CASE COMMENT:

Leblanc (Re), 2007 NSSC 18, 27 C.B.R. (5th) 299, 796 A.P.R. 225, 250 N.S.R. (2d) 225, 2007 CarswellNS 27 (Registrar).

By Tim Hill

This case should be of interest to real property practitioners as it illustrates what not to do when migrating title under the *Land Registration Act* where an owner has previously been a bankrupt.

The bankrupt was employed as a self-employed person in the logging industry. The bankrupt made an assignment in bankruptcy in June 2004. The statement of affairs filed at the time of the assignment showed that the bankrupt owned two small wood lots. The statement of affairs also indicated that those wood lots were subject to security held by the bankrupt's uncle. He owed his uncle $5,000.

Upon searching title to the properties, the Trustee noted that no mortgage was registered. The Trustee disallowed the uncle's claim for security.

The bankrupt was discharged in April of 2005. The Trustee had not registered a copy of the assignment in bankruptcy at the Registry of Deeds. Nothing had been done by the Trustee about the wood lots.

On May 8, 2006, the bankrupt executed a deed to the wood lots in favour of his uncle. In payment the uncle forgave the original $5,000 debt, and paid the bankrupt another $3,200 in cash. The deed was registered on May 17, 2006. In order to register the transfer of title, the property was migrated under the provisions of the *Land Registration Act*.

On May 18, 2006, the Trustee finally registered a copy of the assignment in bankruptcy at the Registry.

Ultimately, the Registrar granted the Trustee an annulment of the bankrupt's discharge, and put in place a conditional order of discharge requiring the bankrupt to pay to the estate $5,700, which the Registrar determined was the actual loss to the estate as a result of the bankrupt conveying the property.

What is interesting about this case is the question of whether the uncle's title was good against the Trustee under the circumstances. Presumably because of the cost involved, the Trustee simply sought to have the discharge set aside so as to require the bankrupt to pay the loss into the estate. Based on the Trustee's approach, it was not necessary for the Registrar to review in any detail the question as to whether or not the uncle's title was good against the Trustee.

Section 71 of the *Bankruptcy & Insolvency Act* provides:

> On a bankruptcy order being made or an assignment being filed with an official receiver, a bankrupt ceases to have any capacity to dispose of or otherwise deal with their property, which shall, subject to this Act and to the rights of secured creditors, immediately pass to and vest in the trustee named in the bankruptcy order or assignment, and in any case of change of trustee the property shall pass from trustee to trustee without any assignment or transfer.

The Registrar satisfied himself that the uncle and both the bankrupt's solicitor and the uncle's solicitor were aware of the bankruptcy. The Registrar commented ... "this raises a question of whether the migration and conveyance were proper. The uncle and the solicitors are not before me. Accordingly, I make no comment as to whether the Trustee may have a remedy against them".

The uncle was aware of the bankruptcy, and had "actual knowledge" of the Trustee's interest which was not yet registered or recorded, as that interest arose on the assignment by virtue of section 71 of the *Bankruptcy & Insolvency Act* without the need to register any assignment or transfer. That being the case, Section 4(3) of the *Land Registration Act* could not be relied upon by the uncle.

As the uncle was aware of the bankruptcy he would appear to have run afoul of Section 4(4) of the *Land Registration Act* which states:

> 4) A person obtains an interest through fraud if that person, at the time of the transaction,
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> (a) had actual knowledge of an interest that was not registered or recorded;
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> (b) had actual knowledge that the transaction was not authorized by the owner of the interest that was not registered or recorded; and
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> (c) knew or ought to have known that the transaction would prejudice the interest that was not registered or recorded.

This being the case, it seems that the uncle did not obtain an interest in the property in priority to that of the Trustee as the interest was obtained through fraud. Section 20(3) of the *Land Registration Act* deals with the situation:

> A registered interest shall be enforced with priority over a prior interest where the subsequent interest
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> (a) was obtained for value;
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> (b) was obtained without fraud on the part of the owner of the subsequent interest;

(c) was obtained at a time when the prior interest was unregistered; and

(d) was registered at a time when the prior interest was not registered or recorded.

To summerize, it seems that the Uncle's interest was not in priority to that of the Trustee.

Of course, the problem for the migrating solicitor does not end there insofar as according to the Registrar he was aware of the Trustee's interest, but migrated title without reference to that interest.

As previously noted, it is not necessary for there to be any assignment or transfer in order for the bankrupt's property to vest in the Trustee. It simply vests in the Trustee on the granting of the bankruptcy order or upon an assignment in bankruptcy. The solicitor migrating title knew of the bankruptcy. He should therefore be taken to have known that the bankrupt did not own the property, and no longer had the capacity to convey the property. Under these circumstances the solicitor involved should never have migrated the title and changed the registered ownership in the manner in which he did.

I leave it to others to judge whether or not good practice might require solicitors involved in the migration of title under the *Land Registration Act* to ask their clients as to whether at any time while owning the property they have made an assignment in bankruptcy. To my mind such an inquiry is unnecessary. However, if there is any doubt about the existence of a prior bankruptcy, a bankruptcy search should be made online.

On a related point, practitioners should not rely on a discharge order as proof real property has re-vested in a discharged bankrupt. On many occasions in a bankruptcy situation there will be insufficient equity in the home to justify the Trustee attempting to sell the home. More often than not a Trustee will make an arrangement with the bankrupt whereby the bankrupt pays the equity to the estate over time. The bankrupt is subsequently discharged. There may still be money owed the estate under the arrangement with the Trustee.

The Trustee may or may not have registered the assignment in bankruptcy at the Registry. If the assignment was registered at the Registry, then of course that is notice to all that the bankrupt's interest in the property has vested in the Trustee. Nevertheless, often solicitors will rely upon the fact that the Trustee has registered an order of discharge of the bankrupt at the Registry to conclude that the property no longer vests in the Trustee. This is a dangerous practice.

The discharge of a bankrupt, and indeed of the Trustee, does not re-vest property in the bankrupt. It remains vested in the Trustee. In order to re-vest the property in the bankrupt what is required is to register a disclaimer or a Quit Claim Deed from the Trustee to the bankrupt.

It may well be that a Trustee is just sitting on the estate's interest in the property, expecting to be paid

when it is conveyed or mortgaged. Do not get caught relying on a discharge order. Make the call and get the disclaimer or a Quit Claim Deed.