CACV3667

IN THE COURT OF APPEAL FOR SASKATCHEWAN

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, JUDICIAL CENTRE OF SASKATOON
Q.B. No. 1401 of 2019

BETWEEN:

HARMON INTERNATIONAL INDUSTRIES INC.

PROPOSED APPELLANT
(Respondent)

AND:

HARDIE & KELLY INC., Receiver of Harmon International Industries Inc.

PROPOSED RESPONDENT
(Applicant)

AND:

PILLAR CAPITAL CORP.

INTERESTED PARTY
(Initial Applicant)

BRIEF OF LAW ON BEHALF OF MCDOUGALL GAULEY LLP, Proposed *Amicus Curiae*

(Motion for Leave to Appeal)

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I. INTRODUCTION

1. This brief of law and argument will address the narrow question of whether the Court's recent decision in *MNP Ltd v Wilkes*[1] provides the proposed appellant, Harmon International Industries Inc. ("**Harmon**"), with an appeal as of right pursuant to ss. 193(c) of the *Bankruptcy and Insolvency Act* (Canada) (the "**BIA**").

2. The submissions made herein will focus on the ground of appeal raised in paragraph 4(b) of Harmon's draft notice of appeal, namely:

> 4. THAT the appeal is taken upon the following grounds:
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> [...]
>
> (b) That the Learned Chambers Judge erred in fact and/or in law in failing to conclude that ICR Commercial Real Estate was intending to list the Harmon Lands, as described in the Sales Process Order, at a value significantly less than fair market value; and
>
> [...]

3. As described in more detail below:

(a) while *Wilkes* certainly requires that the appellant adduce evidence showing that the decision appealed from involves a claim for a loss that exceeds $10,000 in value, the appellant is not required to establish that the loss itself is "*guaranteed or immediate*";[2] and

(b) the evidence filed in the Queen's Bench proceedings suggests that:

(i) Harmon's real property *may* be worth between $3.43 and $5.5 million;

(ii) Harmon's indebtedness to Pillar Capital Corp. ("**Pillar**") is in excess of $4.5 million; and

(iii) a sale of Harmon's real property at the list prices established by the Sales Process Order would not satisfy Harmon's indebtedness to Pillar and leave a deficiency greater than $10,000.

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[1] 2020 SKCA 66 [*Wilkes*].
[2] *Ibid*. at para 64.

4. Consequently, "*the loss which the granting or refusing of the right claimed will entail*"[3] in this case exceeds $10,000 in respect of the ground of appeal raised in paragraph 4(b) of Harmon's draft notice of appeal, such that Harmon has an appeal as of right in respect of the same by virtue of the *Wilkes* decision.

II. ISSUES

5. In order to answer the overarching issue on this application (i.e., Does *Wilkes* apply?), it is necessary to consider the following:

A. Must actual damage be proven in order to have an appeal as of right pursuant to ss. 193(c) of the BIA based on the *Wilkes* decision?

B. Does the evidence before the Court establish a claim for a loss in excess of $10,000?

6. These issues will be addressed in turn with reference to applicable portions of *Wilkes* and evidence filed in the Queen's Bench proceedings, where appropriate.

III. DISCUSSION

A. The Loss Alleged by Harmon

7. The Receiver is quite right that the Sales Process Order does not itself approve a sale of Harmon's real property, but with respect, that avoids the thrust of the allegation made by Harmon.

8. Harmon's complaint is with the list prices for the real estate approved by Sales Process Order, which prices Harmon contends are significantly less than the fair market value of the assets. Harmon's complaint is therefore that, by approving the listing of the

[3] *Ibid*. at para 61.

real property below what Harmon says is the fair market value, the Sales Process Order authorizes and invites prospective purchasers to make offers to purchase the property for less than its fair market value, which creates the likelihood that Harmon will suffer a loss on that future sale. What Harmon has lost is the opportunity to test the market for the real estate at what Harmon says is its fair market value.

9. Put another way, the list price is an express communication to the market that, if a prospective purchaser were to offer to purchase the assets at the list price, that offer will be accepted by the Receiver (in the absence of a greater offer). As will be discussed in Section B of this brief, the approved list prices are less than Harmon's indebtedness to Pillar, which will create a loss in excess of $10,000.

10. It is not disputed that any offer ultimately accepted by the Receiver will be conditional upon Court approval, but it is difficult to imagine the Court not approving a conditional sale of the real property at the very list prices established by its previous order.

11. It is also conceivable that a prospective purchaser may determine that the real property is worth more than the list price and therefore submit a higher offer, but in a distressed sale scenario, would the goal of such an offeror not be benefit from the perceived equity without paying for its full value? That is: a shrewd businessperson would be trying to offer as little as possible above the list price in order to be the highest bid, as opposed to submitting an offer based what he or she believes the fair market value to be.

12. Against this backdrop, the question before the Court is therefore whether the specific loss alleged by Harmon is sufficiently established on the evidence so as to be considered in the context of ss. 193(c) of the BIA and the *Wilkes* decision, which necessarily leads to a consideration of the appropriate standard to be used to evaluate the likelihood of the alleged loss.

B. The Loss Need Not Be Crystallized to Give Rise to an Appeal as of Right

13. At paragraphs 14-16 of the Receiver's brief, the Receiver argues that, because the Sales Process Order does not itself authorize a sale of the real property at a specific price, there is no value in jeopardy and no party can argue that they have suffered a loss as a result, suggesting an appellant must be able to adduce evidence of an actual, crystallized loss in order to avail itself of an appeal as of right pursuant to ss. 193(c) of the BIA.

14. The *Wilkes* decision does not go that far, but instead contemplate instances where the specific damage complained of yet has yet to be incurred. The following excerpts of *Wilkes* are apposite in this regard:

> 62 [...] In answering any of those questions, an appeal court may determine that there is no property involved in the appeal exceeding in value $10,000 but rather that the question in issue is procedural only. But merely because the question in issue is procedural, does not necessarily mean there is not property involved in the appeal that exceeds in value $10,000. An issue can be procedural while also having more than $10,000 at stake. In examining this principle further, it is helpful to look again at the three leading cases that put forward the proposition that the property involved in the appeal did not exceed $10,000 because the question in issue was procedural:
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> (a) *Coast* — the issue was whether the Chambers judge had erred by permitting the bringing of an action rather than requiring the matter to be heard in Chambers;
>
> (b) *Dominion Foundry* — the issue pertained to the manner of sale; and
>
> (c) *Pine Tree* — the issue was whether a receiver should have been appointed or not.
>
> It should be noted that the reported decisions do not show that the proponent of a right of appeal in these cases put forward evidence to show that the procedural issue in question had resulted in or could result in a loss.
>
> [...]
>
> 64 According to the *Orpen — Fallis* line of authority, which I believe this Court should follow, an appellate court's task is to determine first and foremost whether the appeal involves property that exceeds in value $10,000, i.e., to answer the question posed by s. 193(c). It is not necessary that recovery of that amount be guaranteed or immediate. Rather the claim must be sufficiently grounded in the evidence to the satisfaction of the Court determining whether there is a right of appeal. As the Court in *Fallis* indicated, the determination of the amount or value may be proven by affidavit. It may be that a court will conclude that the appeal does not involve property that exceeds in value $10,000, but rather involves a question of procedure alone, but one

> does not begin with the second question first. In my view, this is an important distinction.
>
> [Emphasis added.]

15. *Wilkes* thus expressly admits of the *possibility* that an appellant's appeal rights pursuant to ss. 193(c) could be engaged by virtue of an order that has the potential to cause a loss in excess of $10,000 provided that the prospects of the loss are sufficiently established by the affidavit evidence. This necessarily leads to a consideration of the evidence filed in the Queen's Bench Proceedings.

B. The Affidavit Evidence Establishes a Potential Loss Greater than $10,000

16. The following evidence appears in the affidavits filed in the Queen's Bench Proceedings:

(a) the August 28, 2017 valuation from Brunsdon Lawrek & Associates attached as Exhibit "C" to the Affidavit of Calvin Moneo dated October 8, 2019 estimates the value of Harmon's real estate to be $5.5 million;

(b) the January 6, 2020 valuation from Suncorp attached as Exhibit "A" to Affidavit of Kevin Hoy dated January 8, 2020 estimates the value of Harmon's real estate to be $3.43 to $3.65 million;

(c) the June 3, 2020 Email of Rob Pellegrini of Coldewell Bankers attached as Exhibit "A to June 4, 2020 Affidavit of Calvin Moneo, which does not purport to value the Harmon real estate, but does indicate that Coldwell Bankers would be prepared to list lots 12, 13, 14, and 15 alone for a list price of $4.95 million; and

(d) there is the Confidential Supplement to the Receiver's First Report, which contains additional information with respect to the potential value of the Harmon's real estate.

17. The evidence thus establishes a range of potential values between $3.43 and $5.5 million for the Harmon real property.

18. Appendix A to the First Report of the Receiver is a statement from Pillar indicating that, as of May 21, 2020, Harmon's indebtedness to Pillar was $4,501,644,

with interest accruing thereon at $3,616.46 per day. 64 days have passed since May 21, 2020, such that there would be approximately $231,453 in addition interest that has accrued in the interim, for a total indebtedness of approximately $4,733,097.

19. The Sales Process Order approves the listing of:

(a) Lots 12, 13, 14, and 15 for a list price of $3.8 million; and

(b) 821 47th Street East property for a list price of $740,000.

Total: $4.54 million

20. The prospective sale of the Harmon real property at the list price, as authorized by the Sales Process Order, thus stands to lead to a future sale of the Harmon real property for significantly less than Harmon's indebtedness to Pillar, thereby leaving a shortfall in excess of $10,000.

IV. CONCLUSION

21. For the foregoing reasons, it is respectfully submitted that the issue raised by the Honourable Madam Justice Jackson at the first hearing of this matter on July 22, 2020 should be answered in the affirmative: there is sufficient evidence before the Court that the potential loss which the granting or refusing of the right claimed is in excess of $10,000, such that Harmon has an appeal as of right in respect of the ground of appeal raised in paragraph 4(b) of its draft notice of appeal.

DATED this 24th day of July, 2020, in Saskatoon, Saskatchewan.

McDOUGALL GAULEY LLP

Per: 

CRAIG FRITH

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