1956

*Mar. 14
*Apr. 24

ALBERT LAMARRE AND DAVID GROBSTEIN ..... } APPELLANTS;

AND

DAME ODILE PERRAULT .....RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Bankruptcy—Legal services to bankrupt company after petition in bankruptcy—Continuation of services authorized by trustees after receiving order made—Adoption of services previously rendered—Preference in payment—Bankruptcy Act, R.S.C. 1952, s. 14, ss. 41(4), 95, 155(4, 6).

A claim for legal fees for services rendered by the late P. was made for the period from Nov. 1948 to Feb. 1953 in connection with 30 actions taken against various insurance companies by a company, now in bankruptcy. A petition for a receiving order against the company was filed on Nov. 17, 1948, but the proceedings on it were suspended while the litigation which was started some two weeks later was proceeded with. The actions were allowed and the insurance companies paid $360,000 to the trustees who had been authorized to continue the litigation, the petition for a receiving order having been proceeded with and a receiving order made on Aug. 14, 1951. The inspectors of the bankrupt authorized the continuation of the services of P. at their first meeting in Sept. 1951.

The bill of $22,300 for counsel fees submitted by P. was allowed by the taxing officer, but the judge in bankruptcy taxed it at $8,000 of which $1,875 was declared to be payable by preference as a debt of the estate. The Court of Appeal held that P. was entitled to the full amount claimed and to be paid by preference.

Held: The appeal should be dismissed.

Since under s. 41(4) of the *Bankruptcy Act,* the bankruptcy is deemed to have commenced on Nov. 17, 1948, the time of the filing of the petition, the services were rendered to the estate of the bankrupt. P. was a person "whose services have been authorized by the trustee in writing" as provided by s. 155(4) of the Act. A trustee may in the exercise of his discretion adopt and pay for services rendered to a bankrupt after the filing of a petition when such services have clearly resulted, as in this case, in a benefit to the bankrupt's estate commensurate with the services rendered. In acting upon the inspectors' resolution of Sept. 1951, the trustees adopted the services already performed by P., and that was eminently fair. P. was therefore entitled to be collocated and paid by preference his proper charges.

The taxing officer, the judge in bankruptcy and each member of the Court of Appeal are free to exercise their own discretion in fixing an amount fair and reasonable to the party whose bill is being taxed and to the client. The amount allowed by the judge in bankruptcy was too low, and it cannot be said that the Court of Appeal erred in fixing the value of the services at $22,300.

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*PRESENT: Kerwin C.J., Taschereau, Cartwright, Fauteux and Abbott JJ.

APPEAL from the judgment of the Court of Queen's Bench, appeal side, province of Quebec, reversing the decision of the judge in bankruptcy.

B. Bernstein, Q.C. and *J. Shapiro* for the appellants.

J. Perrault for the respondent.

The judgment of the Court was delivered by:—

ABBOTT J.:—This appeal arises out of a claim for legal fees for services rendered by the late Antonio Perrault, Q.C. These services, which covered a period from November, 1948, to February, 1953, were rendered in connection with thirty actions taken against various insurance companies, to recover moneys payable under fire insurance policies, as indemnity for the loss of property owned by Laurentian Colonies and Hotels Limited, now in bankruptcy.

The facts are fully set out in the judgments in the Courts below and I shall refer to them very briefly.

A petition for a receiving order against the hotel Company was filed on November 17, 1948. The actions against the various insurance companies were taken some two weeks later on December 4, 1948, and with the approval of the petitioning creditor, proceedings on the petition in bankruptcy were suspended while the litigation was proceeded with, it being the view of all concerned apparently, that the claims could be prosecuted more effectively by the hotel company than by a trustee in bankruptcy.

The actions, all of which were contested, were joined for hearing, and judgments were ultimately rendered on February 16, 1951, condemning the insurance companies concerned to pay to the hotel company amounts totalling $313,292.71 with interest. The insurance companies inscribed in appeal against these judgments, and while the appeals were pending but before they had been heard, the petition for receiving order was proceeded with and a receiving order made on August 14, 1951. In due course the appellants as trustees of the bankrupt were authorized to continue the litigation.

It was conceded at the hearing before this Court that at the first meeting of inspectors of the bankrupt company, which took place on September 21, 1951, Mr. Ernest

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Lafontaine was retained as attorney of record and Mr. Antonio Perrault, Q.C., as counsel "to continue the suits on behalf of the trustees."

Judgment was rendered by the Court of Appeal on December 22, 1952, confirming the judgments in the trial court, and the insurance companies eventually paid to the trustees a total of some $360,000.

Both Mr. Lafontaine and the late Mr. Perrault submitted bills for their legal services to the trustees, the bill of the late Mr. Perrault for counsel fees being in the amount of $22,300 after giving credit for a payment of $500. It is his bill that is at issue in the present appeal.

It is unnecessary to discuss what occurred following the initiation of proceedings to tax this bill other than to state that the allowance of the bill by the taxing officer cannot be dignified by the name of taxation. From that determination the appellants as trustees appealed to the Court. The appeal was heard by Chief Justice Scott, sitting as Judge in Bankruptcy, and in the result he taxed the bill at $8,000, of which he held the claimant was entitled to be paid $1,875 by preference. On appeal to the Court of Queen's Bench, this judgment was reversed, the respondent held entitled to the full amount claimed and to be paid by preference.

As Mr. Justice McDougall, who wrote the principal judgment in the Court of Appeal, has pointed out, the real issues on the appeal are limited to two, namely, (1) the amount of the respondent's account and (2) whether it is to be treated in whole or in part as part of the costs of administration and thus payable in priority as provided by s. 95 of the *Bankruptcy Act*.

The services rendered by the late Mr. Perrault unquestionably benefited the estate of the bankrupt company. Virtually the only assets of that company were its claims against the insurance companies and these were only recoverable as a result of court action. Legal services were necessary and enured to the benefit of the company and its creditors. Under the terms of s. 41, subs. 4, of the *Bankruptcy Act*, the bankruptcy is deemed to have commenced on November 18, 1948, the time of the filing of the petition.

As Mr. Justice McDougall has pointed out, the Court of Appeal for Ontario held in *The King* v. *Louis Minden* (1), that the bankruptcy begins at the time of the presentation of the petition for all purposes. This indeed would seem to be clear from the terms of the subsection itself. I think it can be said, therefore, that the services in question were rendered to the estate of the bankrupt.

The respondents are clearly entitled to be paid by preference for services rendered subsequent to September 21, 1951, date of the resolution of the inspectors, which I have referred to. Whether the claim for services prior to that date should be collocated and paid by preference, depends upon the effect to be given to the said resolution and to the relevant sections of the *Bankruptcy Act*. These sections are s. 155(4) and (6) and read as follows:—

155(4) No costs shall be paid out of the estate of the bankrupt, excepting the costs of persons whose services have been authorized by the trustee in writing and such costs as have been awarded against the trustee or the estate of the bankrupt by the court.

* * *

(6) Legal costs shall be payable according to the following priorities:

(*a*) commissions on collections, which shall be a first charge on any sums collected;

(*b*) when duly authorized by the court or approved by the creditors or the inspectors, costs incurred by the trustee after the bankruptcy and prior to the first meeting of creditors;

(*c*) the costs on an assignment or costs incurred by a petitioning creditor up to the issue of a receiving order;

(*d*) costs awarded against the trustee or the estate of the bankrupt;

(*e*) costs for legal services otherwise rendered to the trustee or the estate.

The late Mr. Perrault was clearly a person "whose services have been authorized by the trustee in writing" as provided by s. 155(4) and there remains for consideration the effect to be given to the resolution of September 21, 1951, which reads as follows:—

Mr. Lafontaine, Solicitor, who handled the insurance claim before the Court explained to the meeting, the facts of the case and, after hearing the explanations of Mr. Lafontaine, it was moved by Mr. Parsons, seconded by Mr. Wilkinson and unanimously carried that the trustees continue the proceedings against the 30 insurance companies which have been condemned by Mr. Justice Collins to pay this sum of $313,292.71 to the bankrupt company with interest and costs and that Mr. Ernest Lafontaine be retained by the estate to continue the suits on behalf of the trustees and he is hereby authorized to retain the services of Mr. Antonio Perrault, K.C. as counsel.

(1) 64 C.C.C. 309.

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A trustee in bankruptcy may in the exercise of his discretion adopt and pay for services rendered to a bankrupt after the filing of a petition in bankruptcy when such services have clearly resulted in a benefit or profit to the bankrupt's estate commensurate with the service rendered. See *in re Simonson ex parte Ball* (1) and *in re Geen ex parte Parker* (2).

There can be no question but that the legal services rendered by Mr. Perrault benefited the estate. In my opinion, in acting upon the resolution of September 21, 1951, the trustees adopted the services which Mr. Perrault had already performed, and it was eminently fair that they should do so.

I am therefore of the opinion that the late Mr. Perrault was entitled to be collocated and paid by preference his proper charges for all the services rendered by him to the estate of the bankrupt company.

As to amount, the Court below has held that he was entitled to be paid the full amount of his bill, namely, $22,300. The detailed account which he submitted for taxation was supported by the affidavit of the late Mr. Perrault, in accordance with s. 10 of the *Bar Act*, on which he was not cross-examined, and the appellants offered no expert testimony in connection with this account. A lengthy hearing did take place on the contestation of the Lafontaine account, and a good deal of expert evidence was adduced as to the character of the litigation and the value of legal services rendered by Mr. Lafontaine.

With respect, I am unable to agree with the view which appears to have been held in the Court below that this evidence should not have been considered at all in the present case, since evidence as to the character of the litigation was clearly relevant, but in my opinion it could be of little help in assessing the value of Mr. Perrault's services.

The late Mr. Perrault, a former batonnier general of the Quebec bar, had been for many years a leader in his profession and his learning and experience, more particularly in the field of commercial law were no doubt well known to the Courts below and indeed recognized by the appellants at

(1) [1894] 1 Q.B. 433. (2) [1917] 1 K.B. 183.

the hearing before this Court. The litigation in which he acted as senior counsel was important, the amount involved was large and the result successful. A careful reading of the reasons of Mr. Justice McDougall convinces me that the Court below did not proceed upon the mere fact that Mr. Perrault had pledged his oath as to the value of his services. That by itself is not conclusive since the taxing officer, the judge in bankruptcy and each member of the Court of Appeal is free to exercise his own discretion under all the relevant circumstances in fixing an amount fair and reasonable to the party whose bill is being taxed and to the client. The amount allowed by the judge in bankruptcy, however, in my opinion was too low and I cannot say that the Court of Appeal has erred in fixing the value of the services in question at $22,800.

In the result, in my opinion, the respondents are entitled to be collocated and paid by preference in the distribution of the assets of the bankrupt estate, the sum of $22,300, and I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *B.. Bernstein, J. Shapiro, C. Coderre.*

Solicitor for the respondent: *J. Perrault.*