Court of Appeal File No. C66336

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

FIREPOWER DEBT GP INC., AS AGENT

Applicant (Respondent)

and

THEREDPIN, INC. and THEREDPIN.COM REALTY INC.

Respondents

BOOK OF AUTHORITIES
(Motion for Direction on Appeal returnable February 11, 2019)

January 31, 2019

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INDEX

LIST OF AUTHORITIES

Tab

Most Negative Treatment: Check subsequent history and related treatments.

2016 ONCA 225
Ontario Court of Appeal

2403177 Ontario Inc. v. Bending Lake Iron Group Ltd.

2016 CarswellOnt 4553, 2016 ONCA 225, 264 A.C.W.S. (3d) 26, 347 O.A.C. 226, 35 C.B.R. (6th) 102, 396 D.L.R. (4th) 635

2403177 Ontario Inc., Applicant (Respondent/Responding Party) and Bending Lake Iron Group Limited, Respondent (Appellant/Responding Party)

David Brown J.A., In Chambers

Heard: March 8, 2016
Judgment: March 22, 2016
Docket: CA M46061 (C61637)

Counsel: Kenneth Kraft, for Moving Party, A. Farber & Partners Inc.
Robert MacRae, for Responding Party, Bending Lake Iron Group Limited

Subject: Civil Practice and Procedure; Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.7 Appeals
XVII.7.b To Court of Appeal
XVII.7.b.ii Availability
XVII.7.b.ii.A Future rights

Headnote

Bankruptcy and insolvency --- Practice and procedure in courts — Appeals — To Court of Appeal — Availability — Future rights

Debtor went into receivership with one major asset, undeveloped iron ore mine site, and consented to Sales and Investor Solicitation Process — Debtor opposed receiver's motion for court approval of asset purchase agreement with LH and sought postponement of sale — Motion judge approved sale and ordered vesting of property in LH upon filing of receiver's certificate — Debtor filed notice of appeal — Debtor did not perfect appeal within required time, and LH would not close sale agreement until debtor exhausted appeals — Receiver brought motion for declaration that debtor required leave to appeal — Motion granted — Issue was whether approval and vesting order (AVO) fell under s. 193 of Bankruptcy and Insolvency Act or if debtor required leave — Receiver submitted AVO was matter of procedure not falling within s. 193(c) — For order to involve future rights, it must involve future rights of those with economic interest in debtor company and there was no evidence that any affected Aboriginal community had such an interest — AVO affected present, existing rights of debtor's creditors and shareholders, not future rights — Debtor did not raise issue about receiver's constitutional duty to consult until appeal — Debtor's argument that sale process should be postponed to let shareholders re-finance company did not bring into play value of property — Debtor's secured lenders supported sale agreement, notwithstanding they would suffer significant shortfall — Debtor required leave to appeal AVO.

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Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 193 — considered

s. 193(a) — considered

s. 193(a)-193(d) — referred to

s. 193(b) — considered

s. 193(c) — considered

s. 193(e) — considered

s. 195 — considered

s. 243(1) — considered

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

s. 13 — considered

Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, reprinted R.S.C. 1985, App. II, No. 44

s. 35 — considered

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Generally — referred to

Winding-up and Restructuring Act, R.S.C. 1985, c. W-11

Generally — referred to

s. 103 — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

Generally — referred to

MOTION by receiver for declaration that debtor required leave to appeal sale approval and vesting order.

***David Brown J.A., In Chambers*:**

I. Overview

1 This motion considers the somewhat awkward and anachronistic appeal provisions contained in s. 193 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*"). A. Farber & Partners Inc. was appointed receiver of the property of Bending Lake Iron Group Limited (the "Debtor") pursuant to s. 243(1) of the *BIA*. The Receiver moves for directions whether the Debtor requires leave to appeal under s. 193(e) of the *BIA* from the approval and vesting order made by the motion judge on January 8, 2016, 2016 ONSC 199 (Ont. S.C.J.), transferring all the Debtor's property to

an unrelated purchaser, Legacy Hill Resources Ltd. ("Legacy Hill"). At the conclusion of the hearing, I held that the Debtor did require leave to appeal and set a timetable for its leave motion. These are my reasons for so ordering.

II. History of the Receivership

2 The Debtor went into receivership on September 11, 2014 on the application of its secured creditor, 2403177 Ontario Inc. (the "Receivership Order"). The Debtor's major asset is an undeveloped iron ore mine site located northwest of Thunder Bay, Ontario.

3 By order dated November 27, 2014, the court approved a Sales and Investor Solicitation Process for the Debtor's property (the "SISP Order"). Significantly, the Debtor consented to the SISP Order.

4 In November 2015, the Receiver moved for court approval of an asset purchase agreement it had entered into with Legacy Hill for substantially all of the Debtor's property (the "Sale Agreement"). The Debtor opposed the motion and, in turn, brought its own motion seeking a variety of relief, including the postponement of the sale of its property.

5 The motion judge approved the Sale Agreement and ordered the vesting of the Debtor's property in Legacy Hill upon the filing of a receiver's certificate (the "Approval and Vesting Order"). As well, the motion judge dismissed the Debtor's motion to postpone the sale and for other relief.

6 The Debtor filed a notice of appeal dated January 13, 2016 seeking to set aside the Approval and Vesting Order. Section 195 of the *BIA* provides that all proceedings under an order appealed from are stayed until the appeal is disposed of. However, the Debtor did not perfect its appeal within the time required by the *Rules of Civil Procedure*, and this court has issued a notice of intention to dismiss the appeal for delay unless it is perfected by March 22, 2016.

7 Legacy Hill is not prepared to close the Sale Agreement until the Debtor has exhausted its appeal rights in this court.

8 The Receiver moves for a declaration that the Debtor requires leave to appeal. Granting such relief would quash the Debtor's existing notice of appeal.

III. Issue on the Motion

9 The central issue on this motion is whether the Approval and Vesting Order falls into any of the categories of cases identified in s. 193 of the *BIA* in which an appeal lies as of right to this court, or whether the Debtor must obtain leave to appeal under s. 193(e). Section 193 of the *BIA* provides:

> Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:
>
> (a) if the point at issue involves future rights;
>
> (b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;
>
> (c) if the property involved in the appeal exceeds in value ten thousand dollars;
>
> (d) from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars; and
>
> (e) in any other case by leave of a judge of the Court of Appeal.

10 The Debtor submits that the Approval and Vesting Order falls within ss. 193(a), (b), and (c), and therefore an appeal lies as of right. I shall consider the Debtor's submissions on each sub-section in turn.

IV. Section 193(A): Does the Approval and Vesting Order Involve Future Rights?

A. Positions of the parties

11 The Debtor submits the point in issue in its appeal involves future rights. The Debtor makes the following submissions in its factum:

> [T]here remains outstanding a Notice of Motion seeking a finding that the Receiver has violated the Crown's fiduciary duty to Aboriginal Peoples, as well as the Honour of the Crown, such duties being owed by the Receiver as an Officer of the Court. This motion has not been heard as of yet.
>
> . . . . .
>
> The future rights of the "affected Aboriginal communities" will very much be affected by the confirmation of the Vesting Order as granted by [the motion judge].

12 In order to assess this submission, some review is required of the evidence the Debtor placed before the motion judge on the sale approval motion about "affected Aboriginal communities" and of the relief the Debtor plans to seek in a further motion before the motion judge.

B. Debtor's evidence concerning "affected Aboriginal communities"

13 Mr. Henry Wetelainen, the President and CEO of the Debtor, swore an affidavit which was filed in opposition to the Receiver's motion to approve the Sale Agreement. In it, he deposed that, in early 2015, after the Receivership Order had been made, he held discussions with Legacy Hill about a possible "partnership/co-operative development in rescuing [the Debtor] from receivership." He described his discussions with Legacy Hill as attempts to attract a financial partner to assist in the refinancing of the Debtor in order to terminate the Receivership.

14 At various points in his affidavit, Mr. Wetelainen stated he had pursued those discussions as part of his "continued efforts on behalf of [the Debtor] and its creditors, shareholders, stakeholders and affected Aboriginal communities." He deposed that the termination of the receivership would have a "concurrent benefit to [the Debtor], its creditors, shareholders, stakeholders and affected Aboriginal communities."

15 Despite having pursued discussions with Legacy Hill in early 2015, Mr. Wetelainen opposed the Sale Agreement. He took the position that Legacy Hill had breached a fiduciary duty owed to the Debtor by dealing with the Receiver. Frankly, it is difficult to understand that position given that under the Receivership Order and the SISP Order, Mr. Wetelainen, as an officer of the Debtor, was not permitted to pursue the discussions he did with Legacy Hill without the knowledge and concurrence of the Receiver.

16 In any event, Mr. Wetelainen's evidence disclosed that the main reason he opposed the Sale Agreement was that he wanted more time for the Debtor to find financing to take out its secured creditors and terminate the receivership. In his affidavit, he explained why the Debtor was seeking orders to postpone approval of the Sale Agreement:

> The Orders being sought from the Court will ensure that all of the creditors, shareholders, stakeholders and affected Aboriginal communities be given an appropriate period of time pursuant to Court Order to permit [the Debtor] to complete the Corporate requirement for the purpose of providing the creditors, shareholders, stakeholders and affected Aboriginal communities to invest in Special Shares in [the Debtor] in order to retire the debt that [the applicant] has agreed to reduce to the amount as reflected in the Assets Purchase Agreement.
>
> . . . . .
>
> The net result of the successful refinancing of [the Debtor] will be that all the shareholders will have their share value protected and [the Debtor] will be required to deal with unsecured creditors in a fair fashion. At all times during the financing proceedings with [Legacy Hill], I anticipated that there would be a compromise with respect to the amount of debt owed to the Applicant.

17 In Mr. Wetelainen's view, the Sale Agreement is a "disasterous agreement that will wipe out millions of dollars of shareholder value, creditor obligations to stakeholders and various Aboriginal communities."

18 A further reason given by Mr. Wetelainen for his opposition to the Receiver's sale was that an asset purchase by Legacy Hill ran "a very substantial risk of [Legacy Hill] alienating all of the affected Aboriginal communities as well as the members of the communities where a workforce would have been drawn from and whose cooperation would have been received. The Aboriginal Employment Preferences Policy identifies these clearly articulated goals."

C. The Debtor's pending motion

19 The Debtor intends to bring a motion before the motion judge at the end of May seeking an order that it be granted leave to commence an action against the Receiver "for damages as a result of the failure of the Receiver to uphold the honour of the Crown and the Crown's fiduciary duties to Aboriginal peoples including the Aboriginal communities affected by the actions of the Receiver." In its notice of motion, the Debtor asserts it had provided "continual notice" to the Receiver that Aboriginal communities were directly affected by the receivership, yet the Receiver failed to maintain the honour of the Crown by not notifying affected Aboriginal communities of its intention to seek a sale of the Debtor's assets.

D. Analysis

20 The concept of "future rights" as a category of cases appealable to this court as of right traces its origins to the late nineteenth century federal *Winding-Up Act*. [1] The passage of time has not improved the clarity of the concept. In *Elias v. Hutchison*, [2] McGillivray C.J.A. commented, at para. 20, that "the authorities leave me in a state of uncertainty as to what a future right is at all, let alone what there is about a future right that would require a treatment of cases involving future rights different from cases that do not involve future rights."

21 Although the category of "future rights" increasingly seems an anachronistic and confusing basis upon which to ground appeal rights, courts have attempted to cloak the term "future rights" with some practical meaning. In *Ravelston Corp., Re*, [3] Doherty J.A. stated, at para. 18:

> The meaning of the phrase "future rights" is not obvious. Caselaw holds that it refers to future legal rights and not to procedural rights or commercial advantages or disadvantages that may accrue from the order challenged on appeal ... Rights that presently exist, but may be exercised in the future or altered by the order under appeal are present rights and not future rights...
>
> [Citations omitted.]

22 Doherty J.A. went on to adopt, at para. 19, the view expressed in *Elias v. Hutchison*, at paras. 100-101, that s. 193(a) of the *BIA* "must refer to rights which could not at the present time be asserted but which will come into existence at a future time."

23 More recently, Blair J.A., in *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, [4] stated, at para. 15:

> "Future rights" are future legal rights, not procedural rights or commercial advantages or disadvantages that may accrue from the order challenged on appeal. They do not include rights that presently exist but that may be exercised in the future.

24 The Debtor's argument that the Approval and Vesting Order involves the future rights of "affected Aboriginal communities" is vague and difficult to follow. Nevertheless, I do not accept it for several reasons.

25 First, for an order to involve future rights, it must involve the future rights of those with an economic interest in the debtor company - i.e. its creditors or shareholders. [5] On the sale approval motion, the Debtor did not adduce evidence that any "affected Aboriginal community" had such an economic interest in the Debtor, nor did any "affected Aboriginal community" adduce such evidence on the motion. The Receiver, in its December 21, 2015 Supplemental Report to its Third Report, informed the court that based on its review of the Debtor's creditors listing, "no Aboriginal groups are creditors of [the Debtor]."

26 Second, at this stage of the process it does not lie in the Debtor's mouth to contend that the Receiver failed to give proper notice to "affected Aboriginal communities". The time to raise such an issue was when the Receiver sought approval of the SISP Order, yet the Debtor consented to that order.

27 Third, to the extent that the Approval and Vesting Order affects the rights of those with an economic interest in the Debtor, it affects the present, existing rights of the Debtor's creditors and shareholders, not their future rights.

28 Finally, it is clear from Mr. Wetelainen's affidavit that the Debtor's real complaint about the effect of the Approval and Vesting Order is one concerning the "commercial advantages or disadvantages that may accrue from the order challenged on appeal." Mr. Wetelainen objected to the Sale Agreement because its approval would wipe out shareholder equity and preclude efforts by the shareholders to raise financing to pay out the Debtor's secured creditors. That has nothing to do with "future rights" within the meaning of s. 193(a).

29 I conclude that the point in issue in the Debtor's challenge of the Approval and Vesting Order does not involve future rights within the meaning of s. 193(a) of the *BIA*.

V. Section 193(B): Will The Approval and Vesting Order Affect Other Cases of a Similar Nature in This Proceeding?

A. Positions of the parties

30 The Debtor submits that the Approval and Vesting Order is likely to affect other cases of a similar nature in the receivership proceeding. In its factum, the Debtor argues that in granting the Approval and Vesting Order the motion judge failed "to deal with the rights of the affected Aboriginal communities," an issue the Debtor wishes to raise on its appeal. The Debtor argues that the same issue will lie at the heart of its motion before the motion judge later in May seeking leave to sue the Receiver. The Debtor contends that because the Approval and Vesting Order likely will affect its motion for leave to sue the Receiver, s. 193(b) of the *BIA* applies.

31 The Receiver disputes that the issues on appeal would impact other issues in the receivership.

B. Analysis

32 The jurisprudence under s. 193(b) of the *BIA* has consistently interpreted the section as meaning that a right of appeal will lie where "the decision in question will likely affect another case raising the same or similar issues in the same bankruptcy proceedings." [6] The cases have expressed different views on whether the decisions covered by s. 193(b) can only concern rights asserted against the bankrupt by parties other than the bankrupt, or whether the issue may concern rights asserted by multiple persons against the bankrupt, rather than one person's rights arising in multiple contexts. [7] Regardless, s. 193(b) must concern "real disputes" likely to affect other cases raising the same or similar issues in the same bankruptcy or receivership proceedings. [8]

33 Section 193(b) possesses several anachronistic features. First, while permitting an appeal of right on an issue that likely will arise again in an insolvency proceeding might appear to foster the efficient conduct of insolvency proceedings, in reality any automatic appeal right will slow down insolvency proceedings which usually operate on a "real-time" basis. As well, the language of s. 193(b) does not measure the overall significance of the issue to the proceeding - minor issues which might arise again are treated in the same fashion as major ones. Finally, most contemporary insolvency litigation

sees one judge assigned to manage the proceeding from its inception to its end. Under a "one judge" model of case management, common or repeat issues tend to get grouped together for adjudication at one time, not at different stages of the proceeding.

34 I do not accept the Debtor's submission that the Approval and Vesting Order is likely to affect other cases of a similar nature in the receivership proceedings.

35 The Receiver filed evidence on this motion which shows the Debtor did not raise any issue about a receiver's constitutional duty to consult "affected Aboriginal communities" either in its materials or during its submissions on the sale approval motion. The Debtor does not dispute this evidence. Accordingly, the Debtor will be seeking to raise the duty to consult issue for the first time on appeal.

36 In the normal course, appeals are not the proper forum in which to raise brand new issues that significantly expand or alter the landscape of the litigation. [9] The burden rests on an appellant to persuade the court that all the facts necessary to address the point are before the court as fully as if the issue had been raised in the court below. [10] It is far from clear that the Debtor would succeed in persuading this court that the interests of justice require an exception to this normal course of litigation. The Debtor faces several high hurdles.

37 First, the Debtor consented to the SISP Order which authorized the Receiver to proceed with the sales process. The Debtor did not raise the issue of a duty to consult "affected Aboriginal communities" about a sale at that time; it is difficult to conceive how it can do so now.

38 Second, it is very doubtful that the Debtor has standing to advance on appeal an argument based on the duty to consult. As the Supreme Court of Canada explained in *Moulton Contracting Ltd. v. British Columbia*, [11] at para. 30:

> The duty to consult exists to protect the collective rights of Aboriginal peoples. For this reason, it is owed to the Aboriginal group that holds the s. 35 rights, which are collective in nature... But an Aboriginal group can authorize an individual or an organization to represent it for the purpose of asserting its s. 35 rights.
>
> [Citations omitted.]

39 No evidence was led on this motion to suggest that any Aboriginal group had authorized the Debtor to represent it for the purpose of asserting rights under s. 35 of the *Constitution Act, 1982*.

40 Third, s. 193(b) of the *BIA* requires that the order sought to be appealed is likely to affect "other cases of a similar nature in the bankruptcy proceedings." Here, the Approval and Vesting Order disposed of all the property of the Debtor. Consequently, there will not be any other case dealing with the disposition of the Debtor's property in this receivership.

41 The final hurdle is that only after the Debtor received the January 8, 2016 reasons of the motion judge granting the Approval and Vesting Order did it launch its motion for leave to sue the Receiver for its alleged breach of the duty to consult. That sequence of events strongly suggests that, having unsuccessfully opposed the Receiver's sale, the Debtor looked for some procedural device to fit itself into s. 193(b). Its motion for leave to sue the Receiver was the result. In my view, a party cannot create a "case" after the impugned order was made in order to invoke s. 193(b). Consequently, the Debtor's pending motion for leave to sue does not qualify as a case of a similar nature in the receivership.

42 For those reasons, the Approval and Vesting Order does not fall within s. 193(b) of the *BIA*.

VI. Section 193(C): Does the Property Involved in the Appeal Exceed in Value $10,000?

A. Positions of the parties

43 The Debtor submits that the Approval and Vesting Order will transfer property in excess of $10,000 and, therefore, falls within s. 193(c) of the *BIA* because "the property involved in the appeal exceeds in value ten thousand dollars."

44 While the actual sale price is subject to a confidentiality order pending the closing of the transaction, there is no dispute that the sale price significantly exceeds $10,000. Nor is there any dispute that if the transaction closes, the Debtor's secured lenders will suffer a significant shortfall. [12]

45 On its part, the Receiver submits that an approval and vesting order forms part of the methods a receiver employs to dispose of a debtor's assets and, as such, is a matter of procedure that does not fall within s. 193(c).

B. Analysis

46 The history of the interpretation of s. 193(c) is an unusual one. Under the modern approach to statutory interpretation, the words in a statute must be read in their entire context, in their grammatical and ordinary sense, and in keeping with the scheme and object of the Act. [13] By contrast, as the Manitoba Court of Appeal observed at para. 9 in *Dominion Foundry Co., Re*, [14] the interpretation of the phrase "the property involved in the appeal" found in s. 193(c) historically has proceeded in a different fashion, drawing heavily upon cases interpreting a similar provision in the federal *Winding-Up Act*, [15] as well as on the jurisprudence considering former provisions in the *Supreme Court of Canada Act* which linked the right to appeal to "the amount or value of the matter in controversy." [16]

47 Courts have observed that the availability under s. 193(e) of a right to seek leave to appeal in circumstances falling outside those captured by automatic rights of appeal in ss. 193(a) to (d) signals the need for appeal courts to control bankruptcy proceedings in order to promote the efficient and expeditious resolution of the bankruptcy, one of the principal objectives of bankruptcy legislation. [17] However, courts across the country tend to part company on whether securing those objectives of the *BIA* is fostered by a "broad, generous and wide-reaching" interpretation of the appeal rights contained in *BIA* ss. 193(a) to (d) - with the bar set low to fall within s. 193(c) [18] - or by interpretations conducted within the context of the demands of "real time litigation" characteristic of contemporary insolvency and restructuring proceedings. [19]

48 In my view, two contextual factors should inform any application of the subsection.

49 First, the predecessor section to the modern s. 193(c) was enacted in 1919, at a time when the then *Bankruptcy Act* did not include the right to seek leave to appeal in the event a decision did not fall within one of the categories giving automatic rights of appeal. As Doherty J.A. observed in *Re Ravelston Corp.*, the earlier absence in s. 193 of an ability to seek leave to appeal prompted courts to give categories of appeals as of right a wide and liberal interpretation in order to avoid closing the door on meritorious appeals. The 1949 inclusion of the leave to appeal right now found in s. 193(e) removes the need for such a broad interpretative approach.

50 Second, Canada's other major insolvency statute, the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*"), contains, in s. 13, an across-the-board requirement to obtain leave to appeal from any order made under that Act. The automatic right of appeal provisions in ss. 193(a) to (d) of the *BIA* do not work harmoniously with the *CCAA*'s appeal regime.

51 For example, if one were to accept the Debtor's argument that whenever the value of the property transferred by a sales approval and vesting order exceeded $10,000 an appeal as of right to this court exists, then, as the Manitoba Court of Appeal noted, at para. 7, in *Re Dominion Foundry Co.*, an appeal as of right would exist in almost every case because very few insolvency cases would involve property that did not exceed the statutory threshold. Blair J.A. repeated that concern in *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, at para. 17. By contrast, a challenge to

a sales approval and vesting order obtained by a debtor company under the *CCAA* would require obtaining leave to appeal under s. 13 of that Act.

52 In my view, no principled basis exists to distinguish the treatment of a sale by a receiver or trustee, from that by a *CCAA* debtor company. In each case, approval of the sale would require consideration of the types of principles articulated in *Royal Bank v. Soundair Corp.*.[20] A need for the legislative harmonization of appeal rights in insolvencies is apparent.

53 In my view, these contextual factors militate against employing an expansive application of the automatic right of appeal contained in s. 193(c) and, instead, point to the need for an approach which is alive to and satisfies the needs of modern, "real-time" insolvency litigation. I shall employ such an approach in applying the following three principles that have emerged from the jurisprudence: s. 193(c) does not apply to (i) orders that are procedural in nature, (ii) orders that do not bring into play the value of the debtor's property, or (iii) orders that do not result in a loss.

Is the order procedural in nature?

54 The caselaw holds that s. 193(c) of the *BIA* does not apply to decisions or orders that are procedural in nature, including orders concerning the methods by which receivers or trustees realize an estate's assets.

55 In *Re Dominion Foundry Co.*, the motion judge had dismissed a request to set aside a sale of assets by a trustee in bankruptcy on the grounds that the sale was improvident and the trustee had acted improperly. The Manitoba Court of Appeal held, at para. 20, that although the sale involved assets whose value exceeded the statutory threshold, an order concerning the method by which the trustee disposed of assets did not fall within s. 193(c). Consequently, where a person seeks to challenge an order on appeal by calling into question the methods employed by a trustee to dispose of the assets of the bankrupt, the order involves a matter of procedure which does not fall within s. 193(c).

56 The Alberta Court of Appeal reached a similar result in *Alternative Fuel Systems Inc. v. Edo (Canada) Ltd. (Trustee of)*.[21] There, the trustee had invited tenders for the purchase of the bankrupt's equipment. When tenders closed, the trustee determined that Alternative's tender was the highest. Once another tenderer, Impco Technologies Inc., found out that it was not the highest bidder, it submitted a second tender offering substantially more than Alternative. The trustee sought directions from the court. The bankruptcy judge directed the trustee to accept Impco's second, higher tender. Alternative filed a notice of appeal and moved before the Alberta Court of Appeal for a determination that it could appeal as of right under s. 193(c) because the value of the property involved exceeded the statutory threshold.

57 O'Leary J.A., following *Re Dominion Foundry Co.*, held that Alternative had no right of appeal under s. 193(c). He reasoned, at para. 12, that the bankruptcy judge's order was essentially a procedural direction to the trustee in the face of Alternative's challenge to the method by which the equipment was sold, by-passing the tender process.

58 In the present case, the overwhelming majority of the Debtor's grounds of appeal are process-related, involving issues concerning the Debtor's dealings with Legacy Hill following the Receivership Order, the Receiver's disclosure of information about the Sale Agreement, the negotiation process it followed with Legacy Hill, its treatment of persons affected by the Sale Agreement, and the adequacy of notice it gave to "affected Aboriginal communities." Those grounds of appeal are procedural in nature and do not fall within s. 193(c).

Does the order put into play the value of the Debtor's property?

59 The second principle emerging from the caselaw is that s. 193(c) is not engaged where the decision or order does not call into play the value of the debtor's property. In *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, Blair J.A. considered whether an order appointing a receiver over assets of debtor corporations that exceeded $10,000 in value fell within s. 193(c). He concluded that it did not stating, at para. 17, that "an order appointing a receiver does

not bring into play the value of the property; it simply appoints an officer of the court to preserve and monetize those assets, subject to court approval."

60 In the present case, the Approval and Vesting Order marked the final step in the Receiver's monetization of the Debtor's assets. The property of the Debtor is to be converted through the Sale Agreement into a pool of cash and, as stated in the Approval and Vesting Order, "the net proceeds from the sale of the Purchased Assets shall stand in the place and stead of the Purchased Assets." The ground of appeal advanced by the Debtor to the effect that the sale process should be postponed to let shareholders re-finance the company does not bring into play the value of the Debtor's property, so s. 193(c) does not apply.

Does the order result in a gain or loss?

61 Finally, for s. 193(c) to apply, the order in question must contain some element of a final determination of the economic interests of a claimant in the debtor. In *Trimor Mortgage Investment Corp. v. Fox*, [22] Paperny J.A. described this aspect of s. 193(c) at para. 8:

> The test to be applied under this section was originally articulated in *Orpen v Roberts*, [1925] SCR 364 at 367, [1925] 1 DLR 1101, and confirmed in *Fallis and Deacon v United Fuel Investments Ltd.*, [1962] SCR 771, 4 CBR (NS) 209, which set out that the amount or value of the matter in controversy is the loss which the granting or refusal of that right would entail.

62 The Approval and Vesting Order did not determine the entitlement of any party with an economic interest in the Debtor to the sale proceeds. In that sense, no interested party gained or lost as a result of the order.

63 However, one ground of appeal set out in the Debtor's notice of appeal is that the motion judge erred in law in finding that the Receiver had not acted improvidently. In its factum, the Debtor contends that the Receiver's sale of its property is improvident because it would result in a loss of $125 million to its shareholders. In support of that ground of appeal, on this motion the Debtor relied on a memo prepared by Broad Oak Associates dated February 3, 2014, half a year before the Receivership Order was made. Using an iron ore pellet price of US$100 per tonne, Board Oak placed the value of a fully-developed Bending Lake iron ore project in the range of US$100 million to $300 million. This, the Debtor argues, shows that the Approval and Vesting Order selling its undeveloped mine site assets resulted in a loss to shareholders of an amount exceeding $10,000 in value, giving it a right to appeal under s. 193(c).

64 I do not accept the Debtor's submission. The determination of whether "the property involved in the appeal exceeds ten thousand dollars" is a fact-specific one. In order to bring itself within s. 193(c), the Debtor must do more than make a bald allegation of improvident sale. This is real-time insolvency litigation in which delays in the proceeding can prejudice the amounts fetched by a receiver on the realization process. The Debtor must demonstrate some basis in the evidentiary record considered by the motion judge that the property involved in the appeal would exceed in value $10,000, in the sense that the granting of the Approval and Vesting Order resulted in a loss of more than $10,000 because the Receiver could have obtained a higher sales price for the Debtor's property. Bald assertion is not sufficient, otherwise a mere bald allegation of improvident sale in a notice of appeal could result in an automatic stay of a sale approval order under *BIA* s. 195 as the appellant pursues its appeal. [23]

65 In the present case, the evidentiary record discloses that there were no competing bids for the Debtor's property for the motion judge to consider; only Legacy Hill expressed a serious enough interest to lead to a Sale Agreement with the Receiver.

66 Neither the Debtor nor its shareholders put before the motion judge a valuation of the Debtor made near in time to the execution of the Sale Agreement. Mr. Wetelainen did not attach the pre-receivership Broad Oak memo to the affidavit he placed before the motion judge. By contrast, the Receiver reported to the motion judge that the market price of iron ore had declined to the mid-US$50 per tonne range, making a court sanctioned sales process "very challenging in

the current market conditions." The market price for iron ore reported by the Receiver was far below the pre-receivership assumptions used by Broad Oak.

67 Nor did Mr. Wetelainen depose on the sale approval motion that the Debtor's property was worth over $100 million. Instead, in his affidavit he stressed the need to postpone the sale to allow the Debtor's shareholders time to negotiate a compromise of the secured debt and then pay off the compromised debt.

68 Finally, the Debtor's secured lenders supported the Sale Agreement, notwithstanding that they would suffer a significant shortfall on the sale.

69 Taken together, those facts do not disclose any basis in the evidentiary record for the Debtor's assertion that the sale would result in a loss of rights greater than $10,000 because the Receiver could have obtained a higher price for the Debtor's property. Accordingly, I am not persuaded that there is any evidentiary basis to the Debtor's bald assertion in its notice of appeal that the Approval and Vesting Order sanctioned an improvident sales transaction which resulted in a loss to the Debtor within the meaning of s. 193(c).

70 I conclude that the Approval and Vesting Order does not fall within s. 193(c) of the *BIA*.

VII. Disposition

71 For these reasons, I granted the Receiver's motion and ordered that the Debtor requires leave to appeal from the Approval and Vesting Order. The Debtor's notice of appeal dated January 13, 2016 is quashed.

72 The parties agreed to the following timetable for the filing of materials on the Debtor's leave to appeal motion:

(i) The Debtor would file its leave materials by March 28, 2016;

(ii) The Receiver would file any responding materials by April 4, 2016;

(iii) The Debtor would file reply materials, if any, by April 11, 2016.

73 I directed that the leave materials be placed before a panel for consideration on April 12, 2016. I did so, in part, to obviate the need for Debtor's counsel to travel down to Toronto for an oral Chambers leave motion.

74 The parties may serve their leave materials electronically. Although the parties will need to file the appropriate number of hard copies of their materials in accordance with the *Rules of Civil Procedure*, they may file with the court an electronic copy either by email or by USB key. The date of electronic filing will be deemed the date of the filing of the materials with the court.

75 The parties agreed that the costs of this motion would be reserved to the panel hearing the leave to appeal motion.

Motion granted.

Footnotes

1 Now, the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11, s. 103. See *Clarke v. Union Fire Insurance Co.* (1886), 13 O.A.R. 268 (Ont. C.A.) at pp. 294-295.

2 (1981), 14 Alta. L.R. (2d) 268, 121 D.L.R. (3d) 95, [1981] A.J. No. 896 (Alta. C.A.).

3 (2005), 24 C.B.R. (5th) 256 (Ont. C.A.)

4 2013 ONCA 282, 115 O.R. (3d) 617 (Ont. C.A.).

5 See *Ditchburn Boats & Aircraft (1936) Ltd., Re* (1938), 19 C.B.R. 240 (Ont. C.A.), at p. 242 quoting with approval *Kern Agencies Ltd., Re* (1931), 12 C.B.R. 279 (Sask. C.A.), at p. 281.

6 *Wong v. Luu*, 2013 BCCA 547 (B.C. C.A.), at para. 21.

7 See *Wong v. Luu*, at para. 21, and the Quebec jurisprudence summarized in *Norbourg Gestion d'actifs inc., Re*, 2006 QCCA 752, 33 C.B.R. (5th) 144 (C.A. Que.) at paras. 9-11.

8 *Global Royalties Ltd. v. Brook*, 2016 ONCA 50 (Ont. C.A.), at para. 19.

9 *Perez v. Salvation Army in Canada* (1998), 42 O.R. (3d) 229, 171 D.L.R. (4th) 520 (Ont. C.A.), at para. 11.

10 *Kaiman v. Graham*, 2009 ONCA 77, 245 O.A.C. 130 (Ont. C.A.), at para. 18.

11 2013 SCC 26, [2013] 2 S.C.R. 227 (S.C.C.).

12 In its Third Report dated November 30, 2015, the Receiver informed the court that the Debtor's liabilities totaled approximately $12.4 million consisting of (i) secured loans from the applicant in excess of $3.5 million, (ii) payroll deduction and HST claims by the Canada Revenue Agency of approximately $405,000, and (iii) unsecured liabilities of close to $8.5 million.

13 *Rizzo & Rizzo Shoes Ltd., Re* (1998), 154 D.L.R. (4th) 193 (S.C.C.) at para. 21; *Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42, 212 D.L.R. (4th) 1 (S.C.C.) at para. 26.

14 (1965), 51 W.W.R. 679 (Man. C.A.).

15 Such as *United Fuel Investments Ltd., Re*, [1962] S.C.R. 771 (S.C.C.), at p. 774.

16 *Trimor Mortgage Investment Corp. v. Fox*, 2015 ABCA 44 (Alta. C.A.), at para. 8; *Galaxy Sports Inc. v. Galaxy Sports Inc. (Trustee of)*, 2003 BCCA 322, 44 C.B.R. (4th) 218 (B.C. C.A. [In Chambers]) at para. 12; *Newfoundland & Labrador Refining Corp. v. IJK Consortium*, 2009 NLCA 23, 52 C.B.R. (5th) 8 (N.L. C.A.) at para. 18.

17 *Wong v. Luu*, at para. 23; *Re Norbourg Gestion d'actifs inc*, at para. 9.

18 *Wong v. Luu*, at para. 23.

19 *Stelco Inc., Re* (2005), 8 C.B.R. (5th) 150 (Ont. C.A. [In Chambers]), at para. 4.

20 (1991), 4 O.R. (3d) 1 (Ont. C.A.).

21 1997 ABCA 273 (Alta. C.A. [In Chambers]).

22 2015 ABCA 44 (Alta. C.A.).

23 See, for example, *Faillis and Deacon v. United Fuel Investments Ltd.* where, at pp. 773-774 the Supreme Court of Canada described the specific evidence of loss contained in the record.

End of Document

Most Negative Treatment: Distinguished
Most Recent Distinguished: Di Paola, Re | 2006 CarswellOnt 6737, 26 C.B.R. (5th) 133, 37 C.P.C. (6th) 286, [2006] O.J. No. 4381, 84 O.R. (3d) 554, 152 A.C.W.S. (3d) 800 | (Ont. C.A. [in Chambers], Nov 1, 2006)

2003 BCCA 652
British Columbia Court of Appeal [In Chambers]

Canada v. MKM Manufacturing Ltd.

2003 CarswellBC 2897, 2003 BCCA 652, 188 B.C.A.C. 233, 308 W.A.C. 233, 48 C.B.R. (4th) 222

Her Majesty the Queen in Right of Canada (Respondent / Appellant) and MKM Manufacturing Ltd. (Appellant / Respondent)

Levine J.A.

Heard: October 21, 2003
Judgment: October 21, 2003
Docket: Vancouver CA031254

Counsel: R.A. Chorneyko for Appellant
J.W. Craddock for Respondent, HMTQ, Workers' Compensation Board

Subject: Civil Practice and Procedure; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.7 Appeals
XVII.7.b To Court of Appeal
XVII.7.b.iii Time for appeal
Headnote
Bankruptcy and insolvency --- Practice and procedure in courts — Appeals — To Court of Appeal — Time for appeal
Corporation's proposal was not accepted by creditors and corporation assigned in bankruptcy — Notice of appeal was filed four days after ten-day period set out in Bankruptcy and Insolvency Act — Corporation brought application to extend time for filing notice of appeal — Application granted — Appeal was not strong but was not frivolous — Grounds for appeal concerned grounds on which court may exercise discretion to refuse to annul proposal, when default has occurred — Interest of justice favoured granting extension — At proceedings, stay had been granted in order to file appeal, and other side was aware that corporation intended to appeal.
Table of Authorities
Statutes considered:
Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — considered

s. 195 — pursuant to

APPLICATION by corporation for extension of time to file notice of appeal after assignment in bankruptcy.

***Levine J.A.*:**

1 I have before me applications brought by two parties to a bankruptcy and insolvency matter. The bankrupt company brings an application to extend the time for filing a notice of appeal from the order of Madam Justice Beames made September 17, 2003. She annulled a proposal in bankruptcy made by the company with the effect that the company is deemed to have made an assignment in bankruptcy.

2 The respondents are the major creditors of the bankrupt company, the Canada Customs and Revenue Agency and the Workers Compensation Board. They were owed, at the date of the proposal, approximately $144,000, and are now owed almost $500,000. The respondents object to the application for an extension of time primarily on the basis that there is no merit to an appeal from Madam Justice Beames' order. Their applications are premised on the extension of time being granted and are for cancellation of the stay of proceedings that arises pending an appeal pursuant to s. 195 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, security for costs, an order that the company pay the insurance premium to insure the property, that the appeal be set for hearing, and the time for filing the materials for the appeal be abridged.

3 I will deal first with the application for an extension of time. The notice of appeal was filed on 1 October 2003. The *Act* provides that a notice of appeal must be filed within 10 days of the order appealed from. Thus the notice of appeal was filed four days late. The reason for the delay is that counsel thought that the time for filing the notice of appeal was 14 days and simply erred in filing after the 10 day period provided by the statute.

4 Counsel for the company states that there was an intention to appeal from the outset and the intention was discussed with Madam Justice Beames at the hearing. Madam Justice Beames granted a stay of her order for two weeks to allow an appeal to be filed; thus it appears from her reasons that this discussion did take place. There was no direct communication to the respondents that an appeal was intended, but this discussion took place at the hearing which indicated that an appeal was being considered.

5 The primary issue with respect to the extension of time is whether there is a meritorious appeal. The threshold with respect to the merits is not very high. Nonetheless there is some onus on the applicant to demonstrate that there is an arguable case or that the appeal is not frivolous. The argument raised by counsel for the company is that while the *Act* provides discretion to the court to annul a proposal when a default is made (about which there is no dispute has occurred here), there is little or no case authority providing guidance to a court as to how that discretion should be exercised. In other words, on what grounds may a court exercise its discretion to refuse to annul a proposal where there is a default?

6 Madam Justice Beames rejected factors raised by the applicant company including the delay of CCRA and WCB in bringing the application for annulment, which was five years after the company defaulted under the proposal. She also refused to consider that an annulment might bring about some personal liability of a principal of the company.

7 The overriding factor in this application for an extension of time, as in all such applications, is whether it is in the interests in justice to grant the extension. It is my opinion that the delay resulting from an error of counsel should not be visited on the company. While it appears that the merits of the appeal are not very high I cannot say that it is a frivolous appeal.

8 I therefore find that it is in the interests of justice to grant the extension and will do so. That requires me to consider the applications of the respondents. Counsel for the respondents has advised the Court that he is not pressing his application to lift the stay of proceedings, but is prepared to adjourn that application. He suggests with respect to security for costs the amount that should be provided is $6,000 in addition to the insurance payment which would be $4,257. The suggestion with respect to abridging the time and setting the date for hearing of the appeal is that the hearing date be set for January 6, 2004 for half a day, the appeal books and, I would assume, appeal record, as well, be filed within two weeks, and the factums follow within the following five weeks.

9 In my view, the respondents' applications are reasonable conditions for the extension of time to file the appeal. While counsel for the company says that the company does not have the resources to pursue the appeal, clearly it intends

to do so. I have to presume that there are resources available to pay its costs of pursuing the appeal. The onus is on it to show that it should not have to post security for costs. In my view, it has not satisfied that onus. I therefore order that the company post security for costs in a form acceptable to the respondents no later than 31 October 2003.

10 I have also not heard any reason why the company should not pay the insurance premium on this property. The property is the only asset available for the payment of creditors and its value, as I understand it, has been decreasing over the years that this proposal has been outstanding. In order to sell the property, it would appear to me important to insure it. It is an appropriate condition for the extension of time to appeal that the insurance payment be paid on or before 31 October 2003 by certified cheque. I so order.

11 Finally, the *Act* sets out short deadlines, as demonstrated by the 10 day deadline for filing the notice of appeal. The authorities cited by counsel for the respondents point out that the *Act* provides for summary proceedings in order that matters may proceed expeditiously. While this matter has not proceeded as expeditiously as it might have up to this date, I see no reason to allow it to drag on further.

12 I therefore set the date for hearing of the appeal for half a day on 6 January 2004, order the appeal record and appeal books be filed within two weeks from today and that the factums be filed within the five weeks following the filing of the appeal record and appeal books.

(discussion with counsel)

***Levine J.A.*:**

13 Costs in any event of the cause.

Application granted.

2016 ONCA 247
Ontario Court of Appeal

Enroute Imports Inc., Re

2016 CarswellOnt 5045, 2016 ONCA 247, 265 A.C.W.S. (3d) 287, 35 C.B.R. (6th) 1

In the Matter of the Proposal of Enroute Imports Inc. of the City of Mississauga in the Province of Ontario

K.M. Weiler, C.W. Hourigan, Grant Huscroft JJ.A.

Heard: March 29, 2016
Judgment: April 5, 2016
Docket: CA C60594

Counsel: J. Dannial E.S. Baker, for Appellants, unsecured creditors, Frank Santaguida and Victor Santaguida
Craig A. Mills, for Respondent, Enroute Imports Inc.
R. Graham Phoenix, for Proposal Trustee

Subject: Civil Practice and Procedure; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.7 Appeals
XVII.7.b To Court of Appeal
XVII.7.b.ii Availability
XVII.7.b.ii.C Leave by judge
Headnote
Bankruptcy and insolvency --- Practice and procedure in courts — Appeals — To Court of Appeal — Availability — Leave by judge
Unsecured creditors were awarded judgment against debtor in amount of $65,000 — Unsecured creditors recovered 52.3 per cent of their claim before debtor filed notice of intention to make proposal under Bankruptcy and Insolvency Act — Proposal was filed, amended and accepted by 92 per cent of creditors representing 87 per cent of value of outstanding debt — Unsecured creditors objected to amended proposal and conducted out of court examination of president of debtor — Unsecured creditors sought to adjourn approval motion to compel answers to undertakings, refusals and questions taken under advisement and to continue examination of president — Motion judge declined to adjourn motion, approved amended proposal, and terminated unsecured creditor's notices of garnishment — Unsecured creditor appealed — Leave to appeal denied — Given broad nature of stay imposed by s. 195 of Act, right of appeal without leave under s. 193(c) of Act must be narrowly construed and appeal must directly involve property exceeding $10,000 in value — Unsecured creditors required leave to appeal as right to conduct examination was procedural and did not directly involve property — Issues raised were not of significance beyond interests of parties — There was no merit to proposed appeal — There were ample grounds to refuse adjournment, and motion judge's conclusion that amended proposal was reasonable was also unassailable — It could not be said that granting leave would unduly delay proceedings.
Table of Authorities
Cases considered:
Business Development Bank of Canada v. Pine Tree Resorts Inc. (2013), 2013 ONCA 282, 2013 CarswellOnt 5026, 100 C.B.R. (5th) 91, 115 O.R. (3d) 617, 307 O.A.C. 1 (Ont. C.A.) — referred to
Crate Marine Sales Ltd., Re (2016), 2016 ONCA 140, 2016 CarswellOnt 2491, 33 C.B.R. (6th) 169 (Ont. C.A.) — referred to

Ontario Wealth Management Corp. v. Sica Masonry and General Contracting Ltd. (2014), 2014 ONCA 500, 2014 CarswellOnt 8586, 17 C.B.R. (6th) 91, 323 O.A.C. 101, 37 C.L.R. (4th) 191 (Ont. C.A.) — referred to

Robson, Re (2002), 2002 CarswellOnt 1052, 33 C.B.R. (4th) 86 (Ont. C.A. [In Chambers]) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 193 — considered

s. 193(c) — considered

s. 193(e) — considered

s. 195 — considered

APPEAL by unsecured creditors of decision of motion judge declining to adjourn motion and approving amended proposal under *Bankruptcy and Insolvency Act*.

***Per curiam*:**

1 The appellants were awarded a judgment against Enroute Imports ("Enroute") in 2003 in the amount of $65,000 plus interest and costs. They recovered 52.3% of their claim just prior to Enroute filing a notice of intention to make a proposal under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*"). The proposal was subsequently filed, amended, and accepted by 92% of the creditors representing 87% of the value of the outstanding debt more than the required majority of creditors (the "Amended Proposal").

2 The appellants, who are unsecured creditors, objected to the Amended Proposal and conducted an out of court examination of Vincent Pileggi, the president of Enroute. They sought to adjourn the approval motion to compel answers to undertakings, refusals, and questions taken under advisement, and to continue the examination of Mr. Pileggi. The motion judge declined to adjourn the motion, approved the Amended Proposal, and terminated the appellants' notices of garnishment.

3 In his factum, the appellant raises numerous grounds of appeal related to the motion judge's refusal to adjourn the approval motion. He further submits that as a result of the motion judge's refusal to adjourn the approval proceedings, he was denied the opportunity to establish that the officers and directors of Enroute had engaged in wrongful conduct, a consideration relevant to whether the proposal was reasonable and made in good faith and, ultimately, to whether approval should be granted.

4 A preliminary issue is whether leave to appeal the motion judge's order is required under s. 193 of the *BIA*. The appellants submit that leave is not required, relying on s. 193(c) of the *BIA*, which states: "Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases: (c) if the property involved in the appeal exceeds in value ten thousand dollars". The respondent submits that there is no right of appeal because the primary remedy sought, continuation of the examination of Mr. Pileggi, is not quantifiable in money.

5 The case law considering s. 193(c) from this court makes clear that, given the broad nature of the stay imposed by s. 195 of the *BIA*, the right of appeal without leave under s. 193(c) must be narrowly construed. In addition, the appeal must directly involve property exceeding $10,000 in value: *Crate Marine Sales Ltd., Re*, 2016 ONCA 140 (Ont. C.A.), *Robson, Re* (2002), 33 C.B.R. (4th) 86 (Ont. C.A. [In Chambers]), *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONCA 282, 115 O.R. (3d) 617 (Ont. C.A.), and *Ontario Wealth Management Corp. v. Sica Masonry and General Contracting Ltd.*, 2014 ONCA 500, 17 C.B.R. (6th) 91 (Ont. C.A.).

6 In our view, the appellants require leave to appeal. The right to conduct an examination is procedural and does not directly involve property. Similarly, the appellants' central argument regarding the correctness of the approval order is that the motion judge erred in finding that the proposal was reasonable and made in good faith. Again this is not a situation where property is directly in issue.

7 In considering whether leave to appeal under s. 193 (e) of the *BIA* should be granted, a court will look to whether the proposed appeal: (i) raises an issue that is of general importance to the practice in bankruptcy/insolvency matters or the administration of justice as a whole; (ii) is *prima facie* meritorious; and (iii) would unduly hinder the progress of the bankruptcy/insolvency proceedings: *Business Development Bank of Canada*, at para. 29. In our view, the appellants have not established that leave to appeal should be granted under s. 193 of the *BIA*.

8 We are not satisfied that the issues raised on the proposed appeal are of significance beyond the interests of the parties. The appeal is focused on fact-specific issues of procedural fairness and the reasonableness and good faith of the Amended Proposal. The discretionary considerations of the motion judge do not give rise to any matters of general significance to bankruptcy/insolvency matters or to the administration of justice as a whole.

9 We are also of the view that there is no merit to the proposed appeal. The decision of the motion judge not to grant an adjournment is highly discretionary and will not be lightly interfered with by this court. Moreover, there were ample grounds to refuse the adjournment, including the timing of the request, the fact that the appellants had failed to respond to the proposal trustee's offers to provide information and access to documents, the speculative and disproportionate nature of the ongoing information sought, and the fact that any further delay would impact Enroute's ability to operate its business.

10 The motion judge's conclusion that the Amended Proposal was reasonable is also unassailable. He carefully reviewed the Amended Proposal and concluded that it had the strong support of the creditors and its terms were calculated to benefit the general body of creditors. The motion judge also found that the proposal trustee had conducted a reasonable review and determined that there was no realistic possibility that the unsecured creditors would receive any money in a bankruptcy.

11 Further, there is no basis to interfere with the motion judge's finding that the Amended Proposal was made in good faith. He considered the appellants' concerns regarding the Amended Proposal, which were raised both on the approval motion and repeated on appeal, and dismissed them, finding that they "[were] largely based on speculation and ignore[d] the real and legitimate basis for Enroute's difficulties."

12 With respect to whether the appeal would unduly hinder the progress of the bankruptcy/insolvency proceedings, this is an artificial analysis in the circumstances since the appellants did not first move to obtain leave to appeal before a single judge of this court. Instead, they took the position that leave was not required and argued the issue of leave as part of the appeal. Thus, it cannot be said that granting leave at this stage will unduly delay the proceedings.

13 Finally, we note that the parties filed fresh evidence on consent that Enroute failed to disclose prior to the approval of the Amended Proposal a partially subrogated lawsuit, in which it and a related company sued various parties as result of an olive oil spill. The lawsuit was eventually disclosed to all creditors by the proposal trustee. Because Enroute does not have the resources to fund the litigation, it offered to assign its claim to any creditor. No creditor expressed an interest in participating in the lawsuit. We are of the view that the existence of this lawsuit (which was commenced at the behest of Enroute's insurer, is unvalued, and has not progressed beyond the pleading stage) does not change the analysis above.

14 Leave to appeal is denied. Enroute, as the successful party, is entitled to its costs of the appeal, fixed at $14,500, inclusive of fees, disbursements and applicable taxes. The proposal trustee did not file materials or make submissions. In these circumstances, we decline to make a cost award in its favour.

Leave to appeal denied.

End of Document

Most Negative Treatment: Distinguished
Most Recent Distinguished: McGee v. London Life Insurance Co. | 2011 ONSC 2897, 2011 CarswellOnt 9676, 3 C.C.L.I. (5th) 275, 92 C.C.P.B. 31, 208 A.C.W.S. (3d) 856 | (Ont. S.C.J., Jun 17, 2011)

1997 CarswellOnt 2519
Ontario Court of Justice, General Division (In Bankruptcy)

Eu v. Rosedale Realty Corp. (Trustee of)

1997 CarswellOnt 2519, [1997] O.J. No. 2275, 18 E.T.R. (2d) 288, 33 O.R. (3d) 666, 43 O.T.C. 134, 47 C.B.R. (3d) 218, 71 A.C.W.S. (3d) 828

In The Matter of the Bankruptcy of Rosedale Realty Corporation, A Corporation Incorporated under the Law of the Province of Ontario and having its Head Office in the City of Toronto, The Province of Ontario

Catherine Eu, Kathy Monahan, Tony Bassels, Janis Korbs and Jose Nieves, Appellants and Orenstein and Partners Inc., Trustee of the Estate of Rosedale Realty Corporation, Respondent

Cameron J.

Heard: April 21, 1997
Judgment: June 5, 1997
Docket: 31-304663

Counsel: *David R. Wingfield*, for the appellants.
Thomas M. Slahta, for the respondents.

Subject: Insolvency; Estates and Trusts
Related Abridgment Classifications
Bankruptcy and insolvency
IX Proving claim
IX.2 Disallowance of claim
IX.2.c Appeal from disallowance
IX.2.c.ii Grounds
Estates and trusts
II Trusts
II.2 Express trust
II.2.a Creation
II.2.a.ii Three certainties
II.2.a.ii.B Intention
II.2.a.ii.B.3 Miscellaneous
Headnote
Bankruptcy --- Proving claim — Disallowance of claim — Appeal from disallowance — Grounds
Trustee in bankruptcy refused to allow real estate agents' claim for commissions alleged held in trust by bankrupt — Registrar in Bankruptcy dismissed agent's appeal — Appeal by real estate agents of Registrar's decision allowed — Registrar failed to consider existence of implied trust over commissions.
Trusts and Trustees --- Express trust — Creation — Three certainties — Intention — General

Trustee in bankruptcy refused to allow real estate agents' claim for commissions alleged held in trust by bankrupt — Registrar in Bankruptcy dismissed agent's appeal — Appeal by real estate agents of Registrar's decision allowed — Bankrupt placed commissions into trust account with intention of holding them in trust for agents.

Real estate agents that worked for a broker had an express agreement that commissions earned would be held in trust until the transactions to which they related closed. When the brokerage was taken over by the bankrupt, no such agreement was expressly put in writing, but the bankrupt had a trust account in which it kept the commissions of the plaintiffs until the sale closed, and then paid out the amount of commission. After the bankruptcy, the trustee in bankruptcy disallowed the agents' claims to their commissions on the grounds that the commissions were not held in trust and therefore formed part of the property of the bankrupt and were divisible among all creditors. The Registrar in Bankruptcy dismissed the agents' appeal of the trustee's decision, and the latter further appealed.

Held: The appeal was allowed.

The Registrar's findings of facts could be reversed only if it were established that he made a palpable and overriding error which affected his assessment of the facts. In this case, there was such an error. The Registrar based his decision only on the finding that the trust agreements that the agents had with their original broker were not assigned to the bankrupt. In doing so, the Registrar failed to consider whether, in the absence of any such assignment of the agreements, the bankrupt could have still held the commissions earned by the agents in trust for them. As it was, the evidence established that the commissions were held by the bankrupt for the agents pursuant to a trust, which was established by the surrounding circumstances of the case. In particular, the bankrupt had made a practice of placing commissions earned by the plaintiffs in a commercial trust account. This would not have been done if it were not intended that these funds were held in trust.

Table of Authorities

Cases considered by *Cameron J.*:

Achilles, Re (1993), 83 B.C.L.R. (2d) 116, 23 C.B.R. (3d) 20 (B.C. S.C.) — considered

Brown v. Royal Bank (1984), 31 Alta. L.R. (2d) 389, 53 A.R. 340, 17 E.T.R. 33 (Alta. Q.B.) — considered

Bullock v. Key Property Management Inc. (1992), 46 E.T.R. 275 (Ont. Gen. Div.) — considered

Canada (Attorney General) v. Confederation Life Insurance Co. (1995), 8 C.C.P.B. 1, 2 C.E.B. & P.G.R. 8227 (headnote only), 33 C.B.R. (3d) 161, 8 E.T.R. (2d) 72, 31 C.C.L.I. (2d) 77, 24 O.R. (3d) 717 (Ont. Gen. Div.) — considered

Canadian Pacific Air Lines Ltd. v. Canadian Imperial Bank of Commerce (1987), 61 O.R. (2d) 233, 27 E.T.R. 281, 42 D.L.R. (4th) 375, 71 C.B.R. (N.S.) 40 (Ont. H.C.) — considered

Fletcher v. Manitoba Public Insurance Corp., 5 C.C.L.T. (2d) 1, (sub nom. *Fletcher v. Manitoba Public Insurance Co.*) 74 D.L.R. (4th) 636, [1990] 3 S.C.R. 191, (sub nom. *Fletcher v. Manitoba Public Insurance Co.*) 116 N.R. 1, (sub nom. *Fletcher v. Manitoba Public Insurance Co.*) 44 O.A.C. 81, (sub nom. *Fletcher v. Manitoba Public Insurance Co.*) [1990] I.L.R. 1-2672, 1 C.C.L.I. (2d) 1, 71 Man. R. (2d) 81, 30 M.V.R. (2d) 261, (sub nom. *Fletcher v. Manitoba Public Insurance Co.*) 75 O.R. (2d) 373 (note), (sub nom. *Fletcher c. Manitoba Public Insurance Co.*) [1990] R.R.A. 1053 (headnote only) (S.C.C.) — considered

Kayford Ltd., Re (1974), [1975] 1 All E.R. 604, 118 Sol. Jo. 752, [1975] 1 W.L.R. 279 (Eng. Ch. Div.) — considered

LCI International Inc. v. STN Inc. (1996), 10 E.T.R. (2d) 297 (Ont. Gen. Div. [Commercial List]) — considered

McEachren v. Royal Bank (1990), 2 C.B.R. (3d) 29, [1991] 2 W.W.R. 702, 111 A.R. 188, 78 Alta. L.R. (2d) 158 (Alta. Q.B.) — considered

Ontario (Director, Business Practices Division, Ministry of Consumer & Commercial Relations) v. Safeguard Real Estate Ltd. (1994), 27 C.B.R. (3d) 103, 114 D.L.R. (4th) 546 (Ont. Gen. Div.) — distinguished

Sorochan v. Sorochan, [1986] 2 S.C.R. 38, [1986] 5 W.W.R. 289, 29 D.L.R. (4th) 1, 69 N.R. 81, 46 Alta. L.R. (2d) 97, 74 A.R. 67, 23 E.T.R. 143, 2 R.F.L. (3d) 225, [1986] R.D.I. 448, [1986] R.D.F. 501 (S.C.C.) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 67 — referred to

s. 81(3) — considered

Real Estate and Business Brokers Act, R.S.O. 1990, c. R.4
s. 19(2) — referred to

s. 20(1) — referred to

APPEAL by real estate agents from disallowance of claims for commissions allegedly held in trust by bankrupt.

***Cameron J.*:**

1 This is an appeal from an Order of the Registrar in Bankruptcy dismissing an appeal from the disallowance by the Trustee in Bankruptcy of Rosedale Realty Corporation ("Rosedale") of the claims by independent agents of the broker. The agents claim the broker held in trust for them commissions payable to them on realty sales closed after the date of bankruptcy. The Trustee ruled that the commissions were not held in trust and so formed part of the property of the bankrupt divisible among its creditors.

2 The agents were, until July 1995, agents of the broker, First District Realty Ltd. ("FDR") under the terms of an "Employment Agreement" providing they work for FDR as independent contractors and that "monies received or receivable on account of commission by the Broker from any trade in real estate conducted on behalf of the Broker by the Salesperson, shall be paid (sic?) by the Broker in trust ... directly from the Broker's trust account to the Salesperson".

3 It is clear that FDR held the agent's share of monies paid to the broker in connection with a trade in real estate in the broker's trust account for the benefit of the agent and the broker, and paid out first to the salesperson on completion of the transaction in accordance with the agreed commission split.

4 In July 1995 following discussions with Rosedale, FDR signed a letter of intent to sell its assets to Rosedale. The FDR agents moved into Rosedale's premises and started selling for Rosedale without signing any "employment", "independent contractor" or other agreement with Rosedale, nor did Rosedale adopt the agents' agreements with FDR or agree to hold their shares of commission in trust. The appellants became independent real estate agents with Rosedale and were not regarded by Rosedale as employees. They were responsible for the same expenses and earned the same share of the commission payable on the transaction.

5 The purchase of FDR by Rosedale was never agreed or consummated.

6 Rosedale had a form of independent contractor agreement that was for all intents and purposes the same as the FDR Agreement. Pursuant to Article 3.3 of the Rosedale Agreement, Rosedale was required to hold all commission monies it received in a commission trust account and to allocate those monies in accordance with the Agreement's provisions. Pursuant to Article 1.01(6) of the Agreement a "Commission Trust Account" was defined as meaning:

> such account, other than the Statutory Trust Account, as is from time to time established and maintained by the Broker as a trust account with a Canadian Chartered Bank or Trust Company, licensed as such to carry on business in the Province of Ontario, which account shall be operated so as to include all amounts which the Broker form time to time holds for Co-operating Brokers' Employed Salespersons, Independent Sales persons, or other persons under trust arrangements other than with respect to amounts held by te Broker under Statutory Trust Account.

7 The appellants did not execute the Rosedale Agreement. However, during the time that they were associated with Rosedale the terms of their relationship with Rosedale were essentially the same as they had been with FDR. They remained as independent contractors, they were responsible for the same expenses, they earned the same commission "split", and their commission income was received and held by Rosedale for them in a specific commission trust account.

8 The Trustee in Bankruptcy explained the operation of Rosedale's commission trust account and other accounts in the following manner:

Q. During the course of your investigation of Rosedale's affairs, did you have occasion to make a review of their banking records?

A. Yes I did.

Q. And you can describe for me what you found?

A. Rosedale maintained three separate bank accounts; there was a general bank account at the National Trust; there was a statutory bank account at the Royal Bank and there was a commission trust account at the Royal Bank.

Q. But it was a statutory trust and a commission trust at the Royal Bank?

A. At the Royal Bank, yes.

Q. And based on your investigation did you determine what each account was used for?

A. Yes I did.

Q. Will you explain for us just how they were used and what monies went in and went out?

A. Where Rosedale was the listing broker, they would receive a deposit from a purchaser; that deposit would then go into the statutory trust account at the Royal Bank. When a deal finally closed, the funds were then transferred from the statutory trust account into the commission trust account. From the commission trust account Rosedale paid its own agents; Rosedale paid a portion out to the cooperating broker who acted for the purchaser and then a portion of the commission was then transferred to the general bank account as the company's share.

9 Moreover, when asked by an agent to do so, Rosedale would execute a trust agreement in favour of an agent's factor for commissions earned by the agent but not yet payable.

10 On September 27, 1995 Rosedale made an assignment in bankruptcy. Shortly thereafter, the appellants filed Proofs of Loss with the Trustee in Bankruptcy claiming that Rosedale held their commissions in trust. The net amounts owing to each of the appellants are as follows:

Tony Bassels — $13,953.33

Catherine Eu — $44,451.57

Janis Korbs — $20,397.55

Kathy Monahan — $33,577.28

José Nieves — $11,352.61

11 On November 17, 1995 the Trustee in Bankruptcy disallowed the appellants' claims. The basis of the Trustee's decision was that no trust was established between Rosedale and the appellants. There are sufficient funds received as commissions in the hands of the Trustee in Bankruptcy to satisfy the claims put forth by the appellants, but the Bankrupt has no surplus for distribution to unsecured creditors. The only secured creditor is the former President of Rosedale, George Benarroch, through a company he owns or controls.

12 The appellants objected to and appealed the Trustee in Bankruptcy's decision. The appeals were heard by the Registrar in Bankruptcy between February 28 and March 1, 1996. By reasons released March 13, 1996 the Registrar dismissed the appeal.

13 The Registrar's decision characterized the issues as:

1. Did the FDR contracts oblige FDR to hold commissions earned in trust for the salespersons?

2. Were those contracts adopted by the bankrupt?

14 The Registrar found (1) no trust had been established by the FDR agreement; and (2) Rosedale never adopted the agreements.

15 This is a true appeal and not a hearing *de novo*. The only proper evidence on this appeal is a transcript of the evidence before the Registrar, the appeal book and the exhibits before the Registrar: Houlden and Morawetz, *The Annotated Bankruptcy and Insolvency Act*, 1997 ed. at p.481; *Achilles, Re* (1993), 23 C.B.R. (3d) 20 (B.C. S.C.) at p.27-28.

16 Findings of fact ought not to be reversed on appeal unless it can be established that the Registrar made some palpable and overriding error which affected his assessment of the facts: *Fletcher v. Manitoba Public Insurance Corp.* (1990), 74 D.L.R. (4th) 636 (S.C.C.).

17 The Registrar's decision was based on his finding that the FDR agreements were not assigned to Rosedale. He did not got far enough. He failed to consider whether in the absence of any such assignment Rosedale held the commissions earned by the agents in trust for them so that the commissions are excluded from the property of the bankrupt under s.67 of the *Bankruptcy and Insolvency Act* ("*BIA*"). If they are not, the commissions are only a debt due to the agents.

18 The onus of establishing a claim to or in property in the possession of a bankrupt at the time of the bankruptcy is on the claimant: *BIA*, s.81(3).

19 Trusts may arise either by imposition of law or by intention. In order for a constructive trust to be imposed by law there must be:

(a) an enrichment;

(b) a corresponding deprivation; and

(c) the absence of any juristic reason for the deprivation i.e. the enrichment must be unjust.

20 *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38 (S.C.C.).

21 In this case there was no need to impose a trust in order for the agents to assert their rights to commissions. The commissions were debts due to the agents on the closings of the sales. Had the broker not become bankrupt the agents would have been entitled to receive their commissions. There was no unfair taking advantage of the agents by the broker requiring a constructive trust to remedy the unfairness of an enrichment and a corresponding deprivation: *Canada (Attorney General) v. Confederation Life Insurance Co.* (1995), 24 O.R. (3d) 717 (Ont. Gen. Div.), at 778-9. Following the bankruptcy there was a juristic reason to allow the broker's unsecured creditors to share in the funds, namely the requirements of the *BIA*. See *Brown v. Royal Bank* (1984), 31 Alta. L.R. (2d) 389 (Alta. Q.B.); *LCI International Inc. v. STN Inc.* (1996), 10 E.T.R. (2d) 297 (Ont. Gen. Div. [Commercial List]) at para 13.

22 The fact that the financial collapse and bankruptcy of the broker affects payment to its employees does not establish a deprivation justifying the imposition of a constructive trust: see *Brown v. Royal Bank, supra*, at 398-40 and *Canada (Attorney General) v. Confederation Life, supra*, at p. 780.

23 The next issue is whether there was an express trust or implied trust. Such a trust requires three certainties:

(1) certainty of intent of the settlor;

(2) certainty of subject matter; and

(3) certainty of object.

See D.M.W. Waters, *Law of Trust in Canada*, 2nd ed. (Toronto, Carswell: 1984) at 17-18; *Canadian Pacific Air Lines Ltd. v. Canadian Imperial Bank of Commerce* (1987), 61 O.R. (2d) 233 (Ont. H.C.) at p.237.

24 The issue here is whether there was as certainty of intent in the settlor Rosedale to hold the commissions in trust. There was no agreement either oral or written between the parties, no explicit novation by Rosedale of the agents' contracts with FDR and no correspondence between the parties.

25 The existence of a trust does not depend on the existence of the contract but on the intent of the settlor which must be determined from the surrounding circumstances. The use of the word "trust" or placing the money in a "trust account" is neither conclusive nor indispensable to determine the settlor's intent: *Kayford Ltd., Re* (1974), [1975] 1 All E.R. 604 (Eng. Ch. D.); *Chelsea Cloisters Ltd.. Re* (1980), 41 P. & C.R. 98 (Eng. C.A.) at 116; *Bullock v. Key Property Management Inc.* (1992), 46 E.T.R. 275 (Ont. Gen. Div.); *McEachren v. Royal Bank* (1990), [1991] 2 W.W.R. 702 (Alta. Q.B.).

26 The Trustee cited authority indicating that in the absence of a specific trust agreement between salespersons and the broker or between co-brokers, the commissions are not impressed with a trust and they rank with other unsecured creditors in the bankruptcy of the broker: see *Ontario (Director, Business Practices Division, Ministry of Consumer & Commercial Relations) v. Safeguard Real Estate Ltd.* (1994), 27 C.B.R. (3d) 103 (Ont. Gen. Div.) at p. 107-8 and cases therein cited. In that case the salespersons were employees and counsel admitted this proposition. This authority and the supporting cases really beg the issue of whether or not there was a certainty of intent to create a trust of the sales person's commission.

27 Rosedale operated its business through three bank accounts. There is no evidence that this arrangement had not existed for some time. Deposits from purchasers would go into a trust account at the Royal Bank as required by s.19(2) and s.20(1) of the *Real Estate and Business Brokers Act*, R.S.O. 1990, c.R.4. When the transaction closed the funds were transferred to a commission trust account. The moneys in the commission trust account were then paid to the co-operating broker acting for the purchaser for its share of the commission, to Rosedale's agent for his or her share of the commission and to Rosedale's general account at National Trust as Rosedale's share of the commission. All Rosedale agents received their commissions from the commission trust account, including employed agents as well as independent contractor agents. The latter included those who had specific provisions in their contracts that their commissions be held in trust, those without any contract and those who had factored their commissions under a form of agreement specifically providing that the commission be held in trust.

28 It made no business sense to place commissions into the commission trust account if they were not intended to be held in trust. It would be simpler, cheaper and quicker to pay it directly from the statutory trust account at Royal Bank to Rosedale's general account at National Trust. Such a complex arrangement and similarity of treatment indicates that Rosedale intended that all commissions, and not just those specifically agreed, be held in trust and that Rosedale considered itself entitled to spend for its corporate purposes only money which reached its general account.

29 I order that the decision of the Registrar be set aside and declare that the Trustee in Bankruptcy of Rosedale holds the following amounts in trust for the following persons:

Tony Bassels — $13,953.33

Catherine Eu — $44,451.57

Janis Korbs — $20,397.55

Kathy Monahan — $33,577.28

José Nieves — $11,352.61

30 I order that the Trustee in Bankruptcy of Rosedale pay to the foregoing persons the amounts noted opposite their names together with any accrued interest thereon.

31 Counsel may speak to me respecting costs.

Appeal allowed.

THE 2016 ANNOTATED BANKRUPTCY AND INSOLVENCY ACT

Including
General Rules under the Act
Orderly Payment of Debts Regulations
Companies' Creditors Arrangement Act
CCAA Regulations and Forms
Farm Debt Mediation Act
Wage Earner Protection Program Act
Directives and Circulars

Dr. Janis P. Sarra, B.A., M.A., LL.B., LL.M., S.J.D.
of University of British Columbia
Faculty of Law and the Ontario Bar

The Honourable Geoffrey B. Morawetz, B.A., LL.B.
of the Superior Court of Justice

The Honourable L. W. Houlden, B.A., LL.B.
1922-2012, formerly a Judge of the Court of Appeal for Ontario

STATUTES OF CANADA ANNOTATED

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tive "future" to have any meaning, it cannot refer to that which presently exists. Justice Frankel held that while the appointment of the receiver affected a significant change in the management of the appellants' businesses, the receiver did not exercise its powers in a way that affected their future legal rights with respect to the property of the receivership. Rather, that appointment affected the appellants' present legal rights. Accordingly, s. 193(a) of the *BIA* did not apply: *Farm Credit Canada v. West-Kana Farms Ltd.*, 2014 CarswellBC 3863, 2014 BCCA 501 (B.C. C.A.).

I§59 — The Order or Decision is likely to Affect Other Cases of a Similar Nature

Section 193(b) refers to cases of a similar nature in the same bankruptcy proceedings: *Re Marchessault* (1927), 8 C.B.R. 432 (Que. C.A.); *Re Desnoyers* (1942), 23 C.B.R. 363 (Que. C.A.).

Section 193(b) applies where there are a number of persons in the bankruptcy proceedings who assert rights based on the same facts, and a judgment has been rendered by the bankruptcy judge declaring those rights to be well- or ill-founded. The fact that the decision may affect other cases of a similar nature in other bankruptcy proceedings is, however, not sufficient: *Lemay v. Lamarre* (1934), 16 C.B.R. 189 (Que. C.A.).

I§60 — Property Involved Exceeds $10,000

If the property involved in the appeal exceeds $10,000 in value, an appeal lies to the court of appeal under s. 193(c).

"Property involved" means that the property in jeopardy as a result of the judgment must have a value in excess of $10,000, but it is not necessary that the judgment be for a monetary sum of $10,000: *Fogel v. Grobstein* (1945), 26 C.B.R. 248 (Que. C.A.); *Deslauriers v. Brunet (Vermette)* (1949), 30 C.B.R. 77 (Que. C.A.); *Apex Lumber Co. v. Johnstone* (1925), 7 C.B.R. 157 (B.C. C.A.). In *Fallis v. United Fuel Investments Ltd.*, [1962] S.C.R. 771, 4 C.B.R. (N.S.) 209, 34 D.L.R. (2d) 175, the court said that the proper test is: What is the loss that the granting or refusing of the right claimed will entail?

If the remedy sought in the proceeding is not appreciable in money, *e.g.*, a refusal to stay an action to attack an alleged fraudulent preference because of pending criminal proceedings, there is no right to appeal under s. 193(c), even though the effect of allowing the proceeding to continue may result in an order for payment of more than $10,000: *TFP Investments Inc. (Trustee of) v. Singhal* (1991), 3 C.B.R. (3d) 225, 44 O.A.C. 234.

Where the issue before the court at first instance was voting rights of a creditor in an application for a bankruptcy order, there was evidence that the direct impact of a decision would affect whether the debtor's proposal would be accepted or not as an alternative to bankruptcy; the requirement that the property involved in the appeal exceeded $10,000 in value was satisfied and the debtor had an appeal as of right: *Newfoundland & Labrador Refining Corp. v. IJK Consortium* (2009), 2009 CarswellNfld 76, 52 C.B.R. (5th) 8 (N.L. C.A.).

The Alberta Court of Appeal provided guidance on the proper interpretation of s. 193(c) of the *BIA*. The respondents were preferred shareholders of the debtor that had received default judgment arising from a claim alleging breach of their shareholders' agreement, breach of fiduciary duty by the debtor, fraud, misrepresentation and unlawful enrichment. The trustee disallowed the claims, taking the position that they were not proper claims because the claims had not been adjudicated, and the claimants were in reality equity claimants. The respondents successfully appealed the disallowance to the Court of Queen's Bench, the chambers judge finding that there was no power on the part of the court or the trustee in the

circumstances to challenge the default judgment. The trustee sought to appeal and submitted that it could do so as a matter of right, referencing s. 193(c) of the *BIA*, which specifically allows for a right to appeal if the property involved in the appeal exceeds $10,000 in value. Justice Paperny held that the test is the amount or value of the matter in controversy is the loss which the granting or refusal of that right would entail. Justice Paperny was of the view that there was no principled basis to limit the trustee from appealing where the granting or refusal of the right would lead only to loss to the bankrupt's estate. The focus of the inquiry under s. 193(c) was the amount of money at stake: here $272,000. This claim fell squarely within the section: *Trimor Mortgage Investment Corp. v. Fox*, 2015 CarswellAlta 121, 2015 ABCA 44 (Alta. C.A.).

I§61 — Appeals from Orders Granting or Refusing Discharge of Bankrupt

An appeal lies from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed $500: s. 193(d).

Because of s. 182(1), if there is an appeal from an order of discharge, the court must hear the appeal without the order being entered: *Re Fuller* (1995), 33 C.B.R. (3d) 150, 7 B.C.L.R. (3d) 240, 59 B.C.A.C. 303, 98 W.A.C. 303 (C.A.).

The court of appeal is a court of review. If an appeal from an order of discharge is based on alleged errors in findings of fact, the court of appeal will not interfere if there is no palpable and overriding error in the findings of fact and there is evidence from which the findings of fact could have been made: *Re Clarke* (2000), 17 C.B.R. (4th) 49, 2000 CarswellBC 879 (B.C. C.A.).

Section 193(d) is not restricted to an absolute order of discharge; it also includes a conditional order of discharge: *Re McNeil (Bankrupt)* (1996), 39 C.B.R. (3d) 147, 29 B.C.L.R. (3d) 274, 71 B.C.A.C. 213, 117 W.A.C. 213 (C.A.). Where there has been no change in circumstances since the original conditional discharge order was made, the court is of the opinion that the appellant is attempting to re-litigate the original hearing, and no evidence is adduced to establish any basis on which the registrar's decision could be said to have been wrong, the court will dismiss the appeal: *Re Clarke* (2004), 2004 CarswellBC 1, 2 C.B.R. (5th) 117 (B.C. C.A.); affirming (2003), 2003 CarswellBC 601, 41 C.B.R. (4th) 19 (B.C. S.C.).

An automatic discharge is deemed for all purposes to be an absolute and immediate order of discharge; consequently, there is an appeal as of right under s. 193(d) from an automatic discharge.

In granting an order of discharge, the bankruptcy judge is exercising a judicial discretion, and if the judge has acted reasonably, the court of appeal should not set aside or ignore the order, unless the judge has omitted the consideration of, or misconstrued, some fact or violated some principle of law: *Sederoff v. Vigneault* (1942), 23 C.B.R. 228 (Que. C.A.); *Industrial Acceptance Corp. v. Lalonde*, 32 C.B.R. 191, [1952] 2 S.C.R. 109, [1952] 3 D.L.R. 348; *Clark v. Coopers & Lybrand Ltd.* (1986), 60 C.B.R. (N.S.) 305 (B.C. C.A.). A clear case must be made out that the court was wrong before the Court of Appeal will interfere: *Re Campbell* (1935), 16 C.B.R. 359 (Ont. C.A.).

Regardless of conduct, where there is no ability to pay, a conditional order is inappropriate and the conditions that are fixed should be within the ability of the bankrupt to meet in a reasonable time; however, the court found that it was open to the registrar to conclude that the evidence was inadequate to approve an absolute discharge: *Re Eller* (2007), 2007 CarswellBC 336, 32 C.B.R. (5th) 219, 2007 BCSC 232 (B.C. S.C.).

2018 BCCA 283
British Columbia Court of Appeal

Industrial Alliance Insurance and Financial Services Inc. v. Wedgemount Power Limited Partnership

2018 CarswellBC 1788, 2018 BCCA 283, 294 A.C.W.S. (3d) 237, 61 C.B.R. (6th) 196

Industrial Alliance Insurance and Financial Services Inc. (Respondent / Plaintiff) and Wedgemount Power Limited Partnership, Wedgemount Power (GP) Inc. and Wedgemount Power Inc. (Respondents / Defendants) and British Columbia Hydro and Power Authority (Appellant / Applicant / Respondent)

Groberman J.A., In Chambers

Heard: July 6, 2018
Judgment: July 9, 2018
Docket: Vancouver CA45324, CA45325

Proceedings: affirming *Industrial Alliance Insurance and Financial Services Inc. v. Wedgemount Power Limited Partnership* (2018), 60 C.B.R. (6th) 267, 2018 BCSC 970, 2018 CarswellBC 1565, Butler J. (B.C. S.C.); and affirming *Industrial Alliance Insurance and Financial Services Inc. v. Wedgemount Power Limited Partnership* (2018), 2018 BCSC 971, 2018 CarswellBC 1566, Butler J. (B.C. S.C.)

Counsel: J.I. Maclean, Q.C., J.D. Bradshaw, A. McCawley (articled student), for Industrial Alliance Insurance
V.L. Tickle, for Deloitte Restructuring Inc.
L.C. Hiebert, S.T.C. Warnett, for B.C. Hydro

Subject: Civil Practice and Procedure; Contracts; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.7 Appeals
XVII.7.b To Court of Appeal
XVII.7.b.iii Time for appeal
Headnote
Bankruptcy and insolvency --- Practice and procedure in courts — Appeals — To Court of Appeal — Time for appeal
One group of respondents were owners and developers of power project — Second group of respondents was company who financed power project — When project met delays, owners experienced financial problems — Company appointed receiver over owners — Owners made agreement with appellant power authority, for authority to purchase electricity from owners — Before deadline, authority indicated they were not committed to agreement — Receiver brought application for declaration that authority could not terminate agreement — Receiver's application was successful, after application by authority to stay application was dismissed — Authority filed notices of appeal regarding both above-noted judgments — Company applied to quash notices of appeal, claiming proper leave was not obtained and notices were out of time — Authority applied for extension of time — Notices of appeal converted to notices of application for leave, by court — Application for extension dismissed — Appeal provisions of Bankruptcy and Insolvency Act were applicable — Most applicable considerations favoured extension of time — There were no significant expenses or prejudice to company — However, leave application would have effect of delaying action — Ability of receiver to realize on assets of owners was dependent on being able to move quickly — Judge hearing leave applications would dismiss these applications — Court had power to do same at this stage of litigation.

2018 BCCA 283, 2018 CarswellBC 1788, 294 A.C.W.S. (3d) 237, 61 C.B.R. (6th) 196

Table of Authorities

Cases considered by *Groberman J.A., In Chambers*:

Braich, Re (2007), 2007 BCCA 641, 2007 CarswellBC 3185, (sub nom. *Braich (Bankrupt), Re*) 250 B.C.A.C. 53, (sub nom. *Braich (Bankrupt), Re*) 416 W.A.C. 53 (B.C. C.A. [In Chambers]) — referred to

Edgewater Casino Inc., Re (2009), 2009 BCCA 40, 2009 CarswellBC 213, 51 C.B.R. (5th) 1, 265 B.C.A.C. 274, 446 W.A.C. 274, (sub nom. *Canadian Metropolitan Properties Corp. v. Libin Holdings Ltd.*) 308 D.L.R. (4th) 339 (B.C. C.A.) — followed

Knight v. Thorne, Ernst & Whinney Inc. (1990), 42 C.P.C. (2d) 291, 80 C.B.R. (N.S.) 131, 49 B.C.L.R. (2d) 158, 1990 CarswellBC 427 (B.C. C.A.) — considered

Pope & Talbot Ltd., Re (2009), 2009 BCSC 1014, 2009 CarswellBC 2015, 76 C.C.L.I. (4th) 212, 57 C.B.R. (5th) 94, [2009] I.L.R. I-4871, 98 B.C.L.R. (4th) 169 (B.C. S.C.) — considered

Taylor Ventures Ltd., Re (2002), 2002 BCSC 699, 2002 CarswellBC 1045, 34 C.B.R. (4th) 118, 17 C.L.R. (3d) 42 (B.C. S.C. [In Chambers]) — distinguished

2003945 Alberta Ltd. v. 1951584 Ontario Inc. (2018), 2018 ABCA 48, 2018 CarswellAlta 160, 57 C.B.R. (6th) 272 (Alta. C.A.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 183(1)(c) — considered

s. 183(2) — considered

s. 193(a)-193(d) — referred to

s. 193(e) — considered

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

Court of Appeal Act, R.S.B.C. 1996, c. 77

s. 6 — considered

s. 14(1) — considered

Law and Equity Act, R.S.B.C. 1996, c. 253

Generally — referred to

Rules considered:

Bankruptcy and Insolvency General Rules, C.R.C. 1978, c. 368

Generally — referred to

R. 9(1) — considered

R. 9(4) — considered

R. 31 — considered

APPLICATION by power authority for extension of time to appeal judgments reported at *Industrial Alliance Insurance and Financial Services Inc. v. Wedgemount Power Limited Partnership* (2018), 2018 BCSC 970, 2018 CarswellBC 1565, 60 C.B.R. (6th) 267 (B.C. S.C.) and *Industrial Alliance Insurance and Financial Services Inc. v. Wedgemount Power Limited Partnership* (2018), 2018 BCSC 971, 2018 CarswellBC 1566 (B.C. S.C.).

***Groberman J.A., In Chambers* (orally):**

1 The Wedgemount respondents ("Wedgemount") are the owners and developers of a five-megawatt run-of-river power project located on Wedgemount Creek, near Whistler, British Columbia. Industrial Alliance Insurance and Financial Services Inc. ("Alliance") has provided substantial financing for the project. Unfortunately, the project experienced significant delays, and Wedgemount encountered financial problems. In May 2017, Alliance applied under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 and under the *Law and Equity Act*, R.S.B.C. 1996, c 253 for the appointment of a receiver. The Supreme Court of British Columbia appointed Deloitte Restructuring Inc. ("Deloitte") as receiver over Wedgemount. Deloitte has made considerable efforts to complete the project and to sell it.

2 The viability of the project is closely tied to an agreement between Wedgemount and the British Columbia Hydro and Power Authority ("BC Hydro") under which BC Hydro has committed to purchasing electricity generated by the project. The agreement (which the parties have referred to as the "Electricity Purchase Agreement" or "EPA") set September 30, 2015 as the target date for commercial operation of the project. It gave BC Hydro a right to terminate the agreement if commercial operations did not commence within two years of that date.

3 Deloitte engaged in considerable communications with BC Hydro in an effort to ensure that BC Hydro would not terminate the agreement. Very shortly before the date on which BC Hydro would have the right to terminate the agreement, however, BC Hydro indicated that it was not committed to maintaining the agreement in place.

4 The parties disagreed as to whether BC Hydro had the right to terminate the agreement. I need not describe all of the communications between the parties, or the procedures taken by them. What is important, for our purposes, is that Deloitte brought an application before the BC Supreme Court for a declaration that BC Hydro did not have the unilateral right to terminate the EPA. BC Hydro sought to stay that application, arguing that all issues concerning the EPA were, under the terms of the agreement, to be decided by arbitration.

5 On May 4, 2018, a judge of the Supreme Court dismissed B.C. Hydro's application to stay Deloitte's application. On May 18, 2018 the same judge acceded to Deloitte's application, finding that an estoppel prevented BC Hydro from terminating the agreement.

6 On June 1, 2018, BC Hydro filed notices of appeal in this Court in respect of both the May 4 and May 18 judgments. Alliance applies to quash the notices of appeal on the grounds that the appellant was required to obtain leave to appeal, and on the basis that appeals have been brought out of time.

7 BC Hydro resists the applications to quash, arguing that the statutory provisions requiring leave to appeal and providing for an abbreviated appeal period are not applicable to these appeals. In the alternative, it seeks orders converting the notices of appeal to applications for leave to appeal, extending the time to apply for leave, and granting leave.

8 The various applications, except the actual leave applications, came on before me on July 6, 2018. At the end of the hearing, I advised that I would be declaring that the provisions of the *Bankruptcy and Insolvency Act* and of the *Bankruptcy and Insolvency General Rules* are applicable to the appeals. I further advised that while I would be converting the notices of appeal to notices of application for leave to appeal, I would be refusing the application for extension of time. I am now making those declarations and orders.

Is The Bankruptcy and Insolvency Act Applicable?

9 Alliance commenced the action for appointment of a receiver under both the *Law and Equity Act* and under the *Bankruptcy and Insolvency Act*. Counsel advised that this is a common practice. It allows flexibility as to the appropriate course of proceeding and remedies in the receivership.

10 Section 183(1) of the *Bankruptcy and Insolvency Act* gives the Supreme Court of British Columbia plenary authority to exercise jurisdiction under the Act:

183 (1) The following courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act . . . .

. . .

(c) in the Province . . . of . . . British Columbia, the Supreme Court . . . .

11 Section 183(2) confers jurisdiction on this this Court to hear appeals under the statute:

(2) . . . [T]he courts of appeal throughout Canada, within their respective jurisdictions, are invested with power and jurisdiction at law and in equity, according to their ordinary procedures, except as varied by this Act or the General Rules, to hear and determine appeals from the courts vested with original jurisdiction under this Act.

12 Section 193 authorizes appeals and sets out leave requirements:

193 Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:

. . .

(e) in any other case by leave of a judge of the Court of Appeal.

13 It is common ground among the parties that ss. 193(a) through (d) are inapplicable to these proceedings, and that, assuming the proceedings are properly characterized as appeals under the *Bankruptcy and Insolvency Act*, leave is required pursuant to s. 193(e).

14 Rule 31 of the *Bankruptcy and Insolvency General Rules* (C.R.C., c. 368) sets out the time limit for appeals and leave applications:

31 (1) An appeal to a court of appeal referred to in subsection 183(2) of the Act must be made by filing a notice of appeal at the office of the registrar of the court appealed from, within 10 days after the day of the order or decision appealed from, or within such further time as a judge of the court of appeal stipulates.

(2) If an appeal is brought under paragraph 193(e) of the Act, the notice of appeal must include the application for leave to appeal.

15 Section 6 of the *Court of Appeal Act*, R.S.B.C. 1996, c. 77 is the general provision governing appeals to this Court:

6 (1) An appeal lies to the court

(a) from an order of the Supreme Court or an order of a judge of that court, and

(b) in any matter where jurisdiction is given to it under an enactment of British Columbia or Canada.

(2) If another enactment of British Columbia or Canada provides that there is no appeal, or a limited right of appeal, from an order referred to in subsection (1), that enactment prevails.

16 Section 14(1) of the *Court of Appeal Act* sets out the general time limit for an appeal:

14(1) The time limit for bringing an appeal or an application for leave to appeal is

(a) 30 days, commencing on the day after the order appealed from is pronounced, or

(b) if another enactment specifies a different period, that different period.

17 BC Hydro contends that the appeal provisions of the *Bankruptcy and Insolvency Act* apply only to proceedings filed in the Bankruptcy registry of the Supreme Court, and that those proceedings must comply with Rules 9(1) and (4) of the *Bankruptcy and Insolvency General Rules*:

> 9 (1) All proceedings used in court must be dated and entitled in the name of the court in which they are used, together with the words "in Bankruptcy and Insolvency".
>
> . . .
>
> (4) Every document used in the course of a receivership must be entitled "In the Matter of the Receivership of . . . ".

18 The initiating documents for the action in the Supreme Court did not describe the court as sitting "in Bankruptcy and Insolvency", nor did it include the words "In the Matter of the Receivership of [Wedgemount]". Citing *Taylor Ventures Ltd., Re*, 2002 BCSC 699 (B.C. S.C. [In Chambers]), particularly at paras. 42-46, BC Hydro says that the failure to use language in the forms that conform with the *Bankruptcy and Insolvency General Rules* means that the provisions of the *Act* and *Rules* are inapplicable.

19 In my view, *Taylor Ventures* does not support that conclusion. The question in *Taylor Ventures* was whether Notices of Disallowance were effective, given that they had not been filed in a bankruptcy action, and had not provided the bankruptcy action style of cause. The judge found that the documents were "calculated to mislead" and were, therefore, not proper notices of disallowance.

20 No one suggests, in this case, that any filings were improper or calculated to mislead. The parties knew, at all times, that the proceeding was brought pursuant to the *Bankruptcy and Insolvency Act*, and that remedies were being sought in reliance on that statute. Where a party obtains remedies in reliance on the *Bankruptcy and Insolvency Act*, it is the appeal provisions of that statute that govern: see, for example, *2003945 Alberta Ltd. v. 1951584 Ontario Inc.*, 2018 ABCA 48 (Alta. C.A.) . To require special notations or words on the documents, would, in these circumstances, elevate form over substance.

21 I acknowledge that, in a case such as the present one, where relief is sought under both common law equitable principles and the *Law and Equity Act* as well as under the *Bankruptcy and Insolvency Act*, there can be some question as to whether the appeal provisions of the *Bankruptcy and Insolvency Act* are engaged. In my view, the answer depends on whether the order under appeal is one granted in reliance on jurisdiction under the *Bankruptcy and Insolvency Act*. Where it is, the appeal provisions of that statute are applicable.

22 In the case before us, there are two orders under appeal. The first is the May 4, 2018 order declining to stay Deloitte's application for a declaration against BC Hydro. In making that order, the judge relied on jurisdiction conferred on him by the *Bankruptcy and Insolvency Act*:

> [38] I dismiss BC Hydro's application for a stay of the Receiver's application. I am doing so on the basis that the Receiver has the jurisdiction, in the unusual circumstances of this case, to bring the application for a declaration and directions. It falls within the powers granted to the Receiver under subsections 243(1)(b) and (c) of the [*Bankruptcy and Insolvency Act*] and under the terms of the Order.
>
> [Emphasis added.]

23 In his analysis, the judge also referred at para. 32 to *Pope & Talbot Ltd., Re*, 2009 BCSC 1014 (B.C. S.C.) for the proposition that "the court has considerable jurisdiction to suspend private contractual rights where it is appropriate to do so, . . . *in bankruptcy proceedings.* [Emphasis added.]"

24 It is clear, then, that the judge was purporting to act pursuant to powers conferred on him in the *Bankruptcy and Insolvency Act*. Accordingly, the appeal provisions of that statute govern.

25 The jurisdiction exercised in the May 18 decision is that described in the May 4 reasons. Again, in the May 18 decision, the judge referenced provisions of the *Bankruptcy and Insolvency Act*, as well as provisions in agreements between BC Hydro and Wedgemount referencing bankruptcy. The May 18 decision, then, was also a decision invoking powers conferred by the *Bankruptcy and Insolvency Act*.

26 In the result, I am in no doubt that the appeal provisions of the *Bankruptcy and Insolvency Act* are applicable to these proceedings.

Conversion of the Notices of Appeal to Applications for Leave

27 All of the parties acknowledge that, in the circumstances of this case, it is appropriate to convert the notices of appeal to applications for leave to appeal. I direct that the notices of appeal are, for all purposes, deemed to be applications for leave to appeal.

Should the time to Apply for Leave be Extended?

28 I turn, then, to the question of whether the time to apply for leave ought to be extended.

29 I begin by observing that in a case such as the present, it would have been most efficient for the parties to be prepared to argue the leave applications, themselves, together with the applications for extensions. The considerations on the extension applications include considerations that overlap with those that bear on the granting or withholding of leave.

30 That said, I am able to dispose of this matter on the applications for extension of time. The parties agree on the considerations applicable to the application for an extension. They are the considerations generally applied by this Court in exercising discretions to extend time. As applied to the extension of time to apply for leave in the present case, I would describe the considerations as follows:

a) Was there an intention to apply for leave before the expiry of the time for doing so?

b) Did the appellant communicate the intention to the respondents?

c) Was the delay lengthy?

d) Did the applicant act expeditiously to seek an extension of time?

e) Is there an explanation for the delay?

f) Is there prejudice to the respondents consequent on the delay?

g) Is there merit to the application for leave?

h) Is it in the interests of justice that the extension be granted?

31 It is important to recognize that this is not a checklist. The answers to the various questions are not added together or dealt with in some mathematical or algorithmic approach. Rather, they are simply considerations that guide the exercise of judicial discretion.

32 In this case, most of the considerations favour an extension. The delay was not extensive. In the case of the first appeal, the application for leave ought to have been filed by May 14, and it was filed June 1. The second appeal ought to have been filed by May 28, but was filed June 1.

33 While there is no definitive evidence showing that BC Hydro formed the intention of appealing within the appeal period, there is evidence that it was considering bringing an appeal, and that, at least in respect of the second appeal, it gave some indication to the respondents that an appeal was under active consideration.

34 The material before the Court does not explicitly explain the delay, but does imply that BC Hydro considered that the abbreviated appeal period under the *Bankruptcy and Insolvency Act* was inapplicable.

35 In *Knight v. Thorne, Ernst & Whinney Inc.* (1990), 49 B.C.L.R. (2d) 158 (B.C. C.A.), at 160, Lambert J.A. said:

> Time and again counsel are unaware that under federal legislation special appeal periods may apply of which the short period of 10 days under the *Bankruptcy Act* is one. In my opinion, that constitutes in itself a special circumstance and tends particularly to diminish the significance which should be attached to the first two tests set out by Mr. Justice Craig, namely, that the appellant had a bona fide intention to appeal, formed within the appeal period, and that he notified the respondent of that intention within that period. Those two tests would apply with their usual vigour after 30 days had expired but if the appeal is ready for filing and filed within the period between 10 days and 30 days, then, in my opinion, those two tests have diminished importance or no importance at all.

36 Lambert J.A. was simply recognizing that, as there is widespread unawareness of the abbreviated appeal period under the *Bankruptcy and Insolvency Act*, it would be overly harsh to treat a mistaken belief that the 30-day appeal period applied as culpable. I do not see his statement as obviating the need for a party seeking an extension to provide an explanation.

37 In the case before us, the parties are sophisticated, and their counsel specialize in bankruptcy and insolvency. While I accept that BC Hydro may have considered that it could argue that the *Bankruptcy and Insolvency Act* provisions were inapplicable, I am not prepared to assume that it was unaware of the statutory provisions. Still, in light of the short delay, and the circumstances of this case, it is my view that little weight ought to be attached to the absence of clear evidence of an intention to appeal within the time limited for appeal.

38 In assessing the prejudice occasioned by the delay in filing the leave application, it is important to recognize what is being considered is prejudice arising between the end of the appeal period and the date that the leave application was filed: see *Braich, Re*, 2007 BCCA 641 (B.C. C.A. [In Chambers]). While the evidence in this case is equivocal, I am prepared to accept that no great expenditures or prejudice arose between May 28, 2018 — the last day for timely filing of the application from the second judgment — and June 1, 2018 when the document was filed.

39 Accordingly, apart from a consideration of the merits of the leave application, and general issues of justice, I would have been inclined to grant the extension.

40 I am, on this application, not in a position to assess the substantive merits of the appeals. I am prepared to accept, for the purpose of this application, that arguments can properly be advanced to the effect that the questions ultimately decided by the Court ought, instead, to have been put to an arbitrator. In saying this, I am not suggesting that an appeal would be successful; only that it would be arguable. Indeed I do not see the argument as a particularly strong one.

41 It is less obvious that the judge's May 18 decision, finding that BC Hydro is estopped from terminating the EPA is vulnerable to appeal. On the face of it, the decision involves findings of fact, and I am not, at present, persuaded that any meritorious argument can be advanced to the effect that the judge made a palpable and overriding error in reaching his conclusions. That said, if the appeal from the May 4 decision were successful, it is at least arguable that the May 18 order would fall as a consequence. I am, therefore, prepared to accept, for the purposes of this application, that the appeal would not be doomed to failure.

42 I am, however, of the view that the leave application, itself, does not have any prospect of success. One of the factors to be considered in a leave application is whether the granting of leave will unduly hinder the progress of the action.

43 In *Edgewater Casino Inc., Re*, 2009 BCCA 40 (B.C. C.A.), Tysoe J.A. noted that in cases arising under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, this factor will often be decisive of a leave application:

> [21] The fourth of the above factors [i.e., "whether the appeal will unduly hinder the progress of the action"] relates to the detrimental effect of an appeal on the underlying action. In most non-CCAA cases, the events giving rise to the underlying action have already occurred, and a consideration of this factor involves the prejudice to one of the parties if the trial is adjourned or if the action cannot otherwise move forward pending the determination of the appeal. CCAA proceedings are entirely different because events are unfolding as the proceeding moves forward and the situation is constantly changing — some refer to CCAA proceedings as "real-time" litigation.
>
> [22] The fundamental purpose of CCAA proceedings is to enable a qualifying company in financial difficulty to attempt to reorganize its affairs by proposing a plan of arrangement to its creditors. The delay caused by an appeal may jeopardize these efforts. The delay may also have the effect of upsetting the balance between competing stakeholders that the supervisory judge has endeavoured to achieve.
>
> . . .
>
> [24] As a result of these considerations, the application of the normal standard for granting leave will almost always lead to a denial of leave to appeal from a discretionary order made in an ongoing CCAA proceeding. However, not all of the above considerations will be applicable to some orders made in CCAA proceedings. Thus, in *Westar Mining* [*Re Westar Mining Ltd.* (1993), 75 B.C.L.R. (2d) 16], McEachern C.J.B.C., while generally agreeing with the comments made in *Pacific National Lease* [*Re Pacific National Lease Holding Corp.* (1992), 72 B.C.L.R. (2d) 368], believed that the considerations mentioned by Macfarlane J.A. were not applicable in that case because the CCAA proceeding had effectively come to an end with the sale of the principal assets of the debtor company. Madam Justice Newbury made a similar point in *New Skeena Forest Products* [*Re New Skeena Forest Products Inc.*, 2005 BCCA 192] at para. 25 (which was a hearing of an appeal, not a leave application), although she found it unnecessary to decide the appeal on the point.

44 The current litigation, while not under the *Companies' Creditors Arrangement Act*, is of the nature discussed by Tysoe J.A. in *Edgewater*. This is "real-time" litigation, where the ability of the receiver to realize on the assets of Wedgemount will depend on being able to move quickly, and without entitlement issues being clouded by an appeal. The evidence before the court convinces me that there is a very real chance that delays and uncertainties inherent in an appeal will drastically reduce the amount that Deloitte can ultimately realize on a sale of the project.

45 I am therefore of the view that a judge hearing the leave applications would inevitably conclude that leave should not be granted. As I find the leave applications themselves would be doomed to failure, I decline to extend time to bring the application.

46 The applications to extend time are denied, and the appeals stand dismissed.

Application dismissed.

End of Document

2018 CarswellOnt 16593
Ontario Court of Appeal

National Telecommunications Inc. v. Stalt Telcom Consulting Inc.

2018 CarswellOnt 16593, 297 A.C.W.S. (3d) 28, 64 C.B.R. (6th) 169

National Telecommunications Inc. of the Town of Vaughn in the Province of Ontario (Respondent / Respondent) and Stalt Telcom Consulting Inc. and Cosimo Stalteri (Applicants / Appellants)

Simmons J.A.

Heard: July 10, 2018
Judgment: July 24, 2018
Docket: CA C65324, M49356

Counsel: Sean N. Zeitz, for Michael Farace, for Appellants
James R. D. Clark, for Trustee, Deloitte Restructuring Inc.

Subject: Civil Practice and Procedure; Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.7 Appeals
XVII.7.e Miscellaneous

Headnote

Bankruptcy and insolvency --- Practice and procedure in courts — Appeals — Miscellaneous

Debtor company entered bankruptcy — Trustee was granted declaration under s. 96 of Bankruptcy and Insolvency Act that certain transactions between debtor and S Inc. were transfers at undervalue and order that S Inc. and its privy repay excess value — Motion judge found debtor and S Inc. were not dealing at arm's length in respect of payments — S Inc. brought motion for extension of time to appeal — Motion dismissed — There was no arguable ground of appeal and appeal was frivolous — S Inc. formed intention to appeal within appeal period, instructed their lawyer to appeal and notice of appeal was late filed only because lawyer mistakenly relied on 30-day appeal period under Rules of Civil Procedure rather than 10-day appeal period prescribed by R. 31 of Bankruptcy and Insolvency General Rules — Transactions lacked any generally accepted commercial basis, and recording of transactions showed intention to defraud main creditor of debtor.

Table of Authorities

Cases considered by *Simmons J.A.*:

Canada v. MKM Manufacturing Ltd. (2003), 2003 BCCA 652, 2003 CarswellBC 2897, 188 B.C.A.C. 233, 308 W.A.C. 233, 48 C.B.R. (4th) 222 (B.C. C.A. [In Chambers]) — referred to

Hanley v. Coopers & Lybrand Ltd. (1985), 65 B.C.L.R. 129, 1985 CarswellBC 227 (B.C. C.A.) — referred to

Hansen (Trustee of) v. Hansen (1988), 71 C.B.R. (N.S.) 79, 1988 CarswellBC 543 (B.C. C.A.) — referred to

Ontario Wealth Management Corp. v. Sica Masonry and General Contracting Ltd. (2014), 2014 ONCA 500, 2014 CarswellOnt 8586, 17 C.B.R. (6th) 91, 323 O.A.C. 101, 37 C.L.R. (4th) 191 (Ont. C.A.) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 4(2) — considered

s. 4(5) — considered

s. 96 — referred to

s. 96(1)(b)(ii) — considered

s. 96(2) — considered

s. 96(3) — considered

s. 183(2) — considered

s. 193(c) — considered

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 6 — considered

s. 7(4) — considered

Rules considered:

Bankruptcy and Insolvency General Rules, C.R.C. 1978, c. 368

R. 31 — considered

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

Generally — referred to

R. 61.16(2.2) [en. O. Reg. 570/98] — referred to

MOTION by respondent for extension of time to bring appeal in bankruptcy proceedings.

***Simmons J.A.*:**

1 This is a motion brought on behalf of the appellants, Stalt Telcom Consulting Inc. ("Stalt") and Cosimo Stalteri, for an order *nunc pro tunc* extending the time for filing a notice of appeal in relation to an order made on April 6, 2018, under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, (the "BIA"). The request is made *nunc pro tunc* because a notice of appeal was accepted in error by this court on May 3, 2018, which was after the ten-day appeal period prescribed by Rule 31 of the *Bankruptcy and Insolvency General Rules*, Can. Reg. 368, (the "Bankruptcy Rules") expired on April 16, 2018. [1]

2 The appellants subsequently perfected their appeal in June 2018. As I understand it, no hearing date has yet been set because internal review of the notice of appeal raised a question about the appellants' reliance on s. 6 of the *Courts of Justice Act*, R.S.O. 1990, c C.43 as the jurisdictional basis for their appeal. As part of their notice of motion, the appellants have now filed a proposed amended notice of appeal invoking ss. 183(2) and 193(c) of the BIA as the jurisdictional basis for the appeal. At the motion hearing, the responding party acknowledged that s. 193(c) applies.

3 At the outset of the motion hearing, I raised the issue that I would have no authority to dispose of the appeal, which has now been perfected, if I refused the requested extension: rule 61.16(2.2) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. At the request of counsel, rather than transferring the motion to a panel under s. 7(4) of the *Courts of Justice Act*, I proceeded based on their agreement that, if the extension request was denied, I would dismiss the appeal on consent if no review motion was brought within the time permitted by the *Rules of Civil Procedure*.

4 The responding party resists the extension on one ground: it asserts the appeal is without merit. The appellants respond that where a brief extension is required solely because of solicitor inadvertence, merit should play a minimal, if any, role in determining whether an extension should be granted. In any event, they assert their grounds of appeal meet the low threshold of "not frivolous".

5 In my view, the appellants have not identified an even tenuously arguable ground of appeal. For that reason, I conclude that the appeal is frivolous, and I decline to grant the requested extension.

Background

(i) The order under appeal

6 Deloitte Restructuring Inc. is the Trustee in Bankruptcy for National Telecommunications Inc. ("NTI"). NTI was placed in receivership in April 2015 and made an assignment in bankruptcy in July 2015.

7 In January 2017, the Trustee moved under s. 96 of the BIA for a declaration that certain transactions between NTI and Stalt in late 2013 and 2014 were transfers at an undervalue and for an order that Stalt and its privy, Cosimo Stalteri, repay the excess value to NTI's estate.

8 The motion judge found that between November 18, 2013 and January 31, 2014, Stalt advanced $720,740 to or on behalf of NTI. Further, between December 9, 2013 and November 4, 2014, a period shortly before NTI's initial receivership, Stalt received payments from NTI totaling $1,055,581, a difference of $334,841.

9 As a starting point, in addressing whether the transactions were at an undervalue, the motion judge rejected the appellants' argument that the amounts advanced to or on behalf of NTI related to a joint venture and that the monies received back were a share of the profits. He noted there were no documents to confirm such an agreement. He also explained that the only evidence to support the appellants' argument, which was given by Mr. Stalteri and Stalt's accountant, was inconsistent and not credible when viewed against other evidence.

10 Concerning the latter point, the motion judge noted: i) the inconsistent evidence of Mr. Stalteri's son (the sole officer, director and shareholder of Stalt) and previously given evidence of Mr. Stalteri that the payments were loans; ii) the evidence of the principal of NTI characterizing the payments as in the nature of loans [2] but also describing how they were treated on NTI's books as purchase and sale arrangements between the two entities on which HST was collected; and iii) Stalt's accountant's evidence describing an oral agreement for a joint venture in October 2013 as contrasted with his conduct in briefing Mr. Stalteri's son prior to the son's cross-examination and in helping draft an e-mail referring to the transactions as loans.

11 The motion judge therefore concluded, in accordance with s. 96(2) of the BIA, that there was no evidence to the contrary that could dislodge the Trustee's opinion that the undervalue resulting from these transactions was $334,841.

12 The motion judge went on to find that NTI and Stalt were not dealing at arm's length in respect of the payments exchanged. In reaching this conclusion he relied on: (i) the undervaluation of the transactions; and (ii) the fact that, whether characterized as loans or payments related to a joint venture, the relationship between the parties and the transactions lacked "any of the characteristics of ordinary commercial incentives". Moreover, he found there was no generally accepted commercial basis for the transactions. The motion judge further found that Mr. Stalteri was a person privy to the transfers under s. 96(3) of the BIA. Mr. Stalteri was related to Stalt under s. 4(2) of the BIA and deemed not to deal with it at arm's length under s. 4(5). His own evidence indicated he controlled the day-to-day operations of Stalt, benefitted from the transactions and also caused Stalt and his son to benefit from the transactions.

13 The motion judge accepted the Trustee's evidence that NTI was insolvent at the time of the transactions and applied s. 96(1)(b)(ii) to find the appellants liable.

(ii) The request for an extension

14 It is undisputed that the appellants formed an intention to appeal within the appeal period, instructed their lawyer to appeal and that the notice of appeal was late filed only because their lawyer mistakenly relied on the 30-day appeal

period under the *Rules of Civil Procedure* rather than the applicable ten-day appeal period prescribed by Rule 31 of the Bankruptcy Rules.

15 The appellants submit correctly that the overriding principle on a motion for extension is whether the justice of the case requires an extension. They argue that in circumstances where there is a finding of personal liability and only a brief extension is required, inadvertence by a solicitor should not be permitted to undermine what would otherwise be an automatic right of appeal pursuant to s. 193(c) of the BIA. They contend that the merits of the appeal are of marginal, if any, importance in these circumstances. They point to British Columbia Court of Appeal cases, which they say mandate an extension in similar circumstances involving solicitor inadvertence, for example: *Hanley v. Coopers & Lybrand Ltd.* (1985), 65 B.C.L.R. 129 (B.C. C.A.); *Hansen (Trustee of) v. Hansen* (1988), 71 C.B.R. (N.S.) 79 (B.C. C.A.); and *Canada v. MKM Manufacturing Ltd.*, 2003 BCCA 652, 188 B.C.A.C. 233 (B.C. C.A. [In Chambers]). And in any event, they maintain they meet the very low threshold of presenting grounds of appeal that are "not frivolous".

Discussion

16 Though expressed slightly differently in the many cases, the test for granting an extension is well-established. I prefer Strathy C.J.O.'s articulation in *Ontario Wealth Management Corp. v. Sica Masonry and General Contracting Ltd.*, 2014 ONCA 500, 323 O.A.C. 101 (Ont. C.A.), at para. 26

> The overarching principle is whether the justice of the case requires that an extension be granted. The relevant factors may include:
>
> a) whether the applicant had a *bona fide* intention to appeal before the expiration of the appeal period;
>
> b) the length of and explanation for the delay in filing;
>
> c) any prejudice to the responding parties caused by the delay; and
>
> d) the merits of the proposed appeal.
>
> [citations omitted.]

17 This articulation of the test makes clear that the overriding consideration is whether the justice of the case requires an extension and that the enumerated factors are both non-exclusive and may vary in importance depending on the circumstances.

18 In this case, I agree that the fact of solicitor's inadvertence and the potential for confusion between differing appeal periods militate in favour of an extension. That said, I cannot agree that the merits of the appeal should be ignored. If an appellant is unable to identify an even tenuously arguable ground of appeal, such that the proposed grounds of appeal do not surpass the "not frivolous" standard, it would be contrary to the interests of justice and a waste of time, money and resources to permit the appeal to proceed.

19 In my view, that is the situation here. The appellants' attacks on the motion judge's decision consist exclusively of attacks on findings of fact or findings of mixed fact and law. The appellants do not assert that the motion judge misstated any specific legal test or legal principle. [3]

20 And in attacking the motion judge's findings of fact or mixed fact and law, the appellants have not identified any palpable and overriding error. Rather, they take issue with findings of fact by pointing to evidence that is different than evidence the motion judge chose to rely on and by repeating arguments relating to findings of fact that were considered by the motion judge and rejected by him. [4] Further, their appeal factum consists, in part, of arguments about the Trustee's characterization of the transaction.

21 Fundamental to the appellants' appeal is the renewal of their claim that Stalt was engaged in a joint venture with NTI and their disagreement with the Trustee's alleged characterization of the transactions as loans. As set out above, the motion judge rejected the claim that the transactions were part of a joint venture agreement based largely on credibility findings. In essence, the appellants assert they should have been believed. However, they have not identified any material error in the motion judge's reasoning. [5] Further, at no time did the motion judge characterize the transactions as loans or repayments of loans. Rather, in his view, the transactions lacked any generally accepted commercial basis. Further, he concluded that NTI's recording of the transactions demonstrated that it intended to defraud or delay HSBC Bank, its major creditor, by misleading the Bank as to its (NTI's) receivable and payables.

22 The appellants also challenge the motion judge's finding that they were not acting at arm's length with NTI. They rely primarily on various facts that they say are indicia of acting at arm's length (for example, the fact that Stalt and NTI did not share business premises). [6] Crucially, they fail to identify any legal or factual error in the motion judge's analysis of this issue.

23 Further, the appellants challenge the motion judge's finding, at para. 4 of his reasons, that Stalt "was incorporated in order to help out NTI." They claim there was no evidence to support such a finding. However, on cross-examination Mr. Stalteri's son testified that "Stalt Telcom was originally created to help out NTI." This conclusion was also an available inference from the date of Stalt's incorporation, November 14, 2013, four days prior to the first advance to NTI, and the motion judge's other findings. In any event, this finding was not necessary to the motion judge's conclusions that the transactions were transfers at an undervalue and that the parties were not dealing at arm's length in relation to them.

24 The motion judge made strong credibility findings rejecting the appellants' evidence. He also carefully analyzed the legal and factual basis for the Trustee's claim. On my review of the appellants' submissions, they have not identified any palpable and overriding error or error in principle. I conclude that their appeal is without merit.

Disposition

25 Based on the foregoing reasons, the request for an extension of time *nunc pro tunc* to file the notice of appeal filed on May 3, 2018 is dismissed. On the verbal consent of counsel provided at the motion hearing, it is ordered that, in the event no review motion is delivered within the time stipulated under the *Rules of Civil Procedure* - as that may be extended by order or agreement - the appeal is dismissed.

26 Costs of this motion are to the responding party on a partial indemnity basis fixed in the amount of $5,000 inclusive of disbursements and applicable taxes.

Motion dismissed.

Footnotes

1 The appellants did not follow the required procedure under Rule 31 of filing the notice of appeal in the registrar's office of the court appealed from - which would then transmit the notice of appeal to this court.

2 The motion judge noted the following extract of NTI's principal's evidence: "Basically, if you are asking what the premise of Stalt was for NTI, it would be to bridge a deal, where if I didn't have the funds, he would help out. I would pay it back, and he would make a little bit of money, and I would make a little bit of money." Further, the motion judge stated: "[the principal of NTI] agreed that effectively, NTI was borrowing the money from Stalt and paying it back "with whatever interest or money we worked out."

3 In the factum on this motion, counsel asserts at paras. 45 and 46 that the appeal factum demonstrates: i) no evidence for various conclusions, ii) errors in principle and iii) error in finding the appellants were not in an arm's length relationship with NTI. I deal with arguments i) and iii) specifically at paras. 21 and 22. Although the appeal factum refers to errors in fact and in law (for example at para. 51), I cannot discern any specific error in law being alleged.

4 For example, the appellants repeat the argument, rejected by the motion judge, that Mr. Stalteri's initial evidence that the transactions were loans does not undermine the credibility of his subsequent claims that they were part of a joint venture arrangement because he did not know he was entitled to be represented by counsel at his initial examination and was confused by the use of the word "loans" by the Trustee's counsel.

5 The appellants point to evidence - a tax return for the year ending December 31, 2014 - that suggests that Stalt treated the investments as purchase of products and reflected payments received as revenue. They assert that this evidence is consistent with a joint venture and not a loan. They also rely on this evidence as undermining the motion judge's findings at para. 42 that: "there is no evidence that the three transactions in issue displayed any of the characteristics of ordinary commercial incentives ... The evidence of the participants to the transactions provides differing versions of what took place, none of which match the accounting or establish any form of bargaining or negotiation." As I have explained, the motion judge rejected the claim of a joint venture based on clear credibility findings. Ultimately, he made no finding of a loan versus a joint venture. Rather, his finding was that there was no generally accepted commercial basis for the transactions. The way Stalt treated the payments it received for income tax purposes does not undermine this finding. I take the motion judge's reference to "the accounting" as a reference to NTI's treatment of the advances and repayments as receivables and payables.

6 At para. 42(f) of their appeal factum, the appellants also contend that the Trustee's allegation that Stalt's name was selected to assist NTI in deceiving its lender is baseless. However, the motion judge did not refer to this allegation in his reasons.

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OOSTERHOFF ON TRUSTS:
TEXT, COMMENTARY AND MATERIALS

Eighth Edition
by

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6

VARIATION AND TERMINATION OF TRUSTS

6.1 SCOPE

Normally, a trust ends when the trustees distribute the trust property to the beneficiaries in accordance with the terms of the trust. It may happen, however, that the settlor wishes to revoke[1] the trust, in whole or in part; the beneficiaries want to call for the property earlier than the trust allows; or the court may set the trust aside in exceptional circumstances. In each of these situations, the trust would end prematurely.

This chapter explores each of these topics — revocation, setting aside and termination — to determine when and how each can occur. The related topic of variation of trusts is considered thereafter because there are occasions when the desired result is to keep the trust afoot, but with modifications. You need to understand the constraints governing an application to vary a trust in order to determine how to structure the application. As well, you need to appreciate the interrelationship between the common law right of termination and variation of trusts legislation.

6.2 REVOCATION BY THE SETTLOR

6.2.1 Generally

After constitution, settlors cannot revoke trusts, either completely or in part, unless they retain a power of revocation when creating the trust. This is because when a settlor establishes a trust he or she disposes of the property and no longer has control over it, save by express provision.[2] Before constitution, however, unless the declaration of trust is made for valuable consideration, the creator of a

---

1 A power of revocation enables the settlor to intervene and set the trust aside after its creation. The power of revocation is discussed more fully in §6.2.3, *infra*.

2 See, for example, Donovan W.M. Waters, Mark R. Gillen and Lionel Smith, *Waters' Law of Trusts in Canada*, 4th ed., (Toronto: Thomson/Carswell, 2012), at 383 ("Waters"); *Rose v. Rose* (2006), 81 O.R. (3d) 349, 24 E.T.R. (3d) 217 (S.C.J.), additional reasons at (2006), 24 E.T.R. (3d) 240 (Ont. S.C.J.).

trust is free to revoke because there is no trust without constitution.[3] Unrestricted powers of amendment or modification do not include the power to revoke.[4]

Because testamentary trusts are constituted on the testator's death (technically when the estate is administered and title to the assets are transferred to the trustees) the issue of revocation is relevant only to *inter vivos* trusts. Before death, the testator can revoke the will containing the trust at any time. After the testator's death, there is no one with the power to revoke, so the issue does not arise. The testator may, however, make provision in the trust for its termination and typically does so. Thus, for example, a trust for the benefit of children will normally be scheduled to end when the children reach the age of majority and the capital is paid to them, if the trust so provides.

6.2.2 Exceptions to the Rule against Revocation

If a debtor transfers money to a third party to hold for the purpose of paying his or her general creditors, the debtor may revoke unless the creditors joined as parties to the instrument transferring the funds or, having had notice of the transfer, they forbear from suing. Because of this power to revoke, it has been said that a debtor may revoke a trust made for creditors.

Subject to the exceptions noted in the preceding paragraph, it is correct to say that a debtor may call for the return of the property. However, it is not a true exception to the rule against revocation of trusts. The debtor is free to revoke because no trust in favour of creditors was ever created.[5] The courts have held that the necessary intention to create a trust is lacking because the debtor never intended that equitable title pass to the creditors. Rather, the courts have found that such arrangements are intended to benefit the debtors themselves. In the absence of the requisite certainty of intention no trust is created, the creditors never acquire an interest in the property and there is, therefore, no reason why the debtor may not revoke.[6]

An alternative explanation for the debtor's right to revoke is that the trust was created with the debtor as beneficiary. The trustee is to pay third parties for the benefit of the debtor. On this analysis, the debtor can wind up the trust and obtain the trust property under the rule in *Saunders v. Vautier* because the debtor is the sole capacitated beneficiary.[7]

However, if creditors join as parties to the conveyance, the debtor is precluded from recovering the funds because the requisite certainty of intention exists. Similarly, if the creditors have notice of the trust and forbear from suing, the

---

3 Constitution occurs when trust property is vested in the trustee. See §4.7, *supra*, for a further discussion of constitution and the effect of consideration, or a seal, on a declaration of trust.

4 *Schmidt v. Air Products of Canada Ltd.*, [1994] 2 S.C.R. 611. And see *Buschau v. Rogers Cablesystems Inc.* (2001), 36 E.T.R. (2d) 10 (C.A.), leave to appeal refused (2001), 160 B.C.A.C. 320.

5 *Bill v. Cureton* (1835), 2 My & K. 505, 39 E.R. 1036.

6 *Ibid.*

7 Waters, footnote 2, *supra*, at 386.

2015 ONCA 906
Ontario Court of Appeal

RREF II BHB IV Portofino, LLC v. Portofino Corp.

2015 CarswellOnt 19492, 2015 ONCA 906, 261 A.C.W.S. (3d) 867, 33 C.B.R. (6th) 9

RREF II BHB IV Portofino, LLC, Applicant and Portofino Corporation, Respondent

J.C. MacPherson, Robert J. Sharpe, K. van Rensburg JJ.A.

Heard: December 17, 2015
Judgment: December 21, 2015
Docket: CA M45402, C60169

Counsel: Tony Van Klink, for Appellant, BDO Canada Limited, Receiver of Portofino Corporation
Gino Morga, Q.C., for Respondent, Remo Valente Real Estate (1990) Limited
David A. Taub, for RREF II BHB IV Portofino, LLC

Subject: Civil Practice and Procedure; Contracts; Insolvency

Related Abridgment Classifications

Judges and courts
XVII Jurisdiction
XVII.2 Superior courts
XVII.2.c Jurisdiction under specific statute

Headnote

Judges and courts --- Jurisdiction — Superior courts — Jurisdiction under specific statute

R Ltd. was plaintiff in pending civil action — R Ltd. obtained pre-trial order requiring defendant P Corp. to post security for its claim of oppression and breach of contract — R Ltd. succeeded at trial on oppression claim but that judgment was reversed on appeal and contract claim was remitted for trial — Before contract claim was tried, RREF was appointed by court as receiver for P Corp. — RREF then moved for order to release security — Motion judge declined to cancel letter of credit — RREF appealed order to Court of Appeal — Appeal quashed — Order appealed from was interlocutory — Appeal of interlocutory order was to Divisional Court, with leave — Act of styling motion in receivership as well as civil action did not give RREF automatic access to appeal routes under Bankruptcy and Insolvency Act — Relief sought was against plaintiff in civil action and involved attempt to vary order made by another judge in that proceeding.

Table of Authorities

Cases considered:

TFP Investments Inc. (Trustee of) v. Singhal (1991), 3 C.B.R. (3d) 225, 44 O.A.C. 234, 1991 CarswellOnt 169 (Ont. C.A.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 183 — considered

s. 193 — considered

s. 193(a) — considered

s. 193(c) — considered

s. 193(e) — considered

s. 243 — considered

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 19(1)(b) — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 59.06 — considered

APPEAL by receiver of refusal of order to release security.

***Per curiam*:**

1 The respondent, Remo Valente Real Estate (1990) Limited ("Valente") is the plaintiff in a pending civil action. Valente obtained a pre-trial order requiring the defendant, Portofino Corporation ("Portofino"), to post security for its claim of oppression and breach of contract. Valente succeeded at trial on the oppression claim but that judgment was reversed on appeal and the contract claim was remitted for trial. A further order (of Quinn J.) was made in the civil action, that the security, consisting of a letter of credit, continue in place.

2 Before the contract claim was tried, the appellant was appointed by the court as Portofino's receiver pursuant to s. 243 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA") at the request of a secured creditor, Bank of Montreal. The bank's security in Portofino was assigned to RREF II BHB IV Portofino, LLC. The receivership order expressly provided that the civil action was not stayed.

3 The appellant receiver then moved for an order to release the security. The motion was brought in two proceedings: for advice and directions in the receivership proceedings and for the variation of the order of Quinn J. in the civil action, so that the letter of credit could be cancelled. The motion judge, Carey J., declined to cancel the letter of credit. The appellant seeks to appeal that order to this court. The order is a single order, styled in both the civil action and the receivership proceedings.

4 The appellant contends that it has a right to appeal this interlocutory order under sections 193(a) or (c) of the BIA on the basis that the order was made in the receivership. However, in July 2015 the appellant brought a motion before a single judge of this court in chambers seeking leave to appeal the order under s. 193(e) of the BIA. In argument, the appellant asserted that it had a right of appeal (without leave) under sections 193(a) and (c), but requested leave to appeal, if necessary.

5 In deciding the appellant's motion, the chambers judge expressed doubt as to whether the provisions of the BIA relied upon were applicable, suggesting that the proper appeal route was to the Divisional Court. He denied leave to appeal under s. 193(e) of the BIA and concluded there was no right to appeal under ss. 193(a) and (c). He did not quash the appeal, nor was he asked to do so.

6 The appellant now submits that, as a single judge, the chambers judge had no jurisdiction to make an order that had *the effect* of quashing its appeal: see *TFP Investments Inc. (Trustee of) v. Singhal* (1991), 3 C.B.R. (3d) 225 (Ont. C.A.). Needless to say, that position is inconsistent with the appellant's approach to the motion before the chambers judge, where all aspects of s. 193 were argued. Nevertheless, we agree that a single judge has no jurisdiction to quash an appeal and that only a panel of three judges can conclusively rule that this court does or does not have jurisdiction.

7 However, in our view, the appellant's contention that an appeal lies to this court is misconceived.

8 The order appealed from is interlocutory. Under s. 19(1)(b) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, the appeal of an interlocutory order is to the Divisional Court, with leave.

9 Section 193 of the BIA authorizes the appeal of both interlocutory and final orders to this court, in the circumstances outlined in (a) through (d), or with leave of the court, under (e), but only an order made by a bankruptcy court judge is subject to the appeal routes in s. 193 of the BIA. Section 183 provides that a bankruptcy court has jurisdiction in bankruptcy and in other proceedings authorized by the BIA.

10 The appellant says Carey J. was acting in proceedings authorized by the BIA, because one of the motions resulting in his order was a motion for directions in the receivership. This would mean that, simply by bringing the motion in both the civil action and the receivership, the appellant would have open the route to appeal to this court under s. 193 of the BIA.

11 We disagree. Although the order under appeal was made at the request of a receiver, and styled in the receivership as well as the civil action, the relief sought was against the plaintiff in the civil action, and involved an attempt to vary an order made by another judge in that proceeding. The substance of what the receiver was seeking was a variation under rule 59.06 of the order of Quinn J., which was an order made in the civil action.

12 The act of styling the motion in the receivership as well as the civil action did not give the appellant automatic access to the appeal routes under the BIA. The jurisdiction of the court is governed by the substance of the order made. The order dismissed a motion to vary an order made in a civil action, and required the continued posting of security in that action. This was not an order in proceedings authorized by the BIA. As such, the proper route of appeal is to the Divisional Court, with leave.

13 As this court has no jurisdiction to entertain the appeal, the appeal is quashed.

14 The appellant receiver shall pay the costs of the respondent Valente, fixed at $5,000, inclusive of disbursements and applicable taxes. Although RREF II BHB IV Portofino, LLC appeared and supported the appellant's position, no costs were sought by or from this party.

Appeal quashed.

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2005 CarswellOnt 5080
Ontario Superior Court of Justice

St. Denis v. TD Insurance Home & Auto Liberty Insurance Co. of Canada

2005 CarswellOnt 5080, [2005] O.J. No. 4441, 143 A.C.W.S. (3d) 162, 33 C.C.L.I. (4th) 58, 80 O.R. (3d) 706

Don St. Denis (Plaintiff) and TD Insurance Home and Auto Liberty Insurance Company of Canada (Defendant)

Thomson J.

Heard: August 16, 2005
Judgment: October 7, 2005
Docket: 05-CV-4401SR

Counsel: Rodney M. Godard for Plaintiff
A. Grayson for Defendant

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Insurance

Related Abridgment Classifications

Civil practice and procedure
VII Limitation of actions
VII.4 Actions in contract or debt
VII.4.d Actions on insurance policies
VII.4.d.iii Miscellaneous
Contracts
XIV Remedies for breach
XIV.7 Effect of delay in seeking remedy
Insurance
XII Automobile insurance
XII.6 Catastrophic impairment
XII.6.c Practice and procedure

Headnote

Civil practice and procedure --- Limitation of actions — Actions in contract or debt — Actions on insurance policies — General

Plaintiff instructed attorney to commence action against insurer for coverage of theft of vehicle — Attorney's assistant did not create usual ticklers for issuance and service of statement of claim — Plaintiff's attorney was aware that limitation period was one year, but did not review file to see if tickler system had right date to meet deadline — Plaintiff's attorney only realized that date had been missed when plaintiff attended at his office eight days after deadline had passed, and served statement of claim at that point — Defendant filed statement of defence defending allegations generally and also pleading that statement of claim was served outside of limitation period — Defendant brought motion for summary judgment on grounds that plaintiff's statement of claim was served outside of one-year limitations period — Motion dismissed — One year limitation period had its origin in statute, not withstanding fact that it appeared in every contract of insurance — Defendant would not be prejudiced if matter proceeded in spite of being out of time, as defendant was able to make its investigations and was capable of preparing full answer and defence — There were special circumstances of "explainable solicitor inadvertence" that should allow case to proceed — Delay was result of inaction and not result of bad faith, stupidity or negligence — Plaintiff's attorney could not be expected to know limitations periods of each file in office by memory and neither could staff be expected to do so — Plaintiff's attorney could not be expected to check and double check every entry into tickler system — Plaintiff's counsel was experienced litigation counsel and his actions

were within normal standard of care expected of litigation lawyer in like circumstances and experience — Lawyer's inadvertence should not be visited upon plaintiff when there was no prejudice to defendant.

Insurance --- Automobile insurance — Threshold issues — Practice and procedure

Limitations period — Plaintiff reported theft of vehicle to defendant insurer — Defendant insurer denied coverage — Plaintiff instructed attorney to commence action against insurer, but attorney's assistant did not create usual ticklers for issuance and service of statement of claim — Plaintiff's attorney was aware that limitation period was one year, but did not review file to see if tickler system had right date to meet deadline — Plaintiff's attorney only realized that date had been missed when plaintiff attended at his office eight days after deadline had passed, and served statement of claim at that point — Defendant filed statement of defence defending allegations generally and also pleading that statement of claim was served outside of limitation period — Defendant brought motion for summary judgment on grounds that plaintiff's statement of claim was served outside of one-year limitations period — Motion dismissed — One year limitation period had its origin in statute, not withstanding fact that it appeared in every contract of insurance — Defendant would not be prejudiced if matter proceeded in spite of being out of time, as defendant was able to make its investigations and was capable of preparing full answer and defence — There were special circumstances of "explainable solicitor inadvertence" that should allow case to proceed — Delay was result of inaction and not result of bad faith, stupidity or negligence — Plaintiff's attorney could not be expected to know limitations periods of each file in office by memory and neither could staff be expected to do so — Plaintiff's attorney could not be expected to check and double check every entry into tickler system — Plaintiff's counsel was experienced litigation counsel and his actions were within normal standard of care expected of litigation lawyer in like circumstances and experience — Lawyer's inadvertence should not be visited upon plaintiff when there was no prejudice to defendant.

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s. 47 — referred to

s. 61 — referred to

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Generally — referred to

s. 129 — referred to

s. 281(5) — referred to

Limitations Act, 2002, S.O. 2002, c. 24, Sched. B

Generally — referred to

s. 4 — referred to

s. 15(2) — referred to

MOTION by defendant for summary judgment on grounds that plaintiff did not issue statement of claim within one-year limitation period required by Insurance Act.

***Thomson J.*:**

1 This was a motion for summary judgment on the grounds that the Plaintiff did not issue the Statement of Claim within the one-year limitation period required by the Insurance Act.

2 The Plaintiff conceded that it was 8 days late in issuing the Statement of Claim and violated s.9 (4) of the OPA 1.

3 The relief sought is discretionary and an extension of a time limit may be granted in certain situations. For instance if there is no prejudice to the other party and if there are special circumstances that warrant the extension.

4 The special circumstances were set out at para. 21 of the Plaintiff's factum and included "explainable solicitor inadvertence" as opposed to inexcusable or deliberate inactivity or a conscious decision on the part of Mr. Goddard, counsel for the Plaintiff.

5 Other special circumstances included:

a) the Defendant was fully able and still is to defend the action despite the expiry of the limitation period. There was no evidence that the Defendant would suffer any prejudice if the action proceeded;

b) the delay in issuing the Statement of Claim was merely 8 days;

c) the solicitor advised the Defendant of the issuance of the claim and the limitation problem within 17 days of the expiry of the limitation period;

d) the limitation period is materially shorter that what has become the standard limitation period for commencing actions for breach of contract in the Limitations Act, S.O. 2002, c. 24, Schedule Beauchamp, spousal support. 4, 15(2).

Facts

6 The Plaintiff attended upon Mr. Goddard and explained the facts of the case. His assistant prepared a "matter opening form" dated April 16, 2004. Mr. Goddard indicated on it that a limitation sticker was required to be set up "to issue claim one year form February 9, 2004." The tickler was prepared on April 20, 2004. The assistant indicated in her affidavit that she inadvertently put the limitation date as February 9, 2006 instead of February 9, 2005.

7 Details of the theft were reported to the insurance company on April 1, 2004 by the Plaintiff at an examination of the Plaintiff. The Defendant then denied coverage September 23, 2004. The Plaintiff instructed Mr. Goddard to commence an action. A draft Statement of Claim was prepared and was ready for issuance by November 12, 2004. The assistant did not create the usual reminders for issuance and service of the Statement of Claim which is the normal procedure when a Statement of Claim is prepared. Neither the assistant nor the articling student took any steps to issue and serve the Statement of Claim within the one-year time limit.

8 Mr. Goddard knew the limitation period was one year and not two. He did not review the file to see if the tickler system had the right date in it for this file. His client attended his office 8 days after the limitation period had expired and it was then that Mr. Goddard realized he had missed the date.

9 No objection was taken to these facts.

10 Once the Defendant was served with the Statement of Claim it served and filed a Statement of Defence defending the allegations generally as well as pleading that the Statement of Claim was served outside the limitation period.

11 Subsequently the Plaintiff sought and obtained on consent an amendment to the Statement of Claim to include a claim against the Defendant for a breach of the Defendant's duty of good faith. The amendment indicated that the Defendant did not act promptly and fairly in investigating, assessing and attempting to resolve the claim of the plaintiff.

Plaintiff's Position

12 The Plaintiff argued that there was a discernable chain of events in place. There was a draft Statement of Claim and therefore an intention to proceed with a claim and, there was a reasonable explanation for overlooking the limitation period. He advised the Defendant promptly of the situation.

13 There existed special circumstances for the failure to serve the Statement of Claim within the limitation period and the claim should be allowed to proceed. In the alternative, the breach of good faith was an independent tort and not related to the contractual dispute and therefore the action on that basis should proceed because it carried a two-year limitation period and was issued in time.

Defendant's Position

14 The Defendant argued that the 1-year time limit was absolute and notwithstanding the explanation given by Mr. Goddard the Statement of Claim was not issued in time and the action should be dismissed with costs.

15 The bad faith aspect was contractually related and carried the same time limitation as it was a claim against the insurer under the contract in respect of loss or damage to the automobile and thus was lumped together with the other claim and was subject to the same limitation period.

The Statutory Provisions

16 The one-year limitation period is set out in section 8 of the OAP 1 [Ontario Automobile Policy]. Section 8 requires the conditions of the policy to be printed as part of every automobile insurance policy in Ontario.

17 Statutory condition 9(4) states that "every action or proceeding against an insurer under this contract *in respect of* loss or damage to the automobile or its contents ...shall be commenced within one year next after the happening of the loss and not afterwards ...." [Emphasis added]

The Law

18 The court may, in special circumstances and in the absence of prejudice to the Defendant, exercise discretion to relieve against unfairness in the imposition of a statutory limitation.

19 The S.C.C. in *Basarsky v. Quinlan* (1971), [1972] S.C.R. 380 (S.C.C.) dealt with a case where there had been an application to amend a claim so as to include a claim under the Fatal Accidents Act R.S.A. 1955, c. 111 after the expiry of the two [2] year limitation period. The court held, after considering and commenting on the English case of *Weldon v. Neal* (1887), 56 L.J.Q.B. 621 (Eng. C.A.)], that an "amendment of the nature of that sought in the latter case will be allowed where *peculiar circumstances* exist which warrant the amendment being allowed. The power to allow an amendment after the time limited by a Statute of Limitations will necessarily be infrequently invoked as a the circumstances warranting its use will not often occur." [Emphasis added]

20 The court went on to determine that the words "peculiar circumstances" may be equated with the words "*special circumstances*". It found that special circumstances existed and allowed the amendment. [Emphasis added]

21 The Ontario Court of Appeal in *Deaville v. Boegeman* (1984), 47 C.P.C. 285, 6 O.A.C. 297 (Ont. C.A.) was concerned with a motion to add Family Law Act claimants after the expiry of the limitation period. The Plaintiff had brought an action for damages for personal injuries suffered in a motor vehicle accident and the limitation period expired August 27, 1982. On September 13, 1983 this motion was brought.

22 MacKinnon A.C.J.O. delivered the judgment and acknowledged that there was power in special circumstances to allow an amendment after the time limited to do so had expired. At para. 18 he said:

> This is a discretionary matter where the facts of the individual case are the most important consideration in the exercise of that discretion.... and it is possible to outline only general guidelines to cover the myriad of factual situations that may arise.

23 He commented in para. 19 that after the expiration of the limitation period:

> citizens would not expect to be disturbed once the limitation period had expired..... generally speaking, a Defendant need no longer be concerned about the location or preservation of evidence relevant to the particular claim ....

24 On the presumption of prejudice to the Defendant he said at para. 20:

> in my view the expiry of the limitation period creates a presumption, however slight in some cases, of prejudice to the Defendant. Facts and history may make it clear that prejudice does not exist especially if the Defendant knew the case and the nature of the claim.

25 The court did not find special circumstances in the case and the amendment was not granted.

26 Wilson J. dealt with a recent case where the insured did not commence the action within the time limitation period from the date of a break in as stipulated in the policy. Inadvertence of the solicitor was pleaded as the special circumstance as well as the fact that the insurance company suffered no prejudice. The solicitor failed to take steps to ascertain the relevant limitation period by obtaining a copy of the policy. The insurance company had been informed of the intention of the insured to pursue a claim and that information was within the one-year time limitation. The application to strike the action was allowed. It was clear that the solicitor did not do something he would normally have done in order to ensure he had knowledge of the limitation period in effect, namely have reference to the contract. [see *Boutique Emporio Inc. v. Consolidated Insurance Brokers Ltd.*, [1995] O.J. No. 573 (Ont. Gen. Div.)]

27 She noted at para. 11 that the case involved a contractual limitation as distinct from a statutory limitation. She found that the cases dealing with the exercise of discretion did not apply to contractual limitations because it would be a dangerous precedent to allow the courts to rewrite contractual conditions.

28 In my view section 9(4) of the OPA is a statutory time limitation notwithstanding it appears in every contract of insurance. The genesis is the statute not the contract itself. The statute requires it be published in every contract of automobile insurance. There is no question the time period is in every contract but the genesis needs to be examined to determine whether the time limit is contractual or statutory.

29 The Divisional Court in *Toner (Litigation Guardian of) v. Toner Estate* (1993), 45 M.V.R. (2d) 94, 13 O.R. (3d) 617 (Ont. Div. Ct.) dealt with Plaintiffs who were injured in a motor vehicle accident in August of 1983. The mother of some infants was killed but the action to recover damages and for damages under the Family Law Act was commenced in August of 1987 some 4 years after the accident. The court of first instance found that the Family Law Act claims were not barred by the two [2] year limitation period in the Highway Traffic Act, R.S.O. 1990, c. H.8 and/or s. 61 of the Family Law Act, R.S.O. 1990 c. F. 3, s. 61(1). However, the personal damage claims were statute barred by the existence of the two-year limitation period but special circumstances existed that justified permitting the personal claims to proceed. The appeal was dismissed and the actions proceeded.

30 The court stated at para. 33 that:

> there is no dispute either that if special circumstances can be found, then, in accordance with *Barsarsky v. Quinlan* ... the court may allow an extension of the limitation period and thereby keep the cause of action for the personal claims alive.

31 *Toner* was not appealed.

32 The special circumstances included the fact that section 47 of the Family Law Act covered the extension directly and that that was no prejudice to the Defendants. The insurers had been fully apprised of the position of the infants and had made payments on their account. As well, the insurers had fully investigated the issues of liability with respect to the collision in question and had settled some matters included in outstanding claims that arose because of the accident.

33 There is law that the inadvertence of a solicitor in failing to serve a writ within the proper time should not work a hardship on a Plaintiff. The Ontario Court of Appeal in *Robertson v. Toronto Transit Commission* (1978), 7 C.P.C. 178 (Ont. C.A.) concerned a solicitor who failed to serve the writ due to inadvertence rather than a slip in practice. The court found in allowing the claim to proceed that "the court is concerned primarily with the rights of litigants, rather than with the conduct of solicitors."

34 On the other hand there were many cases introduced by the Defendant to support its position that if the time limit was exceeded the claim was out of time. He highlighted the case of *Hawcher v. Allstate Insurance Co. of Canada*, [1997] O.J. No. 3298 (Ont. Gen. Div.) a decision of Ground J. as he felt it was virtually on all fours with the case at bar. The Plaintiff's claim arose out of the alleged theft of his automobile just like in this case. The policy contained the same one-year limitation period.

35 The court stated at para. 1 that there were no factual issues in dispute. The only issue was the applicability of the one-year limitation period. The loss was November 4 or 5 of 1994. Ground J. found that there was:

> "a need for certainty in interpreting a statutory limitation period. It cannot commence from a floating vague date where a particular person may for a particular reason conclude that the car is not going to be returned." The insured knew the car was stolen November 4 or 5 and that he had legal recourse against Allstate at least as early as February 1995. the claim had been denied and he had been advised of the limitation period to bring the action against Allstate.

36 Summary judgment was granted on the grounds there was no genuine issue for trial.

37 Defence counsel also alluded to *Boutique* [supra] for the proposition that because the limitation period is in the contract it was a contractual limitation as opposed to a statutory limitation and so the case law in *Barsarsky* [supra] etc did not apply. Wilson J. found no prejudice would affect the Defendant and that it had made thorough investigations of the break in.

38 In *Persaud v. Certas Direct Insurance Co.*, [2004] O.J. No. 726 (Ont. S.C.J.) Swinton J. dealt with an appeal of the judgment of a small claims court judge who dismissed the Defendant's argument that the Plaintiff's claim was barred by the expiration of the limitation period. The claim was filed 12 days late.

39 The appeal was allowed because the failure to commence the action within the prescribed time was a breach of a condition precedent to coverage under the policy of insurance. Section 98 of the *Courts of Justice Act* R.S.O. 1990 c. C.43 grants relief against penalties and forfeitures on such terms as to compensation or otherwise as are considered just. The small claims court judge applied s. 98 and allowed the claim to proceed.

40 S. 129 of the Insurance Act states:

> where there has been imperfect compliance with a statutory condition as to proof of loss to be given by an insured or other matter or thing required to be done or omitted by the insured with respect to the loss and the consequent forfeiture or avoidance of the insurance in whole or in part and the court considers it inequitable that the insurance should be forfeited or avoided on that ground, the court may relieve against the forfeiture or avoidance on such terms as it considers just

41 Swinton J. held at para. 5 that:

> courts have generally been willing to grant relief from forfeiture when notice of a claim has been delayed. However, they have treated the failure to institute an action within a prescribed time period as non-compliance or breach of a condition precedent, rather than "imperfect compliance" within s. 129 [of the Insurance Act].... or its counterpart.... Courts have also held that a time limitation condition for bringing an action does not cause a forfeiture; rather, it bars a remedy...

42 She found that the small claims court judge erred in holding that relief from forfeiture was available under s. 98 of the Courts of Justice Act. The Plaintiff failed to commence her action within the time period prescribed in the insurance policy which amounted to non-compliance with the policy or a breach of a condition precedent.

43 It is clear that neither Ground J. nor Swinton J. had special circumstances to consider in either *Hawcher* or *Persaud* nor were the cases of *Barsansky, Toner or Robertson* referred to in either of their comments. That being said these decisions can be distinguished from the case at bar.

Analysis

44 The limitation period:

45 The issue is whether the Plaintiff should be allowed to continue with the action notwithstanding he had not served the Defendant within the required limitation period.

46 There was no allegation that the Defendant would be prejudiced if the matter proceeded. It was able to make its investigations and was and is capable of preparing full answer and defence.

47 Do the cases of *Baransky, Toner* and *Robertson* [supra] apply and, if so, what are the special circumstances that would allow the claim to continue? This requires an examination of the meaning of "explainable solicitor inadvertence".

48 The cases do apply and were instructive as to the tests to be applied.

49 Inadvertence is defined in the Oxford dictionary of Current English, 7th ed. as "unintentional; negligent; inattentive". Negligence is defined as " lack of proper care; culpable carelessness".

50 Clearly inadvertence has to be some action or inaction that causes someone or something some difficulty. Here the difficulty is easily determined and it resulted from inaction. What occurred was not an act of bad faith, done as a result of outright stupidity, or done as a result of gross or even simple negligence. However, what occurred certainly resulted from some act of carelessness committed by staff.

51 Mr. Goddard could not be expected to carry around in his head the limitation periods attached to each file in his office and neither could his staff. That is why tickler systems were put in place. He also cannot be expected to check and double check each entry into the tickler system to ensure his instructions were followed. There was no evidence whether he had a review system in place for his files where he periodically reviewed files to ensure that correspondence or undertakings were answered and where he might have noticed the limitation period error.

52 I find there was inadvertence.

53 Next the explanation for the inadvertence must be reasonable and based on the usual standard of care expected of a litigation lawyer in like circumstances and experience. There is no question that Mr. Goddard is an experienced litigation counsel of long standing.

54 Was what he did within the standard of care expected and was the inadvertence something he had no control over? Or, should he have double-checked the tickler system to ensure that the system had the right date? Or, can he reasonably be able to rely on his staff to get his instructions on things like a limitation period correct?

55 According to the facts, he had a tickler system in place that required him to enter the limitation period date on the file opening sheet. He did. It then went to staff who were required to record the date in the tickler system. They did. If there was an error made in recording the date in the computer it was unlikely to be found unless the lawyer did a double check to see that the information had been properly recorded or some other intervening event caused him to refer to the file and the tickler information.

56 A lawyer is entitled to rely on his staff but the "buck stops with him". Clearly this was not a case where he sat on his hands and did not get a copy of the policy to ascertain the limitation period. He had a system in place to tickle

the memory of his staff and himself as to the time limitation recorded to do the next step. His actions were not cavalier, arrogant or grossly negligent. This was a staff error in entering data into the tickler system.

57 Mr. Goddard was not grossly negligent as was the lawyer in *McRitchie-Tenenbaum (Litigation Guardian of) v. Dyck*, [1996] O.J. No. 2370 (Ont. Gen. Div.) where 4 errors were made in the tickler system. Notwithstanding these findings the motions judge concluded that special circumstances existed and he allowed the claim to proceed where it was issued some period of time after the limitation period expired.

58 Flinn J. dealt with a situation where the lawyer had a tickler system in his office that brought forward the writ for service but through some difficulty [not recorded in the judgment] the writ was not served. This situation came to his attention some 11 days later. The judge found that the Defendants knew the action had been commenced, the period of time was not sufficient to have allowed the Defendant to conclude that the claim had been abandoned, the evidence had not disappeared or lost its reliability in the brief span of 11 days. The court allowed an order to go renewing the writ. (see *Sibbitt v. Cole*, [1981] O.J. No. 353 (Ont. Co. Ct.))

59 In *Curtner v. McNally*, [2002] O.J. No. 4636 (Ont. S.C.J.) the motions judge found the lawyer had a complex system of consultation files and representation files and no tickler was attached to the former. In this case the file changed from consultation to representation but the tickler system was not put into affect and the limitation period was missed due to inadvertence. There was no evidence that the Defendant suffered any prejudice by reason of the delay or acted in any way other than in good faith. The motion for an extension of the limitation period in the Family Law Act was granted.

Conclusion

60 I am satisfied that I should use my discretion and allow the claim to go forward on the primary ground that there is no prejudice to the Defendant and there was a special circumstance in place in this case as a result of the reasonable explanation of the solicitors inadvertence. This inadvertence should not be visited on the Plaintiff by disallowing this claim to go forward. As a result of these findings and applying the law above while distinguishing the learned decisions of Ground J. and Swinton J., I am exercising my discretion and the motion for summary judgment on the basis of late issuance of the writ and the resulting later service is dismissed.

The Bad Faith Claim

61 The Plaintiff also argued that a different and longer two-year limitation period applied as a result of the independent bad faith claim. The writ was issued and served within that period and so the motion should be dismissed.

62 There is no question that the insurer owes the insured a duty of good faith that requires an insurer to act both promptly and fairly when investigating, assessing and attempting to resolve claims made by its insureds. A breach of duty to act in good faith gives rise to a separate cause of action from an action for the failure of an insurer to compensate for loss covered by a policy.

64 The limitation period for a claim of bad faith is two [2] years under the Limitations Act, 2002, S.O., Schedule Beauchamp, Sections 4 and 15(2). In this case the issuance and service of the Statement of Claim would have been in time if this were the only claim being made against the insurance company.

The Facts

65 The Statement of Claim includes in paragraphs 13 and 13.1 what is in essence a claim for a breach of the insurer's duty of good faith to the Plaintiff under the policy.

66 The Plaintiff made two specific requests in addition to the institution of this action and claims not to have received any of the detailed reports requested that it appears the Defendant has had prepared for it in its defence of this action. Specifically, the Defendant has not produced any documentary evidence nor any details to support its assertion that the Plaintiff made "wilfully false statements" as a basis for denying liability.

67 On October 8, 2004 Mr. Goddard wrote to the Defendant insurance company claims department and asked that it provide a full description of its investigation including any documents provided, individuals spoken to, and information obtained that supports its assertion that the subject automobile did not travel across the border to the United States on February 9, 2004.

68 On October 20, 2004 the solicitors for the Defendant insurance company wrote to Mr. Goddard and indicated that they had instructions to provide details from border authorities without however, indicating which border authorities. In the third paragraph the author indicates he has certain information and those records were not forwarded to Mr. Goddard.

69 On November 4, 2004 Mr. Goddard wrote to counsel for the insurance company and asked for documents that supported the insurer's assertion that the subject vehicle did not travel across the border on February 9, 2004. There was no reply in the documents filed on this motion

70 It seems that dismissal of this action at a point prior to this material being produced and tested at trial would be unfair and unjust to the Plaintiff.

The Law

71 *Norris v. Lloyd's of London* (1998), 205 N.B.R. (2d) 29, 523 A.P.R. 29 (N.B. C.A.), dealt with an insurance company that successfully applied to strike the Plaintiff's action on the ground that the action was not commenced within one year after the damage complained of was discovered as required by the policy. The court found that a statutory condition did not bar an action in tort. The New Brunswick Court of Appeal referred to statutory condition # 14 as follows; "every action or proceeding against the insurer *for the recovery of any claim* under or by virtue of this contract shall be absolutely barred unless commenced within one year next after the loss or damage occurs."

72 The Statement of Claim imperfectly raised the issue of lack of good faith as a tort independent of the policy. The adjuster gave the Norris's some information about the coverage they had and did not have. The court found that if the adjuster was in error in the advice he gave the Norris' a claim for bad faith could have merit depending on the evidence adduced.

73 The court referred to *Plourde c. Collin* (1991), 119 N.B.R. (2d) 377 (N.B. C.A.) where Angers J. A. at p. 383 para. 11 described the insurer's duty when providing information to its insured as follows:

> There is a special relationship between an insurer and the insured. The two have a duty to exercise the [utmost] good faith (uberrima fides) in their dealings both from an information standpoint and in their respect for their mutual rights ....

74 It found that statutory condition # 14 did not bar an action in tort against the insurance company.

75 O'Connor J. A. in *702535 Ontario Inc. v. Non-Marine Underwriters, Lloyd's London, England*, 2000 CarswellOnt 904 (Ont. C.A.) paras. 27-31, (2000), 184 D.L.R. (4th) 687 (Ont. C.A.) stated at p. 694 that:

> The duty of good faith also requires an insurer to deal with its insured's claim fairly. The duty to act fairly applies both to the manner in which the insurer investigates and assesses the claim and to the decision whether or not to pay the claim. In making a decision whether to refuse payment of a claim from its insured, an insurer must assess the merits of the claim in a balanced and reasonable manner. It must not deny coverage or delay payment in order to take advantage of the insured's economic vulnerability or to gain bargaining leverage in negotiating a settlement. A decision by an insurer to refuse payment should be based on a reasonable interpretation of its obligations under the policy.

> What constitutes bad faith will depend on the circumstances in each case. A court considering whether the duty has been breached will look at the conduct of the insurer throughout the claims process to determine whether in light of the circumstances, as they then existed, the insurer acted fairly and promptly in responding to the claim.
>
> A breach of the duty to act in good faith gives rise to a separate cause of action from an action for the failure of an insurer to compensate for loss covered by the policy. In *Whiten v. Pilot Insurance*, Laskin J.A. [See Note 1 below] made the point at p. 650: [Emphasis added]
>
> [I]n every insurance contract an insurer has an implied obligation to deal with the claims of its insureds in good faith. [cites omitted] That obligation to act in good faith is separate from the insurer's obligation to compensate its insured for a loss covered by the policy. An action for dealing with an insurance claim in bad faith is different from an action on the policy for damages for the insured loss. In other words, breach of an insurer's obligation to act in good faith is a separate or independent wrong from the wrong for which compensation is paid.

76 The defence referred to the case of *Arsenault v. Dumfries Mutual Insurance Co.*, [2002] O.J. No. 4, 57 O.R. (3d) 625 (Ont. C.A.), which involved a claim for bad faith damages arising out of an insurer's termination of no-fault accident benefits. This claim was subject to a two-year limitation period. The Plaintiff notified the insurer in September 1995 that her weekly statutory accident benefits would be discontinued and she applied for mediation under the Insurance Act. It was unsuccessful. She commenced an action in June of 2000 claiming damages for the Defendant's bad faith conduct in prematurely terminating her weekly benefits. The Defendant moved for a determination whether the Plaintiff's action was statute barred by the two-year limitation period as well as other relief.

77 The Plaintiff argued that the case of *Whiten v. Pilot Insurance Co.* (1999), 42 O.R. (3d) 641, 170 D.L.R. (4th) 280 (Ont. C.A.) entitled her to bring the separate action for damages for bad faith on the part of the insurer.

78 The court held that the words in the Act in section 281(5) that states that a proceeding in a court .... "in respect of" no fault benefits must be commenced within two years after the insurers refusal to pay the benefits claimed.

79 The court at para. 16 found that the phrase "in respect of" should be given the "widest possible scope" referring to the commentary of Dickson J. in *Nowegijick v. R.*, [1983] 1 S.C.R. 29 (S.C.C.). the phrase 'in respect of' is probably the widest of any expression intended to convey some connection between two related subject matters.

80 Abella J. A. found that although Dickson J. was dealing with language concerning an Income Tax matter the observation above was generic in nature and applicable to the relevant Insurance Act provisions in this case. That meant that any and all disputes about an insurer's refusal to pay no-fault benefits, including disputes which allege the insurer's bad faith in connection to that refusal must be brought within two years of the refusal. [para. 17]

81 A bad faith claim would also deal with the non payment of the benefits. At para. 18 she comments that "in order to establish such a claim, the appellant would first have to establish that the insurer's termination of her benefits was improper. Such a claim must comply with the requirements outlined in spousal support. 280-283 of the Insurance Act one of which is the two-year limitation period....The appellant cannot, by the device of a claim for bad faith damages, extend three-fold the length of that termination period."

82 Further, in para. 19 she concluded that the appellant's claim was not an independent actionable wrong, but was in fact exactly the kind of dispute over no-fault benefits entitlements contemplated by the dispute resolution scheme in the Insurance Act.

83 *Arsenault* is distinguishable from the case at bar which is framed as an independent action in bad faith based on the inaction of the Defendant.

Conclusion

84 In the alternative I am satisfied that the secondary argument of the Plaintiff should prevail and the claim of bad faith should proceed in that the Defendant has not provided the appropriate documentary evidence required to allow the Plaintiff to prosecute its claim. The two-year limitation period is triggered and the writ was issued and served in time. The motion for summary judgment is dismissed.

Costs

85 The parties agreed on costs and they are fixed at $2500.00 plus G.S.T. payable to the Plaintiff.

Motion dismissed.

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2015 ABCA 44
Alberta Court of Appeal

Trimor Mortgage Investment Corp. v. Fox

2015 CarswellAlta 121, 2015 ABCA 44, [2015] A.W.L.D. 1096, 249 A.C.W.S. (3d) 13, 26 Alta. L.R. (6th) 291

Deloitte Restructuring Inc., in its Capacity as the Trustee in Bankruptcy of Trimor Mortgage Investment Corporation, Applicant and Robert Fox, White Rain Corporation, the R. Fox Self-Administered RSP and Darlene Shelest, Respondents

Marina Paperny J.A.

Heard: January 27, 2015
Judgment: January 30, 2015
Docket: Calgary Appeal 1401-0318-AC

Counsel: J.P. Flanagan, for Applicant
L.C. Snowball, for Respondents

Subject: Civil Practice and Procedure; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.7 Appeals
XVII.7.e Miscellaneous
Headnote
Bankruptcy and insolvency --- Practice and procedure in courts — Appeals — Miscellaneous
Applicant was trustee in bankruptcy — Applicant sought to appeal chambers decision overturning its disallowance of claim of respondents — Applicant brought application seeking declaration that permission to appeal was not required — Application allowed — Leave to appeal was not required — Issue on appeal was whether trustee was entitled to disallow claim of $272,000 by looking beyond default judgment to circumstances of its granting and merits of claim — Focus of inquiry under s. 193(c) of Bankruptcy and Insolvency Act was amount of money at stake, which here was $272,000 — Claim fell squarely within section.
Table of Authorities
Cases considered by *Marina Paperny J.A.*:
Galaxy Sports Inc. v. Galaxy Sports Inc. (Trustee of) (2003), 44 C.B.R. (4th) 218, 2003 CarswellBC 1305, 2003 BCCA 322, (sub nom. *Galaxy Sports Inc. (Bankrupt), Re)* 183 B.C.A.C. 192, (sub nom. *Galaxy Sports Inc. (Bankrupt), Re)* 301 W.A.C. 192 (B.C. C.A. [In Chambers]) — referred to
Kostiuk, Re (2006), 379 W.A.C. 292, 229 B.C.A.C. 292, [2006] 10 W.W.R. 259, 24 C.B.R. (5th) 160, 55 B.C.L.R. (4th) 276, 2006 CarswellBC 2001, 2006 BCCA 371 (B.C. C.A. [In Chambers]) — referred to
Newfoundland & Labrador Refining Corp. v. IJK Consortium (2009), 2009 CarswellNfld 76, 2009 NLCA 23, 284 Nfld. & P.E.I.R. 53, 875 A.P.R. 53, 52 C.B.R. (5th) 8 (N.L. C.A.) — referred to
Orpen v. Roberts (1925), 1925 CarswellOnt 89, [1925] S.C.R. 364, [1925] 1 D.L.R. 1101 (S.C.C.) — followed
United Fuel Investments Ltd., Re (1962), [1962] S.C.R. 771, (sub nom. *Fallis v. United Fuel Investments Ltd.)* 4 C.B.R. (N.S.) 209, (sub nom. *Fallis v. United Fuel Investments Ltd.)* 34 D.L.R. (2d) 175, 1962 CarswellOnt 54 (S.C.C.) — followed
Statutes considered:
Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 2 "property" — considered

s. 193(c) — considered

s. 193(e) — considered

Rules considered:

Alberta Rules of Court, Alta. Reg. 124/2010

Generally — referred to

APPLICATION by applicant seeking declaration that permission to appeal was not required.

***Marina Paperny J.A.*:**

1 The applicant seeks a declaration that permission to appeal is not required; in the alternative, if permission is required, the applicant asks that it be granted. The applicant is the trustee in bankruptcy of Trimor Mortgage Investment Corporation (Trimor) and wishes to appeal a chambers decision overturning its disallowance of the claim of the respondents Robert Fox, White Rain Corporation, the R. Fox Self-Administered RSP and Darlene Shelest.

2 I endeavour to distill complicated facts to their basics. The respondents obtained a default judgment of $272,000 against Trimor just prior to its bankruptcy. The default judgment was obtained as a result of the failure to file a statement of defence within the time parameters set out by the *Rules of Court*. Trimor says that the failure to file a defence was inadvertent and as soon as it became aware of the judgment, it moved promptly to set it aside. Before the application was heard, Trimor assigned itself into bankruptcy.

3 The respondents are all preferred shareholders of Trimor. Their default judgment arose from a claim alleging breach of their shareholders' agreement with Trimor, breach of fiduciary duty by Trimor, fraud, misrepresentation and unlawful enrichment. The claims all arise from their positions as preferred shareholders. The amount claimed represents each of the claimant's views as to the value of their preferred shares at the time of their respective acquisitions, coinciding with their capital contributions to Trimor. The claim does not seek rescission of the contract. It purports to quantify unliquidated damages based on share value.

4 The respondents tendered their default judgment as proof of their claims to the trustee. The trustee disallowed the claims, taking the position that they were not proper claims because the claims were not adjudicated upon, the claimants were in reality equity claimants and the effect of the default judgment was to prefer the respondent shareholders over other shareholders by having converted their entire equity claim into a debt claim.

5 The respondents successfully appealed the disallowance to the Court of Queen's Bench. The chambers judge accepted their position that there was no power on the part of the court or the trustee in these circumstances to challenge the default judgment.

6 The trustee seeks to appeal and submits it can do so as of right. Section 193(c) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 specifically allows for a right to appeal if the property involved in the appeal exceeds $10,000 in value. Section 2 of the *Act* defines property to include money. The trustee submits that, if the appeal is successful, the estate will recover $272,000 and the respondents will lose that same amount. Thus, it says, the section is clearly engaged.

7 The respondents submit that in the circumstances of this case, there is going to be recovery of 100% to all creditors, including unsecured creditors, and that accordingly there will be no monetary loss to the creditors. As a result, there is no appeal as of right. The respondents' position rests on two propositions: first, that to appeal under s 193(c) the only loss to be considered is that of the party applicant and not the respondent and second, that a loss to an estate is insufficient if there is no ultimate loss to creditors.

8 In my view, neither proposition is supported in law. The test to be applied under this section was originally articulated in *Orpen v. Roberts*, [1925] S.C.R. 364 (S.C.C.), at 367, [1925] 1 D.L.R. 1101 (S.C.C.), and confirmed in *United Fuel Investments Ltd., Re*, [1962] S.C.R. 771, 4 C.B.R. (N.S.) 209 (S.C.C.), which set out that the amount or value of the matter

in controversy is the loss which the granting or refusal of that right would entail. The test has been explained and applied in numerous cases: see *Galaxy Sports Inc. v. Galaxy Sports Inc. (Trustee of)*, 2003 BCCA 322, 183 B.C.A.C. 192 (B.C. C.A. [In Chambers]); *Kostiuk, Re*, 2006 BCCA 371, 55 B.C.L.R. (4th) 276 (B.C. C.A. [In Chambers]); *Newfoundland & Labrador Refining Corp. v. IJK Consortium*, 2009 NLCA 23, 52 C.B.R. (5th) 8 (N.L. C.A.).

9 Though a loss to the creditors may be common in most bankruptcy cases, there is no principled basis to limit the trustee from appealing where the granting or refusal of the right would lead only to loss to the bankrupt's estate. If all creditors are paid in full, after all costs and expenses incurred are paid, the balance will be distributed to the bankrupt on discharge. Here, it is conceded by the respondents that the preferred shareholders will likely receive approximately 40 cents on the dollar of their initial investment. Similarly, if the disallowance is upheld, the respondents will lose $272,000.

10 The issue on this appeal is whether the trustee was entitled to disallow the claim of $272,000 by looking beyond the default judgment to the circumstances of its granting and the merits of the claim. The focus of the inquiry under s 193(c) is the amount of money at stake: here $272,000. This claim falls squarely within the section.

11 Had I concluded otherwise, I would nevertheless have granted permission to appeal. The test under s 193(e) has been met. The legal issue ultimately to be determined is under what circumstances a trustee is entitled to go behind a default judgment obtained before a bankruptcy; specifically, whether fraud or a miscarriage of justice is required, as put forward by the respondents, or whether some lower threshold, such as where there has been no adjudication on the merits, will suffice.

12 Leave to appeal is not required.

Application allowed.

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FIREPOWER DEBT GP INC., AS AGENT
Applicant (Respondent)

-and-

THEREDPIN, INC. et al.
Respondents

Court of Appeal File No. C66336

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT
TORONTO

BOOK OF AUTHORITIES
(Returnable February 11, 2019)

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