CITATION: The Toronto-Dominion Bank v. Brad Duby Professional Corporation, 2022 ONSC 6066
COURT FILE NO.: CV-21-00657656-00CL
DATE: 20221028

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

RE: THE TORONTO-DOMINION BANK, Applicant

AND:

BRAD DUBY PROFESSIONAL CORPORATION, Respondent

BEFORE: Kimmel J.

COUNSEL: *Timothy Hogan and Robert Dante*, for the Receiver, MNP Ltd./Moving Party

Kyle Plunkett, for the Applicant, the Toronto Dominion Bank

Miranda Spence, for the Laurentian Bank of Canada

Melissa Sidhum, Ryan Naimark, Ashu Ismail, Shahen Alexanian, Lindsay Charles, G. Black, A. Somogyi, representatives of some New Counsel (defined herein)

HEARD: October 13, 2022

ENDORSEMENT

Background

The Receivership

[1] Cavanagh J. appointed MNP Ltd. ("MNP") as the receiver (the "Receiver") over the property of the Respondent, Brad Duby Professional Corporation ("BDPC") pursuant an Order dated February 25, 2021 (the "Appointment Order").

[2] The background facts giving rise to this motion are not controversial. They are described in the Receiver's first report dated June 28, 2022 (the "First Report") and the Receiver's factum on this motion. Some of the relevant facts are repeated below to provide some context.

[3] As a lawyer licensed to practice in personal injury law, Bradley Robert Alfred Duby ("Mr. Duby") carried on his law practice through BDPC until his unexpected death on January 28, 2021.

[4] On February 25, 2021, the Applicant (hereinafter the "TD Bank"), a creditor of BDPC, applied for and obtained the Appointment Order.

[5] At the same time as the Appointment Order, the Law Society of Ontario (the "LSO") was appointed as Trustee over certain property and records relating to BDPC, comprised primarily of the roughly 570 client files held by BDPC at the time of Mr. Duby's death (the "Client Files").

[6] The Client Files remain the property of the BDPC clients to whom those files pertain (the "Clients"). The LSO has released Client Files to Clients upon their request, or to their new appointed counsel (the "New Counsel"). As of May 17, 2022, approximately 256 Client Files had been transferred to New Counsel.

[7] The Appointment Order preserved BDPC's (now the Receiver's) rights in respect of entitlement to compensation from Clients, providing at paragraph 29 that:

> 29. THIS COURT ORDERS that any transfer by the LSO of any client files to a successor or substituting lawyer, shall be done without prejudice to any claim that the Receiver may have with respect to the recovery of any and all outstanding out-of-pocket disbursements, to the extent payable, incurred by the Debtor and all work in process or fees earned by the Debtor in connection with or arising from such file or files which is properly payable by the successor or substituting lawyer to the Debtor.

The Retainer Agreements

[8] BDPC had entered into a number of retainer agreements that governed its relationship with the Clients. BDPC used separate retainer agreements for the Clients' tort and accident benefit claims (collectively, the "Retainer Agreements"). The Retainer Agreements typically entitled BDPC to receive a contingency fee, ranging from thirty percent (30%) to thirty-three percent (33%), on average. The contingency fee entitled BDPC to a percentage of any monies successfully recovered from the Clients' damages, compensation and benefit claims ("the Fees"), plus incurred disbursements (the "Disbursements") and Harmonized Sales Tax.

[9] The Retainer Agreements between the Clients and BDPC contained, *inter alia*, the following provisions:

> We End the Relationship
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> There are circumstances where we may choose to end this agreement. For example, if we at any time determine that the Claim is unlikely to succeed or is no longer economically viable. In these circumstances, we may then enter into a new, non-contingency based fee agreement on terms to be negotiated at that time. In the event that we terminate this Agreement and you ultimately received nothing for your Claim, we will not charge you legal fees. If we terminate the Agreement, and you do recovery money for your Claim, you agree to protect or pay our reasonable charges as explained below.
>
> Reasonable Charges Explained
>
> The factors that will determine our reasonable charges where this agreement ends

> prior to resolution of the Claim, include the time and effort required and spent by us; the usual hourly rates charged by us for non-contingency work; the complexity of the case and the responsibility and risk we assumed by representing you in the case; the difficulty and importance of your case; the expertise, experience, degree of skill and competency demonstrated by us in representing you; whether special skill or service was required and provided; the amount involved and/or value of the Claim; results obtained by us; and other relevant circumstances.
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> Our usual hourly rates, which generally increase annually, are:
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> Senior Lawyer $350.00 Junior Lawyer $240.00 Law Clerks $90.00 Articling Students $90.00 Summer Students $90.00.

The Proposed Fee Arrangements

[10] The primary asset in the BDPC estate is its claim for unpaid Fees and Disbursements in respect of the Client Files, properly payable by the Client and/or the successor or substituting lawyer to BDPC upon the completion of the Client Files. The Receiver proposed a fee arrangement to New Counsel, and has since revised it in the form of the Sliding Fee Structure (defined below), setting out the terms on which the Receiver proposes to address the amounts payable to BDPC in respect of the Client Files.

[11] The "Sliding Fee Structure" proposed by the Receiver is as follows:

a. Twenty percent (20%) on each case where total the [New Counsel] Fees are forty thousand dollars ($40,000) or higher;

b. Fifteen percent (15%) on each case where the [New Counsel] Fees are less than forty thousand dollars ($40,000) but are twenty thousand dollars ($20,000) or higher; and,

c. Ten percent (10%) on each case where the [New Counsel] Fees on such case are under twenty thousand dollars ($20,000).

[12] Only some New Counsel have agreed to the Sliding Fee Structure. Some of the New Counsel who oppose the Sliding Fee Structure have indicated that they will not continue to represent the clients whose files they have assumed if the court imposes the Sliding Fee Structure. The Receiver has lined up other counsel to take on Client Files under the Sliding Fee Structure if the New Counsel who oppose the Sliding Fee Structure no longer wish to act. That said, there is no indication that the Clients whose New Counsel oppose the Sliding Fee Structure have agreed to retain the Receiver's proposed counsel.

The Motion and the Receiver's Recommendations

[13] The Receiver wishes to establish a universal and consistent arrangement for addressing the calculation of the claims and interest of BDPC in the Client Files. To that end, and over the objection of certain New Counsel, the Receiver is seeking the court's direction with respect to the

Sliding Fee Structure. Specifically, the Receiver seeks an order that the Sliding Fee Structure be approved and ordered to be binding *nunc pro tunc* on all New Counsel and the Clients.

[14] The Receiver has made it clear that it is not seeking to recover Fees and Disbursements where legitimate claims of malfeasance, such as fraud or negligence, are satisfactorily supported against Mr. Duby and BDPC.

[15] New Counsel at three firms who account for approximately 37 Files[1] have agreed to the Sliding Fee Structure. When the motion was brought, New Counsel at four firms who opposed the Sliding Fee Structure accounted for approximately 122 files. At the hearing, those four firms made submissions but New Counsel from other firms in attendance also voiced objection to the Receiver's motion.

[16] The Receiver recommends the Sliding Fee Structure based on input it says it received from experienced personal injury law firms and the "compelling circumstances" of this receivership. For example, the impracticality of issuing individual accounts to each of the Clients and engaging in individual account assessments. This impracticality is due to the lack of information available to the Receiver from the records of BDPC, the large number of Client Files, and the Receiver's limited resources. Through the proposed Sliding Fee Structure, the Receiver is attempting to put in place an efficient means to determine BDPC's interest and entitlement in and to the Client Files that have been transferred to New Counsel.

[17] The Receiver is concerned that it will not be able to continue administering BDPC's estate if the Sliding Fee Structure is not approved and imposed by the court, although that will have to be assessed after this motion.

[18] The Receiver is also seeking an order expanding its authority to access Client File information, as well as an order that New Counsel be required to disclose such information. This includes, but is not limited to: any proposed or finalized settlement or award figures, New Counsel's retainer/fee agreements, statements of disposition of the settlement or awarded funds, disbursement invoices, New Counsel's account(s), invoices of unpaid suppliers/deferred accounts and any other relevant information reasonably required by the Receiver associated with the BDPC's interest in the Client Files (collectively referred to by the Receiver as, the "Determinable Information").

[19] The Receiver says that it requires the Determinable Information to implement the Sliding Fee Structure. However, the Receiver maintains that the Determinable Information is required for it to administer the BDPC estate whether or not the Sliding Fee Structure is approved and imposed, for example: to assess any allegations of fraud or negligence against Mr. Duby or BDPC and to assess the reasonableness of any settlement of disputed fees and disbursements payable to BDPC, even if they are to be negotiated on a file-by-file basis. The Receiver does not agree that its interest and entitlement in and to the Client Files is a function only of time estimates for work done and

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[1] During oral argument counsel appearing for one of the firms of New Counsel advised that while some lawyers at their firm, acting on behalf of some the Clients, have agreed to the Sliding Fee Structure, not all lawyers at that firm have agreed on behalf of all of the Clients now represented by that law firm, although the specific file breakdown as between these different groups of lawyers at the same firm was not provided.

disbursements, but requires a broader consideration of the overall complexity of the matter and relative value added, that could be informed by information gathered and work done by New Counsel after they assumed carriage of the Client Files.

[20] The Receiver circulated a protocol on how it intends to deal with Determinable Information (the "Protocol"). This Protocol is intended to protect the Client's privileged information and documentation in the Client Files before and after they are transferred to New Counsel, and the disclosure of any Determinable Information from those files to the Receiver, standing in the shoes of BDPC, former counsel.

[21] Lastly, the Receiver seeks approval of two reports: its First Report and supplemental report dated September 21, 2022 (the "Supplemental Report"). The Receiver also seeks approval of its fees and its counsel's fees as set out in the First Report. This relief was unopposed and was not the subject of any submissions when the motion was heard.

Grounds of Opposition by Some New Counsel

[22] The New Counsel who oppose the Sliding Fee Structure do so on the basis that it is not consistent with the BDPC Retainer Agreements and takes away the Clients' rights to receive an account upon the transfer of their files and to have BDPC's accounts assessed under the *Solicitors Act*, R.S.O. 1990, c. S.15. They challenge the court's jurisdiction to make any direction or authorization regarding the Sliding Fee Structure.

[23] They also contend that the Sliding Fee Structure is inappropriate or unfair to be applied to certain Client Files that they have identified where:

a. Little or no work had been completed by BDPC and the file was not very far advanced at the time of its transfer to New Counsel; and/or

b. The work completed by BDPC was poor; and/or

c. There is evidence of fraud or negligence on the part of Duby and/or BDPC.

[24] Some New Counsel have concerns specific to particular Clients whose new retainer arrangements or particular circumstances could result in the loss of representation or a significant diminishment of their recoveries.

[25] Questions and concerns were also raised about questionable charges on accounts previously rendered for some clients (e.g. counsel fees charged as disbursements) and funding or loan arrangements said to have been established for Clients.

[26] The New Counsel who object to the Sliding Fee Structure also object to producing the requested Determinable Information to the Receiver. They argue it serves no purpose other than to support the Sliding Fee Structure, which they object to.

[27] While objections based on the potential for waiver of privilege were raised in the materials filed opposing this motion, they were not emphasized in oral argument. When the issue arose in oral argument, it was acknowledged by at least one New Counsel that the terms of the Protocol

and principles of common interest privilege should allow for some acceptable arrangement to resolve privilege concerns if the Determinable Information is ordered to be made available to the Receiver.

Issues to be Decided

[28] The issues on this motion are:

a. Can and should the court approve the Sliding Fee Structure and impose it on all New Counsel?

b. Can and should the court order New Counsel to provide the Receiver with the requested Determinable Information?

c. Should the activities of the Receiver as set out in the Receiver's First Report and Supplemental Report be approved?

d. Should the professional fees of the Receiver and its counsel, corresponding with the Receiver's activities described and fee affidavits accompanying the Receiver's First Report be approved?

Analysis

The Sliding Fee Structure

[29] Most of the written and oral submissions on this motion were devoted to this issue.

a) The Solicitors Act

[30] The Receiver acknowledges that, in the normal course, the Clients would be entitled to receive accounts from BDPC and to assess those accounts. The following sections of the *Solicitors Act* address these considerations:

a. Section 2(1), requiring the solicitor, his or her executor, administrator or assignee, to deliver a bill to the person to be charged and prohibiting any action for recovery of fees, charges or disbursements until one month thereafter;

b. Section 2(3) permitting a lump sum charge for fees, charges and disbursements if it contains a statement or description of the services rendered and detailed statement of disbursements, although further details of services rendered may be ordered;

c. Sections 3 and 28(11) permitting an order for the delivery and assessment of a solicitor's bill by either the client or the solicitor;

d. Sections 16 and 28.1 permitting an agreement (including a contingency fee agreement) between a solicitor and client respecting the amount and manner of payment, either by a gross sum or by commission or percentage, or by salary or

otherwise, and either at the same rate or at a greater or less rate than that at which he or she would otherwise be entitled to be remunerated; and

e. Sections 29 and 30 that provide that upon the death or incapacity of a lawyer, or the retention of a new lawyer by a client, the court may order the amount in respect of the past performance of a retainer agreement to be ascertained by assessment, and the assessment officer.

[31] The purpose of the *Solicitors Act* and the court's jurisdiction under it is to ensure that fees charged by solicitors to their clients are fair and reasonable. This has long been considered to be important to maintaining public confidence in the administration of justice. See *Clatney v. Quinn Thiele Mineault Grodzki LLP*, 2016 ONCA 377, 131 O.R. (3d) 511, at para. 78 citing also *Plazavest Financial Corp. v. National Bank of Canada* (2000), 47 O.R. (3d) 641 (C.A.).

[32] As explained by Wright J. in *Re Solicitor*, at para. 11:

> It preserves an elaborate but not perfect system, weighted against solicitors, of measures which enable the Court to determine the quantity and quality of the bill. Thus it may be said of the solicitor's profession, that its members cannot set their own individual charges and that there is a procedure for determining in every case where it is invoked, that a solicitor's charges are fair and reasonable. To a degree this is a significant counter-weight to the monopoly, and some assurance against abuse and exploitation.
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> *Re Solicitor*, [1972] 1 O.R. 694 (Ont. H.C.), at para. 11; see also *Balena v. Beck*, [2000] O.T.C. 102 (S.C.), at para 8.

b) The Court's Inherent Jurisdiction

[33] Section 183 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*") grants the Ontario Superior Court of Justice (among other specific provincial superior courts) with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by the *BIA*. So too has s. 243 of the *BIA*, pursuant to which the court appointed the Receiver, been interpreted to provide supervising judges with the broadest possible mandate in insolvency proceedings.

[34] In seeking to impose the Sliding Fee Structure, the Receiver asks this court to invoke the broad inherent jurisdiction that a superior court "may draw upon as necessary whenever it is just or equitable to do so, and in particular to ... do justice between the parties" relying upon: I.H. Jacob, "The Inherent Jurisdiction of the Court" (1970), 23 *Curr. Legal Probs. 23*, at p. 51, as cited in *Endean v. British Columbia*, 2016 SCC 42, [2016] 2 S.C.R. 162, at para. 23 and *Stephen Francis Podgurski (Re)*, 2020 ONSC 2552, 79 C.B.R. (6th) 96, at para. 66.

[35] The Receiver contends that, except where the legislature has divested a specific power from that of the court, the Superior Court's inherent jurisdiction is "unlimited and unrestricted in substantial law and civil matters" and assumed to apply, subject also to fulfilling the underlying purpose of the doctrine of protecting and regularizing the administration of justice. See *80*

Wellesley St. East Ltd. v. Fundy Bay Builders Ltd et al., [1972] 2 O.R. 280 (C.A.), at para. 9. See also *Re Michie Estate and City of Toronto et al.*, [1968] 1 O.R. 266 (Ont. H.C.), at para. 11.

[36] The Receiver argues that, in the absence of any express limitation or exclusion in the *Solicitors Act* of the court's inherent jurisdiction, the court can use that power to override the statutory right of the Clients to receive and assess BDPC's bills for services rendered. The Receiver argues that the court has the jurisdiction to take away the right of a client to an assessment of their solicitor's bill(s) in "compelling circumstances." See: *Borden Ladner Gervais LLP v. Cohen* (2005), 199 OAC 9 (Div. Ct.), at paras. 12-14.

[37] These assertions goes too far and are not supported by the authorities cited. There was no authority cited that has extended the court's inherent jurisdiction or broad supervisory jurisdiction and powers under the *BIA* to negate a prescribed statutory right.

[38] The Receiver's suggestion that the broad and inherent jurisdiction of the court can be used to take away existing statutory rights—such as the right under the *Solicitors Act* of a client to receive a bill and have it assessed by an office of this court for the fairness and reasonableness of the fees and disbursements charged—is not only unsupported by any direct authority, but is contrary to clear doctrinal authority from the Supreme Court of Canada and the *BIA* itself.

[39] In *Crystalline Investments Ltd. v. Domgroup Ltd.*, 2004 SCC 3, [2004] 1 S.C.R. 60, at para. 43, the Supreme Court of Canada stated that "so long as the doctrine of paramountcy is not triggered, federally regulated bankruptcy and insolvency proceedings cannot be used to subvert provincially regulated property and civil rights."

[40] Section 72(1) of the *BIA* expressly provides that: "[t]he provisions of this Act shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act".

[41] In discussing the scope of the court's inherent jurisdiction under s. 183 of the *BIA* in the case of *In the Matter of the Proposal to Creditors of Conforti Holdings Limited*, 2022 ONSC 3264, leave to appeal refused, 2022 ONCA 651, Cavanagh J. canvassed various appellate authorities on this topic, including *Kingsway General Insurance Co. v. Residential Warranty Co. of Canada Inc. (Trustee of)*, 2006 ABCA 293, 65 Alta. L.R. (4th) 32, where the Court of Appeal of Alberta, at paras. 20 and 21, addressed the Bankruptcy Court's inherent jurisdiction at law and in equity under s. 183(1) of the *BIA*:

> Inherent jurisdiction is not without limits, however. It cannot be used to negate the unambiguous expression of legislative will and moreover, because it is a special and extraordinary power, should be exercised only sparingly and in a clear case: *Baxter Student Housing Ltd. v. College Housing Cooperative Ltd.*, 1975 CanLII 164 (SCC), [1976] 2 S.C.R. 475 at 480; *Wasserman Arsenault Ltd. v. Sone* (2002), 2002 CanLII 41494 (ON CA), 33 C.B.R. (4th) 145 (Ont. C.A.).

[42] The statutory entitlement under the *Solicitors Act* to receive a bill and to have it assessed by the court for its fairness and reasonableness is unambiguous.

[43] In *Cohen*, the Divisional Court ordered an assessment on appeal. The reference to the court preserving the right of a client to have the solicitor's account assessed *except in "compelling circumstances"* was in the context of a discussion about the jurisdiction of a superior court judge to consider whether the amounts charged were fair and reasonable in an action for payment of a solicitor's account, or to refer the account for assessment (*Cohen*, at paras. 11-14). There is no suggestion in *Cohen* that the court could do away completely with the client's right to receive a bill or to challenge the fairness and reasonableness of the fees and disbursements charged and have that determined in court.

[44] Furthermore, even if the court may have the jurisdiction to do so in "compelling circumstances" as the Receiver suggests (based on the obiter comment made by the court in *Cohen*), there are no such circumstances in this case that render it necessary to exercise the court's inherent jurisdiction to impose the Sliding Fee Structure—thereby taking away the Clients' rights to receive a bill and have it assessed under the *Solicitors Act*—in order to do justice between the parties.

[45] The Receiver's asserted "compelling circumstances" are a function of Mr. Duby's unexpected death, his failure to keep dockets or other records and the Receiver's perceived impracticality to render accounts that bear meaningful resemblance to the work done and value added by BDPC. The Receiver further contends that allowing for case-by-case assessments of each individual Client File would cause excessive delay and costs to the administration of BDPC's estate.

[46] The Receiver argues that this, in turn, will undermine the Receiver's powers and obligations under the Appointment Order as well as the overarching purpose of the *BIA*, to the detriment of the creditors of BDPC's estate whose recovery would be negatively impacted. The Receiver has limited resources and submits that it is neither financially efficient nor practical for it to review each file and negotiate BDPC's interest or deal with assessments on a case-by-case basis.

[47] There is no doubt that the Receiver will have to spend more time and money to render accounts to the Clients. However, difficulty in setting the fee, even if it must be based (at least in part) on time estimates associated with steps taken without the benefit of dockets, has been considered by this court in the past and not accepted as an excuse or justification for not attempting to do so. Nor is the risk of having to face a multitude of individual assessments of accounts rendered a compelling reason for a lawyer not to render an account. See *Loreto v. Little et al*, 2010 ONSC 755, at paras. 41-42.

[48] The Receiver concedes that the Sliding Fee Structure does not assess the value or reasonableness of the amount charged for work done. The Sliding Fee Structure removes any value based task and/or client specific assessment of the fairness and reasonableness of the fees and disbursements to be charged by BDPC. It eliminates any determination of the merits of an individual assessment. While admittedly imperfect, the Receiver claims to have given the proposal careful consideration with third party input.

[49] The Sliding Fee Structure may not be a cavalier proposal. However, the approach it entails is contrary to the express provisions and purposes of the *Solicitors Act* that requires a solicitor to

render a bill and gives the client the right to have it assessed for fairness and reasonableness. It would be inappropriate for the court to exercise its inherent jurisdiction to impose the Sliding Fee Structure on New Counsel for Clients who have not agreed to it, and negate this unambiguous expression of legislative will. I decline to do so.

c) Addressing the Receiver's Concerns About the Rendering of Accounts

[50] The *Solicitors Act* does not require a docket based account to be issued. Lump sum and continency fees are expressly provided for in ss. 2, 16 and 28.1, for example. Nor do the Retainer Agreements or the Appointment Order impose a specific formula for the determination of fees earned and payable:

a. In the case of the Retainer Agreements, each Client who signed such agreed to protect or pay BDPC's reasonable charges, which can include consideration of a number of factors, including but not limited to time and hourly rates, as follows:

> Reasonable Charges Explained
>
> The factors that will determine our reasonable charges where this agreement ends prior to resolution of the Claim, include the time and effort required and spent by us; the usual hourly rates charged by us for non-contingency work; the complexity of the case and the responsibility and risk we assumed by representing you in the case; the difficulty and importance of your case; the expertise, experience, degree of skill and competency demonstrated by us in representing you; whether special skill or service was required and provided; the amount involved and/or value of the Claim; results obtained by us; and other relevant circumstances.

b. In the case of the Appointment Order, paragraph 29 preserved any claim that the Receiver may have with respect to the recovery of any and all outstanding out-of-pocket disbursements, to the extent payable, incurred by the BDPC and all work in process or fees earned by the debtor in connection with or arising from such file or files which is properly payable by the successor or substituting lawyer to the debtor.

[51] "Fees earned … [and] properly payable by the successor or substituting lawyer" is not defined in the Appointment Order. The Retainer Agreements contain are guidelines (not all of which are based on the time spent on a given matter) that the Receiver can consider in rendering bills to the Clients.

[52] In *Loreto,* at paras. 41-42, the court recognized that "the personal injury lawyers were not required to docket their time and keep track of their hours – they were only to focus on getting a recovery and then billing the contingency fee." Nonetheless, this did not prevent the issuance of accounts, even if based on estimates of "time spent."

[53] Moreover, the Receiver acknowledges that the Sliding Fee Structure may not be appropriate in all cases. The Receiver has said the Sliding Fee Structure may not be applied to situations of legitimate, supported claims of malfeasance, such as fraud or negligence on the part

of Mr. Duby (although it has not delineated who decides whether there was negligence and/or fraud, to what standard that is measured and whether it would negate only some or all of the fees otherwise payable).

[54] New Counsel have identified some other situations that should be exempted because of their own extenuating circumstances, such as:

a. In cases where the New Counsel have not agreed to take care of the fees to former counsel at BDPC, which could lead to the Client having to pay both counsel from their settlement recoveries or being forced to retain New Counsel who will accept the Sliding Fee Structure;

b. In cases of significant settlements that could lead to a large windfall to BDPC even at the lower end of the sliding scale when it did little if any work to advance the file; and

c. Hardship cases like the one being handled by Campisi LLP for a vulnerable client with a history of mental health issues and limited resources who allegedly received $4,050 in undocumented loans from BDPC and for whom no statement of claim was ever issued by BDPC.

[55] The professed justification for imposing the Sliding Fee Structure upon Clients who have not agreed to it is diminished once exceptions are created. The Receiver's concerns about the lack of information and records upon which accounts can be rendered and the potential for challenges on assessment cannot be avoided in all cases. Settling the accounts can avoid assessments and is certainly encouraged, but there is not a one size fits all solution that can be appropriately imposed in this case.

[56] New Counsel who oppose the Sliding Fee Structure say that they are ready, willing and able to receive and review any BDPC account rendered and to negotiate reasonable fees and disbursements on a case-by-case basis; what they are not willing to do is agree to an upfront percentage. They disagree that a fee charged against the eventual settlement proceeds is standard practice for transferred client personal injury files.

[57] The court's unwillingness to impose Sliding Fee Structure does not preclude the continuation of any agreements to implement the Sliding Fee Structure as have already been made with some New Counsel. New agreements that use a Sliding Fee Structure may also be formed, provided the parties agree.

[58] The Receiver still has an inherent interest in the Client Files that are not subject to the Sliding Fee Structure. A mechanism must be established to value and realize upon that interest. The rendering of an account by the Receiver is a necessary first step in that process that must consider:

a. What constitutes "reasonable charges" under the Retainer Agreements? How to measure the time/skill/quality of work in an account if it is undocumented and must be estimated? How to measure and value other aspects of the reasonable charges?

b. What to do with Client Files with no signed Retainer Agreement?

c. What constitutes "all work in process or fees earned by the Debtor in connection with or arising from such file or files which is properly payable by the successor or substituting lawyer to the Debtor" under the reservation of rights under the Appointment Order?

[59] In *Newell v. Sax*, 2019 ONCA 455, the Court of Appeal held that a *quantum meruit* assessment of a solicitor's account is not a bookkeeping exercise or a mechanical calculation. "Rather, a *quantum meruit* assessment is concerned with the reasonable value of services rendered and requires an assessment officer to undertake a nuanced, contextual approach having regard to all the relevant circumstances." As such, "time is only one factor to consider in determining the reasonableness of the bill, a fee, although reduced, may nevertheless be allowed even if not all time is docketed, provided there is other evidence available, as there was here, to support the fairness and reasonableness of the bill." However, the Receiver will need to approach the initial determination keeping in mind that it has been said that the failure of a solicitor to keep proper time dockets may justify a significant reduction in the assessed account. See *Newell*, at paras. 39, 43.

[60] Ultimately, the Receiver must come up with its own principled basis to render a bill/account to each Client who has not agreed to the Sliding Fee Structure or some other settlement of "the fees earned by the Debtor in connection with or arising from such file or files which is properly payable by the successor or substituting lawyer to the Debtor."

d) The Single Proceeding Model

[61] The Receiver in this case, like most, is mandated with the responsibility to realize on the property of BDPC in the most cost-effective and timely manner, for the benefit of BDPC's creditors.

[62] The Receiver contends that imposing the Sliding Fee Structure would respect the single proceeding model by avoiding the potential for multiple assessments of BDPC accounts by the Clients. The logic of this does not flow, although there may be a role for the single proceeding model.

[63] The single proceeding model has been used by courts in Canada to centralize claims against a debtor into a single insolvency proceeding. To avoid inefficiency and chaos in insolvency matters that could result from a multiplicity of proceedings connected to the insolvency proceeding, the single proceeding model has been used to centralize claims advanced by or on behalf of a debtor as well. See: *Royal Bank of Canada v. Mundo Media Ltd.*, 2022 ONSC 2147, at paras. 21-23, 27; *Re: Essar Steel Algoma Inc. et al.*, 2016 ONSC 595, 33 C.B.R. (6th) 313.

[64] The Receiver is asking the court to use the single proceeding model as a justification for taking away the rights of the Clients to bring assessments. The single proceeding model does not take away existing rights; it streamlines their determination into a single proceeding. However, those assessments could be determined in the bankruptcy proceeding or through a summary or omnibus procedure for a determination of the fairness and reasonableness of the accounts rendered and fees and disbursements charged (on grounds consistent with how those considerations would

be determined on an assessment) that could be ordered and directed within the bankruptcy proceeding while still respecting the single proceeding model. See *Mundo*, at paras. 14, 38. That is a question for another day.[2]

The Determinable Information

[65] Certain New Counsel have refused to communicate details of Determinable Information to the Receiver citing solicitor-client privilege and relevance. Pursuant to Osborne J.'s endorsement dated June 20, 2022, the Receiver's counsel has sought to establish with New Counsel a mutually agreeable "consent protocol for the sharing of relevant information relating to fees and disbursements while protecting privilege as appropriate." The Receiver has circulated a Protocol on how it intends to deal with Determinable Information, which explicitly addresses the protection of privileged information and documentation.

[66] While the Appointment Order excludes "solicitor-client communication" from the definition of records required to be turned over to the Receiver, the Receiver submits that the Determinable Information does not fall under this exception, and that the Determinable Information forms part of the records which are permitted and authorized to be turned over to the Receiver pursuant to the Appointment Order. This includes: "Records and/or information relating to the [Client Files]". As such, requiring New Counsel to disclose the Determinable Information to the Receiver would not provide the Receiver with information that it is not already entitled to. As an officer of the court without an adversarial relationship to any of the Clients, the Receiver is both obligated to refrain from releasing such information to third parties, as set out in the draft Protocol circulated, and would have no motivation or opportunity to utilize such information in a manner that would prejudice the Clients.

[67] A common interest privilege in the disclosure of the Determinable Information should be readily established and could be documented in the Protocol, if New Counsel is not satisfied that it has been already. The Determinable Information is to be used for the purposes of addressing issues arising out of the solicitor client relationship between BDPC and the Clients. Privilege concerns can be addressed and are not a basis for denying the Receiver's request for production of the Determinable Information.

[68] The real opposition that New Counsel have raised is whether the Determinable Information is relevant to any case where the Sliding Fee Structure (or some similar structure for billing that is expressly dependent upon the conduct and eventual outcome of the Client File after it was transferred to the New Counsel) has not been agreed to.

[69] Some New Counsel submit that, where the Sliding Fee Structure is not in place, the only items that would be relevant to the determination of the fees payable to BDPC by their former clients would be their Client Files as they existed prior to their transfers to New Counsel. The

[2] This might arise in the context of requests for leave to bring assessments once bills are rendered by the Receiver, having regard to the stay and suspension of any rights or remedies being exercised under paragraph 10 of the Appointment Order.

LSO preserved these files under the Trusteeship Order and they are available to the Receiver through that recourse.

[70] The Receiver claims that it needs the Determinable Information to complete the requisite work to issue an account, based on the "reasonable charges" contemplated under the Retainer Agreements. I can see how that would be so.

[71] Ascribing a value to BDPC's contribution to a Client File, without Mr. Duby, may require some consideration of steps taken after the Client Files were transferred. That is because the Determinable Information would be expected to include information that will assist in the Receiver's task of reconstructing the history of some Client Files, including what was done before the Client Files were transferred, which may in part be informed by what was done afterwards. Further, the time spent and steps taken by Mr. Duby and BDPC are not necessarily the only factors that could be taken into account in determining the fair and reasonable amount to charge each Client. The Determinable Information can also assist the Receiver in assessing difficulty and importance of each Client File and relative contributions of each counsel.

[72] The eventual amount recovered and amount billed by New Counsel can also inform the assessment of the complexity of the Client File, the amount involved and/or the value of the Client's claim and the eventual determination of the fairness and proportionality of the fee to be charged.

[73] The Receiver is operating at a disadvantage and is entitled to be assisted by information that has been acquired, and to be informed by steps that have been taken, by New Counsel that may be relevant to the Receiver's task of rendering a bill to each Client. Cases in which New Counsel allege negligence or fraud or other improprieties as a basis for reducing the fees that might otherwise be payable are another example of why the Determinable Information is relevant to the Receiver, even if the Sliding Fee Structure is not imposed.

[74] With the existing protections in the Protocol (and any supplementary protections thought to be appropriate to record the common interest privilege), I find the Determinable Information to be relevant to the work that the Receiver must complete to render bills to the Clients. This applies regardless of whether the Clients have agreed to the Sliding Fee Structure. The Determinable Information is thereby ordered under the protection of the Protocol.

Approvals of Activities and Fees of the Receiver and its Counsel

[75] The activities outlined in the Receiver's First Report and Supplemental Report appear to be reasonable and consistent with its mandate. No interested party has objected to what is described. The fees for which approval is sought are supported by the fee affidavits and are consistent with the activities described in the Receiver's First Report. No objection has been voiced by any interested party.

[76] In determining whether to approve the fees of a receiver and its counsel, the court should consider whether the remunerations and disbursements incurred in carrying out the receivership were fair and reasonable. See: *Bank of Nova Scotia v. Diemer*, 2014 ONCA 851, 20 C.B.R. (6th) 292, at paras. 33, 45. This receivership has raised some novel challenges for the receiver, in

dealing with an assets and property (Client Files) that are subject to a host of other regulatory, statutory and of legal considerations.

[77] Having reviewed the material filed in support of the activities of the Receiver, its fees and the fees of its counsel, and in the absence of any objection, they appear fair and reasonable and are approved.

[78] The fees for which approval is being sought, as I understand it, pre-date the fees and disbursement associated with this motion.

Costs of the Motion

[79] This motion by the Receiver for the approval and imposition of the Sliding Fee Structure was not brought lightly. Much thought and creativity went into the Sliding Fee Structure and the Proposal. It was proposed with the legitimate objective of attempting to streamline what will be a difficult and time-consuming process of issuing and negotiating bills and individual assessments or negotiations. Even though the Sliding Fee Structure was not accepted by all New Counsel and ultimately not approved by the court, it was not an unreasonable approach for the Receiver to pursue.

[80] The Receiver was entitled and authorized to seek the direction and oversight regarding this issue from the court pursuant to the provisions of the Appointment Order, in particular, paragraph 31. This is to ensure that its administration of the estate is conducted in the most efficient and cost-effective manner, while respecting the rights of all affected parties.

[81] The Receiver's request for production of the Determinable Information has been granted.

[82] The Receiver did not specifically ask for any costs to be awarded to it by parties opposing the motion and did not upload a costs outline onto CaseLines. To the extent it seeks costs for itself and its counsel as part of the fees and disbursements in the receivership, that will be addressed on a future motion. Those amounts would not be paid by the Clients or New Counsel, if awarded.

[83] Although some of the New Counsel did ask for costs in their factums, they did not upload any costs outlines into CaseLines either.

[84] Success was divided on the two primary issues such that costs awards going one way in favour of the Receiver and the other in favour of the New Counsel might cancel each other out. Further, since much of the dispute is over legal fees to begin with, I see no advantage in further exacerbating that dispute by piling on further costs from this motion that I have found to have been reasonable for the Receiver to bring.

[85] In the exercise of my discretion under s. 131 of *Courts of Justice Act*, R.S.O. 1990, c C.43 and having regard to the relevant factors under r. 57 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 plus the particular circumstances of this case, I am not awarding costs of this motion to be paid by any of the parties opposite in interest to each other on this motion.

Final Disposition

[86] The following orders and directions are made:

a. The Receiver's First Report and Supplemental Report and the activities of the Receiver and its counsel set out therein are approved.

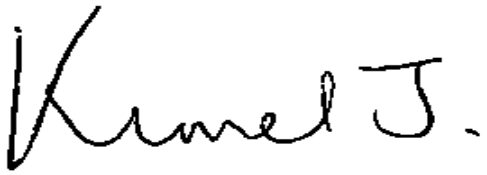
b. The professional fees of the Receiver and its counsel as set out in the First Report are approved.

c. The Sliding Fee Structure proposed by the Receiver will not be imposed upon New Counsel and/or Clients who have not, or do not, agree to it.

d. The Receiver's authority with respect to the requirement of New Counsel to disclose information with respect to Client Files is expanded to require the production of the Determinable Information.

e. There shall be no costs of this motion.

f. This endorsement and the orders and directions contained in it shall have immediate effect as a court order without the necessity of the formal issuance and entry of an order, although any party may take out an order by following the procedure under r. 59.



Kimmel J.

Date: October 28, 2022