COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Podollan v. Trustee of Estate of David Podollan,* 2024 BCCA 173

Date: 20240503
Docket: CA49668

Between:

Leah Podollan

Appellant
(Defendant)

And

Trustee of Estate of David Podollan

Respondent
(Plaintiff)

And

David Podollan

Respondent
(Defendant)

Before: The Honourable Madam Justice Fisher
(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated January 18, 2024 (*Trustee of Estate of David Podollan v. David Podollan*, 2024 BCSC 89, Vancouver Docket S202923).

Counsel for the Appellant:	J.W.T. Robinson T-M. Young
Counsel for the Respondent:	S.R. Andersen
Place and Date of Hearing:	Vancouver, British Columbia April 19, 2024
Place and Date of Judgment:	Vancouver, British Columbia May 3, 2024

Summary:

The appellant filed a notice of appeal 27 days after the order under appeal was pronounced. The respondent Trustee applies to dismiss the appeal as abandoned because of the appellant's failure to comply with the 10-day time limit to appeal prescribed by the Bankruptcy and Insolvency General Rules. The appellant contends the abbreviated appeal period has no application and the appeal was brought in time under the Court of Appeal Rules. As an alternative position, she cross applies for an extension of time to commence the appeal.

Held: Trustee's application dismissed; the appellant's cross application allowed. The abbreviated appeal period applies in the present case as the order under appeal was granted in reliance on jurisdiction under the Bankruptcy and Insolvency Act. The appeal was thus brought out of time. However, it is appropriate to grant an extension of time to commence the appeal. The delay was adequately explained, occasioned no inordinate prejudice to the Trustee and the appeal is not bound to fail.

Reasons for Judgment of the Honourable Madam Justice Fisher:

[1] The appellant, Leah Podollan, seeks to set aside part of an order made under s. 96 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 [*BIA*]. The order declared a separation agreement and certain transfers of property void and of no force and effect and set aside both the agreement and the transfers (the Order). The Order was made January 18, 2024, and the appellant filed her notice of appeal on February 15, 2024.

[2] The respondent, the Trustee of the Estate of David Podollan (the Trustee), applies to dismiss the appeal as abandoned as a consequence of the appellant's failure to comply with a 10-day appeal period under the *Bankruptcy and Insolvency General Rules*, C.R.C., c. 368 [*BIA Rules*].

[3] The appellant contends that the 30-day appeal period under the *Court of Appeal Rules*, B.C. Reg. 120/2022 [*CA Rules*], applies in this case and therefore her appeal was commenced in time. As an alternative position, she applies for an extension of time to appeal to February 16, 2024.

Background

[4] The Order followed a summary trial application brought by the Trustee that concerned the transfer of assets personally owned by the respondent, David Podollan, to the appellant, his estranged wife. Mr. Podollan had previously been assigned into bankruptcy, hence the involvement of a licensed insolvency trustee.

The factual context

[5] The appellant and Mr. Podollan were married in 2003. Throughout their relationship, Mr. Podollan operated a number of companies involved in various lines of business and the parties enjoyed a high quality of life.

[6] By early 2018, creditors were putting significant pressure on Mr. Podollan and that summer a receiver was appointed over one of his companies.

[7] In February 2019, Mr. Podollan and the appellant separated but remained "living together but apart" in the family home.

[8] In March 2019, Mr. Podollan's largest creditor commenced legal action over a personal guarantee he had provided. In October 2019, that creditor applied to have a receiver appointed over the holding company for his various businesses.

[9] After their separation, and amidst the legal proceedings commenced by the creditor, the appellant and Mr. Podollan made two written separation agreements, described by the judge as follows:

- On August 16, 2019, Mr. Podollan handed the appellant a handwritten list of 12 properties, a plane and two boats, and offered to transfer all to her "in exchange for resolving all issues in our marriage and separation". The appellant accepted the offer: at para. 10;
- The next month, the appellant typed out the parties' agreement, which stated the matters that were settled were with respect to "division of assets, property, debts and taxes" but not child and spousal support and other matters relating to the child of the marriage. Both parties signed the document, and the appellant backdated it to August 16th: at para. 10;

- The parties then jointly retained a lawyer to formalize the agreement "into a legal document". The lawyer sent the document to the parties on October 18, 2019, which they endorsed: at para. 11.

[10] The judge found the October 18, 2019 agreement to have been carelessly drafted and inconsistent in some respects with the August 16, 2019 agreement. She found the earlier agreement accurately reflected the parties' intentions and therefore, where the terms of the October 18, 2019 agreement differed, the terms of the August 16, 2019 agreement governed: paras. 12–13. I will refer to these agreements collectively as the Separation Agreement.

[11] As read by the judge, the Separation Agreement provides, among other things, that each party would keep their respective RRSPs; Mr. Podollan would be responsible for any debt acquired by either or both parties prior to the date of the agreement; the appellant would continue to earn an annual salary from a corporate entity associated with Mr. Podollan until February 1, 2025; and certain real and personal property, including a plane, two boats and numerous parcels of land, would be transferred from Mr. Podollan to the appellant: see paras. 10, 13–14. The judge noted the approximate net value of the properties to be $6.5 million, the two boats $200,000 and the plane $3 million.

[12] On October 18, 2019, the parties executed "transfer forms", effecting the transfer of the real and personal property from Mr. Podollan to the appellant: paras. 15, 18. The judge found that these transactions constituted a transfer of substantially all of Mr. Podollan's assets (save for his RRSPs): at paras. 1, 48.

[13] On December 23, 2019, a petition was filed to adjudge Mr. Podollan bankrupt. On February 18, 2020, he was assigned into bankruptcy.

The proceedings below

[14] On March 11, 2020, the Trustee commenced a claim against the appellant and Mr. Podollan by filing a notice of civil claim. The notice of civil claim sought, among other things, a declaration that the Separation Agreement and transfers described above are void and of no effect as against the Trustee, and an order

setting aside the Agreement and the transfers. It stated, as the legal basis for the Trustee's claim, sections 95 and 96 of the *BIA*, the *Fraudulent Conveyance Act*, R.S.B.C. 1996, c. 163, the *Fraudulent Preference Act*, R.S.B.C. 1996, c. 164, and "divisions 3-4" of the *Family Law Act*, S.B.C. 2011, c. 25.

[15] On July 28, 2023, the Trustee filed a summary trial application seeking the same relief set out in the notice of civil claim but relying only on s. 96 of the *BIA* and the *Fraudulent Conveyance Act* as the legal basis for the application.

[16] The matter proceeded as a summary trial despite the appellant's objection that the application was unsuitable for summary trial. The judge reasoned that all the evidence required to decide the relevant questions was before the court, the appellant's credibility was not in issue, there was urgency to the matter due to the appellant's sale of two Mexican properties (which had been transferred to her pursuant to the Separation Agreement) and her use of the proceeds for her living expenses, and finally, the summary trial would resolve all matters in issue.

[17] In her analysis of the property transfers, the judge focused exclusively on s. 96(1) of the *BIA*, which authorizes the court to declare that a transfer at undervalue made within the periods of time specified in paragraphs (a) or (b) is void as against the trustee. She found that the appellant and Mr. Podollan were not dealing at arm's length and therefore the separation in February 2019, the entering into of the August 16, 2019 agreement, and the transfers of property in October 2019, which occurred within the year prior to the initial bankruptcy event, all fell within the scope of s. 96(1)(b)(i). She then considered whether "the transfers made pursuant to the Separation Agreement" were for undervalue.

[18] The judge first referred to the definition of "transfer at undervalue" in s. 2 of the *BIA*:

> ***transfer at undervalue*** means a disposition of property or provision of services for which no consideration is received by the debtor or for which the consideration received by the debtor is conspicuously less than the fair market value of the consideration given by the debtor …

[19] The judge rejected the appellant's argument that she gave valuable consideration for the transfers by waiving her right to child and spousal support, as the Separation Agreement clearly stated that support was still to be determined. She also rejected an argument that the appellant had given valuable consideration by waiving her right to any other assets owned by the Mr. Podollan, accepting the evidence of the Trustee that the assets transferred constituted all of Mr. Podollan's assets save for his RRSPs. She noted that other judges in matters involving Mr. Podollan had considered the Separation Agreement to be "itself a demonstration of an attempt to hinder or delay the creditors": at paras. 49–50. She considered it beyond question that "this was a transfer undervalue", as Mr. Podollan "transferred millions of dollars of property to [the appellant], took responsibility for all of the debt and agreed to continue paying her a salary until 2025 in exchange for no consideration": at para. 51.

[20] The judge made no determination as to the appellant's entitlement to these assets under the *Family Law Act* as the only issue before her was "the validity of the transfers made pursuant to the Separation Agreement". As the Trustee takes the bankrupt's property subject to the same equities as affected the property when it was owned by the bankrupt, she noted that distribution of Mr. Podollan's estate to the Trustee had to be deferred until the appellant's interest in the family property was determined.

[21] The judge concluded by declaring that the Separation Agreement (being both the August 16, 2019 and October 18, 2019 agreements) and the transfers of property "pursuant to those Agreements" were "void and of no force and effect" and she ordered both the Separation Agreement and the transfers to be set aside: at paras. 59–60.

The underlying appeal

[22] On February 15, 2024, the appellant filed a notice of appeal in respect of the part of the judge's order declaring the Separation Agreement to be void and of no force and effect and setting it aside. She asserts two errors made by the judge:

(1) invoking s. 96 of the *BIA* as a basis for setting aside agreements, as opposed to transfers; and (2) failing to identify what rights in the Separation Agreement were set aside.

Time limit for appeal

[23] The first issue to determine is whether the time limit for bringing this appeal is governed by the *BIA Rules*, which provide for a 10-day time limit, or by the *CA Rules*, which provide for a 30-day time limit. The appellant filed her notice of appeal outside the 10-day time limit but within the 30-day time limit.

[24] The Trustee's position is that the appeal provisions of the *BIA* govern, and the *BIA Rules* apply where the order under appeal was granted pursuant to the *BIA*. The Trustee says the *BIA Rules* apply in this case because the Order was made pursuant to s. 96(1)(b)(i) of the *BIA* and thus the appellant brought her appeal out of time.

[25] The appellant's position is that the 10-day time limit in the *BIA Rules* does not apply here because the proceedings were not commenced under the *BIA* and the Order was not made by a judge sitting as a court "in bankruptcy". Because the Trustee chose to commence the proceeding below by way of a notice of civil claim, rather than as a motion under the *BIA*, she says the *CA Rules* apply and dictate the time limit for bringing an appeal in this case.

[26] The 10-day time limit for commencing appeals under the *BIA Rules* is in Rule 31(1):

> 31 (1) An appeal to a court of appeal referred to in subsection 183(2) of the Act must be made by filing a notice of appeal at the office of the registrar of the court appealed from, within 10 days after the day of the order or decision appealed from, or within such further time as a judge of the court of appeal stipulates.

[27] The time limit for commencing appeals under the *CA Rules* is in Rule 6(2):

> 6 (2) The time limit for filing and serving a notice of appeal of an order is the following:
>
> (a) unless paragraph (b) applies, not more than 30 days after the order is pronounced;
>
> (b) if another enactment specifies a time limit within which the appeal must be commenced, that time limit.

[28] Section 183(2) of the *BIA* confers appellate jurisdiction on this Court to hear and determine appeals from "the courts vested with original jurisdiction under this Act":

> … the courts of appeal throughout Canada, within their respective jurisdictions, are invested with power and jurisdiction at law and in equity, according to their ordinary procedures, except as varied by this Act or the General Rules, to hear and determine appeals from the courts vested with original jurisdiction under this Act.[1]

[29] Section 183(1) invests the Supreme Court of British Columbia (BCSC) with "original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act".

[30] It is my view that the time limit to appeal an order made under the *BIA* is governed by Rule 31(1) of the *BIA Rules*. Not only is Rule 31(1) "another enactment" as referred to the Rule 6(2)(b) of the *CA Rules*, but the Order under appeal was also made pursuant to the jurisdiction of the BCSC under the *BIA*. I agree with the Trustee that the substantive exercise of that jurisdiction grounds the requirement to comply with the time limit to appeal provided in the *BIA Rules*.

[31] The jurisprudence from this Court is consistent with this analysis.

[1] A similar provision as to procedure is contained in Rule 3 of the *BIA Rules*: "In cases not provided for in the Act or these Rules, the courts shall apply, within their respective jurisdictions, their ordinary procedures to the extent that that procedure is not inconsistent with the Act or these Rules."

[32] In *Industrial Alliance Insurance and Financial Services Inc. v. Wedgemount Power Limited Partnership*, 2018 BCCA 283 (Chambers) [*Industrial Alliance*], Justice Groberman rejected an argument that the *BIA* appeal provisions applied only to proceedings filed in the Bankruptcy registry of the Supreme Court. He held that the *BIA Rules* applied where the judge below, in making the order, relied on jurisdiction conferred in the *BIA*:

> [20] … The parties knew, at all times, that the proceeding was brought pursuant to the *Bankruptcy and Insolvency Act*, and that remedies were being sought in reliance on that statute. Where a party obtains remedies in reliance on the *Bankruptcy and Insolvency Act*, it is the appeal provisions of that statute that govern: see, for example, *2003945 Alberta Ltd. v. 1951584 Ontario Inc.*, 2018 ABCA 48. To require special notations or words on the documents, would, in these circumstances, elevate form over substance.

[33] He acknowledged that relief in that case had been sought under both common law equitable principles and the *Law and Equity Act*, R.S.B.C. 1996, c. 253, as well as under the *BIA*, and therefore there could be some question as to whether the appeal provisions of the *BIA* were engaged. He concluded that the appeal provisions of the *BIA* are applicable if the order under appeal was one granted in reliance on jurisdiction under the *BIA*, or put another way, if the judge purported to act pursuant to powers conferred in the *BIA*: at paras. 21, 24.

[34] This approach was endorsed in *Forjay Management Ltd. v. 625536 B.C. Ltd.*, 2019 BCCA 368 (Chambers) [*Forjay*] and by the Ontario Court of Appeal in *Business Development Bank of Canada v. Astoria Organic Matters Ltd.*, 2019 ONCA 269.

[35] The appellant distinguishes *Industrial Alliance* and *Forjay* on the basis that neither involved matters arising in a bankruptcy, as in this case, but rather involved orders made in receivership proceedings. She cites various authorities and provisions of the *BIA* and *BIA Rules* to support the proposition that there is a fundamental distinction between the ordinary civil jurisdiction and the bankruptcy jurisdiction exercised by the BCSC. In the appellant's submission, because the Trustee chose to commence these proceedings by way of a notice of civil claim and apply for summary trial thereunder, rather than as an application by motion in

Mr. Podollan's bankruptcy, the judge was exercising ordinary civil jurisdiction, and therefore the ordinary civil rules apply. In effect, she says procedure determines whether a proceeding is in bankruptcy court or ordinary court.

[36] I am unable to accept the appellant's submission for several reasons.

[37] First, I disagree that there is a fundamental distinction between the jurisdictions exercised by the BCSC. The *BIA* does not create a separate bankruptcy court, it confers a jurisdiction in bankruptcy on a pre-existing court. As stated in Lloyd W. Houlden, Geoffrey B. Morawetz, & Janis P. Sarra, *The 2022-2023 Annotated Bankruptcy and Insolvency Act* (Toronto: Thomson Reuters, 2022) at §8:2 [*Annotated BIA*]:

> The *BIA* confers on a pre-existing court a jurisdiction in bankruptcy and all judges of the designated courts have jurisdiction in bankruptcy and power to deal with bankruptcy matters: *Re Dominion Shipbuilding & Repair Co.* (1926), 7 C.B.R. 349 (Ont. S.C.); *Holley v. Gifford Smith Ltd.* (1986), 59 C.B.R. (N.S.) 17, 54 O.R. (2d) 225, 26 D.L.R. (4th) 230, 14 O.A.C. 65 (C.A.).
>
> Although commonly referred to as the bankruptcy court, this term is done for convenience only; there is in fact no such tribunal. Jurisdiction in bankruptcy is assigned to the courts designated in s. 183: *Turcotte v. Cote* (1936), 18 C.B.R. 47, 61 Que. K.B. 72 (C.A.); *Re Artic Gardens*, [1989] R.J.Q. 397 (Que. S.C.), affirmed (1989), 78 C.B.R. (N.S.) 1, 35 Q.A.C. 68, [1990] R.J.Q. 6 (Que. C.A.); *Mancini (Trustee of) v. Falconi* (1987), 65 C.B.R. (N.S.) 246, (*sub nom. Clarkson Gordon Inc. v. Falconi*) 61 O.R. (2d) 554, 43 D.L.R. (4th) 444 (S.C.), affirmed (October 8, 1992), Doc. No. CA 457/88 (Ont. C.A.).

[38] Second, I also disagree with the premise that procedure determines what jurisdiction is being invoked or exercised. While it is true that the *BIA Rules* direct applications to the court to be made by motion (Rule 11), a trustee can nonetheless proceed by action in the ordinary civil courts: see *Annotated BIA* at §8.20. In this case, the Trustee acknowledges that it could have commenced this proceeding by way of motion in Mr. Podollan's bankruptcy but points out that the appellant opposed a summary proceeding, which is the way motions proceed under the *BIA Rules* in any event. The cases cited by the appellant address particular procedural matters in bankruptcy, such as whether an application to set aside or annul an assignment in bankruptcy must be brought expressly in the superior court "In Bankruptcy" (*Saskatchewan Economic Development Corp. v. Michalyca Management Ltd*.

(1991), 12 C.B.R. (3d) 277 (Sask. Q.B.)); what is the proper court within a bankruptcy district or division (*Re Falasca*, 2019 ONSC 1547); and, whether a contractual claim of a trustee in bankruptcy ought to proceed in the jurisdiction where the debtor resides or in the jurisdiction of the law that applies to the disputed contract (*Sam Lévy & Associés Inc. v. Azco Mining Inc.*, 2001 SCC 92). None of these cases assist the analysis required here.

[39] More importantly, consistent with the approach taken by Groberman J.A. in *Industrial Alliance*, it is my view that substance, not procedure, determines whether jurisdiction derives from the *BIA*. Where the order under appeal is granted by a judge in reliance on the court's jurisdiction under the *BIA*, the appeal is "one referred to in subsection 183(2)", that is, an appeal from a court vested with original jurisdiction under the *BIA*. It is not disputed that the Order in this case was made in reliance on s. 96 of the *BIA*.

[40] Further, I do not consider either *Industrial Alliance* or *Forjay* to be distinguishable from this case on the basis that they both involved receivership applications. The applications in those cases were made within extant civil proceedings that relied on the *BIA* and the *Law and Equity Act* and did not indicate the BCSC as sitting "in Bankruptcy and Insolvency".

[41] In *Industrial Alliance*, an action was commenced by notice of civil claim and an application was made within that action for the appointment of a receiver under both s. 243(1) of the *BIA* and s. 39 of the *Law and Equity Act.* In *Forjay*, the proceedings originated in a foreclosure petition, within which an application for a receiver was made also under the *BIA* and the *Law and Equity Act*. Nevertheless, as Groberman J.A. observed in *Industrial Alliance*, there was no suggestion that any filings were improper or calculated to mislead and the parties knew that the proceedings had been brought pursuant to the *BIA*.

[42] In both *Industrial Alliance* and *Forjay*, the orders under appeal were orders made by judges exercising original jurisdiction under the *BIA*, and appeals from those orders were thus appeals "referred to in subsection 183(2) of the Act", *even*

though the proceedings within which that jurisdiction was exercised were not specifically commenced under the *BIA* and the applications were not made as motions pursuant to the *BIA Rules* and filed in a Bankruptcy registry of the BCSC.

[43] The present case is similar. The Trustee commenced a civil action by way of a notice of civil claim that did not indicate the BCSC as sitting "in Bankruptcy and Insolvency" and applied for judgment by way of a summary trial within that action. In both the notice of civil claim and the application, the relief sought included an order under s. 96 of the *BIA*. I see no relevant difference between reliance on s. 96 of the *BIA* and reliance on the receivership jurisdiction in s. 243.

[44] For the foregoing reasons, I conclude that the appeal provisions of the *BIA*, including Rule 31(1) of the *BIA Rules*, govern the subject appeal. It follows that the appellant brought her appeal out of time.

[45] Section 36 of the *Court of Appeal Act*, S.B.C. 2021, c. 6 [*CA Act*], permits a justice to dismiss an appeal as abandoned where an appellant fails to comply with the *Act* or the *CA Rules*. Unless an extension of time is granted, a notice of appeal filed out of time is a nullity and may be dismissed as abandoned: see *Forjay* at para. 32.

[46] It is therefore necessary to consider whether the appeal should be dismissed as abandoned, as urged by the Trustee, or whether an extension of time should be granted. I first turn to whether it is appropriate to grant the extension of time sought by the appellant.

Extension of time

[47] The appellant filed the notice of appeal on February 15, 2024, and served it on the Trustee the next day, February 16, 2024.

[48] On February 21, 2024, the Trustee gave notice of its position that the 10-day time limit for filing an appeal under Rule 31(1) of the *BIA Rules* applied and

consequently, the appellant had filed the notice of appeal out of time and her appeal was a nullity.

[49] On March 4, 2024, the appellant advised the Trustee that she disagreed the notice of appeal had been filed out of time, but in the event this Court found it had been, she intended to apply for an extension of the time to file it.

[50] Between March 7 and March 12, 2024, counsel for the appellant and the Trustee discussed holding dates for the hearing of the Trustee's application to dismiss the appeal and appellant's cross application for an extension of the time.

[51] On April 5, 2024, the Trustee filed its notice of application, seeking an order that the appeal be dismissed as abandoned. On April 11, the appellant filed her notice of application for an extension of time to appeal.

[52] This Court has a discretionary power to extend time limits for filing a notice of appeal, under both the *BIA Rules* and the *CA Act*.

[53] *BIA Rule* 31(1) requires a notice of appeal to be brought "within 10 days after the day of the order or decision appealed from, or within such further time as a judge of the court of appeal stipulates". Similarly, s. 32 of the *CA Act* authorizes a justice to extend the time limit for doing an act under the *Act* or the *CA Rules*, including the time limit for commencing an appeal. A justice has that power even if, as here, the time limit for doing the act expired before the application for an extension was brought.

[54] The considerations applicable on an extension of time application in this context are essentially the same as the well-known set of criteria established in *Davies v. C.I.B.C.* (1987), 15 B.C.L.R. (2d) 256 (C.A.). They were described by Groberman J.A. in *Industrial Alliance* at para. 30:

a) Was there an intention to apply for leave before the expiry of the time for doing so?

b) Did the appellant communicate the intention to the respondents?

c) Was the delay lengthy?

d) Did the applicant act expeditiously to seek an extension of time?
e) Is there an explanation for the delay?
f) Is there prejudice to the respondents consequent on the delay?
g) Is there merit to the application for leave?
h) Is it in the interests of justice that the extension be granted?

See also *Forjay* at para. 33.

[55] These factors are not a checklist and the answers to the questions "are not added together or dealt with in some mathematical or algorithmic approach". They are simply considerations that guide the exercise of judicial discretion: *Industrial Alliance* at para. 31.

[56] Here, many of the considerations favour an extension. There is evidence that the appellant formed an intention to appeal the day the Order was pronounced, after corresponding with her counsel. The delay was 17 days, which is not extensive, and has been explained by the appellant's counsel being unaware until she was notified by the Trustee's counsel on February 21, 2024, of the Trustee's position that the 10-day appeal period applied. The appellant acted with reasonable expedience in seeking an extension of time.

[57] Where, like here, the notice of appeal has been filed between 10 and 30 days after the order under appeal was pronounced, the importance of the first two factors is diminished. Given the result of "widespread unawareness" of the abbreviated appeal period under the *BIA*, it has been considered overly harsh to treat a mistaken belief that the 30-day appeal period applied as culpable, but the party seeking an extension still needs to provide an explanation: *Industrial Alliance* at paras. 35–36, citing *Knight v. Thorne Ernst & Whinney Inc.* (1990), 49 B.C.L.R. (2d) 158 at 160 (C.A. Chambers).

[58] As for prejudice to the Trustee, this is to be consequent on the delay itself, not the existence of the appeal. It is prejudice arising between the end of the applicable 10-day appeal period and the date the notice of appeal was filed that should be considered: see *Industrial Alliance* at para. 38, citing *Re Braich*, 2007 BCCA 641

(Chambers). The Trustee asserts that the proposed appeal would hinder the recovery process, especially since it says the appellant has used the proceeds from the sale of properties in Mexico for her own living expenses and for legal fees, both of which are not permitted under the terms of the Order. This is not prejudice consequent in any significant way on the delay but rather prejudice due to the appeal itself.

[59] The most relevant consideration here, similar in both *Industrial Alliance* and *Forjay*, is whether the appeal has merit. Even if all other considerations favour an extension of time, it will not be in the interests of justice to grant an extension if the appeal has no merit. The threshold question is whether the appeal is doomed to fail or there is no reasonable prospect it will succeed.

[60] The appellant challenges only the judge's order declaring the Separation Agreement to be "void and of no force and effect" and setting the Agreement aside. She submits that s. 96 of the *BIA* confers jurisdiction on the court to set aside only transfers, not agreements, and therefore the judge erred in including the Separation Agreement in the Order and also by failing to identify what rights were set aside. On this second point, the appellant is concerned about the provisions in the Separation Agreement dealing with the parties' debts and RRSPs, as her family law claim continues to be unresolved.

[61] The Trustee submits the appeal has no merit because it is based on findings of fact or mixed fact and law (that the appellant and Mr. Podollan were not dealing at arm's length and the transfers were made during the applicable period and at undervalue), where the applicable standard of review is palpable and overriding error. The Trustee submits further that once those findings are made, the judge's decision to set aside the transactions pursuant to s. 96(1) of the *BIA* is a discretionary order, which also demands a deferential standard of review.

[62] It appears to me that the appellant is not challenging the judge's findings that ground her conclusion that the transfers were at undervalue, or her exercise of discretion, as she is not seeking to set aside any part of the Order that addresses

the transfers themselves. Rather, she raises a question of law regarding the authority provided in s. 96 of the *BIA* to set aside agreements. Section 96(1) permits the court to declare only that "a transfer at undervalue is void as against … the trustee". A "transfer at undervalue" is defined in the *BIA* as "a disposition of property or provision of services" for which no consideration or consideration "conspicuously less" than fair market value is received by the debtor.

[63] I have not been provided with any authorities that define the types of transactions that fall within this definition, and in particular, whether an agreement that contains an obligation to transfer property is captured within it.

[64] The Trustee contends, however, that it was functionally necessary to set aside the Separation Agreement to make the relief effective: because the Trustee is bound by the contractual obligations of the bankrupt, he would be required to transfer the property pursuant to the Separation Agreement.

[65] In my view, it is arguable that the jurisdiction in s. 96 is limited to orders related to transfers and not agreements. Setting aside related agreements in this kind of application may be unnecessary or may create unnecessary complexities, especially where those agreements are made in the family law context. In this case, the appellant's interest in the family property has not yet been determined and it is at least unclear whether the Order has affected the parties' rights and obligations under the Separation Agreement in respect of the debts (and to a lesser extent, the RRSPs). I also note that the judge declared the Separation Agreement and the transfers "void and of no force and effect" whereas the authority provided in s. 96 of the *BIA* to declare a transfer at undervalue void *as against the trustee* is narrower than that.

[66] Although the utility of the appeal may be questionable given the bankruptcy, there is some merit to the contention that the judge overstepped her authority in the Order she made, and I cannot say that the appeal is doomed to fail.

[67] The “interests of justice” is often said to encompass the other factors and to be the decisive one: see e.g., *Davies*. In *Re Braich*, another application for an extension of time in the context of the operation of Rule 31(1) of the *BIA Rules*, the question of whether it was in the interests of justice to grant the extension was described as the “overriding question”: at para. 15. Justice Tysoe described the “essence of the situation” in that case as:

> [15] … there was a short delay resulting from an error on the part of the appellant’s lawyer. It is the type of situation which was recognized in *Davies v. Canadian Imperial Bank of Commerce* as one in which there is a tendency by the court to grant extensions of time. In my opinion, it is in the interests of justice to grant the extension in this case because there was a short delay caused by a lawyer’s mistake in circumstances where no inordinate prejudice has been or will be suffered and the appeal is not bound to fail.

[68] These comments apply with equal force here. The delay was not lengthy. It was caused by a genuine mistake made by counsel for the appellant. Upon learning of the mistake, counsel for the appellant moved with sufficient expediency in attempting to rectify it. Further, counsel’s mistake has not caused inordinate prejudice to the Trustee and the appeal, which raises an arguable question of law, is not bound to fail. In all these circumstances, I consider it in the interests of justice to grant the appellant the extension of time sought.

Terms

[69] The Trustee asks that any extension of time be granted on terms. The Trustee raises issues related to its ability to preserve the property of the bankrupt due to difficulties in realizing on the proceeds of sale of the two Mexican properties discussed above. The evidence before me indicates that a significant portion of those proceeds have not been accounted for and some of those funds have been or are about to be paid to the appellant’s counsel for legal fees. The Trustee has requested counsel to produce the trust records from her firm but this has been refused on the basis of solicitor client privilege. The Trustee submits that the appellant should be ordered to produce the trust records from the law firm pertaining to the funds received and any disbursements made therefrom, or alternatively to

preserve the funds currently held in trust to maintain the status quo until this matter can be resolved.

[70] This issue is very much disputed and has been so since early March of this year. To make such an order in these circumstances is outside the parameters of this application. The proper course is for the Trustee to bring this matter before the judge below, as the Order provided the Trustee with leave to apply for further orders or directions arising from the recovery of the Mexican properties.

Disposition

[71] Accordingly, the appellant's application for an extension of time to commence this appeal to February 16, 2024 is granted.

[72] The Trustee's application to dismiss the appeal as abandoned is dismissed.

"The Honourable Madam Justice Fisher"