

CANADA / JUDGMENT

Forjay Management Ltd. v. Peeverconn Properties Inc.

2018 BCCA 188

COURT

British Columbia Court of Appeal

DECIDED

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2018 BCCA 188 Forjay Management Ltd. v. Peeverconn Properties Inc.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Forjay Management Ltd. v. Peeverconn Properties Inc.,

2018 BCCA 188

Date: 20180507

Docket: CA45234

Between:

Forjay Management Ltd.

Respondent

(Petitioner)

And

0981478 B.C. Ltd., Mark Chandler, Canadian Western Trust Company in trust,

HMF Home Mortgage Fund Corporation, 625536 B.C. Ltd., James Mercier,

Morris Kadylo, Urszula Piaseczna, U.S. Bank National Association, Baramundi

Investments Ltd., Charanjit Kaur, Simrat Viridi, Mukhtiar Singh Nijjar,

Mohan Vilku, Jaspreet Singh Khatra, Amandeep Singh Dhaliwal,

Nirmal Singh Chohan, Sajal Jain, Suparna Jain, Babal Rani Bansal,

Satpal Bansal, Parminder K. Mann, Leena Jain, Vasant Patel,

1074936 B.C. Ltd., 1084165 B.C. Ltd., 1084164 B.C. Ltd., 1084322 B.C. Ltd.,
Surjit Kaur Parmar, Harbhajan Singh Parmar, Daljeet Kaur Gill,
Bhasham Kaur Gill, 812 Capital Holdings Ltd., Catalyst Assets Corp.,
0951019 B.C. Ltd., Wonder Marble & Stone Inc., Intech Pay Ltd.,
1086286 B.C. Ltd., 1085537 B.C. Ltd., and 1083516 B.C. Ltd.

Respondents

(Respondents)

And

Peeverconn Properties Inc., Gopal Naidu, David Brummitt,
Laurie Brummitt, Gary Janzen, Karen Janzen, Walter Bisschop,
and Elsje Bisschop

Appellants

Before:

The Honourable Mr. Justice Willcock

(In Chambers)

On appeal from: an order of the Supreme Court of British Columbia, dated
April 4, 2018 (Forjay Management Ltd. v. 0981478 B.C. Ltd., 2018 BCSC 527,
Vancouver Registry H170498).

Oral Reasons for Judgment

Counsel for the Appellants:

D.A. Solimano and A. Boulton

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J.E. Shragge and M. Nied

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D. Nugent

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K. Jackson

Counsel for and Reliable Mortgages Investment Corp.:

K. Jackson

Counsel for the Respondents 0981478 B.C. Ltd. and Mark Chandler:

N. Hooge

Counsel for the Respondents HMF Home Mortgage Fund Corporation and Canadian Western Trust Company:

G. Plottel

Counsel for Superintendent of Real Estate:

A. Welch

Counsel for J. Tomica and M. Tomica:

S. Roxborough

Appearing in person and also representing M. Sito:

M. Mahony

Place and Date of Hearing:

Vancouver, British Columbia

May 2, 2018

Place and Date of Judgment:

Vancouver, British Columbia

May 7, 2018

Summary:

In the context of a failed real estate development, the court-appointed Receiver was ordered to disclaim 40 pre-sale contracts. Some of the pre-sale purchasers sought leave to appeal, if leave was required. If the appeal was to proceed, the respondents sought orders expediting the appeal and that the appellants post security for costs of the appeal. Held: application for leave to appeal dismissed, leave not being required; application for security for costs reserved; application for an expedited appeal granted. The underlying order was made pursuant to the Bankruptcy and Insolvency Act which provides for a right of appeal in certain circumstances pursuant to s. 193. In this case, the issues on appeal are likely to affect other cases of a similar nature in the bankruptcy proceedings, and concern property whose value exceeds \$10,000. As a result, the appellants have a right to appeal under both ss. 193(b) and (c), whether read narrowly or expansively. The application for leave to appeal shall stand as a notice of appeal. An automatic stay of proceedings flows from the Bankruptcy and Insolvency Act. There being a serious question as to whether recovery of costs will be difficult, the respondents are entitled to an order for security for costs. However, the order concerning security is reserved to allow the parties to

agree on the terms. Orders concerning the expediting of the appeal are given.

Nature of the Application

- [1] WILLCOCK J.A.: On April 16, 2018, Peeverconn Properties Inc. and others filed an application for leave to appeal the April 4, 2018 order of Fitzpatrick J. made for reasons indexed as 2018 BCSC 527.
- [2] That order arose from a court-appointed receiver's request for directions. The order directed the receiver to disclaim 40 pre-sale contracts for units in a 92-unit strata property development known as "Murrayville House" in Langley, B.C. Purchasers under the disclaimed contracts wish to appeal that order.
- [3] The appellants seek orders:
 - a) granting leave to appeal the April 4, 2018 order of Fitzpatrick J., if leave is required; and
 - b) staying the execution of the order until the hearing of the appeal.
- [4] I have made an order abridging the time for service of some of the relevant materials.
- [5] I have also made an order adding Reliable Mortgages Investment Corp. as a respondent to the appeal, and permitting the style of cause to be amended accordingly.
- [6] The respondents, Forjay Management Ltd. ("Forjay") and Reliable Mortgages Investment Corp. ("RMIC"), have applied for orders that:
 - a) the time for hearing the appeal be abridged, and the appeal be heard on an expedited basis on May 31, 2018;
 - b) the requirement that the appellants file an appeal record and appeal books be dispensed with;
 - c) the application record in the court below, together with the order and reasons for judgment of Fitzpatrick J. pronounced on April 4, 2018, and the written submissions of the parties from the hearing in the court below, stand as the appeal record and appeal books for the appeal; and
 - d) dates for the filing of the application record and factums be set and abridged accordingly.
- [7] Last, two respondents seek orders requiring the appellants to post security for costs of the appeal. Forjay seeks an order securing \$11,813.05; Canadian Western Trust Company ("CWT") and HMF Home Mortgage Fund Corporation ("HMF") seek an order securing \$10,656.05.

Background

- [8] The respondent, 0981478 B.C. Ltd. ("098"), was the developer of the project. RMIC, Forjay, CWT, and HMF advanced funds to the numbered company and obtained mortgage security in return.
- [9] 098 entered into pre-sale contracts with purchasers, including the appellants. The development was ready for occupancy by August 2017, but none of the sales had been completed and it remained vacant.
- [10] Forjay filed a petition on August 25, 2017 seeking a declaration that its mortgage charged the lands and was in default and setting a six-month redemption period. It also sought an order appointing a receiver manager of the lands and premises. The motion was brought pursuant to Rule 21-7 of the Supreme Court Civil Rules.
- [11] On October 4, 2017 Fitzpatrick J. made an order, expressly stated to be made pursuant to s. 243(1) of the Bankruptcy and Insolvency Act (R.S.C. 1985, c. B-3) [BIA] and s. 39 of the Law and Equity Act (R.S.B.C. 1996, c. 253) appointing The Bowra Group Inc. as receiver manager of all of the assets, undertakings and properties of the numbered company "acquired for or used in relation to the business carried on by the debtor".
- [12] The former Act provides:
- 243 (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:
- (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
 - (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
 - (c) take any other action that the court considers advisable.
- [13] The later provides:
- 39 (1) An injunction or an order in the nature of mandamus may be granted or a receiver or receiver manager appointed by an interlocutory order of the court in all cases in which it appears to the court to be just or convenient that the order should be made.
- (2) An order made under subsection (1) may be made either unconditionally or on terms and conditions the court thinks just.

- [14] On October 12 the order was amended, in part to provide that the Receiver was appointed as receiver and manager of "all of the assets and undertakings and property of the debtor, including all proceeds thereof, other than any assets of the debtor which are not related to the construction, marketing or the sale of the Lands". Again, the appointment was expressly stated to be made pursuant to s. 243(1) of the Bankruptcy and Insolvency Act and s. 39 of the Law and Equity Act.
- [15] Upon its appointment, the Receiver examined the pre-sale contracts and determined that many units had been sold multiple times, the full purchase price had been paid under some agreements but not others, the purchase price of a majority of contracts differed significantly from an issued price list, and certain agreements did not appear to meet the requirements of the Real Estate Development Marketing Act, S.B.C. 2004, c. 41 [REDMA]. On completion of the review the Receiver wished to authorize and complete 58 of the pre-sale contracts.
- [16] The secured creditors of the development, on consideration, disagreed with the Receiver's assessment and recommendations.
- [17] The Receiver brought an application for directions from the court in January 2018. Because 18 of the 58 agreements were complicated by other issues, the Receiver sought court approval of only 40 sales.
- [18] Justice Fitzpatrick heard the matter in March of 2018 and reserved judgment until April 4, 2018. At para. 44 of the reasons she adopted the following analytical framework for consideration of whether the Receiver should disclaim the pre-sale contracts:
- a) Firstly, what are the respective legal priority positions as between the competing interests?
 - b) Secondly, would a disclaimer enhance the value of the assets? If so, would a failure to disclaim the contract amount to a preference in favour of one party?; and
 - c) Thirdly, if a preference would arise, has the party seeking to avoid a disclaimer and complete the contract established that the equities support that result rather than a disclaimer?
- [19] Her consideration of the respective priorities led to the following conclusion:
- [90] In summary, the purchasers' interests are grounded in contract and no equitable interests have arisen in any of the units. Those purchasers' contractual rights have no legal priority over those held by the mortgagees. Even if the purchasers hold equitable interests in the lands, those interests are not enforceable in the circumstances.
- [20] The question whether a disclaimer would enhance the value of the assets was answered as follows:

- [92] In light of the recent appraisal obtained by the Receiver, there can be no doubt that remarketing and selling these 40 units would enhance the value of the assets to be distributed to the stakeholders. The Receiver described the increase in value as "material". That fact clearly points to disclaimer as being appropriate.
- [93] I also have no difficulty concluding that a failure to disclaim here would result in the purchasers receiving a preference in respect of value that would otherwise accrue to the mortgagees under their prior ranking security. In order to permit the pre-sale contracts to complete, the Court would need to order the discharge of the mortgages in circumstances where the mortgagees would not receive payment of the amounts they bargained to accept in exchange for a discharge. This would be an exceptional result and I know of no authority to order it in these circumstances. I agree with the mortgagees that it would have the effect of elevating the claims of the purchasers above the legal priority and security of the mortgagees: *bcIMC* at para. 96; *Penex* at para. 27.
- [21] In relation to the equities, she examined the actions and alleged inaction of 098 (including allegations the developer had not complied with REDMA); the extent to which the purchasers knew the risks of non-completion; the fact deposits would be recovered; the fact purchasers would retain claims against 098 despite disclaimer; and allegations of bad faith. Having done so, she held:
- [131] Having balanced all of the above considerations, I am satisfied that the equities in favour of the pre-sale purchasers do not justify overriding the mortgagees' legal priority and giving the purchasers a preference that they would not otherwise enjoy.
- [22] The appellants intend to raise the following issues on the proposed appeal:
- a) whether the chambers judge erred in law by misinterpreting or failing to give effect to consumer protection legislation, in particular the REDMA; and
 - b) whether the chambers judge erred in fact by accepting financial assertions by the mortgagees, in support of their claim to priority and in relation to the bona fides of their claims, in the absence of an adequate evidentiary record.

Leave to Appeal

- [23] The first question I must address is whether leave is required.

The Appellants' Argument

- [24] Section 6 of the Court of Appeal Act, R.S.B.C. 1996, c. 77, sets out the jurisdiction of this Court:

6 (1) An appeal lies to the court

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

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

[25] The applicants say an appeal lies without leave because jurisdiction is given to this Court by an enactment of Canada, s. 193 of the BIA which provides, in part:

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;

[26] If leave is required, either because the appeal does not fall within the class of cases described by s. 193(a), (b) or (c), or because the impugned order was not made pursuant to the BIA, the applicants say leave to appeal should be granted. Leave may be granted pursuant to s. 193(e) of the Act (which permits a justice of the Court of Appeal to grant leave) or, if the BIA is inapplicable, s. 7 of the Court of Appeal Act (applicable to limited appeal orders, including those made pursuant to Rule 21-7).

[27] In *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONCA 282 at para. 29 [Pine Tree], Blair J.A. held that on an application for leave under s. 193(1)(e) of the BIA, the Court should consider:

- a) the significance to the practice of the point on appeal;
- b) The significance of the point raised to the action itself;
- c) the prima facie merits of the proposed appeal; and
- d) the effect of an appeal upon the progress of the action (read receivership).

[28] Those criteria are functionally equivalent to those considered by our Court in relation to limited appeal orders:

Power Consolidated (China) Pulp Inc. v. B.C. Resources Investment Corp. (1988), 19 C.P.C. (3d) 396 (C.A.); *Goldman, Sachs & Co. v. Sessions*, 2000 BCCA 326, at para. 10.

The Respondents' Argument

[29] The respondent Forjay says it is doubtful whether the impugned order was made pursuant to the BIA. As noted above, there is some ambiguity in this regard as the order was made pursuant to both s. 243(1) of the Bankruptcy and Insolvency Act and s. 39 of the Law and Equity Act. Counsel for Forjay says there is no obvious bar to the Court ordering a receiver appointed pursuant to the Law and Equity Act to disclaim a contract. In other words, the Court did not necessarily rely upon the BIA as the source of its jurisdiction to make the

impugned order, it was not clearly made pursuant to the BIA and the Act's provisions might not be applicable to this appeal.

- [30] Further, and perhaps more forcefully, the respondents say the appeal does not fall within s. 193(a), (b) or (c) as those sections should be narrowly construed.
- [31] Last, they say that in any event the appellants have not yet filed a Notice of Appeal, that they now require an extension of time within which to file such a notice and should not obtain that extension because they cannot establish that there is any merit in the appeal.

Is the BIA Applicable?

- [32] I would not accede to the argument that the provisions of the BIA are inapplicable. The order the appellants seek to appeal expressly purports to be made pursuant to the BIA. It is not possible to say that certain parts of the model order used in this case were made pursuant to the Law and Equity Act rather than the BIA. In particular, the order directing the Receiver to disclaim the pre-sale contracts cannot be said to have been made pursuant to the Law and Equity Act and only that Act. At most, one can say both enactments appear to have been relied upon, without distinction, in which case, an appeal as of right is conferred upon the applicants by the BIA if they can bring themselves within one of the BIA's enumerated categories where a right to appeal exists.

Construction of Section 193

- [33] The respondents say s. 193(a) to (d) of the BIA should be read narrowly, relying, in part on the decision of the Ontario Court of Appeal in 2403177 Ontario Inc. v. Bending Lake Iron Group Limited, 2016 ONCA 225 (Chambers) [Bending Lake]. In that case, Brown J.A. says:
- [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]

[Emphasis added.]

- [34] Justice Brown adopted the latter approach. The former approach is that taken by my brother Harris J.A. in Wong v. Luu, 2013 BCCA 547, described at para. 23:

[23] I am not persuaded that the objects and purposes of the legislation compel such a narrow construction of the subsection so that it does not apply to the circumstances of this case. I agree that the requirement for leave to appeal in circumstances falling outside those captured by a right of appeal indicates the need to control bankruptcy proceedings in order to promote the efficient and expeditious resolution of the bankruptcy. This is clearly one of the principal objectives of bankruptcy legislation. Nonetheless, that objective cannot be taken too far in eliminating the right to appeal. The right of appeal under the Bankruptcy and Insolvency Act is broad, generous and wide-reaching. A right of appeal exists, for example, in respect of any matter if the property in question has a value greater than \$10,000. This can hardly be thought of as a limited right of appeal; to the contrary, the bar is set low indeed. Interpreting s. 193(b) to confer a right of appeal in the circumstances of this case does not frustrate, nor is it inconsistent with, the purpose and objects of the bankruptcy legislation.

[35] Bearing in mind that there are what appear to be differing approaches to the interpretation of the legislation, I turn to the specific provisions. For reasons that will, I hope, become obvious, it is not necessary in this case to reject the narrow approach of Brown J.A. or to expressly adopt the broader approach favoured by this Court in Wong.

193(a)

[36] I am of the view that the order to disclaim the pre-sale contracts does not fall within s. 193(a) of the BIA because the dispute concerns does not involve "future rights". This Court, in *Farm Credit Canada v. Gidda*, 2014 BCCA 501 at paras. 17-19, held that s. 193(a) is restricted to appeals involving legal rights which cannot be asserted at the present time.

[37] This point was clearly addressed by Blair J.A. in *Pine Tree* at para. 15:

[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: see *Ravelston Corp., Re*, 2005 CanLII 63802 (ON CA), [2005] O.J. No. 5351 (C.A.), at para. 17. See also *Ditchburn Boats & Aircraft (1936) Ltd., Re (1938)*, 19 C.B.R. 240 (Ont. C.A.); *Dominion Foundry Co., Re (1965)*, 1965 CanLII 596 (MB CA), 52 D.L.R. (2d) 79 (Man. C.A.); and *Fiber Connections Inc. v. SVCM Capital Ltd. (2005)*, 2005 CanLII 15454 (ON CA), 10 C.B.R. (5th) 201 (Ont. C.A., in Chambers).

[38] While the appellants' rights under their pre-sale contracts - if recognized as valid and not disclaimed - may be exercised in the future, the appeal concerns their present right to purchase the strata units under their contracts and the extent of the Receiver's existing obligations to them.

193(b)

- [39] Section 193(b) provides that an appeal lies to the Court of Appeal from any order or decision, if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings.
- [40] On its plain reading, even read restrictively in light of the demands of "real time litigation", that section is applicable in this case. The direction to the Receiver to disclaim the 40 pre-sale contracts in issue is clearly, in my view, likely to affect other cases of a similar nature in the bankruptcy proceedings, specifically the 18 other pre-sale agreements the Receiver considered to be substantially similar.
- [41] Justice Harris, in *Wong*, considered this section of the BIA in a case where the decision under appeal dealt with disclosure of a solicitor's files. He described the applicant's submissions as follows:
- [14] The applicants submit they have a right to appeal because the Trustees intend to make a similar application to obtain information from another Vancouver law firm that has represented Mr. Luu. They say that the order in question falls squarely within the language of s. 193(b) because the decision in question is likely to affect at least one other case in these bankruptcy proceedings. They say that there is no legitimate reason to limit the scope of the subsection in a way that would take the circumstances of this case outside its application.
- [42] After considering the leading cases, including *Camirand Ltée v. Gagnon* (1924), 5 C.B.R. 518 (Que. C.A.), and *Re Norbourg Gestion d'actifs inc.* (2006), 33 C.B.R. (5th) 144, he held:
- [21] In my opinion, the current circumstances fall within the plain language of the subsection. The decision in question will likely affect another case raising the same or similar issues in the same bankruptcy proceedings. I accept that the right which is asserted as a defence to production of documents or the provision of information is a right belonging to one person, the bankrupt, and that it is the same right, but the right is being asserted in more than one context. I see nothing in the plain wording of the section that requires that a right be asserted against the bankruptcy by parties other than the bankrupt or that it be asserted by multiple persons, rather than being one person's rights arising in multiple contexts.
- [22] There is, moreover, no doubt that the issue of solicitor-client privilege raises "real disputes", raised in the same matter. I do not think that the issue here is one of the interests lawyers may have in knowing the law or that the issue is about regulating how information gathered in the bankruptcy will be handled procedurally. Importantly, although the right in issue belongs to the client, solicitors handling issues of privilege have professional obligations to deal with such matters properly; their interests, responsibilities and obligations are engaged by the process to determine whether solicitor-client privilege prevents disclosure. In this matter, the pending application will affect and bind different firms of solicitors.
- [43] The chambers judge in the case at bar considered the respective legal priority positions as between the competing interests; the effect of disclaimer on the value of the assets; whether a failure to disclaim could amount to a preference in favour of one party and the equities

arising in the circumstances of this development. Given the Receiver's description of the similarity between the 40 pre-sale agreement in issue in this case and the further 18 agreements not yet considered, to say nothing of the many other outstanding pre-sale agreements, I am of the view that the judgment under appeal is likely to affect other cases of a similar nature in the proceedings.

[44] That is sufficient to dispose of the application for leave to appeal. Leave is not required.

193(c)

[45] Further, however, I am of the view that s. 193(c) is applicable. That subsection provides that an appeal lies to the Court of Appeal from any order or decision:

(c) if the property involved in the appeal exceeds in value ten thousand dollars;

[46] This Court's approach to determining whether a right of appeal exists pursuant to s. 193(c) is set out in *McNeill v. Roe*, *Hoops & Wong* (1996), 20 B.C.L.R. (3d) 274:

11. An appeal lies as of right under s. 193(c) ". . . if the property involved in the appeal exceeds in value ten thousand dollars". In *Fallis et al. v. United Fuel Investments Ltd.* (1962), 4 C.B.R. (N.S.) 209, the Supreme Court of Canada considered the meaning of the words "amount involved" where they appeared in s. 108 of the Winding-up Act, R.S.C. 1952, c. 296. The court adopted the test enunciated in *Orpen v. Roberts*, [1925] S.C.R. 364, [1925] 1 D.L.R. 1101, namely that: "The amount or value of the matter in controversy, . . . is the loss which the granting or refusal of that right would entail" (*Fallis* at 211). In a comment following the report of this case in the *Canadian Bankruptcy Reports*, it was said that the meaning of "amount involved" in the Winding-up Act was substantially the same as the meaning of "property involved" in the Bankruptcy Act. That interpretation has been adopted by Mr. Justice Hollinrake in *Ng v. Ng* (3 February 1995), Vancouver CA019800 (B.C.C.A.); by Mr. Justice Macfarlane in *Re Scott Road Enterprises* (1988), 68 C.B.R. (N.S.) 54 at 58 (B.C.C.A.); and by Mr. Justice Macdonald in *Kenco Developments Ltd. v. Miller Contracting Ltd.* (1984), 53 C.B.R. (N.S.) 297 (B.C.C.A.). I can see no reason to do otherwise.

13. The "property involved in the appeal" which the bankrupt wishes to pursue may be determined by comparing the order appealed against with the remedy sought in the notice of appeal.

[Emphasis added.]

[47] Section 193(c) was read narrowly in *Bending Lake* but, in my view, even taking the restrictive approach described in that case, the case at bar falls within the provision. Justice Brown described the context in which orders pursuant to the BIA are ordinarily made. Such orders are part of a fluid, ongoing process that will not be efficient if interrupted by appeals as of right. The statute, in his view, did not give rise to a right of appeal as of right in every case where the decision in question involved property with a value in excess of \$10,000. Rather, the right arose where the decision affected or "brought into play" that value. He wrote:

- [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.
- [48] Addressing the first point, whether the order the applicant sought to appeal in that case was procedural, he refers to the jurisprudence and observes:
- [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).
- [56] There, the trustee had invited tenders for the purchase of the bankrupt's equipment. When tenders closed, the trustee determined that Alternative's tender was the highest. Once another tenderer, Impco Technologies Inc., found out that it was not the highest bidder, it submitted a second tender offering substantially more than Alternative. The trustee sought directions from the court. The bankruptcy judge directed the trustee to accept Impco's second, higher tender. Alternative filed a notice of appeal and moved before the Alberta Court of Appeal for a determination that it could appeal as of right under s. 193(c) because the value of the property involved exceeded the statutory threshold.
- [57] O'Leary J.A., [in *Alternative Fuel Systems Inc. v. EDO (Canada) Ltd. (Trustee of)*].[21]] following *Re Dominion Foundry Co.*, reasoned, 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.
- [Emphasis added.]
- [49] Justice Brown observed, at para. 58, that the "overwhelming majority" of the grounds of appeal in *Bending Lake* were process-related, involving issues such as disclosure of information, the negotiation process preceding the sale and the adequacy of notice given to affected parties.
- [50] That is not the case here. The issue is whether the Receiver should be directed to disclaim the contracts in question; the order made substantially increased the value of the assets in the hands of the Receiver. It was made for that reason, so as to avoid the preference of unsecured creditors over secured creditors. The order was intended to affect the value of the assets available to be distributed to stakeholders.

- [51] Addressing the question whether the impugned decision or order "brought into play" the value of the debtor's property in *Bending Lake*, Brown J.A. wrote:
- [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.
- [52] In contrast, in the case at bar the Court was called upon to consider something more than the monetization of an asset.
- [53] Addressing the question whether the impugned decision resulted in a loss, Brown J.A. wrote:
- [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 CanLII 2 (SCC), [1925] SCR 364 at 367, [1925] 1 DLR 1101, and confirmed in *Fallis and Deacon v United Fuel Investments Ltd.*, 1962 CanLII 96 (SCC), [1962] SCR 771, 4 CBR (NS) 209, which set out that the amount or value of the matter in controversy is the loss which the granting or refusal of that right would entail.

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

[Emphasis added.]

- [54] That cannot be said to be the case here. The direction to disclaim the contracts in issue finally determined substantive rights and materially increased the value of the property in the hands of the Receiver. If the appellants succeed, the "loss" that the respondents would suffer is the difference between the price of the units under the pre-sale contracts, and the amount for which the units could be resold. The chambers judge estimated this value to be over \$5,000,000 at the time of the hearing.

Extension of Time

- [55] Finally, I would not accede to the argument that I must make an order extending the time within which the appeal may be brought and therefore should impose upon the applicants an obligation to establish that the appeal has some arguable merit.

[56] The appeal could have been brought without leave pursuant to the Bankruptcy and Insolvency Rules if a Notice of Appeal rather than an Application for Leave had been filed on April 16, 2018. The application for leave was filed in compliance with the practice directive of May 8, 2017 which provides:

If a party is unsure if leave to appeal is required, the party should file a Notice of Application for Leave to Appeal and seek leave to appeal.

If leave to appeal is not required, the presiding justice may order that the Notice of Application for Leave to Appeal stand as a Notice of Appeal along with any necessary extension(s) of time.

[57] I have concluded that an order should be made that the Application for Leave to Appeal will stand as the Notice of Appeal. Doing so does not require me to address the merits of the appeal. The consequential extension of time that is ordinarily made on the making of such an order is the extension of time for the filing of an Appeal Record. Such an order is not necessary in this case.

[58] Rule 19 requires an appellant to file and serve an Appeal Record within 60 days after bringing an appeal. If the Application for Leave stands as the Notice of Appeal the appellant will be required, in the absence of an extension, to file a record by June 16. No extension of that deadline is sought.

Stay of Proceedings

[59] Given my conclusion that the appellants can appeal as of right pursuant to s. 193 of the BIA, they are also entitled to a stay of proceedings as of right. Section 195 provides:

195 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.

[60] The respondents do not seek an order pursuant to s. 195 cancelling or staying the order.

[61] In the circumstances an order for a stay is unnecessary. The finding that the proceedings are brought pursuant to the BIA and there is an appeal as of right is sufficient to establish that the proceedings are stayed pursuant to the statutory provisions.

Security for Costs

[62] Two sets of parties, RMIC and Forjay, and CWT and HMF, apply for security for costs pursuant to s. 24(1) of the Court of Appeal Act.

- [63] The appellants bear the burden of establishing that the interests of justice require that security not be ordered: *Creative Salmon Company Ltd. v. Staniford*, 2007 BCCA 285 at para. 9.
- [64] Forjay and RMIC submit that there is a real risk that the appellants will not have the financial means to satisfy a future costs award. They note that a number of the appellants are retired and do not appear to own any real property within the jurisdiction. Their searches indicate that only the appellant Gopal Naidu appears to own real property, which has an assessed value of \$968,000 but is secured by a mortgage for an unspecified amount. Further, they assert that the appeal is without merit.
- [65] The appellants have not satisfied their burden of establishing that their financial circumstances are such that an order for security for costs would preclude them from bringing their meritorious appeal. However, they say the deposits held in trust in relation to the pre-sales will be available to their creditors, including the respondents, once the appeal is concluded.
- [66] Counsel for Forjay suggests the deposits may stand as security for costs.
- [67] In my view, there is a serious question as to whether recovery of costs will be difficult, and the appellants have some difficulty describing a meritorious appeal. The appeal was described to me in vague and uncertain terms and relies, in part, upon an application to adduce new or fresh evidence which will, itself, be a significant hurdle for the appellants.
- [68] In my view, it is in the interests of justice to order the appellants to post security for costs. Given the position of counsel at the hearing I will not make that order now but permit the parties to attempt to agree to the terms of an order that will permit deposits to stand as security. I will reserve judgment on the motion for security until Friday, May 11, at which time I will make an order if a consent order for security has not in the meantime been filed.

Orders

- [69] The application for leave to appeal will stand as a notice of appeal.
- [70] As a consequence, the order of April 4, 2018 is automatically stayed pursuant to s. 195 of the BIA, pending final disposition of the appeal. No order for a stay is necessary.
- [71] Judgment on the application for security for costs is reserved to Friday, May 11 to permit the parties an opportunity to draft a suitable consent order.
- [72] I will make the following orders for the conduct of the appeal, as discussed at the hearing:
- the time for hearing the appeal be abridged, and the appeal be heard on an expedited basis on June 12, 2018;
 - the requirement that the appellants file an appeal record and appeal books is dispensed with;

- c) the application record in the court below, together with the order and reasons for judgment of Fitzpatrick J. pronounced on April 4, 2018, and the written submissions of the parties from the hearing in the court below, will stand as the appeal record and appeal books for the appeal;
- d) the application record will be filed by May 11;
- e) the appellants' factum will be filed by May 25;
- f) the respondents' factums will be filed by June 1; and
- g) factums in reply, if any, will be filed by June 8.

[73] I appreciate that these orders may impact upon the dates currently set for the hearing of other applications in the foreclosure proceedings. I note that I have heard submissions in that regard and have determined that there is no reason to delay the hearing of the appeal in this case so as to permit other pre-sale buyers to advance their claims in the foreclosure proceedings before the hearing of the appeal. Nor, in my view, is there any reason to attempt to create another evidentiary record and have other appeals joined with this appeal. It is in the interests of justice that this appeal proceed expeditiously so as not to interfere with the bankruptcy proceedings and the outcome of the appeal may assist other claimants to weigh the merits of their claims.

"The Honourable Mr. Justice Willcock"

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