Court of Appeal for Saskatchewan
Docket: CACV4293

Citation: *BTA Real Estate Group Inc. v Kaiss*, 2025 SKCA 24
Date: 2025-02-27

Between:

BTA Real Estate Group Inc.

Appellant
(Applicant)

And

Said Wassim Kaiss and MNP Ltd.

Respondents
(Respondents)

Before:	Caldwell, Schwann and Bardai JJ.A.
Disposition:	Fresh evidence application denied; Appeal dismissed
Written reasons by: In concurrence:	The Honourable Justice Naheed Bardai The Honourable Justice Neal W. Caldwell The Honourable Justice Lian M. Schwann
On appeal from: Appeal heard:	BKY-RG-00169-2023, Regina (Sask KB) September 18, 2024
Counsel:	Nicholas Conlon for BTA Real Estate Group Inc. Said Wassim Kaiss on his own behalf Diana Lee, K.C., and Gabrielle Robitaille for MNP Ltd.

Bardai J.A.

I. INTRODUCTION

[1] BTA Real Estate Group Inc. [BTA] appeals the decision of a Court of King's Bench Chambers judge, wherein the judge granted a discharge to the bankrupt, Said Wassim Kaiss, with a 60-day suspension as proposed by MNP Ltd. [Trustee], as opposed to the 24-month suspension that had been sought by BTA: *BTA Real Estate Group v Kaiss* (6 December 2023) Regina, BKY-RG-00169-2023 (Sask KB) [*Chambers Decision*].

[2] For the reasons that follow, I would dismiss the appeal.

II. BACKGROUND

[3] BTA's interest in the estate of Mr. Kaiss arises from a lease of lands to Family Fitness Inc. [Fitness Inc.] dated August 20, 2013. Mr. Kaiss is the sole director and officer of Fitness Inc. Fitness Inc. operated a gym at the leased premises. As a condition of the lease, BTA took a security interest in Fitness Inc.'s property pursuant to a general security agreement. It also obtained an indemnity from Mr. Kaiss and took a security interest in Mr. Kaiss's property, which allows BTA to collect from Mr. Kaiss for amounts which Fitness Inc. fails to pay.

[4] In August of 2017, Fitness Inc. fell into arrears under its lease and the parties entered into forbearance agreements in the hope that the business could be turned around. However, by April of 2020, there were further defaults and, as of October of 2020, the arrears owing to BTA by Fitness Inc. stood at $1,032,067.07. With no hope of repaying the debt and given the personal indemnity, in August of 2021, Mr. Kaiss made an assignment into bankruptcy. The Trustee was appointed to manage Mr. Kaiss's estate in accordance with the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [*Act*].

[5] In the context of the bankruptcy, BTA filed a proof of claim alleging that Mr. Kaiss owed it $2,035,760.81. Of this amount, $500,000.00 is listed as unsecured debt while the balance, being $1,535,760.81, is listed as secured.

[6] Prior to his bankruptcy, Mr. Kaiss owned shares in a host of companies, including the following:

(a) 50% of the voting shares in Madeiras Investments Inc.;

(b) 50% of the voting shares in Madeiras Investments 51 Inc.;

(c) 50% of the voting shares in Madeiras Investments 52 Inc. [collectively, with the two above, Madeiras Investments];

(d) a 15% share interest in GEO Fitness Inc.;

(e) a 15% share interest in GEO2 Fitness Inc.;

(f) a 17% share interest in GEO3 Fitness Inc.;

(g) a 17% share interest in GEO4 Fitness Inc.;

(h) a 25% share interest in 101260539 Saskatchewan Inc. (operating as Orangetheory Fitness);

(i) a 35% share interest in SM Fitness Inc. (operating as Evolution Fitness); and

(j) a 5% share interest in GEO5 Fitness Inc.

[7] Mr. Kaiss transferred his shares in Madeiras Investments to his father, Wassim Kaiss, for nominal value at a time when he was insolvent but before filing for bankruptcy. Further, Fitness Inc. transferred its CalFit membership list, valued at one time at more than $486,000.00, to SM Fitness Inc., of which Mr. Kaiss was a director and shareholder. That transaction was ultimately found by a Court of King's Bench judge to be a fraudulent conveyance. As a result, the transaction was voided, and Fitness Inc. was once again invested with all legal and beneficial interest in the membership rights as well as any funds derived from the CalFit membership list.

[8] Additionally, in March of 2021, Mr. Kaiss entered into several unanimous shareholder agreements [USAs] for the companies in which he was a shareholder, excluding Madeiras Investments (which, as noted, he had transferred to his father). These agreements required

Mr. Kaiss to sell his interest in the various companies in the event he should make an assignment into bankruptcy. Within six months of these USAs, Mr. Kaiss made an assignment into bankruptcy.

[9] The report prepared by the Trustee for Mr. Kaiss's Application for Discharge dated May 3, 2023, indicates that the Trustee, at that time, did not oppose discharge and identified Mr. Kaiss as having shares valued at $257,050.00, cumulatively, in the following [collectively, Shares]:

Description	**Value as per Statement of Affairs**	**Amount Realized**	**Estimate of Assets to be Realized**
Other – 15% Shareholder – GEO Fitness Inc. – valued by accountant – as per Unanimous Shareholder Agreement – Other shareholders have first right of refusal	21,000.00	0.00	0.00
Other – 15% Shareholder – GEO2 Fitness Inc. – valued by accountant – as per Unanimous Shareholder Agreement – Other shareholders have first right of refusal	51,750.00	0.00	0.00
Other – 17% Shareholder – GEO3 Fitness Inc. – valued by accountant – as per Unanimous Shareholder Agreement – Other shareholders have first right of refusal	5,100.00	0.00	0.00
Other – 17% Shareholder – GEO4 Fitness Inc. – valued by accountant – as per Unanimous Shareholder Agreement – Other shareholders have first right of refusal	31,450.00	0.00	0.00
Other – 25% Shareholder – 101260539 Sask Inc. O/A Orangetheory Fitness – valued by account – as per Unanimous Shareholder Agreement – Other shareholders have first right of refusal	45,625.00	0.00	0.00
Other – 35% Shareholder – SM Fitness Inc. O/A Evolution Fitness – valued by accountant – as per Unanimous Shareholder Agreement – Other shareholders have first right of refusal	100,625.00	0.00	0.00
Other – 5% Shareholder – GEO5 Fitness Inc. – valued by accountant – as per Unanimous Shareholder Agreement – other shareholders have first right of refusal	1,500.00	0.00	0.00
TOTAL:	**$257,050.00**		

[10] Mr. Kaiss sold his interest in the above companies to family members on December 6, 2021, well after the date of his assignment into bankruptcy. These sale transactions were not initially disclosed by Mr. Kaiss to the Trustee.

[11] By transferring the Shares to third parties while he was an undischarged bankrupt, Mr. Kaiss contravened s. 173(1)(c) of the *Act*.

[12] The Trustee engaged MNP LLP (an entity related to the Trustee) to conduct a valuation of the Shares as of October 31, 2021. That valuation found the Shares to be of no value as of the valuation date. In particular, the valuation states as follows:

> **14.0 Summary of Value**
>
> 14.1 Subject to the scope, key assumptions, restrictions and qualifications noted in this Report, we calculate the fair market value of 100% of the issued and outstanding shares of each of the Companies, as at the Valuation Date, to be as follows:

	Reference	Adjusted Net Book Value	Reference	2022 Forecast EBITDA	Fair Market Value
GEO Fitness Inc.	Schedule 1	$ (150,000)	Schedule 2	$ (270,654)	$ Nil
GEO2 Fitness Inc.	Schedule 4	$ (150,000)	Schedule 5	$ (324,174)	$ Nil
GEO3 Fitness Inc.	Schedule 7	$ (190,000)	Schedule 8	$ (250,950)	$ Nil
GEO4 Fitness Inc.	Schedule 10	$ (330,000)	Schedule 11	$ (532,701)	$ Nil
GEO5 Fitness Inc.	Schedule 13	$ (40,000)	Schedule 14	$ (356,418)	$ Nil
101260539 Saskatchewan Ltd.	Schedule 16	$ (50,000)	Schedule 17	$ (233,880)	$ Nil
SM Fitness Inc.	Schedule 19	$ (200,000)	Schedule 20	$ (165,854)	$ Nil

[13] The transfer of the Shares and their valuation led the Trustee to make an amended recommendation to the Court, opposing Mr. Kaiss's discharge. The relevant portion of that amended recommendation reads as follows:

> **D. DISCHARGE OF THE BANKRUPT**
>
> 9. (a) Is it the intention of the trustee to oppose the bankrupt's discharge? Yes
>
> The Trustee is recommending the following:
>
> 1) A minimum sixty day suspended discharge due to the fact referred to pursuant to Section 173(1)(c) of the Act;
>
> (b) Does the trustee have reasonable grounds to believe that a creditor or the Superintendent will oppose the bankrupt's discharge for a reason other than those set out in section 173(1)(m) or (n) of the Act? Yes
>
> PARTICULARS OF OPPOSITION: W Law on behalf of the creditor BTA Real Estate Group Inc. has opposed the discharge of the bankrupt on the following grounds:
>
> "1. The assets of the bankrupt are not of a value equal to fifty cents on the dollar of the amount of the bankrupt's unsecured liabilities.
>
> 2. The bankrupt has continued to trade after becoming aware of being insolvent.

> 3. The bankrupt has failed to account satisfactorily for any loss of assets or for any deficiency of assets to meet the bankrupt's liabilities.
> 4. The bankrupt has put any of the bankrupt's creditors to unnecessary expense by a frivolous or vexatious defence to any action properly brought against the bankrupt.
> 5. The bankrupt has committed any [*sic*] offence under the Bankruptcy and Insolvency Act or any other statute in connection with the bankrupt's property, the bankruptcy or the proceedings thereunder.
> 6. The bankrupt has failed to perform the duties imposed on the bankrupt under this Act or to comply with any order of the court."

[14] In the proceeding before the Chambers judge, BTA put in issue the value of the Shares that had been transferred, given the information contained in the Trustee's report of May 3, 2023, wherein those shares were valued at $257,050.00.

III. *CHAMBERS DECISION*

[15] The Chambers judge found that Mr. Kaiss had contravened s. 173(1)(c) of the *Act*, and determined that the appropriate disposition was to suspend the operation of Mr. Kaiss's discharge for a period of 60 days, for the following reasons (*Chambers Decision*):

> [4] I find that a suspension of 60 days is sufficient and appropriate for several reasons:
>
> 1) The bankrupt is a first-time bankrupt;
>
> 2) The bankrupt has cooperated with and continued to make payments to the trustee for the payment to the creditor;
>
> 3) The trustee believes the shares have no or nominal value, as stated in the MLT Aikins LLP letter dated February 8, 2022. If so, then the share transaction, however improper, had no effect on the outcome of the bankruptcy or payment to the unsecured creditors. The court is in no better position to estimate the value of the shares, so relies upon the trustee in that regard;
>
> 4) BTA has alternate recourse. If BTA believes there is value in the shares, it can apply for an order under s. 38 of the *Act*. The trustee said it would consent to such an order;
>
> 5) The discharge has already been delayed by some seven months as a result of the objection.

IV. ISSUES AND POSITION OF THE PARTIES

[16] BTA takes the position that the Chambers judge erred in the following respects:

(a) deciding that the share sale transactions had no effect on the bankruptcy;

(b) failing to consider the repeated transgressions of Mr. Kaiss while insolvent when determining whether to grant a discharge;

(c) failing to give consideration to the factors set out in s. 173 of the *Act*; and

(d) failing to provide adequate reasons.

[17] The Trustee submits that the Chambers judge did not err in the manner suggested by BTA and that the *Chambers Decision* ought to be upheld. The Trustee emphasizes that BTA's objections arise largely as a result of its position as a secured creditor as opposed to its position as an unsecured creditor. The Trustee further asks that it be allowed to adduce fresh evidence, setting out facts not before the Chambers judge.

[18] The parties are largely on common ground on the issues of jurisdiction and standard of review. They agree that this Court has jurisdiction to entertain the appeal pursuant to s. 183(2) and s. 193(d) of the *Act*. The parties also agree that in connection with this appeal, questions of law are subject to review on a standard of correctness, and questions of fact and questions of mixed fact and law are reviewed for palpable and overriding error: see *Boreen v Mosaic Esterhazy Holdings ULC*, 2020 SKCA 132, 58 CCPB (2d) 17 [*Boreen*]; and *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235.

[19] It is not in dispute that, to the extent that the Chambers judge erred when making findings of fact or on questions of mixed fact and law, his decision is entitled to deference. However, citing *Boreen*, BTA contends that the Chambers judge in this case erred in law by failing to consider relevant evidence and that, as such, no deference is owed. The Trustee, meanwhile, argues that the Chambers judge was not required to revisit every piece of evidence and that the questions raised by the appeal are better characterized as questions of mixed fact and law and, thus, are subject to the standard of palpable and overriding error.

[20] In this case, the factual matrix before the Chambers judge was not in dispute. For example, the parties are on common ground that Mr. Kaiss breached his obligations under s. 173(1)(c) of the *Act*, which states as follows:

> **Facts for which discharge may be refused, suspended or granted conditionally**
> **173 (1)** The facts referred to in section 172 are:
>
> …

> **(c)** the bankrupt has continued to trade after becoming aware of being insolvent[.]

[21] The Chambers judge was, therefore, called upon to decide not whether a breach of s. 173(1)(c) had occurred but, rather, what the appropriate disposition should be in the context of a discharge application, given the bankruptcy infractions. Section 172(2) of the *Act* sets out the powers of the court where a s. 173 contravention is established:

> **Powers of court to refuse or suspend discharge or grant conditional discharge**
> **172 (2)** The court shall, on proof of any of the facts referred to in section 173, which proof may be given orally under oath, by affidavit or otherwise,
>
> **(a)** refuse the discharge of a bankrupt;
>
> **(b)** suspend the discharge for such period as the court thinks proper; or
>
> **(c)** require the bankrupt, as a condition of his discharge, to perform such acts, pay such moneys, consent to such judgments or comply with such other terms as the court may direct.

[22] The language of this section makes it clear that, where a s. 173 fact is proven, the court must make one of the orders identified in s. 172(2). In such circumstances, the court cannot grant an absolute discharge. However, what is evident from the language of s. 172(2) is that it vests the presiding judge with discretion when considering the appropriate disposition under that section having regard to the evidence: see Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *The 2024 Annotated Bankruptcy and Insolvency Act* (Toronto: Thomson Reuters, 2024) at §7:108 [Houlden].

[23] The standard of review applicable to discretionary decisions depends on the nature of the issue or type of error raised on appeal: see *Hoedel v WestJet Airline Ltd.*, 2022 SKCA 27 at paras 13–15, 82 CPC (8th) 355; and *Seewalt v Saskatchewan*, 2024 SKCA 100. In this case, given the nature of the errors alleged by BTA, absent a failure on the part of the Chambers judge to consider relevant evidence, the standard of review applicable to the issues raised is one of palpable and overriding error. That said, in my view, even if a correctness standard were to be applied, the outcome of this appeal would be the same.

V. APPLICATION TO ADDUCE TRUSTEE'S FRESH EVIDENCE

[24] The Trustee has applied to adduce fresh evidence on the appeal in the form of two affidavits; one from Pamela Meger, a licensed insolvency professional with the Trustee, and the other from Mr. Kaiss.

[25] In his affidavit, Mr. Kaiss indicates that he had attempted to negotiate with BTA but that BTA demanded the transfer of the Shares now owned by his family in exchange for withdrawing its opposition to the discharge. Mr. Kaiss's affidavit contains settlement communications, dated August 31, 2023; communications he provided to the Trustee only after the *Chambers Decision* was issued.

[26] Ms. Meger's affidavit indicates that the administration of Mr. Kaiss's estate has changed from a summary administration to an ordinary administration due to the many issues raised by BTA on this file. This is because, although there was previously $6,531.51 available in Mr. Kaiss's estate for distribution to unsecured creditors, those funds are no longer available due to the within appeal and the legal costs the Trustee has incurred in order to respond to BTA's court application. Ms. Meger also confirms that the information set out in Mr. Kaiss's affidavit only came to her attention after the release of the *Chambers Decision* on December 6, 2023.

[27] In order for the new evidence to be admitted on appeal, the Court must be satisfied that the test established by the Supreme Court of Canada in *R v Palmer*, [1980] 1 SCR 759 at 775, is met, namely:

> (a) the evidence should not generally be admitted if, by due diligence, it could have been adduced at trial;
>
> (b) the evidence must bear decisively or potentially decisively on an issue in dispute;
>
> (c) the evidence must be credible; and
>
> (d) the evidence must be such that, if believed, it could be expected to have affected the result.

See also *Barendregt v Grebliunas*, 2022 SCC 22 at para 29, [2022] 1 SCR 517.

[28] Mr. Kaiss's evidence relates to events occurring several months before the issuance of the *Chambers Decision*. As such, these matters were known to him and could have been raised at the time of his discharge application. These issues could also have been identified by the Trustee through the exercise of reasonable diligence.

[29] Additionally, a significant portion of Mr. Kaiss's affidavit is comprised of correspondence that details settlement discussions between the parties, which are generally considered privileged and, thus, inadmissible.

[30] In *Union Carbide Canada Inc. v Bombardier*, 2014 SCC 35 at para 31, [2014] 1 SCR 800, Wagner J. (as he then was) set out the purpose behind settlement privilege as follows:

> [31] Settlement privilege is a common law rule of evidence that protects communications exchanged by parties as they try to settle a dispute. Sometimes called the "without prejudice" rule, it enables parties to participate in settlement negotiations without fear that information they disclose will be used against them in litigation. This promotes honest and frank discussions between the parties, which can make it easier to reach a settlement: "In the absence of such protection, few parties would initiate settlement negotiations for fear that any concession they would be prepared to offer could be used to their detriment if no settlement agreement was forthcoming" (A. W. Bryant, S. N. Lederman and M. K. Fuerst, *The Law of Evidence in Canada* (3rd ed. 2009), at para. 14.315).

[31] The proposal in this case was, by its very nature, a settlement communication and is, therefore, presumptively inadmissible. Although there are exceptions to settlement privilege, it has not been suggested or established by the record that any exception does or should apply in this case.

[32] In terms of the affidavit of Ms. Meger, her evidence does not bear decisively on an issue in dispute. The fact that the administration of Mr. Kaiss's estate was changed from a summary administration to an ordinary administration to allow for legal expenses to be paid has no effect on the outcome of the appeal. Accordingly, I am not inclined to admit it as fresh evidence.

[33] Although I find that the Trustee has failed to satisfy the test for the admission of fresh evidence in connection with the body of Ms. Meger's affidavit, I see no reason why exhibits A and B should not be considered on appeal. Exhibit A is an updated final statement of receipts and disbursements, and exhibit B represents a summary of receipts and proposed distribution as of January 17, 2024, in relation to the bankrupt's estate. These are court documents which MNP LLP was required to prepare. There is a duty on officers of the court, which includes lawyers and trustees, to bring all relevant matters to the attention of the court: see *Harper v Harper*, [1980] 1 SCR 2. In this case, I accept that the purpose of Ms. Meger's affidavit and in particular, the attached exhibits, are to provide an update to the Court as to the work undertaken and work

remaining to be completed by the Trustee. While the update does not affect the outcome of this appeal, it is still important that the Court be made aware of the current status of the bankruptcy.

[34] Exhibits A and B to the affidavit of Ms. Meger will be considered by the Court but the balance of the material sought to be introduced by the Trustee will not be considered.

VI. ANALYSIS

A. Did the Chambers judge err in deciding that the share sale transactions had no effect on the bankruptcy?

[35] In oral argument, BTA's counsel acknowledged that if the Shares have no value, their disposition by Mr. Kaiss had no impact on his discharge or the Trustee's obligations under the *Act*. However, BTA's position is that the Chambers judge failed to conduct any meaningful analysis for the purpose of determining whether the Shares have (or had) any value. Instead, BTA contends that the Chambers judge simply accepted the valuation given by the Trustee's expert without engaging in any analysis as to whether that valuation was supported by the balance of the record. BTA argues that the Chambers judge failed to assess the underlying assumptions relied on by the expert in its valuation.

[36] BTA further says that the Chambers judge was not advised about the connection between the Trustee and the entity that performed the valuation. In its factum, BTA contends that the Chambers judge should have been told that MNP LLP is related to MNP Ltd. (i.e., the Trustee). Simply put, I do not accept that the Chambers judge was somehow misled in respect of the connection between MNP Ltd. and MNP LLP. The connection between the two entities is evident in their respective names.

[37] The crux of BTA's complaint is that the Trustee initially reported to the Court that the Shares Mr. Kaiss transferred to his family members had a value of $257,050.00 but subsequently informed the Court that the Shares had no value as of October 31, 2021, based on the valuation prepared by the Trustee in the discharge of its duties as trustee of this estate. These reports are part of the court record.

[38] It is fair to say that the Chambers judge did not provide any detailed analysis on this point. However, in my view, BTA's argument fails to appreciate the role of a trustee and the distinction between the position of a secured creditor and that of an unsecured creditor in the context of a bankruptcy proceeding.

[39] The bankruptcy and insolvency regime is aimed at the following:

(a) permitting the financial rehabilitation of an insolvent person to allow honest but unfortunate individuals to obtain a discharge from their debts, subject to reasonable conditions, so that they may start again;

(b) providing for an orderly distribution of property to unsecured creditors on a *pari passu* basis;

(c) allowing for the affairs of a bankrupt to be investigated; and

(d) setting aside any preferences, settlements or other fraudulent transactions.

See *Alberta (Attorney General) v Moloney*, 2015 SCC 51, [2015] 3 SCR 327 [*Moloney*]; Robert B. Rogers, *An Overview of Bankruptcy and Insolvency Law in Canada* (Surrey, BC: Hamilton Duncan Law Corporation, 13 February 2009) <https://www.hdas.com/wp-content/uploads/2016/01/bankruptcy-insolvency.pdf> [Rogers]; *Re Posner, a Bankrupt* (1960), 67 Man R 288 (QB); *Re Raftis* (1984), 53 CBR (NS) 19 (Ont SC); *McAfee v Westmore* (1988), 49 DLR (4th) 401 (BCCA); *Ross (Re)*, 2014 SKQB 352, 462 Sask R 110; and *Keep (Re)*, 2024 SKKB 110.

[40] Secured creditors and unsecured creditors are not in the same position in a bankruptcy proceeding and, in my view, BTA's submission ignores the important distinction between the two. In Ronald C.C. Cuming, "When an Unsecured Creditor is a Secured Creditor", 66 Sask Law Rev 255 at 267, 2003 CanLIIDocs 654, the learned professor explains the fundamental difference between being a secured creditor and an unsecured creditor in the context of a bankruptcy proceeding as follows:

> **B. BANKRUPTCY LAW**
> The position of secured creditors and unsecured creditors are very different under the *Bankruptcy and Insolvency Act*. While there are some procedural limitations that a secured creditor of a bankrupt debtor may encounter, for the most part bankruptcy law does not

> affect the rights given to a secured creditor under provincial law. Unless the security interest arose under a transaction that is found to be a fraudulent conveyance, a secured creditor can enforce his or her security interest outside the elaborate regime of bankruptcy proceedings. An unsecured creditor is in a very different position. His or her right to invoke provincial judgment enforcement measures is terminated at the date the receiving order is issued or the assignment is made. Bankruptcy law displaces provincial law in this respect.
>
> (Footnotes omitted)

[41] Secured creditors have priority over the assets covered by their security agreement. This priority is not lost by virtue of the debtor's bankruptcy. Sections 70(1) and 71 of the *Act* provide as follows:

> **Precedence of bankruptcy orders and assignments**
>
> **70 (1)** Every bankruptcy order and every assignment made under this Act takes precedence over all judicial or other attachments, garnishments, certificates having the effect of judgments, judgments, certificates of judgment, legal hypothecs of judgment creditors, executions or other process against the property of a bankrupt, except those that have been completely executed by payment to the creditor or the creditor's representative, and *except the rights of a secured creditor*.
>
> …
>
> **Vesting of property in trustee**
>
> **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.
>
> (Emphasis added)

[42] Further, s. 69.3(2) of the *Act* states the following:

> **Secured creditors**
>
> **(2)** Subject to sections 79 and 127 to 135 and subsection 248(1), *the bankruptcy of a debtor does not prevent a secured creditor from realizing or otherwise dealing with his or her security in the same manner as he or she would have been entitled to realize or deal with it if this section had not been passed, unless the court otherwise orders, but in so ordering the court shall not postpone the right of the secured creditor to realize or otherwise deal with his or her security, except as follows*:
>
> > **(a)** in the case of a security for a debt that is due at the date the bankrupt became bankrupt or that becomes due not later than six months thereafter, that right shall not be postponed for more than six months from that date; and
> >
> > **(b)** in the case of a security for a debt that does not become due until more than six months after the date the bankrupt became bankrupt, that right shall not be postponed for more than six months from that date, unless all instalments of interest that are more than six months in arrears are paid and all other defaults of more than six months standing are cured, and then only so long as no instalment of interest remains in arrears or defaults remain uncured for more than six months,

> but, in any event, not beyond the date at which the debt secured by the security becomes payable under the instrument or law creating the security.
>
> (Emphasis added)

[43] In the context of a bankruptcy, except in limited circumstances (for example, where a trustee redeems secured property by paying out the claim of a secured creditor), a secured creditor retains the right and ability to act on their security: see, for example, *Mackesey v Royal Bank* (1991), 86 DLR (4th) 637 (Sask CA); *Bank of Montreal v Hester Creek Estate Winery Ltd. et al.*, 2004 BCSC 724, 2 CBR (5th) 61; and Houlden.

[44] As noted, BTA is a secured creditor. It also has an unsecured claim, but its argument on appeal is directed to the Trustee's handling of assets over which it claims a security interest. On May 7, 2019, BTA, through its counsel, served notice on Mr. Kaiss of its intention to enforce its security interest on all of his present and after acquired property pursuant to its General Security Agreement dated September 26, 2013. BTA, according to its counsel, is now in the midst of pursuing Mr. Kaiss and his family for relief in relation to the Shares in the context of other court proceedings brought outside of the *Act* and outside of the bankruptcy process.

[45] The remedies of a secured creditor in relation to their security interests and the collateral charged by those interests are, for the most part, unaffected by the stay that comes into effect on a bankrupt's assignment. Secured creditors retain the power, even where the debtor is an undischarged bankrupt, to exercise on their security: see Rogers; *Sinco Trucking Ltd. v Paccar Financial Services Ltd.* (1989), 74 Sask R 181 (CA); *KPMG Inc. v Bannerman* (2005), 15 RFL (6th) 305 (Ont Sup Ct); and *Re Goldman* (1982), 43 CBR (NS) 30 (Ont SC).

[46] BTA disagrees with the valuation of the Shares prepared by MNP LLP, but the valuation has little effect on BTA because even if, as BTA asserts, the Shares do have value, BTA retains the ability to pursue the Shares in its capacity as a secured creditor. The assignment in bankruptcy by Mr. Kaiss did not affect BTA's rights in this regard. Indeed, even if there was a problem with BTA's security or if BTA did not have security in the Shares, BTA was offered the option of realizing upon those assets. The Trustee was – and still is – prepared to consent to an order in favour of BTA pursuant to s. 38 of the *Act*, which states as follows:

> **Proceeding by creditor when trustee refuses to act**
>
> **38 (1)** Where a creditor requests the trustee to take any proceeding that in his opinion would be for the benefit of the estate of a bankrupt and the trustee refuses or neglects to

> take the proceeding, the creditor may obtain from the court an order authorizing him to take the proceeding in his own name and at his own expense and risk, on notice being given the other creditors of the contemplated proceeding, and on such other terms and conditions as the court may direct.
>
> **Transfer to creditor**
>
> **(2)** On an order under subsection (1) being made, the trustee shall assign and transfer to the creditor all his right, title and interest in the chose in action or subject-matter of the proceeding, including any document in support thereof.
>
> **Benefits belong to creditor**
>
> **(3)** Any benefit derived from a proceeding taken pursuant to subsection (1), to the extent of his claim and the costs, belongs exclusively to the creditor instituting the proceeding, and the surplus, if any, belongs to the estate.
>
> **Trustee may institute proceeding**
>
> **(4)** Where, before an order is made under subsection (1), the trustee, with the permission of the inspectors, signifies to the court his readiness to institute the proceeding for the benefit of the creditors, the order shall fix the time within which he shall do so, and in that case the benefit derived from the proceeding, if instituted within the time so fixed, belongs to the estate.

[47] This is not a case where the Chambers judge was required to assess conflicting evidence as to the value of the Shares. The evidence before him was that the Trustee initially reported that the Shares had a value of $257,050.00 but later, having the benefit of a new valuation, the Trustee came to learn that the Shares are worthless. In other words, this is not a situation where two witnesses provided contradictory accounts but, rather, one in which the Trustee took steps to correct its account to the court in light of the subsequent valuation. The Trustee, as an officer of the court, has an obligation to keep the court apprised of the circumstances of the bankruptcy. The Trustee cannot be criticized for doing exactly that which it is required to do by the *Act*. The Chambers judge was entitled to conclude, from the evidence before him, that the Shares have no real value.

[48] In sum, I find that the Chambers judge did not err in concluding that the Share transactions had no effect on Mr. Kaiss's bankruptcy or BTA's security interests. This is because of the following:

(a) the Shares are subject to BTA's security claim, which is unaffected by the bankruptcy and, therefore, the Shares do not form part of the pool of assets available to unsecured creditors, unless it is established that the value of the Shares exceeds the amount of the secured obligation. There is no evidence to suggest that to be the case in this instance;

(b) the Shares are worthless and have no impact on the bankruptcy based on the nil valuation; or

(c) if BTA is mistaken and the Shares are not subject to its security claim and the Trustee is mistaken and there is value in the Shares, BTA has been offered the opportunity to pursue the Shares at its own cost and expense pursuant to s. 38 of the *Act*.

[49] In the end result, this ground of appeal must be dismissed.

B. Did the Chambers judge err in failing to consider Mr. Kaiss's repeated transgressions of the *Act* while insolvent when determining whether to grant his discharge?

[50] BTA suggests that the Chambers judge failed to consider the evidence of Mr. Kaiss's pre-bankruptcy conduct and his repeated transgressions of s. 173(1)(c) of the *Act*, and, in doing so, failed to make specific findings regarding that evidence. BTA contends that the Chambers judge failed to take into account the transfer of Mr. Kaiss's interest in the Madeiras Investments to his father, the USAs, the transfer of the Shares and the transfer of the CalFit membership list. BTA alleges that Mr. Kaiss engaged in a pattern of behaviour aimed at defeating his creditors. While it is fair to observe that not all these facts are set out in the *Chambers Decision*, it is also worth noting that the background facts were and remain uncontested, something BTA acknowledged. It is therefore not surprising that the Chambers judge did not spend a great deal of time setting out a series of facts that are not in dispute. The uncontroverted conclusion that emerged from the uncontested facts is that Mr. Kaiss contravened s. 173(1)(c) of the *Act*. This bottom-line finding is stated in the *Chambers Decision*, as follows:

> [3] In this case, the parties agree that the bankrupt contravened s. 173(1)(c) of the *Act* by transferring shares to third parties in multiple companies while an undischarged bankrupt. I agree that some of the consequence is required to uphold the integrity of the legislative scheme. The consequence in this case is a delay in discharge.

[51] The Chambers judge's reference to multiple companies makes it clear that there was more than one isolated transfer and that he was alive to the implications of this fact.

[52] This ground of appeal has no merit and must likewise be dismissed.

C. Did the Chambers judge err in failing to give consideration to the factors set out in s. 173 of the *Act*?

[53] Before addressing s. 173, it is necessary to place it in context in light of the process set out in the *Act* for bankruptcy discharge. In that regard, s. 168.1(1) provides as follows:

> **Automatic discharge**
>
> **168.1(1)** Subject to subsections (2) and 157.1(3), the following provisions apply in respect of an individual bankrupt other than a bankrupt referred to in subsection 172.1(1):
>
> > **(a)** in the case of a bankrupt who has never before been bankrupt under the laws of Canada or of any prescribed jurisdiction, the bankrupt is automatically discharged
> >
> > > **(i)** on the expiry of 9 months after the date of bankruptcy unless, in that 9-month period, an opposition to the discharge has been filed or the bankrupt has been required to make payments under section 68 to the estate of the bankrupt, or
> > >
> > > **(ii)** on the expiry of 21 months after the date of bankruptcy unless an opposition to the discharge has been filed before the automatic discharge takes effect; and
> >
> > **(b)** in the case of a bankrupt who has been a bankrupt one time before under the laws of Canada or of any prescribed jurisdiction, the bankrupt is automatically discharged[.]

[54] As a general rule, and subject to certain statutory exceptions, first-time bankrupts are discharged automatically. Mr. Kaiss is a first-time bankrupt. In this case, BTA raised issues about his conduct while bankrupt and prior. Mr. Kaiss contravened s. 173(1)(c) by transferring the Shares at a time when he was precluded from doing so. This fact alone disentitled him to an automatic discharge because he engaged in the offensive conduct enumerated in that section: see *Michael John Drover in Bankruptcy*, 2018 NLSC 155, 63 CBR (6th) 307.

[55] As mentioned above, s. 172(2) limits the court to one of three options where a breach of s. 173 has occurred (repeated here for ease of reference):

> **(a)** refuse the discharge of a bankrupt;
>
> **(b)** suspend the discharge for such period as the court thinks proper; or
>
> **(c)** require the bankrupt, as a condition of his discharge, to perform such acts, pay such moneys, consent to such judgments or comply with such other terms as the court may direct.

[56] Determining the appropriate option on a discharge application where a s. 173 contravention is established involves the exercise of discretion. However, that discretion is not unfettered, as noted in *Tedford (Re)*, 2015 SKQB 167, 477 Sask R 135:

> [10] At the bankruptcy discharge hearing, the court is vested with broad statutory discretion to determine the appropriate terms of a bankruptcy discharge under s. 172(1) of the [*Act*]. As with all discretion, there are restrictions, depending on the governing law triggered by the circumstances of the bankruptcy. When there is an objection to a bankrupt's discharge, the court has the authority to discharge the bankrupt without terms, if the court finds that the bankrupt fits into the category of the honest but unfortunate debtor the [*Act*] was designed to protect.
>
> [11] In cases where there is evidence that the bankrupt's conduct demonstrates the existence of a fact under s. 173 of the [*Act*], the court does not have the authority to order an absolute discharge. If a s. 173 exists [*sic*], the court only has the authority to refuse the discharge application, order conditions of discharge, order suspension until discharge, or, order conditions of discharge and a suspension.

See also *Contessa (Re)*, 2018 ABQB 608, 63 CBR (6th) 74; *McInnis (Re)*, 2020 NSSC 64, 76 CBR (6th) 284; and *Kassian (Re)*, 2021 SKQB 265.

[57] In this case, the Chambers judge found that Mr. Kaiss had contravened s. 173(1)(c), for which a consequence was mandated. The Chambers judge considered Mr. Kaiss's history and noted that he is a first-time bankrupt. He observed that Mr. Kaiss was cooperating with the Trustee, that the Shares BTA put in issue are of no or nominal value, and that BTA has the ability to pursue the Shares if it believes that they had or have any value. On this latter point, it is significant to note that BTA did not explain how the Trustee would realize on the Shares given that there is no money left in the estate. Finally, while Mr. Kaiss's discharge was suspended for only 60 days, it must be observed that BTA's appeal delayed his discharge by some seven months, during which time he continued to pay surplus income to his estate. Of course, it has now been over a year since the release of the *Chambers Decision* and Mr. Kaiss has yet to be discharged.

[58] In my view, the Chambers judge considered the relevant facts that s. 173 required him to assess, and his decision is in keeping with the underlying purposes of the legislation. Accordingly, this ground of appeal must be dismissed.

D. Did the Chambers judge err in failing to provide adequate reasons?

[59] As its final ground of appeal, BTA asserts that the Chambers judge's reasons were inadequate. For the reasons outlined below, there is no merit to this argument.

[60] The test for sufficiency of reasons is well established. A summary of the law was provided by the Supreme Court of Canada in *R v R.E.M.*, 2008 SCC 51, [2008] 3 SCR 3:

> [16] It follows that courts of appeal considering the sufficiency of reasons should read them as a whole, in the context of the evidence, the arguments and the trial, with an appreciation of the purposes or functions for which they are delivered (see [*R v Sheppard*, 2002 SCC 26, [2002] 1 SCR 869] at paras. 46 and 50; *R. v. Morrissey* (1995), 22 O.R. (3d) 514 (C.A.), at p. 524).
>
> [17] These purposes are fulfilled if the reasons, read in context, show why the judge decided as he or she did. The object is not to show how the judge arrived at his or her conclusion, in a "watch me think" fashion. It is rather to show why the judge made that decision. The decision of the Ontario Court of Appeal in *Morrissey* predates the decision of this Court establishing a duty to give reasons in *Sheppard*. But the description in *Morrissey* of the object of a trial judge's reasons is apt. Doherty J.A. in *Morrissey*, at p. 525, puts it this way: "In giving reasons for judgment, the trial judge is attempting to tell the parties *what* he or she has decided and *why* he or she made that decision" (emphasis added). What is required is a logical connection between the "what" — the verdict — and the "why" — the basis for the verdict. The foundations of the judge's decision must be discernable, when looked at in the context of the evidence, the submissions of counsel and the history of how the trial unfolded.
>
> …
>
> [25] The functional approach advocated in *Sheppard* suggests that what is required are reasons sufficient to perform the functions reasons serve — to inform the parties of the basis of the verdict, to provide public accountability and to permit meaningful appeal. The functional approach does not require more than will accomplish these objectives. Rather, reasons will be inadequate only where their objectives are not attained; otherwise, an appeal does not lie on the ground of insufficiency of reasons. This principle from *Sheppard* was reiterated thus in *R. v. Braich*, [2002] 1 S.C.R. 903, 2002 SCC 27, at para. 31:
>
> > The general principle affirmed in *Sheppard* is that "the effort to establish the absence or inadequacy of reasons as a freestanding ground of appeal should be rejected. A more contextual approach is required. The appellant must show not only that there is a deficiency in the reasons, but that this deficiency has occasioned prejudice to the exercise of his or her legal right to an appeal in a criminal case" (para. 33). The test, in other words, is whether the reasons adequately perform *the function* for which they are required, namely to allow the appeal court to review the correctness of the trial decision. [Emphasis in original.]
>
> (Emphasis in original)

[61] A judge's reasons need not be perfect, but they do need to show why the judge decided as they did. In this case, while the reasons are very brief, they tell the parties that the Chambers judge found Mr. Kaiss to have contravened s. 173(1)(c) and that a consequence for such a breach was necessary. The reasons tell the parties why the Chambers judge considered a suspension of 60 days to be an appropriate consequence. The Chambers judge determined this was an appropriate punishment because:

(a) Mr. Kaiss is a first-time bankrupt;

(b) he was cooperating with the Trustee;

(c) the breach did not affect the bankruptcy as the Shares are of nominal value; and

(d) Mr. Kaiss's discharge had already been delayed for a significant period of time.

[62] In my view, the Chambers judge's reasons are sufficient and allow for meaningful appellate review. The reasons may not be perfect but, they fulfill the purpose for which reasons are required.

VII. CONCLUSION

[63] BTA has failed to establish an error by the Chambers judge. Accordingly, I would dismiss the appeal with costs to the respondent Trustee. Mr. Kaiss appeared on this matter but did not retain outside counsel and did not file material. As such, there shall be no costs in his favour.

[64] To avoid any dispute, I fix the costs payable by BTA to the Trustee at $8,000.00, payable forthwith. This cost award takes into account the results of the fresh evidence application in which BTA was largely successful, the application respecting the filing of the appeal books in which Leurer C.J.S. left the issue of costs to this panel and the outcome of the appeal proper.

"Bardai J.A."

Bardai J.A.

I concur. "Caldwell J.A."

Caldwell J.A.

I concur. "Schwann J.A."

Schwann J.A.