

In the Court of Appeal of Alberta

Citation: Henderson v Peerani, 2024 ABCA 370

Date: 20241120
Docket: 2301-0125AC
Registry: Calgary

Between:

Peggy Henderson

Appellant

- and -

**Sadru Peerani, Din Peerani also known as
Mohameddin Peerani, and Simone Skaff**

Respondents

The Court:

**The Honourable Justice William T. de Wit
The Honourable Justice Jane A. Fagnan
The Honourable Justice Kevin Feth**

Memorandum of Judgment

Appeal from the Order of
The Honourable Justice M.J. Lema
Dated the 19th day of May, 2023
Filed on the 12th day of June, 2023
(2023 ABKB 301, Docket: 1501 04627)

Memorandum of Judgment

The Court:

Overview

[1] The appellant, Peggy Henderson, appeals from a chambers decision dismissing her application to terminate the stays of proceedings shielding the bankrupt respondents from her fraudulent misrepresentation claims. She contends that her claims survive under s 178(1)(e) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (*BIA*).

[2] The appellant sued the respondents and several other defendants to recover monies she loaned to three companies (Court of King’s Bench of Alberta Action No 1501 04627). She alleges that the respondents made fraudulent misrepresentations to her that facilitated the sales of properties and the transfers of the sales proceeds away from two of the companies for no value. The transfers were allegedly directed to the respondents or their proxies. The transfers rendered the debtor companies insolvent, which prejudiced the appellant’s recovery of her loans. She also alleges that the respondents concealed the transfers of the proceeds through additional misrepresentations, which delayed and compromised her efforts as a shareholder and creditor to seek the return of the funds to the debtor companies using oppression remedies available under the *Business Corporations Act*, RSA 2000, c B-9.

[3] The respondents deny making any fraudulent misrepresentations, and alternatively, deny that the appellant relied on any misrepresentations to her detriment. They assert that the property sales and the transfers of the proceeds were for legitimate business purposes.

[4] The appellant’s lawsuit was scheduled for trial. However, each of the respondents made an assignment into bankruptcy before trial which automatically stayed the proceedings against them in accordance with s 69.3 of the *BIA*. By operation of that provision, each stay continues until the trustee in bankruptcy is discharged or the Court grants a declaration under s 69.4 that the stay no longer operates against a creditor or other person seeking to terminate the stay.

[5] The appellant applied to terminate the stays. While a discharge from bankruptcy releases the bankrupt from outstanding debts and liabilities, s 178(1)(e) creates an exception for a claim involving a “debt or liability resulting from obtaining property ... [by] fraudulent misrepresentation”. The appellant asserted a fraudulent misrepresentation claim against each respondent alleging liabilities owed to her that survive bankruptcy.

[6] The matter was heard by a judge in commercial chambers, who dismissed the appellant’s application against each respondent, with detailed reasons: *Henderson v Peerani*, 2023 ABKB 301 [*Decision*].

[7] On appeal, the appellant contends that the chambers judge erred in his interpretation and application of s 178(1)(e) by imposing a requirement that the “debt or liability” owed to the appellant must arise through a transfer of property from the appellant to the respondents. He also erred in finding that her claim was only for the recovery of “debts”, which overlooked her claims against the respondents for their “liability” to her in facilitating fraudulent preferences through misrepresentations. She maintains that the errors prevented the proper exercise of the Court’s discretion under s 69.4 of the *BIA* to terminate the stays. She asks this Court for a declaration that the stays no longer operate against her.

[8] The findings of the chambers judge predate the Supreme Court of Canada’s decision in *Poonian v British Columbia (Securities Commission)*, 2024 SCC 28 [*Poonian*] which has clarified the correct interpretation of s 178(1)(e).

[9] We conclude that the chambers judge erred in his interpretation of s 178(1)(e) and in failing to find that the appellant presented sound reasons for terminating the stays based on her liability claim against each of the respondents for obtaining property by fraudulent misrepresentation. The appeal is allowed. Having determined that the claim has some prospect of falling within the s 178(1)(e) exception to the respondents’ discharges from bankruptcy, we exercise the discretion under s 69.4 to declare that the stays do not operate against the appellant for her claims in fraudulent misrepresentation.

Factual background

[10] The respondents had various roles in interconnected companies, which the appellant alleges were used to siphon her monies. The appellant invested in three companies - Umeta Holdings Ltd (“Umeta”), Mavingo Holdings Inc (“Mavingo”), and Forman’s Men’s Shop Inc (“Forman’s”). Umeta’s only significant asset was a building. The building was sold, and substantial sale proceeds were transferred to Forman’s and then quickly flipped to FFG Incorporated (“FFG”). Mavingo’s primary asset was another building that was also sold, and substantial proceeds were similarly transferred out of that company to FFG. Those transactions ground the appellant’s fraudulent misrepresentation claims.

[11] The appellant is a 20% shareholder and a director of Umeta. The respondent, Sadru Peerani is also a director and shareholder. The appellant and Sadru Peerani were in a common law relationship until sometime before the transactions.

[12] The appellant deposed that she is a 25% shareholder and a former director of Mavingo. The respondents Sadru Peerani and Din Peerani are also shareholders and directors of that company. Sadru Peerani is the son of Din Peerani.

[13] Din Peerani owned all the shares of Forman’s. Sadru and Din Peerani are the sole directors. Ms Skaff was a longtime employee and a manager. The appellant is also a former employee of Forman’s.

[14] Sadru Peerani and Ms Skaff incorporated FFG. Ms Skaff is a longtime friend of Sadru and Din Peerani. In early 2016, Ms Skaff became FFG's sole shareholder and director.

[15] The appellant deposed to advancing approximately \$204,717.55 to Umeta between 2006 and 2011 (plus an additional \$60 in 2016), \$273,430.21 to Forman's between 2003 and April 2012, and \$98,192.70 to Mavingo between 2003 and 2009.

[16] In 2013, Sadru Peerani allegedly made fraudulent statements in an email to the appellant and other shareholders that induced her to approve the sale of Umeta's building located in Calgary, Alberta. The sale of the Umeta building yielded substantial proceeds for Umeta, but most of those proceeds (at least \$362,000) were allegedly diverted to other entities controlled by Sadru Peerani – first Forman's and then FFG – for no consideration. The transfers rendered Umeta insolvent.

[17] The appellant alleges that these transfers of the sale proceeds prejudiced her financial interest in Umeta. Further, she contends that Sadru Peerani and Ms Skaff concealed the transfers of the sale proceeds through various false and misleading statements before she commenced her litigation.

[18] Following the sale of the Umeta building, the appellant started litigation against Sadru Peerani and Umeta. She registered a certificate of *lis pendens* against the building owned by Mavingo. In 2016, the appellant learned that Mavingo had agreed to sell its building. The appellant alleges that false statements from each of the respondents convinced her to discharge her certificate of *lis pendens* so that the building could be sold. Following the sale, substantial proceeds were diverted from Mavingo, leaving insufficient assets to honour the debt owing to the appellant and depriving her of any residual distribution as a shareholder.

[19] The appellant submits that the transactions caused monies to flow from Umeta and Mavingo to other companies controlled by and for the benefit of the respondents, allegedly at no value or undervalue. Her current lawsuit is grounded in breach of directors' duties, unjust enrichment, oppression, fraudulent preferences, and fraudulent misrepresentation. However, the fraudulent misrepresentation cause of action is not yet properly pleaded.

[20] Sadru Peerani and Din Peerani were discharged from bankruptcy on February 17, 2024. Ms. Skaff was discharged on November 8, 2022. The trustees in bankruptcy apparently have not been discharged and the stays remain active.

Decision of the chambers judge

[21] In considering whether to exercise his discretion to lift the stays, the chambers judge reviewed the exception to an order of discharge found in s 178(1)(e) of the *BIA*:

178 (1) An order of discharge does not release the bankrupt from ...

(e) any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation, other than a debt or liability that arises from an equity claim

[22] The chambers judge found that the “property” obtained was the appellant’s “loaned monies”, and that she exchanged the property for “debt claims” against the debtor companies. For the purpose of the application, the chambers judge assumed the appellant made all the loans, when and as described, and that all the claimed misrepresentations by the respondents were established.

[23] The loans to Umeta and Mavingo predated the allegedly false statements made by the respondents (but for the \$60 loaned to Umeta in 2016 which was treated as inconsequential). The chambers judge therefore concluded that the fraudulent misrepresentations did not cause the respondents to obtain the “loaned monies” from the appellant. No “*further movement of property* by her to any of [the bankrupts]” or the debtor companies occurred after the misrepresentations were made, and the appellant “continued to have the same debt claims, in the same amount, against the same debtors” (emphasis in original): **Decision** at para 43. Accordingly, the chambers judge concluded that the respondents did not “obtain” any “property” from the appellant by fraudulent misrepresentation.

[24] The appellant argued that by relying on the misrepresentations, she was prevented from taking steps to restrain the diversion of the debtor companies’ sale proceeds, including through oppression relief available under s 242 of the *Business Corporations Act*. Her claims against the respondents are for their liabilities to her in causing the debtor companies to become insolvent and prejudicing the recovery of her debt claims against those companies. She maintained that her claim against each respondent is a “liability” preserved by s 178(1)(e).

[25] The chambers judge rejected this argument for two reasons. First, he held that s 178(1)(e) contemplates a particular kind of detrimental reliance, specifically a transfer of the *claimant’s* property resulting from the fraudulent misrepresentation. Here, the loaned monies had become the property of the corporate debtors before any allegedly false statements were made and the appellant did not have a continuing property interest in the loaned monies. He rejected her contention that she was the beneficiary of a constructive trust. In the absence of a causal “link” between the fraudulent statements and the claimant’s debt, an essential element of s 178(1)(e) was missing: **Decision** at paras 36-45.

[26] Second, the chambers judge concluded that Parliament did not intend s 178(1)(e) to be used by the creditors of a bankrupt to independently pursue actions for fraudulent preferences or transfers at undervalue. The *BIA* authorizes the bankruptcy trustee to investigate and pursue the recovery of property moved out of the bankruptcy estate through ss 95 and 96 of the *BIA*, which address preferences and transfers at undervalue. These provisions create a complete framework for challenging the transactions. If the trustee does not act, the creditor’s remedy is to then “take the reins” through an application under s 38 of the *BIA* by which the Court may authorize the creditor to take the proceeding in her own name: **Decision** at paras 46-51.

[27] The chambers judge determined that the appellant’s “real complaint is not that the misrepresentations pulled property from her but that they possibly enabled the debtor corporations to move out *their assets*, to her prejudice as a creditor” (emphasis in original). Based on his findings, the chambers judge concluded that the appellant “has no prospect of being able to prove that the [respondents] obtained property from [the appellant] via fraudulent misrepresentations” and she therefore could not show “some prospect” of her claims surviving against the respondents under s 178(1)(e): *Decision* at paras 46, 56-58. Consequently, he declined to exercise his discretion to lift the stays.

Issues on appeal

[28] The parties disagree about the framing of the issues. The appellant relies on 7 grounds of appeal. The respondents contend that the only issue is whether the chambers judge erred in interpreting s 178(1)(e) or in finding no basis to lift the stays.

[29] We have distilled from the parties’ arguments the following issues:

- 1) Did the chambers judge err in his interpretation and application of s 178(1)(e) of the *BIA*?
- 2) Did the chambers judge err in finding that the appellant’s claims concerned a fraudulent preference or transfer at undervalue outside the scope of s 178(1)(e)?
- 3) Did the chambers judge err by not recognizing that the appellant’s claims against the respondents included their liabilities resulting from obtaining property by fraudulent misrepresentation?
- 4) If the chambers judge erred, should this Court terminate the stays so that the appellant may continue with her claims in fraudulent misrepresentation against the respondents?

Standard of review

[30] The decision to terminate a stay granted under s 69.3 of the *BIA* is discretionary and will only be interfered with if it discloses an error of principle, or is plainly unreasonable: *Gaastra v Watts*, 2012 ABCA 262 at para 3 [*Gaastra*]; *Kent v Watt*, 2019 ABCA 326 at para 26 [*Kent*]. A question of statutory interpretation is reviewable for correctness: *Housen v Nikolaisen*, 2002 SCC 33 at para 8, [2002] 2 SCR 235; *Kent* at para 21.

Analysis

[31] The chambers judge erred in principle in dismissing the appellant’s application to terminate the stays and to allow her lawsuit to proceed against the bankrupt respondents. Section 178(1)(e)

does not stipulate that the property (or services) obtained by fraudulent misrepresentation must belong to the creditor, nor that the property pass directly to the bankrupt, and the chambers judge erred in assessing the appellant's claim on such a narrow basis.

[32] The chambers judge did not have the benefit of the Supreme Court's recent decision in *Poonian*, which has clarified certain exceptions under s 178(1), including subsection (e) dealing with fraudulent misrepresentation. He was also disadvantaged by the parties' failure to provide proper written submissions in advance of the hearing, which are generally contemplated for applications placed on the Commercial Chambers List.

1) The chambers judge erred in his interpretation of s 178(1)(e) of the *BIA*

[33] Section 178(1) lists categories of debts and liabilities that are not released by an order of discharge and therefore survive bankruptcy. In *Poonian* at paragraph 54, the Supreme Court confirmed that for a debt or liability to survive under subsection (e), a creditor must establish three elements:

- a) false pretences or fraudulent misrepresentation;
- b) a passing of property or provision of services; and
- c) a link between the debt or liability and the fraud.

While the Supreme Court elaborated on each of these elements in *Poonian*, the elements were previously identified by this Court in *McAteer v Billes*, 2007 ABCA 137 at para 16 [*McAteer #2*] and *Alberta Securities Commission v Hennig*, 2021 ABCA 411 at para 57 [*Hennig*]: see *Poonian* at para 54. *McAteer #2* was not considered by the chambers judge in his *Decision*.

a) Fraudulent misrepresentation

[34] The test to be applied in demonstrating a fraudulent misrepresentation under s 178(1)(e) is the same test followed under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36. *Poonian* at paragraph 58 adopted the following statement of the test from *Montréal (City) v Deloitte Restructuring Inc*, 2021 SCC 53 at para 25, [2021] 3 SCR 736 [*Deloitte Restructuring*] which requires a creditor to show that a debtor knowingly made a fraudulent misrepresentation to the creditor in order to obtain property:

To discharge its burden of proving that its claim relates to a debt "resulting from obtaining property or services by false pretences or fraudulent misrepresentation", a creditor must establish on a balance of probabilities, the following four elements: (i) the debtor made a representation to the creditor [see paragraphs 38-40, 44, 50 below]; (ii) the representation was false; (iii) the debtor knew that the representation

was false; (iv) the false representation was made to obtain property or a service.
[Citations omitted]

[35] The final element of the *Deloitte Restructuring* test does not expressly address whether the property must have transferred from the creditor seeking an exception under s 178(1)(e), nor whether the property must have been received by the bankrupt. However, as explained below, the Court in *Poonian* clarified that neither is required for a debt or liability to survive bankruptcy.

b) A passing of property

[36] The second requirement under s 178(1)(e) is “a loss in the form of a transfer of property or delivery of services, as well as a debt or liability corresponding to that loss”: *Poonian* at para 70. The chambers judge concluded that the property must “transfer” from the creditor and suggested that the property must be received by the bankrupt: *Decision* at paras 5, 12, 26, 36, 43 and 57. However, *Poonian* rejected those propositions.

[37] The underlying objective of s 178(1)(e) was explained in *McAteer v Billes*, 2006 ABCA 312 at paragraph 10 [*McAteer #1*]: “The bankruptcy scheme is intended to benefit honest, but unfortunate, debtors” and s 178(1)(e) is interpreted “to ensure that dishonest debtors do not benefit from their dishonesty”. As with *McAteer #2*, the chambers judge did not refer to *McAteer #1* in his reasons, nor did he fully grapple with the nature of the fraudulent misrepresentations being alleged and their overall effect, focusing instead on the timing of the misrepresentations in relation to the appellant’s original “loaned monies”. This approach improperly narrowed and mischaracterized the claims before him and did not properly account for the “dishonesty” being alleged by the appellant and the property the respondents and their companies purportedly obtained by fraud.

[38] In *Poonian*, the British Columbia Securities Commission imposed administrative penalties and disgorgement orders on bankrupts for breaches of securities legislation. The bankrupts participated in a market manipulation scheme that artificially inflated share prices and caused investors to lose approximately \$5.6 million for the direct and indirect benefit of the bankrupts. The disgorgement orders directed the bankrupts to pay those monies to the Commission. The Supreme Court concluded that the disgorgement orders (but not the administrative penalties) survived bankruptcy under s 178(1)(e) notwithstanding that the fraudulent misrepresentations were not communicated to the Commission and the Commission transferred no property to the bankrupts. The transfers of property from the investors resulting from the bankrupts’ false statements to those investors were sufficient to satisfy the second element of the test under s 178(1)(e). The creditor need not be a “direct victim” provided “the claim is the result of a person being deprived of property or services after having detrimentally relied on the debtor’s false pretences or fraudulent misrepresentation” (emphasis added): *Poonian* at para 94.

[39] Similarly, in *Ste Rose & District Cattle Feeders Co-op v Geisel*, 2010 MBCA 52 [*Ste Rose*], which was cited with approval in *Poonian*, a creditor’s claim for fraudulent

misrepresentation survived bankruptcy even though no property transferred from that creditor because of the misrepresentation. The creditor was a cattle producers' co-operative association that loaned money to a farmer and acquired a security interest in the farmer's cattle. The lending agreement required the farmer to disclose when the cattle were being sold and to ensure the sale proceeds were paid directly to the co-op. The farmer subsequently entered a scheme to sell his cattle through an intermediary, his son, who fraudulently misrepresented to an auctioneer and a transport driver that he was the lawful owner. The son sold the cattle and took the proceeds, which were then seized by a credit union in payment of his debt. The farmer defaulted on his loan from the co-op. The farmer and his son made assignments into bankruptcy and were later discharged.

[40] The co-op obtained default judgment against the farmer and his son grounded in fraudulent misrepresentation, then sought a declaration that the farmer and his son were not released by their discharges. The Manitoba Court of Appeal concluded that the judgment survived the discharges under s 178(1)(e). The farmer's "liability" arose because he fraudulently misrepresented to the co-op that the cattle were to be sold, but withheld the fact that the sale was in his son's name so the co-op would not receive the proceeds. The son's liability to the co-op was established even though his false statements were made to the auctioneer and the driver, not the co-op.

[41] The Court of Appeal held that the fact "the original debt was legitimate does not legitimize the subsequent liability the respondents incurred for fraudulently dealing with the proceeds of sale." The original "debt" and the subsequent "liability" were discrete claims. Further, "[w]hile the debt, being the original borrowing from the Co-op, does not survive the discharge, the respondents' fraudulently obtaining and misapplying the proceeds of sale of cattle creates a liability which does survive discharge": *Ste Rose* at paras 68, 93.

[42] Like the co-op in *Ste Rose* and the securities commission in *Poonian*, the appellant did not transfer any property in reliance on the respondents' fraudulent misrepresentations and was not required to show that she did. Her original "debt claim" and the respondents' potential liability were separate claims. The latter, if established, survives the discharges.

[43] The chambers judge relied in part on this Court's decision in *Hennig* to find that "a transfer of property" from the creditor is necessary: *Decision* at paras 30-34, 36-7. However, *Hennig* did not conclude that the property must be obtained from the creditor; indeed, that issue was expressly left open: *Hennig* at paras 97-99. *Poonian* has now settled any uncertainty.

[44] To the extent that *Hennig* at paragraphs 78, 81 refers to the creditor being "directly victimized by the fraudulent behaviour of the debtor" (emphasis in original), and that the "required link" between the fraudulent statement and the debt is established "only if the debtor makes the fraudulent statement to the creditor", this requirement has also been dispelled by the Supreme Court. As will be discussed below, *Poonian* at paragraphs 86, 94 provides that while s 178(1)(e) requires "detrimental reliance", it "does not import a direct victim requirement." Consequently, a creditor "who is not a direct victim is thus not barred from bringing a claim under s. 178(1)(e)

provided that the claim is the result of a person being deprived of property or services after having detrimentally relied on the debtor's ... fraudulent misrepresentation."

[45] Ms Skaff argues that *Poonian* requires the property to transfer from the creditor because of the following passage at paragraph 73: "[The property] may have passed directly or indirectly *from the person* to a third party at the bankrupt's direction or on his or her behalf" (emphasis added). However, when the passage is read in context, and the reasoning in *Poonian* is considered holistically, the plain meaning is that "the person" need not be the creditor seeking the exception under s 178(1)(e). For example, the "person" in *Poonian* was each defrauded investor, not the securities commission.

[46] We conclude that the chambers judge erred in finding that the property had to transfer from the appellant to engage s 178(1)(e).

[47] The reasons of the chambers judge also suggest that the property must transfer to the bankrupt: *Decision* at paras 5, 12, and 26. However, s 178(1)(e) "does not require that the bankrupt be the recipient of the property of which a person was deprived. The property need not have been obtained, or retained, by the bankrupt". Rather, the property can pass to a third party at the bankrupt's direction or on the bankrupt's behalf: *Poonian* at paras 73, 100; *McAteer #1* at para 7.

[48] The chambers judge framed the question before him as "whether [the appellant] made any loans or otherwise moved any property to any of the defendants after, and as a result of, the asserted misrepresentations". The defendants were the bankrupts and the companies they controlled. The chambers judge then concluded that the transfers "did not represent any *further movement of property* by [the appellant] to any of them" (emphasis in original): *Decision* at paras 26, 43. Any implication that the respondents needed to be the recipient of the property is incorrect.

c) Link between the debt or liability and the fraud

[49] Section 178(1)(e) contemplates a causal link between the creation of the debt or liability and the tortfeasor's deception. The debt or liability must have been created by the false pretences or the fraudulent misrepresentation. While detrimental reliance by a person is necessary, that person need not be the creditor: *Poonian* at para 74.

[50] The chambers judge erred in finding that the necessary "link is missing here", reasoning that the corporations had already obtained the appellant's loan monies and no further property was moved "*by her ... spurred by the misrepresentations*" (emphasis added): *Decision* at paras 38, 43. As *Poonian* makes clear at paragraphs 85-6, a causal connection between the bankrupt's wrongdoing and the creation of the debt or *liability* is required but the creditor need not be the "direct *victim*", nor for that matter, the "direct recipient of the deceitful statement".

[51] Section 178(1)(e) requires a "direct link", meaning that "only the debt or liability that represents the 'value of the property [or services] obtained by false pretences or fraudulent

misrepresentation’ qualifies as non-dischargeable” (citations omitted). The subsection does not limit liability to the property of the creditor flowing to the bankrupt: *Poonian* at paras 76, 85-6.

[52] In short, the chambers judge erred in his interpretation of s 178(1)(e).

2) The chambers judge erred in finding the appellant’s claim was outside the scope of s 178(1)(e) because of a fraudulent preference or a transfer at undervalue

[53] Sections 95 and 96 of the *BIA* create a mechanism for challenging fraudulent preferences and transfers at undervalue that might have diminished the value of an insolvent debtor’s estate. The trustee in bankruptcy of the debtor’s estate may apply for a court order declaring a transaction void and directing that the property be returned to the estate. If the trustee does not act, a creditor may apply under s 38 of the *BIA* for a court order authorizing the creditor to seek those remedies.

[54] The chambers judge concluded that the appellant’s claims are not preserved by s 178(1)(e) because they are in the “zone of fraudulent preferences or undervalue transfers”: *Decision* at paras 47, 52-4. He found that the appellant’s recourse “is to ask the bankruptcy trustee to investigate and, as appropriate, to pursue the recovery, for the bankruptcy estate, of property moved out by perceived fraudulent preferences or undervalue transfers.” If the trustee does not act, the appellant can “take the reins of the estate’s remedies via s. 38 *BIA*”: *Decision* at para 51.

[55] This reasoning misapprehended the bankruptcy estates. The bankrupts were the three individual respondents not the debtor companies. The appellant’s complaint is that she was prejudiced by transfers out of the debtor companies, not the respondents’ bankruptcy estates. The trustees of the bankruptcy estates had no transfers away from the bankrupts to recover. Accordingly, s 38 of the *BIA* was not a basis for rejecting the exception to the discharge from bankruptcy sought by the appellant under s 178(1)(e).

[56] Given our finding, we need not address whether or in what circumstances the availability of recourse through ss 95 and 96 precludes a creditor from maintaining a claim in fraudulent misrepresentation.

3) The chambers judge erred by not finding that the appellant’s claims are for liabilities resulting from obtaining property by fraudulent misrepresentation

[57] The appellant alleges the respondents made fraudulent misrepresentations that prevented her from restraining the transfers out of Umeta and Mavingo. She contends that if her lawsuit is successful, she will establish each respondent’s liability to her for losses suffered because she cannot fully recover her loans from the debtor companies. As in *Ste Rose*, each respondent’s “liability” is her damages claim, not the original debts incurred by lending money to the corporate debtors. The “property” obtained by or for the benefit of the respondents, or transferred to a third party at their direction, is the monies removed from the debtor companies, not the monies originally loaned to those companies.

[58] The appellant confirmed her position before the chambers judge by offering this synopsis (*Decision* at para 35):

The Peeranis and Ms. Skaff made false statements to Ms. Henderson for a reason: to obtain her approval of the Umeta and Mavingo Building transactions and to **prevent her from taking steps to restrain their diversion of the sale proceeds.**

Had the Bankrupts disclosed their intention to divert the sale proceeds in each transaction, Ms. Henderson would not have approved the transactions and could have taken steps to restrain the diversion of the sale proceeds. [Emphasis in original]

[59] The chambers judge, however, treated the appellant's lawsuit as a debt claim seeking the recovery of her property, which he found was "the loaned monies". He focused his analysis on the absence of a transfer of "any *further* property" from the appellant following the alleged fraudulent misrepresentations: *Decision* at paras 8 and 36. Consequently, he did not address the respondents' "liability" for fraudulent preferences arising from the misrepresentations and the transfers of property out of the debtor companies, which were prejudicial to the appellant because those companies became insolvent.

[60] The appellant provided evidence by way of affidavit of the alleged misrepresentations and the consequences to her of acting on those misrepresentations and made submissions before the chambers judge about her detrimental reliance. However, her Amended Statement of Claim does not plead and particularize the misrepresentations as required by r 13.7 of the *Alberta Rules of Court*, Alta Reg 124/2010. The chambers judge was therefore left to define the misrepresentation claims based on the allegations and submissions tendered in support of the application. While the allegations suffer from some imprecision, the record is sufficient to determine the essential elements of the claims.

a) The Umeta claim

[61] For the Umeta transaction, the appellant deposed that in October 2013, Sadru Peerani sent an email to her and other Umeta shareholders stating that a "fast sale" of the Umeta building was needed to "minimize [the shareholders'] losses". She argued that the representation created an expectation that she would share in the proceeds of the sale to satisfy her loans. She therefore consented to the sale, rather than blocking it or restraining the distribution of the proceeds through oppression relief under the *Business Corporations Act*. She also argued that if not misled, her financial interests could have been protected by exercising her shareholder dissent rights under ss 190 and 191 of the *Business Corporations Act*. Those provisions address extraordinary sales of "all or substantially all the property of a corporation other than in the ordinary course of business", require the approval of the shareholders in accordance with a specified process, and entitle dissenting shareholders to be paid the fair value of their shares. The sale disposed of substantially

all of Umeta's property without a meeting of shareholders and the exercise of dissent rights contemplated by those provisions.

[62] The appellant asserts that the pre-sale misrepresentation caused her to acquiesce in the transfer of property to her detriment because no sale proceeds were applied to her debt and Umeta became insolvent as a consequence of the sale. The sale of the Umeta building closed in April 2014, and according to the appellant's evidence, the net proceeds of \$366,473 were deposited into a bank account controlled by Sadru Peerani rather than a Umeta account. She further deposed that on April 29, 2014, Sadru Peerani transferred \$350,000 by bank draft to Forman's. Those funds were then immediately transferred to his company, FFG. On August 5, 2014, Sadru Peerani transferred another \$12,000 of the net proceeds to Forman's, and then ultimately to FFG.

[63] The appellant deposed that "[a]t the time" the respondents falsely represented that "the sale proceeds were transferred to Formans to cover part of a debt that Umeta allegedly owed to Formans and Din [Peerani], and to release [a caveat on the Umeta property] in order for the sale to proceed". She also deposed that the respondents falsely represented that the debt "was secured by the Umeta Building". The debt was supported by a promissory note and a caveat. According to the appellant's evidence, Din Peerani and Ms Skaff testified at questioning that the promissory note and the caveat were created "in 2014 in the midst of the sale of the Umeta Building specifically to secure Formans' loans." The caveat was registered on title at the direction of Ms Skaff on March 6, 2014, and identified her as the agent for the caveator. As a caveat, it was a representation to the world, including the appellant, about the underlying agreement charging the land.

[64] The appellant deposed to various "badges of fraud" suggesting that no debt was genuinely owed by Umeta to Forman's. She asserted that the promissory note and the caveat were phony efforts to create a paper trail for a non-existent debt, and that the transfers of proceeds were part of a fraudulent scheme to deplete Umeta of its assets. The appellant contended that her reliance at the time on these post-sale representations caused her to acquiesce in the transfers of proceeds out of the company. She also asserted that if she had not been misled, she would have objected to the transfers and could have intervened through oppression relief to block or claw back the transfers.

[65] We conclude that the appellant's allegations and evidence provide an arguable fraudulent misrepresentation claim against each respondent that meets the four elements of the *Deloitte Restructuring* test. The chambers judge erred in not recognizing the respondents' possible liability under s 178(1)(e) for the Umeta transfers.

b) The Mavingo claim

[66] Similarly, there is some substance to the appellant's assertion that the respondents made fraudulent misrepresentations to strip Mavingo of its assets, which prejudiced her as a creditor and a shareholder in the company.

[67] The appellant deposed that she loaned \$98,192.70 to Mavingo between 2003 and 2009. Nothing was repaid. By 2016, she was in litigation with Sadru Peerani. Din and Sadru Peerani arranged to sell the Mavingo building, and the sale was to close in March 2016. However, the appellant had registered a certificate of *lis pendens* against the property, which was blocking the closing of the sale.

[68] The Peeranis and Mavingo negotiated with the appellant, through legal counsel, to remove the certificate of *lis pendens*. As part of those negotiations, Mavingo's real estate lawyer provided the appellant's lawyer with several documents addressing Mavingo's debt obligations, which purported to assist the appellant in understanding the net proceeds to flow from a sale of the Mavingo building. The appellant agreed to discharge her certificate of *lis pendens*, allegedly relying on those documents, in exchange for Mavingo paying \$250,933.32 into Court as security for a portion of her claims.

[69] The appellant deposed that she later learned through the course of her litigation and the bankruptcy proceeding involving Ms Skaff that certain critical documents "appear to be prepared by Din and Sadru and approved by Skaff", and that these documents were false. In particular, her evidence was that the respondents manufactured an excessive "rental credit" of \$820,737.50 owing to another company, and a \$500,000 vendor take-back mortgage owing to FFG and another company controlled by Ms Skaff (1952564 Alberta Ltd). These allegedly false charges created the impression that the net proceeds of sale would be much lower than they really were. That fallacy purportedly induced the appellant to discharge her certificate of *lis pendens* and accept less security.

[70] The appellant also deposed to additional financial benefits of \$479,040.48 improperly flowing to FFG, 1952564 Alberta Ltd and Ms Skaff as part of the transaction. If not for these financial transfers, the rental credit and the vendor take-back mortgage, as much as \$1.9 million (minus professional fees, property taxes, and other closing expenses) should have been available after the sale of the Mavingo building to satisfy the company's legitimate debts and provide for a "distribution payment" to Mavingo's shareholders. As a 25% shareholder, the appellant's potential distribution payment could exceed the value of the security posted with the Court.

[71] While the evidence does not explain whether the money paid into Court was insufficient to cover the appellant's loans to Mavingo (after the possible addition of interest and other charges), the appellant also asserted the claim to participate in the net proceeds through a residual distribution to the shareholders. That additional claim also grounds her assertion of a financial loss by relying on the allegedly fraudulent misrepresentations. In combination, the two claims potentially exceed the value of the posted security. Accordingly, we conclude that the appellant has an arguable fraudulent misrepresentation claim against each respondent that meets the elements of the *Deloitte Restructuring* test for the Mavingo transfers. Again, the chambers judge erred in not recognizing the respondents' possible liability under s 178(1)(e) for those transfers.

c) Additional claims

[72] In response to the Supreme Court’s decision in *Poonian*, the parties were invited to provide supplemental written submissions to this Court. The appellant’s submissions attempted to reframe the fraudulent misrepresentation claims to include new allegations that the respondents made fraudulent statements *to the debtor companies* that induced those companies to move “some or all of their property to third parties”, and that the appellant has a fraudulent misrepresentation claim based on the link between those representations and the adverse consequences to her. She asks us to find the necessary misrepresentations in the appellant’s affidavits but does not delineate them.

[73] The record does not suggest that the respondents were ever given notice to respond to this characterization of the appellant’s claim and the transcript of the proceedings before the chambers judge does not mention this argument. Consequently, the respondents were not given an opportunity to introduce responsive evidence, to challenge the appellant’s evidence on this point, or to make argument. We therefore decline to determine whether the appellant has any claim under s 178(1)(e) on that basis.

[74] In summary, we conclude that the chambers judge erred in failing to recognize that the appellant was advancing a claim against each respondent for that respondent’s liability to her in fraudulent misrepresentation – a claim separate from her original debt claim. The result was an error in principle affecting his exercise of discretion. Appellate intervention is warranted.

4) The stays should be terminated so that the appellant may continue with her claims in fraudulent misrepresentation against the respondents

[75] Section 69.4 of the *BIA* confers judicial discretion to terminate a stay. A creditor (or any other person) affected by the stay may apply to the Court “for a declaration” that the stay no longer operates in respect of that creditor, and the Court “may make such a declaration, subject to any qualifications that the court considers proper”, if it is satisfied that: (a) the creditor is “likely to be materially prejudiced” by the continued operation of the stay; or (b) it is “equitable on other grounds to make such a declaration.”

[76] The applicant bears the onus but need not establish a *prima facie* case. The Court’s role is to ensure that there are “sound reasons, consistent with the scheme of the [*BIA*]” to relieve against the automatic stay. While a *prima facie* case is not required, “consideration of the merits of the proposed action [is] relevant to the issue of whether there are ‘sound reasons’ for lifting the stay... [I]f it were apparent that the proposed action had little prospect of success, it would be difficult to find there were sound reasons for lifting the stay”: *Ma v Toronto-Dominion Bank*, 2001 CanLII 24076 (ON CA) at paras 2-3, citing *Re Francisco* (1995), 1995 CanLII 7371 (ON SC) at 29-30, 32 CBR (3d) 29, affirmed 1996 CanLII 10233 (ON CA), 40 CBR (3d) 77.

[77] As this Court found in *Gaastra* at paragraph 2, while “some evidence must be produced to demonstrate that there is some substance to the allegations of fraud ... [t]he threshold of evidence

required to prove fraud at this stage of the proceedings is low”. Further, it is “not necessary that the fraud be the only way of interpreting the available evidence, nor is the possibility of a defence decisive”. In that case, the chambers judge’s decision to lift the stay was upheld because the alleged fraud claims, “if proven, would not be extinguished by the bankruptcy”: *Gaastra* at para 1.

[78] None of the parties requested that we refer the appellant’s request to terminate the stays back to the Court of King’s Bench for determination, if a reviewable error was found by this Court. In these circumstances, doing so would invite litigation inefficiency, significant delay jeopardizing the parties’ new trial dates, and additional expense for financially compromised parties. No party requested that any qualifications be imposed on a declaration lifting the stays.

[79] The chambers judge made no findings about whether the record established some evidence of fraudulent misrepresentations made by each of the respondents. He operated under that assumption “without making any findings either way”: *Decision* at para 17. However, as the parties were required to put their best foot forward in addressing the application to terminate the stays in the first instance, and having considered the available evidence, we are satisfied that this Court can make the necessary findings and are prepared to undertake the exercise of discretion contemplated by s 69.4.

[80] The specific question before us is therefore whether the appellant has presented “sound reasons”, consistent with the scheme of the *BIA*, to relieve against the automatic stays. While the evidence supporting such an application need not necessarily establish a *prima facie* case for the tort of fraudulent misrepresentation, we are satisfied in this case that the evidence, including the circumstantial evidence and the reasonable inferences that may be drawn from that evidence, demonstrate an arguable cause of action.

[81] As explained earlier, the evidence and submissions arguably show that Sadru Peerani made a fraudulent misrepresentation to the appellant before she consented to the sale of the Umeta building, and that she relied on that misrepresentation to her detriment. Similarly, the evidence and submissions demonstrate an arguable claim that each of the respondents made fraudulent misrepresentations before she discharged her certificate of *lis pendens* and allowed the sale of the Mavingo building to proceed to her detriment. Finally, the evidence and submissions establish an arguable claim that each of the respondents made fraudulent misrepresentations to the appellant before the sale proceeds from the Umeta and Mavingo building transactions were transferred out of each company. The prejudice, as asserted, is that the appellant either consented to or acquiesced in the transfers of sale proceeds out of the debtor companies, leaving them insolvent and compromising her ability to recover her loans and shareholder distributions.

[82] On these grounds, the appellant has demonstrated an arguable claim of fraudulent misrepresentation within the scope of the s 178(1)(e) exception to the discharge from bankruptcy. She has shown “some substance to the allegations” against each of the respondents. Further, she has established that the value of the claim is sufficiently substantial to warrant continuing litigation. We find “sounds reasons” for lifting the stays. While financial rehabilitation of the

bankrupts operates as the general rule under the *BIA*, Parliament’s decision to enact specific exceptions to the general rule must be respected. The appellant is therefore materially prejudiced by the continuing operation of each stay. We also find that terminating the stays is equitable in the circumstances.

Conclusion

[83] The appeal is allowed, and the Order of the chambers judge is set aside. The stay of proceedings in favour of each respondent bankrupt under the *BIA* is declared no longer operable as against the appellant.

[84] As a qualification to declaring that the stays are no longer operative, the appellant is directed to amend her Amended Statement of Claim in Action No 1501 04627 within 60 days to properly particularize the fraudulent misrepresentation claims and to address the involvement of the trustees in bankruptcy. If the appellant is unable to do so because the defendants to the action will not consent to the amendments, she may satisfy the qualification by filing and serving on the defendants and the trustees in bankruptcy her application to amend the pleadings within that 60-day time limit. If the appellant fails to comply with this Court’s direction within the time limit, the stays shall resume automatically.

Appeal heard on March 7, 2024.
Supplemental written submissions received on August 30, 2024.

Memorandum filed at Calgary, Alberta
this 20th day of November, 2024

de Wit J.A.

Fagnan J.A.

Feth J.A.

Appearances:

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K. M. Kluz

for the Appellant

F.A. Paredes-Canevari

for the Respondents, Sadru Peerani and Din Peerani,
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J.T. Wallace

E. Ward

for the Respondent, Simone Skaff