COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Maxfine International Limited v. Grant Thornton Limited,* 2024 BCCA 389

Date: 20241125
Docket: CA49936

Between:

Maxfine International Limited and TA Properties (Canada) Ltd.

Appellants
(Applicants)

And

Grant Thornton Limited

Respondent
(Respondent)

Before: The Honourable Justice Griffin
The Honourable Mr. Justice Butler
The Honourable Mr. Justice Abrioux

On an application to vary: An order of the Court of Appeal for British Columbia, dated August 29, 2024 (*Maxfine International Limited v. Grant Thornton Limited*, 2024 BCCA 362, Vancouver Docket CA49936).

Counsel for the Appellants:	R. Clark, K.C.
Counsel for the Respondent:	A.M. Nathanson B. Hunt
Place and Date of Hearing:	Vancouver, British Columbia October 11, 2024
Place and Date of Judgment:	Vancouver, British Columbia November 25, 2024

Written Reasons by:
The Honourable Mr. Justice Abrioux

Concurred in by:
The Honourable Justice Griffin
The Honourable Mr. Justice Butler

Summary:

Review of the chambers decision of a single justice of this Court denying leave to appeal an order denying the applicants leave to sue a trustee in bankruptcy under s. 215 of the Bankruptcy and Insolvency Act. Held: Application dismissed. The chambers judge was correct in deciding that leave to appeal was required and he committed no reviewable error in dismissing the application on its merits.

Reasons for Judgment of the Honourable Mr. Justice Abrioux:

Introduction

[1] The applicants, Maxfine International Limited and TA Properties (Canada) Ltd., seek to vary the order of Willcock J.A., made on August 29, 2024, in which he dismissed their application seeking leave to appeal one of the orders made by the chambers judge, Matthews J., in a bankruptcy proceeding.

[2] The applicants are creditors of TA Hotel Management Limited Partnership ("TA Hotel Management"). Before assigning itself into bankruptcy in August 2020, TA Hotel Management operated a hotel and conference centre in downtown Vancouver. The respondent, Grant Thornton Limited, was appointed trustee in bankruptcy but has since been replaced.

[3] In seeking to advance various allegations against Grant Thornton, the applicants brought an application before Matthews J. for leave to commence proceedings against a trustee in bankruptcy under s. 215 of the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3 (the "*BIA*").

[4] On May 29, 2024, in reasons for judgment indexed as 2024 BCSC 902, Matthews J. allowed the application in part but denied leave in respect of certain proposed claims, including breach of fiduciary duty, breach of contract, pure economic loss arising from negligence, and trespass. The judge granted the applicants leave to amend their pleadings and reapply in respect of all claims except for breach of fiduciary duty.

[5] In this Court, the applicants applied for leave to appeal certain of the orders of the chambers judge, while also arguing they had an appeal as of right under s. 193

of the *BIA.* In reasons for judgment indexed as 2024 BCCA 362, Willcock J.A. dismissed the application for leave to appeal.

On Appeal

[6] This application raises two issues:

a) First, whether the applicants are entitled to appeal Matthews J.'s order as of right or whether leave is required. This involves a consideration of s. 193 of the *BIA* and, of significance, a determination as to whether this division is bound by this Court's decision in *Smith et al v. Clarke*, 2003 BCCA 503 (the "*Clarke* CA" decision). In the *Clarke* CA decision, this Court approved of Esson J.A.'s reasoning in *Murray Douglas Clarke In Bankruptcy,* 2003 BCCA 419 (the "*Clarke* Chambers" decision), in which he held that leave is required where an appeal from an order denying leave to sue under s. 215 is sought.

b) Second, whether, if leave is required, Willcock J.A. made a reviewable error in dismissing the applicants' application for leave.

[7] For the reasons that follow, I would dismiss the variation application. Justice Willcock was correct in concluding that leave to appeal is required and he made no reviewable error in dismissing the leave application on its merits.

Background

[8] The facts giving rise to this appeal and the underlying proceedings have been set out in the reasons of Matthews J. and Willcock J.A. I will refer to certain portions of the background below in relation to the two issues on appeal as they are discussed. At this juncture, it is sufficient to outline the following.

The Bankruptcy and Trusteeship

[9] TA Hotel Management operated a hotel property in downtown Vancouver and an adjacent property (the "conference centre"). The applicants, Maxfine and TA Properties, respectively, own the hotel property and the conference centre. TA Hotel

Management leased the hotel property and its furniture, fixtures, and equipment ("FFE") from Maxfine pursuant to a 25-year lease that began in February 2017. TA Properties leased the conference centre to TA Hotel Management: Matthews J.'s reasons at para. 71.

[10] In 2020, TA Hotel Management assigned itself into bankruptcy due to the COVID-19 pandemic, and Grant Thornton was appointed trustee in bankruptcy. Maxfine and TA Properties were both creditors of the bankrupt: Matthews J.'s reasons at para. 1.

[11] It was not disputed before Matthews J. that Maxfine, TA Properties, and TA Hotel Management are closely related companies comprising a group called the TA Group, and that they share the same senior employees. Maxfine and TA Properties were involved in TA Hotel Management's pre-bankruptcy planning and participated in interviews for potential trustees. It was also not disputed that before TA Hotel Management assigned itself into bankruptcy, Grant Thornton, having made certain due diligence inquiries, estimated that their fees would be approximately $150,000. The applicants say that those fees ultimately came to over $1 million dollars.

Sections 193 and 215 of the *Bankruptcy and Insolvency Act*

[12] Section 215 of the *BIA* provides that no action lies against a trustee or receiver with respect to any report made or action taken pursuant to the *Act,* except with leave of the court. This provision "is designed to protect [a] receiver or trustee against only frivolous or vexatious actions, or actions which have no basis in fact": *GMAC Commercial Credit Corporation-Canada v. T.C.T. Logistics Inc*., 2006 SCC 35 at para. 60.

[13] Section 193 of the *BIA* provides several rights of appeal from orders made pursuant to the *Act:*

> 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.
>
> [Emphasis added.]

The Judge's Reasons for Judgment

[14] Justice Matthews considered whether the proposed claim had the factual and legal basis sufficient to grant leave under s. 215. The applicants claimed that Grant Thornton breached the fiduciary duty it owed to the applicants and the bankrupt's other creditors by engaging in a wrongful course of action designed solely to inflate its fees and secure payment of those fees, which course of action protracted the bankruptcy process and caused loss and damage to the estate and its creditors.

[15] Before Willcock J.A., the applicants challenged Matthews J.'s decision to dismiss the application in respect of both the fiduciary duty claim as well as the claims for pure economic loss said to have been caused by Grant Thornton's negligence. On this application, however, the applicants only challenge the dismissal of their application seeking leave to sue in relation to the claim for breach of fiduciary duty. I will therefor focus on Matthews J.'s reasons on this issue.

[16] The judge first summarized the framework that applies to a leave application under s. 215 of the *BIA.* She referred to *GMAC* at para. 57, where Abella J., writing for a majority of the Supreme Court of Canada, summarized and adopted the principles set out in *Mancini (Trustee of) v. Falconi*, [1993] O.J. No. 146 (C.A.) at para. 7:

> 1. Leave to sue a trustee should not be granted if the action is frivolous or vexatious. Manifestly unmeritorious claims should not be permitted to proceed.
>
> 2. An action should not be allowed to proceed if the evidence filed in support of the motion, including the intended action as pleaded in draft form, does not disclose a cause of action against the trustee. The evidence typically will be

> presented by way of affidavit and must supply facts to support the claim sought to be asserted.
>
> 3. The court is not required to make a final assessment of the merits of the claim before granting leave.

[17] Justice Matthews noted that the threshold under s. 215 is "not high", does not involve a merits assessment, and is focused on whether the pleadings and evidentiary basis disclose a *prima facie* case: at paras. 4, 6. Further, she stated that the provision "is designed to protect the receiver or trustee against only frivolous or vexatious actions, or actions that have no basis in fact": at para. 4, citing *GMAC* at para. 55. In the judge's view, the *prima facie* case threshold will be met where:

a) The proposed claim, as pleaded, discloses a cause of action; and

b) There is evidence of a factual foundation for the claim: at para. 10.

[18] As to the requirement that the proposed claim disclose a cause of action, the judge observed that the proper analytical starting point is the proposed pleading: at para. 18, citing *GMAC* at para. 57 as well as *Mancini* at para. 7. She noted that a common set of principles applies to the assessment of pleadings in different contexts, such as applications to strike, applications to amend, and class action certification: at para. 19, citing *Finkel v. Coast Capital Savings Credit Union*, 2017 BCCA 361 at para. 16. Those principles, summarized at paras. 21–23 of the judge's reasons, include:

a) Pleadings are to be assessed generously, but a claim will be insufficient where it is "doomed to fail" (*Atlantic Lottery Corp. Inc. v. Babstock,* 2020 SCC 19 at para. 19, citing *R. v. Imperial Tobacco Canada Ltd.,* 2011 SCC 42 at para. 21);

b) Courts should not sidestep difficult legal issues that call into question whether there is a reasonable prospect that the case should proceed (*Finkel* at para. 18);

c) A claim will be bound to fail if the pleading does not set out the elements of the cause of action and the material facts in support of the elements (*Imperial Tobacco* at para. 22); and

d) Bare allegations are not material facts: *Netlink Computer Inc. (Re),* 2018 BCSC 2309 at para. 57, citing *Seattle Environmental Consulting Ltd. v. Workers' Compensation Board of British Columbia*, 2016 BCSC 557 at para. 31.

[19] As to the requirement that the proposed claim have a factual foundation, Matthews J. observed:

a) Even if the proposed defendants refute or explain each of the factual allegations made by the proposed plaintiff, the court is not, on that basis alone, justified in refusing leave (*Nicholas v. Anderson*, [1996] O.J. No. 1068 (Gen. Div));

b) The Court should not weigh or assess evidence, resolve hotly contested issues, draw inferences where the evidence on the topic conflicts, or make final assessments of a claim's merits based on the evidence or the lack thereof (*Nicholas* at para. 20; *Jadavji v. Khadjieva*, 2022 BCCA 116 at para. 28, citing *Etemadi v. Maali*, 2021 BCCA 298 at para. 51);

c) The low threshold does not equate to a perfunctory review *(Alberta Treasury Branches v. Elaborate Homes Ltd*, 2014 ABQB 350 at para. 33); and

d) Evidence that is merely an affiant "contending to" the facts in the proposed claim or deposing that he believes that the facts alleged in the proposed claim are true or will be made out is insufficient: *Nicholas* at para. 20; and *Netlink* at paras. 32–33 and 57.

[20] After assessing certain of the applicants' other proposed claims, the judge turned to the claim for breach of fiduciary duty. She began by noting that the weight

of the authorities suggested that, as a trustee in bankruptcy, Grant Thornton owed a fiduciary duty to bankruptcy stakeholders, including the applicants: reasons at para. 164, citing *Petrowest Corporation v. Peace River Hydro Partners*, 2020 BCCA 339; *Salewski Inc. v. BDO Canada Ltd.,* 2016 ONSC 133; and *McKibbon v. BDO Canada Limited*, 2021 BCCA 303 at para. 54. She observed that fiduciaries owe a duty of loyalty to the beneficiaries of their duty, and that where there are multiple beneficiaries with potentially divergent interests, a fiduciary's duty of loyalty includes duties to act impartially and avoid conflicts of interest: at para. 165. She further noted that in the context of a bankruptcy, fiduciaries must also consider the public interest in the discharge of their duties: at para. 165, citing *McKibbon* at para. 54.

[21] The judge then summarized the requirements for a cause of action in breach of fiduciary duty, being:

a) the defendant owed a fiduciary duty to the plaintiff;

b) the defendant acted in a manner inconsistent with that fiduciary relationship, which could include breach of the duty of loyalty, acting in the face of a conflict, preferring a personal interest, taking a profit, or acting dishonestly; and

c) loss or damage, which could be remedied by a monetary or proprietary remedy (e.g., a constructive trust): at para. 168.

[22] She accepted that the proposed notice of civil claim (the "NOCC") disclosed a cause of action for breach of fiduciary duty, at para. 173, and then turned to consider whether the proposed claim had the factual foundation required for leave under s. 215 of the *BIA*.

[23] Before this Court, the applicants contended that two of Grant Thornton's alleged incidents of misconduct provide a sufficient factual basis to make out a *prima facie* case of breach of fiduciary duty: first, Grant Thornton's handling of the FFE property claim; second, Grant Thornton's actions regarding an *ex parte* hearing in which it obtained an order permitting it to remove disputed property from the

conference centre. As such, I will focus on these two claims in summarizing Matthews J.'s reasons.

Grant Thornton's Handling of the Property Claims

[24] In the course of the bankruptcy, there was a dispute between the applicants and Grant Thornton about who owned the FFE. Grant Thornton required Maxfine to submit a further reclamation of property claim in relation to the FFE, and Maxfine did so. Grant Thornton then advised that the claim was deficient, and Maxfine resubmitted the claim along with a copy of the head lease. Grant Thornton disallowed the claim, concluding that the bankrupt held the FFE as a security lease and not a true lease: at paras. 87–89.

[25] In the NOCC, the applicants alleged that Grant Thornton disallowed another property claim and observed that both disallowances were later set aside. They claimed that had the claims been properly adjudicated, the bankruptcy could have concluded much sooner. They further claimed that the disallowances were without any factual or legal basis, and that Grant Thornton was aware of this. They alleged that Grant Thornton disallowed the claims when it was in a conflict of interest, acting not in the interests of the estate beneficiaries but rather in an effort to enrich itself by inflating its fees.

[26] The applicants claimed that they later made an offer to purchase the FFE for $400,000 in cash, and that Grant Thornton rejected that offer without discussing it with the inspectors. Given this, and that there was no other competing offer, the applicants claimed that Grant Thornton's decision to reject the cash offer "indicated its motivation to prolong the bankruptcy exercise and to escalate its fees".

[27] Then, the applicants claimed, Grant Thornton misled them by suggesting that they make a credit bid for the assets instead of appealing the disallowance or filing a further claim. They claimed that they met several times with Grant Thornton to discuss the terms of the credit bid and, according to them, received advice from Grant Thornton that it intended they rely on. After submitting the credit bid, they said that Grant Thornton's counsel wrote to them and rejected the bids, advising that

credit bids were not appropriate for their class of claims and further advising that the only manner in which a credit bid would be acceptable would be if it covered full payment of the priority claims, which the applicants alleged would include Grant Thornton's fees.

[28] The judge observed that there was "no direct evidence" that Grant Thornton made determinations on the property claims based on a motivation to increase its fees: reasons at para. 177. Instead, the applicants argued that an inference of improper motivation could be drawn. The judge noted that it is permissible to find facts by drawing inferences where such inferences are "reasonably supported" by the evidence and do not bridge a gap using "speculation or conjecture": reasons at para. 179, citing *Megaro v. Insurance Corporation of British Columbia*, 2020 BCCA 273 at para. 30. However, she found that Grant Thornton acted on the advice of counsel in handling the property claims; accordingly, an inference of improper motivation would require accepting that outside counsel for Grant Thornton were complicit in Grant Thornton's breach. Since the applicants made no such allegation, and provided no evidence to this effect, she concluded that it would not be "appropriate" to draw an inference of improper motivation: reasons at paras. 180–181.

[29] The judge also concluded that there was "no evidence that Grant Thornton was motivated by its fees" when it rejected the applicants' cash offer. She found that the evidence demonstrated that Grant Thornton was obtaining appraisals of the assets and could not sell them "well below that value to a non-arms length party while comporting itself in accord with its duties": at para. 189.

[30] Turning next to the credit bid, Matthews J. again found no factual foundation for the breach of fiduciary duty claim. She found that the evidence suggested that Grant Thornton did recommend that the applicants' appeal the FFE notice of dispute and that it never "urged" a credit bid, but merely "urged the [applicants] *to get advice* about a credit bid": at paras. 190–192. The judge further noted that even if she could draw the inference that Grant Thornton rejected the credit bid because it would not

secure their own fees, that evidence could not ground a breach of fiduciary duty since such fees would be subject to taxation and would be disallowed if found to be unreasonable: at paras. 196–196.

The Storage Agreement and the Without Notice Application

[31] In the NOCC the applicants claimed that Grant Thornton's actions in respect of the without notice application it made to the court for an order permitting it to remove property from the conference centre constituted a breach of fiduciary duty.

[32] Before Matthews J., it was common ground that Grant Thornton and Maxfine entered into a storage agreement over the hotel property. It was also undisputed that Grant Thornton and TA Properties did not enter into a storage agreement over the conference centre: at para. 48.

[33] The applicants alleged that while the storage agreement was still in effect, Grant Thornton began to consider moving the assets away from the hotel property. The only possible rationale for this, as they assert in the NOCC, was for Grant Thornton to "show its power and attempt to make [the applicants] conform to its extortion of fees".

[34] In addition, the applicants claimed that they proposed a "standstill agreement" pending an upcoming creditors meeting at which the estate inspectors would seek to have Grant Thornton replaced as trustee. The applicants said that the proposed agreement would preserve "the status quo both of the items stored in the Hotel and those at the Conference Centre". However, Grant Thornton then applied *ex parte* for an order permitting it to remove the assets from the conference centre. The applicants claim that on Grant Thornton's instructions, its counsel did not mention the offer of a standstill agreement, even in response to questions from the Court. They also claim that Grant Thornton's counsel, on instructions, falsely advised the Court that there was a risk of removal and dissipation of the assets, "once again not revealing the offer of a standstill agreement so that the Court could have properly assessed that risk with full knowledge of the facts".

[35] The judge found no evidence to support the theory that Grant Thornton's steps to remove TA Hotel Management's property from the hotel property and conference centre were a retaliatory response to the applicants' move to have Grant Thornton replaced as trustee: reasons at paras. 202–203. She noted that the applicants led evidence that Grant Thornton expressed concerns about the storage arrangement five weeks *before* the applicants advised that they would seek to have the creditors vote to replace Grant Thornton. She also noted email correspondence, introduced at the hearing by Grant Thornton, in which it and its counsel sought to extend the storage agreement, and later advised that it would be taking steps to remove TA Hotel Management's assets from the hotel property and conference centre. These communications also occurred prior to the applicants advising that they would seek Grant Thornton's removal: at para. 202.

[36] The judge noted that Grant Thornton's concerns about the security of the property, which s. 16(3) of the *BIA* obliged it to take possession of and safeguard, were "confirmed" when TA Properties denied Grant Thornton access to the conference centre to secure the property on the basis that Grant Thornton had caused the bankrupt to abandon its property by leaving it in the conference centre: at para. 207. She considered that this position was "reaffirmed" by certain assertions in the applicants' notice of application: at para. 207.

[37] The judge also found no evidence that Grant Thornton's expression of concerns over the storage arrangement and its threats to remove the bankrupt's property from the hotel property and conference centre were in furtherance of its "extortion of fees", as the applicants alleged in the NOCC. On this question, she noted that some communications appeared to show that Grant Thornton agreed to *reduce* its fees so that a given credit bid might be more likely to be approved by the Court: at para. 204.

[38] Ultimately, the judge concluded that "while it is conceptually possible to argue that an inference of self-interested behaviour by Grant Thornton could be drawn from that evidence, on the evidence as a whole, it is not a reasonable inference to

draw": at para. 205. This was because Grant Thornton's fees had not yet been approved or taxed in accordance with the *BIA*: at para. 205. In the judge's view, Grant Thornton approached the credit bids assuming a worst-case scenario in which their fees were not reduced, reducing the cashflow down to lower priority creditors: "if the fees were not reduced, then the credit bids needed to be in a form and quantum sufficient to cover the priority claims including those fees": at para. 205.

[39] As to the allegation that Grant Thornton, through its counsel, misled the Court on the *ex parte* application when asked whether a "standstill injunction" would resolve the issue, the judge found no factual foundation for this claim, stating:

> [210] The standstill agreement that Maxfine and TA Properties proposed had 8 terms, most of which did not refer to the property stored in the Conference Centre. The term which did apply proposed that the parties agree to the status quo, "whatever that status quo might be". From that language, I conclude that there was no meeting of the minds as to what the status quo was, and so it is hard to understand how that term could be part of an agreement.

[40] In any event, she was of the view that the standstill agreement the applicants had offered was premised on "a status quo that TA Properties asserted ownership to the property pursuant to its argument about abandonment": at para. 215. TA Properties had argued that the bankrupt abandoned the property at the conference centre, according to the terms of the lease agreement.

[41] The judge referred to an affidavit from Grant Thornton's counsel in which he advised that he did not refer the Court to the standstill agreement proposed by the applicants because it was part of without prejudice communications that counsel believed should not be brought to the Court's attention: at para. 211. The applicants responded by submitting that Grant Thornton did refer the Court to other parts of the without prejudice communications, which in their view demonstrated that Grant Thornton, through its counsel, exercised some deliberation in misleading the Court: at para. 212.

[42] Justice Matthews rejected this argument, finding that counsel for Grant Thornton appropriately replied to the Court's questions about a standstill

arrangement. She also observed that Grant Thornton reasonably took the view that accepting the agreement on the applicants' terms risked the dissipation of the property, since the applicants were taking the position that the property had been abandoned: at paras. 216–218.

General Mismanagement as a Scheme to Increase Fees

[43] Finally, Matthews J. turned to the question of whether there was a factual foundation for the claim that Grant Thornton's overall management of the bankruptcy was driven by a desire to drive up fees at the expense of efficiency. She observed that higher than expected fees, without more, are not *prima facie* evidence of a breach of fiduciary duty: reasons at para. 230.

[44] In the NOCC, the applicants claimed that Grant Thornton's failure to obtain the requisite statutory pre-approval to retain counsel (under ss. 19 and 30 of the *BIA*) was dishonest and in furtherance of its unlawful scheme of exploiting the bankruptcy to incur higher fees. They alleged that when Grant Thornton retroactively sought approval from the estate inspectors, it did not advise them that, since pre-approval was necessary, Grant Thornton would be responsible for legal fees incurred prior to inspector approval. On this point, the judge found that this was not evidence of a scheme by Grant Thornton to enrich itself at the expense of the estate and the creditors, largely because the fees would be subject to approval and taxation under the *BIA:* at para. 233.

[45] The applicants also alleged that Grant Thornton constantly pressured the inspectors to approve its fees, and suggested that this self-interested behaviour was evidence of Grant Thornton's alleged unlawful scheme. Referring to affidavit evidence led by the applicants, the judge observed that Grant Thornton had a statutory obligation to seek approval and, if necessary, proceed to taxation of its fees. The fact that Grant Thornton raised the issue of their fees frequently with the inspectors did not "support a claim that Grant Thornton was acting in its own interest to the detriment of others": at paras. 235–236. Adherence to a statutory obligation could not, the judge concluded, be evidence of a breach of fiduciary duty.

Standard of review

[46] Under s. 29 of the *Court of Appeal Act*, S.B.C. 2021, c. 6, a division of this Court may cancel or vary an order made by a single justice, other than an order granting leave to appeal.

[47] A review application, however, is not a rehearing of the original application. Rather, in keeping with the generally discretionary nature of chambers decisions, a chambers judge's decision is subject to a highly deferential standard of review. The Court will ask whether the judge was wrong in law, wrong in principle, or misconceived the facts: *Haldorson v. Coquitlam (City),* 2000 BCCA 672 at para. 7. Absent any of these errors, a division will not change the order of a single justice: *Gill v. Gill Estate*, 2023 BCCA 427 at para. 13.

[48] On a variation application, the applicant cannot simply argue that the justice should have reached a different result or exercised their discretion differently; a mere difference of opinion will not suffice. Applicants must point to an error justifying this Court's intervention: *Martin v. Riley*, 2024 BCCA 194 at para. 24.

Issue #1: Did the justice err in concluding that the applicants had no appeal as of right?

[49] As I shall explain, Willcock J.A. was correct, in my view, in concluding that leave is required to appeal an order denying leave to sue a trustee pursuant to s. 215 of the *BIA.* In any event, this Court is bound by the *Clarke* CA decision unless and until it is overturned by a five-member division of this Court or the issue is otherwise determined by the Supreme Court of Canada. No such application was made in this case.

The Justice's Reasons for Judgment

[50] Justice Willcock commenced his discussion and analysis by considering certain authorities and academic writing pertaining to the question of whether leave is required from orders granting or refusing leave to commence proceedings against a trustee under s. 215: at paras. 50–53. Of particular relevance to this application

are *Elias v. Hutchinson,* 1981 ABCA 31, the *Clarke* Chambers decision, the *Clarke* CA decision, and a more recent body of case law that suggests a broader and more purposive approach to s. 193(c) of the *BIA,* which provides an appeal as of right where the "amount involved" exceeds $10,000.

[51] *Elias* concerned the former s. 163(c)—now s. 193(c)—of the *BIA* and the meaning of "amount involved". The appellants had unsuccessfully applied for leave to sue a trustee in bankruptcy. The question was whether an appeal lay to the Alberta Court of Appeal as of right under s. 163(c); that Court found it did not.

[52] The Court in *Elias* referred to the Supreme Court of Canada's earlier decision in *Gatineau Power Co. v. Cross,* [1929] S.C.R. 35. In *Gatineau Power,* the question was whether an appeal lay as of right to the Supreme Court in respect of an underlying proceeding raising the issue of whether the Court of Kings Bench had jurisdiction to hear an appeal of a government commission's refusal to grant the Power Company authority to expropriate. At the time, the Supreme Court of Canada's enabling legislation provided an appeal as of right where "the amount or value of the amount in controversy in the appeal exceeds the sum of two thousand dollars": *Gatineau Power* at 37. Writing for the Court, Rinfret J. held that while the Power Company's application, if it were granted by the commission, *might* result in proceedings involving an amount greater than $2,000, the Court's own jurisdiction did "not depend on the possible consequences of a possible judgment": *Gatineau Power* at 38. In *Elias,* the Alberta Court of Appeal thus concluded that insofar as the appeal was about whether the appellant had leave to sue—a question, as in *Gatineau Power,* that might have *downstream* monetary consequences through an award of damages—the matter did not fall within s. 193(c): *Elias* at para. 28.

[53] As Willcock J.A. noted at para. 52 of his reasons, a division of this Court followed *Elias* in the *Clarke* CA decision, and in doing so upheld Esson J.A.'s holding in the *Clarke* Chambers decision, being:

> [5] Counsel for the Trustee concedes that the second aspect of the order comes within s-s.193(d) and that no leave is required but he submits that the action based on s.215 is clearly one that requires leave of a judge of the

> Court of Appeal. That appears to be a correct submission. There are a number of authorities dealing with it, of which the one that states the point most clearly is *Elias v. Hutchison*…
>
> [Emphasis added.]

[54] In *Clarke* CA, MacKenzie J.A. expressly followed *Elias* and the *Clarke* Chambers decision, stating:

> [4] … we have concluded that Mr. Justice Esson was correct in his opinion on the authority of *Elias v. Hutchison*, that leave is required. In the absence of leave, that portion of the appeal must be quashed.

[55] Justice Willcock observed that the applicants, acknowledging these authorities, made a "subtle" argument as to why *Elias* and the *Clarke* decisions should not be read as precluding an appeal as of right. In essence, they argued that a line of more recent authorities—including from this Court—dealing with s. 193(c) of the *BIA* suggest that whether there is an "amount involved" in an appeal should not turn on whether an order appealed from is "procedural" in nature. The applicants submitted that this approach, which focuses on what is "at stake" in the underlying dispute as a whole, provided a basis upon which to distinguish this Court's decision in *Clarke* CA*:* at para. 55; see also Newbury J.A.'s reasons for judgment in *Crowe Mackay & Company Ltd. v. 0731431 B.C. Ltd.,* 2022 BCCA 158 as well as *MNP Ltd. v. Wilkes,* 2020 SKCA 66. Recourse to the question of procedure to determine appeal rights under s. 193(c) remains the governing framework in Ontario: *2403177 Ontario Inc. v. Bending Lake Iron Group Limited,* 2016 ONCA 225.

[56] The justice did not accept this argument. In his view, *Elias* did not turn on the impugned procedural distinction, but rather on the reasoning, from *Gatineau Power,* that the right to an appeal is not appreciable in monetary terms and that jurisdiction is not determined based on the "possible consequences of a possible judgment": at para. 58. As such, he concluded that *Clarke* CA bound him to find that leave is required to appeal an order made under s. 215 of the *BIA.*

The Parties' Positions

Maxfine International Limited and TA Properties (Canada) Ltd.

[57] The applicants submit that the justice erred in failing to find that, because the recent decisions to which I have referred have adopted a more expansive understanding of s. 193(c)'s reference to the "amount involved" they have an appeal as of right from Matthews J.'s order. They say that *Elias*—the foundation of this Court's decisions in the *Clarke* cases—is fundamentally about the question of procedure. In particular, they submit that the reasoning in *Elias* is grounded in the Manitoba Court of Appeal's decision in *Re Dominion Foundry Co. Ltd. Continental Forwarding Ltd. et al. v. Canadian Credit Men's Association Ltd.* (1965), 52 D.L.R (2d) 79 (MBCA), which focused on the question of procedure.

[58] They point out that in Ontario, the reasoning in *Re Dominion Foundry* has culminated in the recent decision in *Bending Lake*, but that in British Columbia this approach has been expressly rejected; on this point, they rely on this Court's decision in *Crowe MacKay* and the Saskatchewan Court of Appeal's decision in *Wilkes.* They also refer to *QRD (Willoughby) Holdings Inc. v. MCAP Financial Corporation,* 2024 BCCA 318, (a decision rendered after Willcock, J.A.'s reasons) in which Newbury J.A. reaffirmed this Court's rejection of the "procedural" approach to s. 193(c).

[59] In sum, noting that the *BIA* defines property as including *choses in action*—which they submit includes seeking leave to sue a trustee under the *BIA*— the applicants submit that "it is clear that the refusal of leave to issue the Notice of Civil Claim claiming damages of well over $1 million, 'involves' more than $10,000".

Grant Thornton

[60] Grant Thornton submits that Willcock J.A. made no error on this issue.

[61] It argues that *Elias* is grounded not on a categorical treatment of orders denying leave under s. 215 as procedural, but rather on the Alberta Court of Appeal's observation that there was no value at stake in the outcome of the appeal

for which leave was sought. It says that whenever this Court has found a right of appeal under s. 193(c), there has been a "tangible amount at stake in the outcome" such as the disclaiming of presale contracts or the payment of funds into court. In this case, Grant Thornton argues that "the right to bring this claim does not have tangible value, and the applicants cannot rely on the quantum of damages they pleaded…to bring themselves within s. 193(c)".

Analysis

[62] This issue raises a question of law. The applicants must demonstrate that the justice was "wrong in law" in concluding that they do not have an appeal as of right from the order denying them leave to sue the trustee under s. 215 of the *BIA*. In my view, the justice's conclusion was correct.

[63] The applicants' argument rests on the following assertions:

a) First, that the entitlement to sue Grant Thornton is (or would be, were it granted) a *chose in action;*

b) Second, that the purported *chose in action* can be valued in monetary terms and is valuable in excess of $10,000, such that the appeal falls within s. 193(c)'s ambit; and

c) Third, that the case law establishing a more purposive, non-categorical approach to the appeal right under s. 193(c) generally also serves to undermine the authority of more specific case law setting out a leave requirement where an appeal is brought from an order granting or denying leave under s. 215 (under circumstances that would otherwise engage s. 193(c)).

[64] As to the question of whether this appeal "involves" a *chose in action,* I accept that there are some authorities that suggest that an existing power to sue for damages constitutes a *chose in action*, including in the bankruptcy context: *Isabelle v. The Royal Bank of Canada,* 2008 NBCA 69. It is not evident, however, that where

leave to sue a trustee is at issue the appeal "involves" a *chose in action* within the meaning of s. 193(c). This is because there is a plausible distinction between having a right and being granted leave by the court to *enforce* that right under the auspices of a statutory provision aimed at gatekeeping frivolous or unmeritorious claims. That said, a final determination on this question is not necessary to dispose of this appeal, because the applicants have failed to establish that the prevailing, more contemporary approach to s. 193(c) disposes of the narrower question of leave under s. 215, such that we are not bound by *Clarke* CA.

[65] I will now consider whether jurisprudential developments in the interpretation of s. 193(c) undermine the authority of this Court's decisions in the *Clarke* CA and *Clarke* Chambers decisions. In my view, they do not.

[66] The applicants are correct that there are currently two competing approaches to the s. 193(c) right of appeal: a comparatively restrictive, categorical approach that has developed principally in Ontario, and a non-categorical approach that has developed, more recently, in British Columbia and Saskatchewan.

[67] The Ontario view was recently summarized by Brown J.A. in *Bending Lake.* According to this approach, s. 193(c) does not apply to "orders that are procedural in nature": *Bending Lake* at para. 53. This is for two reasons. First, the inclusion of s. 193(e) in the *BIA,* which provides an appeal with leave for any matters not otherwise falling within s. 193, militates toward a narrower reading of s. 193(c): on this theory, given the presence of a catch-all appeal provision, a "broad interpretive approach" is unnecessary: *Bending Lake* at para. 49. The second reason for the categorial approach has to do with the assumption that the *BIA's* appeal provisions should work "harmoniously" with those in the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36 (the "*CCAA*").

[68] In two recent decisions of this Court, however, Newbury J.A. explained that whether there is a right of appeal under s. 193(c) does not depend on if the order appealed from is procedural in nature: *Crowe MacKay* at para. 54, *QRD (Willoughby) Holdings* at para. 40. Justice Newbury referred to a 1996 decision of

this Court, *McNeill v. Roe, Hoops & Wong* (1996), 39 C.B.R. (3d) 147 (C.A.), that adopted the Supreme Court of Canada's approach to the phrase "amount involved" in what had been s. 108 of the *Winding-up Act,* R.S.C. 1952, c. 296. In *Fallis et al. v. United Fuel Investments Ltd.,* [1962] 4 C.B.R. (N.S.) 209 (SCC), the Supreme Court held that "the amount or value of the matter in controversy…is the loss which the granting or refusal of that right would entail": *Fallis* at 211, cited in *McNeill* at para. 11. In *McNeill*, this Court went on to explain that the amount involved in an appeal should be determined by comparing the order appealed from with the remedies sought in the notice of appeal: *McNeill* at para. 18.

[69] In the years following *McNeill,* this Court continued to apply a non-categorical approach to s. 193(c), focusing not on the nature of the order appealed from but on the broader question of what was "at stake" in the appeal as a whole: see *Forjay Management Ltd. v. Peeverconn Properties Inc.,* 2018 BCCA 188, *Wong v. Luu*, 2013 BCCA 547, *R. v. C.(P.J.)*, 2003 BCCA 332, and *Farm Credit Canada v. Gidda*, 2014 BCCA 501. The Saskatchewan Court of Appeal recently adopted a similar approach to s. 193(c) in *Wilkes*.

[70] In my view, however, these developments do not affect the binding effect of this Court's decisions in the *Clarke* cases. This is for two reasons.

[71] First, the fact that this Court has taken a certain approach to s. 193(c) is not an answer to the fundamental question at issue here, which involves s. 215 and whether an appeal from an order under that section may only occur with leave—that is, whether such an appeal will always fall under s. 193(e), regardless of whether the prerequisites for an appeal under ss. 193(a)–(d) would otherwise be met. None of the s. 193(c) cases referred to above address this more specific issue. Against that uncertainty, however, we have this Court's decisions in the *Clarke* CA and Chambers decisions as well as *Elias,* which stand as clear statements that leave is required in respect of an order denying or refusing leave under s. 215.

[72] Second, and relatedly, Willcock J.A. was correct, in my view, to conclude that *Elias* does not turn on a distinction between procedural and non-procedural orders.

In *Elias*, the Court references the issue of procedure in its discussion of s. 193(a), which provides an appeal as of right in situations concerning "future rights": *Elias* at paras. 13–24. Adopting the Manitoba Court of Appeal's analysis in *Re Dominion Foundry,* the Alberta Court of Appeal drew a distinction between procedural and legal rights that (whatever the substantive merits of the distinction) it considered necessary to avoid implying that s. 193(a) gave litigants an automatic right of appeal in all cases: *Elias* at para. 23.

[73] It is true that the procedurally oriented commentary from *Re Dominion Foundry* that was cited in *Elias* references both ss. 193(a) and (c). However, the purpose for which *Re Dominion Foundry* was quoted in *Elias* as a whole concerned s. 193(a). When the Court in *Elias* turned to s. 193(c), its focus was on the Supreme Court of Canada's reasoning in *Gatineau Power*. As I summarized above, the relevant holding in *Gatineau Power* was grounded in the concept that a right to appeal cannot be valued in monetary terms and that a court's jurisdiction to hear an appeal does not depend on the possible downstream effects of a possible judgment. Regardless of how *Elias* may have been interpreted in subsequent decisions, its reasoning regarding s. 193(c), as followed in the *Clarke* decisions, does not turn on the distinction between procedural and non-procedural orders that this Court has now rejected.

[74] Finally, I would add that requiring leave to appeal an order denying leave to sue a trustee under s. 215 is consistent with s. 215's broader purpose as set out by Abella J. in *GMAC*:

> [58] The court in *Mancini* explained that the duty of the trustee is to protect both the creditors and the public interest in the proper administration of the bankrupt estate. The gatekeeping purpose of the leave requirement, therefore, in light of this duty, is to prevent the trustee or receiver "from having to respond to actions which are frivolous or vexatious or from claims which do not disclose a cause of action" (para. 17) so that the bankruptcy process is not made unworkable. On the other hand, it ensures that legitimate claims can be advanced.

[75] Requiring leave to appeal an order made under s. 215 of the *BIA* is consistent with this "gatekeeping" purpose, ensuring that trustees or receivers are only called

upon to respond to *prima facie* meritorious appeals, while still ensuring that such appeals are heard.

[76] In conclusion, I would not accede to this ground of appeal.

Issue #2: Did the justice err in declining to grant the applicants leave to appeal?

The Reasons for Judgment

[77] Having found no appeal as of right under s. 193(c), Willcock J.A. turned to whether leave to appeal should be granted pursuant to s. 193(e) of the *BIA.* In doing so, he correctly formulated the test for granting leave under s. 193(e), which asks 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 [not] unduly hinder the progress of the bankruptcy/insolvency proceedings: at para. 62, citing *McKibbon* at para. 20.

[78] The justice confined his leave analysis to the breach of fiduciary duty claim, given that the judge below granted leave to amend in respect of all other claims. He began by considering the importance of the issues raised by the proposed appeal, observing that “there are few cases grappling with how a chambers judge should address whether the evidence provides the required support for the cause of action sought to be asserted on a s. 215 application”: at para. 66.

[79] He then turned to the “more significant” questions of whether the proposed appeal was *prima facie* meritorious and whether granting leave would be in the interests of justice: at para. 67.

[80] As to the proposed appeal's *prima facie* merit, the justice noted that the merits threshold is a "relatively low" one that focuses on whether the applicant has identified a "good arguable case" of sufficient merit to warrant scrutiny by a division of this Court: at para. 68, citing *Bartram v. Glaxosmithkline Inc.*, 2011 BCCA 539 (Chambers) at para. 16 and *Wang v. Sullivan*, 2023 BCCA 409 (Chambers) at para. 20. At para. 72, he also relied on Deschamps J.'s judgment in *GMAC* (dissenting, but not on this point) for the proposition that:

> [140] … the judge to whom an application for leave is made under s. 215 cannot accept vague allegations. The allegations must be supported by the evidence. The judge does not have to be convinced that the action is well founded, since he or she is not the trier of fact. However, the judge must ensure that there is sufficient factual evidence, whether in the form of affidavits or exhibits, to support the allegations. To do this, the judge must review the evidence. In ordinary usage, the standard of proof in civil proceedings is often characterized as requiring either proof on the balance of probabilities or *prima facie* evidence. The threshold under s. 215 is not the trial judge's threshold of proof on the balance of probabilities, but *prima facie* evidence.
>
> [Emphasis added.]

[81] The justice then concluded that leave should be granted if the applicants could identify an instance where the judge below erred by weighing the evidence, drawing inferences based on competing evidence, or making a final assessment of the merits of the claim or any available defences. He considered each of the errors alleged by the applicants and found that they had not identified a "good and arguable case of sufficient merit to warrant scrutiny by a division of this Court": at paras. 75–91. I will review the reasons further when I consider the alleged errors below.

The Parties' Positions

Maxfine International Limited and TA Properties (Canada) Ltd.

[82] The applicants submit that leave under s. 215 should have been granted unless it was "perfectly clear" that the action was either without foundation or frivolous or vexatious. They say that Matthews J. did not limit herself to this constrained test and went far beyond determining whether the proposed claims were

frivolous or vexatious. They argue that she erred in weighing the evidence, resolving contested issues, drawing inferences based on conflicting evidence, and making final assessments about the claim's merits.

[83] In particular, they point to two "principal areas which on their own…should result in a finding of a *prima facie* case of breach of fiduciary duty", being: first, Grant Thornton's disallowance of the FFE property claim; and second, Grant Thornton's actions, including through its counsel, in obtaining an *ex parte* order permitting it to remove assets from the conference centre.

Grant Thornton

[84] Grant Thornton points to the highly deferential standard of review and argues that the applicants have not identified any reviewable error by the justice, instead repeating the arguments made before him. Its position is that the applicants are "essentially treating the review hearing as a new application", within the context of the justice's reasons, in which he correctly stated the governing principles and embarked on a careful and systematic analysis of the issues raised.

Analysis

[85] The question of whether leave ought to have been granted is subject to the highly deferential standard of review that applies on an application to vary the order of a single justice of this Court, to which I have referred above. When I consider this standard, it is necessary to emphasize that the justice approached the issue from the perspective of "[whether] the applicant has identified a good arguable case of sufficient merit to warrant scrutiny by a division of this Court": at para. 68.

[86] It bears emphasizing that the NOCC contained the following overarching allegations:

> **Position of the Plaintiff**
>
> 16. The Trustee abused its position by using the bankruptcy as a platform to enrich itself through engaging in a series of wrongful actions that brought no benefit to the estate and creditors but only served to inflate the Trustee's fees. These unjustified fees would have absorbed any recoveries into the estate, due to the priority standing of the Trustee's fees over other creditors.

> These wrongful actions of the Trustee furthermore protracted the bankruptcy process and caused losses and damages to the estate and its creditors, including significant damages to the Landlords and exposed the estate to the risk of litigation.
>
> …
>
> 33 …. However, instead of effecting an orderly wind down of the estate, the Trustee embarked on a scheme to use the bankruptcy as a platform to enrich itself.

[87] The starting point of the analysis is the specific allegations that constitute the applicants' claim for breach of fiduciary duty, which the justice referred to at para. 43 of his reasons and which I summarized above. He undertook a detailed summary and consideration of the various arguments advanced by the applicants, which related to the chambers judge's alleged errors in considering the evidence, making determinations of credibility, and refusing to draw certain inferences.

[88] On this appeal, the applicants have emphasized that it is most difficult to meet the requisite evidentiary threshold to establish a *prima facie* case as described by Abella J. in *GMAC* (see para. 16 above) when, as in this case, the allegations concern a trustee's *purposes* for acting. They submit that documentary disclosure and examinations for discovery are required to fully flesh out the evidentiary basis for the claim of breach of fiduciary duty. It is important to keep the principles from *GMAC* in mind when assessing Matthews J.'s discussion of this argument and of the applicants' related submission that this Court should draw the inference that Grant Thornton was motivated to increase its fees when it disallowed Maxfine's property claim. In that regard, Justice Matthews stated:

> [180] I am not persuaded that it is appropriate to draw the inferences that Maxfine and TA Properties seek in this regard. The jurisprudence acknowledges that while the s. 215 threshold is low, it must be met. Despite that the proposed plaintiff may be challenged to muster the evidence before having discovery, the plaintiff must lead evidence: *Nicholas* at para. 21. While that may be evidence from which an inference can be drawn, there should be evidence that at least supports that inference.
>
> [181] In this case, the evidence does not support the specific inference that Grant Thornton made the decision with the aim of increasing its fees as opposed to with the aim of making the correct decision. As described above there was some evidence in favour of Maxfine and TA Properties' position about the nature of the leases and some against it. There is also evidence

> that Grant Thornton sought legal advice on that issue and handled the property claim in accordance with the legal advice. That evidence supports Grant Thornton's position that its decision on the issue, right or wrong, cannot be a breach of a fiduciary duty based on the theory that it was undertaken to increase its fees in priority to making the right decision. As counsel for Grant Thornton points out, to conclude otherwise would be to accept that outside counsel for Grant Thornton was complicit in Grant Thornton's scheme to increase its fees at the costs of the assets of the bankrupt and its creditors. Maxfine and TA Properties do not make that allegation.
>
> [182] I conclude that the evidence, including the evidence led by Maxfine and TA Properties does not support the inference which Maxfine and TA Properties seek this Court to draw.
>
> [Emphasis added].

[89] Justice Matthews, in my view, was correct to emphasize that while s. 215 does not present a high standard, the standard it *does* set is firm and does not vary based on the precise nature of the claim advanced or the practical difficulties that may arise in making it. As the judge noted, the applicants' claim regarding the property disallowance—and, I would add, the *ex parte* application—was implicitly premised on the allegation that Grant Thornton's legal counsel was complicit in the alleged scheme. This is because there was evidence that in disallowing Maxfine's claim, Grant Thornton sought and relied upon legal advice: Matthews J.'s reasons at para. 181. It is noteworthy in my view, that in the NOCC the applicants chose not to make this most serious allegation directly against legal counsel who, like a trustee in bankruptcy, are also officers of the court.

[90] An important component of the s. 215 threshold is the requirement of a factual basis for claims of wrongdoing against officers of the court, which allegations threaten public perceptions of the administration of justice. As Southin J. (as she then was) observed in *Girardet v. Crease & Co.,* [1987] B.C.J. No. 240 (S.C.) at para. 2 (which involved claims against a firm of lawyers, including breach of fiduciary duty) these kinds of allegations carry with them "the stench of dishonesty – if not of deceit then of constructive fraud" and such pleadings should be drafted with care. There can be no doubt that the allegations against the trustee in this case carry that "stench" with them.

[91] Furthermore, the applicants led no evidence on the crucial point of collusion by Grant Thornton's counsel in its alleged egregious scheme, thus, in my view, undermining whatever factual foundation could otherwise have been established. As Abella J. emphasized in *GMAC,* "vague" and unsupported allegations of wrongdoing are not sufficient to be granted leave under s. 215: *GMAC* at para. 140. Before Justice Willcock, the applicants argued that Matthews J. inappropriately drew a final conclusion about the proposed inferences when she wrote that she was "not persuaded that it [would be] appropriate to draw" them: at para. 180. But as the justice observed, the judge was evidently aware that her role was limited and did not extend to making final conclusions about the facts and evidence: at para. 83. He also noted that "if a judge concludes that it is *inappropriate* to draw the inferences sought…a *prima facie* case is not made out": at para. 83. In other words, Matthews J. was of the view that the claim's factual basis was *incapable* of reasonably supporting the proposed inferences—a determination that is to be distinguished from a conclusion about the ultimate reasonableness of a given inference (which conclusion would go beyond the scope of a s. 215 application).

[92] In my view, the applicants are simply seeking to reargue the points they advanced before Matthews J. and Willcock J.A. in the hope that this Court, on a variation application, will reach a different decision as to whether they have established a *prima facie* case of breach of fiduciary duty. But that is not our role, unless the applicants can first establish that the justice was wrong in law, wrong in principle, or misconceived the facts when he denied the applicants leave to appeal.

[93] Before considering the applicants' submissions regarding the FFE claim and the *ex parte* hearing, I will briefly comment on their submission that the fact Grant Thornton's fees rapidly escalated to five times the amount of the original estimate is *prima facie* proof that it breached its fiduciary duty to the applicants and other creditors. Justice Matthews observed, correctly, that "the quantum of the fees alone is not sufficient evidence to raise a *prima facie* claim that Grant Thornton preferred increasing its fees to the interests of the bankruptcy stakeholders and creditors": at para. 230. Indeed, any link between the bare fact of higher-than-expected fees and a

breach of fiduciary duty, without more to support it, is a link that may only be established "by speculation or conjecture": *Megaro* at para. 30. I do not accept, as the applicants seem to argue, that in the circumstances of this case as pleaded, higher-than-expected fees incurred by a professional, who is also an officer of the court, carry a "stench of dishonesty".

[94] I will turn now to the applicants' submission that Grant Thornton's conduct regarding the FFE property claim establishes the requisite factual foundation for a *prima facie* case of breach of fiduciary duty. The observation I made above applies equally here: vague or unsupported allegations are insufficient for leave under s. 215, and so are inferences that can only be made by speculation or conjecture. Justice Matthews decided that it would be inappropriate to infer an intent on Grant Thornton's part to protract the bankruptcy, thereby inflating its fees. There was evidently a genuine dispute as to the nature of the lease and, as above, the possibility of drawing such an inference depended on there being evidence of collusion by Grant Thornton's legal counsel. The applicants led no such evidence, while Grant Thornton led contrary evidence that it relied on an opinion from counsel in disallowing the claim.

[95] In addition, the justice, in my view, made no reviewable error in finding that Matthews J. did not err in her reasons regarding the proposed "standstill agreement". In considering the reasons as a whole, the justice concluded that Matthews J. was focused on whether there was a factual foundation for the breach of fiduciary duty claim: at paras. 86–91. And, as Willcock J.A. seems to have concluded, Matthews J.'s discussion of the proposed standstill agreement was focused on whether there was a factual foundation for a claim of breach of fiduciary duty based on deliberately misleading the court: Matthews J.'s reasons at para. 222. She determined, in essence, that the term "whatever that status quo may be" left the terms of the alleged agreement so uncertain as to be incapable of counting *as* an agreement (hence her commentary about there being no meeting of the minds): at para. 210. She also determined that a status quo agreement that left possession of the property unresolved was not what Grant Thornton's counsel had been asked to

address by the judge who heard the application: rather, the Court's question concerned an "injunctive standstill", whereby Grant Thornton would secure (and so take possession of) the assets, an offer the applicants had already rejected by the time of the *ex parte* hearing: at para. 215. As did Justice Willcock, I can see no reviewable error in this analysis.

[96] Overall, the allegations regarding the *ex parte* hearing are problematic for the applicants. On the one hand, they have alleged that Grant Thornton made the application on an *ex parte* basis in order to inflate its fees. But it seems equally likely that had that been its goal, Grant Thornton would have arranged for a *with* notice hearing so as to prolong and complicate the chambers application by involving the applicants. The evidence is, at its highest, equivocal; something more is required.

[97] After concluding that the applicants had failed to establish a good arguable case of sufficient merit to warrant scrutiny by a division of this Court, the justice then considered whether granting leave would be in the interests of justice. He referred to the principles to be taken from *GMAC* and emphasized the importance of s. 215's gatekeeping function and concluded that it would not be in the interests of justice to grant leave in this case, where a chambers judge applied the proper test to assess whether a factual basis for the claim had been made out: at paras. 94–95.

[98] I would agree with the justice. It bears emphasizing that s. 215's function is not only to ensure that bankruptcies are orderly and workable, but also to insulate officers of the court from having to respond to baseless claims, an exercise that may undermine the public's confidence in the bankruptcy regime and in the administration of justice more broadly. In this case, an allegation of breach of fiduciary duty—with none too subtle undertones of fraud—was made against a trustee in bankruptcy as well as its counsel. The s. 215 threshold is low, but it is firm.

[99] In this case, the specific claim advanced—of conduct comprising an illegal scheme by the trustee to increase its fees at the expense of the estate's creditors, which involved unsupported allegations of egregious conduct by Grant Thornton with the collusion of its legal counsel—simply lacked the requisite factual basis for leave

to be granted. Both Willcock J.A. and Matthews J. performed thorough analyses. When I focus on the justice's reasons, which ground the order we are asked to review, I can see no reviewable error in his discretionary conclusion that leave to appeal should not be granted. Nothing in his reasons or the record suggests he was wrong in law, wrong in principle, or misconceived the facts.

Disposition

[100] I would dismiss the appeal.

"The Honourable Mr. Justice Abrioux"

I AGREE:

"The Honourable Justice Griffin"

I AGREE:

"The Honourable Mr. Justice Butler"