

**CITATION:** In the Matter of the Bankruptcy of Henry George Cole, 2016 ONSC 7110  
**COURT FILE NO.:** BH-11-456669  
**DATE:** 20161312

**SUPERIOR COURT OF JUSTICE – ONTARIO**

**IN THE MATTER OF THE BANKRUPTCY OF HENRY GEORGE COLE OF THE  
CITY OF TORONTO, IN THE PROVINCE OF ONTARIO**

**RE:**

HENRY GEORGE COLE, Appellant

**AND:**

RBC DOMINION SECURITIES INC., Respondent

**BEFORE:** Mr. Justice H.J. Wilton-Siegel

**COUNSEL:** *Hari Nesathurai and Glen Perinot*, for the Appellant

*Jeremy Deveruex and Saeed Teebi*, for the Respondent

*G. Benchetrit*, for KSV Kofman Inc., Trustee in Bankruptcy

**HEARD:** November 14, 2016

**ENDORSEMENT**

[1] The bankrupt, Henry George Cole (the “appellant” or the “Bankrupt”), appeals the order of Master Jean dated June 1, 2016 (the “Order”) made in her capacity as a Registrar under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the “BIA”). The Order gave effect to her reasons of the same date (the “Reasons”).

**Background**

[2] The Bankrupt was employed by RBC Dominion Securities Inc. (the “Creditor”) from 2005 to 2010 as an investment advisor. During that time, he misappropriated funds totaling approximately \$5 million from clients. He pleaded guilty to fraud and served two and one-half years in jail. He has also been permanently banned by Canadian regulatory authorities from working in the investment industry and ordered to pay a fine of \$5,020,022. In addition, he has been ordered to pay the Creditor restitution in the amount of \$2,260,021.88, all of which remains outstanding.

[3] The Creditor, which is the predominant creditor of the Bankrupt’s estate, petitioned him into bankruptcy on February 10, 2011. The Creditor has filed a proof of claim for \$5,008,103.95, being the amount it has reimbursed its clients.

[4] During the bankruptcy, the Bankrupt received non-taxable disability payments increasing from approximately \$13,000 to approximately \$15,000 per month. He failed to pay any surplus income during the bankruptcy. The hearing before the Master proceeded on the basis of an Agreed Statement of Facts. The Bankrupt did not testify.

### **Applicable Law**

[5] Section 68 of the BIA addresses surplus income. The relevant provisions for present purposes are the following:

68 (1) The Superintendent shall, by directive, establish in respect of the provinces or one or more bankruptcy districts or parts of bankruptcy districts, the standards for determining the surplus income of an individual bankrupt and the amount that a bankrupt who has surplus income is required to pay to the estate of the bankrupt.

(2) The following definitions apply in this section.

*surplus income* means the portion of a bankrupt individual's total income that exceeds that which is necessary to enable the bankrupt individual to maintain a reasonable standard of living, having regard to the applicable standards established under subsection (1).

#### ***total income***

(a) includes, despite paragraphs 67(1)(b) and (b.3), a bankrupt's revenues of whatever nature or from whatever source that are earned or received by the bankrupt between the date of the bankruptcy and the date of the bankrupt's discharge, including those received as damages for wrongful dismissal, received as a pay equity settlement or received under an Act of Parliament, or of the legislature of a province, that relates to workers' compensation; but

(b) does not include any amounts received by the bankrupt between the date of the bankruptcy and the date of the bankrupt's discharge, as a gift, a legacy or an inheritance or as any other windfall.

(3) The trustee shall, having regard to the applicable standards and to the personal and family situation of the bankrupt, determine whether the bankrupt has surplus income. The determination must also be made

(a) whenever the trustee becomes aware of a material change in the bankrupt's financial situation; and

(b) whenever the trustee is required to prepare a report referred to in subsection 170(1).

[6] Section 172 of the BIA sets out the powers of the court to grant a conditional discharge to a bankrupt:

172 (1) On the hearing of an application of a bankrupt for a discharge, other than a bankrupt referred to in section 172.1, the court may

- (a) grant or refuse an absolute order of discharge;
- (b) suspend the operation of an absolute order of discharge for a specified time; or
- (c) grant an order of discharge subject to any terms or conditions with respect to any earnings or income that may afterwards become due to the bankrupt or with respect to the bankrupt's after-acquired property.

(2) The court shall, on proof of any of the facts referred to in section 173, which proof may be given orally under oath, by affidavit or otherwise,

- (a) refuse the discharge of a bankrupt;
- (b) suspend the discharge for such period as the court thinks proper; or
- (c) require the bankrupt, as a condition of his discharge, to perform such acts, pay such moneys, consent to such judgments or comply with such other terms as the court may direct.

(3) Where at any time after the expiration of one year after the date of any order made under this section the bankrupt satisfies the court that there is no reasonable probability of his being in a position to comply with the terms of the order, the court may modify the terms of the order or of any substituted order, in such manner and on such conditions as it may think fit.

(4) The powers of suspending and of attaching conditions to the discharge of a bankrupt may be exercised concurrently.

[7] The Bankrupt does not dispute that the standard of review on this appeal is the standard articulated in *Housen v. Nikolaisen*, 2002 SCC 33, 2 S.C.R. 235, at paras. 8, 10, 19, 25, 27 and 28. On this standard, a decision will be interfered with only if the trial judge made an error of law, exercised his or her discretion on the wrong principles, or misapprehended the evidence such that there is a palpable and overriding error.

[8] In deciding whether to grant a conditional discharge, a court exercises a wide discretion: see *Dament (Re)*, 2015 ONSC 7960, [2015] O.J. No. 6710, at paras. 88-90. Discretionary decisions of a Registrar in Bankruptcy are accorded deference. They should not be interfered with unless it is demonstrated that the Registrar erred in principle or law, failed to take into account a proper factor, or took into account an improper factor which led to a wrong

conclusion: see *Impact Tool & Mould Inc. (Estate Trustee of) v. Impact Tool and Mould Inc. (Interim Receiver of)* (2006), 79 O.R. (3rd) 241, at paras. 47-49 (C.A.).

### **The Master's Reasons**

[9] In the Order, Master Jean ordered that:

(1) as a condition of his discharge, the Bankrupt pay \$284,346 to the Trustee, KSV Kofman Inc. (the "Trustee"), as surplus income to October 2015 payable at a rate of \$5,000 per month;

(2) the Bankrupt pay an additional \$5,000 per month to the Trustee for a further six years for a total additional payment of \$360,000; and

(3) the discharge of the Bankrupt from bankruptcy was suspended for a two-year period, bringing the period of bankruptcy to seven years, subject to payment of surplus income.

[10] In her Reasons, the Master set out the relevant background facts, including that the discharge hearing proceeded on the basis of the Agreed Statement of Facts. She described the principal issue as "surplus income, its calculation and the length of time surplus income should be paid." She noted that the Bankrupt claimed that he should be permitted two deductions which the Trustee opposed. The Master denied these deductions and accepted the Trustee's calculation of the Bankrupt's surplus income.

[11] The Master then addressed and rejected the Creditor's submission that the Bankrupt's discharge should be refused. Instead, the Master concluded that it would be appropriate to discharge the Bankrupt on the condition that the surplus income of \$284,346 be repaid at the rate of \$5,000 monthly. To be clear, this addresses the surplus income calculated by the Trustee under section 68 of the BIA to the date of the discharge hearing before the Master.

[12] Under the heading "Whether further surplus income should be paid by the bankrupt", the Master then addressed the Creditor's submission that she should order the Bankrupt, as a condition of his discharge, to make a further payment of \$5,000 per month for a period of eight years.

[13] On this issue, the Master held as follows:

In my view, the income enjoyed by the bankrupt is more than ample to support the further payment sought by [the Creditor] and I so order as a condition of discharge, the further payment of \$5,000 per month to the trustee for a further 6 years, for a total of \$360,000.

I will return to the significance of this paragraph later in this endorsement.

[14] The Master then proceeded to set out six factors that she took into consideration in reaching this determination. The first five factors were, in summary:

1. the substantial income of the Bankrupt;

2. the fact that the Bankrupt's surplus income had risen as a result of the termination of his support obligations, his former spouse having died and his daughter having ceased to be dependent;
3. the ability of the Bankrupt to pay, given the OSB Guidelines for a family of two;
4. the fact that the Bankrupt's significant income could have supported the making of a proposal but none was made; and
5. the consideration that the Bankrupt should not benefit from his failure to make timely surplus income payments during the bankruptcy by a reduction of post-discharge payments.

[15] In respect of item (1), the Master concluded that the Bankrupt would still have \$5,000 per month available to provide for himself and his spouse even after payment of the amounts stipulated in her Reasons. She noted that this amount was well above the OSB Guidelines. In respect of item (5), the Master noted that, if the Bankrupt had made the surplus income payments at the time he was obligated to do so, he would not be faced in the post-discharge period with making both \$5,000 payments. The Master held that the Bankrupt should not benefit from his delay in making the surplus income payments.

[16] While the Master uses the term "surplus income" loosely to refer to the Bankrupt's income pre- and post-discharge, there is little confusion in the Master's discussion of these five considerations in her Reasons. The sixth reason has, however, fostered this appeal. It reads as follows:

6. This court has the discretion to fix surplus income at 75%. The trustee and creditor, reasonably, sought surplus income at 50%. Surplus income calculated at 50% is approximately \$5,265 per month and at 75% is approximately \$7897 per month. The total payment obligation for surplus income (\$584,346) is roughly 73 months of surplus income fixed at 75%. This is more than reasonable given the circumstances leading to the bankruptcy, the bankrupt's significant income and the significant level of debt in the bankruptcy.

[17] The Master then concluded this section of her Reasons in support of her decision to impose the further payment condition of \$5,000 per month for six years as follows:

While the further 6 years of payments lengthens the period of surplus income payments, I am of the view that the interests of the creditors, of which [the Creditor] is a significant creditor and the interests of society outweigh the interests of the bankrupt. I would further observe that there has been a lack of financial restitution and, generally, a lack of remorse or sense of responsibility for the hardships caused by the bankrupt in his financial dealings.

Despite the lack of remorse or responsibility, I have considered the interests of the bankrupt. I have ordered payments of surplus income for a period of 6 as opposed to 8 years, to allow the bankrupt a two year period of time during which he will have no surplus income obligations prior to the cessation of the disability

payments. This will provide the bankrupt with a period of time, free of obligations to the trustee and his creditors, to adjust his finances and to financially plan for his retirement years.

[18] As discussed below, it is the Master's reference to these payments as "surplus income payments" or "payments of surplus income", and the further reference to the Bankrupt's obligation as "surplus income obligations", that constitute the basis for the Bankrupt's principal ground of appeal.

### **The Grounds of Appeal**

[19] In its November 4, 2015 supplemental report to its section 170(1) report, the Trustee calculated the Bankrupt's surplus income using a 50% adjustment. The Bankrupt did not dispute the Trustee's calculation of his surplus income on this basis as being \$284,346 to the date of the discharge hearing. On this appeal, he does not dispute the Master's determinations regarding the two deductions that were denied by the Trustee in making that calculation. Nor does he dispute his obligation to pay the surplus income in monthly payments of \$5,000 until such time as it is paid off entirely. However, the Bankrupt submits that the Master erred when she ordered him, as a condition of his discharge, to pay a further \$5,000 per month of "surplus income" for a period of six years.

[20] Among other things, the Bankrupt says that Master Jean erred in setting out how she arrived at the further amount of \$5,000 per month for 6 years for a total of \$360,000. He says the calculation is flawed insofar as it purports to conclude that the two payments of \$5,000 monthly represent 75% of the Bankrupt's surplus income. He says that the Master merely reduced the Creditor's request from \$5,000 per month for 8 years to \$5,000 per month for six years. He says this condition is tantamount to a penalty and is unreasonable given his personal and family situation. These submissions are addressed in two principal grounds of appeal.

[21] On the first ground of appeal, the Bankrupt argues that the Master made her own determination of surplus income and ordered that the surplus income be repaid at the rate of \$10,000 per month. He says that section 68 constitutes a complete code for the treatment of surplus income. In that provision, the responsibility for the calculation of surplus income rests with the trustee in bankruptcy, leaving no discretion in favour of the court.

[22] I agree that, under section 68, the Trustee had the obligation to calculate surplus income, rather than the Master. Moreover, in this case, the Trustee and the Creditor had agreed on the amount of surplus income to the date of the discharge hearing. There are, however, two ways of conceptualizing the Master's Reasons, which frame the issues on this appeal.

[23] The first way of conceptualizing the Master's Reasons, as the appellant argues, is that the further payment condition imposed is an additional amount of "surplus income" as that term is understood in section 68 of the BIA. The second way, urged by the Creditor, is that the Master intended the further payment condition to be a condition of the appellant's discharge justified, among other actions, by the application of section 173(1)(o) of the BIA, to which the Master referred in the last paragraph of the Reasons. The Creditor suggests that, in the section of the Reasons dealing with this condition, the Master used the term "surplus income" to mean income

of the Bankrupt after the discharge hearing that could reasonably be considered available to satisfy a payment condition of the Bankrupt's discharge, rather than "surplus income" as that term is understood for the purposes of section 68. In other words, the Master erred in a non-substantive manner by using the term "surplus income" in two different senses within the Reasons.

[24] I would also observe that the two-year suspension of the Bankrupt's discharge imposes a complication in this case. It is technically possible to have surplus income during a suspension of a discharge. However, the Reasons do not specifically address surplus income in this period, nor was any such income included in the Trustee's calculation of surplus income for the purposes of section 68. It may be that this fact influenced the Master's use of the term "surplus income." The effect of her decision was to require payment commencing immediately, running for two years prior to the discharge and for four years after the discharge. In addition, the Master's reference to the OSB Guidelines in her assessment of the Bankrupt's capacity to pay an additional \$5,000 per month is susceptible of different interpretations.

[25] I agree that the Master uses language in certain places that could be interpreted, if viewed selectively, as imposing a further obligation to pay "surplus income" of \$5,000 per month as that term is understood for the purposes of section 68. However, when viewed in their entirety, I think the Master's Reasons under the heading entitled "Whether further surplus income should be paid by the bankrupt" do not refer to surplus income within its meaning in section 68. Rather, they refer to income which is available for payment pursuant to a condition of the Bankrupt's discharge pursuant to section 172. In this regard, the following considerations are relevant.

[26] First, in the first paragraph of this section, it is clear that the Master is calculating "surplus income" as the future income available to the Bankrupt to fund a prospective payment condition. In this regard, the Master uses the current anticipated income of the Bankrupt of \$14,600, rather than any historical amounts. I accept that, in reaching the income reasonably available to fund a payment condition, the Master uses the OSB Guidelines. However, she does not purport to make a calculation under section 68. Moreover, her use of the OSB Guidelines to assist in her determination of a reasonable income condition is itself a reasonable approach.

[27] Second, as set out above, the Master's decision is set out in the relevant section of the Reasons before the references to "surplus income" upon which the appellant relies for this ground of appeal. In setting out her decision, the Master is clear that the further payment is imposed as a condition of the Bankrupt's discharge without any reference to surplus income under section 68.

[28] Third, in her first consideration, the Master clearly distinguishes between the surplus income payment in respect of section 68 and the payments as a condition of discharge. It is only after this passage and, in particular commencing with her last consideration, that any confusion can be said to arise. By that time in her Reasons, I think that the Master has made her intention sufficiently clear that the appellant's first ground of appeal should be rejected.

[29] Fourth, while the Master's discussion of her sixth consideration is susceptible of different interpretations, after a review of this paragraph, I think the Master is saying no more than that the payment obligation in respect of surplus income is reasonable in the sense that it could have been

more severe and, accordingly, a further payment obligation as a condition of discharge would also not be unreasonable. I accept that the Master's math is wrong. The total payment obligations are \$644,346, not \$584,346, and the resulting payment period on her approach should be 6.8 months. Notwithstanding this error, however, I think the Master's reasoning in this paragraph supports her determination. The Master is not saying that the additional \$5,000 payment would result in the aggregate monthly payments of \$10,000 falling within the range of 50%-75% under the OSB Guidelines. Rather, the Master is saying that the maximum level of surplus income payments that could have been proposed by the Trustee was a relevant consideration in fixing the additional payment obligation.

[30] The second ground of appeal is that, if the Master is treated as having imposed a payment condition rather than re-calculating surplus income, the payment condition imposed was unreasonable. I do not agree for the following reasons.

[31] First, I do not agree with the Bankrupt's submission that the Master failed to take into account his family situation. On the contrary, the Master took into consideration all of the facts that were before her, which were limited to those contained in the Agreed Statement of Facts as the Bankrupt chose not to testify. Those facts indicated that the Bankrupt would be receiving insurance payments going forward of approximately \$15,000 per month and that his support obligations had terminated. Accordingly, the Master observed that, after payment of the obligations imposed by the Order, the Bankrupt would have \$5,000 monthly remaining, which was considerably in excess of the OSB Guidelines.

[32] The Master also fixed the term of the additional payments to terminate several years before his retirement age to provide some additional cushion to the Bankrupt. The Master was certainly correct in observing that, given that the income remaining to the Bankrupt going forward substantially exceeds the OSB Guidelines for a two-person family, the Bankrupt should not benefit from his failure to pay surplus income by a reduced payment obligation as a condition of his discharge. The record also demonstrates a lack of financial restitution as the Master observed. The Master was also entitled to infer that the Bankrupt had failed to demonstrate any remorse or sense of responsibility for the hardships that he caused based on the record before the Master and the Court. These are additional considerations weighing in favour of the additional payment condition.

[33] Second, I do not agree that the duration of the payments is unduly long. Whether or not three years is a more usual maximum, as the Bankrupt submits, the circumstances in this case are exceptional, both in terms of the breach of trust and fraud that have given rise to the Creditor's claim and in terms of the amount of that claim.

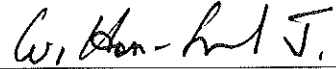
[34] Third, I do not accept the argument that there is no certainty that the Bankrupt will continue to receive his insurance payments until age 63. There was no evidence before the Master of any risk of suspension or termination of payments. Moreover, if that were to occur, the Bankrupt has the right to seek relief under section 172(3).

[35] I would add that, if I have erred in reaching the conclusion set out above in respect of the first ground of appeal, I would nevertheless confirm the Order pursuant to the authority granted to the Court by section 134(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. I consider the



payment condition of \$5,000 per month for 72 months and a two-year suspension of the Bankrupt's discharge to be reasonable for the reasons set out above in respect of the Bankrupt's second ground of appeal. Accordingly, in the circumstances where the Order would have been set aside, I would have substituted an order of the Court which included the same payment conditions and two-year suspension of the Bankrupt's discharge as being reasonable in the circumstances of the Bankrupt set out in the record before the Court.

[36] Accordingly, the Bankrupt's appeal is dismissed.

A handwritten signature in cursive script, appearing to read 'Wilton-Siegel J.', written above a horizontal line.

Wilton-Siegel J.

**Date:** December 13, 2016