

CANADA / JUDGMENT

Kriegman v. Wilson

2020 BCCA 66

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 66 Kriegman v. Wilson

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Kriegman v. Wilson,

2020 BCCA 66

Date: 20200224

Docket: CA45580

Between:

Bruce P. Kriegman, solely in his capacity as court-appointed

Chapter 11 Trustee for LLS America LLC

Appellant

(Plaintiff)

And

Ana Wilson and Larry Wilson

Respondents

(Defendants)

Before:

The Honourable Madam Justice Newbury

The Honourable Madam Justice D. Smith

The Honourable Madam Justice Griffin

On appeal from: An order of the Supreme Court of British Columbia, dated August 31, 2018 (Kriegman v. Wilson, 2018 BCSC 1497, Vancouver Docket L13011).

Counsel for the Appellant:

G.J. Roper

Counsel for the Respondent:

J.R. Pollard

Place and Date of Hearing:

Vancouver, British Columbia

June 6, 2019

Written Submissions Received:

December 17, 2019

January 7, 2020

Place and Date of Judgment:

Vancouver, British Columbia

February 24, 2020

Written Reasons by:

The Honourable Madam Justice Griffin

Concurred in by:

The Honourable Madam Justice Newbury

The Honourable Madam Justice D. Smith

Summary:

The appellant seeks to enforce a judgment by selling the property of the respondent judgment debtor, Ms. Wilson. Ms. Wilson resides in the property with her son, and both have serious health conditions. While granting the order for sale, the judge below deferred the sale for 24 months. The appellant submits that the judge erred in not imposing terms and conditions on the respondent, which the appellant says is mandatory pursuant to s. 96(2) of the Court Order Enforcement Act, and further erred in granting such a long deferral. Held: Appeal allowed. The judge did not err in his interpretation of s. 96(2), which does not require the imposition of terms and conditions. However, the judge erred in his exercise of discretion in granting such a long deferral which gave insufficient weight to the prejudice to the appellant. Given the passage of

time, the order for sale will be varied such that the deferral will expire on March 31, 2020.

Reasons for Judgment of the Honourable Madam Justice Griffin:

- [1] The appellant, the bankruptcy trustee (the "Trustee") of LLS America LLC ("LLS America"), appeals from an order pronounced August 31, 2018, granting a 24-month deferral of the sale of the interest of the respondent, Ms. Ana Wilson, in the lands and premises situated at 17825 57 Avenue, Surrey, BC (the "Property").
- [2] The issue on appeal is whether the chambers judge erred, in law or in the exercise of his discretion, by granting the deferral of the sale of the Property or in regards to the length of the deferral.
- [3] For the reasons that follow, I do not agree that the judge erred in law but I would allow the appeal on the issue of the appropriate length of the deferral of the sale. I would order that the order below be varied such that the deferral of sale will expire on March 31, 2020.

Background

- [4] LLS America is a company involved in bankruptcy proceedings in the United States of America, commenced in Nevada in July 2009, and continued in the United States District Court, Eastern District of Washington (the "Washington Court").
- [5] LLS America operated as the "Little Loan Shoppe", established by Ms. Doris Nelson in 1997. While LLS America operated as a payday loan business, it was, in fact, a Ponzi scheme. The scheme involved issuing promissory notes to investors who were promised high rates of return ranging from 40-60%.
- [6] Ms. Wilson and Mr. Larry Wilson (the "Wilsons"), met Ms. Nelson through their church and invested \$220,000 with her in 2005, thinking they were investing in a payday loan business. It was in fact a Ponzi scheme. They were paid from the funds taken from later lenders and received \$252,720 from their initial investment. After taxes their profit was \$13,460. There is no evidence they had any knowledge that this was a fraudulent scheme.
- [7] Mr. Wilson died in November 2010. Ms. Wilson is in her early 70s and resides at the Property, which serves as the family home, with her son, Mr. Alejandro Wilson ("Mr. A. Wilson"). She retired in 2010.
- [8] Ms. Wilson and Mr. A. Wilson both suffer from health-related issues. Ms. Wilson was treated for skin cancer in 2016 and is a Type 2 diabetic. In addition, she reports a number of ailments that have lead to ongoing pain, the most significant of which is undiagnosed bleeding in her right eye for which she sees a specialist.
- [9] As to Mr. A. Wilson, he has spent significant time in hospital in recent years as a result of pancreatitis and liver degeneration, which resulted in him receiving a liver transplant. These ailments have taken a toll on Mr. A. Wilson's health in other ways, namely, he: struggles to maintain muscle mass, and is assessed as a falling risk; has developed

osteoporosis and has broken his leg twice in consecutive years; takes immune-suppressant drugs; suffers from diabetes; and experiences circulation problems, all of which result in a weakened state. He needs to attend medical appointments frequently, to which his mother drives him. In a letter appended to an affidavit sworn by Ms. Wilson, Dr. Frankel (a physician treating Mr. A. Wilson) described Mr. A. Wilson's situation as of May 2018:

[Mr. A. Wilson] is very reliant on his mother to provide the care he will need for his recovery process. [He] still struggles with daily tasks, like shopping and laundry. He occasionally has difficulty ascending stairs. He often needs to be driven to doctor's appointments. It is my opinion that disrupting the arrangements he has with his mother would be very detrimental to [Mr. A. Wilson's] health, and delay his recovery significantly.

- [10] On October 31, 2012, the Trustee obtained final default judgment against the Wilsons in the Washington Court in the amount of \$347,044.92 plus costs. The effect of the judgment was to "claw back" any payments made to Ms. Wilson by the scheme. Any entitlement to recover her original investments will be by way of claims against LLS America in the US bankruptcy proceedings.
- [11] The judgment was registered in British Columbia in ex parte proceedings on April 10, 2013 (the "Judgment").
- [12] On March 11, 2014, the Judgment was registered against title to the Property. The registration of the Judgment against title was subsequently renewed on January 26, 2016, and January 23, 2018.
- [13] Ms. Wilson sought to have the registration of the Judgment set aside, and alleged many flaws in the default judgment process, including a lack of evidence that the Wilsons were ever properly served with the US proceedings. Ms. Wilson brought her application more than 30 days after she received notice of the registration of the Judgment. This was outside the time limit mandated by s. 34(1)(b) of the Court Order Enforcement Act, R.S.B.C. 1996, c. 78 [COEA], and on that basis her application was dismissed: LLS America LLC (Trustee of) v. Wilson, 2015 BCSC 441, aff'd 2016 BCCA 122.
- [14] Based on her financial circumstances, Ms. Wilson is unable to satisfy the Judgment by paying a lump sum or installment payments. The Property is her only material asset. She is on a fixed income of approximately \$1,600 per month (Canada Pension Plan, Old Age Security, and disability pension combined).
- [15] In 2016, the Trustee commenced proceedings pursuant to ss. 92-96 of the COEA to have the Property sold to satisfy the Judgment. For ease of reference, it is convenient to now set out ss. 92, 94 and 96 of the COEA:

Procedure for enforcing charge

92 (1) If a judgment creditor has registered a judgment under this Act, and alleges that the judgment debtor is entitled to or has an interest in any land, or that any land is held subject to the lien created by registration of judgment under section 82, a motion may be made in Supreme Court Chambers, by the judgment creditor calling on the judgment debtor, and on any trustee or other person having the legal estate in the land in question, to show cause why any land in the land title district in which the judgment is registered, or the interest in it of the judgment debtor, or a competent part of the land, should not be sold to realize the amount payable under the judgment.

- (2) If the judgment debtor is dead, the motion to show cause must call on those to whom the interest of the deceased in the land in question has passed, and on any trustee or other person having the legal estate in it.
- (3) Any notice of application or order made on it under this section may, in any case where in the opinion of the court personal service cannot be reasonably effected, be served in a manner the court directs, and the court may in any case allow service of the notice of application or order to be made out of the jurisdiction.

Reference to ascertain land and settle priorities

94 (1) If an order is made on an application under section 92, there must be included in the order a reference to a district registrar of the Supreme Court

- (a) to find what land is liable to be sold under the judgment,
- (b) to find what is the interest of the judgment debtor in the land and of his or her title to it,
- (c) to find what judgments form a lien and charge against the land and the priorities between the judgments,
- (d) to determine how the proceeds of the sale are to be distributed, and
- (e) to report all the findings to the court.
- (2) The district registrar must deal with all judgments registered against the land whether registered before or after the judgment on which the proceedings are taken.
- (3) Unless good reason is found to the contrary, the creditor first taking proceedings is entitled to his or her costs in priority to all claims under the judgment whether before or after his or her own.
- (4) The district registrar must serve all persons affected by his or her inquiries.

- (5) The report, when made, requires confirmation by the Supreme Court, and all persons affected by it must have notice of the application for confirmation, and on application the court may confirm all or part of the report, and may alter it or may refer it back to the district registrar.

Order for sale of land

96 (1) If in a summary way or on the trial of an issue, or as the result of inquiries under sections 92 to 95, or otherwise, any land or the interest of any judgment debtor in it is found liable to be sold, an order must be made by the court declaring what land or what interest in it is liable to be sold, and directing the sale of it by the sheriff.

- (2) Despite subsection (1), if a premises situated on the land or interest in it of a judgment debtor is the home of the debtor, the court may defer the sale, subject to the performance by the judgment debtor of terms and conditions of payment or otherwise as the court imposes.
- (3) If in any case substituted service has been ordered by the court on the judgment debtor of the notice of civil claim or notice of family claim, as the case may be, or other process in the proceeding in which the judgment is obtained, the land ordered to be sold must not be sold by the sheriff until it has been advertised as provided in section 97 for 6 months after the order for sale.
- (4) Despite subsection (3), on application by the judgment creditor to the Supreme Court, the court may shorten the period of 6 months referred to in that subsection, or make any other order in that behalf it thinks fit.

[Emphasis added.]

[16] In *Barker v. Daum*, 2018 BCCA 402, Justice MacKenzie summarized the three-stage process to enforce a charge against land as follows:

[14] Sections 92 to 96 of the COEA set out the three-step procedure that a judgment creditor is to follow to enforce a charge against land, as follows:

- a) A show cause hearing where the judgment debtor bears the onus to show cause why the land should not be sold to realize the judgment (ss. 92 and 93);
- b) A registrar's hearing to determine the land that is liable to be sold, the judgment debtor's interest in the land, the judgments that form a lien and charge against the land, and the relative interests and priorities of the judgment creditors (s. 94); and
- c) An application to the court to make an order for sale of the land (s. 96).

[17] The third stage is sometimes referred to as the confirmation hearing because the court is asked to confirm the report of the registrar regarding the land that is to be sold.

- [18] On June 20, 2016, a show cause hearing was held and Master Tokarek determined Ms. Wilson failed to show cause why her interest in the Property should not be sold to satisfy the Judgment. On July 20, 2016, Master Taylor, sitting as a registrar, reported that Ms. Wilson is the registered owner of the Property and the sole charge or lien against the Property is the Judgment.
- [19] Next, on June 6, 2018, the Trustee's application for the order for sale, the confirmation hearing under s. 96 of the COEA, came before the chambers judge. This resulted in the order now under appeal.
- [20] Ms. Wilson filed a response seeking a deferral of the sale.
- [21] Ms. Wilson relied on ss. 48 and 96(2) of the COEA. Section 48 provides:
- When order is payable
- 48 (1) If an order has been obtained for a sum of money, the sum is payable immediately unless the court orders otherwise.
- (2) The court may provide that an order is payable by instalments or may suspend execution for the time it considers proper.
- [Emphasis added.]
- [22] Both ss. 48 and 96 are found in Part 5 of the COEA, dealing with enforcement of court orders. For the purposes of Part 5 of the COEA, "execution" is defined in s. 47 as including "an order for sale of land under this Part".
- [23] The judge observed that the determination of whether to defer a sale under the COEA required a comparison of the relative risk of prejudice suffered by each party (at para. 33).
- [24] The judge reasoned that while a deferral would, to a degree, increase costs and impact those entitled to share in the distribution of assets acquired by the Trustee, it was not possible to find any actual prejudice suffered by anyone entitled to share in the distribution of funds acquired by the Trustee. He also held that the Judgment was well secured against the Property and that the amount of the Judgment was not at risk (at paras. 42-43).
- [25] The judge further considered Ms. Wilson's ongoing responsibilities to care for Mr. A. Wilson, her inability to pay either a lump sum or installment payments to satisfy the Judgment, that the Property had been the family residence for a significant period of time, and Ms. Wilson's own health issues (at para. 44).

- [26] In the result, the judge exercised his discretion to grant a deferral of the sale of Property for a period of 24 months, following which the Property was to be sold in accordance with procedures for sale sought by the Trustee, including: granting the Trustee exclusive conduct of sale and liberty to list the Property and approve real estate fees; and terms by which agents of the Trustee were to have the ability to inspect and appraise the Property and show the interior to prospective purchasers (at paras. 45-46).

On Appeal

- [27] The Trustee says it was not open to the chambers judge to grant the deferral of the sale of the Property because the judge failed to impose terms and conditions on Ms. Wilson. The Trustee says this was an error in law, based on the plain, mandatory wording of s. 96(2) of the COEA.
- [28] Further, the Trustee says it was not open to the judge to consider s. 48 of the COEA as a basis for delaying the sale.
- [29] Alternatively, the Trustee says the chambers judge erred in the exercise of his discretion when he granted the deferral of sale. In the Trustee's submission, the deferral of the sale simply delays the inevitable, because the Property will be sold in any event, in contrast to a case where there might be steps taken to pay a debt that would avoid having to sell the home. Further, the Trustee says, the chambers judge's decision failed to account for the risk to the Trustee of a wasting of the asset that such a long deferral presents.

Standard of Review

- [30] The issue regarding the proper interpretation of ss. 48 and 96(2) of the COEA is a question of law, reviewable on a standard of correctness: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 8.
- [31] The judge's decision to grant the deferral of sale of the Property was an exercise of discretion, entitled to deference. As is well established, this court will not interfere in the exercise of a lower court's discretion unless the appellant can show that the court misdirected itself or came to a decision so clearly wrong it amounts to an injustice; or where the lower court gave no or insufficient weight to relevant considerations: *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19 at para. 27; *Kish v. Sobchak Estate*, 2016 BCCA 65 at para. 34.

Discussion

Interpretation of s. 96(2) of the COEA: Discretion to Defer Sale

- [32] The Trustee raises a question of statutory interpretation.

- [33] The Trustee submits that s. 96(2) of the COEA mandates that a court impose terms and conditions for performance by the judgment debtor, as a prerequisite to exercising discretion to defer the sale of a home. The Trustee submits that the judge therefore erred in his interpretation of the section by not imposing such terms when ordering the deferral of sale of the Property.
- [34] Again, s. 96(2) provides that the court "may defer the sale, subject to the performance by the judgment debtor of terms and conditions of payment or otherwise as the court imposes."
- [35] The Trustee submits that the terms and conditions that must be imposed pursuant to s. 96(2) may be related to payment but it concedes that such conditions do not necessarily have to relate to payment, given the words "or otherwise".
- [36] Ms. Wilson submits that the words of s. 96(2) should be construed in context together with s. 48(2) of the COEA, which gives the court discretion to suspend execution of an order for payment of a sum of money "for the time it considers proper."
- [37] Ms. Wilson submits that s. 96(2) is clearly meant to ameliorate hardship for persons who are at risk of losing their personal residence and so must be interpreted liberally and not more narrowly than s. 48(2).
- [38] In *B.C. Freedom of Information and Privacy Association v. British Columbia (Attorney General)*, 2017 SCC 6, the Court affirmed the well-settled approach to statutory interpretation:
- [21] namely 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": *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26, quoting both *E. A. Driedger, Construction of Statutes* (2nd ed. 1983), at p. 87, and *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21.
- [39] In addition, s. 8 of the Interpretation Act, R.S.B.C. 1996, c. 238, provides that "[e]very enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."
- [40] It was not until 1970 that the legislature enacted a provision expressly giving the court discretion to defer execution against a home. On April 3, 1970, s. 42(1) of the Execution Act, R.S.B.C. 1960, c. 135 [Execution Act] (now s. 96 of the COEA), was amended to permit the court to defer the sale of a judgment debtor's land where a premises situated on the land was "the matrimonial home of the debtor and his spouse". The amendment contained similar language as in the present section, but with some differences, stating that "the Court or Judge may defer the sale, subject to the performance by the judgment debtor of such terms and conditions of payment or otherwise as the Court or Judge may impose" (my underlining to emphasize relevant differences from present wording).

- [41] The present words "the home of the debtor" were substituted for "the matrimonial home of the debtor and his spouse" by amendment of the COEA in 1985.
- [42] In my view, the plain reading of the original version of the section with the word "may", as above, meant that it was at the judge's discretion whether or not to impose terms and conditions when ordering the deferral of the sale of the debtor's home. The word "may" is clearly permissive, as noted in the Interpretation Act, R.S.B.C. 1996, c. 238, s. 29 (and as noted in the Interpretation Act, R.S.B.C. 1960, c. 199, s. 23(a), the version in place at the time of the 1970 amendment of s. 42(1) of the Execution Act).
- [43] There was no discussion in the legislative debates regarding this amendment to the Execution Act in 1970. However, there is an explanatory note in the bill that introduced the amending Act, which states that the amendment "gives the Court the discretion, not now available to the Court, to defer a sale by the sheriff under execution, if it is the matrimonial home".
- [44] I pause to note that at the time the Execution Act was amended to give the court power to defer sale of a matrimonial home, s. 48 of the COEA was not part of the Execution Act.
- [45] When the BC statutes were revised and consolidated in 1979, the words "such" and "may" as I have underlined above in the 1970 amendment, were taken out, so that the relevant portion of then s. 88(1) of the COEA read as s. 96(2) does now (for ease of reference I will show the changes as crossed out):
- the court [or Judge] may defer the sale, subject to the performance by the judgment debtor of [such] terms and conditions of payment or otherwise as the court [or Judge] [may] imposes.
- [46] The critical question becomes: were these changes made in 1979 to what is now s. 96(2) of the COEA intended to make the imposition of terms and conditions on deferral of the sale of land mandatory?
- [47] It is necessary to consider that the changes in 1979 to what is now s. 96(2) were part of an overall revision and consolidation of statutes.
- [48] During the revision, the name of the statute changed from Execution Act to Court Order Enforcement Act.
- [49] Professor Ruth Sullivan in *Sullivan on the Construction of Statutes*, 6th ed. (Markham, Ont.: LexisNexis, 2014) notes that generally there is a strong presumption that the legislature did not intend to change the law substantively during a statute revision, since "the purpose of a revision is to restate the law, not change it" (at 741). This passage was cited with approval in *R. v. Penunsi*, 2019 SCC 39 at para. 49 in relation to a statute revision and consolidation.
- [50] This presumption is codified in s. 8(1) of the Statute Revision Act, R.S.B.C. 1979, c. 394 [Statute Revision Act], which governed the 1979 revisions, as follows:

8. (1) The Revised Statutes of British Columbia, 1979 shall not operate as new laws but shall be construed and have effect as a consolidation of the law as contained in the Acts repealed and for which the Revised Statutes of British Columbia, 1979 are substituted.

[51] Also consistent with this presumption is s. 3 of the Statute Revision Act, which set out the powers of the commissioner charged with making the revisions as follows:

3. the commissioner shall prepare and arrange the revised and consolidated statutes for publication, and may alter their numbering and the arrangement of their different sections where considered necessary or advisable, make alterations in their language required to preserve a uniform mode of expression, make minor amendments necessary to clarify what is considered to have been the intention of the Legislature, to reconcile seemingly inconsistent enactments or to correct clerical or typographical errors

[Emphasis added.]

[52] Despite ss. 3 and 8(1), s. 8(3) of the Statute Revision Act contemplates the possibility of substantive changes being introduced in the revision and if so, makes it clear that the new provisions will prevail, stating:

(3) If on any point the provisions of the Revised Statutes are not in effect the same as those of the repealed Acts for which they are substituted, then as respects all transactions, matters and things subsequent to the time the Revised Statutes take effect the provisions contained in them shall prevail

[53] Provisions similar to ss. 3, 8(1), and 8(3) appear in the current Statute Revision Act, R.S.B.C. 1996, c. 440. In *Knight v. Imperial Tobacco Canada Limited*, 2009 BCCA 541, rev'd on other grounds 2011 SCC 42, a majority of this Court concluded that revisions may be substantive in nature, consistent with s. 8(3) of the current Act:

[31] Section 2 of the Statute Revision Act, R.S.B.C. 1996, c. 440 [s. 3 of the 1979 Statute Revision Act], empowers the Chief Legislative Counsel to, among other things, make minor amendments to clarify the intent of the Legislature. Although limited by the use of the word "minor", the amendments effected by revisions may be substantive in nature. This is illustrated by s. 8(3) of the Act, which provides that if a revised provision does not have the same effect as a provision replaced by the revision, the replaced provision governs until the time of the revision and the revised provision governs thereafter.

[54] In *Angled Ent. Ltd. v. Quesnel (City)* (1988), 27 B.C.L.R. (2d) 59 at 69-70 (C.A.), this Court, in obiter, similarly noted that the new provision of a statute revised during the 1979 revisions prevailed pursuant to s. 8(3), as it had a different effect from the previous version. However, the Court also noted the following commentary regarding s. 8(3) in *Ammerlaan and Ammerlaan v. Drummond* (1982), 37 B.C.L.R. 394 at 395 (S.C.):

There is a common law presumption that a legislative body, under the guise of a consolidation, is presumed not to have intended a substantive change in the law: see *Cedar Rapids Saving Bank v. Dom. Purebred Stock Co.* [citation omitted] ... That presumption is incorporated into the Statute Revision Act by s. 8(1). Section 3 of the Act limits what the commissioner appointed under the Act can do. He may make changes to the wording of Acts for the limited purposes set out in s. 3, and he can go so far as making minor amendments necessary to clarify "what is considered to have been the intention of the Legislature". Nowhere is he given the power to make substantive changes to the law. Strangely however, s. 8(2) and (3) seem to envisage what the result shall be if substantive changes are made to the law. I do not think I need deal here with the lawfulness of either of those two subsections.

- [55] All of which is to say that while there remains a presumption that the legislature did not intend to make a substantive change on a general statute revision and consolidation, as captured in s. 8(1) of the Statute Revision Act, this presumption can be overcome when changes to the wording are seen to effect a substantive change in the law.
- [56] This leads me to consider the change that occurred resulting in what is now s. 96(2) of the COEA, by the dropping of the word "may" in the phrase "as the court imposes." It is my view that the Legislature did not intend to make a substantive change to this section in the 1979 general revision. Rather, the drafter simply wished to remove superfluous language.
- [57] The Trustee reads the words "subject to" and the language following in s. 96(2) as requiring the court to impose terms on the debtor. I disagree with this interpretation. The words read, "subject to the performance by the judgment debtor of terms and conditions" (emphasis added). I read the words "subject to" as clearly applying to the debtor who wishes to have the benefit of a sale deferral. The words mean that if and when terms are imposed on a debtor by the court, the sale will only continue to be deferred if the debtor performs the terms. If a debtor does not perform the terms, the creditor is free to return to court and seek an order ending the deferral of sale.
- [58] Indeed, in my view it makes no sense to read the language following "subject to" in s. 96(2) as qualifying the court's discretion to defer the sale: the court's discretion to make the order cannot be qualified by the debtor's performance of terms and conditions because any performance or non-performance will necessarily occur after the court has exercised its discretion to defer the sale. The words do not read that the court's order is "subject to the imposition of terms and conditions".
- [59] I am unpersuaded by the import of the Trustee's argument that in 1970 the Legislature intended to grant to the court wide judicial discretion to defer the sale of a home of a debtor, but then decided in 1979 to fetter that discretion by requiring the judge to impose some terms, whatever they may be. In my view, the words "as the court imposes" are consistent with wide judicial discretion to impose one term, several terms, or no terms.

- [60] I am satisfied that the changes to the legislation from 1970 to the version introduced in 1979 were merely a matter of form and not substance, and did not narrow the former discretion available to a judge under what is now s. 96(2).
- [61] As Professor Sullivan notes, "When only formal change is intended, the amended version of the legislation has the same meaning and scope as the previous version. This means that the previous version may be relied on to clarify the amended version" (at 667). Consistent with the 1970 version, I read s. 96(2) as giving the judge a discretion to defer the sale of a home, and when doing so, the discretion to impose terms or to not impose terms.
- [62] It follows that I conclude the judge made no error of law in his interpretation of s. 96(2) of the COEA. He had discretion to order deferral of the sale of the Property under s. 96(2), without imposing terms and conditions for performance by the judgment debtor, Ms. Wilson.

Interpretation of s. 48 of the COEA: Discretion to Suspend Execution

- [63] I turn to consider s. 48 of the COEA. To repeat, it permits a court to "suspend execution for the time it considers proper", with "execution" being defined in s. 47 as including an order for the sale of land under Part 5.
- [64] The predecessor to s. 48 dates back to 1915 in relation to the Supreme Court of British Columbia by way of an amendment to the Supreme Court Act, R.S.B.C. 1911, c. 58 and at least 1885 in respect of the County Court of British Columbia, by way of the County Court Jurisdiction Act, S.B.C. 1885, c. 7. Later, s. 42.1 (now s. 48) was added to the COEA in 1990 when the two courts were merged.
- [65] When s. 48 was added to the COEA in 1990, the statute already included s. 88(1) (now s. 96(2)), allowing for deferral of the sale of the debtor's home. It also already contained the definition of "execution" now found in s. 47.
- [66] The judge exercised his discretion pursuant to s. 96(2) and not pursuant to s. 48 of the COEA. This is clear from para. 32 of his reasons, which referred to s. 96(2) as authority for the court's discretion to defer the sale, and para. 45, in which he expressly ordered that the sale "shall be deferred" for a period of 24 months. The judge did not make an order "suspending execution".
- [67] It is therefore unnecessary to consider the application of s. 48.

Was Discretion Properly Exercised?

- [68] The next question is whether the Trustee can show that the judge erred in the exercise of his discretion.

- [69] The Trustee submits that if the discretion to defer a sale is exercised under s. 96(2), it must be for some specific purpose and not just generally to extend the time the debtor is able to live in the home. The Trustee submits that the judge erred in that there was no reasonable rationale for ordering a 24-month deferral.
- [70] The Trustee submits the discretion under s. 96(2) is limited to cases where a deferral may obviate the need for sale because with the benefit of time some other arrangements for payment of the judgment debt will likely be possible. I agree that evidence presented by a debtor, to the effect that with some additional time they might have a real opportunity to make other arrangements for payment of the judgment debt, can potentially justify deferral of the sale of a home. However, I disagree that the discretion to defer a sale is limited to only these kinds of circumstances.
- [71] In enacting s. 96(2), the Legislature recognized that there is something special about a person's home, as compared to other property, which may require some exceptions to be made to the ordinary judgment enforcement process.
- [72] A home provides shelter and accommodation for the debtor. There may be other special characteristics of a home as well, in that it may be designed to accommodate some special needs or, because of the length of time it was a home, be filled with a lifetime of personal effects that will require extra effort to dispose of or move. A debtor may have special circumstances that will require more time to find alternative shelter.
- [73] I therefore find that it would not be contrary to the legislation for a judge to take into account hardship to the debtor when considering the discretion to defer sale of the debtor's home under s. 96(2). However, proper consideration of the discretion would require considering prejudice to both parties, the debtor and creditor.
- [74] In this case, the judge did consider the relative risk of prejudice to both parties: to the Trustee if a deferral was ordered, and to Ms. Wilson if no deferral of sale was ordered.
- [75] The judge recognized and took into account that any delay in realizing available assets will to some degree increase the costs of the Trustee and impact those entitled to share in the ultimate distribution of assets, however, it was hard to put a precise figure on this prejudice (at para. 42). In this unusual case, in the absence of evidence as to when the Trustee expected to be in a position to say it had completed its other collection efforts from other debtors, it could not be concluded that the delay in selling Ms. Wilson's home was going to cause any material delay in recovery by other persons awaiting the Trustee's efforts.
- [76] Countering the prejudice to the Trustee caused by delay was the judge's finding that the Judgment was well secured against the Property and there was no evidence it was at risk (at para. 43). The amount of the Judgment was \$347,044.92 and the Property was appraised in August 2016 as having a market value of \$650,000; it was assessed in 2017 at a value of \$821,900 (at para. 13). Even if there were downward pressures in the market, it would seem a negative market change was a risk to be borne by the debtor who would lose equity, but it

was unlikely to affect the creditor.

- [77] Further, nearly the entirety of the value of the Property stems from the underlying land, and not the home itself. There is little risk to value as a result of the home aging. There was no evidence to suggest that Ms. Wilson has other creditors that would potentially dilute the Trustee's recovery under the Judgment. The judge made it clear in the terms he imposed that it was the debtor's obligation to make the Property available for sale free of encumbrances.
- [78] The Trustee argues that there was no purpose to the deferral as eventually Ms. Wilson and Mr. A. Wilson will have to move, and there is no evidence that waiting will make that any easier. I find this to be too simplistic a view of the situation.
- [79] Here, the chambers judge was clear as to the purpose of the deferral of sale: to minimize the disruption to Ms. Wilson and Mr. A. Wilson arising from an immediate sale of the Property given the obvious hardship this would cause.
- [80] The judge recognized that there would be exceptional hardship affecting Ms. Wilson if she were forced to move out of the home quickly, given her age, her serious health conditions, her very limited income, and the very serious health conditions of Mr. A. Wilson who lives with her and who is dependent on her for his care.
- [81] The evidence was that the home was not only shelter for Ms. Wilson and Mr. A. Wilson, and had been the family home for 38 years, it also provided close access to their medical providers. The judge was clearly concerned that it would take Ms. Wilson some time to find suitable replacement accommodation, given her and her son's special needs and limited income. Without replacement accommodation, the sale of the home could seriously jeopardize their health.
- [82] The Trustee submits that the judge should have considered a time period for deferral that is consistent with ss. 96(3) and 100 of the COEA. Section 96(3) defers sale for six months when substitute service on the judgment debtor is required, and s. 100 mandates that the sheriff must wait for one month from receipt of an order for sale before offering property for sale. However, I note that these sections do not restrict the judge's exercise of discretion under s. 96(2). These sections are of little assistance in this matter.
- [83] Nevertheless, despite there being no error by the judge in his interpretation of s. 96(2) or his general approach of weighing the prejudice to the parties, I am concerned about the length of deferral imposed by the judge. In the absence of an explanation for this length of deferral, I consider 24 months to be beyond the range one would normally expect to provide some reasonable relief to the hardship of a debtor. I note that other trial court decisions do not approach this range in granting deferrals or stays of execution of sale orders: see, for example, *Topouzis v. Abboud*, 2012 BCSC 1379, and 2013 BCSC 269, which involved a delay of four months initially then a further five months; *Canada Mortgage and Housing Corporation v. 447136 B.C. Ltd.*, 2014 BCSC 480, involving a stay of six months; and *Canada (Attorney*

General) v. Nichols, 2018 BCSC 1185, involving a delay of four months.

- [84] Respectfully, I would conclude that the judge gave insufficient weight to the potential prejudice to the creditor imposed by such a lengthy deferral as 24 months. The future is unpredictable, and a court can be more confident in weighing relative prejudice when a delay is in a range of a matter of months as opposed to years. Given the circumstances, a more appropriate deferral would have been in the range of up to six months.

Conclusion

- [85] The judge did not make an error of law in interpreting s. 96(2) of the COEA as authority for his order deferring sale of the Property without the necessity of imposing terms and conditions on the respondent. I would vary the judge's order on the length of the deferral. In light of the time that has already passed since the order was made, and in light of Ms. Wilson's personal circumstances which persuade me she ought to be given some notice to allow her time to make arrangements to move, I would vary the order below such that the deferral of sale will expire on March 31, 2020.

"The Honourable Madam Justice Griffin"

I AGREE:

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Madam Justice D. Smith"

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