

COURT OF APPEAL FOR ONTARIO

CITATION: Heliotrope Investment Corporation v. 1073650 Ontario Inc., 2024
ONCA 767
DATE: 20241018
DOCKET: M55301, M55412 (COA-24-CV-0318)

In the Matter of the Bankruptcy of Martha Lorraine Beach, of the Village of
Inverary, in the County of Frontenac, in the Province of Ontario

Zarnett J.A. (Motions Judge)

BETWEEN

Heliotrope Investment Corporation

Moving Party
(Respondent/Moving Party/Responding Party by way of cross-motion)

and

1073650 Ontario Inc., 1324789 Ontario Inc. and 2290998 Ontario Inc.

Responding Parties
(Appellants)

Denise Sayer and Percy Ostroff, for the respondent/moving party
(M55301)/responding party by way of cross-motion (M55412), Heliotrope
Investment Corporation

Karey Anne Dhirani, for the appellant/responding party (M55301)/moving party
by way of cross-motion (M55412), Gary Beach

Heard: October 10, 2024

ENDORSEMENT

Introduction

[1] On February 16, 2024, Hackland J. (the bankruptcy judge) made an order,
on a motion brought in the bankruptcy of Martha Beach, appointing MNP Ltd.
("MNP") as receiver of the assets and undertakings of three corporations:

1073650 Ontario Inc., 1324789 Ontario Inc. and 2290998 Ontario Inc. Martha Beach is the sole shareholder and director of the corporations.

[2] Acting without counsel, Gary Beach, who was not named as a responding party to the motion to appoint the receiver but was served and participated in the hearing, filed an appeal of the receivership order and then perfected the appeal (COA-24-CV-0318). It is scheduled to be heard on November 13, 2024.

[3] Mr. Beach is the spouse of Martha Beach. Martha Beach was adjudged bankrupt on November 18, 2022, after a contested hearing. That determination was upheld by this court in 2023. MNP is the trustee in bankruptcy for Martha Beach.¹

[4] The appeal Mr. Beach filed from the receivership order purports to name Martha Beach, Mr. Beach, and the three corporations as appellants.

[5] Mr. Beach filed the appeal from the receivership order as though that order could be appealed as of right. However, an order appointing a receiver under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (“BIA”) may not be appealed without leave by virtue of s. 193 of the BIA: *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONCA 282, 115 O.R. (3d) 617, at para. 17. The BIA provisions govern the appeal rights, even though MNP was appointed as

¹ Mr. Beach is also an undischarged bankrupt and MNP is the trustee in bankruptcy for his bankruptcy. However, Heliotrope did not pursue an argument that Mr. Beach lacked standing to pursue leave to appeal.

receiver under both the BIA and the *Courts of Justice Act*, R.S.O. 1990, c. C.43: *Business Development Bank of Canada v. Astoria Organic Matters Ltd.*, 2019 ONCA 269, 69 C.B.R. (6th) 13, at para. 5.

[6] Recognizing this, Mr. Beach, now represented by counsel, acknowledges that he requires leave under s. 193(e) of the BIA for the appeal that he filed. He moves for leave and an extension of time within which to seek it. Heliotrope Investment Corporation (“Heliotrope”), which brought the motion to appoint the receiver, opposes the extension and the granting of leave. It brings its own motion contending that leave was required for the appeal (a point that is conceded) and that leave should not be granted.

[7] For the reasons below leave to appeal should not be granted. It is therefore unnecessary to separately address whether an extension of time to seek it would otherwise be warranted.

Analysis

[8] The principles guiding consideration of a request for leave to appeal under s. 193(e) of the BIA were summarized in *Pine Tree Resorts, Inc.*, at para. 29. The court is to consider 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.

[9] Mr. Beach's proposed appeal has four grounds: first, that the bankruptcy judge did not identify the test for appointing a receiver; second, that he gave no reasons; third, that parts of the formal order were settled without Mr. Beach's involvement; fourth, that assurances Mr. Beach alleges he received during the hearing were not reflected in the receivership order.

[10] In my view, none of the proposed grounds of appeal are *prima facie* meritorious.

[11] Dealing with the first ground, a judge is presumed to know the law. I see no significance in the failure of the bankruptcy judge to expressly refer to the statutory tests for a receiver's appointment in s. 243 of the BIA and s. 101 of the *Courts of Justice Act*. These provisions were referred to in Heliotrope's motion material requesting the appointment of the receiver. It is fully apparent from the record why it was just or convenient to appoint the receiver. Martha Beach, the sole shareholder and director of the corporations, is bankrupt. The shares represent an asset of her bankrupt estate, and she is not entitled to act as a director given her bankruptcy. It is necessary for there to be an ability to operate the corporations and realize upon their assets while respecting the interests of the corporations' creditors. The appointment of a receiver fulfills that purpose.

[12] Mr. Beach does not point to any alleged error in the propriety of the appointment of a receiver in the circumstances.

[13] Turning to the second ground, I do not accept the argument that the bankruptcy judge gave no reasons. He conducted an oral hearing. He heard submissions from Heliotrope and other interested parties.² The creditors of the corporations who attended either consented to or did not oppose the appointment. Mr. Beach (at the time self-represented) made submissions that no receivership order should be made for essentially two reasons which the bankruptcy judge addressed during the hearing. Mr. Beach contended that MNP had a conflict of interest because it had acted for him and Martha Beach prior to its appointment as trustee in bankruptcy, and that on a proper accounting neither he nor Martha Beach was bankrupt. The bankruptcy judge explained that neither the propriety of MNP's appointment in the bankruptcy, nor the status of Mr. Beach and Martha Beach as bankrupts, could be relitigated. He indicated that if the Superintendent of Bankruptcy acted on a complaint Mr. Beach had made about MNP, then MNP would have to bring that to the court's attention. But he saw no current concern with MNP taking on the role of receiver. At the conclusion of the hearing, he indicated that the receivership order would issue.

² Other than Mr. Beach's submissions, no submissions opposing the receivership order were made.

[14] The bankruptcy judge did not give written or oral reasons beyond what he stated while conducting the oral hearing. But viewed contextually, his rulings at the oral hearing served, and fulfilled, the function of reasons. They addressed the live issues and the key points Mr. Beach raised. They show that the bankruptcy judge dealt, in real time, with the positions advanced by Mr. Beach and they explained why he was not giving effect to them. More extensive reasons were not, in the circumstances, required.

[15] As Binnie J. pointed out in *R. v. Walker*, 2008 SCC 34, [2008] 2 S.C.R. 245, at para. 20, “Reasons are sufficient if they are responsive to the case’s live issues and the parties’ key arguments. Their sufficiency should be measured not in the abstract, but as they respond to the substance of what was in issue.” He went on to explain, citing *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, at paras. 46 and 53, that “[w]here it is plain from the record why an accused has been convicted or acquitted, and the absence or inadequacy of reasons provides no significant impediment to the exercise of the right of appeal, the appeal court will not on that account intervene”. The duty to give reasons “should be given a functional and purposeful interpretation” and the failure to live up to the duty does not provide “a free-standing right of appeal” or “in itself confe[r] entitlement to appellate intervention”.

[16] The rulings made by the bankruptcy judge at the hearing are sufficient for appellate review, which is the litmus test for the adequacy of reasons. Mr. Beach

has not identified any alleged error in the way the bankruptcy judge dealt with his submissions about not being bankrupt and about MNP's conflict, or any impediment to appellate review arising from the nature of the rulings. In these circumstances, the argument that the alleged failure to give reasons suffices as a free-standing ground of appeal is not *prima facie* meritorious.

[17] Mr. Beach's third ground of appeal arises from the fact that, toward the conclusion of the hearing, another party (not Mr. Beach) raised a point that the bankruptcy judge asked counsel for Heliotrope to address by adding language to the proposed form of order. Mr. Beach does not, however, point to any error in the language of the order that resulted, nor to how he is affected by it. In the absence of any prejudice or alleged error, there is no *prima facie* merit to this ground of appeal.

[18] Mr. Beach's fourth ground of appeal relates to his concern that the order appointing the receiver did not reflect assurances he says the bankruptcy judge gave him about information he would receive from the receiver and about its activities. This was something to be addressed by a further attendance before the bankruptcy judge, rather than an appeal. Indeed, at the hearing of this motion, Mr. Beach's counsel advised that at a recent hearing before the bankruptcy judge, orders were made to address this concern.

[19] In addition to the lack of *prima facie* merit to the proposed appeal is the absence of any issues of general importance that are raised by the proposed appeal. Therefore, although the appeal would not unduly hinder the progress of the receivership, since it is scheduled to take place within approximately one month, the other factors relevant to the question of whether leave should be granted require that leave to appeal be refused.

Disposition

[20] Mr. Beach's motion (M55412) is dismissed. Heliotrope's motion (M55301) is moot in light of the acknowledgement by Mr. Beach's counsel that the appeal Mr. Beach filed and perfected needs leave and the dismissal of the request for leave.

[21] Counsel advised that they have agreed on the quantum of costs for the motions but not on the associated terms of payment. If they remain unable to agree, they may make written submissions, not exceeding 3 pages each. The submissions of Heliotrope are due within 10 days of the release of these reasons. The submissions of Mr. Beach are due within 10 days thereafter.

“B. Zarnett J.A.”