

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Diana M. Cameron
Mr. Justice James G. Edmond
Madam Justice Anne M. E. Turner

<i>IN THE MATTER OF THE BANKRUPTCY OF:</i>	)	<i>J. Doris</i>
<i>GALTON CORPORATION</i>	)	<i>for the Appellant</i>
)	
<i>BETWEEN:</i>	)	<i>R. W. Schwartz and</i>
	)	<i>C. Jonsson</i>
<i>SENSIBLE CAPITAL CORP.</i>	)	<i>for the Respondent</i>
)	
<i>(Applicant) Respondent</i>	)	<i>Appeal heard and</i>
	)	<i>Decision pronounced:</i>
<i>- and -</i>	)	<i>December 8, 2025</i>
)	
<i>GALTON CORPORATION</i>	)	<i>Written reasons:</i>
	)	<i>December 19, 2025</i>
<i>(Respondent) Appellant</i>)	

On appeal from *The Bankruptcy of Galton Corporation*, 2025 MBKB 13 [KB decision]

EDMOND JA (for the Court):

Introduction

[1] The respondent (Galton) appealed a bankruptcy order granted by the application judge pursuant to the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [the *BIA*], challenging his discretionary decisions. The bankruptcy application was advanced by the applicant (Sensible). In its factum and at the hearing, Sensible raised one further issue respecting the award of elevated

costs against Galton. Sensible submitted that the application judge erred in failing to award elevated costs against the President and Chief Executive Officer of Galton, Susan Bonk (Ms. Bonk), personally.

[2] After hearing arguments, we dismissed the appeal and Sensible's request that this Court grant an award of costs against Ms. Bonk (a non-party), with reasons to follow. These are those reasons.

Positions of the Parties

[3] It is undisputed that Sensible obtained a judgment against Galton in the amount of \$500,000 plus interest and costs and that Galton has committed an act of bankruptcy within six months of the application for the bankruptcy order. It is admitted that Galton has no assets to satisfy its outstanding debts. Galton's only asset is shares held in Precision Weather Solutions Inc. (Precision). Ms. Bonk is a shareholder of both Galton and Precision.

[4] Galton submits that the application judge erred in not exercising his discretion to dismiss the application for a bankruptcy order brought by Sensible pursuant to section 43(7) of the *BIA*. Alternatively, Galton submits that the application judge erred in not exercising his discretion under section 43(11) of the *BIA* to stay the bankruptcy order pending the determination or resolution of litigation by a related company, Precision, against Farmers Edge Inc. and other entities (the Farmers Edge litigation).

[5] Galton argues that either outcome would have preserved the status quo and maximized the likelihood that the Farmers Edge litigation could generate value for the benefit of all of Galton's creditors.

[6] Sensible submits that the application judge correctly granted the bankruptcy order and properly declined to exercise the discretionary relief sought by Galton under sections 43(7) and 43(11) of the *BIA*.

Standard of Review

[7] The application judge's refusal to dismiss the application for a bankruptcy order or grant a stay are discretionary decisions that are afforded a high degree of deference on appeal. A discretionary order will not be interfered with on appeal unless there has been an error in law, a material misapprehension of the evidence or the decision is so clearly wrong as to amount to an injustice (see *White Oak Commercial Finance, LLC v Nygård Enterprises Ltd et al*, 2023 MBCA 73 at para 24; *Project Management and Development Limited (Re)*, 2016 NLCA 60 at para 7).

Analysis and Decision

[8] Section 43(7) of the *BIA* provides that a court “shall dismiss” a bankruptcy application where it is satisfied that “for other sufficient cause no order ought to be made”.

[9] Galton advanced three primary submissions: 1) granting a bankruptcy order would “serve no meaningful purpose”, 2) the application was “driven by an ulterior motive or for an improper purpose” (*KB decision* at para 71), and 3) granting the bankruptcy order would impede recovery in the Farmers Edge litigation.

[10] Galton relies on authorities that have interpreted section 43(7) of the *BIA* as conferring on the court a broad and flexible discretionary power to

reject an otherwise valid application, even where the debt and act of bankruptcy have been established (see *JICO Holdings Inc v Lynco Construction Ltd*, 2016 SKCA 126 at para 26 [*JICO*]; *Buth-Na-Bodhiaga Inc v Lambert*, 2002 CanLII 45022 at para 39 (ONCA) [*Lambert*]).

[11] The main thrust of Galton’s submission is that granting a bankruptcy order does not promote the equitable distribution of assets nor enhance recovery for creditors in this case. Further, Sensible stands to gain no meaningful benefit from the bankruptcy.

[12] The application judge considered each of the submissions advanced by Galton. He reviewed the list of examples set forth in *Lambert* at para 40, of “other sufficient cause” described in section 43(7) of the *BIA*. He found none of the examples applied in this case and dealt with the specific objections advanced by Galton. As well, he addressed the fact that there was no evidence that if the bankruptcy order were to be granted, Precision would be deprived of funding or otherwise be impeded in prosecuting or defending the various actions, including the Farmers Edge litigation.

[13] The application judge acknowledged that Galton has no assets, other than its interest in Precision. However, the application judge accepted that “[a]n order in bankruptcy would permit a trustee to investigate” (*KB decision* at para 22) the conduct of Galton and that “investigatory remedy is both meaningful and legitimate” (*ibid*) because “Galton ha[d] failed to respond to repeated requests from Sensible to explain what it did with the funds that were loaned to it” (*ibid*).

[14] As to the allegation that the application was driven by an ulterior motive or for an improper purpose, the application judge found that there was no evidence to support that allegation.

[15] Galton submits that the application judge's reliance on the trustee's investigatory purpose was misplaced and he afforded far too much weight to it in his consideration as to whether to exercise his discretion under section 43(7) of the *BIA*. Galton relies upon the decision of *JICO*. In that case, the Chambers judge hearing the bankruptcy application identified three reasons for dismissing the application under section 43(7) of the *BIA*. First, she observed the bankruptcy order would stay civil proceedings in Alberta and she had determined the matters would be better resolved through those proceedings. Second, bankruptcy proceedings would eliminate the respondent, Lynco Construction Ltd. as a business competitor. Third, there would be no benefit to *JICO* in obtaining a bankruptcy order since Lynco's assets were subject to prior security interests (see *JICO* at para 29).

[16] The Saskatchewan Court of Appeal upheld the dismissal of the bankruptcy application, as the Court was not persuaded the Chambers judge erred in exercising her discretion to dismiss the application. It found that each of the reasons was sufficient cause for the Chambers judge to have exercised her discretion as she did (see *ibid* at paras 29-30). However, none of the three reasons given by the Chambers judge in *JICO* apply in this case.

[17] The parties agree, as do we, that the only asset of value is Galton's direct interest in Precision and the ability to recover a judgment in the Farmers Edge litigation. It was open to the application judge on the facts before him to

exercise his discretion in the manner he did and to find that the bankruptcy order would not impede the Farmers Edge litigation.

[18] In our view, the application judge made no errors of law or palpable and overriding errors of fact or mixed fact and law. Nor is his decision so clearly wrong as to amount to an injustice.

[19] Similarly, it was open to the application judge to exercise his discretion to stay the application on certain conditions. However, he made no palpable and overriding error in refusing to do so. In our view, Galton is asking us to re-weigh the evidence and substitute our discretion for that of the application judge. That is not our role. With a discretionary decision there rarely is “a ‘right’ or ‘wrong’ result” (*Perth Services Ltd v Quinton et al*, 2009 MBCA 81 at para 28). It is not enough that we would have decided differently; as appellate judges we must respect, not replicate, the unique role of trial or application judges (see *ibid* at paras 24-28).

[20] Further, we are not persuaded that staying the bankruptcy application would have more effectively advanced the objectives of the *BIA*. As part of the trustee’s investigative powers under the *BIA*, the trustee has a meaningful and legitimate purpose of investigating what happened to the funds that were loaned by Sensible and other creditors to Galton. As well, the trustee may inquire into and receive information regarding Galton’s interest in the Farmers Edge litigation on behalf of the creditors.

[21] In the result, the appeal was dismissed.

Costs

[22] As to the issue of costs raised by Sensible, it is important to emphasize that an order of costs is a highly discretionary decision, and the standard of review has been described by the Supreme Court of Canada and by this Court as “quintessentially discretionary” (*RMS v BDW*, 2025 MBCA 21 at para 12; *Dundas v Schafer*, 2014 MBCA 92 at para 70; *Sun Indalex Finance, LLC v United Steelworkers*, 2013 SCC 6 at para 247). Cost awards are not lightly interfered with by this Court unless the judge made an error in principle and the award is plainly wrong (see *Johnson v Mayer*, 2016 MBCA 41 at paras 21-22).

[23] In his oral reasons for decision dealing with costs (the costs decision), the application judge incorrectly referred to the Court’s authority to determine liability and quantum of costs contained in section 96(1) of *The Court of King’s Bench Act*, CCSM c C280 [the *KB Act*] and rule 57.01 of the MB, *King’s Bench Rules*, Man Reg 553/88 [the *KB Rules*]. As this is a bankruptcy proceeding, costs are governed by the *BIA*. Section 197(1) of the *BIA* provides the Court with the discretion to award costs. As pointed out by the Ontario Court of Appeal in *Dallas/North Group Inc (Re)*, 2001 CanLII 3636 (ONCA) [*Dallas/North*]: “There are no words limiting this section which, on its face, gives the court the widest discretion. The [*BIA*] is a federal statute which must be interpreted within its own parameters. A court must be careful to avoid interpreting a federal statute using local rules of practice not necessarily found in other provinces” (at para 11).

[24] In *Dallas/North*, the trial judge concluded that there was overwhelming evidence that the petitions seeking a bankruptcy order had been

brought for a collateral purpose, and not for the purpose of obtaining a distribution of property among creditors. An order of costs was made against non-parties based on evidence of bullying, harassment and intimidation, and that the barrage of proceedings brought constituted an abuse of process.

[25] Sensible urges this Court to apply the same reasoning based on the actions and conduct of Ms. Bonk in this proceeding as well as her conduct in other civil proceedings.

[26] While the application judge failed to reference section 197(1) of the *BIA*, he concluded “that the court’s discretion [to award costs] is very broad.” That conclusion is consistent with the discretion to award costs in section 197(1) of the *BIA*. Therefore, while the application judge referenced the wrong authority to award costs, the error was not material.

[27] Regarding the request for personal costs against Ms. Bonk, awarding costs against directing minds of a corporation should be used sparingly and the test applied is referenced in some authorities as the person of straw test (previously referred to as the “man of straw” test) (*Conversions by Vantasy Ltd et al v General Motors of Canada Limited*, 2003 MBQB 263; *Television Real Estate Ltd v Rogers Cable TV Ltd*, 1997 CarswellOnt 1580, 1997 CanLII 999 (ONCA); *Rockwell Developments Ltd v Newtonbrook Plaza Ltd* (1972), 27 DLR (3d) 651, 1972 CanLII 531 (ONCA); *Sturmer v Beaverton (Town)* (1912), 2 DLR 501, 1912 CanLII 588 (ONSCDC)), which is summarized as follows:

- (1) it must be shown that the directing mind or non-party had status to bring the action themselves;

- (2) that the corporation was not the true litigant; and
- (3) the corporation was a person of straw put forward to protect the true litigant from liability for costs.

[28] In *Dallas/North*, the Court upheld the costs order made against non-parties in bankruptcy proceedings due to the conduct of the parties, despite the person of straw test not being satisfied (see para 13). The Court justified the award of costs on the basis of special policy considerations when dealing with abuse of process in bankruptcy court (see *ibid* at para 14).

[29] While the application judge did not clearly articulate the test that he applied to determine whether costs should be awarded against a non-party, he was referred to the relevant authorities and he exercised his discretion to not award costs against Ms. Bonk personally. He acknowledged that while the arguments advanced by Galton did not persuade him to dismiss Sensible's bankruptcy application, he stated: "Nevertheless, they were reasonably arguable positions. I am unable to conclude, as Sensible urges me to do, that there was, 'no reasonable basis for Ms. Bonk's continued resistance to the bankruptcy application.'"

[30] On appeal, Sensible argues that the application judge erred when he equated the test for awarding solicitor and client costs to an award of costs against a director of a corporation in a bankruptcy proceeding. The application judge stated: "In short, Galton's conduct does not fall to the level that justifies solicitor/clients, and for that same reason I am not prepared to visit an order of costs against Ms. Bonk personally."

[31] We are not satisfied that this statement in the costs decision means that he erred in his application of the test to award costs against a non-party. This statement is his conclusion based on the application of the legal principles to the facts of the case. The application judge was familiar with the authorities and concluded that the conduct of Galton and Ms. Bonk did not rise to the level and meet the applicable test for awarding costs against a non-party. The application judge could have stated more clearly the manner in which he applied the test. However, the *Dallas/North* case was argued by Sensible, and the principle enunciated in that case was not accepted by the application judge as applicable to the facts before him.

[32] Finally, we disagree with the submission of Sensible that Ms. Bonk's conduct in other litigation is a relevant factor to consider in awarding costs in this application or on this appeal. Her conduct in other proceedings is relevant to cost orders made in those other proceedings. There are circumstances where a party's conduct in related litigation is relevant to an award of costs. However, we are not satisfied the application judge erred in exercising his discretion to refuse to award costs against Ms. Bonk.

[33] To conclude, on the issue of costs, we agree that the application judge made an error in principle in referencing the *KB Act* and *KB Rules* as the legislation and rules governing costs. However, we are not satisfied the error was material. The governing authority, the *BIA*, gave the application judge a wide discretion to award costs and Sensible did not satisfy us that he made any palpable and overriding error in his findings of fact and his decision to not award costs against Ms. Bonk personally was not plainly wrong.

Conclusion

[34] In the result, the appeal and Sensible’s request to order costs against Ms. Bonk personally were dismissed, with tariff costs to Sensible.

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