

COURT OF APPEAL FOR ONTARIO

CITATION: Phillips v. Kheil, 2026 ONCA 215

DATE: 20250326

DOCKET: COA-24-CV-1348

Miller, Thorburn and Monahan JJ.A.

BETWEEN

Joshua Phillips

Plaintiff (Appellant)

and

Hassouna M. Kheil and Bido Kheil

Defendants (Respondents)

Sean C. Flaherty, for the appellant

Dawson Wigle, for the respondents¹

Heard: January 27, 2026

On appeal from the judgment of Justice Sandra Antoniani of the Superior Court of Justice, dated November 26, 2024.

Monahan J.A.:

[1] The appellant appeals a judgment which dismissed his action against the respondents (the “Action”) on the basis that he was an undischarged bankrupt at the relevant time and thus lacked capacity to commence it.

¹ Dawson Wigle appeared but made no written or oral submissions on behalf of the respondents.

[2] The appellant argues that the motion judge erred because the trustee in bankruptcy (the “Trustee”) had appointed him to deal with his primary asset, a combined commercial and residential property (the “Property”), and that this appointment gave him capacity to commence the Action. Alternatively, the appellant argues that the motion judge erred by holding that his general damages claim for loss of enjoyment and use of the Property was a proprietary claim, rather than a personal claim which would not have vested in the Trustee.

[3] Although counsel for the respondents appeared at the hearing of the appeal, the respondents did not file any materials or take a position on the merits of the appeal.

[4] As explained below, the motion judge committed no reviewable error in dismissing the Action and I would therefore dismiss the appeal.

I. BACKGROUND

[5] The appellant made an assignment in bankruptcy in 2013. Notwithstanding the bankruptcy, the Trustee permitted the appellant to remain in possession of the Property, which included the residential home he shared with his family and a commercial building containing several units. The appellant continued to manage the Property, including paying the mortgage and other expenses and generating rental income through leasing units in the commercial building. The respondents

were the tenants in one of those units, which they used for their business of dismantling and repairing automobiles.

[6] In 2016, part of the commercial building was damaged by a fire, which the appellant alleged was caused by the respondents. Without informing the Trustee, in 2018, the appellant commenced the Action. The Trustee did not become aware of the fire damage or the Action until sometime after the appellant was discharged from bankruptcy in 2019.

[7] In 2023, the respondents learned that the appellant was an undischarged bankrupt when the Action was commenced. The respondents therefore moved under r. 21.01(3)(b) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, to have the Action dismissed on the grounds that, pursuant to s. 71 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the “*BIA*”), the appellant did not have the capacity to commence or continue a legal proceeding in respect of the Property.

[8] The appellant argued that, although s. 71 of the *BIA* vests the right to deal with a bankrupt’s property in the trustee, including the capacity to commence legal proceedings, the Trustee in this case implicitly assigned him the right to commence the Action pursuant to s. 30(1)(l) of the *BIA*. This provision enables a trustee to “appoint the bankrupt to aid in administering the estate of the bankrupt in such manner and on such terms as the inspectors may direct”. The appellant argued that because the Trustee allowed him to continue his possession of the Property

and manage it during the bankruptcy, he also had capacity to commence legal proceedings in relation to the Property. In the alternative, the appellant argued that his claim for general damages relating to loss of enjoyment and use of the Property was a personal claim, and therefore exempt from the bankruptcy proceedings.

II. THE MOTION JUDGE'S REASONS

[9] The motion judge agreed that a trustee may assign an undischarged bankrupt the right to commence legal proceedings in relation to the bankrupt's property. However, the motion judge found that no such assignment had been made in this case. The Trustee was not aware of the fire damage or that the appellant had commenced the Action until after the appellant was discharged from bankruptcy. The appellant did not seek, proactively or retroactively, authorization from the Trustee to bring the proceeding. Nor did any party (the appellant, the Trustee, or a creditor of the appellant) seek to transfer the litigation, substitute the plaintiff, or obtain relief from the appellant's procedural defect.

[10] The motion judge was also unpersuaded by the appellant's argument that the Action could be saved because part of his Action advanced a personal claim, which would have been exempt from the bankruptcy proceedings. The motion judge found that the damage allegedly suffered by the appellant was proprietary rather than personal in nature. Given this conclusion, the motion judge dismissed the appellant's motion to amend his pleadings to add a claim of nuisance.

[11] Accordingly, the motion judge granted the respondents' motion and dismissed the Action.

III. GROUNDS OF APPEAL

[12] The appellant argues that the motion judge erred in the following respects:

- (i) by holding that the Trustee did not assign the authority to commence the Action to the appellant, despite the fact that he was permitted to continue to manage the Property; and
- (ii) by holding that the appellant's claim for general damages for loss of enjoyment and use of the Property was a proprietary claim rather than a personal claim.

IV. STANDARD OF REVIEW

[13] Questions of law are reviewed on a standard of correctness: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 8-9. The standard of review for questions of mixed fact and law lies on a spectrum, although such findings are most often reviewed on a more deferential standard of palpable and overriding error: *Housen* at para. 36.

[14] As discussed below, the appellant's grounds of appeal raise questions of mixed fact and law, and thus the motion judge's findings should not be disturbed absent palpable and overriding error.

V. DISCUSSION

A. Relevant statutory provisions

[15] Pursuant to s. 71 of the *BIA*, following the filing of an assignment in bankruptcy, all property of the bankrupt vests in the trustee in bankruptcy and the bankrupt has no capacity to deal with their property:

71. On a bankruptcy order being made or an assignment being filed with an official receiver, a bankrupt ceases to have any capacity to dispose of or otherwise deal with their property, which shall, subject to this Act and to the rights of secured creditors, immediately pass to and vest in the trustee named in the bankruptcy order or assignment, and in any case of change of trustee the property shall pass from trustee to trustee without any assignment or transfer.

[16] The term “property” is defined broadly in s. 2 of the *BIA* and has been interpreted to include tort and contract claims in relation to property: *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, at para. 41. Therefore, the bankrupt person loses the capacity to commence legal proceedings in relation to their property, which must, instead, be brought by the trustee. This is made explicit by s. 30(1)(d) of the *BIA* which grants the trustee (with the permission of any inspectors appointed by the creditors) the authority to “bring, institute or defend any action or other legal proceeding relating to the property of the bankrupt”.

[17] At the same time, certain claims are so inherently personal in nature that they do not form part of a bankrupt’s property that is vested in the trustee. This would include claims for such matters as physical injury, mental distress, or loss of reputation, which may continue to be pursued by the bankrupt in their own right:

Wallace, at para. 38; *Meisels v. Lawyers Professional Indemnity Company*, 2015 ONCA 406, 126 O.R. (3d) 448, at para. 13. Such personal causes of action are excluded from the property that is vested in the trustee because “it is not the policy of the law to convert into money for the creditors the mental or physical anguish of the debtor”: *Re Holley* (1986), 54 O.R. (2d) 225 (C.A.), at p. 240.

[18] Also relevant is s. 30(1)(l) of the *BIA*, which, as noted above, authorizes the trustee to “appoint the bankrupt to aid in administering the estate of the bankrupt in such manner and on such terms as the inspectors may direct”. Courts in Ontario as well as other provinces have held that a trustee may assign a bankrupt the authority to commence legal proceedings, but in all such cases cited by the appellant this has been done through an express authorization or assignment: see e.g. *Stec v. Blair*, 2021 ONSC 6212, 93 C.B.R. (6th) 217, at paras. 10-12; *Blackmore v. Abdi*, 2019 ONSC 4550, at paras. 21-22, 33-34; *Spiroulias c. Chriscon Investments Ltd.*, 2006 QCCS 2019, 34 C.B.R. (5th) 69, at paras. 7, 23, 31; and *Kirschner v. Moore*, 2023 BCSC 450, at para. 35.

B. The motion judge did not make a palpable and overriding error in finding that the Trustee did not assign the authority to commence the Action to the appellant

[19] The motion judge accepted that s. 30(1)(l) of the *BIA* permits a trustee to assign a bankrupt person the right to commence a legal proceeding in respect of the bankrupt’s property. However, the motion judge found that no such assignment was made by the Trustee in this case because the Trustee was unaware of the

Action and never granted the appellant the right to commence it – either before it was brought, or retroactively to cure the procedural defect. This was a finding of mixed fact and law reviewable on a standard of palpable and overriding error.

[20] The motion judge did not err in this finding. As noted above, those cases which found that a trustee assigned the right to commence legal proceedings to a bankrupt person featured an express authorization. Requiring the authorization to be express rather than implied is consistent with the wording of s. 30(1)(l), which grants the trustee authority to “appoint the bankrupt ... in such manner and on such terms as the inspectors may direct”. The trustee can only “appoint” the bankrupt by taking some positive action authorizing the bankrupt to commence proceedings, as opposed to merely acquiescing in the bankrupt’s decision to commence a legal action. Further, in situations where the creditors have appointed inspectors, the bankrupt’s appointment is on terms directed by the inspectors, which could only be the case if the appointment is made expressly.

[21] This interpretation of s. 30(1)(l) is consistent with a key underlying purpose of the *BIA*, namely, to ensure equitable distribution of the bankrupt’s assets among their creditors: see *Aquino v. Bondfield Construction Co.*, 2024 SCC 31, 496 D.L.R. (4th) 613, at para. 36. A trustee’s responsibilities and powers under the *BIA* are intended, in part, to protect the interests of the creditors: *GMAC Commercial Credit Corporation — Canada v. T.C.T. Logistics Inc.*, 2006 SCC 35, [2006] 2 S.C.R. 123, at para. 58. Commencing, continuing, or defending a legal proceeding may require

the payment of legal fees and expenses and/or affect the bankrupt's entitlements and liabilities, including exposure to costs orders. This could, of course, enhance or jeopardize the bankrupt's assets available to the creditors to settle the bankrupt's debt. Requiring the bankrupt to obtain the express permission of the trustee in order to institute, continue, or defend legal proceedings related to their property ensures that the interests of all stakeholders have been properly taken into account.

[22] There is no dispute that no such express authorization was provided by the Trustee in this case. As the motion judge pointed out, the Trustee was not even aware of the fact that there had been a fire at the Property, let alone that the appellant was seeking to recover damages for the loss suffered in a legal action. Thus, while the Trustee may have acquiesced in the appellant continuing to manage the Property, this acquiescence was not sufficient to "appoint" the appellant to commence the Action pursuant to s. 30(1)(l). Therefore, the motion judge did not err in finding that the appellant lacked the legal capacity to commence the Action.

C. The motion judge did not make a palpable and overriding error in holding that the appellant's claim for general damages for loss of enjoyment and use of the Property was a proprietary claim rather than a personal claim

[23] The motion judge found that the appellant's claim for general damages relating to his loss of enjoyment and use of the Property was proprietary in nature.

Because it was not a personal claim, it was not excluded from the property vested in the Trustee and the appellant lacked the capacity to commence proceedings in respect of such a claim.

[24] The motion judge's characterization of the general damages claim as proprietary rather than personal is one of mixed fact and law reviewable on a standard of palpable and overriding error. I see no such error in the motion judge's findings.

[25] The motion judge determined that there was "no aspect of damages claimed which would be personal to the [appellant] and therefore exempt from bankruptcy proceedings". A review of the appellant's statement of claim confirms this conclusion. The damages that the appellant particularized in his statement of claim are suffered by the Property, rather than the appellant personally. These include replacement of a roof; remediation of physical building elements, electronic components, and smoke and water damage; lost profits; and rent arrears.

[26] There is no standalone personal claim, such as a physical or psychological injury, at issue in this case. The appellant did not plead any facts which allege substantial and unreasonable interference with his health, comfort, or convenience: see *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2013 SCC 13, [2013] 1 S.C.R. 594, at paras. 21-23.

[27] The fact that the appellant had possession of the commercial units following the fire does not transform the claim into a personal one, since the damage alleged

still relates to the real property, which was vested in the trustee at the relevant time. The appellant's Action cannot be saved by a nuisance claim which could, in other circumstances, be a personal claim, because in the context of this case it is clearly rooted in proprietary loss which is suffered by the estate in bankruptcy: see *Little (Nautilus North Strength and Fitness Centre) v. Bramcan Investments Limited*, 2025 ONCA 86, 21 C.B.R. (7th) 236, at para. 9.

[28] The motion judge did not make a palpable and overriding error in her characterization of the appellant's claim, and the appellant's motion seeking to amend his claim to add the claim in nuisance was properly dismissed.

VI. DISPOSITION

[29] I would dismiss the appeal. Given that the respondents did not participate, I would not order any costs.

Released: March 26, 2026 "B.W.M."

"P.J. Monahan J.A."

"I agree. B.W. Miller J.A."

"I agree. Thorburn J.A."