

CANADA / JUDGMENT

Tasci (Re)

2020 BCCA 317

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 317 Tasci (Re)

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Tasci (Re),

2020 BCCA 317

Date: 20201119

Docket: CA47030

IN THE MATTER OF THE BANKRUPTCY OF

Kris Sinan Tasci

Between:

Lynette Dianne Hebert, Just Fish-Inn Inc., Stonewater Ventures (No. 179) Ltd.,

Stonewater Ventures (No. 181) Ltd.

Appellants

(Applicants)

And

Roy Sommerey

Respondent

(Respondent)

Before:

The Honourable Mr. Justice Abrioux

(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated September 29, 2020 (Tasci (Re), 2020 BCSC 1438, Vernon Docket 180676).

Counsel for the Appellants

(via teleconference):

J.D. Shields

Counsel for the Respondent

(via teleconference):

K. Ihas

Place and Date of Hearing:

Vancouver, British Columbia

October 23, 2020

Place and Date of Judgment:

Vancouver, British Columbia

November 19, 2020

Summary:

The applicants seek to appeal an order dismissing their application to set aside an order under s. 38 of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 [BIA] which permitted the respondent to commence proceedings in place of a trustee. They submit that they may appeal as of right pursuant to ss. 193(b) and (c) of the BIA as the impugned order is so broad as to permit the respondent to bring additional proceedings similar to the one at issue, and concerns a sum of property exceeding \$10,000. Alternatively, they submit that leave should be granted pursuant to s. 193(e) on the basis that the standing of civil defendants and the sufficiency of affidavit evidence in s. 38 proceedings are questions of general significance, and that the impugned order was impermissibly broad. Held: Leave to appeal is required and leave is denied. The application does not engage ss. 193(b) or (c) and the proposed grounds of appeal do not warrant granting leave.

Reasons for Judgment of the Honourable Mr. Justice Abrioux:

Introduction

- [1] The applicant appellants seek to appeal an order of Justice Davies (the "Order") pronounced September 29, 2020 and not yet entered, which dismissed their application to set aside (i) an order made by a Master granting the respondent permission to commence proceedings in place of the trustee pursuant to s. 38 of the Bankruptcy and Insolvency Act, R.S.C. 1985, c.

B-3 [BIA]; and (ii) 16 Certificates of Pending Litigation ("CPLs") filed by the respondent against various of their properties. They seek an order that they may appeal the order as of right, or alternatively, an order granting leave to appeal.

- [2] The respondent opposes the application. He submits that there is no leave as of right and that the application for leave should be dismissed.
- [3] For the reasons that follow, I agree with the respondent that leave to appeal is required, and I would decline to grant leave.

Background

- [4] Mr. Kris Tasci, a businessman, made an assignment in bankruptcy on December 14, 2017. Roy Sommerey, his former lawyer, filed a proof of claim with the Trustee on February 21, 2018, pursuant to which he is a secured creditor of the bankrupt in the amount of \$1,201,018.91 and an unsecured creditor in the amount of \$548,829.45.
- [5] On August 9, 2019, Mr. Sommerey emailed the Trustee requesting an update on the status of Mr. Tasci's bankruptcy. He also asked the Trustee to commence legal proceedings against Mr. Tasci, Mr. Tasci's spouse Ms. Herbert, and their respective companies in respect of alleged fraudulent preferences and fraudulent transactions. Mr. Sommerey noted that he had become aware of possible claims following review of a bailiff's report received August 30, 2017, and that the two-year limitation period pursuant to s. 6 of the Limitation Act, S.B.C. 2012, c. 13 was therefore fast approaching.
- [6] The Trustee replied that she was unable to respond to information requests until she returned to work on August 20, 2019 and that there were no funds in the estate with which to proceed with the proposed action. She advised Mr. Sommerey that he would either have to fund the litigation or apply under s. 38(1) of the BIA to bring proceedings at his own expense.
- [7] Section 38 of the BIA provides:

Proceeding by creditor when trustee refuses to act

38(1) Where a creditor requests the trustee to take any proceeding that in his opinion would be for the benefit of the estate of a bankrupt and the trustee refuses or neglects to take the proceeding, the creditor may obtain from the court an order authorizing him to take the proceeding in his own name and at his own expense and risk, on notice being given the other creditors of the contemplated proceeding, and on such other terms and conditions as the court may direct.

Transfer to creditor

- (2) On an order under subsection (1) being made, the trustee shall assign and transfer to the creditor all his right, title and interest in the chose in action or subject-matter of the proceeding, including any document in support thereof.

Benefits belong to creditor

- (3) Any benefit derived from a proceeding taken pursuant to subsection (1), to the extent of his claim and the costs, belongs exclusively to the creditor instituting the proceeding, and the surplus, if any, belongs to the estate.

Trustee may institute proceeding

- (4) Where, before an order is made under subsection (1), the trustee, with the permission of the inspectors, signifies to the court his readiness to institute the proceeding for the benefit of the creditors, the order shall fix the time within which he shall do so, and in that case the benefit derived from the proceeding, if instituted within the time so fixed, belongs to the estate.

[8] On August 19, 2019, Mr. Sommerey appeared before a Master of the Supreme Court of British Columbia and obtained short leave to proceed with the s. 38 application. The following day Master Schwartz granted the order, which authorized Mr. Sommerey to

1. prosecute legal proceedings against the Bankrupt and other persons and companies to be named as defendants for conducting or participating in money, property or financial transactions comprising fraudulent transfers, fraudulent preferences, and/or placing property or money derived from or through the initiative and work of the Bankrupt into the names of others

[9] The Trustee's right title and interest in the proceedings was then transferred to Mr. Sommerey. On August 23, 2019, he filed a Notice of Civil Claim with the Kelowna registry against Mr. Tasci and the applicants in this application, seeking remedies under the Fraudulent Preference Act, R.S.B.C. 1996, c. 164 and Fraudulent Conveyance Act, R.S.B.C. 1996, c. 163, among others.

[10] The applicants filed a Notice of Application on July 20, 2020 to set aside Master Schwartz's order. Their arguments centered on three grounds: (i) that Mr. Sommerey, a practicing lawyer, inappropriately relied on his own affidavit; (ii) that the affidavit failed to disclose a cause of action except through reliance upon inadmissible hearsay; and (iii) that the short leave application of August 19, 2020, was "in every way an ex parte application" and that Mr. Sommerey had failed to comply with the duty to make full and frank disclosure.

[11] Justice Davies dismissed the application on September 29, 2020. In his reasons for judgment, indexed at 2020 BCSC 1438 (the "Reasons"), he explained that in light of Mr. Sommerey's correspondence with the Trustee and his steps in obtaining short leave, the application was

not equivalent to an ex parte application. He found that Mr. Sommerey was not precluded from relying on his own affidavit since he was acting on his own behalf rather than on behalf of a client. Lastly, he decided that there was sufficient admissible evidence in Mr. Sommerey's affidavit to uphold Master Schwartz's order.

[12] In light of these conclusions, the judge declined to address what the applicants submit was a threshold issue, being whether they have the standing to challenge the granting of an s. 38 order.

The Legislation

[13] Recourse to this Court in this matter is governed by s. 193 of the BIA:

Court of Appeal

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.

Positions of the Parties

[14] This application raises two issues: whether leave to appeal is required; and if so, whether it should be granted.

[15] The applicants' primary position is that they are entitled to appeal as of right on the basis of ss. 193(b) and 193(c) of the BIA. They submit that s. 193(b) applies because the scope of Master Schwartz's order is so broad as to leave "no limits to what cases of a similar nature [Mr.] Sommerey might bring against the current Defendants or others." They also argue that s. 193(c) applies in that the property at issue in Mr. Sommerey's Notice of Civil Claim is well in excess of \$10,000.

[16] Alternatively, they submit that leave should be granted under s. 193(e). They say that the proposed appeal is of general importance since it raises issues concerning the sufficiency of evidence in support of s. 38 applications, the permissible scope of s. 38 orders and the standing of similarly situated applicants to challenge these orders once made. In particular, they refer to certain case law which, they submit, reflects inconsistent approaches to the issue of standing. They add that the appeal is clearly of great importance to the applicants, since it could be dispositive of Mr. Sommerey's civil claim. The appeal, they submit, would

have arguable merit.

- [17] In relation to the sufficiency of the affidavit evidence required on an s. 38 application, the applicants say that it is clear from Mr. Sommerer's affidavit that he seeks to commence the action against them for the purposes of conducting a speculative fishing expedition. Paragraph 31 of his affidavit states:
31. The exact nature of what Mr. Tasci did do and is doing in business, the money these activities made and what he did or directed to be done with it are all unknown to me. It is necessary to commence legal proceedings to obtain this information.
- [18] Mr. Sommerer submits that neither ss. 193(b) nor 193(c) applies in the circumstances. He argues that s. 193(b) is inapplicable because there are no other proceedings of a similar nature in these bankruptcy proceedings. Furthermore, s. 193(c) does not apply because the proposed appeal concerns procedural matters lacking any direct monetary impact on the applicants.
- [19] Mr. Sommerer further argues that leave should not be granted under s. 193(e). He characterizes the points on the proposed appeal as of limited significance generally or to the action itself. He submits that an appeal would lack merit, as the applicants are seeking to "re-argue the issue[s] de novo" by raising the same arguments made before the chambers judge. Lastly, he submits that granting leave to appeal would unduly hinder the progress of his action.

Analysis

Is Leave Required?

- [20] The applicants base their primary submission on this issue by referring to ss. 193(b) and 193(c) of the BIA. They submit that these subsections involve rights which this Court has described as "broad, generous and wide-reaching": *Wong v. Luu*, 2013 BCCA 547 at para. 23 (Harris J.A. in Chambers) [Wong]. Following this approach, they have an appeal from the judge's order as of right.
- [21] In *Forjay Management Ltd. v. Peeverconn Properties Inc.*, 2018 BCCA 188 at paras. 33-35 (in Chambers) [Forjay], Justice Willcock referred to differing view points on this issue:

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*.

[22] I consider myself to be in a similar position here since whether the broad or narrow approach is followed, the result would be the same. The applicants do not have a right to an appeal; leave is required.

[23] I will first consider s. 193(b), which 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.

[24] Section 193(b) only applies if the other cases potentially affected by an impugned order are "in the bankruptcy proceedings," which is to say "in the same matter": Forjay at para. 42, citing *Wong* at para. 22. Those other cases must involve a "real dispute": *Wong* at para. 19, citing *Lemay c. Lamarre* (1934), 16 C.B.R. 189 (Q.C.C.A.).

- [25] In *Forjay*, the appellants sought to appeal an order of Justice Fitzpatrick directing the court-appointed receiver of a property development to disclaim 40 pre-sale contracts for units in the development. The appellants, who were parties to those contracts, argued that they had a right to appeal the order pursuant to ss. 193(a), (b) or (c). Justice Willcock held, *inter alia*, that s. 193(b) was engaged because the appeal was likely to affect the resolution of disputes between purchasers and secured creditors over other pre-sale contracts in the development, many of which were "of a similar nature" to those at issue: *Forjay* at paras. 40 and 43.
- [26] Here, the applicants have not identified any other cases in the bankruptcy proceedings that could be affected by the judge's order. Rather, they argue that the underlying order of Master Schwartz is so broad that it could conceivably lead Mr. Sommerey to bring further cases of a similar nature. In my view, this fails to satisfy the threshold of a "real dispute" that would bring the proposed appeal within s. 193(b) such that leave to appeal would not be required.
- [27] I will now turn to s. 193(c) which provides an appeal lies to the Court of Appeal from any order or decision "if the property involved in the appeal exceeds in value ten thousand dollars."
- [28] *Forjay* is authority for the proposition that s. 193(c) does not apply to orders that:
- (a) are procedural in nature;
 - (b) do not bring into play the value of the debtor's property; or
 - (c) do not result in a loss.

Forjay at para. 47, citing *Bending Lake* at para. 53.

- [29] To "result in a loss," the order in question must contain some element of a final determination of economic interests: *Forjay* at para. 53, citing *Bending Lake* at para. 61.

- [30] All three factors from *Forjay* are present here.

- [31] No property, strictly speaking, is at issue in this appeal. The issue underlying this application and the proceedings below is whether Mr. Sommerey was entitled to bring a claim against the applicants in place of the Trustee. Even if the appeal was successful, the claims in the action would not be resolved, but would rather revert to the Trustee of the Bankrupt's estate. As such, s. 193(c) is not engaged.

- [32] I would therefore find that neither provision applies, and leave to appeal is required.

Should Leave Be Granted?

- [33] The test for leave pursuant to s. 193(e) of the BIA was recently described by Justice Garson in *McKibbin v. BDO Canada Limited*, 2020 BCCA 7 (in Chambers):

- [20] In *Farm Credit Canada v. Gidda*, 2015 BCCA 236 at para. 11 (Chambers), Justice Goepel citing *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONCA 282 articulated the test for granting leave under s. 193(e) of the BIA. The test inquires 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.
- [21] Justice Goepel noted that these criteria are functionally identical to the general test for leave to appeal set out in *Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp.* (1988), 19 C.P.C. (3d) 396 (B.C.C.A.), which direct an inquiry into:
- [1] whether the point on appeal is of significance to the practice;
 - [2] whether the point raised is of significance to the action itself;
 - [3] whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and
 - [4] whether the appeal will unduly hinder the progress of the action.
- [22] In the general test for leave to appeal, the overarching concern is the interests of justice: *Hanlon v. Nanaimo (Regional District)*, 2007 BCCA 538 (Chambers) at para. 2. As per Justice Goepel in *Farm Credit Canada*, the two tests above are functionally identical, and this includes the requirement that I consider the interests of justice in an application for leave to appeal under s. 193(e) of the BIA.
- [34] In my view, Justice Davies accurately summarized the framework which applies to an s. 38 application at paras. 23-26 of the Reasons:
- [23] Although s. 38 states that notice of the contemplated proceeding is to be given to other creditors no such notice is required before an application can be made. The only party to whom notice of an application under s. 38 must be given is the trustee of the bankrupt's estate. See: *Bank of British Columbia v. McCracken et al* (1986), 4 B.C.L.R. (2d) 35 (C.A.) [McCracken] and *Jaston and Co. v. McCarthy* (1998), 59 B.C.L.R. (3d) 168 (C.A.) [Jaston].
- [24] More specifically, there is no requirement that notice be given to the bankrupt or any other proposed defendant. See: *Salloum (Re)* (1990), 51 B.C.L.R. (2d) 336 [Salloum] at para. 27.
- [25] It is also settled law in British Columbia that failure to comply with or incomplete procedural compliance with s. 38 of the Act is to be treated in appropriate circumstances only as an irregularity. See: *Jaston and Culp v. KPMG et al.*, 2006 BCSC 1599 [Culp] at para. 13, leave to appeal refused, 2006 BCCA 462 at para. 20.

- [26] Jaston further establishes that where there is no proof of prejudice caused to a person affected by non-compliance or incomplete procedural compliance with the procedural requirements of s. 38 of the Act such an irregularity can and should be cured by the making of or amending an order made under s. 38 nunc pro tunc.
- [35] The power to grant an s. 38 application is discretionary: *KPMG LLP v. Culp*, 2006 BCCA 462 at para. 22 (Smith J.A. in Chambers).
- [36] The applicants submit that the issues raised on appeal, which include who has standing to oppose an s. 38 application and the adequacy of the affidavit evidence in support of the application for an s. 38 order, are of general importance to the practice in bankruptcy/insolvency matters, and to the administration of justice as a whole. Accordingly, they require that a division of the Court address them.
- [37] Regarding standing, they submit that courts appear to have differed on when a bankrupt or civil defendant has standing in s. 38 proceedings.
- [38] In particular, they cite jurisprudence in British Columbia that appears to be divided regarding whether fraud is the sole ground upon which standing can be founded, or whether other concerns such as harm to the administration of justice or material nondisclosure may also suffice: see *Formula Atlantic Financial Corp. v. Canada (Attorney General)* (1994), 10 B.C.L.R. (3d) 52 at paras. 11-13 (C.A.) (Taylor J.A. in Chambers) and *Culp v. KPMG et al.*, 2006 BCSC 1599 at paras. 28 and 36, leave to appeal ref'd 2006 BCCA 462 at para. 21.
- [39] They contrast this with jurisprudence in other provinces that appears to have endorsed the broader view of standing: see *Shaw (Trustee of) v. Nicol Island Development Incorporated*, 2009 ONCA 276 at paras. 44-48; *Smith v. Pricewaterhousecoopers Inc.*, 2013 ABCA 288 at para. 34.
- [40] In this case, the applicants submit that their standing derives from procedural irregularities in the proceedings below, including Mr. Sommerer's reliance on what they assert was inadmissible evidence, and para. 31 of Mr. Sommerer's affidavit which is set out at para. 17 above.
- [41] In my view the applicants have not established that this issue militates in favour of leave being granted.
- [42] The judge, having considered many of the authorities to which I have referred on the question of standing, stated at para. 39 of the Reasons:
- [39] I have concluded that the issues raised should be determined on the merits of this application rather than upon the disputed issue of whether the applicants have standing to apply to set aside the Order.

- [43] While there may be inconsistencies in the jurisprudence, and I make no comment on whether there are in fact any, since the issue played no part in the outcome of the proceedings below and there was no analysis by the judge on the issue, in my view the interests of justice would be better served by considering the question with the benefit of full reasons in the Court below: *Gorenshtein v. British Columbia (Employment Standards Tribunal)*, 2016 BCCA 457 at paras. 45-46 [Gorenshtein]; *Price v. Robson*, 2017 BCCA 419 at para. 75 (Fitch J.A. in Chambers).
- [44] I will now turn to the applicants' other submissions.
- [45] An appeal is not significant to the practice where there is an abundance of law on the point and where it would not settle the law on a substantive or procedural issue: *Carpenter Fishing et al v. HMTQ*, 2002 BCCA 104 (Prowse J.A. in Chambers) at para. 6.
- [46] In considering the merits of the application, the judge concluded that Mr. Sommerer's affidavit was sufficient to support the making of the Master's Order. He did so having carefully considered the applicants' objections to Mr. Sommerer having filed and spoken to his own affidavit together with other arguments relating to inadmissible hearsay.
- [47] With respect to the latter issue, the judge, having quoted from this Court's decision in *Albert v. Politano*, 2013 BCCA 194 at paras. 19-22 concluded:
- [71] In considering the applicant's hearsay submissions it must also be noted that if evidence is not adduced to prove the truth of an out of court statement or document but is rather adduced for a non-hearsay purpose, it will not be inadmissible.
- [72] In this case the causes of action against the applicants and Mr. Tasci that are asserted by Mr. Sommerer (as identified by him to the Trustee in the correspondence from which I have quoted at para. 19 of these Reasons) are fraudulent preferences and fraudulent transactions contrary to the provisions of either the Act or of Provincial legislation, or both.
- [73] Those causes of action are not complex.
- [74] The delict in each case is the transfer of an interest in property by an insolvent debtor to avoid recovery from the sale of that property by creditors or in an attempt by an insolvent debtor to advantage one creditor (usually a related party) to the disadvantage of others.
- [75] Mr. Sommerer's affidavit and the information upon which he relied in seeking authorization under s. 38 of the Act must be considered in that context.
- [76] More specifically in relation to admissible evidence related to the causes of action asserted by him, Mr. Sommerer:
- 1) Identified from his own knowledge the assets and apparent wherewithal of the bankrupt when he and his wife loaned significant amounts of money to Mr. Tasci when compared to the bankrupt's similar lifestyle after his assignment in bankruptcy.

- 2) Identified from his own knowledge the existence of the applicants' corporations involved with or related to the bankrupt and his wife and the fact that Mr. Tasci granted a security interest to one of those corporations in 2014 when Mr. Sommerer and his wife were unsecured judgement creditors due to a shortfall in mortgage foreclosure proceedings against Mr. Tasci.
 - 3) Identified with specificity the bailiff retained by Ms. Whidden to pursue collection proceedings under her GSA who reported upon assets that were seized by him and also identified assets held by either a corporation related to the bankrupt and his wife or by the bankrupt's wife. Although that evidence is not admissible to prove the truth of what the bailiff determined to be the ownership of individual items seized, it is, admissible to the extent that it records Mr. Sommerer's knowledge of the progress or lack of progress of the collection proceedings.
 - 4) Identified from his own knowledge that the security interest granted by the bankrupt to the related company in 2014 was amended by the bankrupt in 2017 (immediately before the bankrupt's assignment bankruptcy) to provide security over two of the assets that had earlier been seized by the bailiff.
- [77] The fact that Mr. Sommerer's wife was later successful in obtaining an order for the disposition of assets seized by the bailiff (a copy of which was appended to Mr. Sommerer's affidavit) notwithstanding the assertions by the related corporation that it held a security interest in some of those assets is not hearsay evidence and also affirms the truth of at least some of the contents of the information related to Mr. Sommerer by the bailiff.
- [78] In all of those circumstances I am satisfied that notwithstanding some of the information contained in Mr. Sommerer's affidavit constitutes inadmissible hearsay because he did not specifically assert his belief in each piece of information to which he referred, sufficient reliable non-hearsay evidence remains after the excising of inadmissible hearsay evidence to preclude the setting aside of the Order.
- [48] I agree with the respondent that the sufficiency of Mr. Sommerer's affidavit evidence before Master Schwartz was a highly fact-specific exercise. Furthermore:
- the legal framework referred to by the judge does not involve any point of principle nor does it raise an issue of importance to the practice or the action itself; and
 - the applicants have not identified any extricable errors of law in the judge's decision, such that granting leave is warranted.
- [49] The applicants also submit that the Master's order was impermissibly broad and vague. This issue does not appear to have been specifically addressed before the judge and would thus constitute a new issue on appeal. As Justice Saunders explained in *Gorenshtein* at para. 44, this Court "generally does not consider submissions that were not advanced in the proceeding giving rise to the order appealed." The power to do so is ultimately discretionary, and is "guided by the balancing of the interests of justice as they affect all parties": *R. v.*

Winfield, 2009 YKCA 9 at para. 18.

- [50] The applicants cite *Jaston & Co. v. McCarthy* (1998), 59 B.C.L.R. (3d) 168 (C.A.). In that case, the plaintiffs had obtained an order under s. 38 of the BIA permitting them to "take this proceeding in their own names," without any further specification. On appeal, this Court observed that the order "according to its terms purport[ed] to permit the appellants to take over the bankruptcy proceeding" and therefore failed to comply with s. 38: at paras. 27-28.
- [51] In my view, *Jaston* is distinguishable. Master Schwartz's order in this case specifies that the order applies to proceedings for fraudulent transactions, fraudulent preferences and other instances in which property derived from the Bankrupt's own efforts, and held in trust for the Bankrupt, has been transferred to others. While broadly worded, I am not persuaded that this amounts to permitting Mr. Sommerey to "take over the bankruptcy proceeding."
- [52] Considering the stringency of the test for permitting new issues on appeal, I am not persuaded that it would be appropriate to entertain this issue on appeal.
- [53] For all these reasons I would also conclude that the applicants have not established that the appeal is *prima facie* meritorious.
- [54] The final factor to be considered is whether granting leave will unduly hinder the progress of the action.
- [55] This factor includes an examination of potential concerns as to timing and the sufficiency of the factual matrix. As explained by Justice Hall in *Smith v. Global Plastics*, 2001 BCCA 152 (in Chambers):
- [11] Concerns as to timing and possible interference with a number of matters that are important such as,
- [1] the trial date which we ought not to imperil,
- [2] the possibility of bringing a rule 18A application;
- [3] the possibility of settlement negotiations; or
- [4] matters that relate to the temporal aspect of the litigation.
- must fall for consideration in making any decision relative to any order for leave, or a stay that might be granted.
- [56] It appears from the record that the appellants have failed to comply with document obligations and to move the underlying action forward since the application which resulted in the order under appeal was brought before the judge.
- [57] Accordingly, this criterion also weighs against granting leave to appeal.
- [58] In conclusion, when I consider all the relevant factors, it is not in my view, in the interests of justice, to grant leave.

Disposition

[59] Pursuant to s. 193(3) of the BIA leave to appeal is required.

[60] For the reasons I have identified, leave to appeal is denied.

"The Honourable Mr. Justice Abrioux"

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