

# COURT OF APPEAL FOR ONTARIO

CITATION: Cole v. RBC Dominion Securities Inc., 2017 ONCA 1009

DATE: 20171220

DOCKET: C63228

Pepall, Benotto and Paciocco JJ.A.

In the Matter of the Bankruptcy of Henry George Cole, of the City of Toronto, in  
the Province of Ontario

BETWEEN

Henry George Cole

Applicant (Appellant)

and

RBC Dominion Securities Inc.

Respondent (Respondent)

Hari Nesathurai and Glen Perinot for the appellant, Henry Cole

Jeremy Devereaux and Danny Urquhart for the respondent, RBC Dominion  
Securities Inc.

Heard and released orally: December 14, 2017

On appeal from the order of Justice Herman J. Wilton-Siegel of the Superior Court  
of Justice, dated December 13, 2016.

REASONS FOR DECISION

[1] The appellant, age 52, was petitioned into bankruptcy in 2011 by RBC, after he misappropriated \$5 million from clients while working as their investment advisor. While in bankruptcy, he had a net monthly income of \$14,600, resulting in surplus monthly income of \$12,500. He nevertheless failed to make any surplus income payments.

[2] The appellant applied for a discharge from bankruptcy. The registrar in bankruptcy ordered that: (1) as a condition of his discharge, the appellant pay \$284,346 to the Trustee as surplus income to October 2015, payable at a rate of \$5,000 per month; (2) as a condition of his discharge, the appellant 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 appellant's discharge from bankruptcy be suspended for two years.

[3] The appellant's appeal of the order was dismissed by Wilton-Siegel J. The appellant now appeals from that order.

[4] Before this court, he renews his numerous objections to the registrar's order and principally argues that the treatment of surplus and other income was in error. Moreover, he submits that it was not for Wilton-Siegel J. to rewrite the decision of the registrar and, in any event, his decision was unreasonable.

[5] We disagree.

[6] The registrar ordered that as a condition of his discharge from bankruptcy, the appellant was to pay surplus income for the period to October 2015 in the amount of \$284,346, at the minimum rate of \$5,000 per month until paid in full. This was the recommendation of the Trustee and there is no dispute with respect to this part of the order. This provision in the order was based on s. 68 of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3.

[7] In addition, as a condition of his discharge, the appellant was to pay an additional amount for six years.

[8] Justice Wilton-Siegel acknowledged that some of the registrar's language was loose. However, he considered her reasons in their entirety and read her decision on prospective payments as referring to income that was to be paid as a condition of the appellant's discharge pursuant to s. 172. He effectively recognized her error in wording but properly identified the substance and purport of her decision.

[9] We agree with his conclusion.

[10] Sections 68 and 172 represent different types of orders. Section 68 addresses surplus income and s. 172 addresses the grant or refusal of a discharge from bankruptcy. Specifically, s. 172(2)(c) provides that the court shall, on proof of any of the facts referred to in s. 173, require the bankrupt, as a condition of his discharge to, among other things, pay such monies or comply with such other

terms as the court may direct. The registrar found that the facts referred to in s. 173(1)(o) had been established in that the appellant had failed to provide information to enable the Trustee to calculate surplus income. Additionally, the appellant had conceded that s. 173(a), (d), and (e) applied. Justice Wilton-Siegel did not rewrite the registrar's reasons as alleged, rather he read the registrar's reasons in their totality and was readily able to discern her intention and meaning.

[11] Lastly, we do not accept that his decision was unreasonable. The registrar's order was discretionary in nature and there was ample evidence to support her decision. Among other factors, the appellant has a substantial income and the ability to pay. Moreover, the appellant chose not to testify to provide any evidence to the contrary. As noted by Wilton-Siegel J., the circumstances of the case were exceptional. Justice Wilton-Siegel was correct in concluding that the s. 172 order imposed by the registrar was reasonable. He also noted the appellant's right to seek relief if necessary under s. 172(3). We see no basis on which to interfere.

[12] For these reasons, the appeal is dismissed. As agreed by the parties, the appellant is to pay to the respondent \$4,100 in costs on a partial indemnity scale inclusive of disbursements and applicable tax.

SE Repall JA :

MR Benoit J.A.

