Court of Appeal File No.:
Court File No.: CV-22-00674810-00CL

COURT OF APPEAL FOR ONTARIO

BETWEEN:

KINGSETT MORTGAGE CORPORATION

Applicant / Respondent in Appeal

- and -

30 ROE INVESTMENTS CORP.

Respondent / Appellant in Appeal

IN THE MATTER OF AN APPLICATION UNDER SUBSECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED, AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43, AS AMENDED

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March 10, 2023

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INDEX

1

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*.

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[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).

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[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 "D.B."

"David Brown J.A."
"I agree. L.B. Roberts J.A."
"I agree. Paciocco J.A."

2

COURT OF APPEAL FOR ONTARIO

CITATION: Buduchnist Credit Union Limited v. 2321197 Ontario Inc., 2019 ONCA 588
DATE: 20190711
DOCKET: M50486 (C66503)

Feldman, Hourigan and Brown JJ.A.

BETWEEN

Buduchnist Credit Union Limited

Applicant
(Respondent/Moving Party)

and

2321197 Ontario Inc., Carlo DeMaria, Sandra DeMaria, 232198 Ontario Inc., Sasi Mach Limited, Vicar Homes Ltd. and Trade Finance Capital Corp.

Respondents
(Appellants/Responding Parties)

Barabara L. Grossman, for the moving party/respondent

Andrew Winton and Philip Underwood, for the responding parties/appellants

Heard: July 5, 2019

REASONS FOR DECISION

I. OVERVIEW

[1] This is a motion by the respondent, Buduchnist Credit Union Limited ("BCU"), to quash the appeal filed by Carlo DeMaria and Vicar Homes Ltd. from the order of Penny J. dated January 17, 2019 (the "Order"). The Order appointed

a receiver over two pieces of real property pursuant to s. 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, and s. 101 of the *Courts of Justice Act*, R.S.O., c. C.43.

[2] The appellant, Carlo DeMaria, borrowed money for many years from BCU, both for his own use and the use of several of his companies, of which the appellant, Vicar Homes, is one.

[3] In 2010, Mr. DeMaria and his wife granted a first mortgage on their Family Residence to BCU. In 2012, the DeMarias granted a second mortgage over the Family Residence. In April 2015, Mr. DeMaria gave a personal guarantee to BCU to secure, in part, the indebtedness of Vicar Homes under certain loan agreements with BCU.

[4] In 2006, the DeMarias granted a charge against their Cottage to MCAP Mortgage Corporation, which later assigned the mortgage to BCU.

[5] In November, 2018 the Credit Union issued the notice of application in this proceeding seeking the appointment of a receiver over five properties, owned by the DeMarias and/or certain DeMaria companies, over which the BCU has security, as well as judgment for the debts owed. On November 13, 2018 a receiver was appointed over two of the properties.

[6] The Order appointed a receiver over two more properties: the Family Residence and Cottage. The Order was in the form of the Commercial List's Model Order for receivers appointed under the *BIA* and *CJA*, with some tweaks to reflect the specific circumstances.

[7] The Order in respect of the Family Residence has been stayed for a short period of time pending the determination of a motion to set aside a *Mareva* injunction granted against Mr. DeMaria at the instance of another creditor.

[8] On January 29, 2019, twelve days after the Order was made, the appellants filed a notice of appeal with this court, asking that the Order be set aside and the application to appoint a receiver over the Family Residence and Cottage be dismissed. The appellants did not seek leave to appeal. The appeal was perfected on March 4, 2019.

[9] On May 24, 2019, BCU filed this motion seeking to quash the appeal on the basis that the appellants have no right of appeal to this court, they have not sought or obtained leave to appeal to this court and, in any event, they cannot meet the test for leave to appeal.

II. THE APPLICABLE APPEAL ROUTES

[10] Both s. 243(1) of the *BIA* and s. 101 of the *CJA* authorize a court to appoint a receiver when it is "just or convenient to do so." In *Business*

Development Bank of Canada v. Astoria Organic Matters Ltd., 2019 ONCA 269, 69 C.B.R. (6th) 13, Zarnett J.A. concluded, at paras. 66 and 67, that where an order is made pursuant to both s. 243 of the *BIA* and s. 101 of the *CJA*, the more restrictive appeal provisions in the *BIA* govern the rights of appeal and appeal routes.

[11] In the present case, para. 1 of the Order expressly states that the appointment of the receiver is made pursuant to *BIA* s. 243(1) and *CJA* s. 101. The recitals to the Order state that the application is under both the *BIA* and the *CJA*. And the powers of the receiver to which the appellants object – the power to take possession of and exercise control over the Family Residence and Cottage – are powers that *BIA* ss. 243(1)(a) and (b) expressly authorize a court to grant to a receiver. Accordingly, the right to appeal the Order and the appeal routes are those set out in the *BIA*.

III. DOES AN APPEAL AS OF RIGHT FROM THE ORDER EXIST?

[12] There is no appeal as of right under *BIA* ss. 193(a) or (c) from an order appointing a receiver: *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONCA 282, 115 O.R. (3d) 617, at para. 14.

[13] The appellants argue they have an appeal as of right under *BIA* s. 193(b): "if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings." The jurisprudence has consistently interpreted s.

193(b) 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 or receivership proceedings: *2403177 Ontario Inc. v. Bending Lake Iron Group Ltd.*, 2016 ONCA 225, 396 D.L.R. (4th) 635, at para. 32.

[14] Here, BCU's application for the appointment of a receiver concerns five residential properties. The application judge's endorsement for an April 25, 2019 case conference records that "a new receivership proceeding involving a property known as Stavebank" is contemplated. That new proceeding is not the receivership proceeding in which the Order was made. Accordingly, *BIA* s. 193(b) does not apply.

[15] As a result, the appellants require leave to appeal the Order under *BIA* s. 193(e).

IV. SHOULD LEAVE TO APPEAL BE GRANTED?

[16] Notwithstanding their technical non-compliance with *BIA* Rule 31(1) – namely, not filing the appeal in the proper office strictly within the prescribed time – the appellants request that leave to appeal be granted, if leave is required. Given that the appellants had an intention to appeal and exceeded the filing time prescribed by the *BIA Rules* by only one day, we shall consider their alternative position that leave to appeal should be granted.

(a) The guiding principles

[17] The principles guiding the consideration of a request for leave to appeal under s. 193(e) were set out by Blair J.A. in *Pine Tree Resorts* where, at para. 29, he stated:

> Beginning with the overriding proposition that the exercise of granting leave to appeal under s. 193(e) is discretionary and must be exercised in a flexible and contextual way, the following are the prevailing considerations in my view. The court will look to whether the proposed appeal,
>
> > a) raises an issue that is of general importance to the practice in bankruptcy/insolvency matters or to the administration of justice as a whole, and is one that this Court should therefore consider and address;
> >
> > b) is *prima facie* meritorious, and
> >
> > c) would unduly hinder the progress of the bankruptcy/insolvency proceedings.

(b) Consideration of the factors

(1) Issue of general importance

[18] The proposed appeal does not raise an issue of general importance to the practice in insolvency matters or to the administration of justice as a whole. It concerns a very fact-specific dispute between two debtors and their creditor.

(2) Is the appeal *prima facie* meritorious?

[19] In their appeal factum, the appellants advance two main grounds of appeal in respect of the Order: (i) the application judge failed to consider BCU's conduct in engaging in an unauthorized transaction; and (ii) the application judge's treatment of certain factors relevant to whether it was "just and convenient" to appoint a receiver was not appropriate.

The "unauthorized transaction"

[20] First, the appellants submit that in granting the Order, the application judge failed to take into consideration conduct by BCU that disentitled it to the equitable relief of the appointment of a receiver.

[21] In their appeal factum, the appellants acknowledge that the first mortgages on the Family Residence and Cottage fell into arrears in August 2018 and November 2018 respectively. Their main ground of appeal concerns the conduct of BCU in respect of the debt secured by the second mortgage on the Family Residence.

[22] The second mortgage on the Family Residence secures the line of credit extended to Vicar Homes (the "Vicar LOC"). In opposing the appointment of a receiver over the Family Residence, the appellants took the position that in February and March 2017 BCU carried out a series of unauthorized transactions

in respect of the Vicar LOC. Mr. DeMaria deposited funds into the account of a related company, Do You Know Inc. He transferred those funds to the Vicar LOC. The cheques deposited were returned NSF. As a result, BCU reversed the transactions, without Mr. DeMaria's authorization, thereby increasing the amount due under the Vicar LOC.

[23] In their appeal factum, the appellants contend that the reversal of the transactions constituted a breach of the Vicar LOC Loan Agreement and amounted to misconduct that deprived BCU of the ability to claim the equitable relief of the appointment of a receiver over the Family Residence. The second mortgage on the Family Residence secured the Vicar LOC but not the Do You Know account into which Mr. DeMaria initially deposited the NSF cheques.

[24] The appellants submit that "by failing to consider this breach, the application judge did not give any weight to this critical factor in the test for the appropriateness of the appointment of a receiver and in particular the issue of whether BCU had clean hands."

[25] The reasons of the application judge disclose that he did consider this issue. He stated:

> Before the cheques cleared, [DeMaria] instructed BCU to transfer the money from DYK to reduce the line of credit of Vicar. BCU did as instructed. The cheques bounced. BCU reversed the transfers, putting the Vicar LOC back where it was before the NSF cheque

> amounts were transferred from the DYK to the Vicar account.
>
> I simply cannot agree that this was misconduct or motivated by a conflict of interest by BCU. No money was actually deposited to DYK. Therefore, the "transfer" of this money to reduce the Vicar LOC was really nothing more than an accounting error on the part of BCU. Had it waited for the cheques to clear, no funds would have been transferred and there would never have been a credit of $800,000 to the Vicar account. The problem arose, not from BCU misconduct, but from the fact that the cheques deposited to the DYK account were bad.

[26] In respect of the Vicar LOC, the application judge also reviewed and considered whether the change in the amount outstanding under the Vicar LOC amounted to a material variation in the guaranteed obligations and whether the relevant lending and security documents permitted the variation. He concluded that the documents permitted an increase in the amount loaned to Vicar Homes. That said, the application judge made it clear that: "This hearing, of course, is not a final ruling on the question. No doubt further evidence would be required in the event there are proceedings to enforce the guarantee."

The application judge's treatment of other factors

[27] Second, the appellants argue in their appeal factum that the application judge based his assessment on whether it would be "just and convenient" to appoint a receiver on two erroneous findings of fact: (i) the existence of

competing creditor claims to the Family Residence and Cottage; and (ii) the appointment of the receiver would not be the "high cost alternative".

[28] As to the first finding of fact, the application judge's reasons disclose that his reference to other creditors was made in his discussion of the earlier appointment of a receiver over two other properties and disputes involving other creditors "over adequacy of security and priority issues." In those circumstances, the application judge concluded that it was "critical to move matters 'under one roof' so to speak".

[29] As to the second finding of fact, the application judge expressed the view that given the existence of other receivership proceedings and added costs through private mortgage enforcement proceedings, "it is not at all clear to me that extending the receiver's powers to [the Family Residence and Cottage] as well is the "high cost" alternative."

[30] On the face of his reasons, it is not apparent that the application judge made any palpable and overriding error. The findings, when read in context, were more in the nature of his assessment of relevant factors to take into account in considering whether to appoint a receiver.

[31] When their grounds of appeal are considered together, it is far from clear that the appellants have demonstrated a *prima facie* meritorious appeal from the Order.

(3) Effect of an appeal on the conduct of the receivership

[32] Although the enforcement of the Order against the Family Residence has been stayed for a time, BCU contends that the receiver has been reluctant to freely exercise its powers under the Order to market and sell the Cottage while the appeal is pending.

(c) Conclusion

[33] From the materials before us, we conclude that: (i) an appeal would affect the conduct of the receivership proceedings, at least in respect to the Cottage; (ii) the appeal does not raise an issue of general importance; and (iii) the appellants have not demonstrated that their appeal is *prima facie* meritorious. In those circumstances, we do not grant leave to appeal the Order.

V. DISPOSITION

[34] For the reasons set out above, we grant the motion and quash the appeal on the basis that leave to appeal is required, which we decline to grant.

[35] BCU seeks full indemnity costs of this motion and the appeal. Although the appellants perfected their appeal, BCU has not filed its responding materials. While the charges enable BCU to recover its costs of enforcement on an elevated basis, this court retains the discretion to determine the award of costs that would be fair and reasonable in the circumstances. We fix the fair and

reasonable costs to which BCU is entitled at $20,000, inclusive of disbursements and applicable taxes.

"K. Feldman J.A."
"C.W. Hourigan J.A."
"David Brown J.A."

3

COURT OF APPEAL FOR ONTARIO

CITATION: 2403177 Ontario Inc. v. Bending Lake Iron Group Limited, 2016 ONCA 225
DATE: 20160322
DOCKET: M46061 (C61637)

Brown J.A. (In Chambers)

BETWEEN

2403177 Ontario Inc.

Applicant (Respondent/ Responding Party)

and

Bending Lake Iron Group Limited

Respondent (Appellant/ Responding Party)

Kenneth Kraft, for the moving party, A. Farber & Partners Inc.

Robert MacRae, for the responding party, Bending Lake Iron Group Limited

Heard: March 8, 2016

ENDORSEMENT

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, 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. Hutchinson*,[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

[1] Now, the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11, s. 103. See *In re Union Fire Insurance Co.* (1886), 13 O.A.R. 268, (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 (C.A.).

have attempted to cloak the term “future rights” with some practical meaning. In *Re Ravelston Corp.,*[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.

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[3] (2005), 24 C.B.R. (5th) 256 (Ont. C.A.)
[4] 2013 ONCA 282, 115 OR (3d) 617.

[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

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

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

[6] *Wong v. Luu*, 2013 BCCA 547, at para. 21.
[7] See *Wong v. Luu*, at para. 21, and the Quebec jurisprudence summarized in *Re Norbourg Gestion d'actifs inc.,* 2006 QCCA 752, 33 C.B.R. (5th) 144 at paras. 9-11.
[8] *Global Royalties Ltd. v. Brook*, 2016 ONCA 50, at para. 19.

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

[9] *Perez v. Salvation Army in Canada* (1998), 42 O.R. (3d) 229, 171 D.L.R. (4th) 520 (C.A.), at para. 11.
[10] *Kaiman v. Graham*, 2009 ONCA 77, 245 O.A.C. 130, at para. 18.

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 *Behn v. Moulton Contracting Ltd.*,[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.

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

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 *Re Dominion Foundry Co.,*[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

[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.
[15] Such as *Faillis and Deacon v. United Fuel Investments Ltd*, [1962] S.C.R. 771, at p. 774.

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 sub-section.

[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

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[16] *Trimor Mortgage Investment Corporation v. Fox*, 2015 ABCA 44, at para. 8; *Galaxy Sports Inc. v. Abakhan & Associates Inc.*, 2003 BCCA 322, 44 C.B.R. (4th) 218 at para. 12; *Newfoundland and Labrador Refining Corporation v. IJK Consortium*, 20098 NLCA 23, 52 C.B.R. (5th) 8 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] *Re Stelco Inc*. (2005), 8 C.B.R. (5th) 150 (Ont. C.A.), at para. 4.

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 of Canada v. Soundair*.[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.

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

[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.

[21] 1997 ABCA 273, 48 C.B.R. (3d) 171.

[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 Corporation 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.

[22] 2015 ABCA 44.

[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

[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.

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.

"David Brown J.A."

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COURT OF APPEAL FOR ONTARIO

CITATION: Hillmount Capital Inc. v. Pizale, 2021 ONCA 364
DATE: 20210528
DOCKET: M52200 (C68999)

Strathy C.J.O., Brown and Miller JJ.A.

BETWEEN

Hillmount Capital Inc.

Respondent
(Applicant)

and

Celine Brittany Pizale and Richard Stanley Pizale

Moving Parties/Appellants
(Respondents)

Jamie Spotswood and Rachel Migicovsky, for the moving parties/appellants, Celine and Richard Pizale

Robert Macdonald and Teodora Prpa, for the receiver, Zeifman Partners Inc.

Behn Conroy, for the purchasers, Patricia and David Armstrong

Shana Nodel, for second mortgagees, 1713691 Ontario Inc. and Boris Nodel

Terry M. Walman, for first mortgagee, Elle Mortgage Corporation

Heard: February 8, 2021 by video conference

BROWN J.A.:

I. OVERVIEW

[1] The appellants, Celine and Richard Pizale, owned a partially-renovated residential property on Lyndhurst Avenue in Toronto (the "Property"). In June

2020 the first mortgagee, Hillmount Capital Inc. (“Hillmount”), applied for an order appointing the respondent, Zeifman Partners Inc., as receiver of the Property (the “Receiver”). Koehnen J. granted such an order on June 19, 2020 (the “Appointment Order”).

[2] The Receiver marketed the Property on an “as is” basis and entered into an agreement of purchase and sale with Patricia and David Armstrong (the “Purchasers”). By orders dated January 8, 2021, Conway J. granted a sale approval and vesting order (the “Approval Order”), together with an administration order approving the Receiver’s activities, as well as increasing its borrowing authority to $250,000.00 (the “Administration Order”).

[3] On January 15, 2021, the Pizales filed a notice of appeal of the Motion Judge’s January 8 orders. Two motions then ensued before the Chambers Judge.

[4] First, the Receiver moved for orders (i) declaring that the Pizales do not have an automatic right of appeal under ss. 193(a)-(d) of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 (the “*BIA*”), and (ii) denying them leave to appeal the Approval and Administration Orders under *BIA* s. 193(e).

[5] The Pizales then brought a motion for (i) a declaration that they have a right to appeal to this court from the Approval and Administration Orders under s. 193(c), which states that an appeal lies to the Court of Appeal “if the property involved in the appeal exceeds in value ten thousand dollars,” or (ii) alternatively,

leave to appeal the orders pursuant to s. 193(e) and a stay of the Approval and Administration Orders pending their appeal.

[6] By order dated February 4, 2021 the Chambers Judge declared that the Pizales did not have an automatic right of appeal and denied them leave to appeal (the "Chambers Order"). He ordered that the sale of the Property should proceed.

[7] The Pizales thereupon brought an urgent panel review motion pursuant to s. 7(5) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 ("*CJA*"), to set aside the Chambers Order and, if necessary, stay the Approval and Administration Orders.

[8] The panel heard the motion on February 8, 2021, the day scheduled for the closing of the sale of the Property. At the conclusion of the hearing the panel dismissed the Pizales' motion, with reasons to follow. These are those reasons.

II. BACKGROUND

The Property and the receivership

[9] The Pizales were in the process of renovating the Property when Hillmount, the first mortgagee, applied for the appointment of a receiver. At the time, there were four mortgages registered against the Property: (i) the first mortgage to Hillmount for approximately $3.35 million, later assigned to Elle Mortgage Corporation ("Elle"); (ii) an $800,000 second mortgage to 1713691 Ontario Inc. and Boris Nodel; (iii) a third mortgage for $569,359 to Harold Wine,

Gad Caro, and Marshall Morris; and (iv) a $325,000 fourth mortgage to Weihao Zhang. The Pizales had been in default under the first mortgage for a number of months prior to the Receiver's appointment.

[10] The Appointment Order authorized the Receiver to take possession of the Property, preserve, market, and sell it. The Receiver was authorized to borrow up to $150,000 from Hillmount. Given the significant costs required to complete the renovation of the Property, the limited borrowing authority given to the Receiver clearly indicated that its mandate under the Appointment Order was to sell the Property on an "as is" basis.

[11] As described by the Motion Judge in her endorsement, the Receiver initially listed the Property for sale at $4.8 million, which was higher than the appraisals it had obtained for a sale on an "as is" basis. Notwithstanding numerous showings of the Property, that listing price did not attract any offers. In mid-September 2020, the Receiver reduced the listing price to $4.15 million. Several offers were received, which the Receiver pursued. The Receiver entered into a Sale Agreement with the Purchasers for a purchase price that was higher than its two "as is" appraisals and any other offers received by the Receiver.

The decision of the Motion Judge

[12] The Receiver moved for court approval of the Sale Agreement. In its Second Report, the Receiver stated that if the Sale Agreement was not

approved, it did not believe it would be able to sell the Property for an equal or higher price.

[13] The Pizales opposed the Receiver's motion. They wanted to regain possession of the Property, complete the renovations, and sell it for an "as complete" or "as renovated" price. The second mortgagees also opposed the sale. Elle, the assignee of the first mortgage, and the third and fourth mortgagees opposed any sale of the Property but supported a discharge of the Receiver. Notwithstanding those positions, no motion to discharge the Receiver was brought before the Motion Judge.

[14] The Motion Judge approved the Sale Agreement, concluding that the evidence showed the proposed sale satisfied the principles set out in *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1(C.A.). She rejected the submissions made in opposition to the sale stating, at para. 26 of her endorsement:

> It was only after the Sale Agreement was entered into that the mortgagees (after making certain arrangements with the Respondents) joined forces to mount a coordinated opposition to the [Approval and Vesting Order]. Their reasons for doing so are not apparent on the face of the record and consist only of a stated opposition. The mortgagees and Respondents failed to engage in the court-authorized receivership and sales process at any time prior to the signing of the Sale Agreement. The Receiver, after conducting a legitimate and proper sales process, entered into an agreement with the Purchasers, which the mortgagees and Respondents are now seeking to have this court reject. They are seeking to prevent the sale altogether. I have

> considered and weighed the interests of all parties and find that there is no basis for this court to allow the objections of the mortgagees and Respondents to prevent the Receiver from concluding its agreement with the Purchasers.

[15] The Motion Judge also granted the Administration Order, which was unopposed save for the Receiver's fees and disbursements, for which the Receiver intended to seek approval at a later date.

The decision of the Chambers Judge

[16] The Pizales submitted to the Chambers Judge that their appeal fell within *BIA* s. 193(c). The Chambers Judge noted that the Pizales accepted the jurisprudence summarized in the chambers decision in *2403177 Ontario Inc. v. Bending Lake Iron Group Limited*, 2016 ONCA 225, 347 O.A.C. 226 ("*Bending Lake*"),[1] that *BIA* s. 193(c) does not apply to orders that: are procedural in nature; do not bring into play the value of the debtor's property; or do not result in a loss. The Chambers Judge concluded that the Pizales' appeal did not fall within *BIA* s. 193(c) for three reasons: (i) the Pizales' critiques of the Approval Order all related to the manner in which the Property was sold and therefore concerned matters of procedure that did not give rise to an automatic right of appeal; (ii) the Pizales' appeal did not bring into play the value of the Property; and (iii) the Approval Order would not result in a loss. The Chambers Judge rejected the Pizales' argument that an automatic right of appeal lay in respect of the

[1] Application for leave to appeal under *BIA* s. 193(e) dismissed: 2016 ONCA 485, 37 C.B.R. (6th) 173.

Administration Order for the same reasons he rejected the argument for the Approval Order.

[17] The Chambers Judge then concluded that the Pizales should not be granted leave to appeal under *BIA* s. 193(e). He did not regard their appeal as raising an issue of general importance to the practice in bankruptcy/insolvency matters or the administration of justice as a whole. Instead, it was "an attempt to relitigate a dispute between the Pizales and the receiver that will have little importance to bankruptcy/insolvency matters beyond the parties." Nor did the Chambers Judge view the Pizales' appeal as *prima facie* meritorious. He found the Motion Judge's *Soundair* analysis to be "complete and the grounds do not raise a serious issue to be appealed." Finally, the Chambers Judge held that granting leave would risk losing the sale to the Purchasers, thereby placing into question the whole integrity of the sales process.

III. THE STANDARD OF REVIEW

[18] On a panel review of the order of a single judge pursuant to *CJA* s. 7(5), the panel may interfere with the order if the chambers judge failed to identify the applicable principles, erred in principle or reached an unreasonable result: *DeMarco v. Nicoletti*, 2017 ONCA 417, at para. 3; *Yaiguaje v. Chevron Corporation*, 2017 ONCA 827, 138 O.R. (3d) 1, at para. 21; *Struik v. Dixie Lee Food Systems Ltd.*, 2018 ONCA 22, at paras. 5-6.

IV. THE ISSUES RAISED BY THE REVIEW MOTION

[19] On this motion to review, the Pizales advance three main arguments to set aside the Chambers Decision.

[20] First, they contend the Chambers Judge erred by applying the legal principles concerning *BIA* s. 193(c) in a too restrictive or narrow way.

[21] Second, the Pizales submit that the Chambers Judge misconstrued their arguments about why they had an automatic right of appeal under *BIA* s. 193(c). They were not alleging improvident sale or an improper sale process. Instead, they were alleging that the receivership was "spent" so there was no need to liquidate the Property. In their submission, the purpose of the receivership was achieved when Hillmount, the applicant creditor, was made whole and assigned its first mortgage to Elle. According to the Pizales, given that assignment the Motion Judge should have given more weight to the objections to the sale by the Pizales and remaining creditors. Instead, the Approval Order wrongfully preferred preserving the integrity of the sales process over the substantive interests of the Pizales and their creditor mortgagees.

[22] More specifically, the Pizales submit that the Chambers Judge erred in concluding that:

(i) the Approval and Administration Orders were procedural in nature when the Pizales were arguing that the orders prejudiced their substantive rights;
(ii) the Approval Order did not put the value of the Property in question. The Pizales submit that the appraisals they filed put that value in question;

(iii) the Pizales did not retain an interest in the Property and therefore its value was not in question. The Pizales argue that while the receivership changed the nature of their interest in the Property, it did not extinguish it; and

(iv) the Approval Order did not result in a loss of at least $10,000. According to the Pizales, the Chambers Judge ignored the increase in their exposure to their creditors resulting from the sale of the Property on an "as is" rather than "as complete" basis.

[23] Finally, the Pizales submit the Chambers Judge erred in failing to grant leave to appeal as he misconstrued the bases of the Pizales' opposition to the Approval Order and their grounds of appeal.

V. FIRST ISSUE: DID THE CHAMBERS JUDGE APPLY THE CASE LAW CONCERNING *BIA* s. 193(c) TOO NARROWLY?

[24] Section 193(c) of the *BIA* states that "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."

[25] Before the Chambers Judge, the Pizales acknowledged that *BIA* s. 193(c) does not apply to certain types of orders, specifically those identified in *Bending Lake*. That decision observed, at para. 53, that the case law holds that *BIA* s. 193(c) does not apply to orders (i) that are procedural in nature,[2] (ii) that do not bring into play the value of the debtor's property[3] or (iii) do not result in a loss.[4] The last principle derives from two Supreme Court of Canada cases, *Orpen v.*

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[2] *Re Dominion Foundry Co.*, (1965) 52 D.L.R. (2d) 79 (Man. C.A.); *Alternative Fuel Systems Inc. v. EDO (Canada) Ltd. (Trustee of)*, 1997 ABCA 273, 48 C.B.R. (3d) 171 (Chambers).

[3] *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONCA 282, 115 O.R. (3d) 617 (Chambers), at para. 17.

[4] *Trimor Mortgage Investment Corporation v. Fox*, 2015 ABCA 44, 26 Alta. L.R. (6th) 291 (Chambers).

Roberts, [1925] S.C.R. 364, at p. 367, and *Fallis and Deacon v. United Fuel Investments Ltd.*, [1962] S.C.R. 771.

[26] Notwithstanding this acknowledgement, the Pizales contend that the Chambers Judge failed to apply those principles in what they style as the less restrictive approach set out in the decision of the Saskatchewan Court of Appeal in *MNP Ltd. v. Wilkes*, 2020 SKCA 66, 449 D.L.R. (4th) 439 ("*Wilkes*").

[27] To deal with that submission, I shall address two issues: (i) the significance, if any, of the "narrow" and "broad" interpretation labels regarding s. 193(c) found in some of the case law; and (ii) the practical difference, if any, of the approach in *Wilkes* in contrast to that found in the cases summarized in *Bending Lake*.

The "narrow" and "broad" interpretation dichotomy

[28] Although the Pizales rely on some appellate decisions from other provinces to advocate for a broad interpretation of the automatic rights of appeal in *BIA* ss. 193(a)-(d), they ignore panel decisions of this court that have expressly taken a narrow approach to the interpretation of those appeal rights due to the broad automatic stay on appeal contained in *BIA* s. 195.[5]

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[5] Section 195 states, in part, that "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 … 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."

[29] For example, several weeks after the *Bending Lake* decision, a panel of this court released reasons in *Enroute Imports Inc. (Re)*, 2016 ONCA 247, 35 C.B.R. (6th) 1. At issue on that appeal was an order concerning the ability to examine a representative of the bankrupt. The panel stated, at para. 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 Limited (Re)*, 2016 ONCA 140, *Robson Estate v. Robson* (2002), 33 C.B.R. (4th) 86 (Ont. C.A.), *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONCA 282, 115 O.R. (3d) 617, and *Ontario Wealth Management Corporation v. Sica Masonry and General Contracting Ltd.*, 2014 ONCA 500, 17 C.B.R. (6th) 91. (emphasis added)

[30] The panel found that the order at issue did not fall within s. 193(c) for two reasons: the entitlement to conduct an examination was procedural in nature and did not directly involve property, and the appellants' argument that the motion judge erred in finding that the proposal was reasonable and made in good faith did not put the property directly in issue. The panel also denied leave to appeal.

[31] The next year, a panel in *Romspen Investment Corporation v. Courtice Auto Wreckers Limited*, 2017 ONCA 301, 47 C.B.R. (6th) 1, leave to appeal refused, [2017] S.C.C.A. No. 238, followed *Enroute Imports* in holding that the right of appeal under s. 193(c) must be narrowly construed and limited to cases

where the appeal directly involves property exceeding $10,000 in value: at para. 22.

[32] These statements by two panels of this court strike a different analytical stance than the comments by the chambers judge in *Wong v. Luu*, 2013 BCCA 547, 348 B.C.A.C. 155, at para. 23, that the right of appeal under *BIA* s. 193 is "broad, generous and wide-reaching." I would further note that the decisions in *Wong* and *Wilkes* did not address the effect of the automatic stay in s. 195 on the interpretation of ss. 193(a)-(d), a factor this court has considered significant for its interpretative approach.

[33] That said, the recent panel decision of this court in *Davidson (Re)*, 2021 ONCA 135, 86 C.B.R. (6th) 1, determined that it was not necessary in that case to engage in a debate over whether *BIA* s. 193(c) should be given a narrow or broad interpretation: at paras. 9-10. In that case, the panel assumed that s. 193(c) applied but dismissed the appeal on the merits.

The state of the case law

[34] When one looks past the labels of "narrow" and "broad", one discovers that a consensus appears to exist in the case law about how to answer s. 193(c)'s question of whether the property involved in the appeal exceeds $10,000. As I will explain, the Pizales' submission greatly overstates the differences between the operative principles described in *Wilkes* and the case law summarized and categorized in *Bending Lake*.

[35] *Wilkes* held that a court's primary task when examining whether an automatic right of appeal exists is to answer the question raised by s. 193(c) "and determine whether the property involved in the appeal exceeds $10,000." Writing for the court, Jackson J.A. continued, at para. 61:

> Courts have used different ways of giving meaning to s. 193(c), but it is still the words of the statute that govern. Thus, in *Fallis*, by its adoption of what the Court had said in *Orpen*, the test is stated as, What is the loss which the granting or refusing of the right claimed will entail? In *Fogel*, the Court asked what is "the value in jeopardy" (at para 6). In *McNeil*, the Chambers judge observed that "[t]he 'property involved in the appeal' … may be determined by comparing the order appealed against the remedy sought in the notice of appeal" (at para 13). In *Trimor*, the Chambers judge added to the *Orpen–Fallis* test by stating "[t]he focus of the inquiry under s. 193(c) is the amount of money at stake …" (at para 10). All of these expressions are consistent with the statutory language present in s. 193(c).

[36] As mentioned above at para. 25, *Bending Lake* summarized the case law as identifying three types of orders that do not fall within the ambit of *BIA* s. 193(c). The first type the case law identifies is an order that does not result in a loss, as described in the *Orpen* and *Fallis* cases, which were the focus of the court's analysis in *Wilkes*. The need for an order to result in a loss to fall within s. 193(c) was framed slightly differently by the Alberta Court of Appeal in *Re Bearcat Exploration Ltd. (Bankrupt)*, 2003 ABCA 365, 339 A.R. 376, where the court stated, at para. 10, that an appeal under *BIA* s. 193(c) "must in substance be about the value of the property, not just any claim related to bankruptcy." Or,

as put by panels of this court in *Enroute Imports* and *Courtice Auto Wreckers*, the appeal must "directly involve" property exceeding $10,000 in value.

[37] *Bending Lake* also pointed out that the jurisprudence treated two other types of orders as falling outside of s. 193(c): those that do not bring into play the value of the debtor's property; and those that are procedural in nature. Excluding those types of orders from the ambit of s. 193(c) is consistent with – and indeed flows logically from – the loss principle articulated in the *Orpen/Fallis* cases.

[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.[6]

[39] The third type of order that the case law places outside of s. 193(c) is a procedural order, which really is a sub-set of orders that do not bring into play the value of the debtor's property. The case law identifies various procedural orders of this kind: the dismissal of the bankrupt's motion to strike out the petition

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[6] *Simonelli v. Mackin*, 2003 ABCA 47, 320 A.R. 330 (Chambers), at paras. 18-20; *Re Bearcat Exploration Ltd.*, at para. 10; *Business Development Bank of Canada v. Pine Tree Resorts,* at para. 17; *7451190 Manitoba Ltd. v. CWB Maxium Financial Inc. et al.*, 2019 MBCA 95 (Chambers), at para. 18; *Buduchnist Credit Union Limited v. 2321197 Ontario Inc.*, 2019 ONCA 588, 72 C.B.R. (6th) 245, at para. 12; *CWB Maxium Financial Inc. v. 2026998 Alberta Ltd.*, 2020 ABCA 118 (Chambers), at paras. 1-2.

against him;[7] the conduct of an examination of the bankrupt;[8] an order declining leave to examine the bankrupt;[9] approval of the trustee's proposed auction process;[10] directions regarding the conduct of a trial;[11] an appeal process order;[12] an order denying a union leave to apply for certification during receivership;[13] and an order granting an adjournment.[14] In some circumstances, a sale approval order, on analysis, may be merely procedural in nature.[15]

[40] *Wilkes* acknowledges that "it is solidly established in the jurisprudence that there is no right of appeal under s. 193(c) from a question involving procedure *alone*": at para. 61 (emphasis in original). Indeed, a few months after the release of *Wilkes*, Jackson J.A., sitting as a chambers judge, concluded in *Re Harmon International Industries Inc.*, 2020 SKCA 95, 81 C.B.R. (6th) 1, that leave was required to appeal a receiver's sale process order stating, at paras. 34-35:

> Thus, what the Court has before it is an Order that authorizes a *list price* of $3.8 million for the Millar Avenue Building. It does not propose a sale price of $3.8 million. <u>All that the Order does is establish a process for the sale of the property.</u> Any proposed sale must still be confirmed.

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[7] *Simonelli*, at paras. 26-27.
[8] *Enroute Imports Inc. (Re)*, at para. 6.
[9] *Davidson (Re)*, at para. 6.
[10] *IceGen Inc. (Re)*, 2016 ONCA 902, 42 C.B.R. (6th) 183 (Chambers), at para. 3, leave to appeal under s. 193(e) dismissed, 2016 ONCA 907, 42 C.B.R. (6th) 175.
[11] *2003945 Alberta Ltd. v. 1951584 Ontario Inc.*, 2018 ABCA 48, 57 C.B.R. (6th) 272 (Chambers), at para. 21.
[12] *Sangha v. Bhamrah*, 2017 BCCA 434, 6 B.C.L.R. (6th) 1, at paras. 9-12.
[13] *Courtice Auto Wreckers*, at para. 22.
[14] *ATB Financial v. Coredent Partnership*, 2020 ABCA 83, 77 C.B.R. (6th) 190 (Chambers), at para. 6.
[15] *Athabasca Workforce Solutions Inc. v. Greenfire Oil & Gas Ltd.*, 2021 ABCA 66, 87 C.B.R. (6th) 26 (Chambers), at para. 14.

> At this point, the claim of loss is without any foundation at all. It is, as such, entirely speculative. It assumes that the listing agent will not market the property to its fullest potential or that the receiver will place an improvident sale before the Court of Queen's Bench to be confirmed and the Court will confirm it. It is possible that Harmon will apply to Elson J. under s. 185(7) of the *BIA* or wait until it is determined that the property is proposed to be sold for less than what Harmon believes it is worth and place the Brunsdon Appraisal before Elson J. at that time. It is also possible that Harmon will obtain other financing so as to permit it to buy the property at the list price or the property will sell for an amount acceptable to Harmon. In my view, the Order does not directly have an impact on the proprietary or monetary interests of Harmon or crystallize any loss at this time. It concerns a matter of procedure only. It is merely an order as to manner of sale, as was the case in *Dominion Foundry Co. (Re)* (1965), 52 DLR (2d) 79 (Man CA). No value is in jeopardy, and no party can claim a loss as a result. In my view, the property involved in the proposed appeal does not exceed in value $10,000 as those words are used in s. 193(c) of the *BIA*. Thus, I conclude it was necessary for Harmon to apply for leave to appeal. (Emphasis added.)

[41] However, *Wilkes* makes an additional point. Merely because the question in issue is procedural does not necessarily mean there is not property value involved in the appeal that exceeds $10,000. Section 193(c) requires a court to analyze the economic effect of the order sought to be appealed: at paras. 62-63.

[42] I agree. What is required in any consideration of whether the appeal of an order falls within *BIA* s. 193(c) is a critical examination of the effect of the order sought to be appealed. Such an examination requires scrutinizing the grounds of appeal that are advanced in respect of the order made below, the reasons the lower court gave for the order, and the record that was before it. The inquiry into

the effect of the order under appeal therefore is a fact-specific one; it is also an evidence-based inquiry, which involves more than merely accepting any bald allegations asserted in a notice of appeal: *Bending Lake*, at para. 64. *Wilkes* concurs on this point, holding, at para. 64, that the loss claimed must be "sufficiently grounded in the evidence to the satisfaction of the Court determining whether there is a right of appeal," a point repeated in the subsequent chambers decision in *Re Harmon International Industries*, at para. 32.

[43] While the amendment of the *BIA* in 1992 to include Part XI dealing with "Secured Creditors and Receivers" increased the practical need for the timely adjudication of appeals launched from orders made under the Act, an approach to the application of s. 193(c) that requires a fact-specific, evidence-based critical scrutiny of the effect of the order sought to be appealed should foster the remedial objectives of Canada's insolvency statutes to provide for "timely, efficient and impartial resolution of a debtor's insolvency": *9354-9186 Quebec Inc. v. Callidus Capital Corp.*, 2020 SCC 10, 444 D.L.R. (4th) 373, at para. 40 (emphasis added.)

[44] There will be cases where the effect of an order sought to be appealed is such that an appeal lies as of right under *BIA* s. 193(c) but the respondent takes the view that the appeal is without merit or the automatic stay under *BIA* s. 195 would cause undue delay or prejudice in the bankruptcy proceeding. In such cases, it is open to the respondent to move to cancel the automatic stay. A

motion to cancel the stay prompts a judicial assessment of the merits of the appeal, the appellant's litigation conduct, and the relative prejudice that cancelling or maintaining the stay would have on interested persons and the interests of justice generally: *Royal Bank of Canada v. Bodanis*, 2020 ONCA 185, 78 C.B.R. (6th) 165 (Chambers), at paras. 11-14; *After Eight Interiors Inc. v. Glenwood Homes Inc.*, 2006 ABCA 121, 391 A.R. 202 (Chambers), at para. 6; *Pelletier (Re)*, 2020 ABCA 450, 86 C.B.R. (6th) 108 (Chambers), at para. 45.

Conclusion

[45] The Pizales' contention that the Chambers Judge erred by applying too restrictive an approach to s. 193(c) is based on a dichotomy in the case law that is more illusory than real, more semantic than substantive. While the cases under s. 193(c) have explained the interpretative task using differing language (as is to be expected in a body of jurisprudence under a national statute), at their core the cases share common ground in attempting to discern the operative effect of the order sought to be appealed: does the order result in a loss or gain, or put in jeopardy value of property, in excess of $10,000?

[46] The Chambers Judge identified the applicable legal principles. I see no basis to interfere with his decision on that ground.

VI. SECOND ISSUE: DID THE CHAMBERS JUDGE MISAPPREHEND THE PIZALES' KEY ARGUMENTS?

[47] I shall now consider the Pizales' submission that the Chambers Judge misapprehended the key elements of their arguments. The Pizales advance two main arguments:

(i) The Chambers Judge erred in holding that as a result of the Approval Order they had not suffered a loss of greater than $10,000; and
(ii) The Chambers Judge misapprehended their principal ground of appeal, which is not based on allegations of an improvident sale or improper sale process but rather based on a failure of the Motion Judge to properly weigh the interests of the creditors and debtor, favouring process in so doing. As part of this submission the Pizales contend that the receivership was "spent" upon Hillmount's assignment of its first mortgage to Elle, which meant that there was no need for a sale of the Property.

The "loss" argument

[48] The Pizales are not arguing that since the Property is worth more than $10,000, a "loss" of greater than that amount is established for purposes of *BIA* s. 193(c). Instead, they submit that appraisals showed they had equity in the Property greater than $10,000 when the Property was valued on an "as complete" basis. The Receiver's sale jeopardized that equity and approval of the sale would increase their liability exposure to their mortgagees as compared to a sale on an "as complete" basis. As they submitted in their factums: the Approval Order entails a loss of their rights to retain the Property as its value increases and sell it when the renovations are complete if they so choose (Jan. 19 factum,

para. 53); what they want to do is retain ownership of the Property (Jan. 25 factum, para. 7).

[49] The Chambers Judge understood the Pizales' argument. At para. 26 of his reasons he wrote: "As I understand this argument, if the renovations were completed, they could achieve a higher price for the home and the gap between what the receiver is selling the house for and what could be obtained if the Pizales were permitted to finish the renovation would represent the loss." He rejected the submission that the Approval Order would result in a loss to the Pizales, concluding that the "motion judge made strong findings that the receiver did not act improvidently."

[50] I do not regard the Chambers Judge's conclusion as one based on an error in principle or an unreasonable result.

[51] Central to the Pizales' submission is their assertion that selling the Property in a renovated state would fetch a higher sales price. The evidence before the Motion Judge and Chambers Judge strongly indicated that such would be the case. But, for the purposes of a s. 193(c) analysis, that is neither here nor there. That is because the parameters of the Receiver's sale were set, for all practical commercial purposes, by the terms of the Appointment Order made earlier on June 19, 2020.

[52] The Appointment Order was made when the Property was in an unfinished state and a significant expenditure of funds would be required to complete the

renovations. The Appointment Order authorized the Receiver to take possession of the Property and market it for sale. It did not authorize the Receiver to complete the renovations the Pizales had started to make. Indeed, para. 19 of the Appointment Order limited the Receiver's authority to borrow from Hillmount to $150,000, an amount that would not come close to completing the needed renovations.

[53] The Appointment Order had the effect of authorizing a process to market the Property on an "as is" basis or, as put by the Receiver in one of its factums, the Appointment Order "contemplated a liquidation process, not a renovation process." That order, not the Approval Order, put in jeopardy any difference in value between the sale of the Property on an "as complete" and "as is" basis. Accordingly, the Approval Order did not result in any loss beyond that already worked by the Appointment Order's authorization of the Receiver to market the Property on an "as is" basis. Put another way, the Pizales' appeal of the Approval Order seeks to unwind the economic effect of the Appointment Order, which the Pizales did not appeal.

[54] The Pizales advance a supplementary argument, contending that even on an "as is" sale basis the Approval Order resulted in a loss to them because the price fetched by the Receiver was less than one of their "as is" appraisals. They argue that the Chambers Judge exacerbated the Motion Judge's error in finding that none of the Pizales' appraisals considered the Property on an "as is" basis.

[55] I am not persuaded by this submission. After the Receiver had entered into the Sale Agreement and moved for approval, the Pizales filed two appraisals of the Property:

(i) a December 30, 2020 appraisal by Heather Markoff, which valued the Property on an "as complete" basis at $6.9 million. The report recorded the land value "as if vacant" at $5 million and estimated the Property's "as is" market value at $5.955 million, although the author stated that she was unable to locate current sales activity in a partially complete state of construction at time of sale; and
(ii) a January 4, 2021 Colliers appraisal, which estimated the "as complete" value of the Property at $6.075 million.

[56] The Pizales also had obtained a June 2020 appraisal from TM Appraisers Inc., which opined that the fair market value of the Property on an "as if complete" basis was $7.5 million. It listed the land value "as if vacant" at $5 million "by extraction" and contained an "As Is" Addendum that estimated the "as is" value at $6.525 million. According to the Receiver, this appraisal was before Koehnen J. in redacted form but not produced in response to the Sale Agreement.

[57] Although the Motion Judge referred in her reasons to the December 2020 and January 2021 appraisals, she did not make express reference to the "as is" value found in the December 2020 appraisal. I do not view her failure to do so as amounting to an error that somehow brings the "as is" value of the Property into question. As the Motion Judge noted in her reasons: the Receiver listed the Property at $4.8 million, a price higher than the appraisals it had received; 23 showings elicited no offers; the Receiver lowered the listing price, which resulted

in its receipt and negotiation of a number of offers but no deal; and, finally the Receiver accepted the early November 2020 offer from the Purchasers, which was higher than its two appraisals and any other offer received. Against those efforts by the Receiver, and the absence of any alternative transaction presented by the Pizales or their creditors, the fact that the Purchaser's offer was lower than the "as is" appraisals received by the Pizales spoke loudly to the reality of the existing market for the partially completed Property: *Pricewaterhousecoopers Inc. v. 1905393 Alberta Ltd*, 2019 ABCA 433, 98 Alta. L.R. (6th) 1, at para. 15. In those circumstances, it is no surprise that the Motion Judge did not treat the "as is" estimate as a relevant indicator of market conditions.

[58] Accordingly, I am not persuaded that the Chambers Judge erred in concluding that the Approval Order did not result in a loss greater than $10,000 and, as a result, the Pizales' appeal did not fall within *BIA* s. 193(c).

The "spent" receivership argument

[59] Although that is sufficient to dispose of the Pizales' panel review motion, I wish briefly to address the Pizales' submission that when Hillmount assigned its first mortgage to Elle, it was "made whole". They argue that with the original applicant creditor no longer part of the receivership and the remaining mortgagees opposed to the sale, the receivership was "spent," with the result that there was no need for the Property's sale.

[60] The Motion Judge's reasons provide a complete answer to that submission. The Motion Judge spent considerable time in her reasons considering and weighing the interests of the various parties: at paras. 18-26. She wrote that:

(i) The reasons for the mortgagees opposing the sale were not apparent on the face of the record;
(ii) The mortgagees and Pizales failed to engage in the court-authorized receivership and sales process at any time prior to the signing of the Sale Agreement;
(iii) The Receiver conducted a legitimate and proper sales process; and, significantly,
(iv) The mortgagees and Pizales did not put on the table any alternative transaction or bring a motion to discharge the Receiver.

[61] On the last point, in its December 1, 2020 Acknowledgement in favour of the Receiver and Hillmount, Elle specifically acknowledged that it understood "(i) the Receivership is not at an end by virtue of the undersigned accepting the Assignment; and (ii) until terminated by Court order, the Receivership remains in full force and effect."

[62] In light of those circumstances, the Motion Judge's conclusion that, having weighed the interests of all parties there was no basis to allow their objections to prevent the Receiver from concluding the agreement, was a reasonable one.

VII. THIRD ISSUE: DID THE CHAMBERS JUDGE ERR IN FAILING TO GRANT LEAVE TO APPEAL PURSUANT TO *BIA* s. 193(e)?

[63] In seeking to set aside the Chambers Judge's refusal to grant leave to appeal the Approval Order pursuant to *BIA* s. 193(e), the Pizales largely repeat

the arguments they make in respect of s. 193(c). I have already dealt with those arguments. I would only add that the Chambers Judge, applying the well-known test for granting leave to appeal set out in *Business Development Bank of Canada v. Pine Tree Resorts*[16] and the deference appropriate to the discretionary decision of the Motion Judge,[17] concluded that the Pizales' appeal would have little importance to bankruptcy/insolvency matters beyond the parties, did not raise a serious issue for appeal, and would hinder the receivership and risk losing the sale to the Purchasers. Those conclusions were reasonable ones, anchored as they were in the record. I see no basis to interfere with the Chambers Judge's refusal to grant the Pizales leave to appeal.

VIII. FOURTH ISSUE: THE ADMINISTRATION ORDER

[64] The Administration Order approved the Receiver's activities described in its Second Report and First Supplement to the Second Report and increased the Receiver's borrowing authority from $150,000 to $250,000. Before the Motion Judge, the Pizales did not oppose the issuance of the Administration Order.

[65] The Pizales sought to appeal, or seek leave to appeal, the Administration Order. Before the Chambers Judge they made two arguments: (i) the

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[16] The test set out in *Pine Tree Resorts* was adopted by a panel of this court in *Impact Tool & Mould Inc. v. Impact Tool & Mould Inc. Estate*, 2013 ONCA 697, at para. 3.

[17] *Reciprocal Opportunities Incorporated v. Sikh Lehar International Organization*, 2018 ONCA 713, 426 D.L.R. (4th) 273, where this court stated, at para. 54, that "an appeal court will interfere only where the judge considering the receiver's motion for approval of a sale has erred in law, seriously misapprehended the evidence, exercised his or her discretion based upon irrelevant or erroneous considerations, or failed to give any or sufficient weight to relevant considerations."

Administration Order is inextricably linked to the issues regarding the Approval Order, so that if they had a right to appeal the Approval Order or were granted leave to do so, they were entitled to appeal the Administration Order; and (ii) the Administration Order creates a "loss" as it authorizes the Receiver to borrow a further $100,000.

[66] In its Second Report dated December 4, 2020, the Receiver stated that any additional amounts borrowed would be applied to the Receiver's existing fees and any future fees or expenses leading up to the closing of the sale. Accordingly, the purpose of the further borrowing approved by the Administration Order is to enable the Receiver to complete its efforts to sell the Property on an "as is" basis. The increased borrowing power is ancillary to the exercise of the Receiver's powers under the Appointment Order and does not result in any further jeopardy of value than that worked by the Appointment Order. Accordingly, for purposes of the s. 193(c) analysis, the operative effect of the Administration Order is, as the Pizales describe, inextricably linked with the effect of the Approval Order, which the Chambers Judge correctly found did not fall within s. 193(c).

[67] The Chambers Judge dismissed the Pizales' motion in respect of the Administration Order for the reasons supporting his dismissal of their motion regarding the Approval Order. That was a reasonable conclusion for him to reach on the record. I see no basis to interfere with it.

IX. DISPOSITION

[68] For the reasons set out above, I would dismiss the Pizales' panel review motion.

[69] If the parties are unable to agree on the costs of the motion, any party seeking costs of the motion may deliver brief written cost submissions of up to five pages in length within 10 days of the release of the reasons. Any party against whom costs are sought may deliver brief responding cost submissions within 5 days thereafter.

Released: May 28, 2021 "G.R.S."

"David Brown J.A."
"I agree. G.R. Strathy C.J.O."
"I agree. B.W. Miller J.A."

5

COURT OF APPEAL FOR ONTARIO

CITATION: Cosa Nova Fashions Ltd. v. The Midas Investment Corporation, 2021 ONCA 581
DATE: 20210823
DOCKET: M52741 (C69767)

Fairburn A.C.J.O. (Motion Judge)

BETWEEN

Cosa Nova Fashions Ltd., B & M Handelman, Investments Limited, Comfort Capital Inc., 693651 Ontario Ltd., E. Manson Investments Limited, Natme Holdings Ltd., Francie Storm, Barsky Investments Ltd., Stephen Handelman, Rosewill Investment Corporation, Thomas Bock, The Bank of Nova Scotia Trust Company and Canada Investment Corporation

Applicants

and

The Midas Investment Corporation

Respondent

Catherine Francis, for the moving party, Rosen Goldberg Inc.

Kevin Sherkin, for the responding party, John Kavanagh

David P. Preger, for the applicants

Michael G. McQuade, for the respondent

Robert A. Klotz and Timothy Danson, for Auto World Imports

Heard: August 20, 2021 by video conference

REASONS FOR DECISION

A. OVERVIEW

[1] Rosen Goldberg Inc. (the "Receiver") brings this urgent motion. John Kavanagh, a non-party in the proceeding, is the responding party on the motion. Both made written and oral submissions on the motion.

[2] In addition, the parties to the proceeding – the applicant mortgagees and the respondent Midas Investment Corporation ("Midas") – made oral submissions on the motion. Auto World Imports, the tenant of the "Eastern Avenue property", which is described below, also made oral submissions before me.

[3] This urgent motion arises from two orders made by Koehnen J. (the "Motion Judge") related to the sale of two properties.

[4] The applicants hold a mortgage over the "Eastern Avenue property" and the "Yonge Street property".[1] The mortgage has been in default since October 1, 2013, shortly after it was registered on March 4, 2013. This resulted in the court-appointed Receiver becoming involved in the sale of the properties.

[5] The Motion Judge granted two approval and vesting orders: (i) the August 5, 2021 order (reasons dated August 9, 2021) for the Eastern Avenue property; and (ii) the August 12, 2021 order (reasons dated August 13, 2021, revised on

[1] While there were initially two mortgages, one for each property, the second mortgage was used to pay out the first mortgage, thereby consolidating the two into a single, large mortgage registered on March 4, 2013: *Thomas Farrell v. John Kavanagh*, 2020 ONSC 8154, at paras. 1-2.

August 15, 2021) for the Yonge Street property. The sale of the Yonge Street property is scheduled to close on Monday, August 23, 2021. The sale of the Eastern Avenue property is scheduled to close on Thursday, September 2, 2021.

[6] Mr. Kavanagh has filed two notices of appeal, intending to appeal both approval and vesting orders. The Receiver, concerned that these attempted appeals could derail the imminent closing of the Yonge Street property and the shortly forthcoming closing of the Eastern Avenue property, brought an urgent motion seeking declaratory relief, which I heard on Friday, August 20, 2021. While the Receiver has raised a number of issues, in light of how I am deciding this matter, the only issues I need to address are: (i) whether Mr. Kavanagh has a right to appeal the approval and vesting orders under s. 193(c) of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 ("*BIA*"); and, if not, (ii) whether he should be granted leave to appeal those orders under s. 193(e) of the *BIA*.

[7] The answer to both of these questions is no.

B. BACKGROUND

[8] Midas was the owner of both the Yonge Street and the Eastern Avenue properties. It appears that Mr. Kavanagh worked for Midas as an in-house accountant: *Thomas Farrell v. John Kavanagh*, 2020 ONSC 8154, at para. 13. He was involved in arranging the mortgages on the Yonge Street and Eastern Avenue

properties. In the materials he filed on this motion, Mr. Kavanagh describes himself as a “shareholder and guarantor” of Midas and its properties.

[9] Midas defaulted on the mortgages. Eventually, Midas and Midas’ President, Thomas Farrell, started an action, alleging that the mortgages taken out on the two properties were unauthorized and the result of fraudulent activity by Mr. Kavanagh. After over seven years of litigation, which saw Midas and Mr. Farrell seeking judgment against Mr. Kavanagh, the Motion Judge (who was also the trial judge on the action) determined that the mortgage was valid and dismissed the action: *Farrell*, at para. 124. Midas and Mr. Farrell unsuccessfully sought a stay of the decision: *Farrell v. Kavanagh*, 2021 ONCA 213.

[10] Following the completion of the trial in *Farrell*, the applicants made a demand on Midas for payment of the sum of $11,045,858.94 and, when the demand was not met, applied for the appointment of a receiver. By order dated April 6, 2021, the Receiver was appointed over the assets, undertakings, and properties of Midas, including the Yonge Street and Eastern Avenue properties, which are the subject of this motion.

[11] By order dated May 31, 2021, the marketing and sale process for the properties was approved, and Auto World Imports, the tenant at the Eastern Avenue property, was directed to produce documents showing how much rent they

had prepaid on the property.[2] Subsequently, the Receiver came to learn that: (i) the tenant had paid $2 million in advance rent, half of which was paid while the decision in *Farrell* was under reserve; and (ii) Midas had agreed to sell the Eastern Avenue Property to a company affiliated with the tenant.

[12] Given these newly discovered facts, the Receiver entered into negotiations with the tenant at the Eastern Avenue property and they ultimately entered into an agreement of purchase and sale. Equally, the Receiver entered into a separate agreement of purchase and sale for the Yonge Street property.

[13] After the agreements had been reached in relation to both properties, the Receiver sought and obtained approval and vesting orders. Notably, the combined proceeds to be realized from the sale of the properties will be sufficient to pay out all encumbrances against the properties, although the Receiver acknowledges that it is possible that there could be a shortfall in respect of accrued interest depending on when distributions are authorized.

[14] Mr. Kavanagh has now filed two notices of appeal, one for each of the approval and vesting orders. He maintains that he has a right to appeal the orders under s. 193(c) of the *BIA*.

[2] It had come to light that the tenant had prepaid some rent, but that a confidentiality order precluded disclosure of any details of the arrangement that had been made.

[15] In the event he is wrong about that, Mr. Kavanagh has also filed a motion seeking leave to appeal the August 5, 2021 approval and vesting order relating to the sale of the Eastern Avenue property, pursuant to s. 193(e) of the *BIA*. Counsel for Mr. Kavanagh informs the court that he also filed a motion seeking leave to appeal the August 12, 2021 approval and vesting order relating to the sale of the Yonge Street property, pursuant to s. 193(e) of the *BIA*. If that motion has been filed, it has not yet been located in the court's records. In any event, I am prepared to take Mr. Kavanagh's position at its highest and proceed on the assumption that the missing leave motion has been properly filed.

C. ANALYSIS

[16] Section 195 of the *BIA* says that "all proceedings under an order or judgment appealed from shall be stayed until the appeal is disposed of" (emphasis added). The provision goes on to say that a single judge of this court may do any number of things, including cancel the stay for any reason deemed proper.

[17] As I understand it, what has triggered this last-minute motion for declaratory relief is that the Receiver is concerned about the potential operation of s. 195 of the *BIA*. That concern rests on the fact that Mr. Kavanagh has filed two notices of appeal and a leave motion, all arising from the approval and vesting orders made pursuant to the *BIA*. The Receiver wants to foreclose any possible suggestion that the approval and vesting orders – which are required to close the sales of the

Yonge Street property on Monday, August 23, 2021 and the Eastern Avenue property on Thursday, September 2, 2021 – will be the subject of automatic stays pursuant to s. 195 of the *BIA*. If the automatic stays apply, then the Receiver asks that they be cancelled.

[18] The Receiver's concerns are well placed given that Mr. Kavanagh has responded to this motion, suggesting that he has a right to appeal under s. 193(c) of the *BIA* and, therefore, s. 195 operates to automatically stay the approval and vesting orders. He says the stay should not be cancelled. He also argues that, if he is wrong about the right to appeal, then I should grant him leave to appeal and impose stays on that basis.

[19] I have concerns about whether Mr. Kavanagh even has standing to appeal the approval and vesting orders. The Receiver submits that he has no standing as a non-party with no personal stake in the proceeding. In the end, though, as will become clear in these reasons, it is unnecessary for me to settle on the question of standing. For the purposes of these reasons, I proceed on the assumption, but without deciding, that Mr. Kavanagh has standing to challenge the approval and vesting orders.

(1) Is There an Automatic Right of Appeal Under s. 193(c) of the *BIA*?

[20] Mr. Kavanagh's first position is that he has an automatic right of appeal under s. 193(c) of the *BIA*, which reads 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:
>
> …
>
> (c) if the property involved in the appeal exceeds in value ten thousand dollars;

[21] The Receiver argues that, in this case, there is no such right of appeal. I agree.

[22] This court has been clear that, given the "broad nature of the stay imposed by s. 195 of the *BIA*", the right to appeal under s. 193(c) must be narrowly construed: *First National Financial GP Corporation v. Golden Dragon HO 10 Inc.*, 2019 ONCA 873, 74 C.B.R. (6th) 1, at para. 15, citing *Enroute Imports Inc., Re.*, 2016 ONCA 247, 35 C.B.R. (6th) 1, at para. 5. As noted by Brown J.A., the narrow construction of s. 193(c) accords with the "needs of modern, 'real-time' insolvency litigation": *2403177 Ontario Inc. v. Bending Lake Iron Group Limited*, 2016 ONCA 225, 396 D.L.R. (4th) 635, at para. 53. Therefore, Brown J.A. affirmed that s. 193(c) does not provide for an appeal as of right to matters involving: "(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": *Bending Lake*, at para. 53.

[23] The operation of any one of these principles is fatal to an applicant's automatic right of appeal pursuant to s. 193(c) of the *BIA:* see, for example,

Downing Street Financial Inc. v. Harmony Village-Sheppard Inc., 2017 ONCA 611, 49 C.B.R. (6th) 173. The first and third principles are operative in this case.

(a) Is the Order Procedural in Nature?

[24] Section 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": *Bending Lake*, at para. 54. At least in relation to the appeal from the order relating to the Eastern Avenue property, that is precisely what Mr. Kavanagh is seeking to appeal as of right: the method used by the Receiver to arrive at the agreement of purchase and sale of the Eastern Avenue property.

[25] Mr. Kavanagh's chief complaint is that the Receiver, as he puts it, "sought and obtained the Sale Process order and then abandoned that process and negotiated directly with one party based on new facts." What he is referring to is the fact that, after receiving the May 31, 2021 court order setting out a marketing and sale process that the Receiver would follow for the Eastern Avenue property, the Receiver did not follow that process, but rather negotiated the sale with the current tenant at that property.

[26] As the Motion Judge detailed in his reasons, the Receiver acted reasonably in the circumstances. The Receiver had very good reason to negotiate with the tenant before embarking upon the marketing and sale process that had been

approved in the May 31, 2021 order. That reason rested on the fact that it was only after the May 31, 2021 order was issued that the Receiver came to learn that the tenant at the Eastern Avenue property had prepaid $2 million in rent to Midas and Mr. Farrell, representing rents paid until May 31, 2027, and had actually entered into an agreement of purchase and sale for the property. In light of that state of affairs, the Receiver recognized the obvious: unlike an ordinary buyer, the tenant would be highly motivated to protect its financial outlay, and allowing the tenant to do so would avoid potentially lengthy and costly litigation.

[27] While the Receiver did not seek an order varying the marketing and sale process set out in the May 31, 2021 order on the basis of the new information that had come to light, I am not satisfied that the Motion Judge erred in concluding that the Receiver acted appropriately in the circumstances. Importantly, there is no evidence that the manner in which the Receiver proceeded resulted in any loss.

[28] While Mr. Kavanagh is not pleased with the Receiver's decision to negotiate with the tenant, in my view, his complaint in relation to the Eastern Avenue property is entirely procedural in nature. At its core, his complaint is that the Receiver should have followed a different process for selling the Eastern Avenue property. Section 193(c) does not permit an appeal as of right for this type of procedural complaint.

(b) Does the Order Result in a Loss?

[29] In any event, there is another reason that s. 193(c) does not afford Mr. Kavanagh an appeal as of right in relation to either approval and vesting order.

[30] Section 193(c) grants a right of appeal where "the property involved in the appeal exceeds in value ten thousand dollars". Determining the "value" of the "property involved" is subject to significant constraints because any other approach would lead to an automatic right of appeal in virtually all *BIA* matters: *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONCA 282, 115 O.R. (3d) 617, at para. 17.

[31] As Brown J.A. explained in *Bending Lake*, 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. The court does not look to the total value of the property involved in the dispute, but to the value of the actual loss (or gain) resulting from the impugned order: *Bending Lake*, at paras. 61-64. The loss (or gain) must be squarely rooted in the evidentiary record. As Brown J.A. stated in *Bending Lake*, at paras. 64 and 69:

> 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.
>
> …
>
> … 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).

[32] Similarly, I am not persuaded that there is anything in the factual record here that supports Mr. Kavanagh's suggestion that he has suffered or will suffer a loss greater than $10,000. The factual record does not even suggest that he has suffered or will suffer any loss at all. Recall that he describes himself, for the purposes of this motion, as the guarantor of the subject mortgage. It is worth emphasizing a point made earlier: it is anticipated that the mortgage will be paid out as a result of the sales of the properties, should those sales move efficiently. Therefore, as a guarantor, Mr. Kavanagh should not lose on the approved sales.

[33] Mr. Kavanagh also points to what he describes as appraisals that have been done by a reputable broker, which value the properties at more than the ultimate purchase price. He further shares his view that this appraisal is at "the low end" of what could be obtained for the properties through a bidding process. As noted by the Motion Judge, the "report" makes clear that it is not an appraisal. The report also does not reference the critical fact that rent had already been prepaid on the property until May 31, 2027, meaning that even if the property could be sold to

someone else, it would not earn rental income for a very long time. As a commercial investment property, this would undoubtedly affect the value received through a bidding process. Moreover, having reviewed the report, it appears that the author of the report was told that the landlord had indicated that the tenant was willing to vacate the property and reoccupy only after the property had been redeveloped. Therefore, few of the underlying premises upon which the report rested accord with reality.

[34] At the very most, as a guarantor, someone in Mr. Kavanagh's position may have a statutory right to redeem the mortgage. Counsel for Mr. Kavanagh stated in oral argument that this is Mr. Kavanagh's primary concern. Mr. Kavanagh asserts he has that right, but has not clearly identified from which statute that right would arise. Others on the motion say he does not have that right in the current circumstances. Others were unsure, identifying various statutes from which that right might arise. In any event, Mr. Kavanagh has not clearly asserted the basis for his purported right of redemption, has not attempted to redeem the mortgage over the past eight years during which it has been in default, and has not proffered any evidence of the value of his loss.

[35] Therefore, I have arrived at the conclusion that there is no evidence in the record to support the suggestion that the value of the property involved in Mr. Kavanagh's appeals exceeds $10,000. Accordingly, I conclude that Mr. Kavanagh does not have a right to appeal either approval and vesting order under s.193(c)

of the *BIA*. This means that there is no automatic stay of the approval and vesting orders pursuant to s. 195 of the *BIA*.

(2) Should Leave to Appeal be Granted Pursuant to s. 193(e) of the *BIA*?

[36] If he does not have a right to appeal under s. 193(c) of the *BIA*, Mr. Kavanagh asks that leave to appeal be granted pursuant to s. 193(e) of the *BIA*. He has filed a motion seeking leave to appeal the August 5, 2021 approval and vesting order relating to the sale of the Eastern Avenue property. Pursuant to s. 193(e), I have jurisdiction to determine this issue as a single judge of this court.

[37] Granting leave to appeal is a discretionary decision. In exercising that discretion, the court must take into account whether the issue: "(1) raises an issue of general importance to bankruptcy/insolvency practice or the administration of justice, and is one this court should address; (2) is *prima facie* meritorious; and (3) would not unduly hinder the progress of bankruptcy/insolvency proceedings": *Marchant Realty Partners Inc. v. 2407553 Ontario Inc.*, 2021 ONCA 375, at para. 12, referring to *Pine Tree Resorts*, at para. 29; *McEwen (Re)*, 2020 ONCA 511, 452 D.L.R. (4th) 248, at para. 76.

[38] Applying this test, I would dismiss the motion for leave to appeal.

[39] I see no issue of importance to bankruptcy and insolvency practice. This case is really about mortgages that fell into arrears a very long time ago and obstacles put in the way of the ability of the applicant mortgagees to recover on

their losses. While it is true that the Receiver did not comply with the process as spelled out in the original order of May 31, 2021, the Motion Judge's reasons aptly explain why the Receiver's actions made perfect sense in the unusual circumstances of this case.

[40] In the end, the proposed appeal really come down to Mr. Kavanagh's complaint that the Motion Judge should not have approved the Receiver's decision to deal directly with the tenant at Eastern Avenue. In my view, the Motion Judge's reasons are clear, concise, and directly responsive to the issue at hand. There is no issue of general importance involved.

[41] Nor is the issue one that is *prima facie* meritorious. While Mr. Kavanagh perhaps wishes that the Motion Judge's order were different, it was an order that was available to him to make.

[42] Finally, to grant leave to appeal would undoubtedly hinder the progress of the proceeding by interfering with the sale of the Eastern Avenue property.

[43] For these reasons, I dismiss the leave motion in relation to the Eastern Avenue property.

[44] As indicated above, I am prepared to take Mr. Kavanagh's position at its highest and proceed on the assumption that the leave motion in relation to the Yonge Street property has been filed. However, in my view the proposed appeal raises no issues of importance to the practice, it is not *prima facie* meritorious, and

it would hinder the progress of the proceeding by interfering with the sale of the Yonge Street property.

[45] Given that I have refused to grant leave to appeal under s. 193(e) of the *BIA*, and given that s. 193(c) does not apply, s. 195 is inapplicable and no stay of either of the approval and vesting orders is imposed.

D. CONCLUSION

[46] The Receiver's motion is granted. Mr. Kavanagh's notices of appeal in respect of the August 5, 2021 approval and vesting order and the August 12, 2021 approval and vesting order are quashed. His motion for leave to appeal in respect of the August 5, 2021 approval and vesting order is denied. Proceeding on the assumption that the motion for leave to appeal in respect of the August 12, 2021 approval and vesting order has been filed, it is also dismissed.

[47] I note that there was a time-limited sealing order imposed by the Motion Judge so as to protect the pending sales. Therefore, the Receiver is directed to communicate with the Registrar of this court to identify whether there are any documents that have been filed in this matter that fall within the parameters of the Motion Judge's sealing order or that should otherwise be sealed for a short time pending the completion of the sales.

[48] Costs submissions of no more than three pages may be provided by the moving party and those supporting the moving party no later than August 25, 2021. Mr. Kavanagh may respond with no more than three pages by August 27, 2021.

"Fairburn A.C.J.O."

6

COURT OF APPEAL FOR ONTARIO

CITATION: B&M Handelman Investments Limited v. Drotos, 2018 ONCA 581
DATE: 20180625
DOCKET: M49307 (C65474)

Paciocco J.A. (Motion Judge)

In the Matter of the Bankruptcy of Christine Drotos, of the City of Toronto, in the Province of Ontario

BETWEEN

B&M Handelman Investments Limited, Flordale Holdings Limited, M. Himel Holdings Inc., 1530468 Ontario Ltd., Maxoren Investments, and Sheilaco Investments Inc.

Applicants (Responding Party)

and

Christine Drotos

Respondent

Eric Golden, for the moving party, Rosen Goldberg Inc.

P. James Zibarras, Leslie Dizgun, and Caitlin Fell, for the responding party, World Finance Corporation

David Preger, for the responding party, B&M Handelman Investments Limited

Adam J. Wygodny, for the responding party, Money Gate Investment Corp.

Miranda Spence, for the purchaser, Frederic P. Kielburger

Heard: June 13, 2018

On a motion for directions and leave to appeal from the order of Justice Sean F. Dunphy of the Superior Court of Justice, dated June 1, 2018.

Paciocco J.A.:

OVERVIEW

[1] Rosen Goldberg Inc. is the receiver (the “Receiver”) of property known municipally as 4 Birchmount Avenue, Toronto (the “Birchmount Property”). At all material times, the Birchmount Property was registered to Ms. Christine Drotos (the “Debtor”).

[2] On June 1, 2018, Dunphy J. made an Approval and Vesting Order approving the Receiver’s sale of the Birchmount Property (the “Order”). The Order authorizes the transfer of the Birchmount Property to Mr. Frederic P. Kielburger (the “Purchaser”) free and clear of all mortgages.

[3] On June 7, 2018, World Finance Corporation (“World Finance”), a mortgagee of the Birchmount Property, filed a notice of appeal challenging the Order. In its notice of appeal, World Finance asserts that its appeal was as of right pursuant to s. 193(b) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (“*BIA*”). In the alternative, it sought leave to appeal the Order pursuant to s. 193(e).

[4] If World Finance was appealing as of right, the Order would have automatically been stayed pending World Finance’s appeal pursuant to *BIA*, s. 195. This stay would have prevented the Receiver from completing the sale of the Birchmount Property, which was set to close on June 14, 2018.

[5] On June 11, 2018, the Receiver brought the instant motion on an urgent basis seeking directions regarding World Finance's appeal. The Receiver took the position that s. 193(b) did not apply and that no leave to appeal should be granted under s. 193(e). The Receiver sought an order declaring that the Order was not stayed by World Finance's notice of appeal and approving the closing of the sale on June 14, 2018.

[6] After denying an adjournment motion brought by World Finance, I abridged the time for service and heard the Receiver's motion on June 13, 2018. At the conclusion of the hearing, I held that World Finance does not have an appeal as of right pursuant to s. 193(b). I denied leave to appeal pursuant to s. 193(e). And I also approved the sale pursuant to the Order. I indicated that reasons for my decision would follow in writing. These are my reasons.

THE RECEIVERSHIP AND THE APPLICATION FOR THE APPROVAL AND VESTING ORDER

[7] The Birchmount Property is a partially constructed 12,900 square-foot home located in the Scarborough Bluffs neighborhood. At all material times, the Birchmount Property was vacant, in need of repairs, and unfit for occupancy. There were three mortgages on title

[8] The first mortgagee, Pillar Capital Corporation ("Pillar"), claims that as of May 29, 2018 it was owed $2,534,582.27 under its mortgage.

[9] The second mortgage is held by a group of corporations comprising the applicants in the proceedings below. B&M Handelman Investments Limited ("B&M") is one of the second mortgagees. It claims that as of June 11, 2018, $1,164,755.78 was owing under the second mortgage, excluding legal fees.

[10] The third mortgage is held 69.9% and 30.1% by World Finance and Money Gate Mortgage Investment Corporation ("Money Gate"), respectively. World Finance alleges that the total amount owing under this third mortgage was approximately $6.7 million as of May 14, 2018.

[11] On April 10, 2018, B & M applied, pursuant to BIA s. 243(1), for the appointment of a receiver. On April 13, 2018, the requested Appointment Order was made, appointing the Rosen Goldberg Inc. as receiver over the Debtor's lands and premises, including the Birchmount Property.

[12] The Appointment Order contains the usual Model Order clauses granting the Receiver the power to engage consultants and appraisers, market the property, and negotiate the terms and conditions of sale. The Appointment Order also permits the Receiver to report to, meet with, and discuss with affected Persons (as defined in the Appointment Order) "as the Receiver deems appropriate" and to share information subject to confidentiality terms. It permits the Receiver to sell the Birchmount Property with court approval and to apply for

a vesting order to convey the property to a purchaser free and clear of encumbrances.

[13] After obtaining the Appointment Order, the Receiver secured an appraisal of the Birchmount Property which set the value at $3.2 million. The Receiver considered different sale options and determined that an MLS listing process was the optimal method. After reviewing various listing proposals, it entered into a 90-day listing agreement with Chris Kelos of Re/Max Corbo & Kelos Realty Ltd. ("Kelos"). Kelos listed the Birchmount Property on the MLS on April 30, 2018 at a sale price of $3.8 million.

[14] On May 3, 2018, an unconditional offer to purchase for $2.5 million was submitted. The Receiver did not accept this offer.

[15] On May 8, 2018, the Receiver received an unconditional offer to purchase from the Purchaser. Following negotiations, the Purchaser increased his offer to $3.45 million, an amount higher than the appraised value. Nonetheless, it was evident that insufficient proceeds of sale would be generated by this offer to fully retire the encumbrances. In fact, B&M would suffer a shortfall and World Finance would recover nothing. The Receiver accepted this offer subject to court approval.

[16] The Receiver then brought an application before Dunphy J. in the instant Debtor's bankruptcy proceedings, seeking approval of the sale of the Birchmount

Property. At the same time, the Receiver also applied for approval of the sale of four other properties from the separate bankruptcy proceeding of Comfort Capital. The sale approvals raised similar issues, but the two bankruptcies involve different debtors and different subsequent mortgagees. World Finance claims to be interested in both of the bankruptcies. Although the Receiver brought both applications at the same time, no formal consolidation order was made linking or joining the two applications. The form of receivership order in both cases is effectively identical.

[17] With respect to the instant Debtor's bankruptcy proceedings, the parties disputed who had the authority to speak in respect of the third mortgage on the Birchmount Property. World Finance appeared and opposed the Receiver's application. Money Gate appeared and supported the Receiver's position.

[18] World Finance's key complaint before Dunphy J. was that the Receiver failed to consult World Finance about the sale and marketing process and the listing price. In its view, had the Receiver discharged its duty, a higher purchase price would have resulted. In support of its assertion that the property was undervalued, World Finance relied on the opinion of a realtor who states that he would have listed the Birchmount Property at between $4 million to $4.5 million, and would not have accepted an offer of $3.4 million.

THE DECISION OF DUNPHY J.

[19] Dunphy J. granted the Order respecting the Birchmount Property. He considered the criteria in *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (C.A.), [1991] O.J. No. 1137 and the procedure adopted by the Receiver in selling the property:

> …In each case, the first step the Receiver took was to seek appraisals. These are a necessary pre-condition to a Receiver having a sense of what the property being marketed is worth. The Receiver obtained two appraisals in respect of the High Point property, one appraisal in respect of the Bridge property, one appraisal for the Loyalist property, two for the Caldwell property, and one for the Birchmount property.
>
> The Receiver also consider [*sic*] how best to market these properties. In considering that question, the Receiver had to have regard to the state of these properties. At least two of them were in a very challenging state […] The Birchmount property is a partially constructed shell with a roof that has a hole in it and has become a home for wild animals.
>
> Among other things, the Receiver also had to consider the carrying costs of these properties in terms of accrued reality [*sic*] taxes, which are in arrears on many of the properties, and the state of the market and other relevant considerations.
>
> After considering the matter, the Receiver determined that proceeding to market through the MLS process was the optimal process to follow in relation to the five properties that are the subject matter of these motions.
>
> The Receiver also considered possible listing agents and in considering that question looked at the experience of the brokers considered, looked at their experience in the areas, considered their recommendations as to listing price and considered that in relation to appraisals…

> […]
>
> In the case of the B&M receivership, which is to say the Birchmount property, an information package was prepared, there were online and advertising and email blasts, open houses, newspaper coverage was arranged…

[20] Justice Dunphy concluded that fair market value had been obtained. He referred to the realtor's opinion of value that World Finance relied upon to support its position that a higher value could be obtained, stating that while this report had some helpful comments, it did "not have any solid valuation evidence that I can attach weight to in it." Justice Dunphy concluded that the Receiver's business judgment had been applied and informed by the appraisals responsibly sought.

[21] He applied the *Soundair* principles to the argument that the Receiver failed to consult World Finance. He was not prepared to accept the criticism that the Receiver acted too quickly. In his view, the MLS marketing process was designed to obtain offers as soon as reasonably practicable and in each case multiple offers were received. Nor was Dunphy J. persuaded that the Receiver failed to consider the interests of all parties. He stated:

> There has been some confusion about who those other parties are and how much their claims are. Who is entitled to speak for them has also been an issue in this case. Ultimately, however, the interests of all of the parties is the same. Their interest is in obtaining the highest and best price reasonably available.

[22] Justice Dunphy dismissed the specific complaint that World Finance ought to have been consulted on the marketing process and given a greater degree of input, concluding as follows:

> This objection runs into a number of factual walls. Firstly, the appraisals were obtained in this case and they were available to the creditors if they chose. The receivership order allowed the Receiver to share information with creditors subject to appropriate NDAs. At least some of the stakeholders did obtain the appraisals and signed NDAs. I cannot say that this was not available to others. Nobody in this case contacted the Receiver until the time came to begin the process of seeking court approval, which does not speak well for the level of interest they had in seeking to shape the process.

THE ISSUES

[23] The issues on this motion are: (1) whether the proposed appeal of the Order is as of right pursuant to s. 193(b);[1] and (2) alternatively, whether leave to appeal should be granted pursuant to s. 193(e). If the appeal is not as of right, and leave is not appropriate, the Receiver asks this court to approve the sale to the Purchaser, as provided for in the agreement of purchase and sale.

[24] Section 193 of the *BIA* provides, in relevant part:

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[1] While World Finance raised the potential application of s. 193(c) in its factum, it did not seek to rely on that subsection in oral argument. In any event, reliance on that subsection would not have been tenable given World Finance's emphasis on process-related errors: *2403177 Ontario Inc. v. Bending Lake Iron Group Ltd.*, 2016 ONCA 225, 396 D.L.R. (4th) 635, at para. 54.

> 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:
>
> […]
>
> (b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;
>
> […]
>
> (e) in any other case by leave of a judge of the Court of Appeal.

ANALYSIS

(1) Subsection 193(b) does not apply

[25] World Finance contends that it has the right to appeal the Order under s. 193(b). It claims that any order made in connection with its appeal of the Approval and Vesting Order related to the Birchmount Property will likely affect other cases of a similar nature relating to Approval and Vesting Orders made in the Comfort Capital bankruptcy.

[26] World Finance contends that although there are two separate bankruptcies involved, in substance the application to approve the sale of the five properties was only one bankruptcy proceeding within the meaning of s. 193(b). It notes that the Receiver brought the applications together before the same judge. Each application raised the same course of conduct by the Receiver. And one set of

reasons was provided. World Finance argues that it would be met with an issue estoppel argument if it raises the same issues in subsequent proceedings to approve vesting orders on other properties. It contends that s. 193(b) should be interpreted purposively, giving World Finance an appeal as of right so that it is not left, unfairly, without an avenue to challenge the Order.

[27] First, I do not agree that s. 193(b) should be interpreted in the expansive manner that World Finance submits. In *Downing Street Financial Inc. v. Harmony Village-Sheppard Inc.*, 2017 ONCA 611, 49 C.B.R. (6th) 173, at para. 20, Tulloch J.A. described the "clear direction in recent case law in favour of a narrow construal of the rights to appeal in ss. 193(a) to (d) of the *BIA*", citing *Re En Route Imports Inc.*, 2016 ONCA 247, 35 C.B.R. (6th) 1, at para. 5. This "narrow construal" is incompatible with World Finance's position, and there are good reasons for it.

[28] In *2403177 Ontario Inc. v. Bending Lake Iron Group Ltd.*, 2016 ONCA 225, 396 D.L.R. (4th) 635, at para. 49, Brown J.A. explained that initially the *BIA* provided only for appeals as of right. The inclusion in 1949 of a leave to appeal provision removed the need for a broad interpretive approach to ss. 193(a) to (d). More importantly, the appeal as of right provisions should be read harmoniously with the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, which

requires leave for all appeals from orders made under the statute.[2] Reading s. 193's appeal as of right subsections narrowly avoids disharmony between the two insolvency regimes.

[29] In *Bending Lake*, Brown J.A. explained at para. 32 that s. 193(b) applies where there is a real dispute that is likely to affect another case in the same bankruptcy proceedings. The Order that World Finance proposes to appeal was made in the instant Debtor's bankruptcy and pertains only to this bankruptcy proceeding. The fact that the outcome of the proposed appeal could affect cases arising out of the Comfort Capital bankruptcy is insufficient to give rise to an appeal as of right. There is no appeal as of right in this case under s. 193(b).

[30] Second, this outcome does not operate to unfairly deny World Finance an opportunity to challenge the Order that it says will likely affect other cases it will be involved in. This is because a party whose interest are likely to be affected in other case of a similar nature arising in other bankruptcy proceedings can move to protect those interests by seeking leave to appeal, where an appeal as of right is not available. Where leave is warranted in the circumstances, it will be granted.

[31] I turn, then, to World Finance's alternative position that leave to appeal should be granted under s. 193(e) in this case.

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[2] See also *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, at para. 24, where a majority of the Supreme Court held that the *BIA* and the *CCAA* should be read harmoniously to the extent possible.

(2) Leave to appeal should not be granted

[32] The granting of leave to appeal under s. 193(e) is discretionary and contextual. The test for leave described by Blair J.A. in *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONCA 282, 115 O.R. (3d) 617, at para. 29, was adopted by a panel of this court in *Impact Tool & Mould Inc. (Receiver of) v. Impact Tool & Mould Inc. (Trustee of)*, 2013 ONCA 697, at para. 3. The proposed appeal must:

> a) raise an issue that is of general importance to the practice in bankruptcy/insolvency matters or to the administration of justice as a whole, and is one that this [c]ourt should therefore consider and address;
>
> b) be *prima facie* meritorious; and
>
> c) [not] unduly hinder the progress of the bankruptcy/insolvency proceedings.

[33] As Doherty J.A. noted in *Ravelston Corp. (Re)*, [2005] O.J. No. 5351 (C.A.), 24 C.B.R. (5th) 256, at para. 28, the leave inquiry should begin with some consideration of the merits of the proposed appeal, for if the appeal cannot possibly succeed, "there is no point in granting leave to appeal regardless of how many other factors might support the granting of leave to appeal."

[34] World Finance argues that its proposed appeal is *prima facie* meritorious. It contends that the Receiver failed to consider World Finance's interests, and that the process used was unfair because the Receiver did not consult with

World Finance on the marketing process, or the price at which the Birchmount Property would be listed. It urges that Dunphy J. misapplied the *Soundair* principles in finding otherwise.

[35] Specifically, World Finance claims that Dunphy J. erred in law when finding that the Receiver had considered World Finance's interests by assuming that all parties had the same interest, namely, obtaining a higher sale price. It further submits that he erred in law in finding the process to have been fair by considering irrelevant or improper explanations for the Receiver's failure to consult with World Finance about the marketing process and listing price.

[36] In my view, World Finance's grounds of appeal are not legitimately arguable points. They do not present a realistic possibility of success and therefore lack *prima facie* merit.

[37] First, there is no reasonable prospect that fault could be found in Dunphy J.'s conclusion that, in seeking the highest and best price reasonably available, the Receiver was considering the shared interest of all of the parties. World Finance's argument that, as a fulcrum creditor, it had unique interests in the marketing strategy and list price that were not considered has no traction. Marketing strategy and list price are means to an end, namely, achieving the highest and best price reasonably available, the very thing that Dunphy J. considered.

[38] World Finance's claim that Dunphy J. considered irrelevant and improper explanations for the Receiver's failure to consult directly with World Finance about the marketing and listing price for the Birchmount Property is also without merit.

[39] World Finance has not presented any authority for the proposition that a receiver has a positive obligation to consult with subsequent mortgagees as to a particular sales process and the listing price.

[40] Indeed, the Appointment Order in this case expressly permits the Receiver to report to, meet with, and discuss with affected Persons "as the Receiver deems appropriate" and to share information subject to confidentiality terms. The Receiver had discretion under the order to proceed as it did.

[41] Moreover, even if a general duty to consult applied in this case, Dunphy J. was clearly entitled to come to the decision he did, for the reasons he expressed.

[42] As he pointed out, in this case there was confusion as to the secured creditors' true identities and who represented their interests. There were also fraud allegations at play, which explained why the Receiver was not more proactive in its dealings with certain creditors. Moreover, those creditors previously showed a low level of interest in seeking to shape the process. In these circumstances, Dunphy J. found that making the appraisals available to those creditors who chose to consult them was sufficient.

[43] None of these factors are irrelevant or improper considerations. Dunphy J. was entitled to consider them. As Blair J.A. pointed out in *Regal Constellation Hotel Ltd. (Re)* (2004), 71 O.R. (3d) 355 (C.A.), [2004] O.J. No. 2744, at para. 23, courts exercise considerable caution when reviewing a sale by a court-appointed receiver and will interfere only in special circumstances. Moreover, defence is owed to the decision Dunphy J. made: 22.

[44] Finally, I accept the Receiver's submission that World Finance's proposed appeal lacks merit for the simple reason that even if the Birchmount Property were to sell for the amount World Finance claims it could have achieved, World Finance would still receive nothing. World Finance's process-based complaint is therefore an idle appeal. There is no material wrong it can complain of.

[45] Even if World Finance's proposed appeal had *prima facie* merit, I still would have denied leave to appeal, as neither of the other two leave to appeal requirements are satisfied.

[46] World Finance's proposed appeal does not raise an issue that is of general importance to the practice in bankruptcy matters or to the administration of justice as a whole. It is a fact-specific dispute about the propriety of this particular sale transaction.

[47] In my view, granting leave to appeal would also unduly hinder the bankruptcy proceeding. If the sale was delayed, additional interest and costs

payable on the first mortgage would have continued to accrue, serving only to further denude the second mortgagee's position.

[48] Moreover, the agreement of purchase and sale provided specific timelines for the obtaining of court approval and for the closing of the sale. It permitted postponement of the closing date for only 60 days after the original closing date. The sale transaction was originally scheduled to close on June 11, 2018 and was postponed until June 14, 2018. If leave to appeal had been granted, the additional delay required for the disposition of the appeal could have resulted in the loss of this transaction.

[49] Accordingly, I denied leave to appeal pursuant to s. 193(e).

[50] I granted the Receiver's request to approve the sale under the agreement of purchase and sale because Dunphy J. found that the Receiver made efforts to obtain the best price and achieved the offer to purchase after considering the interests of all parties in a fair process that had integrity. Moreover, postponement of the sale would have created the prejudice described above.

DISPOSITION

[51] For these reasons, I granted the Receiver's motion. I declare that World Finance does not have an appeal as of right pursuant to s. 193(b) and hold that leave to appeal pursuant to s. 193(e) of the *BIA* should not be granted. The

Order approving the closing of the sale to the Purchaser on June 14, 2018 is also approved.

[52] Costs are assessed by a judge of the Superior Court of Justice, Commercial List in insolvency proceedings. I will not interfere with that judge's discretion to do so, and therefore will make no costs order relating to the costs claimed by the Receiver and B&M.

[53] Money Gate was not served with the motion but appeared and exercised its right of standing, as its interests were at stake. World Finance will pay costs, on a partial indemnity basis, to Money Gate in the amount of $2,000, inclusive of HST and disbursements.

[54] The Purchaser also requested nominal costs. It did not play an active role in the proceedings. In my view, a costs award in favour of the purchaser is not warranted so I decline to make one.

Released: June 25, 2018 ("D.M.P.")

"David M. Paciocco J.A."

7

COURT OF APPEAL FOR ONTARIO

CITATION: First National Financial GP Corporation v. Golden Dragon HO 10 Inc., 2019 ONCA 873
DATE: 20191105
DOCKET: M50969 (C67612)

Fairburn J.A. (Motion Judge)

BETWEEN

First National Financial GP Corporation

Applicant (Respondent)

and

Golden Dragon HO 10 Inc. and Golden Dragon HO 11 Inc.

Respondents (Appellants/Responding Parties)

David Preger and David Seifer, for the moving party, the receiver Deloitte Restructuring

Ian Matthews, for the Ministry of Municipal Affairs & Housing

Chad Kopach, for First National Financial GP Corporation

Karen Perron, for Royal United Investments

Martin Diegel, for the responding parties

Heard: November 4, 2019

REASONS FOR DECISION

A. OVERVIEW

[1] This motion for declaratory relief was heard yesterday. I granted that relief with written reasons to follow. These are my reasons.

[2] On September 22, 2017, Deloitte Restructuring Inc. was appointed as an interim receiver under s. 47 of the *Bankruptcy and Insolvency Act,* R.S.C., 1985, c. B-3*.* The order related to a two-building apartment complex at 345 and 347 Barber Street, Ottawa. Of the 110 units in the buildings, 30 units are used for affordable housing pursuant to agreements with the City of Ottawa and the Ontario Ministry of Municipal Affairs and Housing.

[3] Those properties are the subject of five mortgages extended by three mortgagees: (1) First National Financial GP Corporation (three mortgages); (2) Liahona Mortgage Investment Corp; and (3) the City of Ottawa and Ministry of Municipal Affairs and Housing. The total value of the mortgages exceeds $15,000,000.

[4] The receiver's powers were expanded on May 21, 2019. At that time, the motion judge issued a receiver and manager order which included an approved marketing and sale process for the properties. The receiver was authorized pursuant to that order to enter into a listing agreement for the properties. That process was followed and, ultimately, an agreement of purchase and sale ("APS") was entered into on August 27, 2019. The purchase was conditional on only one matter. That condition was waived on September 26, 2019.

[5] The APS requires that an approval and vesting order be granted within 21 days of the purchaser's waiver and that the transaction close within 10 days

following the issuance of that order. It further provides that the receiver may postpone the closing date for up to 60 days after the original closing date.

[6] The appellants, who are the debtors in this case, opposed the issuance of the approval and vesting order on the basis that the purchase price under the APS does not represent fair market value. In support of that claim, the debtors pointed to another “higher” offer. However, they admit that the “higher” offer was late, having been delivered to the receiver on September 19, 2019. Indeed, the “late offer” was provided after:

(i) the call for offers had closed on July 30, 2019,

(ii) the qualified offers had been identified and the offerors had been invited to resubmit their offers with improved terms by August 7, 2019,

(iii) the qualified offerors had complied with the August 7, 2019 deadline,

(iv) the best offer had been identified, and

(v) the APS had been signed by the purchaser and receiver on August 27, 2019.

[7] After the purchaser waived the sole condition upon which the APS rested and delivered written directions to the receiver, directing that title to the properties be placed in the names of certain designees upon closing, the late offer was replaced by an “amended late offer”. The amended late offer was

delivered to the receiver on October 4, 2019, which was the day after the original return date for the receiver's motion for the approval and vesting order.

[8] The receiver did not consider either of the late offers to be credible ones. I will later explain why I agree with that position.

[9] The motion judge granted the approval and vesting order on the same day that the motion was heard, October 11, 2019, with written reasons following just over a week later.

[10] The debtors have filed a notice of appeal seeking to set aside the approval and vesting order. They signaled their intention to do so on October 17, 2019, right after the receiver informed them that the closing date was being moved to October 18, 2019. The closing date was moved to accommodate a religious holiday that conflicted with the original closing date.

[11] A new closing date was then chosen to accommodate having this motion heard. I was informed during oral submissions that the new closing date is November 6, 2019. Accordingly, there is urgency around deciding this matter.

[12] The receiver seeks directions to ensure that the closing proceeds on schedule. The receiver seeks the following relief:

(i) a declaration that the appeal from the approval and vesting order dated October 11, 2019 is governed by the *BIA*;

(ii) a declaration that the appellants do not have an automatic right of appeal under ss. 193(a) to (d) of the *BIA* (meaning that they must seek leave to appeal pursuant to s. 193(e) of the *BIA*); and

(iii) a declaration that the approval and vesting order is not automatically stayed pursuant to s. 195 of the *BIA* and, if it is stayed pursuant to that provision, an order cancelling the stay.

B. ANALYSIS

(1) Is the appeal governed by the *BIA*?

[13] The appellants agree that the appeal is governed by the *BIA*. In light of that concession, there is no need to address this issue.

(2) Do the appellants have a right to appeal under ss. 193(a) to (d) of the *BIA* or must they seek leave to appeal under s. 193(e) of the *BIA*?

[14] The appellants contend that their right to appeal lies under s. 193(c) of the *BIA*. Accordingly, I will only address the arguments advanced in respect of that provision. Section 193(c) reads:

> 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:
>
> …
>
> (c) if the property involved in the appeal exceeds in value ten thousand dollars.

[15] In the event of an appeal as of right under s. 193(c) of the *BIA,* a stay of the order appealed from is automatically triggered by virtue of s. 195 of the *BIA*. Therefore, in light of the "broad nature of the stay imposed by s. 195 of the *BIA*",

the right to appeal under s. 193(c) (as opposed to seeking leave to appeal under s. 193(e)) has been narrowly construed: *Enroute Imports Inc., Re.,* 2016 ONCA 247, 35 C.B.R. (6th) 1, at para. 5. Accordingly, s. 193(c) has been granted a restrictive interpretation, one that accords with the "needs of modern, 'real-time' insolvency litigation": *2403177 Ontario Inc. v. Bending Lake Iron Group Limited*, 2016 ONCA 225, 347 O.A.C. 226, at para. 53.

[16] In keeping with that narrow interpretation, the total value of the property that forms the subject of the impugned order does not inform whether "the property involved in the appeal exceeds in value ten thousand dollars." As Blair J.A. held in *Business Development Bank of Canada v. Pine Tree Resorts, Inc., et al.,* 2013 ONCA 282, 115 O.R. (3d) 617, at para. 17, to allow an appeal as of right under s. 193(c) of the *BIA* every time property value exceeds $10,000 would be to permit an appeal as of right in almost every case.

[17] To bring some meaningful limit to the parameters of s. 193(c), the court must instead focus upon the value of the "loss" that results from the impugned order: *Bending Lake*, at para. 64. The evidentiary record must be considered to determine the question of "loss". As Brown J.A. held in *Bending Lake,* at para. 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).

[18] When determining the amount of loss in a situation like this case, the court looks beyond the simple question of whether a higher price for the subject property could be obtained. In *Downing Street Financial Inc. v. Harmony Village-Sheppard Inc.*, 2017 ONCA 611, 49 C.B.R. (6th) 173, a case that is very similar to this one, Tulloch J.A. emphasized the fact-specific nature of the inquiry into potential loss and the need to determine loss by way of a "substantive assessment of competing offers" and not a "mere comparison of formal prices": *Downing Street,* at para. 28.

[19] The appellants argue that there is a clear loss in excess of $10,000 arising from the approval and vesting order in this case. The appellants say that the purchase price under the APS is $3.5 million below the late offer and $2 million below the amended late offer. They say that this proves that the purchase price, as encapsulated under the APS, and as approved by the impugned order, does not reflect fair market value.

[20] They go on to disavow any suggestion that they are simply comparing prices. Instead, they claim that the differential between the current purchase amount and the late offers should give the court pause about the actual value of

the subject properties. The appellants argue that the late and amended late offers should be considered against the backdrop of the vacancy rate for the building, which lies at about 8 to 10 percent and which they argue is well above market average. They also submit that the value of the buildings should be considered in relation to the value of the units on a per unit basis. That comparison is said to yield a fair market value well exceeding the current purchase price. The appellants also claim that there was insufficient marketing done on the property and that it was not properly exposed to the market, including the failure to list it on MLS.

[21] In all of these circumstances, the appellants say that the court should be satisfied that the loss exceeds $10,000 and that they come within s. 193(c) of the *BIA*.

[22] I disagree.

[23] I start with the late and amended late offers. I agree with the receiver that neither of those offers were credible and cannot be used to set the benchmark for the fair market value of the subject properties. I say this for a number of reasons:

(i) I note that the purchaser under the late offer is the director of a company that registered a collateral third mortgage over one of the properties five days after the original appointment order was made.

That collateral third mortgage was later discharged and deleted by the court.

(ii) The terms of the late offer are not credible, including that:

(a) The deposit of $50,000 was entirely out of proportion to the purchase price offered;

(b) the offer was conditional on the purchaser obtaining a mortgage to finance the purchase;

(c) the closing date was into December; and

(d) the purchaser wanted the vendor to obtain estoppel certificates from all tenants within the complex.

[24] Both the proposed purchaser and the terms of the late offer render it highly suspicious, full of risk, uncertain, and difficult for the vendor to comply with (particularly the insistence upon estoppel certificates). The offer was entirely dependent on financing and there is no evidence that the financing was even realistic. This is to be contrasted with the solid APS as approved by the court, one that rested on a single condition that was waived early in the process. I agree with the receiver that, unlike the actual APS, the late offer was not a serious or credible offer.

[25] In my view, the revised late offer was no better. The purchase price went down by $1.5 million, and the deposit rose by $50,000 to $100,000 in total. That deposit was still out of proportion to the actual purchase price being offered. The closing date was moved up by a couple of weeks, but the offer had become entirely conditional upon the purchaser convincing First National to allow the

purchaser to assume the First National mortgages over the property. First National is not prepared to entertain that request. Accordingly, and importantly, even if the late amended offer had been a *bona fide* offer (which I do not accept), it would not have survived the test of time.

[26] In my view, the late offers were not credible and should not be used as a benchmark for "loss" under s. 193(c).

[27] Moreover, I do not agree with the appellants' suggestion that the motion judge erred by failing to take into account the "per unit" price to calculate the value of the property and determine whether fair market value had been achieved. The motion judge specifically rejected the appellants' evidence on that point. He was entitled to do so and his conclusion attracts deference by this court.

[28] Nor did the motion judge accept the appellants' criticism of the receiver's failure to have the property marketed on MLS. Indeed, there was evidence before the motion judge, which he accepted, that marketing a property of that value through MLS is not a suitable means to attract buyers. In fact, the appellants are known to have marketed similar large-scale properties in the past and foregone any use of MLS as a marketing tool. Again, deference applies to the motion judge's factual determination on this point.

[29] As for the vacancy rate, I do not accept the appellants' submission that it impacts the amount of loss. The appellants say that the motion judge erred by not considering the vacancy rate, for which they say the receiver is responsible, in determining the fair market value. The appellants argue that, had the vacancy rate been at the market standard, the building would have attracted a higher purchase price.

[30] I do not accept this submission. Although a higher occupancy rate may have attracted a higher price, the fact is that the occupancy rate for the buildings was vastly improved under the receivership, going from about 60% occupancy when the receiver originally took over, to about 90% or more. Even if that occupancy rate was still below the average occupancy rate for that area in Ottawa, the receiver had made great strides in achieving an increase in the occupancy rate which no doubt assisted in increasing the market value for the buildings. There is no evidence to support the suggestion that the receiver could have achieved an even higher occupancy rate.

[31] The fact is that the properties were appraised. While the purchase price as reflected in the APS is below the appraised value, this court has been provided with information explaining the gap. That information was filed in this court on the consent of the parties. Included in that information is reference to the purchaser's estimated capital expenditure upon closure, which will well exceed the differential between the purchase price and the average appraised value of the properties.

In these circumstances, it is unsurprising that the motion judge granted the approval and vesting order.

[32] While the appellants also maintain that the real estate market was gaining in strength after the appraisals were done, and they do not, therefore, reflect the true market value of the buildings, I see nothing in the record to support that submission.

[33] In my view, the granting of the approval and vesting order did not result in a loss of more than $10,000 because there is no credible evidence to support the position that the receiver could have obtained a higher sales price for the debtors' property. Nor is there credible evidence that, when looked at on a more substantive and general level, the receiver could have obtained a better offer.

[34] Accordingly, the appeal is not governed by s. 193(c) of the *BIA* and the appellants must seek leave to appeal under s. 193(e) of the *BIA*.

[35] Although the appellants ask that leave to appeal be granted as a form of relief in their factum in response to this motion, they have not sought leave to appeal to this court under s. 193(e). No such application has been filed and no material in support of that application has been given. There is simply a notice of appeal.

[36] In light of the absence of a leave to appeal application, I am not inclined to determine the issue of leave.

[37] For the reasons that follow, though, even if the appellants had a right to appeal or were granted leave to appeal, triggering a s. 195 *BIA* stay of the approval and vesting order, I would cancel that stay. Accordingly, and in the alternative, I will address the issue of a stay.

(3) Does section 195 of the *BIA* apply and, if so, should the stay be cancelled?

[38] Among other things, s. 195 of the *BIA* allows for an automatic stay where there is an appeal from an approval and vesting order unless the stay is cancelled for a reason deemed proper. Section 195 of the *BIA* reads:

> 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. [Emphasis added.]

[39] Even if there was a properly constituted appeal before this court, I would cancel the stay so that the transaction can be completed by tomorrow.

[40] In doing so, I emphasize two points: (a) the appeal is lacking in merit; and (b) the relative prejudice to the parties arising from a stay of the approval and vesting order.

[41] In my view, the grounds do not raise a serious issue to be appealed. The notice of appeal refers to only very general grounds, which are largely complaints

about findings of fact and appear to be based upon a desire to factually relitigate the matter that was already determined by the motion judge. Accordingly, even if the appeal was properly constituted, I am not satisfied that there is any substance to the appeal.

[42] The fact that the appeal is lacking in merit combines with the prejudice that would arise and costs that would be accumulated if a stay under s. 195 (assuming s. 195 is invoked) were allowed to continue. The appellants (debtors) have no money. They are broke. Importantly, therefore, any costs arising from the continued operation of the buildings, and any risk associated with those buildings, comes out of the pockets of the creditors. The monthly costs are exorbitant. For example:

(i) $60,000 monthly interest is accruing under the mortgages registered on title;

(ii) $22,000 per month insurance costs are accruing;

(iii) utility costs are rising with the winter coming; and

(iv) the receiver's costs continue to accumulate.

[43] Moreover, I agree with the receiver that if this transaction is lost, there will be "a serious chilling effect on the market" and a "risk that another buyer would not assume the affordable housing agreement with the City of Ottawa and the Province. That agreement is critical to many people residing in that affordable housing.

[44] In my view, the integrity of the sale process, combined with the costs currently being incurred, and the risks associated with this transaction not being completed, pitted against what I determine to be a very weak appeal, all favour the lifting of any stay that may be operative under s. 195 of the *BIA*.

C. CONCLUSION

[45] I conclude that this appeal is not brought under s. 193(c) of the *BIA* and, therefore, leave to appeal must be sought. Leave to appeal has not been properly sought. Even if the appeal is properly constituted under s. 193(c) or leave should be granted under s. 193(e), pursuant to the powers under s. 195 of the *BIA*, I would cancel any stay of the approval and vesting order.

"Fairburn J.A."

8

COURT OF APPEAL FOR ONTARIO

CITATION: Downing Street Financial Inc. v. Harmony Village-Sheppard Inc., 2017 ONCA 611
DATE: 20170720
DOCKET: M48044 (C63937)

Tulloch J.A. (In Chambers)

BETWEEN

Downing Street Financial Inc., in Trust

Applicant (Respondent in Appeal)

and

Harmony Village-Sheppard Inc., as General Partner of Harmony Village-Sheppard LP, and City Core Developments Inc.

Respondents (Respondents in Appeal)

David P. Preger and Michael J. Brzezinski, for the moving party, Court-appointed Receiver, Rosen Goldberg Inc.

Barbara Green, for the responding parties, Fortress Shepard (2016) Inc., Fortress Real Developments and Derek Sorrenti

Raymond M. Slattery, for the responding party, Purchasers

Mitchell Wine, for the responding party, Jozef Zubrzycki

Sean Zweig, for the responding party, the Successful Bidders

David T. Ullmann, for the responding party, Downing Street Financial Inc., in Trust

Heard: June 29, 2017

Tulloch JA:

A. INTRODUCTION

[1] The moving party on this motion was Rosen Goldberg Inc., the receiver in the underlying insolvency proceedings (the "Receiver"). The Debtor is Harmony Village-Sheppard LP. The responding parties on the motion were Fortress Shepard (2016) Inc., Fortress Real Developments and Derek Sorrenti (collectively, "Fortress").

[2] The Receiver's purpose in bringing this motion was to defeat Fortress' appeal from a court order approving an asset sale (the "Approval Order") and thereby to secure that sale, for which the closing date was June 30, 2017. Fortress had filed a Notice of Appeal in this court, dated June 21, 2017, in which it had sought to appeal the Approval Order, asserting that this court had jurisdiction solely based on s. 193(c) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*").

[3] I heard the motion on June 29, 2017, and, given its urgency, I granted the motion orally and notified the parties that written reasons would follow. These are my written reasons.

B. BACKGROUND

(1) The Property and the Stakeholders

[4] Before its insolvency proceedings, the Debtor had been developing some real estate in Toronto (the "Property") as a residential condominium project,

marketed to seniors. At the time of the Receiver's appointment, the Debtor had pre-sold 223 units in this project to various purchasers (the "Unit Purchasers"), although construction had not yet begun.

[5] The Property is subject to three encumbrances. Downing Street Financial Inc. ("DSFI") holds the first in priority, securing payment of approximately $20 million. The second in priority, held by JYR Capital Mortgage Investment Corp. and Li Ruixia as tenants in common, secures payment of approximately $1,395,000. The third encumbrance is a syndicated mortgage involving 542 investors. According to Fortress, Sorrenti and a related company are the trustees of this syndicated mortgage.

(2) The Approval Order

[6] The Superior Court judge who reviewed the sale (the "motions judge") made the Approval Order on June 19, 2017, and issued a brief endorsement on the same date. The Approval Order, granted in response to a motion by the Receiver, approved the Receiver's sale of the Property to Pinnacle International One Lands Inc. ("Pinnacle").

[7] The sale to Pinnacle was the culmination of a court-approved sale process under the Receiver's supervision in which Pinnacle and Fortress had competed for the Property.

(3) The "Stalking Horse Bid"

[8] Pursuant to the Receiver's appointment order, dated January 20, 2017, the Receiver conducted a "stalking horse" sale process, in which a sale agreement between the Receiver and Fortress would constitute the "stalking horse bid" (the "Stalking Horse Bid"). The Stalking Horse Bid would have required Fortress to assume the Debtor's agreements of purchase and sale with the Unit Purchasers. The Stalking Horse Bid also was a credit bid. On closing, the first mortgagee, DSFI, would have been paid in full, while the purchaser would have assumed the existing debt secured under the second and third charges.

[9] The Receiver and Fortress each provided different explanations for why Fortress repudiated the Stalking Horse Bid. However, the parties agreed in their submissions that, beyond the deal discussed in the next paragraph, the "stalking horse" process did not attract any offers for the Property.

[10] According to Fortress, Fortress always had intended to find a developer to build the condo project, and it ultimately had negotiated a sale of the Property to Pinnacle (the "Pinnacle-Fortress APS"). The Pinnacle-Fortress APS required Pinnacle to assume the terms of the Stalking Horse Bid. Fortress advised the Receiver of its deal with Pinnacle, and the Receiver acquiesced on the condition that the sale price of the Pinnacle-Fortress APS would not exceed the Stalking

Horse Bid's sale price, so that Fortress' intermediary role would not cost the Debtor's estate any value.

[11] However, in Fortress' narrative, the Stalking Horse Bid failed because, on April 4, 2017, only three days before the court-approval hearing for the Pinnacle-Fortress APS, Pinnacle informed Fortress that it no longer was willing to assume the contracts with the Unit Purchasers. Fortress informed the Receiver of this problem, and the Receiver refused to save the deal by amending the requirements of the Stalking Horse Bid.

[12] In the Receiver's version, Fortress told the Receiver on April 6, 2017, the day before the hearing to approve the Pinnacle-Fortress APS, that Fortress would not complete the purchase of the Property pursuant to the Stalking Horse Bid because Fortress no longer was willing to assume the Unit Purchasers' contracts.

(4) Subsequent Offers and Negotiations

[13] According to the Receiver, its subsequent efforts produced three offers for the Property. One of them, from an offeror whom the Receiver does not identify, which involved a price that the Receiver found unacceptably low. The other two offers were from Fortress and from Pinnacle, respectively. Fortress' offer, dated April 13, 2017, involved the same price as the Stalking Horse Bid and similar financial terms. The important differences were that Fortress would not assume

the contracts with the Unit Purchasers, but that Fortress' deposit would be slightly higher. Pinnacle communicated its offer to the Receiver several days later. The Receiver accepted Pinnacle's offer on May 2, 2017, and informed Fortress of this acceptance on May 3, 2017.

[14] The Receiver asserts that it had legitimate concerns regarding Fortress' financial capacity. The Receiver's motion record includes some e-mail correspondence raising such concerns. The correspondence suggests that Fortress was unwilling to provide a deposit large enough to satisfy the Receiver.

(5) Fortress' Opposition to Pinnacle's Offer

[15] Fortress advised the Receiver on April 28, 2017 that it would oppose any deal between the Receiver and Pinnacle. Fortress alleged that Pinnacle had improperly exploited its earlier negotiations with Fortress to develop its own direct offer to the Receiver.

[16] On June 16, 2017, several days before the scheduled hearing of the Receiver's motion for approval of Pinnacle's bid, Fortress submitted to the Receiver a new, third, offer to purchase the Property. This offer relied on a financing commitment from another party, MarshallZehr, to cover the cash component of Fortress' offer, all closing costs, and the costs of the financing. During the hearing of this motion, counsel for Fortress conceded that the Receiver had correctly identified several conditions of the MarshallZehr financing

that would limit Fortress' ability to obtain additional financing from other parties. However, counsel for Fortress asserted that such formal conditions would not be a practical obstacle to the Fortress offer's feasibility.

C. FORTRESS' APPEAL

[17] After the granting of the Approval Order on June 19, 2017, Fortress filed a Notice of Appeal in this court, dated June 21, 2017. The relief that Fortress seeks from this court is the following: an order setting aside the Approval Order, and an order directing the Receiver to accept Fortress' June 16, 2017 offer that would also serve as an approval and vesting order for a sale on that offer's terms.

[18] Based on the Notice of Appeal and Fortress' submissions on this motion, the essence of Fortress' planned argument on appeal would seem to be that the motions judge did not apply the right legal test when making the Approval Order; his brief endorsement said that he approved Pinnacle's bid because it was "the best offer to purchase the Property from the point of view of the majority of stakeholders." In oral argument for this motion, counsel for Fortress suggested that this language in the motions judge's endorsement demonstrates that the motions judge did not correctly apply the relevant principles from *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (C.A.).

[19] The Notice of Appeal relies only on s. 193(c) of the *BIA* in support of this court's jurisdiction to hear the Appeal. Fortress explicitly disclaims reliance on s.

193(e), the provision for leave to appeal, by asserting in the Notice that it does not require leave to appeal. Rule 31 of the *Bankruptcy and Insolvency General Rules*, C.R.C., c. 368, precludes reliance by an appellant on s. 193(e) of the *BIA* when that appellant's Notice of Appeal does not include the relevant application for leave to appeal. Therefore, jurisdiction pursuant to s. 193(e) is unavailable in this case.

[20] Fortress chose to rely exclusively on s. 193(c) despite the clear direction in recent case law in favour of narrow construal of the rights to appeal in ss. 193(a) to (d) of the *BIA*: *Re Enroute Imports Inc.*, 2016 ONCA 247, 35 C.B.R. (6th) 1, at para. 5. As Brown J.A. explained in his chambers decision in *2403177 Ontario Inc. v. Bending Lake Iron Group Ltd.*, 2016 ONCA 225, 396 D.L.R. (4th) 365, at paras. 50-53, these automatic rights of appeal create disharmony between the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*") and the *BIA* because s. 13 of the *CCAA* imposes a leave requirement for all appeals from orders made under that statute. Therefore, the goal of regulatory harmony between these two major insolvency statutes favours narrow construal of the *BIA*'s automatic rights of appeal. This jurisprudential context, along with Fortress' strategic decision not to seek leave to appeal, informed my decision on s. 193(c).

D. ANALYSIS

(1) Subsection 193(c) of the *BIA*

[21] Subsection 193(c) of the *BIA* provides a right to appeal to the Court of Appeal "if the property involved in the appeal exceeds in value ten thousand dollars". As Blair J.A., in chambers, noted in *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONCA 282, 115 O.R. (3d) 617, at para. 17, a narrow construal of "property involved in the appeal" is necessary because otherwise the low quantum of this automatic right to appeal would make s. 193(e) practically redundant.

[22] In *Bending Lake*, at para. 53, Brown J.A., summarizing prior case law, identified three kinds of order from which s. 193(c) would not grant a right to appeal: (i) orders that are procedural in nature; (ii) orders that do not bring into play the value of the debtor's property; and (iii) orders that do not result in a loss. I will consider only the third category because doing so will suffice to resolve the s. 193(c) analysis.

(2) Does the Approval Order "Result in a Loss?"

[23] As Brown J.A. explained at para. 61 of *Bending Lake*, for an order to "result in a loss" in the relevant sense, "the order in question must contain some element of a final determination of the economic interests of a claimant in the debtor."

[24] Fortress is correct that, in *Bending Lake*, Brown J.A. relied on the fact that there was no competing bid for the disputed property, as well as the fact that there was an absence of any valuation of the debtor's estate in the record before the motions judge: *Bending Lake*, at paras. 63-66. In contrast, in this case, there were competing bids with different purchase prices.

[25] Nevertheless, I do not accept that the Approval Order "resulted in a loss" in the relevant sense.

[26] Although some of the factors on which Brown J.A. relied do not apply in this case, these distinctions do not defeat the broader reasoning of *Bending Lake*. I quote from para. 64 of *Bending Lake* at length:

> 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 [appellant] 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 [appellant] 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. [Emphasis added.]

[27] I focus here on the requirement for "some basis in the evidentiary record" to support an assertion that the impugned sale would cause a loss to the Debtor's estate, as opposed to a "bald assertion" to that effect. In its submissions before me, the primary basis for Fortress' assertion that the impugned order might "result in a loss" is the fact that the nominal purchase price in Fortress' offer was higher than the nominal purchase price in Pinnacle's offer.

[28] The passage that I have quoted from *Bending Lake* casts the issue as whether "the Receiver could have obtained a higher sales price for the Debtor's property." However, given the diversity among financing structures for commercial sale agreements, I do not think that I betray the spirit of Brown J.A.'s reasons by reading his comments to contemplate a more substantive assessment of competing offers than a mere comparison of formal prices.

[29] On this motion, Pinnacle presented compelling evidence to suggest that the practical value of its offer exceeded that of Fortress' offer.

[30] First, the deposit in Pinnacle's offer was much higher than the deposit in Fortress' offer. This factor gains salience from the correspondence that demonstrates that, during the sale process, Fortress resisted the Receiver's demands to increase the deposit in its offer substantially.

[31] Second, the Pinnacle offer was entirely in cash, whereas only approximately 40% of the Fortress offer was in cash. Fortress planned to fund

the rest of its offer through credit. This factor gains salience from the structure of the Debtor's pre-existing secured debt. Fortress explains in its submissions that Fortress (more specifically, Sorrenti), along with a related company, is trustee for the 542 investors who collectively hold the beneficial interest in the Debtor's third encumbrance, a syndicated mortgage. Fortress further submits that its ordinary business is in "real estate consulting and arranging financing for real estate development projects". Fortress' submissions before me did not assuage the concern that the effect of the Fortress offer, if accepted, would have been to allow Fortress to preserve its business interest in the Property as a development project at the risk of providing less recovery for other creditors, including the investors for whom Sorrenti acts as trustee. Indeed, Fortress explained in its submissions that it entered into a Joint Venture Agreement with another firm in the hope, based on "anticipated profits", of providing full repayment of the second and third mortgages on the Property.

[32] Third, Fortress conceded in its submissions that its offer would not have involved assuming the Unit Purchasers' contracts. Instead, it promised a "friends and family VIP event" for the Unit Purchasers and opportunities for first access and special pricing. This concession undermines Fortress' assertion that the Stalking Horse Bid would have succeeded had it not been for Pinnacle's refusal to assume the Unit Purchasers' contracts.

[33] Fourth, the Receiver's Report states that the highest-ranking secured creditor, DSFI, supported Pinnacle's bid over Fortress', despite the fact that both offers purported to provide full recovery to DSFI.

[34] Fifth, Fortress does not dispute the Receiver's assertions that the "stalking horse" process attracted no bidders other than Fortress and Pinnacle and that the Receiver's subsequent efforts procured only one other offeror, who offered a price that was unacceptably low and that caused concern that the market's valuation of the Property might be much lower than Pinnacle's.

[35] Although Fortress' argument for the application of s. 193(c) is slightly more plausible than that of the appellant in *Bending Lake*, Fortress has not demonstrated a sufficient basis in the record that was before the motions judge for me to conclude that there is an arguable case that the Receiver could have obtained a better deal than Pinnacle's.

[36] Therefore, s. 193(c) did not grant a right of appeal to Fortress because the impugned order did not "result in a loss or gain" in the relevant sense.

(3) Leave to Appeal (s. 193(e))

[37] As I noted earlier in these reasons, Fortress did not meet the procedural requirements for consideration of an application for leave to appeal. Therefore, what follows is *obiter dicta*. However, since both parties made alternative submissions on s. 193(e), I will address the issue briefly.

[38] Although leave to appeal pursuant to s. 193(e) is discretionary and "must be exercised in a flexible and contextual way", the prevailing considerations are whether the proposed appeal :

> (i) raises an issue of general importance to the practice in insolvency matters or the administration of justice as a whole;
>
> (ii) Is it *prima facie* meritorious; and
>
> (iii) Would it unduly hinder the progress of the insolvency proceedings: *Enroute*, at para. 7.

[39] I will address the second criterion, i.e., the *prima facie* merit, first. As I mentioned above, the Notice of Appeal and Fortress' submissions on this motion suggested that the primary ground for Fortress' appeal was that the motions judge applied the law incorrectly when he approved Pinnacle's bid because it was "the best offer to purchase the Property from the point of view of the majority of stakeholders."

[40] The allegation was that the motions judge misapplied the criteria from *Soundair* for judicial review of a receiver's sale of property. *Soundair*, at p. 6, identifies four duties of a judge reviewing a receiver's sale. Those duties are to:

> (1) "consider whether the receiver has made sufficient effort to get the best price and has not acted improvidently";
>
> (2) "consider the interests of all parties";
>
> (3) "consider the efficacy and integrity of the process by which offers are obtained"; and

> (4) "consider whether there has been unfairness in the working out of the process." [Emphasis added.]

Furthermore, at p. 7, *Soundair* prescribes a deferential standard of review in this court.

[41] Given this framework and the facts of the sale process that I summarized above, the argument that the motions judge misinterpreted or misapplied the *Soundair* test is implausible. The motions judge's comment that the Pinnacle offer was best "from the point of view of the majority of stakeholders" does not indicate a failure to have considered Fortress' interests. Therefore, the appeal was *prima facie* meritless.

[42] I will address the other factors more briefly. This appeal did not raise any issue of general importance to insolvency practice or the broader administration of justice; it was a fact-specific dispute about the propriety of a receiver's sale. Additionally, given the difficulty that the Receiver had faced in finding prospective purchasers other than Pinnacle and Fortress, a hearing of the appeal probably would have unduly hindered the Debtor's insolvency proceedings.

E. DISPOSITION

[43] These are my reasons for my granting of the Receiver's motion on June 29, 2017. The Receiver did not seek an order for costs of the motion.

Released: MT JUL 20 2017

"M. Tulloch J.A."

9

COURT OF APPEAL FOR ONTARIO

CITATION: IceGen Inc. (Re), 2016 ONCA 902
DATE: 20161128
DOCKET: M46307 (C61444)

Gillese J.A. (In Chambers)

In the Matter of the Bankruptcy of IceGen Inc. of the City of Markham, in the Province of Ontario

and

In the Matter of the Bankruptcy of 1807983 Ontario Limited of the City of Markham, in the Province of Ontario

George Benchetrit, for the moving party KSV Kofman Inc., in its capacity as Trustee in the Consolidated Bankruptcy of IceGen Inc. and 1807983 Ontario Limited

Catherine Francis, for the responding party Dr. Lionel Gerber

Tony Reyes, for the responding party Rushlade Investments Limited

Heard: April 11, 2016

ENDORSEMENT

[1] The trustee in the consolidated bankruptcy Estate of IceGen Inc. and 1807983 Ontario Limited (the "Trustee") moves for an order requiring Dr. Lionel Gerber to obtain leave to appeal the order of Penny J. dated December 2, 2015, pursuant to s. 193(e) of the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3 (the "*BIA*"). Dr. Gerber opposes the motion on the basis that leave is not

required pursuant to s. 193(c) of the *BIA* which provides there is a right to appeal "if the property involved in the appeal exceeds in value ten thousand dollars."

[2] In my view, this court's recent decision in *2403177 Ontario Inc. v. Bending Lake Iron Group Limited*, 2016 ONCA 225, 35 C.B.R. (6th) 102, is a full answer to Dr. Gerber's objections to the motion.

[3] In *Bending Lake*, at para. 53, Justice Brown states that 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. The Penny Order approved the auction process recommended by the Trustee. Dr. Gerber's complaints relate to the process leading to the Penny Order and to the auction process. The Penny Order is procedural in nature.

[4] In *Bending Lake*, Justice Brown found that the order approving the sale of the debtor's assets and vesting title in the purchaser marked the final step in the receiver's monetization of the debtor's assets and so did not bring into play the value of the debtor's property. The Penny Order contains the same wording as that considered by Justice Brown in *Bending Lake*. Therefore, the Penny Order did not "put into play" the value of the debtor's property.

[5] For the same reason, the Penny Order did not result in a gain or loss. The wording of the Penny Order is identical to that in *Bending Lake* for the purpose of

this analysis. It did not determine the entitlement of any party with an economic interest in the debtor to the sale proceeds.

[6] A major plank in Dr. Gerber's submissions relates to the question of the return of his deposit in the first auction. Counsel for Dr. Gerber contends that the Penny Order has the effect of barring the return of that deposit. (The deposit was for almost $500,000.)

[7] I do not accept this submission. There is nothing in the Penny Order to that effect. Furthermore, the reasons given by Justice Penny for the order do not say that. The reasons, at p. 5, identify two main issues, the first of which is whether "additional" deposits would have to be tendered. Read in context, it is clear that Penny J. was considering whether a new deposit would be required as a condition of bidding. Indeed, shortly below that on p. 5 of the reasons, Penny J. states:

> Both parties paid deposits previously. Without in any way prejudicing the outcome, both parties arguably defaulted on their obligations during the first auction.

[8] The Trustee submits that in these two sentences, Penny J. was expressly recognizing that the issue of entitlement to the return of the first deposits was a matter to be determined, but not on the motion or by the court at that time.

[9] I agree. Indeed, para. 82 of the Responding Party's factum essentially concedes this point, as it says that unless the Penny Order is reversed, Dr.

Gerber will be unable to obtain the return of his deposit without "lengthy and messy litigation with the Estate."

[10] Accordingly, I have concluded that the Penny Order does not fall within s. 193(c) of the *BIA* and Dr. Gerber requires leave to appeal the Penny Order. Dr. Gerber has asked that leave be sought from the panel scheduled to hear the appeal on June 9, 2016. Given that the appeal is scheduled to be heard in less than two months and as the materials necessary to argue the leave motion will duplicate much that has already been done by Dr. Gerber in preparation for the appeal and that must be done by the Trustee in responding on the leave motion, I accept Dr. Gerber's submission. Dr. Gerber may seek leave to appeal from the panel on June 9, 2016. If the panel sees fit to grant leave to appeal, the appeal shall also be heard that day.

[11] The parties should consider the time they have been allotted on June 9. If the time appears insufficient to argue both the leave motion and the appeal, they should contact Court of Appeal staff to seek additional time.

[12] Costs of the motion are reserved to the panel hearing the leave motion.

"E.E. Gillese J.A."

10

COURT OF APPEAL FOR ONTARIO

CITATION: Royal Bank of Canada v. Bodanis, 2020 ONCA 185
DATE: 20200306
DOCKET: M51328 (C67467)
M51356 (C67464)

Nordheimer J.A. (Motions Judge)

BETWEEN

Royal Bank of Canada

Moving Party
(Respondent)

and

David Bodanis

Responding Party
(Appellant)

AND BETWEEN

Royal Bank of Canada

Moving Party
(Respondent)

and

Irenka Bodanis

Responding Party
(Appellant)

Rachel Moses, for the moving party

Scott Rosen, for the responding parties

Heard: March 2, 2020

REASONS FOR DECISION

[1] There are companion motions in these two bankruptcy proceedings that seek directions. The moving party asserts that the appellants in these matters do not have an appeal as of right but rather must seek leave to appeal. In the alternative, the moving party says that the automatic stay that would result from an appeal as of right ought to be cancelled.

[2] Both appellants owe monies to the moving party and others pursuant to various judgments and costs awards totalling in the hundreds of thousands of dollars. They have owed these monies, in some cases, for many years. In November 2018, the moving party commenced bankruptcy applications against the appellants. A trial was held on these applications and, at its conclusion, on August 12, 2019, the trial judge granted bankruptcy orders. The appellants then filed appeals from those orders.

[3] The first issue is whether there is an appeal as of right. The conclusion on that issue turns on the wording of s. 193 of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, which reads:

> 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.

[4] Each of ss. 193(a), (b) and (c) are invoked in this case. I agree that neither ss. 193(a) nor (b) apply. Based on the analysis contained in *Ravelston Corp (Re)* (2005), 24 C.B.R. (5th) 256 (Ont. C.A.), I conclude that a bankruptcy order does not involve future rights. Similarly, there is no evidence in this case that the bankruptcy orders will likely affect another case raising the same or similar issues in the same bankruptcy proceedings, unlike the situation in *Wong v. Luu,* 2013 BCCA 547, 55 B.C.L.R. (5th) 129, at para. 21. Consequently, s. 193(b) does not apply.

[5] However, in my view, s. 193(c) does apply to this case. Clearly, the value of the property involved in this appeal exceeds $10,000. Indeed, there is no dispute that that is the case. However, the moving party submits that the bankruptcy orders, which appoint a Trustee in Bankruptcy, simply preserve the assets of the bankrupt and therefore do not “involve” property of more than $10,000. The moving party relies on observations made in certain other cases including *Business Development Bank of Canada v. Pine Tree Resorts Inc.,* 2013 ONCA 282, 115 O.R. (3d) 617, *2403117 Ontario Inc. v. Bending Lake Iron Group*

Limited, 2016 ONCA 225, 369 D.L.R. (4th) 635, and *Buduchnist Credit Union Limited v. 2321197 Ontario Inc.,* 2019 ONCA 588, 72 C.B.R. (6th) 245.

[6] Each of those decisions is distinguishable from the case at hand. In all three of those cases, the order being appealed was an order appointing a Receiver over certain properties. It was not a bankruptcy order as is the case here. There are distinctions between orders appointing a Receiver and bankruptcy orders appointing a Trustee in Bankruptcy. Among those distinctions is the fact that, unlike a Receiver, the Trustee in Bankruptcy does not require court approval in order to monetize the bankrupt's assets (except in limited circumstances). Instead, the Trustee has a duty to dispose of the bankrupt's assets and distribute the proceeds amongst the creditors, subject to the inspectors' approval.

[7] In relying on these decisions, the moving party points out the commentary that has been made in them that s. 193(c) ought to be narrowly construed in order to avoid conflict with other statutes, particularly the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36. As laudable a goal as that may be, it cannot be used to, in effect, read the subsection out of the statute. On that point, counsel for the moving party fairly concedes that, if the interpretation of s. 193(c) that she urges in this case were to be adopted, the subsection would not apply to any bankruptcy proceeding, since all of them will realistically involve assets totalling more than $10,000.

[8] While I appreciate the concerns that are used to justify the narrow approach, I do not see how a court can invoke those concerns in order to avoid the plain wording of the statute. The basic principle of statutory interpretation is that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Rizzo & Rizzo Shoes Ltd (Re),* [1998] 1 S.C.R. 27, at para. 21. If there is a pressing concern on this issue, it is one that Parliament must address.

[9] While the facts of each case may determine whether s. 193(c) properly applies, in my view, it clearly applies here where the appellant's entire property have been taken out of their control and placed into the hands of a Trustee in Bankruptcy, who has the right to dispose of that property and distribute it among the creditors, without further court intervention. The orders here are more akin to the type of orders that were considered in *Crate Marine Sales Ltd (Re),* 2016 ONCA 140, 33 C.B.R. (6th) 169, and *Comfort Capital Inc v. Yeretsian*, 2019 ONCA 1017, where an appeal as of right was found to exist. Consequently, I conclude that the appellants have an appeal as of right.

[10] That conclusion then raises the second issue: should this court cancel the automatic stay that results from an appeal? Section 195 of the *Bankruptcy and Insolvency Act* reads:

> 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.

[11] In considering whether the automatic stay should be cancelled, the court will principally consider two factors: (1) the merits of the appeal and (2) the relative prejudice to the parties: *First National Financial GP Corp. v. Golden Dragon HO 10 Inc.*, 2019 ONCA 873, 74 C.B.R. (6th) 1, at para. 40; *Yewdale v. Campbell, Saunders Ltd.* (1995), 9 B.C.L.R. (3d) 252 (C.A.), at para. 15.

[12] In this case, while the appeals may not be entirely meritless, they are ones that appear to only challenge either the trial judge's exercise of discretion in refusing an adjournment, or his factual findings that an act of bankruptcy had been committed. Their chances of success cannot be seen as being very high.

[13] In addition, I fail to see any prejudice to the responding parties if the automatic stay is cancelled. Their sole significant asset appears to be their residence and it is already the subject of mortgage proceedings by the Toronto-Dominion Bank. Another factor is, as the trial judge noted, that the responding parties have a history of delay. Further, there is some evidence of the responding parties' improper dealings with their property, as evidenced by a fraudulent conveyance action that was commenced in 2014.

[14] All of these considerations favour the moving party. Consequently, I conclude that the automatic stay under s. 195 should be cancelled.

[15] The moving party is entitled to its costs of these motions fixed at $5,000, inclusive of disbursements and HST.

"I.V.B. Nordheimer J.A."

KINGSETT MORTGAGE CORPORATION Applicant / Respondent in Appeal	- and -	**30 ROE INVESTMENTS CORP.** Respondent / Appellant in Appeal

Court of Appeal File No.:
Court File No.: CV-22-00674810-00CL

COURT OF APPEAL FOR ONTARIO

Proceeding commenced in Toronto

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