

COURT OF APPEAL FOR ONTARIO

DATE: 20190212
DOCKET: M50109 (C66336)

Hourigan J.A. (Motion Judge)

BETWEEN

Firepower Debt GP Inc., as agent

Applicant (Respondent)

and

Theredpin, Inc. and Theredpin.com Reality Inc.

Respondent

Simon Bieber and Alex Fidler-Wener, for the respondents

Jeffrey Klein, for Lloyds Underwriters

Harvey Chaiton, for the applicant

Aubrey Kauffman, for Trilogy Growth Fund L.P.

Harry Fogul, for MNP Ltd.

Heard and released orally: February 11, 2019

REASONS FOR DECISION

[1] An order was made under s. 243 of the *Bankruptcy and Insolvency Act* (the “BIA”) and s. 101 of the *Courts of Justice Act* (the “CJA”) for the appointment of a receiver over the assets, undertakings, and properties of TRP Reality (the “Receivership Order”). As part of the receivership proceeding, the motion judge

ruled on a motion by the receiver that the funds in one of the accounts of TRP Realty were not imposed with a trust. The appellant real estate agents bring a motion for an extension of time to appeal the motion judge's order and for directions in respect of whether leave to appeal is required. This motion turns on the answers to a number of questions, which will be considered below.

[2] First, is this appeal governed by the BIA or the CJA? If it is governed by the CJA, the appellants have brought their appeal in time. If it is governed by the BIA, then they are out of time.

[3] Generally, appeals from decisions or orders made in proceedings under the BIA are governed by the BIA and BIA Rules and not the CJA or *Rules of Civil Procedure: Canada (Superintendent of Bankruptcy) v. 407 ETR Concession Co. Ltd.*, 2012 ONCA 569, at para. 19. The mere reference to the CJA in the standard receivership form does not oust the operation of the BIA: *Business Development Bank of Canada v. Astoria Organic Matters Ltd.* (7 January 2019), M49872 (C65512) (Ont. C.A), at para 21.

[4] However, the appellants, relying on *RREF II BHB IV Portofino LLC v. Portofino Corp.*, 2015 ONCA 906, submit that where the court is dealing with issues of common law only, the BIA is not engaged and the appeal lies under the CJA. They argue that in this case the motion judge was simply applying trust principles and thus the BIA was not engaged.

[5] I disagree. The motion for directions was brought under s. 249 of the BIA and paragraph 28 of the Receivership Order. It related directly to the discharge of the receiver's duties. In these circumstances, any appeal is governed by the BIA and the BIA Rules.

[6] Second, should an extension be granted? The test is well established and was stated by Chief Justice Strathy in *Ontario Wealth Management Corp. v. Sica Masonry and General Contracting Ltd.*, 2014 ONCA 500, at para 26:

The overarching principle is whether the justice of the case requires that an extension be granted. The relevant factors may include:

- (a) whether the applicant had a *bona fide* intention to appeal before the expiration of the appeal period;
- (b) the length of and explanation for the delay in filing;
- (c) any prejudice to the responding parties caused by the delay; and
- (d) the merits of the proposed appeal.

[7] I am satisfied that the test for an extension has been met. The appellants clearly had an intention to appeal and were weighing their options during what they erroneously thought was the appeal period. They have also adequately explained the brief delay in filing and there is no prejudice to the responding parties. In terms of the merits of the appeal, at this stage we are only interested in whether the appeal is frivolous: *National Telecommunications Inc. v. Stalt Telecom Consulting Inc.*, 64 C.B.R. (6th) 169 (Ont. C.A.), at para. 18. This is not a frivolous appeal.

There are arguable grounds set forth by the appellants, including an alleged extricable error regarding the conflation of express and implied trusts. Although it may be difficult to meet the palpable and overriding error standard of review with respect to the alleged error of fact, I cannot find that the argument is frivolous. There is a significant difference between frivolous and difficult appeals. Courts should be careful about labelling cases as frivolous when they have not been fully argued before them. Therefore, I grant the extension sought.

[8] Third, is this appeal as of right or must leave be obtained? The appellants make three arguments supportive of their position that the appeal is as of right: the case impacts the rights of agents to future commissions (s.193(a)); it affects other cases of a similar nature (s.193(b)); and the case involves property exceeding \$10,000 (s.193(c)).

[9] Only the last argument was covered in oral argument, so I will begin with it. Generally, given the broad nature of the stay imposed by s.195 of the BIA, the right of appeal without leave under s.193(c) must be narrowly construed. The appeal must directly involve property exceeding \$10,000 in value: *Re Enroute Imports Inc.*, 2016 ONCA 247, at para. 5.

[10] The respondents rely on *Ontario Wealth Management Corp.* in support of their submission that where a lower court considered only an issue of priority, the appeal in such a case does not fit within s.193(c). In that case, Strathy J.A., as he

then was, distinguished between a case regarding the value of a claim and a priority dispute.

[11] In my view, *Ontario Wealth Management Corp.* is distinguishable from the case at bar. In the present case, we are not dealing with a priority dispute. Rather, the issue is whether the commissions are part of the funds controlled by the Receivership Order. This is a case that puts directly in issue property in excess of \$10,000. The order at issue is not merely a procedural order, it directly affects the value of the debtor's property (as it determines finally whether the funds in issue are subject to the Receivership Order or are imposed with a trust), and it has resulted in a loss to the appellants. In these circumstances, the appeal fits within s.193(c): *2403177 Ontario Inc. Bending Lake Iron Group Ltd.*, 2016 ONCA 225 at para. 53. Given this conclusion, I need not consider the arguments advanced under s.193(a) and (b).

[12] Based on the foregoing, I conclude that leave is not required under s.193 (e). It becomes unnecessary, therefore, to consider whether the appellants meet the test for leave to appeal under that subsection.

[13] In the result, I grant the motion for an extension of the time to appeal and order that leave to appeal is not required.

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