 161 (S.C.C.)).

Section 52(2) provides as follows:

Where a bankrupt is the registered owner of any land or charge, the trustee, on

registration of the documents referred to in subsection (1), is entitled to be registered as owner of the land or charge free of all encumbrances or charges mentioned in subsection 50(1).

Thus the Trustee takes title free and clear of all encumbrances, including judgments, referred to in Section 50(1).

Mortgagees are secured creditors and a bankruptcy does not affect them, and of course, releases would have to be obtained in the usual manner.

Thus, the unsecured creditor or Judgment Creditor does not have a remedy against the property.

Section 49(1) provides that no creditor with a claim provable in bankruptcy shall have a remedy until discharge is granted, unless leave of the Court is obtained. Judgment Creditors have no rights by virtue of Section 52(2). Most claims provable in bankruptcy, which include all debts and liabilities present or future to which the Bankrupt is subject at the date of bankruptcy or to which he may become subject before his discharge by reason of any obligation incurred before the date of the bankruptcy, are released by an Order for Discharge with certain exceptions(s.142).

Debts or liabilities not released by an Order for Discharge are set out in Section 148(1). However, these can only affect property acquired after the Assignment or Receiving order is made. Section 52(2) gives the Trustee the title to property, owned by the bankrupt at the time of the assignment or receiving order, free and clear of any encumbrances set out in 50(1).

However, where you are dealing with property which has been acquired after the date of the assignment, then it is important to recognize that under Section 148(1), there may be certain debts or liabilities which are not discharged and which survive. They may already be in the form of a registered judgment or may subsequently become a registered judgment which will then be a charge against this property aquired after the

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QUALITY OF TITLE

A Trustee can give no better title than a Bankrupt had at the time the Assignment or Receiving Order was made. Thus, you should always check the title behind an Assignment or Trustee's Deed for the proper period.

EFFECT OF DISCHARGE

The only effect of the discharge of a bankrupt is to release debts and liabilities of the Bankrupt other than those set out in Section 148(1). The discharge has no effect on the title of the Trustee or the ability of the Trustee to convey

title. Obviously, the Trustee's ability to deal with the estate of a bankrupt ceases when he has been discharged.

JUDGMENTS ARISING AFTER ASSIGNMENT

Judgments arising after the Assignment but which were incurred by reason of an obligation in existence before the date of the Assignment or Receiving Order, are released by the Discharge with the exception of those set out in Section 148(1). Of course, the title will have already been transferred to the Trustee free and clear of all judgments and so the Trustee is free to deal with the property. The question is relevant, however, for property acquired by the Bankrupt after the filing and recording of the Assignment. A prudent solicitor might wish to wait for a discharge and ensure that these judgments represent obligations that are in fact discharged by that order (i.e. incurred prior to bankruptcy and not of the type enumerated in S. 148(1)). Judgments, which are not the result of obligations incurred before the date of the bankruptcy or represent debts in the ambit of S. 148(1), are not released by the discharge and are charges against after-acquired property and should be released or satisfied in the normal manner.

DIVESTING OF PROPERTY BY TRUSTEE

Under Section 12(11), the Trustee is permitted with the consent of the Inspectors to divest himself of any interest in real property of the bankrupt by Notice of Quit Claim or Disclaimer which may be registered at the Registry of Deeds. If you come across this in your search of title, then the conveyance should be dealt with in the normal manner had there been no Assignment or Receiving Order involved and the judgments, if any, would have to be released or satisfied, or a discharge would have to be filed and recorded. Such disclaimers are unusual, and are almost always executed in favour of a mortgagee of the property.

ANNULMENT OR REVOCATION OF A DISCHARGE

Section 150 provides that this shall not prejudice the validity of the sale or disposition of property done before the

revocation or annulment. However, as a discharge has no effect on the title of a Trustee, this should not affect the transfer of real property by the Trustee.

ENCUMBRANCES TO THE TITLE PLACED BY THE TRUSTEE

The Trustee does **have the power to give security and** mortgage real property with the permission of the inspectors. If this arises in the title, you should require that any such encumbrances be released. The covenant in the Trustees Deed will have to be amended to reflect this encumbrance.

EFFECT OF THE MATRIMONIAL PROPERTY ACT

The Matrimonial Property Act, S.N.S. 1980, Ch.9, s.8(1) provides that a spouse cannot dispose of an interest in a matrimonial home without the consent of the non-owning spouse or a Court order. The question arises here whether or not an Assignment in Bankruptcy is a disposition of the matrimonial home. To my knowledge, there have not been any cases deciding this and it would be interesting to learn whether the Trustees' title is affected by the Matrimonial Property Act.

There is however authority for the proposition that Trustees cannot sell the matrimonial home without the consent of the bankrupt's spouse. Refer here to Saskatchewan case Re Stevenson (1971), 20 D.L.R. (3d) 119 (Sask.Q.B.). Therefore, if you are receiving a deed from a Trustee for a matrimonial home ensure that the non-owning spouse consents to the transfer.

If the non-owning spouse is declared a bankrupt, the right of possession would appear to be a statutory right in equity which is not vested in the Trustee. Thus, the Trustee does not obtain the right to control the disposition of the matrimonial home.

I leave these questions with you as there is no controlling authority in Nova Scotia.