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(Winnipeg Centre)
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COURT OF QUEEN'S BENCH OF MANITOBA

IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT,* R.S.C. 1985, c. B-3, AS AMENDED	)	Counsel:
	)	ERIN CRADDOCK
	)	for Bellhop Express Corp.
	)	
	)	J.J. BURNELL
	)	for 5274398 Manitoba Ltd
	)	
AND IN THE MATTER OF THE PROPOSAL OF 5274398 MANITOBA LTD. O/A CROSS COUNTRY MANUFACTURING of the City of Morden, in the Province of Manitoba	)	ANDREW P. LOEWEN
	)	for Lazer Grant Inc.
	)	
	)	JUDGMENT DELIVERED
	)	June 18, 2019

DEWAR J.

INTRODUCTION

[1] This is an appeal of Bellhop Express Corp. ("Bellhop") from the Notice of Disallowance of Claim by Lazer Grant Inc. in its capacity as proposal trustee (the "Trustee") of 5274398 Manitoba Ltd. operating as Cross Country Manufacturing ("Cross Country").

FACTS

[2] Cross Country is a company that manufactures large open topped trailers. In 2017, Cross Country was suffering financial difficulties and on August 11, 2017, it filed a Notice of Intention to Make a Proposal pursuant to the ***Bankruptcy and Insolvency Act***, R.S.C., 1985, c. B-3 and amendments thereto (the "***BIA***"). A series of extensions were granted following the initial filing during which a sale of certain Ontario assets was effected which reduced significant financing costs and allowed the company to make a proposal. On January 19, 2018, the company filed its proposal with the Trustee, who proceeded to distribute it to creditors and arrange and hold a creditors meeting. On February 6, 2018 a creditors meeting was held in Winnipeg at which time the creditors of Cross Country, present either in person or by proxy and whose claims were admitted, voted to accept the proposal. On February 5, 2018, the day before the creditors meeting, Bellhop submitted its Proof of Claim and registered its vote against the Proposal. Prior to the creditors' meeting, the Trustee disallowed the Bellhop Proof of Claim for voting purposes, and its vote was therefore not counted in the resolution to approve the proposal.

[3] On March 2, 2018, the proposal was approved by this Court. Bellhop did not formally object to the granting of the Proposal Order and did not appear at the hearing. An email from its counsel to counsel for the Trustee was filed which said:

> Without prejudice to any of our client's rights, I can advise that we will not be attending at the Approval hearing on March 2, 2018, or filing anything with the court in advance of the same.

[4] Following the approval of the Proposal, the Trustee further considered Bellhop's Proof of Claim, and on September 10, 2018, by Notice of Disallowance, disallowed Bellhop's Proof of Claim. It is from that Notice of Disallowance that Bellhop has appealed to the Court.

[5] The Proof of Claim filed by Bellhop sought compensation for damages allegedly sustained by Bellhop as the result of an agreement entered into with a company called Cervus Contractors Equipment LP ("Cervus") for the purchase of two trailers manufactured by Cross Country. The Proof of Claim was supported with an affidavit from James Crespi, the president of Bellhop, ("the First Crespi Affidavit"), in which he deposed that the agreement required the first trailer to be delivered by May 18, 2015 and the second trailer to be delivered by June 1, 2015 and that there existed warranties from both Cervus and Cross Country. Mr. Crespi also deposed that the warranties and/or conditions of fitness for purpose and merchantability implied by the *Ontario Sale of Goods Act* had never been explicitly excluded by Cross Country, and that there were representations as to quality and fitness contained in the manual for the trailer. Mr. Crespi further deposed that Bellhop only received one of the contracted trailers. It was financed through a lease arrangement with Mercado Capital Corporation ("Mercado"). Mr. Crespi further deposed that the trailer which was delivered to Bellhop never operated properly and as a result, Bellhop incurred

repair costs, and, because the trailer failed to operate properly, it lost a major contract. The amount of Bellhop's loss was estimated by Mr. Crespi in the Proof of Claim to be $3,270,684. In the First Crespi Affidavit, Mr. Crespi also deposed that Bellhop had commenced an action on March 17, 2017 in the Supreme Court of Ontario against Cross Country, Cervus, Elcargo Fabrication Inc. and John Doe and Jane Doe ("the Ontario Litigation"). Mr. Crespi deposed that although Cross Country had filed a notice to defend the action in Ontario, it had never actually filed a statement of defence. He further deposed that although Cervus had filed a statement of defence and cross-claim, the action had not even proceeded to the affidavit as to documents stage.

[6] Mr. Crespi therefore concluded his affidavit with the following:

> As of February 5, 2018, Cross Country remains a contingent debtor to Bellhop for the total amount of $3,270,684.00.00

[7] In June 2018, the Trustee requested and received certain information from representatives of Cross Country. On September 10, 2018, the Trustee disallowed Bellhop's claim. In so doing, the Trustee wrote as follows:

(a) The claim of Bellhop was contingent and unliquidated and it therefore considered the claim pursuant to ss. 121(2) and 135 of the ***BIA*****;**

(b) Neither the pleadings in the Ontario Litigation nor the documents submitted by Bellhop in the First Crespi Affidavit support the existence of a contract between Bellhop and Cross Country or between Bellhop and Cervus;

(c) No evidence of an assignment of any Cross Country warranty from Mercado to Bellhop was provided;

(d) To the extent that Bellhop relied upon an unsigned purchase agreement between it and Cervus, it contained language which specifically excluded consequential damages resulting from any breach of warranty;

(e) The documents provided by Bellhop at best evidence only one trailer, and not two as deposed by Mr. Crespi;

(f) The Statement of Claim in the Ontario Litigation asserts that the same damage claimed against 5274398 was caused by the independent breaches by third parties;

(g) The documents provided by Bellhop suggest that it was at risk of losing a major contract even before the scheduled delivery date for the first trailer.

(h) As to the second trailer, the documents provided in the First Crespi Affidavit suggest that Bellhop declined to proceed with the purchase of a second trailer, not that Cross Country or Cervus failed to deliver it;

(i) As to the alleged misrepresentations of Cross Country concerning the fitness of the trailer, those misrepresentations were contained after the agreement was made, and in any event are only in the nature of mere puffery;

(j) There was no reasonable evidence to support the loss of profits claimed including:

(a) the Income Statement included in the Crespi Affidavit shows an increase in after-tax profits for the 12 month period ending August 2016 over the prior period and is not indicative of financial stress;
(b) the Balance Sheet included in the Crespi Affidavit shows an increase in Retained Earnings and Equity for the 12 month period ending August 2016 over the prior period and is not indicative of financial stress;
(c) there is no substantiation of the claim that delays in the delivery of the trailer affected BEC's operations and/or contracts;
(d) there is no substantiation of when and for how long the 5274398 trailer was out of service, or of the financial impact of same;
(e) there is no substantiation of how or why down-time with the 5274398 trailer impacted the ability of BEC's other trailers to generate income in 2016;
(f) there is no evidence of why BEC did not replace the trailer manufactured by 5274398 with another trailer if the expected profits from continued operations were as large as claimed;
(g) there is no substantiation of when or for what reason BEC ceased operations.

(k) As to the assertion that certain repair costs were incurred, the Trustee concluded:

(a) certain of the documentation of incurred costs does not appear to relate the to the subject trailer;
(b) certain of the documentation of incurred costs appears to relate to ordinary wear and tear;
(c) the balance of the documentation of incurred costs suggest that the cost of the repairs were modest relative to the value of the trailer. Further, this documentation largely pertains to a period of several months following BEC's receipt of the trailer;
(d) documentation included in the Crespi Affidavit suggests that BEC neglected or delayed in returning the trailer to 5274398 for warranty work/repairs, despite requests by Cervus and 5274398;

(e) there is no substantiation of how such repairs caused the loss of profits claimed.

(l) As a result of the foregoing, the claim of Bellhop was too remote or speculative to be valued.

[8] Bellhop appeals the Trustee's decision on the following grounds:

(a) Bellhop's claim is neither contingent or unliquidated;

(b) The materials attached to Bellhop's Proof of Claim support the existence of a contract between Bellhop and Cervus;

(c) It was unreasonable of the Trustee to decline to find a warranty from Cross Country to Bellhop;

(d) The Trustee erred in declining to find a collateral warranty by Cross Country to Bellhop in respect of the fitness of the trailer that was purchased;

(e) The Trustee erred in failing to consider whether Bellhop had successfully asserted a negligence claim against Cross Country; and

(f) Cervus' joint and several liability does not preclude Bellhop's claim.

ANALYSIS

TRUE APPEAL OR HEARING *DE NOVO?*

[9] The onus is on a creditor to prove its claim. This is accomplished within the mechanism set out in the *BIA* by the creditor's filing a Proof of Claim. Section 124 of the *BIA* reads as follows:

> **124 (1)** Every creditor shall prove his claim, and a creditor who does not prove his claim is not entitled to share in any distribution that may be made.
>
> **Proof by delivery**
>
> **(2)** A claim shall be proved by delivering to the trustee a proof of claim in the prescribed form.
>
> **Who may make proof of claims**
>
> **(3)** The proof of claim may be made by the creditor himself or by a person authorized by him on behalf of the creditor, and, if made by a person so authorized, it shall state his authority and means of knowledge.
>
> **Shall refer to account**
>
> **(4)** The proof of claim shall contain or refer to a statement of account showing the particulars of the claim and any counter-claim that the bankrupt may have to the knowledge of the creditor and shall specify the vouchers or other evidence, if any, by which it can be substantiated.

[10] In *Mamczasz Electrical Ltd. v. South Beach Homes Ltd.*, 2010 SKQB 182 (CanLII), at para. 46, Registrar Schwann wrote:

> 46 Case authority is quite clear: the creditor bears the onus of establishing its claim. It does so by providing vouchers, statement of account or other evidence sufficient to substantiate it. Put another way, the creditor must provide sufficient evidence so as to enable the trustee to make an informed decision on the validity of the proposed claim. ...

[11] Once in receipt of a Proof of Claim, the trustee has the responsibility of reviewing it in order to determine whether the claim is valid. If the trustee is not satisfied with the Proof of Claim, he may seek further information from other sources, including the claimant. The objective of the trustee is to determine whether the claim of the claimant is a "claim provable" in proceedings under the *BIA*. This objective is described in s. 121 of the *BIA*, the first three subsections of which read as follows:

> **Claims provable**
>
> **121 (1)** All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.
>
> **Contingent and unliquidated claims**
>
> **(2)** The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such a claim shall be made in accordance with section 135.
>
> **Debts payable at a future time**
>
> **(3)** A creditor may prove a debt not payable at the date of the bankruptcy and may receive dividends equally with the other creditors, deducting only thereout a rebate of interest at the rate of five per cent per annum computed from the declaration of a dividend to the time when the debt would have become payable according to the terms on which it was contracted.

[12] If the claim is contingent or unliquidated, the trustee must if possible value it. This is described further in s. 135 of the *BIA*, which reads:

> **135 (1)** The trustee shall examine every proof of claim or proof of security and the grounds therefor and may require further evidence in support of the claim or security.
>
> **Determination of provable claims**
>
> **(1.1)** The trustee shall determine whether any contingent claim or unliquidated claim is a provable claim, and, if a provable claim, the trustee shall value it, and the claim is thereafter, subject to this section, deemed a proved claim to the amount of its valuation.
>
> **Disallowance by trustee**
>
> **(2)** The trustee may disallow, in whole or in part,
>
> (a) any claim;
>
> (b) any right to a priority under the applicable order of priority set out in this Act; or

(c) any security.

Notice of determination or disallowance

(3) Where the trustee makes a determination under subsection (1.1) or, pursuant to subsection (2), disallows, in whole or in part, any claim, any right to a priority or any security, the trustee shall forthwith provide, in the prescribed manner, to the person whose claim was subject to a determination under subsection (1.1) or whose claim, right to a priority or security was disallowed under subsection (2), a notice in the prescribed form setting out the reasons for the determination or disallowance.

Determination of disallowance final and conclusive

(4) A determination under subsection (1.1) or a disallowance referred to in subsection (2) is final and conclusive unless, within a thirty day period after the service of the notice referred to in subsection (3) or such further time as the court may on application made within that period allow, the person to whom the notice was provided appeals from the trustee's decision to the court in accordance with the General Rules.

Expunge or reduce a proof

(5) The court may expunge or reduce a proof of claim or a proof of security on the application of a creditor or of the debtor if the trustee declines to interfere in the matter.

[13] In performing the task of assessing Proofs of Claims, the trustee must maintain an even hand between the various stakeholders, including the claimant whose claim is then under consideration. In practical terms, this will require a trustee to objectively assess the information contained within the Proof of Claim, to investigate other sources of information which might shed some light on the claim, when appropriate to request further information from the claimant, to consider the legal position upon which the claim is based, and to render a decision as to whether the claim is allowed or disallowed. It is not unusual in the course of this process for a trustee to engage in negotiation with a claimant with a view to finding a compromise. The amount of work done by the Trustee in

assessing a claim should be performed with a view to the practicalities of the situation. The trustee represents creditors of an entity which is financially strapped and there is no requirement for the trustee to look under every stone in order to satisfy itself to a degree of certainty. Were that the case, the estate would be eroded by the trustee's efforts to achieve that overwhelming standard. It is reasonableness that governs, both as to the nature of the investigation and the decision that is made. This is even the case where the trustee is faced with the assessment of a claim that is contingent or unliquidated.

[14] Again from the case of ***Mamczasz Electrical Ltd***. (*supra*):

> ... The test to be applied when examining proofs of claim has been described as follows:
>
> > In deciding the validity of a claim, *certainty* is not the test. If the method used in calculating the amount of the claim is reasonable and the evidence in support of the claim is relevant and probative, the claim should be admitted. *Re HDYC Holdings Ltd*. (1995), 35 C.B.R. (3d) 294. [Houlden and Morawetz p. 5-181; emphasis added]
>
> [emphasis in original]

[15] Once the Trustee has made its decision, an appeal lies. The question is whether the appeal is to be treated as a true appeal or a hearing *de novo*. In the case of a hearing *de novo*, new evidence would be available for consideration.

[16] By way of background, this appeal was commenced by Bellhop when it filed its notice of motion in October 2018 in which it requested an order setting aside the Notice of Disallowance of the Trustee. In a hearing that took place on January 21, 2019, counsel for the Trustee took the position that an appeal under

s. 135(4) of the ***BIA*** was a true appeal and that Bellhop would not be entitled to adduce further evidence from that which had already been furnished to the Trustee. During that hearing, counsel for Bellhop indicated that she was considering filing an additional short affidavit. I deferred the issue at that time on the basis that counsel for Bellhop was at liberty to file whatever additional affidavit was intended, but subject to the proviso that if there was a continued contest as to its admissibility, I would render my decision on its admissibility during the course of the appeal hearing to be held on April 24. 2019. Counsel for Bellhop did file a further affidavit of Mr. Crespi sworn February 21, 2019 ("the Second Crespi Affidavit"). This filing requires me to make a decision as to whether Bellhop's motion should be treated as a "true appeal" or a "hearing *de novo*". At the oral hearing on April 24, 2019, all counsel were content to argue the appeal on its merits and leave the decision as to the admissibility of the Second Crespi Affidavit to be rendered at the same time as judgment was given on the merits of the appeal.

[17] Whether an appeal under section 34(4) of the ***BIA*** is a true appeal or a hearing *de novo* has been the subject of conflicting decisions in Canadian courts. Prior to amendments to the ***BIA*** made in 1997 s. 121(2) of the ***BIA*** read as follows:

> 121(2) The court shall, on the application of the trustee, determine whether any contingent claim or any unliquidated claim is a provable claim, and, if a provable claim, it shall value the claim, and the claim shall after that valuation be deemed a proved claim to the amount of its valuation.

[18] That provision was replaced in 1997 with the following:

> 121 (2)the determination whether a contingent or unliquidated claim is a provable claim and the valuation of such a claim shall be made in accordance with section 135.

[19] Section 135(1.1) was then added to read:

> 135 (1.1) The trustee shall determine whether any contingent claim or unliquidated claim is a provable claim, and, if a provable claim, the trustee shall value it, and the claim is thereafter, subject to this section, deemed a proved claim to the amount of its valuation

[20] The right of appeal from the disallowance was set out in subsection 135(4) which read:

> (4) A determination under subsection (1.1) or a disallowance referred to in subsection (2) is final and conclusive unless, within a thirty day period after the service of the notice referred to in subsection (3) or such further time as the court may on application made within that period allow, the person to whom the notice was provided appeals from the trustee's decision to the court in accordance with the General Rules.

[21] In other words, prior to the 1997 amendments, where there was no agreement between the trustee and a claimant in respect of a contingent or unliquidated claim, the court would make the decision upon the application of the trustee. After the 1997 amendments, the trustee was given the task of making the initial decision about a contingent or liquidated claim, subject to the right of the claimant to appeal to the bankruptcy court. Although the parties agreed in the case at bar to bring their appeal to a judge, they could have brought the appeal before the Registrar. There would then have been a right to appeal to this court from the decision of the Registrar, but the authorities are clear that that appeal would have been restricted to a hearing on the record that was before the Registrar. For the purposes of this appeal, it should be decided as if it was placed before the Registrar.

[22] The nature of the appeal by a claimant who appeals a Notice of Disallowance was discussed by Registrar Schlosser in ***Oil Lift Technology Inc. v. Deloitte & Touche Inc.***, 2012 ABQB 357 a paras. 30-33:

> 30 The authorities determining what evidence should be considered on appeal are mixed. Some cases say that appeals are *de novo* and fresh evidence can be considered on appeal as a matter of course.
>
> *Re Eskasoni Fisheries Ltd.,* (2000), 16 C.B.R. (4th) 173 (N.S. S.C.);
> *Re Alberta Permit Pro Inc.,* 2011 ABQB 141;
> *Re Experience Equipment Sales and Rentals,* 2001 ABQB 641
>
> 31 Other cases hold that appeals from a Trustee are 'true appeals'. They are essentially appeals on the record that was before the Trustee.
>
> *Re Galaxy Sports Inc.,* 2004 BCCA 284
>
> 32 A hybrid line exists as well:
>
> *Re San Juan Resources Inc.,* 2009 ABQB 55 (Prowse, R.);
> *Re Transglobal Communications Group Inc.*, 2009 ABQB 195 (at para. 49-50, per Yamauchi, J.;
> *Re South Beach Homes Ltd.*, 2010 SKQB 182 per Schwann, R;
>
> 33 The hybrid approach is that an appeal is on the record but it can be *de novo*, involving fresh evidence, where the interests of justice require it. ...

[23] Only one Manitoba case on this issue was cited to me during argument, namely ***Bankruptcy of David Michael Henderson***, 2018 MBQB 23, a decision of Registrar Sharp who permitted additional evidence to be filed, but without commenting upon whether she was presiding over a true appeal or a hearing *de novo*. There does not appear to have been a definitive ruling on the issue in Manitoba.

[24] There is recent authority from the Manitoba Court of Appeal which addresses when an appeal prescribed by statute is a true appeal or a hearing *de*

novo. In ***Friesen (Brian Neil) Dental Corp. et al. v. Director of Companies (Man.) et al.***, 2011 MBCA 20 (CanLII), Steele J.A. wrote:

> 42 Thus, the general case law on this point suggests that when a statute uses the word "appeal," and nothing in the statute appears to expand the nature and the scope of the appeal hearing, then the appeal will be considered a "true appeal" as opposed to a *de novo* hearing....

[25] In ***Santarsieri (Michele) Inc. et al. v. Manitoba (Minister of Finance)***, 2015 MBCA 71, a case dealing with an appeal from a taxing assessment, Cameron J.A. wrote:

> 32 In *Friesen*, Steel J.A. outlined several factors to consider when determining the nature of an appeal right intended by the Legislature.
>
> 33 The first consideration is the provision itself. Where the provision is silent as to the possibility of a hearing *de novo*, a presumption arises that the review is to be on the record (at para. 32).
>
> 34 A presumption having arisen, as it has in this case, Steel J.A. then identified other factors for the court to consider in its analysis. These include the nature of the decision appealed from, the statutory framework and legislative history of the legislation, and the scheme of the legislation as a whole, including the duties and expertise of the original decision maker. Other considerations include whether or not there is a legislative requirement that the administrative entity being appealed from keep a record or give reasons for its decisions.

[26] There are conflicting interests in the decision as to whether an appeal from a Notice of Disallowance under s. 135(4) of the ***BIA*** should be a true appeal or a hearing *de novo*. On the one hand, the ***BIA*** regime is intended to be relatively inexpensive and somewhat expeditious, and a hearing *de novo* has the potential of incurring significant cost and occasioning significant delay in the administration of a bankruptcy proceeding. On the other hand, some claims may involve millions of dollars, at least on a gross basis, and a claimant should not necessarily lose its ability to advance its position simply because it failed to

anticipate the Trustee's response to its Proof of Claim before the Notice of Disallowance was issued. Nonetheless, there is some advantage to requiring claimants to provide substantial evidence of their claims when they file their Proof of Claim. A process in which a claimant is able to simply file a Proof of Claim in cursory form knowing with certainty that upon disallowance it may bolster its materials before the bankruptcy court, is not a satisfactory process.

[27] Some decisions have attempted to find a balance between the various considerations. That approach has been adopted in the "hybrid line of cases". Using the terminology of Registrar Schlosser in the ***Oil Lift Technology Inc.*** case:

> 33 The hybrid approach is that an appeal is on the record but it can be *de novo*, involving fresh evidence, where the interests of justice require it.

[28] This compromise approach in my opinion is the approach which we should follow in this province. It is consistent with the general approach of our Court of Appeal in ***Friesen*** and ***Santarsieri*** in that the default position is an appeal on the record, but it is flexible enough to ensure that the claimant is not unfairly prejudiced in attempting to join the general body of creditors. Admittedly, there is a danger that the "interests of justice" is too wide a concept and will simply encourage claimants to file additional buttressing material in every case. However, notwithstanding that risk, if the default position requires a party to obtain leave before additional material is filed, there is at least some incentive

for a claimant to be diligent about its claim at the time that it files its Proof of Claim.

[29] I adopt the "hybrid approach" in this case.

[30] I am prepared to grant leave to Bellhop to file the Second Crespi Affidavit. My reasoning is this. The Trustee received Bellhop's Proof of Claim and made inquiries of representatives of Cross Country about it. It received certain information. It is difficult to say exactly how it used all of the information that it received, but there is no doubt in my mind that it used some of it. It also has used the information that was supplied in the Cervus Proof of Claim. In my view, fairness dictated that Bellhop should receive the specific information that was received by the Trustee and used by it in formulating its Notice of Disallowance. No such transmittal of information was given by the Trustee to Bellhop prior to the issuance of the Notice of Disallowance. The failure to transmit such information deprived Bellhop of commenting upon it, and as a result opened the door to Bellhop requesting, and in this case receiving, the opportunity to file additional material.

[31] Additionally, the claim advanced by Bellhop was a large claim, perhaps unexpectedly so from the standpoint of Cross Country. Nonetheless, Bellhop was entitled to have its claim investigated. Its claim had the appearance of some substance since there clearly was some warranty work that had been performed by Cross Country on the trailer. Rather than dealing with it primarily on the basis of the gaps in the materials attached to the Proof of Claim, it would have

been prudent for the Trustee to raise its specific concerns with counsel for Bellhop before simply casting the claim aside. Relying too heavily on the proposition that a claimant has the onus of proving its claim upon its initial filing will many times result in an appeal in which the claimant is entitled to file additional material because it did not anticipate the concerns expressed in the Notice of Disallowance.

[32] In my respectful view, one of the ways that a Trustee might avoid the claimant's use of additional evidence in an appeal would be to telegraph its decision to the claimant in advance of the formal Notice of Disallowance and seek the claimant's comments, if any, before issuing its decision. If the claimant failed to respond, or respond appropriately, then it will have a more difficult task in obtaining leave to give further evidence if it launches an appeal to the court. Alternatively, the use of the examination sections under the *BIA* might assist the Trustee in cases in which the evidence provided with the Proof of Claim is deficient, since then, the Trustee might invite the claimant to fill in the gaps and avoid the argument at a subsequent time that the claimant was not given enough opportunity to advance its position. Neither of these two alternatives are mandated, and in many cases may not be appropriate. However, in some cases, taking advantage of them may save the Trustee (and the estate) additional time and expense in the long run.

WHAT IS THE STANDARD OF REVIEW?

[33] Where the appeal is a true appeal, if the Trustee's decision involves a question of law, the standard of review is correctness. Where a factual issue is in dispute, the standard of review generally is reasonableness. Those propositions, along with the statement that those propositions should apply "regardless of the nature of a s. 135(5) appeal", come from ***Royal Bank of Canada v. Insley***, 2010 SKQB 17, (Registrar), cited as well in ***Bankruptcy of David Michael Henderson*** (*supra*) at para. 27. I simply caution that where an appeal is a *de novo* hearing, although the notion of correctness for issues of law will continue, the notion of reasonableness may not apply since the appeal judge (or Registrar) may be working with a different factual matrix, depending upon what additional evidence was led during the appeal.

[34] Even in a hearing *de novo,* the opinion of the Trustee should not be inconsequential. Trustees are officers of the court with the qualifications and experience to make determinations as to what might constitute a provable claim. However, where evidence is placed before the court that is additional to what was before the Trustee, the court official hearing an appeal from the Trustee may exercise his or her discretion in determining issues of fact. In such a situation, less deference is to be expected because the factual matrix upon which the Trustee's decision was based has changed. As a matter of practice, the more significant the change in the factual matrix, the less deference will be given.

THE APPEAL ON ITS MERITS

[35] The balance of this decision will deal with Bellhop's appeal in the order of the grounds set forth in its motion brief.

(1) Whether Bellhop's Claim is Contingent or Unliquidated.

[36] Bellhop argued that its claim was neither contingent or unliquidated.

[37] A contingent claim is one in which "not all elements necessary to establish liability have occurred by the date of bankruptcy". (See ***Chartered Professional Accountants of Alberta v. Neilson***, 2018 ABQB 170 at para. 52). This has been interpreted to mean that where the claims are under review of a court, they are contingent only. In ***Cooke (Re)***, 2018 SKQB 329, Registrar Thompson wrote at para. 5

> 5 Section 121(2) of the *BIA* governs the provability of a contingent claim and directs that provability is to be ascertained in accordance with s. 135 of the *BIA*. The term "contingent" is not defined in the *BIA*. At common law, courts consider a contingent claim to include a claim for a debt that has not yet been established and determined by a court of law.

[38] It is beyond question that the claim for damages described in the statement of claim filed in the Ontario Litigation has never been established and determined by a court of law. That makes the claim contingent.

[39] Indeed, when Bellhop filed its Proof of Claim, its own materials described its claim as contingent.

[40] Furthermore, the claim is unliquidated. In ***McAllister v. Orrock***, 1937 CarswellMan 4, 45 Man. R. 433, when discussing the meaning of "unliquidated

damages" under the then existing *Bankruptcy Act*, Adamson J. wrote at para. 4:

> 4 ... While bankruptcy and insolvency are exclusively within the jurisdiction of Parliament, yet it seems to me that when the expression "unliquidated damages" is used, it must mean unliquidated damages according to the law and practice of the province....

[41] In the case of ***GRH Ventures Ltd. v. De Neve***, 1987 CarswellMan 189, [1987] M.J. No.137, Huband J.A. wrote:

> 16 The third ground for attacking the garnishing order is more substantial. It is alleged that the claim in question is not for a "debt or ***liquidated*** demand in money" and consequently a garnishing order is not available under the rules of the Court of Queen's Bench.
>
> 17 The requirement that the claim be a "debt or ***liquidated*** demand" is also a prerequisite to obtaining final as opposed to interlocutory judgment in default of a statement of defence being filed. Many other jurisdictions impose the same requirement in order to obtain a final judgment by default. There are also some jurisdictions where a legal action is commenced by a writ of summons which includes an indorsement as to the nature of the claim and the relief or remedy required. Where the claim is for a "debt or ***liquidated*** demand" then the writ will include a specific demand for that sum plus specified costs. In short, the phrase "debt or ***liquidated*** demand" arises in different contexts in various jurisdictions, and there are many cases, ancient and modern, which touch upon the meaning of that phrase.
>
> 18 The import of these cases is synthesized in Odgers' Principles of Pleading and Practice (21st ed. 1975) at p. 44, in these terms:
>
> > "When the amount to which the plaintiff is entitled can be ascertained by calculation, or fixed by any scale of charges or other positive data, it is said to be '***liquidated***' or made clear provided that it is expressed in sterling. But when the amount to be recovered depends upon the circumstances of the case and is fixed by opinion or by assessment or by what might be judged reasonable, the claim is generally unliquidated."
>
> 19 Odgers' cites the case of G.L. Baker, Ltd. v. Barclays Bank, Ltd., [1956] 3 All E.R. 519, as an example where the claim can be ascertained by calculation or fixed by positive data. In that case the plaintiff's claims against three separate defendants were for money allegedly wrongly converted by the various defendants. Even though the claims were founded upon the tort of wrongful conversion, they were certain in amount, and not dependent upon opinion or assessment.

> 20 In the present case, in contrast, the claim advanced by the plaintiff is subject to assessment and opinion in arriving at a final figure. The plaintiff acknowledges that its contractual obligations to construct the house were not completed, and that there were deficiencies in the work which was performed. The plaintiff contends that the incomplete work and the deficiencies might be fairly valued at $10,000.00, and after giving credit for that sum, the plaintiff contends that it is entitled to the balance, $28,596.74, plus interest. It is clear on the face of the pleadings that the deficiencies and the incomplete work lead into an area of opinion and assessment as opposed to a figure which can be "... ascertained by calculation, or fixed by any scale of charges or other positive data."
>
> [emphasis added]

[42] Here although there may be parts of the claim that are liquidated (such as a claim for the cost of repairs), there are other parts such as the claim for loss of profits which would be determined on the methodology employed and the assumptions and discounts which a judge would need to consider.

[43] I am of the view that the Trustee did not err when it concluded that it was dealing with a contingent and unliquidated claim.

(2) Whether the materials attached to Bellhop's Proof of Claim support the existence of a contract between Bellhop and Cervus.

[44] In its Notice of Disallowance, the Trustee wrote:

> The Statement of Claim in Ontario Superior Court of Justice action No. 914/17 (the "**BEC Action**"), as attached to the Affidavit of James Crespi given in support of the Proof of Claim ("**Crespi Affidavit**") seeks, *inter alia,* damages for breach of contract, but no contract is alleged between Bellhop Express Corp. ("**BEC")** and the debtor 5274398 Manitoba Ltd. o/a Cross Country ("**5274398**") and the documents submitted do not support the existence of a contract between BEC and 5274398 Manitoba Ltd. o/a Cross Country ("**5274398**") or between BEC and Cervus Contractors ("**Cervus**").
>
> [underlining added]

[45] Bellhop submits that there is ample material before the Trustee to demonstrate an agreement between Cervus and Bellhop in respect of a trailer manufactured by Cross Country.

[46] The above comments by the Trustee appear to be intended to emphasize that there is an initial onus on a claimant to provide proof of facts which demonstrate the claim. It was fair for the Trustee to point out that in a claim of the nature being advanced by Bellhop, one would have expected to see a copy of the purchase agreement between Bellhop and Cervus attached to the Proof of Claim. Here there is none. Bellhop provided only an unsigned agreement in what appears to be a standard form of Cervus' purchase agreement and a signed lease agreement between Bellhop and Mercado in respect of one trailer. These documents were used by Bellhop in its Proof of Claim to support the notion that there was an order for two trailers, that the trailers were to be delivered by May 18, 2015 and June 1, 2015, that there was a manufacturer's warranty from Cross Country and that the implied warranties in the Ontario *Sale of Goods Act* applied to the transaction.

[47] There was evidence before the Trustee that there never was a contract between Cervus and Bellhop. There was in fact only a contract between Mercado and Cervus. This evidence comes from the Statement of Defence and Cross-claim filed by Cervus in the Ontario Litigation commenced by Bellhop. In its Statement of Defence, Cervus pleads that it has never orally, or in writing, entered into any contract with Bellhop, and, although it did sell one 485D Cross

Country trailer, the transaction was with Mercado as distinct from Bellhop. Although a court pleading contains allegations only, this allegation is entitled to additional weight since Bellhop failed to provide a copy of a signed contract between Bellhop and Cervus, but did provide a copy of signed lease agreement between Mercado and Bellhop. The absence of a copy of a contract between Bellhop and Cervus and the existence of a lease agreement between Mercado and Cervus is entirely consistent with the Cervus statement of defence. The only document missing is the agreement between Cervus and Mercado, but given the reliance of Bellhop on the unsigned Bellhop/Cervus agreement on what Bellhop submits is a standard Cervus sale agreement, and the fact that there is no doubt that Bellhop actually operated a Cross Country trailer, I am prepared to infer that the Cervus/Mercado sale agreement would be in the same form as the unsigned Cervus/Bellhop agreement relied upon by Bellhop.

[48] Nonetheless, to the extent that Bellhop makes any allegations in contract against either Cervus or Cross Country, it has no direct contractual link to make them. A finding by the Trustee that there was no contract between Cervus and Bellhop or between Cross Country and Bellhop was a reasonable finding to make on the evidence available to it prior to the Notice of Disallowance. Nothing has been led into the evidence on this appeal to permit to any other conclusion. There was however an agreement between Cervus and Mercado which the Trustee impliedly accepts.

(3) Whether it was unreasonable of the Trustee to decline to find a warranty from Cross Country to Bellhop.

[49] In the initial First Crespi Affidavit, Mr. Crespi deposed that:

> 4. The trailers included a manufacturer's warranty from Cross Country that the trailers were free of defects in material and workmanship. In particular, the warranty included a 5 year 100% manufacturer's warranty on the structure of the trailer and a 1 year warranty for parts and labour on the McKoy live bottom drive system from. Attached hereto and marked as **Exhibit "C"** to my Affidavit is a copy of the warranty with respect to the trailers provided by Cross Country.

[emphasis in original]

[50] Mr. Crespi provided an unsigned copy of the Cross Country warranty which corresponds to the description set out in the body of his affidavit, but which also contains a number of limitations not referenced in his affidavit such as:

> This warranty applies only when properly maintained and used in normal service. "Normal service" means usage in the manner and for the purposes for which such goods are generally purchased and utilized and with respect to the loading, unloading and carriage of uniformly distributed legal loads of non-corrosive cargo, properly secured, in a manner which does not subject the vehicles to strains or impacts greater than normally imposed by lawful use on well-maintained public roads. This warranty does not cover components of the trailer as they are covered by original manufacturers' warranty (hoists, axles, wheels, tires, brakes, suspensions, ABS and other). Cross Country Mfg does not warranty Calcium Sprayers or any other parts, accessories or items custom designed or manufactured (Cross Country Mfg will pass on the warranty if the items were purchased with it).
>
> Your sole remedy under this warranty is limited to Cross Country Mfg. repairing or replacing at Cross Country Mfg factory or authorized repair station any part or parts thereof, which shall be returned on request to Cross Country Mfg, with transportation charges prepaid and which Cross Country Mfg's examination shall disclose to its satisfaction to have been defective
>
> Cross Country Mfg makes no warranty whatsoever in respect to tires, brake drums and other attaching equipment, ….

. . . . .

> Cross Country Mfg makes no warranties except as expressly stated herein and hereby excludes any implied warranty of merchantability or fitness for particular purpose. It is agreed that Cross Country Mfg shall not be liable for incidental or consequential damages resulting from any breach of warranty including, and without limiting the generality of the foregoing, loss of income, damage to vehicle, attachments, trucks or cargo, towing expenses, or injury to or death of persons.

[51] The warranty also was directed to the "original purchaser only" and said this:

> This instrument constitutes the entire agreement between the Purchaser and Cross Country Mfg and the Purchaser understands and agrees that no person is authorized to make any other warranties or representations which will be binding upon Cross Country Mfg with respect to the sale of new trailers manufactured by Cross Country Mfg. This agreement is not valid unless a signed copy is received by Cross Country Mfg within 14 days of date of delivery.

[52] In the Notice of Disallowance, the Trustee said this:

> The BEC Action alleges a breach of written warranty on the part of 5274398, however:
>
> (a) there is no evidence in the Crespi Affidavit of an assignment of the warranty from Mercado Capital to BEC;
> (b) the Warranty document relied upon in the Crespi Affidavit:
> i) is unsigned by 5274398;
> ii) excludes implied warranties of merchantability or fitness for particular purposes;
> iii) states that 5274398, "shall not be liable for incidental or consequential damages resulting from any breach of warranty including, and without limiting the generality of the foregoing, loss of income…", and therefore on its face excludes the loss of profits claimed by BEC in its Proof of Claim.

[53] The significance of the Trustee's comments is that the Cross Country Warranty for the trailer was not initially given to Bellhop. It was made to the original purchaser, namely Mercado. In straight legal theory, Bellhop's cause of

action for a defective piece of equipment would be directed to its lessor. The complicating feature in this case is that the terms of the lease between Bellhop and Mercado prohibit recourse by Bellhop to Mercado. It does however provide that Mercado will assign to Bellhop during the term of the lease any warranties given to Mercado by the vendor or the manufacturer. Unfortunately, the Trustee was not provided with any assignment document regarding any warranty from Cross Country to Mercado. There is a further provision stating that there is a deemed reassignment of any warranties if Mercado obtained possession of the trailer. In this latter event, all warranty rights would be left in the possession of Mercado, not Bellhop. The Cervus Statement of Defence in the Ontario Litigation alleged that the trailer had been sold by auction and Mercado is no longer the owner of the trailer. In the First Crespi Affidavit, Mr. Crespi deposes that Bellhop ceased carrying on business around October 2016 when creditors seized its equipment. There is no evidence from Bellhop as to what has become of the trailer. In short, there is no documentary evidence that Bellhop ever acquired any Cross Country warranty, or if it did, whether it still was in possession of it at the time of the filing of the Notice of Intention.

[54] Bellhop has proven however that Cross Country has performed some warranty work on the trailer at the request of Bellhop. In my respectful opinion, it was not open to the Trustee to therefore raise the lack of warranty. The Trustee has given no reason why Cross Country performed that warranty work, and I am prepared to conclude that having performed it, in the absence of any

explanation, Cross Country is now estopped from arguing that there was no warranty available to Bellhop. I conclude that the trailer was sold by Cervus with a Cross Country warranty, and notwithstanding that there is no evidence of an assignment of the warranty from Mercado to Bellhop, Cross Country was prepared to permit Bellhop to take advantage of the warranty at least until the time that Bellhop was dispossessed of the trailer by its creditors. There was evidence before the Trustee that Cross Country provided some warranty work and invited further warranty work to be provided as a result of Bellhop's complaints. There is also evidence that Bellhop incurred additional expense in effecting emergency or temporary repairs for the trailer. I am prepared to concede that Bellhop has provided enough evidence to demonstrate that while it was in possession of the trailer, it incurred some expense that should have been covered by warranty.

[55] That however does not help Bellhop in a significant way since the total of the repair bills which it has provided to the Trustee and the court amount only to $3,672.08, of which $742.64 is not attributable to the Cross Country trailer, $355.95 is for a Department of Transport Inspection and $341.66 is for a defective tarp which was not warranted by Cross Country, netting the sum of $2,231.83. Although counsel for the Trustee has argued that some of the remaining expenses may arise from lack of maintenance or care on the part of Bellhop, there is insufficient evidence before me on this appeal to assess that argument nor do the amounts justify adjourning matters for further evidence to

be advanced. I simply conclude that Bellhop does have a valid claim for Breach of Warranty in the amount of $2,231.83.

(4) <u>Whether the Trustee erred in declining to find a collateral warranty by Cross Country to Bellhop in respect of the fitness of the trailer that was purchased.</u>

[56] In its Proof of Claim, Mr. Crespi deposed that:

> 6. In fact, in Cross Country's manual for the trailer (provided to Bellhop), Cross Country makes the following representations with respect to the quality and fitness for the purpose of the trailers:
>
> a) "We (Cross Country) take pride in being able to supply you (Bellhop) with a quality unit that will provide many years of trouble free service and ensure your satisfaction"; and
>
> b) "we (Cross Country) are dedicated to building trailers that are not only suited to your (Bellhop's) needs, but have been engineered with safety, durability and overall performance in mind".

[57] Mr. Crespi then attached selected pages from the Cross Country manual.

[58] Bellhop submits that these comments constitute collateral warranties or negligent misrepresentations regarding the fitness of the trailer.

[59] The Trustee wrote:

> The BEC Action contains allegations of pre-contractual misrepresentations; however, the only representations on the part of 5274398 cited in the Crespi Affidavit are written statements in an owner's manual provided at the time BEC took possession of the trailer. Further, the alleged misrepresentations appear to be in the nature of mere puffery.

[60] There is a short answer to this ground of appeal. Bellhop is not pointing to a sales brochure. It is pointing to a manual. There is no evidence that the manual was provided to Bellhop <u>before</u> the decision was made to purchase the trailer with the assistance of Mercado. Firstly, the purchaser of this trailer was

Mercado. There is nothing from Mercado to say that it relied upon the manual at the time of purchase. Secondly, unless the purchaser can demonstrate that it had received the representations before the transaction was made and that it relied upon the representations when making the purchase, there can be no actionable collateral warranty or misrepresentation. The absence of proof that the manual was provided to either Mercado or Bellhop in advance of the purchase permits the inference that the manual was provided at the same time that the trailer was delivered, which would have been after the agreement to purchase had been made.

[61] To the extent that the Trustee argued that the statements from the manual are mere puffery, his argument is supported by ***Andronyk v. Williams***, 1985 CarswellMan 211 at para. 55 which reads:

> 55 Indeed, many statements of opinion as to quality will be treated by the courts as what some call mere puffery. 31 Hals. (4th) 623, at para. 1017, puts it this way:
>
> > Mere **praise** by a man of his own goods, inventions, projects, undertakings or other marketable commodities or rights, if confined to indiscriminate puffing and pushing, and not related to particulars, is not representation.
>
> [emphasis added]

[62] The trustee was fully justified in concluding that there were no actionable collateral warranties or misrepresentations on the evidence before it, and there has been no further evidence filed in this court to suggest otherwise.

(5) Whether the Trustee erred in failing to consider whether Bellhop had successfully asserted a negligence claim against Cross Country.

[63] Bellhop submits that the Trustee failed to consider the part of its claim which alleged negligence on the part of Cross Country such that it received a defective trailer which created a danger to the health and safety of the user of the trailer. The defects listed in the affidavit of Mr. Crespi were as follows:

(a) improperly installed fenders;
(b) faulty wiring and electrical systems;
(c) non-operating lift axels;
(d) faulty air line;
(e) non-operating belt;
(f) broken output shaft;
(g) leaking airbags;
(h) improperly installed ladder latch;
(i) faulty chain oiler system;
(j) leaking axel seal;
(k) incorrect threaded rods;
(l) improper chain tension thread rod in the live bottom;
(m) improper reflective tape on fender;
(n) improper flaps installed behind all axels; and
(o) no centre mud flaps in front of landing gear.

[emphasis in original]

[64] In the First Crespi Affidavit, he attached a copy of the statement of claim in the Ontario Litigation which includes an allegation of negligence calling it "negligent supply of shoddy or defective goods". In the First Crespi Affidavit, when discussing Bellhop's claim for loss of profits, Mr. Crespi deposed that "But for the breaches of the Agreement, warranty and negligence," Bellhop would

have attained annual profits of $575,934.34. There was therefore a claim for negligence put before the Trustee. After listing the alleged defects in the First Crespi Affidavit, Mr. Crespi deposed:

> The aforesaid defects created a danger to the health safety of the user of the trailer

[65] The Notice of Disallowance does not directly address the alleged defects nor the allegations of negligence other than questioning the damages claimed by Bellhop. I infer that the approach of the Trustee to the allegation of negligence was to look for actual proof of the defects as well as evidence of the losses caused by them. The Trustee concluded that the loss of profit claim was not substantiated to the requisite standard nor were the repair costs appropriately detailed. Hence he concluded the claim was too remote and too speculative to be accepted or valued.

[66] No further proof of damage was provided by Bellhop in the Second Crespi Affidavit other than reference to Bellhop's purchase of a trailer in the amount of $107,944 on some unspecified date in an attempt to mitigate its damages. But for that addition, the evidentiary record before the court is the same as it was before the Trustee. In her brief, counsel for Bellhop indicated that the second trailer was a substitute trailer, but what is not clear in the Second Crespi Affidavit is whether it was to substitute for the allegedly defective trailer or for the second trailer allegedly earlier ordered but never delivered.

[67] Liability for economic loss sustained as a result of the negligent supply of shoddy or defective goods only arises if the defects in the defective goods create

a dangerous situation, ***Winnipeg Condominium Corp. No. 36 v. Bird Construction Co***., [1995] 1 S.C.R. 85. In ***Thorpe v. Honda Canada Inc.***, 2011 SKQB 72, 2011 CarswellSask 114, Propescul J. (as he then was) wrote at para. 38:

> The risk of harm to a foreseeable user is an essential element in a defective product claim in negligence. Although negligence law imposes a duty on a manufacturer of a product to ensure that they do not put products into the commercial stream that gives rise to an unreasonable risk of physical harm, that duty does not extend to products that are merely shoddy or of poor quality. Issues pertaining to poor quality can be dealt with by utilization of the laws of contract or consumer products legislation. The law of negligence is generally not the appropriate vehicle to advance an action alleging a "safe but shoddy" defect.

[68] Counsel for Bellhop also relied upon ***Panacci v. Volkswagen***, 2018 ONSC 6312 (CanLII) at paras. 28-29 and ***Reid v. Ford Motor Company***, 2003 BCSC 1632 at paras. 29-35.

[69] ***Thorpe***, ***Panacci*** and ***Reid*** are all class action cases in which a court simply reviews the pleadings. When a Trustee reviews a Proof of Claim, it is not reviewing a pleading - it is looking for evidence.

[70] A one line statement in an affidavit of the claimant in my view is insufficient to demonstrate that the defects created a danger either to the claimant or the general public. That one line statement is all that is before the court. Giving it little weight here is justified because there are other statements made in the First Crespi Affidavit which are clearly wrong. For example Mr. Crespi deposed that there was an agreement between Bellhop and Cervus, when the agreement was between Bellhop and Mercado. He deposed that there was an agreement to supply two trailers, when the materials before the court

suggest that although there was discussion about purchasing two trailers, there was no firm agreement to do so. In addition there was a Department of Transport Inspection invoice submitted by Mr. Crespi for payment by the Trustee, but there is nothing to suggest that the trailer did not pass the inspection. That would suggest that it was not dangerous at that time. Finally, there is no suggestion that Bellhop chose to park the trailer because it was unsafe. I say this simply to emphasize that I am not prepared to take at face value the statements by Mr. Crespi that all of the alleged defects existed or emanated from the manufacturer of the trailer and, even if they did, created a danger to users of the trailer. I would have expected to be provided with evidence from an independent mechanic who might have furnished an unbiased account of the real problems, if any, which existed in this trailer.

[71] Nonetheless, even if I am wrong, the evidence as to the damages sustained by Bellhop for the defective trailer is deficient. There are three heads of damage which are being advanced, namely cost of repairs, cost of acquiring the trailer described in the Second Crespi Affidavit, and loss of profit.

[72] In his argument, counsel for the Trustee argued that the Proof of Claim only related to damages for loss of profit. On its face, the amount claimed, namely $3,270,684 was described at paragraph 23 as follows:

> 23. Bellhop estimated loss of profit for the year before it ceased operation, plus 5 additional years of lost income is $3,270,684.00.

[73] In her brief and during argument, counsel for Bellhop argued for consideration of all three heads of damage. Since this is a hearing *de novo*, I am prepared to do so, notwithstanding that the Trustee's interpretation that the Proof of Claim referred only to Loss of Profits was understandable.

[74] I have already dealt with the claim for repairs under the warranty portion of these reasons and concluded that Bellhop is entitled to prove for $2,231.83

[75] I am not prepared to compensate Bellhop for the cost of the trailer described in the Second Crespi Affidavit. If the so called substitute trailer was to replace the defective trailer, there was no evidence before the Trustee and there is no detailed evidence before this court as to what happened to the original trailer. The only evidence appears in a statement of defence issued by Cervus in the Ontario Litigation which contained an allegation that "in or around the spring of 2017, the Mercado Trailer was sold at auction and is no longer owned by Mercado." Of particular relevance would be the amount which was received either by Mercado or Bellhop for the trailer, if sold, or the value of the trailer if it remains within Bellhop's control. If the trailer described in the Second Crespi Affidavit was purchased to replace the allegedly defective trailer, any monies obtained from the sale of the first trailer would be offset against the cost of the second, assuming of course that the first trailer was defective.

[76] If the trailer described in The Second Crespi Affidavit was purchased because Cervus failed to deliver two trailers to Bellhop, there does not appear to be a loss since Bellhop never paid Cervus for two trailers. Additionally, the

evidence does not show to the required degree that there ever was an agreement to purchase two trailers.

[77] What then of the claim of Bellhop for loss of profits? I find no error in the concerns expressed by the Trustee in its Notice of Disallowance about the evidence submitted to it in order to justify a claim of $3,270,684. Bellhop's $3,270,684 claim was calculated because it alleged that a certain contract was cancelled which in turn prevented Bellhop from meeting its liabilities as a result of which its creditors seized its equipment in October 2016. However, Mr. Crespi deposed that the contract was terminated in or about May 5, 2015. If that is the case, that contract was terminated before the trailer was delivered to Bellhop. If it was the loss of that contract which caused Bellhop's impecuniosity, that could not have been the result of a defective trailer since the trailer was not even in operation when the contract was terminated. There is no other evidence to suggest that other contracts could not be performed because of the defects in the trailer.

[78] Furthermore, there is an unaudited financial statement for Bellhop respecting year ends of August 31, 2015 and August 31, 2016. Those financial statements show an improvement in the financial position of Bellhop during fiscal year August 31, 2015/16.

[79] The evidence submitted to the Trustee did not justify a claim of $3,270,684, or anything remotely close to it. It was not sufficient to enable the Trustee to assess any loss of income claim without being unduly arbitrary.

Although there are times when a Trustee might be justified in putting a value to a claim based upon the practicalities and the costs of addressing a claim, the evidence in this case on the issue of loss of profit was so insufficient to justify any valuation being made. There is an obligation upon creditors in a bankruptcy to furnish a Trustee with enough evidence that supports a part or all of the amount claimed. That did not occur in respect of the loss of income claim. Furthermore, I see no obligation on a Trustee to incur the costs of a significant investigation of a claim which on its face appears to be grossly inflated. Were that the case, creditors would be encouraged to file overly inflated claims and expect the Trustee to come back to them for discussion. The better approach is to encourage a situation where creditors advance reasonable claims and enough evidence to support them so that the time, effort, and cost of a Trustee to investigate, assess and value the claim is justifiable.

(6) Whether Cervus' Joint and Several Liability precludes Bellhop's claim.

[80] In the Notice of Disallowance, the Trustee wrote:

> The Statement of Claim in the BEC Action asserts that the same damage claimed against 5274398 was caused by the independent breaches by third parties.

[81] Bellhop has interpreted this to mean that the Trustee concluded that because other parties may be liable to Bellhop, then Bellhop has no claim against Cross Country.

[82] I do not understand the significance of that part of the Trustee's Notice of Disallowance, and if it was intended to say what Bellhop has interpreted, it would not be correct. It may however only have been included in the Notice of Disallowance to observe that there are other entities being sued by Bellhop in addition to Cross Country.

[83] Whatever the case, since there were other valid reasons that exist to disallow the bulk of Bellhop's Proof of Claim, I need not further deal with this ground of appeal.

CONCLUSION

[84] The decision of the Trustee is set aside and Bellhop's Proof of Claim is admitted but given a value of $2,231.83. Costs may be spoken to unless otherwise agreed.

R.A. Dewar, J.

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J.