

COURT OF APPEAL FOR ONTARIO

APPLICATION UNDER SECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, C. B-3, AS AMENDED, SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990 C. C.43, AS AMENDED AND SECTION 68 OF THE *CONSTRUCTION ACT*, R.S.O. 1990, C. 30

B E T W E N:

C & K MORTGAGE SERVICES INC.

Applicant
(Respondent in Proposed Appeal)

- and -

CAMILLA COURT HOMES INC. and ELITE HOMES INC.

Respondents

FACTUM OF THE RESPONDENT C & K MORTGAGES SERVICES INC.

PART I - OVERVIEW

1. This is the Appellant Jeremy Tan's third kick at the can. It should be his last. The Court-appointed Receiver waited for the ten day period for filing an appeal of the August 27 Order of Justice Dietrich (the "**August 27 Disclaimer Order**") under the *Bankruptcy and Insolvency Act* (the "**BIA**") to expire. As a result of the Appellant having failed to appeal within the prescribed time, the Receiver entered into an agreement of purchase and sale to sell the Mateo Property. Moreover, there is no automatic right to appeal the August 27 Disclaimer Order and leave to appeal should be denied.

PART II - THE FACTS

2. Pursuant to a commitment letter dated October 6, 2018 (the “**Loan Agreement**”) among C & K Mortgage Services Inc., (the “**First Mortgagee**”), and Camilla Court Homes Inc. (the “**Camilla**”) and Elite Homes Inc. (“**Elite**” and together with Camilla, collectively, the “**Debtors**”), the First Mortgagee advanced a secured loan of \$4.55M to the Debtors. As security for the loan, the First Mortgagee obtained a first charge (the “**First Mortgage**”) against six properties located within within a residential common area condominium that were being developed by the Debtors, including the property known municipally as 180 Mateo Place, Mississauga (the “**Mateo Property**”). A second mortgage and a number of construction lien claims were subsequently registered on title to the Mateo Property.¹

3. Pursuant to the Loan Agreement, the First Mortgagee agreed to provide partial discharges for individual house sales provided that it received 100 percent of the net proceeds of sale, less the Debtors’ real estate commission, legal fees and HST, but not less than \$1.75M per house.²

4. On February 12, 2020, the Appellant entered into an agreement to purchase the Mateo Property from Elite (the “**Tan APS**”). Prior to executing the Tan APS, the Appellant retained a lawyer, Stephen Poquiz, to review it.³ Paragraph 41 of Schedule “A” to the Tan APS provides that the Tan APS “shall be, and is hereby, subordinated to and postponed to any mortgage(s) arranged by the Vendor and any advances made thereunder from time to time or liabilities secured thereunder ...”⁴

5. The Appellant paid a deposit of \$500,000, \$100,000 of which was paid to the real estate broker, in trust, and \$400,000 of which was paid directly to Elite. The closing was to take place on April 30, 2020, when the balance of the purchase price of \$1,758,000 would be due. The closing date was extended to June 26, 2020.⁵ Because the Debtors had used Appellant’s \$400,000 deposit, the net sale proceeds from the sale of the Mateo Property to the Appellant would be less than the amount required to discharge the First Mortgage. Prior to the scheduled

¹ Endorsement of Dietrich, J. dated August 27, 2020 (“Endorsement”), para 10.

² Endorsement, para 11.

³ Endorsement, paras 2 and 12.

⁴ Endorsement, para 13.

⁵ Endorsement, paras 2 and 14.

closing date, the First Mortgagee declined to grant a partial discharge and ceased to make any further advances on its loan to the Debtors.⁶

6. The First Mortgagee's application to appoint the Receiver was brought on notice to the Appellant. Mr. Poquiz represented the Appellant both at the initial return of the hearing on June 18, 2020, which was adjourned by Justice Conway, and at the July 2, 2020 hearing at which Justice Conway appointed the Receiver. In Her Honour's endorsement, she held that it was just and convenient to appoint the Receiver to take possession and control of the Mateo Property and the other remaining property subject the First Mortgage (the "**Camilla Property**" and together with the Mateo Property, collectively the "**Properties**"), finance the remaining construction as necessary and then market and sell the Properties, taking into account the interests of the various stakeholders, notwithstanding that she was sympathetic to the plight of the purchasers.⁷

7. That was the Appellant's first kick at the can. But he did not apply to vary or appeal Justice Conway's Order appointing the Receiver.⁸

8. The Receiver notified the Appellant of its intention to disclaim the Tan APS. It also confirmed that the Appellant could make an offer, and compete with any other purchaser, but that he would not receive any credit for his deposit.⁹

9. The Receiver's disclaimer of the Tan APS prompted the Appellant to move to compel the Receiver to complete the Tan APS. The Appellant's motion was heard by Justice Dietrich. On August 27, 2020, Justice Dietrich granted the August 27 Disclaimer Order dismissing the Appellant's motion on the basis that Justice Conway was well aware of his concern and the real possibility that the Tan APS would be disclaimed, but the Appellant did not take steps to appeal the Order appointing the Receiver. Justice Dietrich also held that the equities did not justify subordinating the legal priority of the First Mortgage and rejected Appellant's argument that the Receiver breached its fiduciary duty to take into account the interests of the stakeholders in the Debtor's estates in deciding to disclaim the Tan APS.

⁶ Endorsement, para 15.

⁷ Endorsement dated July 2, 2020, Exhibit D, Affidavit of Gary Gruneir sworn August 11, 2020, Responding Motion Record of C & K Mortgages Services Inc.

⁸ Endorsement, para 16.

⁹ Endorsement, para 17.

10. That was the Appellant's second kick at the can.

11. The Receiver undertook various work to complete and repair the home on the Mateo Property to enhance its saleability and listed it for sale with an experienced broker. The listing price was \$1.898M. In order to protect the Appellant's ten day right to file an appeal of the August 27 Disclaimer Order under the *BIA*, which expired on September 8, 2020, the Receiver decided that no offers would be considered until September 10, 2020.¹⁰

12. There were 34 showings and ultimately four offers were received. After reviewing the offers, on September 11, 2020 the Receiver accepted an offer from Janek Bhawani and his wife, Sharmila Bhawnani (collectively, the "**Mateo Purchasers**") to purchase the Mateo Property (the "**Mateo APS**"). The purchase price payable under the Mateo APS was the highest price offered. The Mateo APS is unconditional. The Receiver is holding a deposit of \$200,000. The closing date is November 5, 2020, which will allow the Receiver to complete remaining work required and obtain an occupancy certificate.¹¹

13. On September 14, 2020, the Appellant's counsel first notified the Receiver that he was finalizing instructions to appeal the August 27 Disclaimer Order. On September 17, 2020, the Appellant served a notice of motion to extend the ten day period prescribed for filing a notice of appeal and for directions on whether leave is required to appeal the August 27 Disclaimer Order.¹²

14. The Mateo Purchasers presently live with Mrs. Bhawnani's 92 year mother, and 24 year old daughter, a paralegal.¹³ They had been searching for a larger home to provide a bedroom and full bathroom on the ground floor to accommodate Mrs. Bhawnani's mother, as she has difficulty climbing stairs, and to give their daughter a home office. Their current home is too small and does not meet these requirements.¹⁴ The Mateo Property meets all of these criteria and is less

¹⁰ Third Report of the Receiver dated October 5, 2020 (the "**Third Report**"), para 14.

¹¹ Third Report, para 15.

¹² Third Report, para 10.

¹³ Bhawani Affidavit, para 3.

¹⁴ Bhawani Affidavit, para 4.

than a five minute drive to Trillium Health Partners-Mississauga Hospital, where Mrs. Mrs. Bhawnani's mother's health care professionals are located.¹⁵

15. The Mateo Purchasers chose a closing date of November 5, 2020 for important, symbolic reasons. They are observant Hindus. The festival of Dwali falls on November 14 and November 5 is an auspicious date relative to Diwali.¹⁶

16. In reliance on their rights under the Mateo APS, on September 12, 2020, the Mateo Purchasers listed their current home for sale on MLS. There have been many visits by prospective buyers, and an offer to purchase is expected shortly.¹⁷

17. If the proposed appeal is permitted to proceed, and the Receiver is prevented from completing the sale of the Mateo Property as scheduled, the Mateo Purchasers are concerned that they will be forced to terminate the listing of their current home, which could stigmatize the home in the market and result in suppressing the purchase price that will be obtained.¹⁸

18. The Mateo Purchasers have also paid deposits of approximately \$11,000 to buy new appliances and window coverings for the Mateo Property. They risk forfeiting these deposits if they are unable to complete the purchase of the Mateo Property as scheduled.¹⁹

19. Due to difficulties encountered by the Receiver in scheduling a motion in the Commercial List for Court approval of the transaction contemplated under the Mateo APS (and for the sale of Camilla Property), as result of time becoming available on October 6, 2020 late last week, the motions are scheduled for hearing on October 6, 2020. However, the Receiver notes that the closing date of November 5, 2020 under the Mateo APS is sufficiently far out that it will not interfere with the within motion.²⁰

PART III – ISSUES

20. The following issues are raised on this motion:

¹⁵ Bhawani Affidavit, para 5.

¹⁶ Bhawani Affidavit, para 6.

¹⁷ Bhawani Affidavit, para 7.

¹⁸ Bhawani Affidavit, para 8.

¹⁹ Bhawani Affidavit, para 9.

²⁰ Third Report, para 17.

- (a) whether an Order should issue extending the time for the Appellant to file his Notice of Appeal or apply for leave to appeal, as the case may be;
- (b) whether the August 27 Disclaimer Order falls within the scope of subsections 193(b) or 193(c) and is automatically stayed pursuant to subsection 195 of the *BIA*;
- (c) if not, whether leave to appeal should be granted pursuant to subsection 193(e);
- (d) if the August 27 Disclaimer Order is stayed, whether the stay should be lifted to permit the Receiver to complete the sale to the Mateo Purchasers.

PART IV – LAW AND ARGUMENT

The Motion to Extend the Time Appeal Should Be Dismissed

21. Rule 31 of the *Bankruptcy and Insolvency General Rules*²¹ provides that a notice of appeal must be filed within ten days after the date of the Order or decision appealed from or within such further time as a judge of the Court of Appeal stipulates. Rule 4 of the *Bankruptcy and Insolvency General Rules* provides that Saturdays and holidays are only excluded in calculating a period of less than six days.²² Therefore, the Appellants' notice of appeal was required to be filed by September 8, 2020.

22. In *Ontario Wealth Management Corporation v. Sica Masonry and General Contracting Ltd.*,²³ Strathy J.A. dismissed a motion to extend the time to appeal from an Order determining a priority dispute between a construction lien claimant and a mortgagee. Strathy J.A. noted that the overarching principle on such motions is whether the justice of the case requires that an extension be granted. The relevant factors to be considered may include:

²¹ *Bankruptcy and Insolvency General Rules*, CRC, c. 368 (the "Rules").

²² *Rules*, s. 4.

²³ *Ontario Wealth Management Corporation v. Sica Masonry and General Contracting Ltd.* ("Sica"), [2014 ONCA 500 \(CanLII\)](#).

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

23. In the case at bar, no evidence has been filed to establish that the moving party formed an intention to appeal before the expiry of the ten day appeal period.

24. There was a delay of 9 days in the service of the notice of appeal on September 17, 2020 caused by an error of the Appellant's counsel. It would be manifestly unfair to visit the consequences of that error upon the First Mortgagee, the Receiver, or the Mateo Purchasers, given that the Receiver specifically waited to consider offers in order to protect the Appellant's ten day right to file an appeal .

25. The Receiver was entitled to rely upon the August 27 Disclaimer Order in entering into the Mateo APS. The Receiver and the Mateo Purchasers expended time, effort and money participating in the receivership sale process. As Strathy J. A. stated "Where there is no automatic stay of an order pending appeal, a losing party is well - advised to seek a stay pending appeal....Receivers are entitled to act on the advice they receive from the Court."²⁴

26. If the appeal is allowed to proceed at this late stage, it will jeopardize the completion of the sale to the Mateo Purchasers, cause prejudice to them and to the First Mortgagee and undermine the integrity of the receivership sale process.

27. The importance of protecting the integrity of receivership sale processes and preserving the confidence of the public in dealing with receivers has been repeatedly emphasized by the

²⁴ *Sica, supra*, [at para. 32](#).

courts.²⁵ The following comments by Justice Paperny, J.A, in *Matco* apply equally in the facts at bar:

In assessing the balance of convenience, I am obliged to consider the impact of a stay on the sale process and on the stakeholders as a whole. The real prospect that the sales will not proceed and that the market will be negatively affected with no assurance that there will be any other comparable offer forthcoming from the appellants or elsewhere tips the balance of convenience in favour of the respondents. The potential harm to the entire estate from granting a stay far outweighs any benefit for the appellants.²⁶

28. The proposed appeal is also not *prima facie* meritorious. The decision of Justice Dietrich turned on the specific facts and circumstances that were before her. In similar circumstances, Strathy J.A. stated as follows:

I am not persuaded that the appeal has any merit. ... The appeal is, at its core, fact-based, and the moving party has identified no palpable or overriding error in the motion judge's findings of fact.²⁷

29. The findings of fact and factual inferences made by Justice Dietrich cannot be reversed on appeal unless it can be established that the judge made a palpable and overriding error.²⁸ The First Mortgagee submits that no such errors have been identified by the Appellant. On the contrary, the August 27 Disclaimer Order is consistent with well-established legal principles and precedent, and Justice Dietrich committed no errors of law.

30. Justice Dietrich gave full consideration to the arguments raised by the Appellant, applied the correct legal principles and considered all of the relevant factors in determining whether the Receiver's proposed disclaimer of the Tan APS was appropriate. Her analysis is consistent with the legal principles adopted by courts in similar cases, including *Forjay*, *Third Eye Capital Corporation v. Resources Dianor Inc./Dianor Resources Inc.* and *Firm Capital Mortgage Fund*

²⁵ *B&M Handelman Investments Limited v. Mass Properties Inc.*, 2009 CanLII 37930 (ON SC), [at para. 22](#); *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.*, 2020 ONSC 3659 (CanLII), [at para. 36](#); *Royal Bank of Canada v. Soundair Corp.*, [1991 CanLII 2727 \(ON CA\)](#).

²⁶ *Matco Capital Limited v. Interex Oil Field Services Ltd.* ("Matco"), 2007 A.B.C.A. 317 (CanLII), [at para. 11](#).

²⁷ *Sica*, *supra*, [at paras. 29-30](#).

²⁸ *Housen v. Nikolaisen*, [2002] 2 SCR 235, [at paras. 4, 10, 19](#).

*Inc. v. 2012241 Ontario Ltd.*²⁹ The applicable legal framework was set out by Fitzpatrick J. in *Forjay* as follows:

- a) What are the respective legal priority positions as between the competing interests?
- b) Would a disclaimer enhance the value of the assets? If so, would a failure to disclaim the contract amount to a preference in favour of one party?; and
- c) If a preference would arise, has the party seeking to avoid a disclaimer and complete the contract established that the equities support that result rather than a disclaimer?

31. Her Honour correctly found that all of the equity in the Mateo Property was charged by the First Mortgage, such that the completion of the Tan APS would confer a benefit and preference on the Appellant, at the expense of the First Mortgagee, to the extent of the shortfall in the deposit, any incremental value realizable in the market upon a sale by the Receiver and the \$40,000 expended by the Receiver in completing construction of the Property. Her Honour rejected that result as it would “resolve one inequity, by creating another”.³⁰

32. Justice Dietrich acknowledged that the Appellant is a victim of the improper use of his \$400,000 deposit paid directly to Elite, but also noted that he assumed some risk in advancing the funds without security.

33. Finally, Justice Dietrich found that the First Mortgagee had “in no way participated in Mr. Tan’s decision to make that improvident payment and was unaware that such payment had been made”.

34. After weighing all of the equities, Her Honour found that the equities did not justify subordinating the First Mortgagee’s legal priority, and that the Appellant had failed to meet his burden of proving that his interest should be preferred to that of secured creditors. In short, there

²⁹ *Forjay Management Ltd. v 0981478 B.C. Ltd.*, 2018 BCSC 527, [at para. 44](#); *Firm Capital Mortgage Fund Inc. v. 2012241 Ontario Ltd.*, 2012 ONSC 4816, [at paras. 27, 31, 38](#); *Third Eye Capital Corporation v. Resources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508, [at paras. 108-110](#).

³⁰ Endorsement, *supra*, at para. 44.

was “no basis in law or in equity that would permit this court to visit the consequences of Mr. Tan’s unfortunate decision on the Applicant secured creditor”.³¹

35. In reliance on the leading jurisprudence Justice Dietrich held that “[i]n assessing whether disclaimer of an agreement is appropriate, the priority of a secured interest registered under the *Land Titles Act*, while not determinative, weighs heavily.”³²

36. Justice Dietrich also correctly applied the law in concluding that the Appellant could not seek specific performance of the Tan APS, and at the same time assert that the waiver and subordination clauses in the Tan APS did not apply.

37. The leading case on the enforceability of exclusion clauses is *Tercon Contractors Ltd. v. British Columbia (Minister of Transportation & Highways)*.³³ Justice Binnie summarized the law as follows:

121 The present state of the law, in summary, requires a series of enquiries to be addressed when a plaintiff seeks to escape the effect of an exclusion clause or other contractual terms to which it had previously agreed.

122 The first issue, of course, is whether as a matter of interpretation the exclusion clause even applies to the circumstances established in evidence. This will depend on the Court’s assessment of the intention of the parties as expressed in the contract. If the exclusion clause does not apply, there is obviously no need to proceed further with this analysis. If the exclusion clause applies, the second issue is whether the exclusion clause was unconscionable at the time the contract was made, “as might arise from situations of unequal bargaining power between the parties” (Hunter, at p. 462). This second issue has to do with contract formation, not breach.

123 If the exclusion clause is held to be valid and applicable, the Court may undertake a third enquiry, namely whether the Court should nevertheless refuse to enforce the valid exclusion clause because of the existence of an overriding public policy, proof of which lies on the party seeking to avoid enforcement of the clause, that outweighs the very strong public interest in the enforcement of contracts.³⁴

³¹ Endorsement, *supra*, at para. 46.

³² Endorsement, *supra* at paras 48-51.

³³ *Tercon Contractors Ltd. v. British Columbia (Minister of Transportation & Highways)* (“*Tercon*”), [2010] 1 SCR 69.

³⁴ *Tercon*, *supra*, [at paras. 121-123](#).

38. In the case bar, there was no basis to disregard the waiver and subordination clause in the Tan APS. The Appellant was represented by legal counsel at the time of entering into the APS, and there was no evidence of any unconscionable conduct or overriding public policy which would prevent enforcement.

Issue II – No Appeal as of Right

Statutory Framework

39. The appeal route in this case is governed by Section 193 of the *BIA*, which provides that leave to appeal is required, except in certain specified circumstances, none of which apply here. Section 193 of the *BIA* provides as follows:

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 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.

40. Section 193 of the *BIA* is narrowly construed to ensure that bankruptcy proceedings are administered in an efficient and expeditious manner. In *2403177 Ontario Inc. v. Bending Lake Iron Group Ltd.*, the gatekeeping function which the statute reposes in appellate courts was expressed by Brown, J.A. as follows:

Courts have observed that the availability under Section 193(e) of a right to seek leave to appeal in the circumstances falling outside those captured by automatic rights of appeal in Sections 193(a) to (d) signals the need for appeal courts to control bankruptcy proceedings in order to promote the efficient and expeditious resolution of the bankruptcy, one of the principle objectives of bankruptcy legislation.³⁵

³⁵ *2403177 Ontario Inc. v. Bending Lake Iron Group Ltd.* (“*Bending Lake*”), 2016 ONCA 225, 2016 Carswell Ont 4553, [at para. 47](#).

Subsections 193(b) and (c) are Not Engaged by the Proposed Appeal

41. In *Business Development Bank of Canada v. Pine Tree Resorts, Inc.*,³⁶ Blair J.A. explained that the narrow interpretation of subsection 193(c) was necessary because the vast majority of bankruptcy claims involve amounts in excess of \$10,000.00 and to interpret paragraph 193(c) broadly would open the floodgates to appeals and render paragraph 193(e), which requires leave to appeal, meaningless.³⁷

42. In *Royal Bank v. Profor Kedgwick Ltd.*,³⁸ the Alberta Court of Appeal adopted a purposive analysis and narrowly interpreted Section 193(c) of the *BIA*:

It is difficult to think of a case involving a corporate bankrupt in which the amount ultimately at issue would not exceed \$10,000.00. Consequently, there would be little utility to the other four subsections under Section 193 if such cases were subject to an appeal as a right.

43. The following orders have been held not to engage subsection 193(c):

- (i) orders that are procedural in nature,
- (ii) orders that do not bring into play the value of the debtor's property, or
- (iii) orders that do not result in a loss.³⁹

44. Orders concerning the methods by which a receiver realizes an estate's assets are procedural in nature and, therefore, fall outside the scope of subsection 193(c).

45. In *Bending Lake*, this Court considered whether subsection 193(c) applied to an approval and vesting order where the debtor argued that the sale price achieved by the receiver was less than what it should have been and resulted in a significant loss for the debtor's shareholders. In determining that the sale approval order did not fall within subsection 193(c), Brown, J.A. noted that the allegations of improvident sale were procedural and did not call into play the value of the

³⁶ *Business Development Bank of Canada v. Pine Tree Resorts Inc.* ("Pine Tree"), 2013 ONCA 282 (CanLII).

³⁷ *Pine Tree*, *supra*, [at paras. 17 and 18](#).

³⁸ *Royal Bank v. Profor Kedgwick Ltd.*, 2008 NBCA 69, 2008 Carswell NB 463, [at para. 54](#).

³⁹ *Bending Lake*, *supra*, [at para. 53](#).

debtor's property. Moreover, he found that the fact that stakeholders would suffer a loss was not a basis for concluding that the sale would result in a loss of rights greater than \$10,000.00.

46. The decision in *Forjay Management Ltd v. Peeverconn*,⁴⁰ relied upon by the Appellant is distinguishable from the case at bar. In *Forjay*, the receiver sought approval to complete 40 of 400 agreements of purchase and sale entered into by the debtor, and intended to seek approval of 18 similar agreements of purchase and sale at a future time following the resolution of other issues. Therefore, it was clear that the order under appeal was likely to affect other cases of a similar nature in the proceedings. On that basis alone, the court concluded that leave to appeal was not required.⁴¹

47. In contrast, in the case at bar, the receiver is only dealing with Mateo Property and the Camilla Property (which has now been sold).

48. Although Justice Willcock in *Forjay*, in *obiter*, expressed his view that subsection 193(c) applied, it is respectfully submitted that, his decision is not binding on this Court, and ought not to be followed.

49. As discussed above, the Court of Appeal for Ontario has adopted a different approach to the interpretation of subsection 193(c). In *Bending Lake*, Justice Blair held the appeal did not fall within subsection 193(c), notwithstanding that the appellant argued that the improvident sale would result in a loss to the debtor and its shareholders of more than \$10,000.

50. Similarly, in *Sica*, Strathy J. A. held that that leave to appeal was required to appeal from an order resolving a priority dispute, even though the property or amount in issue exceeded \$10,000. Priority disputes are the daily fare of bankruptcy courts, as are disputes regarding disclaimer of agreements by receivers. A right of appeal in such cases would open the floodgates and hinder the receivership process:⁴²

While the practical effect of the motion judge's decision is that Ontario Wealth will receive proceeds of sale exceeding \$10,000 and *Sica* will not, this results not from the

⁴⁰ *Forjay Management Ltd v. Peeverconn* (“*Forjay*”), [2018 BCCA 188](#).

⁴¹ *Forjay*, [at paras. 43 and 44](#).

⁴² *Sica*, [at paras 41-42](#).

decision itself but from the reality that there are insufficient funds in the estate to repay both creditors.

51. The crux of the issue in the case at bar is whether the First Mortgagee or the Appellant has priority to the sale proceeds from the Mateo Proceeds. The Appellant, in fact, seeks a compensation order in his Notice of Appeal and seeks to have monies paid into Court pending the disposition of the Appeal. This supports the notion that the issue is one of priority between to claims to the debtor's assets and, therefore, leave to appeal is required.

52. A narrow interpretation of section 193 of the *BIA* is consistent with the objective of harmonizing insolvency legislation and reading the *BIA* and the *Companies' Creditors Arrangement Act* ("CCAA")⁴³ harmoniously, so as to achieve similar treatment under both insolvency statutes.⁴⁴ Leave to appeal is required to appeal all orders granted under the *CCAA*.⁴⁵

Leave Should Not Be Granted Under Subsection 193(e)

53. In *Pine Tree*, Blair J.A. adopted the following approach with respect to the factors to be considered on an application for leave to appeal under Section 193(e):

Beginning with the overriding proposition that the exercise of granting leave to appeal under Section 193(e) is discretionary and must be exercised in a flexible and contextual way, the following are the prevailing considerations in my view. The Court will look to whether the proposed appeal,

- (a) raises an issue that is of general importance to the practice and 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.

⁴³ *Companies Creditors Arrangement Act*, RSC 1985, c. C-36.

⁴⁴ *Ted Leroy Trucking [Century Services Ltd.]*, Re, 2010 SCC 60, [at para. 24](#).

⁴⁵ *CCAA*, s. 13.

54. Blair J. A. went on to state that leave to appeal motions under the *BIA* “often arise from discretionary decisions made by judges particularly attuned to the particular dynamics of the case. Those decisions are entitled to considerable deference.”⁴⁶

55. As hereinabove discussed, the August 27 Disclaimer Order does not break new ground and is consistent with the other cases on the issue of disclaimer of contracts by receivers. The proposed appeal is not *prima facie meritorious*. The delay and uncertainty created by an appeal will prejudice all stakeholders, as the costs of the receivership will increase and the interest accruing on the First Mortgage continues to accrue.

There Should Be No Stay Pending Appeal

56. In *First National Financial GP Corp. v. Golden Dragon HO 10*, Fairburn J.A. (as she then was) held that in considering whether whether an automatic stay should be cancelled, the Court principally considers two factors: (1) the merits of the appeal and (2) the relative prejudice to the parties.⁴⁷ More recently, Nordheimer J.A. applied the same test in *Royal Bank of Canada v. Bodanis*.⁴⁸

57. In *First National*, in the context of an appeal to an Approval and Vesting Order for the sale of the debtor’s property, Fairburn J.A. found that the automatic stay should be cancelled:⁴⁹

In my view, the integrity of the sale process, combined with the costs currently being incurred, and the risks associated with this transaction not being completed, pitted against what I determine to be a very weak appeal, all favour the lifting of any stay that may be operative under s. 195 of the *BIA*.

58. As discussed above, a stay will jeopardize the sale of the Mateo Property to the Mateo Purchasers, cause prejudice to them and to the First Mortgagee, and undermine the integrity of the receivership sale process.

⁴⁶ *Pine Tree*, *supra*, [at para. 33](#).

⁴⁷ *First National Financial GP Corp. v. Golden Dragon HO 10*, [2019 ONCA 873](#).

⁴⁸ *Royal Bank of Canada v. Bodanis*, 2020 ONCA 185 [at para 11](#).

⁴⁹ *First National*, [at para 44](#).

59. The Debtors are insolvent. If the Order is stayed pending appeal, the receivership will continue for an extended period of time and the costs of the receivership will continue to mount. As the Receiver's fees and disbursements are secured by a charge ranking in priority to other creditors, such creditors will be prejudiced by the accrual of additional costs. As well, interest is accruing on the amount owing under the First Mortgage, and will continue to increase until such time as a sale is completed and proceeds are distributed. Finally, the Receiver will incur significant legal fees in responding to the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of October, 2020.

Per:



David Preger, of Counsel for C & K Mortgage
Services Inc.

SCHEDULE “A”

1. *Ontario Wealth Management Corporation v. Sica Masonry and General Contracting Ltd.*, 2014 ONCA 500
2. *B&M Handelman Investments Limited v. Mass Properties Inc.*, 2009 CanLII 37930
3. *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.*, 2020 ONSC 3659
4. *Royal Bank of Canada v. Soundair Corp.*, 1991 CanLII 2727 (ON CA)
5. *Matco Capital Limited v. Interex Oil Field Services Ltd.*, 2007 A.B.C.A. 317
6. *Housen v. Nikolaisen*, [2002] 2 SCR 235
7. *Forjay Management Ltd. v 0981478 B.C. Ltd.*, 2018 BCSC 527
8. *Firm Capital Mortgage Fund Inc. v. 2012241 Ontario Ltd.*, 2012 ONSC 4816
9. *Third Eye Capital Corporation v. Resources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508
10. *Tercon Contractors Ltd. v. British Columbia (Minister of Transportation & Highways)*, [2010] 1 SCR 69
11. *2403177 Ontario Inc. v. Bending Lake Iron Group Ltd.*, 2016 ONCA 225
12. *Business Development Bank of Canada v. Astoria Organic Matters Ltd.*, 2019 ONCA 269
13. *Royal Bank v. Profor Kedgwick Ltd.*, 2008 NBCA 69
14. *Forjay Management Ltd v. Peeverconn*, 2018 BCCA 188
15. *Ted Leroy Trucking [Century Services Ltd.], Re*, 2010 SCC 60
16. *First National Financial GP Corp. v. Golden Dragon HO 10*, 2019 ONCA 873
17. *Royal Bank of Canada v. Bodanis*, 2020 ONCA 185
18. *Business Development Bank of Canada v. Pine Tree Resorts, Inc.*, et al, 2013 ONCA 282, 115 O.R.(3rd) 617
19. *Royal Bank v. Profor Kedgwick Ltée/Ltd.*, 2008 NBCA 69, 2008 CarswellNB 463

SCHEDULE “B”

TEXT OF STATUTES, REGULATIONS & BY - LAWS

Bankruptcy and Insolvency Act (R.S.C., 1985, c. B-3)

Court of Appeal

193 Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:

- (a) if the point at issue involves future rights;
- (b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;
- (c) if the property involved in the appeal exceeds in value ten thousand dollars;
- (d) from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars; and
- (e) in any other case by leave of a judge of the Court of Appeal.

Stay of proceedings on filing of appeal

195 Except to the extent that an order or judgment appealed from is subject to provisional execution notwithstanding any appeal therefrom, all proceedings under an order or judgment appealed from shall be stayed until the appeal is disposed of, but the Court of Appeal or a judge thereof may vary or cancel the stay or the order for provisional execution if it appears that the appeal is not being prosecuted diligently, or for such other reason as the Court of Appeal or a judge thereof may deem proper.

Bankruptcy And Insolvency General Rules, CRC. C. 368

Appeal to Court of Appeal

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.

(2) If an appeal is brought under paragraph 193(e) of the Act, the notice of appeal must include the application for leave to appeal.

4 If a period of less than six days is provided for the doing of an act or the initiating of a proceeding under the Act or these Rules, calculation of the period does not include Saturdays or holidays.

Courts of Justice Act (R.S.O., 1990, c. C. 43)

Court of Appeal jurisdiction

6 (1) An appeal lies to the Court of Appeal from,

(a) an order of the Divisional Court, on a question that is not a question of fact alone, with leave of the Court of Appeal as provided in the rules of court;

(b) a final order of a judge of the Superior Court of Justice, except an order referred to in clause 19 (1) (a) or an order from which an appeal lies to the Divisional Court under another Act;

(c) a certificate of assessment of costs issued in a proceeding in the Court of Appeal, on an issue in respect of which an objection was served under the rules of court;

(d) an order made under section 137.1.

Divisional Court jurisdiction

19 (1) An appeal lies to the Divisional Court from,

(a) a final order of a judge of the Superior Court of Justice, as described in subsections (1.1) and (1.2);

(b) an interlocutory order of a judge of the Superior Court of Justice, with leave as provided in the rules of court;

(c) a final order of a master or case management master.

Same

(1.0.1) Clauses (1) (a) and (b) do not apply to orders made under section 137.1.

Same

(1.1) If the notice of appeal is filed before October 1, 2007, clause (1) (a) applies in respect of a final order,

(a) for a single payment of not more than \$25,000, exclusive of costs;

(b) for periodic payments that amount to not more than \$25,000, exclusive of costs, in the 12 months commencing on the date the first payment is due under the order;

(c) dismissing a claim for an amount that is not more than the amount set out in clause (a) or (b); or

(d) dismissing a claim for an amount that is more than the amount set out in clause (a) or (b) and in respect of which the judge or jury indicates that if the claim had been allowed

the amount awarded would have been not more than the amount set out in clause (a) or (b).

Same

(1.2) If the notice of appeal is filed on or after October 1, 2007, clause (1) (a) applies in respect of a final order,

(a) for a single payment of not more than \$50,000, exclusive of costs;

(b) for periodic payments that amount to not more than \$50,000, exclusive of costs, in the 12 months commencing on the date the first payment is due under the order;

(c) dismissing a claim for an amount that is not more than the amount set out in clause (a) or (b); or

(d) dismissing a claim for an amount that is more than the amount set out in clause (a) or (b) and in respect of which the judge or jury indicates that if the claim had been allowed the amount awarded would have been not more than the amount set out in clause (a) or (b).

Injunctions and receivers

101 (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

Terms

(2) An order under subsection (1) may include such terms as are considered just.

***Rules of Civil Procedure* (R.R.O. 1990, Reg. 194.)**

Payment of Money

63.01 (1) The delivery of a notice of appeal from an interlocutory or final order stays, until the disposition of the appeal, any provision of the order for the payment of money, except a provision that awards support or enforces a support order.

Exception, Default Judgment

(2) The delivery of a notice of appeal from an order refusing to set aside a default judgment does not stay the default judgment, but it may be stayed by order and rule 63.02 applies as if the appeal were from the default judgment.

Lifting Stay

(5) A judge of the court to which the appeal is taken may order, on such terms as are just, that the stay provided by subrule (1), (3) or (4) does not apply.

STAY BY ORDER

By Trial Court or Appeal Court

63.02 (1) An interlocutory or final order may be stayed on such terms as are just,

(a) by an order of the court whose decision is to be appealed;

(b) by an order of a judge of the court to which a motion for leave to appeal has been made or to which an appeal has been taken.

Setting aside or Varying Stay

(3) A stay granted under subrule (1) may be set aside or varied, on such terms as are just, by a judge of the court to which a motion for leave to appeal may be or has been made or to which an appeal may be or has been taken.

C & K MORTGAGE SERVICES INC.
Applicant

-and- **CAMILLA COURT HOMES INC. et al**
Respondents

Court File No. CV-20-00643021-00CL
Court of Appeal File No. M51800

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT TORONTO

**FACTUM OF THE RESPONDING PARTY,
C & K MORTGAGES SERVICES INC.**

DICKINSON WRIGHT LLP

Barristers & Solicitors
199 Bay Street
Suite 2200, P.O. Box 447
Commerce Court Postal Station
Toronto, Ontario, M5L 1G4

DAVID P. PREGER (36870L)

Email: DPreger@dickinsonwright.com
Tel: 416-646-4606

LISA S. CORNE (27974M)

Email: LCorne@dickinsonwright.com
Tel: 416-646-4608

DAVID Z. SEIFER (77474F)

Email: DSeifer@dickinsonwright.com
Tel: 416-646-6867

Fax: 844-670-6009

Lawyers for the Respondent, C & K Mortgages Services Inc.