

Court File No. CV-19-627184-00CL
CV-19-627185-00CL
and CV-19-627186-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF THE BANKRUPTCY OF QUADRIGA FINTECH
SOLUTIONS CORP., WHITESIDE CAPITAL CORPORATION AND
0984750 B.C. LTD. D/B/A QUADRIGA CX AND QUADRIGA COIN
EXCHANGE

BOOK OF AUTHORITIES

October 11, 2019

MILLER THOMSON LLP
Scotia Plaza
40 King Street West, Suite 5800
P.O. Box 1011
Toronto, ON Canada M5H 3S1

Gregory Azeff (LSO #: 45324C)
Tel: 416.595.2660
Fax: 416.595.8695

Asim Iqbal (LSO #: 61884B)
Tel: 416.597.6008
Fax: 416.595.8695

Tamie Dolny (LSO #: 77958U)
Tel: 416.597.6076
Fax: 416.595.8695

Representative Counsel for the Affected Users

COX & PALMER LLP
Purdy's Warf Tower
1959 Upper Water Street
Halifax, NS
B3J 3N2

Gavin MacDonald
Tel: 902.421.6262
Fax: 905.421.3130

Representative Counsel for the Affected Users

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Samji, Re

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In Bankruptcy and Insolvency

In the Matter of the Bankruptcy of Rashida Abdulrasul Samji

Gerow J., In Chambers

Heard: September 6, 2013; October 18, 2013

Judgment: November 20, 2013

Docket: Vancouver B121430

Counsel: C.J. Ramsay for Applicant, Trustee in Bankruptcy

D.F. Sutherland for Mohinder Sandhu, Parminder Vickram, Dr. Cameron Vickram and Atul Mehra

P.R. Bennett for Plaintiff, Class VA S121627

Subject: Insolvency; Estates and Trusts

Related Abridgment Classifications

Bankruptcy and insolvency

XIV Administration of estate

XIV.13 Miscellaneous

Headnote

Bankruptcy and insolvency --- Administration of estate — Miscellaneous

Bankrupts had operated fraudulent investment scheme, and some investors received more money from scheme than they invested ("net winners"), while many others lost money ("net losers") — Net losers comprised majority of creditors of bankrupts' bankruptcy estates — Trustee in bankruptcy began taking steps to recover some, or all, of monies paid to net winners — Two of net winners, JT and DT, offered to repay all funds they received from scheme in excess of their investment provided they received release from any and all claims which bankrupts' bankruptcy estate and its creditors might have against JT and DT — Trustee brought application seeking order approving terms of settlement proposal with JT and DT, and four of net losers ("respondents") opposed granting of order — Application granted — Bankruptcy and Insolvency Act was silent with regards to approval of settlement between bankrupt and third party that included full and final settlement of any and all claims against third party which bankrupt and bankrupt's creditors might have against third party — Evidence was that trustee was attempting to enter into settlements rather than pursuing costly litigation against all of net winners — Decision of trustee, with approval of inspectors, to accept this settlement was legitimate business decision — Trustee and inspectors acted reasonably and settlement was not contrary to interests of creditors generally — After balancing competing interests, benefit to creditors as whole of approving settlement outweighed potential prejudice to respondents — This was appropriate circumstance in which to exercise court's inherent jurisdiction to approve settlement.

Table of Authorities

Cases considered by Gerow J., In Chambers:

Eagle River International Ltd., Re (2001), (sub nom. *Sam Lévy & Associés Inc. v. Azco Mining Inc.*) 2001 SCC 92, 2001 CarswellQue 2725, 2001 CarswellQue 2726, (sub nom. *Sam Lévy & Associés Inc. v. Azco Mining Inc.*) [2001] 3 S.C.R. 978, 30 C.B.R. (4th) 105, (sub nom. *Sam Lévy & Associates Inc. v. Azco Mining Inc.*) 207 D.L.R. (4th) 385, (sub nom. *Lévy (Sam) & Associés Inc. v. Azco Mining Inc.*) 280 N.R. 155 (S.C.C.) — referred to
Hoque, Re (1996), 38 C.B.R. (3d) 133, (sub nom. *Hoque (Bankrupt), Re*) 429 A.P.R. 142, (sub nom. *Hoque (Bankrupt), Re*) 148 N.S.R. (2d) 142, 1996 CarswellNS 51 (N.S. C.A.) — considered

Maple Homes Canada Ltd., Re (2000), 2000 BCSC 1443, 2000 CarswellBC 2017, 21 C.B.R. (4th) 87 (B.C. S.C.) — referred to

Residential Warranty Co. of Canada Inc., Re (2006), 2006 ABQB 236, 2006 CarswellAlta 383, (sub nom. *Residential Warranty Co. of Canada Inc. (Bankrupt), Re*) 393 A.R. 340, 62 Alta. L.R. (4th) 168, 21 C.B.R. (5th) 57 (Alta. Q.B.) — considered

Residential Warranty Co. of Canada Inc., Re (2006), 65 Alta. L.R. (4th) 32, 2006 ABCA 293, 2006 CarswellAlta 1354, 275 D.L.R. (4th) 498, (sub nom. *Residential Warranty Co. of Canada Inc. (Bankrupt), Re*) 417 A.R. 153, (sub nom. *Residential Warranty Co. of Canada Inc. (Bankrupt), Re*) 410 W.A.C. 153, 25 C.B.R. (5th) 38, [2006] 12 W.W.R. 213, (sub nom. *Kingsway General Insurance Co. v. Residential Warranty Co. of Canada Inc. (Trustee of)*) [2006] I.L.R. I-4552 (Alta. C.A.) — referred to

Roberts v. E. Sands & Associates Inc. (2013), 2013 CarswellBC 1618, 2013 BCSC 902, 4 C.B.R. (6th) 1 (B.C. S.C.) — considered

Titan Investments Ltd. Partnership, Re (2005), 2005 ABQB 637, 2005 CarswellAlta 1153, 14 C.B.R. (5th) 112, 383 A.R. 323 (Alta. Q.B.) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 37 — considered

s. 183(1) — referred to

APPLICATION by trustee in bankruptcy seeking order approving terms of settlement proposal.

Gerow J., In Chambers:

1 The applicant is the trustee in bankruptcy of Rashida Samji, Rashida Samji Notary Corporation, and Samji & Assoc. Holdings Ltd. (collectively, the "Samji Group"). The Samji Group operated a fraudulent investment scheme from 2003 until it was discovered in January 2012. Some investors received more money from the scheme than they invested (the "Net Winners"), while many others lost money (the "Net Losers"). The Net Losers comprise the majority of the creditors of the Samji Group's bankruptcy estates.

2 On this application, the applicant seeks an order approving the terms of a settlement proposal with two of the Net Winners, John and Diana Tang (the "Tang Settlement"). Four of the Net Losers, Mohinder Singh Sandhu, Parminder Vickram, Dr. Cameron Vickram and Atul K. Mehra oppose the granting of the order (collectively, the "respondents"). The respondents take the position they would be materially prejudiced by the granting of the order because it would preclude their ability to bring an action for fraudulent preference and tracing of trust funds against the Tangs. As well, the respondents say the Tang Settlement would be a precedent for other Net Winners disgorging only their profits. The respondents say this type of settlement would result in an unfair sharing amongst the investors of the total losses from the scheme.

Background

3 From 2003 to January 2012, the Samji Group promoted a fraudulent scheme in which "returns" were paid to investors from their own money or money paid into the scheme by subsequent investors, and not from profits earned by an individual or organization running a legitimate business. At no time did the Samji Group pursue any legitimate business purpose through the scheme. This type of fraudulent scheme is known as a Ponzi scheme.

4 On or about December 5, 2012, Ms. Samji, Rashida Samji Notary Corporation and Samji & Assoc. Holdings Inc. were all assigned into bankruptcy. The applicant was appointed as the trustee in bankruptcy of each of the three estates.

5 Approximately 218 investors invested in the scheme promoted by the Samji Group. Instead of depositing the investors' money into a trust account as agreed upon in Letters of Direction executed by investors, the Samji Group dispersed the monies

without the investors' knowledge or consent. As a result of the Samji Group's conduct, certain investors suffered loss and damage because they did not receive as much money from the scheme as they invested.

6 Some investors, including the Tangs, enjoyed false profits because they received more money from the scheme than they invested. The Tangs received approximately \$157,800 more than the amount they invested in the scheme.

7 In June 2013, the applicant began taking steps to recover some, or all, of the monies paid to the Net Winners. In August 2013, the applicant received a settlement proposal from the Tangs. The Tangs offered to repay all the funds they received from the scheme in excess of their investment provided they receive a release from any and all claims which the Samji Group's bankruptcy estate and its creditors may have against the Tangs.

8 On August 19, 2013, the inspectors of the Samji Group's bankruptcy estate passed a resolution approving the acceptance of the Tang Settlement. The Tangs' proposal has been reviewed by the trustee and in the opinion of the trustee the acceptance of the Tang Settlement is in the best interests of the creditors of the Samji Group's estate.

9 The applicant seeks an order approving the terms of the Tang Settlement including a release of any and all claims which the Samji Group's bankruptcy estate and its creditors have against the Tangs.

Trustee's Position

10 The trustee takes the position that the Tang Settlement should be approved by the Court under its inherent jurisdiction. The trustee submits that the approval of the Tang Settlement is in the best interests of the Samji Group's creditors as a whole, and that any potential prejudice to an individual creditor is outweighed by the benefits to the creditors as a whole.

11 The trustee submits the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 [*BIA*], provides a scheme in which a trustee in bankruptcy is allowed to administer an estate without interference from creditors. It is very difficult for a trustee to administer an estate if every creditor who disagrees with the actions of the trustee can interfere, unless the creditor can show the trustee is exercising an excess of power or improperly administering the estate.

12 The trustee submits that the two preconditions to a court exercising its inherent jurisdiction have been met in this case: (1) the *BIA* is silent on the point; and (2) the benefit of granting the relief outweighs the relative prejudice to those affected by it. The trustee points to the fact that the administration of the *BIA* requires a pragmatic problem-solving approach in which the realities of commerce and business efficacy are considered.

13 The trustee says that if it is not allowed to enter into settlements with the Net Winners, lawsuits will have to be commenced against all of the Net Winners, and limitation periods are running out. The trustee and the inspectors are in a position to assess whether a settlement is advantageous to the creditors as a whole. The trustee points to the fact the inspectors have reviewed the Tang Settlement and approved it. The trustee disagrees that the order being sought sets a precedent for all other Net Winners, and says each case will be determined on its facts.

Respondents' Position

14 The respondents take the position that the approval of the inspectors and the opinion of the trustee should be disregarded or discounted. The respondents submit that contrary to the assertion the trustee was not aware of any party who would be materially prejudiced by the Tang Settlement, they would be prejudiced in two respects:

1) The terms of the proposed order preclude pursuit of both a fraudulent preference and a tracing of trust funds claim by the respondents against the Tangs which might seek to recover the monies the Tangs would have lost if they shared the losses from the scheme equally with the Net Losers; and

2) The Tang Settlement would be part of, and a precedent for, an accounting adjustment whereby the Net Winners would disgorge their profits but no more. Setting such a precedent will not assist with the accounting and adjustment

which is ultimately suitable under applicable principles and procedures, which mandate an adjustment to equalize recovery as far as practical.

15 The respondents agree the Court has jurisdiction to grant the order being sought. However, the respondents submit the release sought goes beyond the scope of the bankruptcy to compromise a chose in action. The respondents say as a result granting such a release would exceed the power of a trustee and therefore the trustee is exercising excessive power.

16 The respondents say they appear to have a cause of action against the Tangs for fraudulent preference, and that right should not be extinguished by granting the order sought. The Court ought not to extinguish a cause of action without hearing the case on its merits unless it meets a test somewhat more stringent but comparable to the plain and obvious test that there is no merit to the cause of action: *Maple Homes Canada Ltd., Re*, 2000 BCSC 1443 (B.C. S.C.) at paras. 30-34.

17 The respondents also rely on *Titan Investments Ltd. Partnership, Re*, 2005 ABQB 637 (Alta. Q.B.), in arguing they have a fraudulent preference action against the Net Winners for not only their profits but also the amount of their investment.

18 In the alternative, the respondents have made a trust claim which was declined by the trustee and which the respondents are intending to appeal. Trust claims pursued by a claimant are not extinguished by the bankruptcy process except on their merits.

Analysis

Applicable Law

19 A superior court retains its inherent jurisdiction in the context of proceedings under the *BIA*: s. 183(1) of the *BIA*; *Eagle River International Ltd., Re*, 2001 SCC 92 (S.C.C.) at para. 20.

20 In order for a court to exercise its inherent jurisdiction in the context of proceedings under the *BIA*, two preconditions must be met:

- 1) The *BIA* must be silent on a point or not have dealt with the matter exhaustively; and
- 2) After balancing competing interests, the benefit of granting the relief must outweigh the relative prejudice to those affected by it.

Residential Warranty Co. of Canada Inc., Re, 2006 ABQB 236 (Alta. Q.B.) at para. 26; aff'd 2006 ABCA 293 (Alta. C.A.).

21 The respondents take issue with the decision of the trustee to accept the Tang Settlement proposal. The section which provides relief for an aggrieved creditor under the *BIA* is s. 37 which provides:

Where the bankrupt or any of the creditors or any other person is aggrieved by any act or decision of the trustee, he may apply to the court and the court may confirm, reverse or modify the act or decision complained of and make such order in the premises as it thinks just.

22 In *Hoque, Re* (1996), 148 N.S.R. (2d) 142 (N.S. C.A.), the court discussed the role of the trustee, noting that even when the trustee has the benefit of a group of experienced creditors' representatives acting as inspectors, the trustee has to act with integrity and in a competent and reasonable manner. A court is to show deference to the business decision made by those entrusted by the creditors and the *BIA* to make such decisions. The court adopted the following comments at para. 41:

I agree with the comments of Mcfarlane J. in *Groves-Raffin Construction Ltd. (No. 2), Re* [1978] 4 W.W.R. 451, 28 C.B.R. (N.S.) 104 where he stated at (C.B.R.) 112:

In considering the conduct of a trustee it is well to keep in mind that the scheme of the Act is to allow the trustee to administer the estate under the supervision of the inspectors without interference unless there has been an excess of power, fraud, a lack of bona fides, or unless the actions of the trustee and the inspectors are unreasonable from the standpoint of the good of the estate.

23 In *Roberts v. E. Sands & Associates Inc.*, 2013 BCSC 902 (B.C. S.C.) at paras. 40-41, the court made the following comments in the context of a complaint by a creditor that the trustee should not have allowed claims of some of the creditors on the basis that a limitation period had expired:

[40] In *Kortev v. Deloitte Haskins & Sells* (1996), 44 C.B.R. (3d) 259 (Alta. Q.B.), Cooke J. made these statements regarding the preferable procedure to be followed in order to resolve questions similar to the question here:

The purpose of the *Bankruptcy Act* is to ensure that insolvencies are dealt with expeditiously and efficiently. In the words of the Manitoba Court of Appeal:

The fundamental idea of the legislation is that all claims against the bankrupt be dealt with within the context of the bankruptcy proceedings.

The Alberta Supreme Court has acknowledged that the *Bankruptcy Act* provides an expeditious and inexpensive method for distributing the property of an insolvent person among his creditors. (*Bowles v. Barber* (1985) 60 C.B.R. (N.S.) 311; *Can. Credit Men's Trust Assn. v. Umbrel* (1931) 13 C.B.R. 40) ...

[41] The solutions under the *B.I.A.* take into account the realities of commerce and business efficacy: "A strictly legalistic approach is unhelpful in that regard. What is called for is a pragmatic problem-solving approach which is flexible enough to deal with unanticipated problems, ...": *per* Topolniski J. in *Resident Warranty Co. of Canada Inc. (Re)* (2006), 21 C.B.R. (5th) 57 (Alta. Q.B.), at para. 27.

Application to the Facts

24 I agree with the applicant and the respondents that the Court has the inherent jurisdiction to make the order approving the Tang Settlement, including the release.

25 The issue is whether this is an appropriate case in which to exercise the Court's inherent jurisdiction to approve the Tang settlement proposal.

26 I also agree with the applicant that the pre-condition that the *BIA* is silent with regards to this issue has been met. The *BIA* is silent with regards to the approval of a settlement between a bankrupt and third party that includes a full and final settlement of any and all claims against the third party which the bankrupt and the bankrupt's creditors may have against the third party.

27 The second pre-condition is whether after balancing the competing interests, does the benefit of granting the relief outweigh the prejudice to those affected by it.

28 As stated earlier, the respondents oppose the granting of the order because they have potential claims for fraudulent preference and tracing of trust funds, and the order sought would preclude them from advancing such claims against the Tangs. The trustee submits that the approval of the Tang Settlement proposal is in the best interests of the Samji Group's estates' creditors as a whole and any potential prejudice to the respondents is outweighed by the benefits to the creditors as a whole.

29 The trustee points to the fact that if it is not permitted to enter into settlements with the Net Winners, actions will have to be commenced against every Net Winner and the costs will be exorbitant. There are a number of Net Winners who wish to settle in exchange for similar releases.

30 It is apparent from a review of the *Titan* case relied upon by the respondents that it was decided on the basis of its facts. In *Titan*, the court found the individual operating the Ponzi scheme, Mr. Comte's decision to ignore the requests of certain investors for redemption of their funds and to instead pay full redemptions to investors who made no such requests, was evidence that Mr. Comte made a decision to prefer some investors over others. The respondents could not point to any other case in which a court has ordered that the Net Winners in a Ponzi scheme pay back not only the profits they received but also the principal they had invested.

31 It is clear from the case law that both the trustee and inspectors are entitled to rely on legal advice as to the potential success of actions against the Net Winners.

32 The trustee in this case submits that the approval of the Tang Settlement proposal will avoid potentially lengthy and expensive litigation which would not only subject the Samji Group's estates to a level of risk, but may in fact ultimately lead to the recovery of less funds for the creditors of the Samji Group's estates. The approval of the Tang Settlement will allow the trustee to move forward in negotiations with other investors who are willing pay back their profits from the investment scheme provided they are assured of a full and final release. The approval of the Tang Settlement proposal is key to the successful negotiation of settlements with other investors.

33 In the trustee's submission the ability to settle some of the Samji Group's estates' claims would allow the trustee to administer the estates in an efficient manner and would likely provide for the best ultimate recovery for the creditors as a whole.

34 In my view, the procedure followed by the trustee in attempting to have the Net Winners disgorge their profits in exchange for a release is sound and in keeping with the objectives of the *BIA*.

35 The cases acknowledge that the purpose of the *BIA* is to ensure that bankruptcies are dealt with expeditiously and efficiently. In this case, not only has the trustee reviewed the proposed settlement and release, but the inspectors have also reviewed and approved it.

36 The solutions under the *BIA* take into account the commercial realities of the circumstances of the particular bankruptcy. In this case, the approach the trustee is taking maximizes the returns to the creditors without having to commence costly litigation against all of the Net Winners. The trustee reviewed the terms of the Tang Settlement and determined it was in the best interests of the creditors as a whole.

37 If the trustee is not able to enter into settlement discussions with investors who are willing to pay back any profit received from the scheme, the trustee will be forced to commence multiple, potentially costly, civil actions against all of the investors who profited from the scheme even in circumstances where it would otherwise be more beneficial to the creditors to enter into a settlement.

38 The decision of the trustee was to enter into a settlement with the Tangs without costly litigation. Having considered the evidence and the submissions of counsel, I have reached the same conclusion. In my view, the granting of a court ordered release in the context of the Tang Settlement does not set a precedent whereby the trustee cannot commence actions against other Net Winners, for the return of not only the profit they received but the invested capital if it is deemed appropriate. Actions have already been commenced by the trustee against some of the Net Winners.

39 The respondents say the decision of the trustee to seek an order which would preclude them from commencing an action against the Tangs for fraudulent preference and the tracing of trust funds is unreasonable.

40 However, the evidence is that the trustee is attempting to enter into settlements rather than pursuing costly litigation against all of the Net Winners. In my view, the decision of the trustee (with the approval of the inspectors) to accept the Tang Settlement was a legitimate business decision. The trustee and inspectors acted reasonably and the settlement was not contrary to the interests of the creditors generally.

Conclusion

41 After balancing the competing interests, I am of the view that the benefit to the creditors as a whole of approving the Tang Settlement outweighs the potential prejudice to the respondents. As a result, I have concluded that this is an appropriate circumstance in which to exercise the Court's inherent jurisdiction to approve the Tang Settlement.

42 Accordingly, I am making the following orders:

- The Tang Settlement proposal is approved and shall be binding upon the Samji Group's estates and the Samji Group's estates' creditors.
- Upon full payment of the Tang Settlement monies to the trustee:
 - (a) any and all Tang claims, whether contingent or not, which the Samji Group's estates and/or the Samji Group's estates' creditors may have against the Tangs shall be released; and
 - (b) the Tangs shall be released and have no further liability whatsoever to the Samji Group's estates and/or the Samji Group's estates' creditors.

Application granted.

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MILLER THOMSON LLP

Scotia Plaza
40 King Street West, Suite 5800. P.O. Box 1011
Toronto, ON Canada M5H 3S1

Gregory Azeff (LSO #: 45324C)

Tel: 416.595.2660
Email: gazeff@millerthomson.com

Asim Iqbal (LSO #: 61884B)

Tel: 416.597.6008
Email: aiqbal@millerthomson.com

Tamie Dolny (LSO #: 77958U)

Tel : 416.597.6076
Email : tdolny@millerthomson.com

Representative Counsel for the Affected Users

Cox & Palmer LLP

Purdy's Warf Tower
1959 Upper Water Street
Halifax, NS B3J 3N2

Gavin MacDonald

Tel: 902.421.6262
Email: gmacdonald@coxandpalmer.com

Representative Counsel for the Affected Users
