COURT OF APPEAL FOR ONTARIO

CITATION: KingSett Mortgage Corporation v. 30 Roe Investments Corp., 2022 ONCA 479
DATE: 20220617
DOCKET: M53449 & M53510 (C70638)

Brown, Roberts and Paciocco JJ.A.

BETWEEN

KingSett Mortgage Corporation

Applicant
(Moving Party/Responding Party)

and

30 Roe Investments Corp.

Respondent
(Responding Party/Moving Party)

Richard Swan and Sean Zweig, for the moving party (M53449)/responding party (M53510) KingSett Mortgage Corporation

Nancy J. Tourgis and Laney Paddock, for the responding party (M53449)/moving party (M53510) 30 Roe Investments Corp.

Mark Dunn, for KSV Restructuring Inc. in its capacity as court-appointed receiver

Darren Marr, for Canadian Imperial Bank of Commerce

Heard: June 13, 2022

On appeal from the order of Justice Peter J. Cavanagh of the Superior Court of Justice, dated May 9, 2022, with reasons reported at 2022 ONSC 2777.

Brown J.A.:

I. OVERVIEW

[1] The respondent, KingSett Mortgage Corporation ("KingSett"), moves to quash the appeal brought by 30 Roe Investments Corp. ("30 Roe") from the order of Cavanagh J. dated May 9, 2022 (the "Receivership Order"). That order appointed KSV Restructuring Inc. as the receiver and manager of nine residential condominium units owned by 30 Roe in a 397-unit condominium building located at 30 Roehampton Avenue, Toronto (the nine units are hereafter referred to as the "Real Property").

[2] 30 Roe opposes the motion to quash, arguing that it enjoys an appeal as of right from the Receivership Order under s. 193(c) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*").[1] As well, it moves for leave to appeal the Receivership Order pursuant to s. 193(e) of the *BIA*.

---

[1] *BIA* s. 193 provides as follows:

> 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:
>
> (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.

[3] At the conclusion of the hearing of the motions, the panel granted KingSett's motion to quash and dismissed 30 Roe's motion for leave to appeal with reasons to follow. These are those reasons.

II. BACKGROUND FACTS

[4] On April 8, 2019, KingSett advanced a non-revolving demand loan to 30 Roe, which originally was for the principal amount of $1.5 million, but later increased to $1.875 million. The advance was secured, in part, by a second mortgage on the Real Property. The advance is also secured by an April 8, 2019 General Security Agreement and other security.

[5] The Canadian Imperial Bank of Commerce ("CIBC") holds a first mortgage on the Real Property.

[6] The original loan maturity date was in April 2021. The loan facility was extended several times, with the final maturity date set for December 1, 2021.

[7] 30 Roe defaulted on the December 1, 2021 interest payment, as it had on some other interest payments, and it did not pay out the loan upon maturity. KingSett served a notice of default. On December 13, 2021, KingSett issued a demand letter and gave notice of intention to enforce security in accordance with s. 244 of the *BIA.*

[8] As of December 31, 2021, the amount due under the loan was $1,895,958.85.

[9] KingSett applied on January 7, 2022 for the appointment of a receiver and manager of the Real Property pursuant to s. 243(1) of the *BIA* and s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 ("*CJA*"). 30 Roe sought and received three adjournments of the application, including one to enable the hearing of a motion brought by former counsel to get off the record. Cavanagh J. approved a timetable for all pre-hearing steps. Ultimately, KingSett's application was scheduled to be heard on May 6, 2022.

[10] On that date, 30 Roe sought a further adjournment. Cavanagh J. refused an adjournment for two reasons: (i) although 30 Roe had obtained an expression of interest to provide refinancing, the letter of intent was not a binding commitment letter and the application judge concluded there was no assurance 30 Roe would secure refinancing to pay out its debt to KingSett if a further adjournment was granted; and (ii) 30 Roe had not acted reasonably or in accordance with prior court endorsements to find new counsel.

[11] As of the hearing date, the state of affairs regarding the Real Property was as follows: (i) CIBC took no position in opposition to the application; (ii) all units were rented and rents were being paid; (iii) 30 Roe was paying interest on the second mortgage debt; and (iv) CIBC was willing to defer enforcement steps for 30 days commencing May 6, 2022 to allow 30 Roe an opportunity to put in place refinancing.

[12] On May 9, 2022, Cavanagh J. made the Receivership Order.

[13] The next day, May 10, 2022, 30 Roe delivered a notice of appeal in which the grounds of appeal are essentially three-fold: (i) the motion judge erred in refusing its fourth adjournment request; (ii) he misapplied the factors applicable to whether it would be just and convenient to appoint a receiver; and (iii) he erred in failing to recognize that KingSett had impliedly extended the loan facility until April 1, 2022, by debiting the amount of an extension fee to 30 Roe's mortgage debt account in January and February 2022. (The application judge accepted KingSett's evidence that the debits were the result of an administrative error, which KingSett had reversed once advised of the mistake.)

[14] KingSett moves to quash the appeal on the basis that 30 Roe does not enjoy an appeal of right under *BIA* s. 193 but requires leave to appeal.

[15] 30 Roe takes the position that an appeal lies as of right under *BIA* s. 193(c), as the "the property involved in the appeal exceeds in value ten thousand dollars". 30 Roe has brought a separate motion for leave to appeal the Receivership Order pursuant to *BIA* s. 193(e).

III. KINGSETT'S MOTION TO QUASH

[16] In its jurisprudence regarding the appeals of orders appointing a receiver under *BIA* s. 243 and *CJA* s. 101, this court has consistently made two points:

(i) Where a receivership order is made pursuant to both *BIA* s. 243 and *CJA* s. 101, the more restrictive appeal provisions of *BIA* s. 193 govern the rights of appeal and appeal routes: *Business Development Bank of Canada v. Astoria Organic Matters Ltd.*, 2019 ONCA 269, 69 C.B.R. (6th) 13, at paras. 66 and 67; *Buduchnist Credit Union Limited v. 2321197 Ontario Inc.*, 2019 ONCA 588, 72 C.B.R. (6th) 245, at paras. 10 and 11;

(ii) No appeal as of right exists under *BIA* ss. 193(a) or (c) from an order appointing a receiver: *Hillmount Capital Inc. v. Pizale*, 2021 ONCA 364, 462 D.L.R. (4th) 228, at para. 38; *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONCA 282, 115 O.R. (3d) 617, at paras. 15-17; and *Buduchnist*, at para. 12.

[17] In an effort to avoid the effect of that jurisprudence, 30 Roe fashions two arguments about the availability of a right of appeal under *BIA* s. 193(c). The first draws upon several decisions of judges of this court sitting in Chambers; the second is based on a sales approval “carve-out” provision in the Receivership Order.

[18] First, 30 Roe relies on several Chambers decisions of this court to contend that s. 193(c) authorizes an automatic right of appeal from a receivership order. The first decision is that of the Chambers judge in *Comfort Capital Inc. v. Yeretsian*, 2019 ONCA 1017, 75 C.B.R. (6th) 217. However, that case did not involve an

appeal from an order appointing a receiver; the nature of the order in *Comfort Capital* was quite different. There, the order under appeal directed payment of part of the proceeds of the receiver's sale of property to one set of claimants that was otherwise payable to another claimant. The order resulted in a loss to the second claimant and, therefore, the nature of the order fell within *BIA* s. 193(c). *Comfort Capital* has no application to the order at issue in the present case.

[19] The other Chambers decisions are those in *Royal Bank of Canada v. Bodanis*, 2020 ONCA 185, 78 C.B.R. (6th) 165[2] and *Shaver-Kudell Manufacturing Inc. v. Knight Manufacturing Inc.*, 2021 ONCA 202, 88 C.B.R. (6th) 1. Neither case provides support for 30 Roe's submission that *BIA* s. 193(c) grants an automatic right of appeal from a receivership order, because neither case involved an attempt to appeal a receivership order. The order at issue in *Bodanis* was a bankruptcy order; that in *Shaver-Kudell* an order declaring that a bankrupt's debts and liabilities would survive his discharge from bankruptcy.

[20] Moreover, 30 Roe's submission based on those Chambers decisions ignores the more recent panel decision of this court in *Hillmount Capital Inc. v. Pizale*, 2021 ONCA 364, 462 D.L.R. (4th) 228. In the course of discussing the

---

[2] While the court concluded that *BIA* s. 193(c) provided for the right to appeal a bankruptcy order, the Chambers judge cancelled the automatic stay on appeal under *BIA* s. 195.

types of orders that fall outside of s. 193(c), the court in *Hillmount Capital* stated, at para. 38:

> By its nature the second type of order - one that does not bring into play the value of the debtor's property - would not result in a loss or put property value in jeopardy. For example, it is well-established in the *BIA* s. 193(c) jurisprudence that an order appointing a receiver or interim receiver usually does not bring into play the value of the debtor's property as it simply appoints an officer of the court to preserve and monetize those assets subject to court approval. [Emphasis added.]

[21] 30 Roe's second argument is based on para. 3(k) of the Receivership Order, which deals with the powers of the receiver and authorizes the receiver to sell any part of the Real Property out of the ordinary course of business "without the approval of this Court in respect of any transaction not exceeding $250,000, provided that the aggregate consideration for all such transactions does not exceed $500,000."

[22] Drawing on that provision, 30 Roe argues as follows: (i) in *Pine Tree Resorts* the Chambers judge described the nature of a receivership order as one that does not bring into play the value of the debtor's property but simply appoints an officer of the court to preserve and monetize those assets subject to court approval: at para. 17; (ii) in *Pine Tree Resorts* the court relied on that description of the nature of a receivership order to conclude that *BIA* s. 193(c) does not provide an automatic right of appeal from such an order; (iii) however, para. 3(k) of the Receivership Order identifies a sub-set of 30 Roe's property that the receiver may

sell without applying for court approval; so, therefore, (iv) the nature of the Receivership Order containing para. 3(k) differs from that which led the court in *Pine Tree Resorts* to conclude that no appeal as of right existed. It follows, according to 30 Roe, that the presence of the para. 3(k) carve-out in the Receivership Order places that order in the class of orders for which an automatic right of appeal exists under *BIA* s. 193(c).

[23] This submission is not persuasive. First, 30 Roe does not cite any authority involving a receivership order to support its proposition. Second, as KingSett points out, the receivership order made in *Pine Tree Resorts* contained the same carve-out granting the receiver the power to sell assets without court approval in any transaction not exceeding $250,000. The presence of such a carve-out provision did not affect Blair J.A.'s characterization of the *Pine Tree Resorts* receivership order as one that did not bring into play the value of the debtor's property but simply appointed an officer of the court to preserve and monetize those assets subject to court approval: at para. 17. No doubt Blair J.A. reached that conclusion in part because the initial receivership order itself granted court approval for the monetization of assets of less than $250,000. As well, while a sale transaction of less than $250,000 would not require a further approval motion, the court ultimately reviews the receiver's conduct for such transactions as part of its periodic review and approval of receiver's reports. Accordingly, the presence of a "carve-out" provision such as para. 3(k) in the Receivership Order does not alter the essential

nature of that order: namely, an order that does not bring into play the value of the debtor's assets for the purpose of a *BIA* s. 193(c) analysis.

[24] In its notice of appeal, 30 Roe also asserts that an appeal to the Court of Appeal is provided under *BIA* s. 195.[3] With respect, that assertion does not accurately describe the operation of s. 195, which deals with stays of orders pending appeal to an appellate court, not with when rights of appeal lie, or with appeal routes.

[25] To summarize, two recent panel decisions of this court, *Buduchnist* and *Hillmount Capital*, confirmed the court's jurisprudence that no appeal as of right exists under *BIA* s. 193(c) from an order appointing a receiver. The Receivership Order was made under *BIA* s. 243(1); *BIA* s. 193 therefore governs the availability of appeals; with the result that 30 Roe does not enjoy an automatic right to appeal the Receivership Order under *BIA* s. 193(c). Accordingly, 30 Roe must seek leave to appeal pursuant to *BIA* s. 193(e).

---

[3] *BIA* s. 195 states:

> Except to the extent that an order or judgment appealed from is subject to provisional execution notwithstanding any appeal therefrom, all proceedings under an order or judgment appealed from shall be stayed until the appeal is disposed of, but the Court of Appeal or a judge thereof may vary or cancel the stay or the order for provisional execution if it appears that the appeal is not being prosecuted diligently, or for such other reason as the Court of Appeal or a judge thereof may deem proper.

IV. 30 ROE'S MOTION FOR LEAVE TO APPEAL

[26] The test for leave to appeal under *BIA* s. 193(e) is well-established:

- Does the proposed appeal raise an issue of general importance to the practice in bankruptcy/insolvency matters or to the administration of justice as a whole and therefore is one that an appellate court should consider and address?
- Is the proposed appeal *prima facie* meritorious and does it involve a point that is of significance to the proceeding?
- Would the proposed appeal unduly hinder the progress of the bankruptcy/insolvency proceedings?

See: *Pine Tree Resorts*, at para. 29; *Buduchnist*, at para. 17; *Essar Steel Algoma Inc. (Re)*, 2017 ONCA 478, 49 C.B.R. (6th) 259, at para. 19.

Issue of general importance

[27] The proposed appeal does not raise an issue of general importance to insolvency practice or to the administration of justice as a whole. The grounds of appeal are rooted in the specifics of the relationship between a mortgagor – 30 Roe – and a mortgagee – KingSett, including the effect on the maturity date of the loan facility by KingSett debiting an extension fee against 30 Roe's mortgage account in January and February 2022. It is also grounded in the fact-specific, discretionary decision of the application judge to refuse a fourth adjournment request by 30 Roe.

Merits of the appeal

[28] Nor does the notice of appeal disclose a *prima facie* meritorious appeal. The application judge's reasons disclose that he fairly considered all relevant factors in refusing the fourth adjournment request, especially in circumstances where, by the May 6, 2022 hearing date, it was clear 30 Roe had no ability to make payments of principal, remained in default, and offered no tangible prospect of refinancing. There was nothing premature or disproportionate about the application judge's appointment of a receiver.

[29] 30 Roe argues that r. 15.04(6) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 gave it the right until May 20, 2022 to appoint new counsel, with the consequence that the scheduled May 6 hearing had to be adjourned until after that date. 30 Roe's submission is without any merit. During the course of case managing the matter, the application judge set a timetable that governed the date of the hearing. That timetable took precedence over any time specified in r. 15.04(6). As the application judges stated at para. 15 of his reasons, "I made it clear in my March 8, 2022 endorsement that May 6, 2022 was a firm date". In that circumstance, the language of r. 15.04(6) that a corporation must appoint counsel "within 30 days" after receiving the order removing former counsel from the record has no effect on the hearing date already set by a judge. It should go without saying that where a removal order is made in the face of a hearing date fixed by the judge

managing an application, the corporation obviously must appoint new counsel before the hearing date or risk the hearing proceeding without representation.

[30] Finally, 30 Roe has not demonstrated any palpable and overriding error or unreasonableness in the application judge's conclusion, at para. 15, that 30 Roe "has not acted reasonably and in accordance with my [prior endorsements] by not seeking to identify counsel who could represent it …"

[31] As to the ground of appeal that the application judge failed to have regard to the evidence that KingSett debited 30 Roe's mortgage account for extension fees in January and February, 2022, the reasons disclose that the application judge dealt squarely with that issue, accepting KingSett's explanation that the debits were simply administrative errors: at paras. 23-25.

[32] That conclusion by the application judge was reasonable in light of the evidence that: (i) 30 Roe acknowledged in the October 25, 2021 fourth amendment letter that "there shall be no further extensions of the Term beyond December 1, 2021"; and, (ii) KingSett sent a December 13, 2021 demand letter and notice of intention to enforce to 30 Roe – acts inconsistent with granting an extension of the maturity date.

[33] According to the affidavit of a director of 30 Roe, Raymond Zar, the debtor also takes the position that the maturity date of the second mortgage was extended until April 1, 2022 as he had sent a December 16, 2021 email to KingSett

requesting an extension of the maturity date to that time. However, KingSett did not respond to that email, and the record contains no evidence that KingSett granted such an extension. Instead, KingSett moved to enforce its security. In any event, the April 1, 2022 date has come and gone, and there is no evidence that 30 Roe has paid the mortgage debt. It remains in default.

[34] Finally, the reasons of the application judge do not disclose that his analysis was based on any error of law. While 30 Roe obviously does not agree with how the application judge weighed the various factors relevant to whether a receiver should be appointed, his decision to appoint a receiver was not unreasonable given 30 Roe's default and inability to cure its default.

[35] Accordingly, the proposed appeal is not *prima facie* meritorious.

Effect of an appeal on the progress of the receivership

[36] Finally, the proposed appeal would unduly hinder the progress of the administration of the receivership. Granting leave would trigger the automatic stay contained in *BIA* s. 195, thereby preventing the receiver from exercising its power under the Receivership Order to market and sell the Real Property. No purpose would be served by such a delay. It is apparent from the record that 30 Roe has been unable to secure third party financing to take out the KingSett second mortgage notwithstanding several extensions of the mortgage maturity date and the lapse of almost half a year since KingSett initiated its receivership application.

[37] To delay the ability of KingSett to enforce its second mortgage – the validity and enforceability of which are not in dispute – would be unfair to KingSett, especially given 30 Roe's consent, in the third and fourth amendments to the commitment letter, to KingSett's appointment of a receiver, either privately or court-appointed, in the event of a default by 30 Roe going beyond the applicable cure period.

Summary

[38] For these reasons, the panel did not grant 30 Roe leave to appeal the Receivership Order.

V. DISPOSITION

[39] As stated at the end of the hearing, KingSett's motion to quash 30 Roe's appeal C70638 is granted and 30 Roe's motion for leave to appeal is dismissed.

[40] As agreed by the parties, KingSett is entitled to its costs of both motions fixed in the aggregate amount of $15,000, inclusive of disbursements and applicable taxes.

Released: June 17, 2022 "gs."

"J.A."

"I agree. J.B. Roberts J.A."

"I agree - J.A."