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COURT FILE NUMBER	2203 12557
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
APPLICANT	ROYAL BANK OF CANADA
RESPONDENTS	FAISSAL MOUHAMAD PROFESSIONAL CORPORATION, MCIVOR DEVELOPMENTS LTD., 985842 ALBERTA LTD., 52 DENTAL CORPORATION, DELTA DENTAL CORP., 52 WELLNESS CENTRE INC., PARADISE MCIVOR DEVELOPMENTS LTD., MICHAEL DAVE MANAGEMENT LTD., FAISSAL MOUHAMAD and FETOUN AHMAD also known as FETOUN AHMED
DOCUMENT	**BRIEF AND AUTHORITIES OF THE RECEIVER**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	McMillan LLP TD Canada Trust Tower 1700, 421 – 7th Avenue SW Calgary, Alberta T2P 4K9 **Attention: Adam Maerov/Kourtney Rylands/ Preet Saini** Telephone: (403) 531-4700 Fax: (403) 531-4720 File Number: 293571

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TAB A

Brief of the Receiver

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A. INTRODUCTION

1. This brief is submitted on behalf of MNP Ltd. in its capacity as receiver and manager (the **"Receiver**") of the Companies (defined in the Ninth Report of the Receiver) ("**Ninth Report**") for the application before the Honourable Justice K. Feth on July 17, 2023.

2. The Receiver seeks the following at the application on July 17, 2023:

   a. Relief that was adjourned from May 8, 2023 at the request of interested parties and then re-scheduled to be heard on July 17, 2023 by an Order granted on June 13, 2023, being:

      i. Approval of the Receiver's professional fees and disbursements and those of its legal counsel ("**Professional Fees**") for the period of January 1 to March 31, 2023, including an estimate to complete the administration of the receivership proceedings for 52 Wellness Centre Inc. (the "**Jan-Mar Fee Approval**");

      ii. Approval of a sale process (the "**985842 Sale Process**") for all of 985842's right, title and interest, if any, in and to the limited partnership units (the "**LP Units**") issued by InvestPlus Master Limited Partnership ("**InvestPlus LP**"), the class A units (the "**Class A Units**") issued by in InvestPlus Real Estate Investment Trust ("**InvestPlus REIT**") and/or any claims in connection with the LP Units or the Class A Units;

      iii. In connection with the 985842 Sale Process, directing InvestPlus LP and InvestPlus REIT to:

         1. provide the Receiver with their respective most recent audited and unaudited financial statements; and

         2. issue a letter substantially in the form attached as "Schedule 1" to the Seventh Report of the Receiver dated May 8, 2023 to all of the holders of the LP Units and Class A Units ("**985842 Letter**"); and

   b. The following additional relief:

      i. Approval of the actions, activities, and conduct of the Receiver in administering these receivership proceedings, as described in the Ninth Report, provided that

only the Receiver, in its personal capacity and with respect to its own personal liability, shall be entitled to rely upon or utilize in any way such approvals;

ii. Approval of the Interim Statements of Receipts and Disbursements for periods ended July 3, 2023 for FMPC and DDC, 52 Dental, MDML and 985842; and

iii. Approval of Professional Fees for the period of April 1 to May 31, 2023 ("**April-May Fee Approval**").

3. This brief addresses two issues: (i) approval of Professional Fees of the Receiver and its legal counsel for the period of January 1 to May 31, 2023, and (ii) whether the 985842 Sale Process (defined above and described in the Seventh Report of the Receiver and in the Ninth Report) ought to be approved.

B. RELEVANT HISTORY

a. 985842 Sale Process Approval

4. As set out in the Seventh Report, 985842 is the owner of the Investment.

5. The Investment was listed, in a statement of account from InvestPlus REIT, as having a market value of approximately $1.2 million as at June 30, 2022.

6. Based on information provided by InvestPlus, the Receiver understands as follows:

a. InvestPlus LP has taken the position that LP Units were converted to Class A Units, which were subsequently cancelled and, as such, have no value. The Receiver's legal counsel has reviewed the information provided and determined that the conversion of the LP Units and the subsequent cancellation of the Class A Units were likely not completed pursuant to the express terms of the various underlying agreements.

b. InvestPlus LP and InvestPlus REIT filed a statement of claim against various parties, including 985842, asserting that they were defrauded with respect to an offer to purchase a building located at 5018 45 Street in Red Deer, Alberta, (the "**Offer to Purchase**") pursuant to which the LP Units and the Class A Units were issued (the "**Litigation**").

c. In connection with the Litigation, InvestPlus LP applied to the Court for an Order rescinding the Offer to Purchase on the grounds of an alleged fraud perpetrated against InvestPlus by 985842, Dr. Mouhamad and others prior to the Receiver's appointment. To

date, there have been no findings of fraud by the court and no order for rescission has been granted.

7. In light of the foregoing, 985842 may still be the owner of the LP Units and/or the Class A Units and/or may have a claim against InvestPlus LP and/or InvestPlus REIT in relation to the LP Units and/or the Class A Units.

8. In the Receiver's view, efforts to realize on the LP Units and the Class A Units or the pursuit of any claims against InvestPlus LP and/or InvestPlus REIT can best be pursued outside of the receivership proceedings since these efforts may take an extended period of time and there are limited funds available in the estate of 985842 with which to pursue any such litigation.

9. The 985842 Sale Process involves the issuance by 985842 of the 985842 Letter to secured claimants in the receivership proceedings for FMPC and DDC, 52 Wellness and 985842 and to all holders of LP Units or Class A Units.

10. The 985842 Sale Process will be conducted as follows after issuance of the 985842 Letter:

a. Additional information related to the Investment will be made available to interested parties in an electronic data room, upon the execution of a non-disclosure agreement.

b. Any sale of the Investment would be on an "as is, where is" and "without recourse" basis with no representations or warranties of any kind.

c. Should any letter of intent be submitted that results in the Receiver entering into an offer to purchase with respect to the Investment, such offer will be subject to Court approval.

11. The application for approval of the 985842 Sale Process was originally scheduled to be heard on May 3, 2023. Prior to that hearing, counsel for InvestPlus requested an adjournment because he was not available and potentially intended to object to some or all of the relief being sought. The Receiver consented to that adjournment.

12. The Receiver is not currently aware of any specific opposition to approval of the 985 Sale Process.

b. <u>Fee Approval</u>

13. The Jan-Mar Fee Approval was also originally scheduled to be heard on May 3, 2023. Prior to that hearing, counsel for Jovica Property Management Ltd. ("**JPML**"), Solar Star Holdings Inc. ("**Solar Star**"),

1245233 Alberta Ltd. ("**1245233**"), 1105550 Alberta Inc. ("**1105550**"), and 1193770 Alberta Ltd. ("**1193770**", collectively the "**Jovica Group**") requested an adjournment so that the Jovica Group had an opportunity to ask questions of the Receiver's professional fees and those of its legal counsel.

14. The Receiver consented to the adjournment requested by the Jovica Group.

15. Following unsuccessful efforts to re-schedule the adjourned relief with various interested parties, on June 13, 2023 the Receiver sought and obtained an order scheduling the Jan-Mar Fee Approval and 985842 Sale Process approval relief to be heard on July 17, 2023.

16. The parties then entered into the following agreed timetable for the Receiver to respond to written interrogatories to be submitted by the Jovica Group:

a. June 15 – written interrogatories to be provided;

b. June 26 – responses to be provided by the Receiver;

c. July 4– follow-up questions to be provided by counsel for the Jovica Group, if any;

d. July 10 – follow -up answers.

17. Counsel for the Jovica Group provided its written interrogatories on June 15, 2023.

18. The Receiver responded to written interrogatories submitted by the Jovica Group on June 23, 2023. The Receiver's responses to interrogatories are found at Schedules 17 and 18 of the Ninth Report.

19. Counsel for the Jovica Group advised on July 4, 2023, that it did not have follow-up questions.

20. The Receiver is not currently aware of any specific opposition to approval of the Jan-Mar Fee Approval.

C. ISSUES

a. Whether the 985842 Sale Process ought to be approved; and

b. Whether the Receiver's Professional Fees and those of its legal counsel for the period of January 1 to May 31, 2023 are fair and reasonable, and ought to be approved.

D. LAW AND ANALYSIS

a. The 985842 Sale Process Ought to be Approved

21. Counsel for InvestPlus has asked the Receiver for a case in which a court approved a sale of disputed property by a Receiver.

22. There is an Alberta receivership decision entirely analogous to the case before this Court. In *Bank of Montreal v Calgary West Hospitality Inc.*, 2011 ABQB 293 ("***Calgary West Hospitality***"), the Receiver sought to approve a sale process for a chose in action. The Receiver was of the view that more could be realized for the estate by putting the chose in action up for sale than by pursuing the cause of action itself.

23. In the course of approving the receiver's intended sale process for a chose in action, Justice Topolniski held the following (paras 30 to 37):

> [30] Section 247 of the *BIA* specifies that a receiver must act honestly and in good faith and deal with the property of the insolvent company in a commercially reasonable manner.
>
> [31] The Receiver here is of the view that more can be realized for the estate by putting the Cause of Action up for bidding by the Defendants and CES (the most interested parties to the proposed litigation) and by BMO (the "most interested" creditor), than by pursuing the Cause of Action itself at the expense of the estate.
>
> [32] There is case law which supports the Receiver's proposal to put the Cause of Action up for bids. In **Re Katz** (1991), 6 C.B.R. (3d) 211 (Ont. Ct. (Gen. Div.)), Farley J. considered an application to set aside the sale of a lawsuit by a trustee in bankruptcy who had sold a piece of litigation after seeking sealed bids from the only two likely bidders, the "parties friendly to the two sides of the action." The highest and successful bidder was a company owned by the defendants to the litigation, which beat out the bankrupt. Mr. Justice Farley observed that the result of the sale was a settlement of the lawsuit for the price of the assignment, concluding that the process and result were legitimate.
>
> [33] Farley J. compared (at para. 5) the trustee's duty to that of a receiver. Citing ***Royal Bank of Canada v. Soundair Corporation*** (1991), 1991 CanLII 2727 (ON CA), 4 O.R. (3d) 1 (C.A.)), he considered the following to be factors relevant to assessing the propriety of a receiver's action in selling assets:
>
> (i) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;
>
> (ii) the interests of all parties;
>
> (iii) the efficacy and integrity of the process; and
>
> (iv) whether there has been unfairness in the working out of the process.
>
> [34] In my view, these considerations also apply to a receiver's intended sale process.

> [35] There are many ways that a receiver can go about selling an asset. Where, as here, the asset is an unusual one, the court should be open to creative processes to maximize recovery for the estate. In ascertaining whether a suggested process is appropriate, the court's concern (as on an application to approve a sale completed by a receiver) should be whether the process is reliable, transparent, efficient, fair and one which guards the parties' interests.
>
> [36] The Defendants do not suggest that the proposed bidding process would constitute champerty and maintenance. Given the commercial interests at stake, I agree (***1239745 Ontario Ltd. v. Bank of America Canada***, ([1999] 0.J. No. 3178 at para. 67 (S.C.J.) (QL)). They simply take the position that neither BMO nor CES should participate in the bidding. They offer no alternatives, presumably as they wish to be the only bidder.
>
> [37] Like Farley J. in ***Re Katz***, I consider the process of calling for tenders one that invites fairness (at para.12). A bid process or auction involving the only directly interested parties, the Defendants, CES and BMO would provide an efficient and commercially reasonable approach to monetizing the asset. The question is whether it would be fair and one which guards the parties' interests.[1]

24. The Receiver's proposed 985842 Sale Process meets all of the criteria set out in *Calgary West Hospitality* (citing *Soundair*). The 985842 Sale Process is a transparent and efficient process that is fair to all parties. The 985842 Letter makes it clear that the Investment is disputed and that there is pending litigation to rescind the Offer to Purchase. All documents relevant to the Investment in the Receiver's possession will be uploaded to a data room for review by prospective purchasers who execute non-disclosure agreements.

25. Any sale will be completed on an "as is, where is" and "without recourse" basis. Any prospective purchaser will be provided with information to enable it to make an independent assessment of the risk and value of the Investment. The Receiver will not make any representations or warranties regarding the value or recovery of the Investment.

26. The Investment appears to have been obtained as part of the overall transaction with the Offer to Purchase. The Investment is accordingly related to the ongoing Litigation and 985842's rights to the Investment are disputed. Given the foregoing, the Receiver has concluded that realization efforts for the Investment can be pursued more efficiently outside of the receivership proceedings since these efforts may take an extended period of time and there are limited funds available in the estate of 985842 with which to pursue any resulting litigation.

[1] *Bank of Montreal v Calgary West Hospitality Inc.*, 2011 ABQB 293 at paras 30 -37 [TAB 1].

27. Any sale following receipt of offers (if any) will be subject to further Court approval and any affected parties, including InvestPlus, will have an opportunity to make submissions regarding the impact of a proposed sale on their interests at that time.

b. <u>the Receiver's professional fees and those of its legal counsel for the period of January 1 to May 31 are fair and reasonable, and ought to be approved</u>

28. Recent case law has held that the usual course is for a Receiver to obtain approval of professional fees from time to time during the course of a receivership rather than altogether at the conclusion of a receivership.[2]

29. The Receivership Orders contain the same language regarding passing of accounts, which reads as follows:

> **The Receiver and counsel to the Receiver shall be paid their reasonable fees and disbursements, in each case incurred at their standard rates and charges…**
>
> **The Receiver and its legal counsel shall pass their accounts <u>from time to time</u>.**

30. The governing principle in assessing a receiver's fees is that they should be measured by the fair and reasonable value of its services.

31. The factors to be considered on application for approval of a receiver's fees and those of its legal counsel were set out by the court in *Servus Credit Union Ltd v Trimove Inc,* 2015 ABQB 745 and include the following[3]:

a. the nature, extent and value of the assets;

b. the complications and difficulties encountered; the degree of assistance provided by the debtor;

c. the time spent;

d. the receiver's knowledge, experience, and skill;

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[2] *Jethwani v Damji,* 2018 ONSC 4246 at para 34 [TAB 2].

[3] *Servus Credit Union Ltd v Trimove Inc,* 2015 ABQB 745 at para 28, citing ***Federal Business Development Bank v Belyea*** 1983 CanLII 4086 (NB CA), [1983] N.B.J. No. 41 and ***Bank of Nova Scotia v Diemer (c.o.b. Cornacre Cattle Co.)*** 2014 ONCA 851 [TAB 3].

e. the diligence and thoroughness displayed;

f. the responsibilities assumed;

g. the results of the receiver's efforts; and

h. the cost of comparable services when performed in a prudent and economical manner.

32. In *Winalta*, the Court held that the court officer bears the onus to provide the court with cogent evidence on which the court can base its assessment of whether the fee is fair and reasonable in all of the circumstances.[4]

33. The Receiver and its legal counsel filed fee affidavits and responded to detailed written interrogatories (the "**Receiver Interrogatory Responses**") and ("**McMillan Interrogatory Responses**") received from the Jovica Group in relation to its fees for the Jan-Mar Fee Approval. The Receiver's responses are found at Schedules "17" and "18" of the Ninth Report. Both the Receiver and its legal counsel have also filed fee affidavits for the April-May Fee Approval. All invoices (redacted for privilege) have been provided for the period between January 1 to May 31, 2023.

34. Accordingly, the Court ought to have all necessary information to assess whether or not the Professional Fees are fair and reasonable in all of the circumstances.

35. These receivership proceedings involved six estates, the sale of three parcels of real estate and two dental clinics, the development and implementation of a unique claims process to address disputes regarding ownership of assets and competing or potentially competing secured claims and responses to a number of stakeholder applications and extensive dialogue by the Receiver and its counsel with these stakeholders.

36. The Receiver negotiated the sale of one parcel of real estate, referred to in the Ninth Report as the DV Unit, which failed to close after significant structural issues came to light that resulted in a potential purchaser refusing to proceed with the sale. In addition, the sale of two of the three parcels of land and the two dental clinics were extended due to the inability of the purchaser to close the transactions as contemplated, which required additional management of those assets by the Receiver and additional amendments to the various underlying agreements/ negotiations with the purchaser. Ultimately, the various sales were completed, thereby maximizing the recoveries in the various estates.

[4] *Re Winalta Inc*, 2011 ABQB 399 at para 32 [TAB 4].

37. The Interim Statements of Receipts and Disbursements for FMPC and DDC, 52 Dental, MDML and 985842 appended to the Ninth Report of the Receiver for various periods ended July 3, 2023 and the Interim Statement of Receipts and Disbursements for 52 Wellness for the period from September 16, 2023 to April 24, 2023 appended to the Seventh Report of the Receiver dated May 1, 2023 ("**Seventh Report**") demonstrate that the Receiver's efforts generated total receipts in the amount of approximately $8.4 Million in relation to the Companies.

38. The Receiver's knowledge, experience, and skill and that of its legal counsel are described in detail in the Schedule to the Receiver Interrogatory Responses and paragraph one of the McMillan Interrogatory Responses respectively.

39. The steps taken by the Receiver and its legal counsel relevant to the Jan-Mar Fee Approval are described in detail in the following:

a. Schedules 2 and 3 to the McMillan Interrogatory Responses

b. Paragraphs 32 and 35 of the Receiver Interrogatory Responses

c. Schedules 3, 4, 6, and 7 of the Receiver's supplemental response to the Jovica Group interrogatories for MDML and 985842;

d. The Exhibits to the Fee Affidavit of the Receiver sworn May 2, 2023

e. Exhibit "A" to "C" to the Affidavit of Fees of P. Saini sworn May 4, 2023

f. Exhibits "A" and "B" to the Affidavit of Fees of P. Saini sworn July 6, 2023

g. Paragraph 10 of the Seventh Report and paragraph 11 of the Ninth Report

40. The Receiver submits that it acted diligently and thoroughly, and its efforts to date have resulted in the sale of substantially all material assets of the debtors.

41. The Receiver submits that its professional fees and disbursements and those of its legal counsel are fair and reasonable in the circumstances and in each case were charged at or below their standard hourly rates. In addition, these fees have been duly incurred by the Receiver (assisted where appropriate by its legal counsel) being required to carry out the duties of the Receiver in accordance with the provisions of the receivership orders.

E. **RELIEF REQUESTED**

42. The Receiver respectfully requests that this Honourable Court (i) grant the Jan-Mar Fee Approval and the April-May Fee Approval, (ii) approve the 985842 Sale Process proposed by the Receiver, and (iii) grant the other relief sought in the Application.

TAB B
Authorities

Court of Queen's Bench of Alberta

Citation: Bank of Montreal v. Calgary West Hospitality Inc., 2011 ABQB 293

Date: 20110429
Docket: 0903 12151
Registry: Edmonton

Between:

Bank of Montreal

Plaintiff

- and -

Calgary West Hospitality Inc., Gamehost Limited Partnership, Gamehost Management Inc., Darcy Will and David Will

Defendants

Reasons for Judgment
of the
Honourable Madam Justice J.E. Topolniski

I. Introduction

[1] A consent receivership order granted on August 13, 2009 (the Receivership Order) appointed Deloitte & Touche Inc. the receiver and manager (Receiver) of the assets and undertakings of Calgary West Hospitality Inc. (Calgary West).

[2] There are two interconnected applications now before the court:

1. The Defendants' application for leave to commence litigation (Cause of Action) against the Calgary Exhibition and Stampede Limited (CES), which they say they are entitled to pursue at their own cost and for their own benefit under an agreement made with the Plaintiff Bank of Montreal

(BMO). The Receiver and BMO oppose the application on the basis that there is potential value in the Cause of Action, which should be monetized for the benefit of the creditors of Calgary West.

2. The Receiver's application for directions concerning marketing the Cause of Action. The Receiver suggests a closed auction involving BMO, the Defendants and CES. The Defendants oppose the application, urging that any bidding process for the Cause of Action should exclude BMO and CES.

II. Background

[3] The Defendant Calgary West is a private company that was involved in the operation of a casino on the Calgary Stampede grounds. The casino and grounds are owned by CES. BMO provided a commercial debt facility to Calgary West, secured by assignments of rents and leases and a charge against all of its present and after acquired property, including "choses in action of every kind or nature." The Defendants Gamehost Limited Partnership, Darcy Will and David Will all gave limited guarantees of Calgary West's obligations to BMO. The Defendant Gamehost Management Inc. is the general partner of Gamehost Limited Partnership. After February or March 2009, Calgary West's account was under the management of BMO's special accounts handling unit.

[4] On July 27, 2009, Calgary West informed BMO that it could no longer fund casino operations and intended to cease operations by August 7, 2009 - two days before the opening of the Calgary Stampede.

[5] BMO commenced action against the Defendants on August 6, 2009. It claims that Calgary West owed it $41,245,554.80 at the time.

[6] Counsel for BMO and the Defendants started negotiating a form of receivership order while their clients engaged in simultaneous settlement discussions that included Calgary West proposing to "hand over the casino keys" to BMO and to waive the notice requirement under s. 244 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), and the guarantors proposing a payment on the guarantees in satisfaction of their obligations.

[7] The following is a summary of the pertinent events (taken in part from certain "without prejudice" correspondence relating to the settlement discussions entered into evidence on this application by BMO, without objection by the Defendants):

(a) On July 31, 2009, the Defendants offered to resolve matters with BMO in part by making a deferred $20,500,000 cash payment in satisfaction of the guarantors' obligations, entering into a management agreement with the

receiver, co-operating with the receiver, and sharing with BMO in any surplus at the end of the receivership.

(b) On August 6, 2009, BMO responded with a counter-proposal that referred to a receiver and potential for a management agreement with the receiver, but pointing out that any surplus would be paid to other creditors in priority to the Defendants.

(c) On August 10, 2009, BMO's counsel presented a draft receivership order to Defendants' counsel that provided in clause 3(j) of the order for the usual power of a receiver to prosecute, defend and settle litigation. That provision also required the receiver to investigate the Cause of Action and to report to the court on its investigation on notice to BMO and the Defendants if it chose not to seek court approval to sue CES.

(d) Defendants' counsel responded on August 10, 2009 by e-mail (the letter is incorrectly dated July 30, 2009) seeking a change to clause 3(j) (the Requested Change) to "…reflect that the Defendants are at liberty, at their cost, to pursue the claim against Calgary Exhibition & Stampede Limited in the event that the Receiver elects not to do so..."

(e) The Defendants made another settlement offer on August 11, 2009 for $20,500,000 to be paid by the guarantors by installments, the last of which would occur by September 20, 2009. This offer also spoke of a management agreement with the receiver.

(f) BMO's counsel responded on August 11, 2009, accepting the money payment offered by the guarantors and offering this comment about the proposed management agreement: "…BMO cannot fetter the discretion of the Court and the entering into any Management Agreement by Deloitte & Touche would be subject to Court approval. That said, if BMO, as the largest creditor of Calgary West and Deloitte, as the Receiver support entering into a Management Contract with your client's management company, we are hopeful that the Court would be persuaded that entering into a Management Contract was in the best interests of all parties." Aspects of BMO's letter of August 6th referencing the receivership also were incorporated by reference.

(g) On August 12, 2009, a revised draft receivership order incorporating the Requested Change was circulated by counsel for BMO to counsel for the Alberta Gaming and Liquor Commission, Deloitte & Touche, the Defendants and CES (the August 12th Draft). Clause 3(j) of the August 12th Draft read, in part:

> …In respect to potential for commencement for proceedings as against (CES), the Receiver shall investigate the commencement of such proceedings and shall report to this Court in respect thereto upon notice to BMO and the Defendants and in the event that the Receiver does not seek the approval of the Court to commence such proceedings, some or all of the Defendants shall be authorized to commence such proceedings. The Receiver shall not settle or compromise any claim against CES without first obtaining the approval of the Defendants and failing such approval, the Order of this Court." [Emphasis added.]

(h) Deloitte & Touche's counsel indicated that leave of the court would be required before the Defendants could pursue the Cause of Action. On being advised of that, Defendants' counsel sent a letter to BMO's counsel on August 12th (the "August 12th Letter") saying:

> You have advised that the solicitor for the Receiver has requested a further change to paragraph 3(j) of the Receivership Order. I do not see the need for the change. However, I also do not see the need for incurring additional costs for the Receiver's solicitor to attend in Court to argue the matter. It does not make economical sense. Having said this, please provide me with a revised form of Receivership Order that includes the change requested for the solicitor for the Receiver.

(i) The August 12th Draft was amended to reflect the Receiver's request, signed by the Defendants' counsel, and returned to BMO's counsel later in the day on August 12, 2009.

(j) The Receivership Order was granted on August 13, 2009. The relevant portion of clause 3(j) of the Receivership Order reads as follows:

> …In respect to potential for commencement for proceedings as against (CES), the Receiver shall investigate the commencement of such proceedings and shall report to this Court in respect thereto upon notice to BMO and the Defendants and in the event that the Receiver does not seek the approval of the Court to commence such proceedings, some or all of the Defendants may seek leave of the Court to commence such proceedings. The Receiver shall not settle or compromise any claim against CES without first obtaining the approval of the Defendants and falling such approval, the Order of this Court." [Emphasis added.]

(k) The guarantors' settlement with BMO was concluded in October 2009. Monies were paid and releases given.

(l) Since its appointment, the Receiver has carried out its mandate, including operating the casino while it was being marketed, and investigating the proposed litigation. A broad marketing effort resulted in sale of the casino for nine million dollars to corporate and trust vehicles controlled by CES. [The Receiver's Third Report to the Court indicates that it had been proposed that concurrent with the sale, CES would acquire all or a portion of the debt and security held by BMO over Calgary West's present and after acquired property. It is unknown whether that occurred.] The sale was approved by the court in May 2010.

(m) Even with the monies paid on the guarantees and the net proceeds from the casino sale, BMO has sustained a shortfall of more than thirty million dollars. The Receiver reported in May 2010 that it anticipated there would be no funds available for distribution to the unsecured creditors.

[8] The Receiver has not sought the approval of the court to pursue the Cause of Action against CES itself. As a result, the present cross-applications have been brought. The Cause of Action is a chose in action which, subject to any agreement between BMO and the Defendants and the effect of clause 3(j) of the Receivership Order, is captured by the security made in BMO's favour.

III. The Issues

[9] The interconnected issues in relation to the cross-applications are:

A. Should the Defendants be granted leave to pursue the Cause of Action at their own cost and for their own benefit?

B. If not, how should the Receiver realize on the value of the Cause of Action?

IV. The Parties' Positions

[10] The Defendants assert that it would be unfair and constitute a miscarriage of justice to deny them leave to pursue the Cause of Action at their own cost and for their own benefit, since BMO agreed that they could do so.

[11] Alternatively, they argue that if leave is denied and the Cause of Action is put to auction, BMO and CES should be excluded from the bidding process; BMO because of the alleged agreement and CES because it is not a known creditor of Calgary West.

[12] BMO contends that the wording of clause 3(j) of the Receivership Order is sufficient evidence of it having reserved the right to argue against the Defendants being allowed to pursue the Cause of Action if the Receiver elected not to do so itself. BMO takes the position that there was no agreement between it and the Defendants. It says that it did not require a consent receivership order as a condition of the settlement with the guarantors and was merely deferring decision-making. It says that it only consented to the final Receivership Order and that the August 12th Draft was just that, a draft. It asserts that it has not released its security in the Cause of Action and wants to bid on it.

[13] The Receiver submits that the Defendants' leave application supports a finding that the Cause of Action is an asset of some value that should not be given away for free. It contends that even if the alleged agreement between BMO and the Defendants exists, it cannot override the Receiver's fiduciary duty to maximize recovery for the creditors or derogate from the court's jurisdiction. The Receiver wants to put the Cause of Action to a bidding process involving the Defendants, CES and BMO as the "most interested" parties.

V. Analysis

A. Should the Defendants be Granted Leave to Pursue the Cause of Action at Their Own Cost and for their Own Benefit?

[14] The Defendants' leave application hinges on whether they can establish in this summary hearing that they should be allowed to pursue the Cause of Action at their own cost and for their own benefit because:

1. all interested parties agreed that they could do so; or

2. the Cause of Action has no value for the estate; or

3. there is some reason why the estate should not benefit from realizing on the value of the Cause of Action.

1. Is there an agreement by all interested parties?

[15] The Defendants contend that BMO agreed that they could pursue the Cause of Action at their own cost and for their own benefit if the Receiver elected not to do so, as evidenced by the August 12th Draft.

[16] However, while the Cause of Action remains the property of Calgary West and while BMO has security in the Cause of Action, neither has control over that property. It is the Receiver which has possession and control over the Cause of Action. There is no dispute that the Receiver refused to agree to the August 12th Draft and insisted that the Defendants would have to seek court approval to commence the litigation.

[17] The Defendants do not allege any agreement on the part of the Receiver to consent to their leave application. Indeed, Victor Kroeger, who swore an affidavit on behalf of the Receiver, deposed that at no time was the Receiver a party to any agreement with the Defendants or any other party to the effect that the Defendants could proceed, for their own benefit, with a claim against CES should the Receiver elect not to pursue such a claim.

[18] Even if BMO did enter into the agreement alleged by the Defendants, that agreement would bind only those two parties. At most, BMO could have agreed to compromise only its own position, not that of Calgary West's other creditors. If the implication of the alleged agreement is that BMO would relinquish its security in the Cause of Action or not take any benefit from it, the Cause of Action would remain the property of the Defendants. That property would still fall under the receivership and should be available to benefit the other creditors. The Defendants do not allege that Calgary West's other creditors agreed that the Defendants could pursue the Cause of Action if the Receiver decided not to do so.

[19] The Receivership Order speaks for itself. The language of clause 3(j) is clear. Leave is required before the Defendants can pursue the Cause of Action. For their own reasons and based on their own perceptions of the consequences, the Defendants agreed to that language. It is a valid, subsisting and binding order. It is also a sensible order as it properly recognizes and preserves the functions of the Receiver and the court.

[20] A court-appointed receiver is an officer of the court with fiduciary obligations to the estate (*Bennett on the PPSA (Ontario)*, 3rd ed. (Markham, Ont.: Butterworths, 2006) at p. 53). A court appointed receiver is not subject to control by the party appointing it or by anyone other than the court.

[21] The Receiver here has not sought the approval of the court to pursue the Cause of Action at the expense of the estate, but rather is proposing a limited sales process which it believes could result in the estate obtaining maximum value and realization on the Cause of Action.

2. Does the Cause of Action have some value for the estate?

[22] I agree with the Receiver that the Defendants' leave application and BMO's support for the Receiver's proposal to allow the Defendants, BMO and CES to bid on the Cause of Action are evidence that the Cause of Action has some value. As a result, the potential exists for the creditors to benefit from a sale of this property.

[23] Having investigated the Cause of Action, the Receiver has elected not to pursue it. Presumably, if the Receiver was of the view that the Cause of Action might have a value of over 30 million dollars, it would have decided otherwise.

[24] As BMO is Calgary West's principal secured creditor (unless its security has been assigned to CES) and as it is still owed over 30 million dollars, the reality is that it is the only creditor which could benefit from the proceeds received from a sale of the Cause of Action, unless the Defendants can prove that BMO agreed to relinquish its security in that asset and/or agreed not to take any benefit from the Cause of Action, in which case the other creditors of Calgary West might receive a benefit.

3. Is there some reason why the estate should not benefit from realizing on the value of the Cause of Action?

[25] No contractual, equitable or other reason has been cited by the Defendants why its creditors, other than BMO, should not benefit from a sale of the Cause of Action.

[26] The Defendants may have a cause of action against BMO if they can prove that the bank impliedly agreed not to contest their leave application. However, that need not be decided now. The Defendants can file a statement of claim against BMO if they choose to do so.

[27] The Defendants contend that the court should not allow a process that could result in BMO reneging on its agreement to allow them to pursue the Cause of Action at their own cost and for their own benefit.

[28] I agree that it would be inequitable to allow BMO (and presumably any assignee of its security in the property of Canada West) to participate in the bidding and/or to benefit from a sale of the Cause of Action if the Defendants can prove that BMO expressly or impliedly agreed not to do so. That issue can be addressed in relation to the Receiver's application. However, as I have stated previously, even if the Defendants can prove the alleged agreement with BMO, that agreement cannot prejudice the rights of other creditors.

[29] The Defendants' application for leave to pursue the Cause of Action at their own cost and for their own benefit is denied.

B. How Should the Receiver Realize on the Value of the Cause of Action?

1. Bidding process

[30] Section 247 of the *BIA* specifies that a receiver must act honestly and in good faith and deal with the property of the insolvent company in a commercially reasonable manner.

[31] The Receiver here is of the view that more can be realized for the estate by putting the Cause of Action up for bidding by the Defendants and CES (the most interested parties to the proposed litigation) and by BMO (the "most interested" creditor), than by pursuing the Cause of Action itself at the expense of the estate.

[32] There is case law which supports the Receiver's proposal to put the Cause of Action up for bids. In ***Re Katz*** (1991), 6 C.B.R. (3d) 211 (Ont. Ct. (Gen. Div.)), Farley J. considered an application to set aside the sale of a lawsuit by a trustee in bankruptcy who had sold a piece of litigation after seeking sealed bids from the only two likely bidders, the "parties friendly to the two sides of the action." The highest and successful bidder was a company owned by the defendants to the litigation, which beat out the bankrupt. Mr. Justice Farley observed that the result of the sale was a settlement of the lawsuit for the price of the assignment, concluding that the process and result were legitimate.

[33] Farley J. compared (at para. 5) the trustee's duty to that of a receiver. Citing ***Royal Bank of Canada v. Soundair Corporation*** (1991), 4 O.R. (3d) 1 (C.A.)), he considered the following to be factors relevant to assessing the propriety of a receiver's action in selling assets:

> (i) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;
>
> (ii) the interests of all parties;
>
> (iii) the efficacy and integrity of the process; and
>
> (iv) whether there has been unfairness in the working out of the process.

[34] In my view, these considerations also apply to a receiver's intended sale process.

[35] There are many ways that a receiver can go about selling an asset. Where, as here, the asset is an unusual one, the court should be open to creative processes to maximize recovery for the estate. In ascertaining whether a suggested process is appropriate, the court's concern (as on an application to approve a sale completed by a receiver) should be whether the process is reliable, transparent, efficient, fair and one which guards the parties' interests.

[36] The Defendants do not suggest that the proposed bidding process would constitute champerty and maintenance. Given the commercial interests at stake, I agree (***1239745 Ontario Ltd. v. Bank of America Canada***, ([1999] 0.J. No. 3178 at para. 67 (S.C.J.) (QL)). They simply take the position that neither BMO nor CES should participate in the bidding. They offer no alternatives, presumably as they wish to be the only bidder.

[37] Like Farley J. in ***Re Katz***, I consider the process of calling for tenders one that invites fairness (at para.12). A bid process or auction involving the only directly interested parties, the Defendants, CES and BMO would provide an efficient and commercially reasonable approach to

monetizing the asset. The question is whether it would be fair and one which guards the parties' interests.

2. Who should be invited to participate?

[38] The Defendants argue that it would make no sense to include CES in the bidding process. However, as the intended defendant in the Cause of Action, CES may well have an interest in bidding as a sale to it would constitute a settlement of the lawsuit.

[39] BMO, assuming it has not assigned its security to some other entity, is the principal secured creditor of Canada West and has an interest in recovering as much as possible on the debt owed to it.

[40] As previously stated, the Defendants urge that it would be unfair to allow BMO (and presumably any assignee of its security in the property of Canada West) to participate in the bidding and/or to benefit from a sale of the Cause of Action since it agreed that the Defendants could pursue the Cause of Action for their own benefit if the Receiver elected not to do so. The Defendants, in bringing their own application and in opposing BMO's right to bid on the Cause of Action, in essence are seeking a form of summary judgment.

[41] It is helpful in framing the analysis to consider the following principles governing summary judgment:

1. The party who applies for summary judgment bears the evidentiary burden of proving all facts necessary to establish its claim on a balance of probabilities (***Pioneer Exploration Inc. (Trustee of) v. Euro-Am Pacific Enterprises Ltd.***, 2003 ABCA 298, 339 A.R. 165); ***Bank of Montreal v. Kalin*** (1992), 131 A.R. 397 (C.A.)). The evidentiary burden then shifts to the other party to prove that there is a genuine issue for trial, although the ultimate burden remains with the moving party.

2. It must be beyond doubt that no genuine issue for trial exists ***(Dow Chemical Canada Inc. v. Shell Chemicals Canada Ltd.***, 2010 ABCA 126 at para. 14, citing ***Tottrup v.Clearwater (Municipal District No. 99)***, 2006 ABCA 380 at paras. 9-10, 401 A.R. 88).

3. If the outcome of the case depends on the interpretation of a statute or document or some other issue of law arising from undisputed facts, the test is whether the issue of law can fairly be decided on the record before the court. It may be necessary to have a full trial if the legal issue is unsettled, complex or fact dependent, in order to provide a proper foundation for the decision (***Tottrup*** at para. 11).

[42] As to consideration for the agreement alleged by the Defendants, David Will, one of the Defendant guarantors and a director of Calgary West, deposed that:

> At the same time as the proposed Consent Receivership Order the Defendants proposed a settlement on the Guarantees which was accepted by the Plaintiff. The settlement included a Consent Receivership Order as well as the payment of $20,500,00.00 on the Guarantees. However, included in this settlement was the agreement of the Bank of Montreal that the Defendants could proceed with a claim for their own benefit, against the Calgary Exhibition and Stampede Limited in the event that the Receiver elected not to do so.

[43] While it is not entirely clear, this statement seems to suggest that it was a condition of the Defendants' agreement to consent to a receivership order and to reach a settlement on the guarantees that BMO would allow the Defendants to pursue the Cause of Action for their own benefit if the Receiver elected not to do so.

[44] The "without prejudice" correspondence entered into evidence does not disclose an express requirement by BMO for a consent receivership order as a condition of its settlement with the guarantors, nor an express requirement by the guarantors that the Defendants be allowed to pursue the Cause of Action as a condition of their settlement with the bank. However, there were repeated references to receivership that began with the Defendants' opening offer of July 31, 2009 and continued until the parties' attentions turned to drafting the receivership order.

[45] BMO contends that a consent receivership order was not a condition of BMO's settlement with the Defendants, but rather arose from Calgary West's notification of its intention to "hand over the keys" to BMO and its advice that BMO could "continue operations under its security."

[46] David Ross, the lead special accounts manager at BMO assigned to this loan, swore an affidavit in opposition to the Defendants' application. In questioning on that affidavit, he confirmed that settlement discussions with the guarantors and discussions concerning a consent receivership order were being held within the same time frame. However, he denied that the two were a package deal. He reluctantly acknowledged that he had had "no objection" to the Defendants' Requested Change, but later added that the August 12th Draft was a draft order which had to be agreed to by other counsel.

[47] As to the terms of the alleged agreement, the Defendants maintain that BMO's August 12th Draft included their Requested Change and accurately reflects the intentions of BMO and the Defendants and what actually was agreed to by them. It stresses that it was the Receiver and not BMO which sought amendment of clause 3(j).

[48] On August 10, 2009, counsel for the Defendants requested an amendment to the initial draft of the receivership order to "…reflect that the Defendants are at liberty, at their cost, to pursue the claim against Calgary Exhibition & Stampede Limited in the event that the Receiver

elects not to do so...” No mention was made of who was to receive the benefit if the Cause of Action was successfully litigated.

[49] The August 12th Draft stated: “... in the event that the Receiver does not seek the approval of the Court to commence such proceedings, some or all of the Defendants shall be authorized to commence such proceedings...” Again, no mention was made of who was to receive the benefit of pursuing the Cause of Action. Nor was mention made as to who would bear the cost of the litigation.

[50] In its submissions, BMO states that: “[o]n August 12, 2009, the Receivership Order was revised to reflect the changes requested by RMRF to paragraph 3(j) and was circulated ... for comment and agreement thereto.” At most then, BMO appears to be acknowledging that the August 12th Draft was intended to reflect the Requested Change that the Defendants be at liberty, at their cost, to pursue the Cause of Action.

[51] Murray Sutherland, a special accounts manager with BMO, deposed that:

1. Before the Receivership Order, BMO deferred making a decision about who would benefit from the proposed litigation as it was unnecessary to do so earlier;

2. Clause 3(j) of the Receivership Order allowed the parties to defer their decisions and advance all available arguments on a leave application;

3. There was no discussion about selling the proposed litigation before the Receivership Order or about BMO releasing its security in it.

4. BMO never entered into the agreement alleged by the Defendants.

[52] BMO is a sophisticated lender. It involved its special accounts branch and veteran insolvency counsel to deal with the Defendants and this receivership. Given the experience of those involved, I would have expected BMO to respond to the Defendants’ Requested Change with a clear statement that it wished to defer any decision on who should benefit from the Cause of Action, if that in fact was its intention. Instead, BMO’s counsel prepared and circulated the August 12th Draft, which incorporated the Requested Change. In doing so, BMO ran the risk that the Receiver would agree to the August 12th Draft. If BMO’s counsel had no objection to the Defendants’ Requested Change but questioned whether the Receiver might, why was that not communicated clearly? If BMO was concerned about fettering the court’s discretion and the need for court approval, why did it not provide for that in the April 12th Draft?

[53] I note that in communications dated August 11, 2009, the Defendants sought a management contract with the receiver as part of the settlement. BMO’s counsel responded, advising that BMO could not agree as it would fetter the court’s jurisdiction and that court approval was needed. He went on to say “…we are hopeful that the Court would be persuaded

that entering into a Management Contract was in the best interests of all parties." This is an unequivocal statement of position. If BMO had decided that it could not accede to the Defendants' Requested Change without the receiver's approval and, ultimately, court approval, it is surprising that it did not make a similarly clear statement of position. Rather, BMO's counsel simply circulated the August 12th Draft.

[54] BMO's explanation for the August 12th Draft, the position which it now takes, and the conflict in the evidence with respect to consideration for the alleged agreement raise questions of credibility, which cannot be determined summarily. In my view, there is a genuine issue for trial as to whether there was an agreement (aside from any reflected in the Receivership Order) between the Defendants and BMO concerning the Defendants' pursuit of the Cause of Action and, if there was such an agreement, what the express and implied terms of that agreement were.

[55] I am directing a trial of those issues. Counsel are to appear before me within the next 30 days in order to discuss the manner of proceeding.

[56] Should BMO be precluded from bidding on the Cause of Action in the interim? The tripartite test for an injunction is whether the applicant can demonstrate: (1) there is a serious question to be tried; (2) the applicant would suffer irreparable harm if the stay were refused; and (3) the balance of convenience favours the stay: ***Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.***, [1987] 1 S.C.R. 110, 38 D.L.R. (4th) 321; ***RJR-MacDonald Inc. v. Canada (A.G.)***, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385; ***Harper v. Canada (Attorney General)***, 2000 SCC 57; [2000] 2 S.C.R. 764.

[57] I have already concluded that there is a serious issue to be tried. The parties did not make submissions on the other parts of the tripartite test. Given that there may be a limitation period approaching in terms of the Cause of Action, I conclude that it would be more appropriate as an interim measure to direct the Receiver to file a claim in respect to the Cause of Action in order to preserve the rights of the Defendants and BMO. The Cause of Action can be put up for bidding after the trial of the issues between the Defendants and BMO, if appropriate. If no bids are received, the Receiver may discontinue the litigation. The Receiver may apply to the court for directions as to whether the estate or some other party should be responsible for any costs incurred by the Receiver in commencing the action.

[58] The Receiver and BMO are to have their costs of the Defendants' leave application. If the parties cannot agree on costs of the Receiver's application, they may speak to me on issue within the next 30 days.

Heard on the 24th day of March, 2011.
Dated at the City of Edmonton, Alberta this 29th day of April, 2011.

J.E. Topolniski
J.C.Q.B.A.

Appearances:

Richard J. Cotter Q.C.
for the Bank o Montreal

Douglas N. Tkachuk
for Gamehost Limited Partnership, Gamehost Management Inc., Darcy Will and David Will

Steven H. Leitl
for Deloitte & Touche Inc.

CITATION: Jethwani v. Damji, 2018 ONSC 4246
COURT FILE NO.: 02-CL-4519
DATE: 20180706

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

AND IN THE MATTER OF AN INTERIM RECEIVERSHIP ORDER OF THE HONOURABLE MR. JUSTICE GROUND DATED MAY 7, 2002, AS AMENDED

RE: Nyaz Jethwani, Plaintiff

AND:

Salim Damji and Strategic Trading Systems Instant White (also known as STS Instant White or Strategic Trade Systems or STS Inc.), Jem Holdings a division of 1289629 Ontario Inc., Izmo Investments Inc., Shaffin Damji, Hanif Damji, Olympic Sports Data Services, Limited and Spiros G. Athanas, Defendants

BEFORE: L. A. Pattillo J.

COUNSEL: *Michael McQuade*, for the Plaintiff

Clifton Prophet, for A. Farber & Partners, Interim Receiver

Paul J. Martin, for Fasken Martineau

Jonathan Cooperman, for the Interim Receiver

HEARD: April 9, 2018

COSTS ENDORSEMENT

Introduction

[1] For reasons released on October 11, 2017, (2017 ONSC 3524), I granted, among other things, an order discharging A. Farber & Partners Inc. ("Farber"), in its capacity as court-appointed Interim Receiver (the "Interim Receiver") over the assets, property and undertaking of Salim Damji ("Damji") (the "Damji Receivership") (the "Discharge Motion").

[2] The Plaintiff, Nyaz Jethwani ("Jethwani"), on his own behalf and as a representative plaintiff for all other investors who lost money as a result of Damji's fraud, opposed the Discharge Motion. Although not opposed to the discharge, Jethwani took issue with certain of the Interim Receiver's actions during the Damji Receivership and the fees of both the Interim Receiver and certain of the professionals engaged in the Damji Receivership.

[3] The Discharge Motion lasted a day. In support of the motion, the Interim Receiver filed its Eighth Report which contained a detailed summary of the events that occurred over the course of the 15-year period of the Damji Receivership. The Eighth Report was 70 pages in length and had 82 appendices. The Interim Receiver and the professionals were successful on the Discharge Motion and obtained the orders they sought.

[4] At the conclusion of my reasons, I encouraged the parties to meet and discuss costs of the motion with the object of reaching an agreement on costs. In the absence of an agreement, the Interim Receiver and Fasken, Martineau DuMoulin LLP ("Faskens") now seek orders granting them each the costs of the Discharge Motion against Jethwani.

The Position of the Parties

[5] The Interim Receiver seeks costs of the Discharge Motion on a substantial indemnity basis in the total amount of $305,960.92, made up of fees inclusive of HST of $296,650.42 and disbursements of $9,310.50, inclusive of taxes. In support of its request, the Interim Receiver relies on two offers to settle; Jethwani's conduct in connection with the Discharge Motion; the complexity and difficulty of the Discharge Motion and the ordinary course in receiverships whereby the receiver is entitled to be paid the fees and disbursements of its counsel on motions for discharge and approval of accounts on a full indemnity basis.

[6] Faskens, which was successful on having its fees approved, seeks its costs of the Discharge Motion, also on a substantial indemnity basis in the total amount of $81,186.38, made up of fees of $81,071.0, inclusive of HST and disbursements of

$115.37. In support, Faskens also relies on an offer to settle; Jethwani's conduct in respect of its fee approval request; the complexity of the Discharge Motion; and the successful approval of its fees.

[7] In response, Jethwani submits that there should be no costs awarded against him in respect of the Discharge Motion or in the alternative, only a modest cost award for the following reasons:

- The failure of the Interim Receiver to keep Jethwani and the Investment Recovery Group ("IRG") informed of developments and to seek timely approval of its accounts and those of its counsel which resulted in the necessity to examine the Interim Receiver and its counsel;

- The uniqueness of the case, the lack of personal benefit to Jethwani as a representative plaintiff, and the clear public interest component to the receivership, militate strongly that there should be no costs awarded against Jethwani;

- If costs are to be awarded against Jethwani, there is no basis for awarding them on a substantial indemnity basis. Neither the Interim Receiver's or Faskens' offers qualify as Rule 49 offers. Nor was Jethwani's conduct in opposing the approval of the accounts of the Interim Receiver and its counsel such that it would give rise to a higher scale of costs;

- The Interim Receiver has a duty to prove its accounts and Jethwani should not be penalized for holding the Interim Receiver to its obligations.

Discussion

[8] The Damji Receivership lasted 15 years between its inception on May 7, 2002 and the Discharge Motion on June 1, 2017. During that period, the Interim Receiver recovered $18,711,462. In the same period, the Interim Receiver incurred fees of $5,772,141.44 of which $1,652,044.15 had been paid. In addition, the professionals (lawyers and the investigators) had incurred fees totaling $4,919,916.42 of which $3,750,988 had been paid. As at June 1, 2017, the Interim Receiver had on hand $4,800,595. My approval of the fees of the Interim Receiver and the professionals over the period resulted in a shortfall in the Damji Receivership in an aggregate amount in excess of $665,000.

[9] In my view, having regard to the issues raised on the Discharge Motion and the success achieved by both the Interim Receiver and Faskens on the motion, they are each entitled to costs of the motion from Jethwani. Jethwani took issue with a number of the Interim Receiver's actions and its accounts as well as the accounts of its counsel and was not successful.

[10] I do not accept Jethwani's submission that the Damji Receivership was unique and, as a public litigant, he should not be required to pay costs. In my view, Jethwani fails to meet the criteria set out in *House v. Lincoln (Town)*, 2015 ONSC 6236 (S.C.J.) at para. 9 for a public interest litigant. The Damji Receivership was commenced by Jethwani, on behalf of himself and other investors who all lost money as a result of Damji's fraud. Their object was to recover some or all of their money. Jethwani, along with the other investors, clearly had an economic interest in the litigation. More importantly, I do not consider that the issues raised in the Damji Receivership, while complex and lengthy, were of such importance that they extended beyond the immediate interests of the parties.

[11] Jethwani also submits that he is merely a nominal plaintiff who stepped forward to lend his name to the litigation which was commenced on behalf of all Damji's investors. While that may be, in the end he is the sole plaintiff and the person who is responsible for any cost order. It is also not the first time in the Damji Receivership that Jethwani has had costs ordered against him.

[12] Both the Interim Receiver and Faskens seek their costs on a substantial indemnity basis. In support of that scale, they each rely on offers to settle and on Jethwani's conduct during the Discharge Motion.

[13] The Interim Receiver made two offers to settle. The first one was by letter on January 13, 2017 from its counsel. The Interim Receiver offered to settle Jethwani's opposition to the Discharge Motion in return for a payment of $75,000 to the Aga Khan Foundation, a charity supported by Jethwani. It was rejected by Jethwani's counsel on January 27, 2017. The second offer is contained in a letter dated February 28, 2017 from the Interim Receiver to Jethwani personally. The Interim Receiver offered to donate $100,000 to the Aga Kahn Foundation in return for Jethwani's agreement not to oppose the Discharge Motion. There is no evidence of any response from Jethwani. That offer was withdrawn in writing delivered after the June 1, 2017 hearing began.

[14] The Interim Receiver submits that its offers were genuine and generous and complied "with the spirit of Rule 49". I infer from that submission that the Interim Receiver concedes that the offers were not strict Rule 49 offers. I agree. Given the way in which they were structured, I do not consider either offer was within the technical requirements of Rule 49 such that they constituted valid Rule 49 offers. Given Jethwani and the other investors' position that they should receive some return from the Damji Receivership, payment to the Aga Kahn Foundation does not incorporate any element of compromise. Further, because the Interim Receiver was aware he was acting for all investors, the offer was not one Jethwani could accept. Accordingly, the cost implications of Rule 49 do not apply.

[15] Faskens' offer was sent by email on March 30, 2017 and provided that in exchange for Jethwani consenting to an order approving their accounts, Faskens would not seek any costs against him. The offer remained open for acceptance until the commencement of any cross-examinations between Faskens and Jethwani. As it turned out, no cross-examinations between the parties ever took place.

[16] Jethwani submits that as Faskens' offer was only open to the commencement of cross-examinations and not until trial, it is not a valid Rule 49 offer. Faskens submits that the offer remained operative at all times. While Rule 49 does not require that an offer remain open until trial, it is important that the expiry of an offer, if any, be clear and unambiguous. In my view, the fact that the Faskens' offer was open only until the start of an event that did not occur does not provide the clarity required to bring it within Rule 49.

[17] Although I have concluded that both the Interim Receiver's offers and the Fasken offer do not comply with Rule 49, the fact of the offers remain one of the factors to be considered in exercising my discretion in awarding costs: *Elbakhiet v. Palmer*, 2014 ONCA 544, 121 O.R. (3d) 616 (C.A.). That said, I am mindful that two of the three offers were made late in the process, after the adjournment of the first hearing date.

[18] Both the Interim Receiver and Faskens also rely on Jethwani's conduct during the Discharge Motion to support their submission for substantial indemnity costs.

[19] The Interim Receiver's concerns relate to the nature of Jethwani's opposition to the Discharge Motion. The Discharge Motion was commenced by the

Interim Receiver serving its five-volume Motion Record on Jethwani on November 25, 2016. As a result of the adversarial position of Jethwani and the investors, the Interim Receiver had not provided the investors with any fee accounts since 2007.

[20] At the first scheduling appointment on December 13, 2016, the Discharge Motion was set for February 24, 2017 for one day and counsel for the Interim Receiver undertook to provide redacted invoices for review by Jethwani's counsel. The redacted copies were provided on January 9, 2017.

[21] On January 17, 2017, counsel attended before Hainey J. and a timetable was agreed to regarding pre-hearing steps. The Interim Receiver agreed to provide unredacted copies of the invoices subject to a confidentiality agreement. Jethwani agreed to provide written interrogatories and notice of objection by January 30, 2017 and the Interim Receiver agreed to provide answers to the written interrogatories and a supplementary report by February 11, 2017. The Interim Receiver submits that Jethwani subsequently delivered one set of 26 objections and one set of 88 interrogatories which were "confusing and iterative". Nevertheless, the Interim Receiver delivered answers to both the objections and the interrogatories.

[22] At another scheduling appointment on February 14, 2017, Newbould J. directed that Jethwani was required to bring a motion to cross-examine counsel to the Interim Receiver, and set February 21, 2017 for such motion. Jethwani never brought the motion.

[23] On February 24, 2017, at the outset of the hearing of the Discharge Motion, Jethwani sought an adjournment to permit cross-examination of the Interim Receiver, and its counsel Gowlings. Myers J. granted the adjournment. He noted that court officers' fee issues should be transparent. In light of the fact that no fee affidavits had been filed from any of the firms seeking approval of fees, he set a June 1st hearing date and a timetable leading up to it. Given the production and discovery process which had already taken place, the learned judge noted:

> The process being embarked upon is potentially very expensive. If one side or the other is shown to have taken outrageous positions, serious cost consequences should be expected.

[24] The Interim Receiver submits that Jethwani's decision to switch from extensive objections and written interrogatories to then requiring cross-

examinations amounts to the outrageous conduct warned against by Myers J. and, given the Interim Receiver was entirely successful on the Discharge Motion should give rise to substantial indemnity costs.

[25] Conduct that gives rise to substantial indemnity costs must be reprehensible, scandalous or outrageous in nature: *Springer v. Aird & Berlis LLP*, 2009 ONSC 26608 at para. 4. In the circumstances, I am not satisfied that the conduct relied upon is of a nature that it should give rise to substantial indemnity costs of the Discharge Motion. I do not consider that Jethwani's attempt to understand what the Interim Receiver had been doing between 2007 and 2016 to justify its fees to be improper. The Discharge Motion was principally about approval of fees incurred (and partially paid) over the 15 years. While I understand the Interim Receiver's reluctance to provide its accounts to Jethwani and the investors after 2007 given their actions, Jethwani was entitled to full information concerning the fees. I agree with Myers J. that public officers must be transparent in respect of fee issues.

[26] Given the litigious history between the Interim Receiver and Jethwani (and the IRG), the Interim Receiver knew or ought to have known that approval of the fees, particularly given that they would consume all recoveries leaving nothing for the investors, would be contentious. Yet the Motion Record contained no fee affidavits or invoices. The invoices were provided subsequently in redacted form and only unredacted after a court appearance. I have not reviewed the interrogatories or objections but given the Interim Receiver's initial reluctance to provide the information on its fees, I am unable to conclude that Jethwani's request for fee affidavits and cross-examination amounted to reprehensible or outrageous conduct.

[27] That is not to say that Jethwani should not be responsible for the costs thrown away on February 24, 2017. Myers J. noted in his endorsement that the costs thrown away were reserved to the motion judge. While Myers J. did not direct who should be responsible for those costs, in my view, they should be borne by Jethwani. Rather than bring his motion to seek cross-examination on February 21, 2017, as directed by Newbould J., Jethwani waited until the motion date to bring the motion giving rise to unnecessary preparation costs. The costs thrown away are due to both the Interim Receiver and Faskens.

[28] Faskens also seeks substantial indemnity costs as a result of what it submits is Jethwani's "sanction-worthy conduct". Specifically, it relies on Jethwani's allegations of negligence against Faskens which it submits were demonstrably

false. Faskens responded to the allegations with detailed, factual evidence which completely discredited Jethwani's position and led eventually to Jethwani abandoning the allegation.

[29] While I agree the allegation of negligence is serious for a law firm, it does not rise to the level of conduct, such as fraud or dishonesty, which gives rise to substantial indemnity costs.

[30] Faskens had two retainers. First, between May 16, 2003 and June 15, 2007 as counsel to Jethwani in respect of an action commenced against the Bank of Montreal relating to Damji and second as counsel to the Interim Receiver from May 16, 2003 to February 2008. On the Discharge Motion, it sought approval of accounts totaling $1,085,622.92 ($107,527.15 for the BMO Action and $978,095.77 for the Damji Receivership work). Once the negligence allegation was abandoned, Jethwani continued his opposition to Faskens' fees necessitating the continued presence of counsel on Faskens behalf. On the Discharge Motion, I was satisfied Jethwani's objections to Faskens' fees had no substance and I approved them as requested on the basis they were fair and reasonable.

[31] I turn then to the determination of the costs of both the Interim Receiver and Faskens.

1) The Interim Receiver

[32] As noted, the Interim Receiver has submitted a Bill of Costs setting out substantial indemnity costs totaling $305,960.92. The Bill of Costs also set out partial indemnity costs totaling $203,744.11.

[33] Apart from any opposition by Jethwani, the Interim Receiver is required, by the terms of its appointment, to have its fees approved by the court. While in the ordinary course, the costs of such approval would come out of the Estate or the party who sponsored the receivership based on an agreement at the outset, the Damji Receivership is in a deficit and there is no agreement with Jethwani or the IRG. As a result, Jethwani should not be required to pay the costs of the Discharge Motion apart from those costs which were incurred as a result of his opposition.

[34] Further, the Discharge Motion sought approval of fees over the entire course of the Damji Receivership. While the usual course is to obtain approval of the fees from time to time during the course of a receivership, given the unique

circumstances of the Damji Receivership, I accepted the Interim Receiver's approach. The downside to such an approach, however, is that the approval motion necessarily involves substantial resources and is costly.

[35] Accordingly, Jethwani should not have to pay any costs relating to counsel's involvement in the preparation of the substantial Motion Record. Nor should he be responsible for the costs incurred in respect of the production of the invoices and the interrogatories. I have already commented on my view of the Interim Receiver's responsibility to provide that information. In my view, cost consequences for Jethwani arise at the point of his request to cross-examine and subsequent opposition to the Discharge Motion.

[36] As discussed, the Interim Receiver is entitled to its costs thrown away in respect of the February 24, 2017 adjournment, recognizing that some of those costs will benefit the return of the motion. I also consider that the Interim Receiver should receive its costs in respect of the cross-examinations which took place over two days. Finally, the Interim Receiver is entitled the majority its costs of the June 1, 2017 hearing given that court time would have been required in the absence of Jethwani's opposition. The Interim Receiver is also entitled to its costs for the subsequent preparation of the Bill of Costs and submissions.

[37] Taking into account all of the above, including the offers, I assess the Interim Receiver's costs of the Discharge Motion against Jethwani on a partial indemnity basis fixed at $75,000 in total. Given the issues, the adjournment and Jethwani's opposition, I consider that award to be both fair and reasonable in all the circumstances.

2) Faskens

[38] Faskens Bill of Costs claims substantial indemnity costs totaling $81,186.38 and partial indemnity costs of $54,162.71.

[39] In my view, Faskens is entitled to its full partial indemnity costs as claimed. I consider those costs to be fair and reasonable given the issues raised by Jethwani against Faskens, its detailed response and that, after Jethwani abandoned the negligence claim, it was required to remain in the proceedings because of Jethwani's continued opposition to Faskens' accounts notwithstanding there was no substance to that opposition. I have also considered Faskens offer to settle.

[40] Based on the above, therefore, I assess Faskens' costs on a partial indemnity basis at $54,000 in total.

Conclusion

[41] Based on the above, the costs of the Discharge Motion payable by Jethwani are assessed as follows:

a) To the Interim Receiver, $75,000 in total; and

b) To Faskens, $54,000 in total.

[42] At the conclusion of the costs hearing, both the Interim Receiver and Faskens submitted that costs of $2,500 each for the costs motion would be appropriate. Jethwani's counsel indicated he had no argument with that amount. In my view, given the issues, I consider that amount for each of the Interim Receiver and Faskens to be fair and reasonable.

[43] Accordingly, costs of the cost motion fixed at $2,500 for each of the Interim Receiver and Faskens, payable by Jethwani.

L. A. Pattillo J.

Released: July 6, 2018

Court of Queen's Bench of Alberta

Citation: Servus Credit Union Ltd v Trimove Inc, 2015 ABQB 745

Date: 20151125
Docket: 1503 06388
Registry: Edmonton

Between:

Servus Credit Union Ltd

Applicant

- and -

Trimove Inc. and Geeta Luthra

Respondents

Memorandum of Decision
of the
Honourable Madam Justice J.B. Veit

Summary

[1] The court-appointed receiver asks for approval of its, and its lawyer's, fees.

[2] The debtors claim that both the receiver's fees and the receiver's lawyer's fees are excessive. They do not provide any evidence in support of their argument.

[3] The court granted to Servus Credit Union Ltd. a without notice interim receivership, subsequently extended to a full receivership, of Trimove Inc. By the time of the granting of the full receivership, it was apparent that the debtors were insolvent: not only could they not pay Servus' demand claims, they could not pay their employees' salaries, etc. As of the date of the current application to distribute proceeds and award costs, the debtors owed Servus Credit Union approximately $1.2 million. The instruments creating the secured debt include a contractual obligation on Trimove Inc. and the guarantor Luthra to pay all costs and expense of enforcing the security, including legal fees on "a solicitor-and-his-own-client full indemnity basis". The

receiver recovered a total of approximately $1.1 million, of which approximately $863,000.00 was available to distribute to Trimove's secured creditors. The receiver proposes that Servus receive approximately $298,000.00 of that fund. The fees claimed by the receiver and the receiver's lawyer total approximately $82,000.00.

[4] The debtors propose that the court appoint an independent expert in receiverships to assess the costs claimed and report to the court; they propose that the maximum fee payable for that work be $3,000.00.

[5] The debtors' application for the appointment of an expert to give an opinion on fees is denied. The applicant's request for approval of its, and its lawyers' fees, is granted.

[6] Receivers and receivers' lawyers' fees are tested according to well-established legal principles as set out, for example, in ***Belyea***, ***Bakemates*** and ***Diemer***.

[7] Here, the receiver has set out detailed dockets and an explanation of the multiplicand basis for its fee. Not only have the debtors not provided any evidence that the hourly fees charged were excessive, they have not established that the work undertaken was excessive. On the contrary, in light of the principal's early comment to the receiver, 'We'll make sure you get nothing", the nature of the assets – rolling stock, and the documented failure of the debtors to provide reliable information on such crucial assets as accounts receivable, there is no evidence that the time spent by the receiver in tracking down assets was unreasonable.

[8] While the claim for lawyer's fees was set out in only two lines of information and was not verified by affidavit as is recommended in ***Bakemates***, the debtors contracted to pay all legal costs associated with recovery "on an indemnity basis"; that contract does not limit fees to what is reasonable. There is no suggestion of duress or equivalent in the negotiation of the lawyer's fee contract; as indicated by Farley J., in the absence of duress, an "agreement as to the fees should be conclusive.":***BT-PR Realty Holdings***. In any event, however, neither of the two main secured creditors, who are the only parties whose recovery deficit would be ameliorated if the fees were reduced, nor the court, in the exercise of its oversight responsibility, discern any excess in the fees claimed by the receiver's lawyers.

[9] If there were a basis for review of the receivers' fees, the court would not hire an outside expert; rather it would engage in the process outlined in ***Bakemates***.

Cases and authority cited:

[10] **By the debtors**: ***Federal Business Development Bank v Belyea*** [1983] N.B.J. No. 41; ***Bank of Nova Scotia v Diemer (c.o.b. Cornacre Cattle Co.)*** 2014 ONCA 851.

[11] **By the court**: ***Bakemates International Inc. (Re)*** [2002] O.J. No. 3569***; BT-PR Realty Holdings Inc. v Coopers & Lybrand*** [1997] O.J. No. 1097***; 911502 Alberta Ltd. v. Elephant Enterprises Inc.***2014 ABCA 437; ***Sidorsky v CFCN Communications Ltd.*** [1995] A.J. No. 174 (Q.B.); ***Trinier v Shurnaik*** 2011 ABCA 314.

1. Background

[12] Trimove is a transport company specializing in the delivery of heavy crude oil in the Vermilion area of Alberta; it also operates in the United States.

[13] Servus Credit Union Ltd. issued a demand overdraft loan, and demand term loans, to Trimove Inc.; those facilities totalled approximately $1.1 million. As a representative example,

in the $700,000.00 Demand Commercial Mortgage issued on June 12, 2013 to Trimove by Servus, Trimove agreed to the following conditions of credit:

> 1) The Borrower agrees to pay all expenses, fees and charges incurred by Servus Credit Union in relation to the loans; the preparation and registration of security, enforcement or preservation of Servus Credit union's rights and remedies; whether or not any such documentation is completed or any funds are advanced, including but not limited to legal expenses (on a solicitor-and-his-own-client full indemnity basis), cost of accountants, engineers, architects, consultants, appraisers and cost of searches and registration.

[14] Geeta Luthra guaranteed the repayment of those facilities.

[15] Neither the demand for repayment of the facilities nor the demand for payment of the guarantee, each of which was made on or about April 25, 2015, was met. Servus therefore initiated an *ex parte* receivership application as a result of which MNP Ltd was appointed as interim receiver on May 1, 2015. In support of that application, Servus filed an affidavit from one of its senior relationship managers of commercial special loans which included the following assertion:

> On April 29, 2015, due to Trimove's significantly worsening margining position, I advised Karan Luthra, a principal and director of Trimove, that Servus was no longer agreeable to the forbearance arrangements previously discussed . . . . In response to this statement Karan stated that "We'll make sure you get nothing".

[16] When the matter came back before the court, on notice, on May 8, the court confirmed the receivership order, but, in response to the submissions of the debtors, required an undertaking from Servus not to file the order until May 22; the delay was intended to give the debtors time to retain an insolvency lawyer, to arrange alternate financing, and to comply with the terms of the Interim Receivership Order. On that date, the court explicitly reminded the debtors of their obligation to cooperate with the receiver. Up to that point, the debtors had received at least informal legal advice from Luthra Law Group.

[17] On May 15, 2015, Trimove had insufficient funds to meet its payroll obligations. Trimove also had $146,480.00 in outstanding accounts payable and no funds to pay them.

[18] On May 19, 2015, Servus went back to court and obtained an order authorizing the immediate use of the receivership order in order to protect both Trimove's estate and the interests of Servus and the other creditors. Servus' application asserted that representatives of Trimove had not been fully cooperative with the receiver in that they failed to provide financial information and to identify and locate equipment. The interim receiver had been forced to send a letter to Trimove threatening a contempt application before cooperation was improved, "but there still appears to be information that has not yet been provided to the Interim Receiver". Trimove never did retain an expert insolvency lawyer; nor did it obtain alternative financing.

[19] On May 19, the debtor filed an affidavit from Vishal Luthra attempting to demonstrate that Trimove had been cooperative with the receiver. Mr. Luthra swore:

> [the receiver] demanded that we release to him all the data and mentioned that his team is out and about looking for our equipment. I assured him at that point, that equipment is safe and there is no risk for the lender's security. . . .

> Eric Sirrs gave me 2 hours to compile information for him to satisfy his court order demands. . . . I provided him the following items . . . list of equipment, I recalled from my memory and locations . . .

[20] Another example of the kind of lack of cooperation complained of is the failure of Trimove, even up to and including the date of this application, to explain how the payment of a Trimove account receivable ended up in the hands of a stranger. At this hearing, the debtors explained that they owned a separate entity, with a very similar name to Trimove Inc., and there had perhaps been a typing error in naming the payee of the cheque.

[21] Another example of the problems experienced by the receiver relates to the failure of Trimove to satisfactorily explain the transfer of two of its serial numbered pieces of equipment to a third party who asserted that he had done machinist's work for Trimove over a period of a year and not been paid. That stranger, Khullar, has provided information to the receiver, but management has failed to do so.

[22] Another example of the debtor's failure to provide accurate, timely information relates to the failure of Trimove to provide GPS locations for some of its equipment moving on highways even when, by May 12, one unit was still out of the country.

[23] Finally, in respect of the Aarbro issue, the debtors filed evidence at this hearing concerning their interest in that property. In light of that late dispute relating to ownership of the company owning the ranch property in question, the disposition of the Aarbro claim is deferred to a separate hearing.

[24] In support of the claim for its fees, MNP filed an affidavit attaching docketed time allocations for work done on the receivership, together with an outline of the individuals who worked on the receivership and their billable cost. MNP also approved as part of its receivership expenses the fees of its lawyer.

[25] The legal fees claimed are not the subject of an affidavit. There is, however, reference in the law firm's two line claim to invoices relating to the totals claimed. There is no evidence that the debtors ever asked for information about the invoices themselves.

2. Testing receivers' and lawyers' fees

[26] I agree with the debtors that general guidance to receivers', and their lawyers', fees can be found in ***Belyea*** and ***Diemer***.

[27] In addition to those authorities, I bring to the debtors' attention two additional cases, the first of which is ***Bakemates***, which expands on some of the topics relating to the testing of fees and provides a useful outline of the processes by which any necessary examination of fees will be conducted.

[28] The other case to which I must refer is ***BT-PR Realty Holdings.*** That decision is important in the circumstances here where there is a contract relating to fees, specifically the lawyer's fees. A court's general approach to fees must also take into account, not only the general principles as set out in decisions such as ***Diemer***, but also any contract in relation to legal fees. As Farley J. said***:***

> I do not particularly quarrel with the list of factors set out in the Bank of Montreal v. Nicar Trading Co. (1990), 78 C.B.R. (N.S.) 85 (B.C.C.A.):

(a) the nature extent and value of the cases;

(b) the complications and difficulties encountered;

(c) the degree of assistance provided by the parties;

(d) time spent by the receiver;

(e) the receiver's knowledge, experience and skill;

(f) diligence and thoroughness;

(g) responsibilities assumed;

(h) results achieved; and,

(i) the cost of comparable services.

However I would add

(j) other material considerations –

for example in this case:

(i) the April 12 agreement to the fees;

(ii) the priority receivership of the Bank in this co-receivership relationship; and
(iii) the apparent diversionary and distracting excessive hands on requirements of Miller who all the while is demanding efficiency (more accurately a low fee at any price).

I would think however that where there is a retainer given which indicates that the fee will be based upon the multiplicand of hourly rates and time expended this factor should receive special emphasis as it is what the parties bargained for. See above for my views about allowing the taxi meter to run without taking the passenger along the appropriate route. In the subject case C&L charged on the multiplicand basis. Given their explanation and the lack of any credible and reliable evidence to the contrary, I see no reason to interfere with that charge. It would also seem to me that on balance C&L scores neutrally as to the other factors and of course, the agreement as to the fees should be conclusive if there is no duress or equivalent.

In other words, in ***BT-PR Realty Holdings***, Farley J. emphasized that while an outrageous departure from the norm, such as a taxi driver "[taking] his fare from the Courthouse to the Royal York Hotel via Oakville", or, in Edmonton terms, taking a fare from the Law Courts to the MacDonald Hotel via Spruce Grove, will not be tolerated, an agreement about fees is usually conclusive.

3. Applying the principles in this case

a) Receiver's fees

[29] Information about the receiver's fees is attached to an affidavit in the manner recommended by ***Bakemates.*** The debtors do not provide any evidence on the issue of fees.

[30] It's true, of course, that this was not a technically complicated receivership. The receiver sold most of the debtors' assets by auction. However, even settling on that procedure entailed

some work by the receiver as there were competing offers from auction businesses and the receiver had to do some research to determine why it should prefer one auctioneer's offer to the other.

[31] More important than the way in which the receiver disposed of most of the assets is the unfortunate response of the debtor to the initial approach by the receiver, coupled with the nature of the debtor's assets; those two factors justify what the debtors consider to be excessive scrutiny by the receiver.

[32] In addition to this main problem, which is represented by the docket in the greater expenditures at the outset of the receivership, there are the continuing problems over the course of the receivership.

[33] The debtors never did retain an insolvency expert; therefore, the receiver was dealing with them personally. Dealing with self-represented litigants takes more time and care and provides less comfort than dealing with professionals.

[34] Also, Mr. Luthra's affidavit of May 19, 2015 illustrates the gulf which Trimove did not recognize between verifiable information and opinion.

[35] Problems of the type exemplified by the cheque which was attempted to be cashed by a stranger caused additional administration expenses since it precipitated a mail re-direction notice which then required the receiver to return mail which it received to a law firm which shared the mailing address of Trimove.

[36] It's also true that, over time, Trimove and its representatives did become more cooperative without ever seeming to completely realize the importance from the receiver's perspective of getting accurate, substantiated, information promptly. Nonetheless, the failure to simply and promptly provide the information and documents required by the receiver caused the receiver to spend more time on the administration of this receivership than would otherwise be necessary.

[37] Against the receiver's docketed multiplicand, the debtors have raised arguments of the "I can deliver goods to Texas for $3,000.00 so how come did it cost the receiver so much to go around to the yard I was renting to check my equipment" variety.

[38] In summary with respect to the receiver's fees, the receiver has provided detailed information about its activities and the individuals, and their rates, who have undertaken those activities. The amount of work undertaken by the receiver must be assessed in light of all of the circumstances of this case, including the unfortunate attitude expressed by the debtor at the outset, the difficulties of accounting for rolling stock, and the ongoing failure of the debtors to provide timely, accurate, information. For their part, the debtors have not provided any evidence. Given the role of court-appointed receivers, and all of the information provided about this particular receivership, the court concludes that no basis has been established for any substantive challenge to the receiver's fees. The receiver's fees are therefore approved.

b) Lawyer's fees

[39] The receiver's lawyers' fees have not been submitted by way of affidavit in the manner suggested in ***Bakemates***: see, paras 38 ff. Indeed, the only information about the lawyer's fees is contained in two lines which set out the total amount of fees claimed.

[40] However, there is no suggestion that the debtors attempted to learn more about the lawyers' fees by asking for copies of the invoices which are referred to in the two lines of information.

[41] More importantly, the debtors contracted to pay any lawyers' fees on a full indemnity basis. It is important to note that the contract concerning fees was clear: the language referred explicitly to "solicitor-and-his-own-client full indemnity basis". Therefore, there is no uncertainty about the level of fees the debtor agreed to pay of the type identified by our Court of Appeal in ***Elephant Enterprises.***

[42] As to what a contract means when one party agrees to pay "solicitor and his own client full indemnity" fees, we obtain assistance from McMahon J. in ***Sidorsky***, at para. 5 where that judge, who was an expert in the matter of fees having chaired a provincial committee on the setting of Schedule C fee items, said:

> 5 There are three levels of costs that may be payable by one party to another:
>
> 1. Party and party costs: calculated on the basis of Schedule C of the Alberta Rules of Court or some multiple thereof, plus reasonable disbursements.
>
> 2. Solicitor and client costs: which provide for indemnity to the party to whom they are awarded for costs that can be said to be essential to and arising within the four corners of the litigation.
>
> 3. Solicitor and his own client costs: sometimes referred to as complete indemnity for costs. These are costs which a solicitor could tax against a resisting client and may include payment for services which may not be strictly essential to the conduct of the litigation.

[43] As to whether there is any capacity for a court to depart from a contract term that obliges one party to pay an indemnity of legal fees, I note our Court of Appeal's decision in ***Trinier***:

> G. Any Discretion?
>
> 39 It was argued before us that the chambers judge now appealed from had a "discretion" to deny solicitor-client costs. Given the covenants here, it is doubtful.
>
> 40 But even if a discretion existed as to certain items, there is no proper legal ground to exercise such a discretion here. No misconduct or sharp practice by the appellants is even alleged. They ultimately lost no step, in my view. They did not churn, and did not pursue trivia in order to incur huge solicitor-client costs. And most of the steps whose costs were in issue had already been the subject of previous costs decisions.
>
> 41 If there was any discretion as to costs, at best it was as to the costs of the "side issue" about contribution for the first $100,000 paid by the appellants before the suit. But any such discretion was that of the first judge (Lewis J.), not the (second) chambers judge now under appeal. So the second judge was not entitled to revisit that. And so even if he was, the Court of Appeal owes him no deference on further appeal on that topic. He purported to sit on appeal from the taxing officer who taxed solicitor-client costs.
>
> 42 Besides, the covenants here are for solicitor-and-own-client costs, so a mere immoderate amount of costs or of the appellants' steps would likely not remove the right to such costs.

This, of course, echoes the comments of Farley J. to the effect that a contract with respect to fees should be conclusive in the absence of any argument that the contract itself is invalid: ***BT-Pr Realty Holdings Inc.***

[44] In summary on the legal interpretation of the contract the debtors executed, the debtors agreed to pay even for legal services which may not have been strictly essential to the conduct of the receivership.

[45] However, and importantly, there is no suggestion whatever that the legal fees in the circumstances here even exceeded those which could be said to be essential to and arising within the four corners of the litigation. On the contrary, the two main creditors of Trimove, creditors who have hundreds of thousands of dollars of shortfall in their secured claims against Trimove and who are the only persons who might conceivably have their financial position improved by any reduction of the legal fees, have both accepted the legal fees claimed by the receiver's lawyer. As Farley J. said all those years ago, even if a party agreed to indemnify a lawyer for their fees, the court would then, and would still step in to prevent an injustice if there were some outrageous fee claim made by a lawyer. There is no such basis for interference here. The receiver's lawyer's fees are therefore approved.

4. Proposal to hire an expert to review the receiver's fees

[46] If there had been a basis on which either the receiver's or the receiver's lawyer's fees should be reviewed, the court would have followed the procedure recommended in ***Bakemates*** rather than the proposal made by the debtors. Since the debtors did not establish the required basis, the ***Bakemates*** procedure does not arise.

5. Costs

[47] The debtors were unsuccessful in their application to reduce the receivership fees. If the parties are not agreed on costs, I can be spoken to within 30 days of the release of this decision.

Heard on the 18th day of November, 2015.
Dated at the City of Edmonton, Alberta this 24th day of November, 2015.

J.B. Veit
J.C.Q.B.A.

Appearances:

Kentigern A. Rowan, QC, Ogilive LLP
for the Receiver MNP Ltd.

Thomas Gusa, Miller Thompson LLP
for the Applicant, Servus Credit Union Ltd.

Darren R. Bieganek, QC, Duncan Craig LLP
for AFSC (Agricultural Financial Service Corporation)

Vishal Luthra and Geeta Luthra
own their own behalfs

Court of Queen's Bench of Alberta

Citation: Winalta Inc. (Re), 2011 ABQB 399

Date: 20110624
Docket: 1003 06865
Registry: Edmonton

In the *Matter of the Companies' Creditors Arrangement Act* R. S. C. 1985, c.C - 36, as amended

In the Matter of the Plan of Compromise or Arrangement of Winalta Inc., Winalta Homes Inc., Winalta Carriers Inc., Winalta Oilfield Rentals Inc., Winalta Carlton Homes Inc., Winalta Holdings Inc., Winalta Construction Inc., Baywood Property Management Inc., and 916830 Alberta Ltd.

Memorandum of Decision
of the
Honourable Madam Justice J.E. Topolniski

I. Introduction

> Professional fees in a *CCAA* proceeding hold the potential to be behest with controversy as a result of various factors including lack of transparency, overreaching and conflicts of interest.
>
> (Professor Stephanie Ben-Ishai and Virginia Torres, "A Cost-Benefit Analysis: Examining Professional Fees in *CCAA* Proceedings," in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2009* (Toronto: Thomson Carswell, 2008) 142 at p. 169)

[1] Deloitte & Touche Inc's. application for approval of its fees as a monitor under the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (*CCAA*) is opposed by the debtor

companies, whose allegations mimic the concerns expressed by Professor Ben-Ishai and Virginia Torres in the preceding quote.

[2] The Winalta companies (Winalta Group) obtained protection from their creditors under the provisions of the *CCAA* on April 26, 2010. At the time, three of nine of the Winalta Group were active. The Winalta Group's assets were worth about $9.5 million, while its liabilities exceeded $73 million.

[3] The *CCAA* proceedings moved swiftly at the behest of the primary secured creditor, HSBC Bank Canada (HSBC). It took just six months from the initiation of the proceedings to implementation of the plan.

[4] Deloitte & Touche Inc. now wants to be discharged and paid. The Winalta Group takes umbrage at its bill for $1,155,206.05 (Fee) and is asking for a $275,000.00 adjustment for alleged overcharging. It complains about the following:

(i) charges for support and professional staff other than partners' services/inadequately particularized services (Non-Partner Services);

(ii) duplication;

(iii) a six percent administration fee charged in lieu of disbursements ($50,000.00);

(iv) mathematical errors ($47,979.39); and

(v) charges for internal quality reviews described as something “required to be independent from the engagement” ($10,000.00).

[5] The Winalta Group also seeks a $75,000.00 reduction to the Fee as something “akin to punitive damages” for breach of fiduciary duty. It claims that the breach arose when Deloitte & Touche Inc. prepared and delivered a net realization value report to HSBC on September 2, 2010 (September NVR) that prompted HSBC to refuse funding costs to acquire takeout financing.

[6] Deloitte & Touche Inc. has agreed to deduct its $10,000.00 charge for the internal quality reviews, but rejects the suggestion that the Fee otherwise is unfair or unreasonable. It asserts that it acted within its mandate and in compliance with its fiduciary obligations. It contends there is no evidence to support the suggestion that HSBC withdrew or reduced its support for the restructuring after receiving the September NVR.

II. A Quick Look Back

[7] A brief review of the relationship between the Winalta Group, HSBC and Deloitte & Touche Inc. is useful to better appreciate some of the dynamics at play in this application.

[8] The Winalta Group's operations and assets are located in Alberta, except for a small holding in Saskatchewan. Its head office is in Edmonton.

[9] In November 2009, HSBC entered into a forbearance agreement with the Winalta Group, which owed it in excess of $47 million (the "Forbearance Agreement"). The Winalta Group agreed to Deloitte & Touche Inc. being retained as HSBC's private monitor, commonly called a "look see" consultant. The Winalta group also agreed to give HSBC a consent receivership order that could be filed with no strings attached.

[10] The Winalta Group was not a party to the private monitor agreement between HSBC and Deloitte & Touche Inc., although it was responsible for payment of the private monitor's fees pursuant to the security held by HSBC. It was aware that the private monitor agreement provided for a six percent flat "administration fee" that would be charged by Deloitte & Touche Inc. in lieu of “customary disbursements such as postage, telephone, faxes, and routine photocopying.” Charges for “reasonable out of pocket expenses” for travel expenses were not included in the “administration fee.”

[11] Clearly, HSBC was in the position of power. It agreed to support the Winalta Group's restructuring and to fund its operations throughout the *CCAA* process on the following conditions:

(i) the monitor would be Deloitte & Touche Inc. (the Monitor) and a Vancouver partner of that firm, Jervis Rodriquez, would be the "partner in charge" of the file;

(ii) HSBC would be unaffected by the *CCAA* proceedings;

(iii) the initial order presented to the court for consideration would authorize the Monitor to report to HSBC; and

(iv) the Winalta's Group's indebtedness to HSBC would be retired by October 30, 2010.

[12] On April 26, 2010, the initial order was granted as the Winalta Group and HSBC had planned (Initial Order).

[13] HSBC continued to provide operating and overdraft facilities to the Winalta Group during the *CCAA* process, as outlined in the Initial Order, which also provided that the Monitor could report to HSBC on certain matters, the details of which are discussed in the context of the Winalta Group’s allegation that the Monitor breached its fiduciary duties.

[14] The Winalta Group did not seek DIP financing. Its quest for takeout financing to meet the October 30, 2010 cutoff imposed by HSBC was frustrated when HSBC refused to fund the costs

associated with obtaining replacement financing without a three million dollar guarantee. A stakeholder came to the rescue. The Winalta Group is of the view that HSBC's refusal to pay the costs is directly attributable to the Monitor's actions in connection with the September NVR.

[15] There is nothing in the evidence or the submissions made at the hearing of this application that hints at a strained relationship between the Winalta Group and the Monitor before the Winalta Group learned when it examined a Deloitte & Touche Inc. partner in the context of this application that the Monitor had provided HSBC with the September NVR.

[16] The Monitor's interim accounts were sent at regular intervals. They described activities typical of a monitor in a *CCAA* restructuring, including intense activity in the early phases tapering off as the process unfolded, with a spike around the time of the claims bar date and creditors' meeting. There is no suggestion that the Winalta Group voiced concern about the Monitor's interim accounts. Up until the present application, it seems to have been squarely focused on the goal of obtaining a positive creditor vote and paying its debt to HSBC by the cutoff date.

[17] In its twentieth report to the court, the Monitor stated that its Fee is for services rendered in response to "the required and necessary duties of the Monitor hereunder, and are reasonable in the circumstances."

III. Analysis

A. Proper Charges

1. General Principles

[18] There is a scarcity of judicial commentary relating specifically to the fees of court-appointed monitors, which likely is attributable to the limited number of opposed applications for passing of their accounts.

[19] In their article "A Cost-Benefit Analysis: Examining Professional Fees in *CCAA* Proceedings," the authors discuss their (qualified) survey of insolvency practitioners, stating at p. 168:

> Several answers noted the court's tendency has been to "rubber stamp" professional fees in non-contentious cases. This lack of judicial scrutiny was concerning to some participants, who stated that an increased degree of oversight would be helpful to ensure the legitimacy of the work completed and fees charged.

[20] At pp. 146-147, they review certain cases addressing *CCAA* monitors' fees. Most of these cases, rather than focussing on general considerations in determining what constitutes a monitor's "reasonable fee," deal with specific concerns about professional fees, such as:

(i) approval of Canadian and American counsel fees in a cross-border insolvency (***Re Muscletech Research & Development Inc.*** (2007), 30 C.B.R. (5th) 59 (Ont. S.C.J.)); or

(ii) approval of "special" or "premium fees" for an administrator under a *CCAA* plan of arrangement (***Confederation Financial Services (Canada) Ltd. v. Confederation Treasury Services Ltd.*** (2003), 40 C.B.R. (4th) 10 (Ont. S.C.J.)).

[21] In ***Community Pork Ventures Inc. v. Canadian Imperial Bank of Commerce,*** 2005 SKQB 24 at para. 10, 8 C.B.R. (5th) 34, Kyle J. commented in the context of opposed applications to extend a stay under the CCAA on the significant amount of anticipated professional fees, noting that: "... the court must be on guard against any course of action which would render the process futile."

[22] On a different application in the same proceeding (2005 SKQB 252), Kyle J. reiterated a concern about the burgeoning professional fees (at para.5), saying that they might "sink the company's chances of survival." He also was critical (at paras. 11-12) of the monitor's "excellent though useless" report, its practices of recording minimum half-hour blocks of time and billing for discussions with junior staff. The final criticism (para. 15) was that the monitor's fees were offside the local practice.

[23] In ***Re Triton Tubular Components Corp.*** (2006), 20 C.B.R. (5th) 278 at para. 83 (Ont. S.C.J.), additional reasons at 2006 CarswellOnt 1029 (S.C.J.), Madam Justice Mesbur's criteria in scrutinizing the propriety of a monitor's counsel's fee was that which "...one would expect from a resistant client."

[24] Given the paucity of judicial commentary on the fees of *CCAA* monitors generally, guidance often is sought from analogous case law dealing with the fees of receivers and trustees in bankruptcy.

[25] One of the cases most often cited is ***Federal Business Development Bank v. Belyea*** (1983), 46 C.B.R. (N.S.) 244 at paras. 3 and 9, 44 N.B.R. (2d) 248 (C.A.), which set out the following principles and considerations that apply in assessing a receiver's fees:

> …The governing principle appears to be that the compensation allowed a receiver should be measured by the fair and reasonable value of his services and while sufficient fees should be paid to induce competent persons to serve as receivers, receiverships should be administered as economically as reasonably possible. Thus, allowances for services performed must be just, but nevertheless moderate rather than generous ...

> . . .The considerations applicable in determining the reasonable remuneration to be paid to a receiver should, in my opinion, include the nature, extent and value of the assets handled, the complications and difficulties encountered, the degree of assistance provided by the company, its officers or its employees, the time spent, the receiver's knowledge, experience and skill, the diligence and thoroughness displayed, the responsibilities assumed, the results of the receiver's efforts, and the cost of comparable services when performed in a prudent and economical manner.

[26] In ***Re Agristar Inc***., 2005 ABQB 431, 12 C.B.R. (5th) 1, Hart J. applied the factors articulated in ***Belyea*** in determining the fairness of the fees charged by a *CCAA* monitor which had been replaced part way through the proceedings. In that case, the court had the benefit of the replacement monitor's accounts to use as a direct comparator.

[27] Referee Funduk in ***Northland Bank v. G.I.C. Industries Ltd.*** (1986), 60 C.B.R. (N.S.) 217, 73 A.R. 372 refused (at para. 18) to place a receiver's account under a microscope and to engage in a minute examination of its work. He opined (at para. 35) that: "... parties should not expect to get the services of a chartered accountant at a cheap rate," citing ***Prairie Palace Motel Ltd. v. Carlson*** (1980), 35 C.B.R. (N.S.) 312 (Sask. Q.B.) and ***Peat***, ***Marwick Ltd. v. Farmstart*** (1983), 51 C.B.R. (N.S.) 127 (Sask. Q.B.) in support.

[28] In ***Re Hess*** (1977), 23 C.B.R. (N.S.) 215 (Ont. S.C.), Henry J. considered the following factors in taxing a trustee in bankruptcy's accounts:

> (a) allowing the trustee a fair compensation for his services;
>
> (b) preventing unjustifiable payments for fees to the detriment of the estate and the creditors; and
>
> (c) encouraging efficient, conscientious administration of the estate.

[29] Similar to the caution given in ***Northland Bank***, Henry J. warned consumers (at para. 11) that: "...it should be borne in mind that the labourer is worthy of his hire. The creditors and the public are entitled to the best services from professional trustees and must expect to pay for them."

[30] In my view, the appropriate focus on an application to approve a *CCAA* monitor's fees is no different than that in a receivership or bankruptcy. The question is whether the fees are fair and reasonable in all of the circumstances. The concerns are ensuring that the monitor is fairly compensated while safeguarding the efficiency and integrity of the *CCAA* process. As with any inquiry, the evidence proffered will be important in making those determinations.

[31] The Monitor in the present case takes the position that the Winalta Group has failed to present cogent evidence to show that the Fee is neither fair nor reasonable. In essence, it asks that the court apply a presumption of regularity.

[32] I am not aware of any reported authority supporting the proposition that there is a presumption of regularity that applies to a monitor's fees. This application is no different than any other. The applicant, here the Monitor, bears the onus of making out its case. A bald assertion by the Monitor that the Fee is reasonable does not necessarily make it so. The Monitor must provide the court with cogent evidence on which the court can base its assessment of whether the Fee is fair and reasonable in all of the circumstances.

2. Non-Partner Services

[33] The Fee includes charges for eighteen support staff, a number which the Winalta Group wryly notes equals that of its own staff complement. The support staff involved included those in clerical, website maintenance, analysis, managerial and senior management positions, with (discounted) hourly billing rates ranging from $65.89 per hour (clerical services) to $460.79 per hour (senior management services).

[34] The Winalta Group urges that the (discounted) hourly rate of $588.00 charged by the two partners, Messrs. Jervis and Keeble, should have included any work performed by support staff, as is the typical billing practice for lawyers.

(a) *Clerical, administrative, and IT staff*

[35] In ***Peat, Marwick Ltd.*** at para. 9, Vancise J. ruled that the charges for secretarial and clerical staff should properly form part of the firm's overhead and, therefore, should not be included in the account for professional services.

[36] Referee Funduk in ***Northland Bank*** refused to follow that aspect of the ***Peat, Marwick Ltd.*** decision as it rested on what he referred to as an "erroneous presumption" that chartered accountants necessarily employ the same billing format as lawyers. Referee Funduk found that the receiver in that case had used the standard billing format for chartered accountants, in which support staff were charged separately. He expressed the view (at para. 30) that it is wrong to compare a chartered accountant's hourly charges to those of a lawyer and to conclude that there is enough profit in the accountant's charges so that work undertaken by staff should not be charged separately. He said that the two operations are not the same and the inquiry should focus on the standard billing format and practice of the profession in question.

[37] The Alberta Court of Appeal weighed in on the topic in ***Columbia Trust Company v. Coopers & Lybrand Ltd.*** (1986), 76 A.R. 303, Stevenson J.A. stating at para. 8:

> ... the propriety of charges for secretarial and accounting services must be reviewed to determine if they are properly an "overhead" component that should

> be or was included or absorbed within the hourly fee charged by some of the professionals who rendered services. The Court, moreover, must be satisfied that the services were reasonably necessary having regard to the amounts involved.

[38] In the result, the court in ***Columbia Trust Company*** elected not to make an arbitrary award but rather to return the matter for "the application of proper principles."

[39] In ***Bank of Montreal v. Nican Trading Co.***, (1990), 78 C.B.R. (N.S.) 85 at 93, 43 B.C.L.R. (2d) 315, the British Columbia Court of Appeal found that, having regard to the evidence in that case, it was appropriate for the receiver to have charged separately for the secretarial and support staff. Taggart J.A., for the court, observed that ***Columbia Trust*** qualified but did not overrule ***Northland Bank*** as the Alberta Court of Appeal simply referred the matter back for review to ensure there was no duplication.

[40] The law is no different as it concerns a *CCAA* monitor. While the court should avoid microscopic examination of the Monitor's work, the ***Columbia Trust*** requirements nevertheless apply. To a degree, I concur with Referee Funduk's observation in ***Northland Bank*** that the appropriate comparator of a monitor's charges is not the legal profession, as the Winalta Group urges. While mindful that insolvency professionals typically have a chartered accountant's designation, I do not agree with Referee Funduk that the standard billing format for chartered accountants is necessarily the correct comparator. The billing practices for chartered accounts engaged in non-insolvency work may, for a host of reasons, be based on different considerations. What matters is the standard billing practice in the Monitor's own specialized profession - that of the insolvency practitioner.

[41] In the present case, the Initial Order specified that: "[t]he Monitor, counsel to the Monitor and counsel to the Applicants shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by the Applicants as part of the costs of these proceedings." I interpret this to mean the Monitor's standard rates and charges applied in its insolvency practice.

[42] Concerning the charges for IT staff, the law required the Monitor to maintain a website (*Companies' Creditors Arrangement Regulation*, SOR/2009-219, s. 7). However, that does not derogate from the Monitor's burden to establish that the service should be a permissible separate charge. Practically, the evidence in this regard should say whether the partners' hourly billing rates have been adjusted specifically to address the legislated requirement to maintain a website.

[43] The Monitor has not met the evidentiary burden required of it. It must adduce sufficient evidence to show that in its insolvency practice its industry standard is to charge out secretarial, administrative and IT staff separately rather than to include or absorb those charges as part of the hourly fee charged by the professional staff. If that is its standard practice, it must show that the rates charged were its standard (or discounted) rates. It must also establish that the services were reasonably necessary having regard to the amounts involved.

[44] The Monitor is to present affidavit evidence within the next 60 days to address the issues discussed, failing which the charges will be disallowed. This material will be prepared at the Monitor's own cost and the costs of any further application will be addressed at the appropriate time.

(b) *Professional staff (non-partner)*

[45] The Winalta Group contends that there was a duplication of work by non-partner professional staff and that inadequate billing information has been provided. It points to certain entries that are terse, non-specific descriptions of services.

[46] Like Hall J. in ***Re Hickman Equipment (1985) Ltd.*** (2002), 34 C.B.R. (4th) 203 at para. 20, 214 Nfld. & P.E.I.R. 126, I consider many of the descriptions of services in the Monitor's accounts to be "singularly laconic." The party responsible for paying a monitor's bill is entitled to more. That said, I find the Winalta Group's suggestion of punishing the Monitor for this infraction by reducing the Fee to be unduly harsh.

[47] Despite the cursory nature of certain entries, the work of the Monitor’s subordinate professional staff appears to have been appropriate and in furtherance of the ultimate goal of restructuring the Winalta Group's affairs. There seems to be nothing blatantly untoward or unusual about the work undertaken by these individuals.

[48] Engaging less senior professionals and other subordinate staff to report to and discuss their findings with more senior professionals is not unusual and does not "constitute any type of double teaming of a nature that would be obviously inappropriate" (***Re Hickman Equipment (1985) Ltd.*** at para. 26).

[49] Consideration of the factors articulated in ***Belyea*** supports the finding that it was acceptable for the Monitor to engage less senior professional staff. In my view, it is relevant that the *CCAA* proceedings moved quickly; the restructuring involved multiple entities, including a publically traded parent; liabilities far outweighed asset values; an intensive sales campaign was initiated to shed redundant asset; and there were numerous claims and disallowances (all but one of which was resolved without the need for court intervention).

[50] There is no evidence suggesting that the Monitor's non-partner professional staff was anything but knowledgeable, thorough and diligent, or that their services were excessive, duplicative or unnecessary. While there may have been some degree of professional overlap with the partners, given typical reporting structures, that is facially neither unusual nor inappropriate. The result achieved was positive - a 100 percent vote in favour of the plan of arrangement.

[51] I am mindful that the Winalta Group was a co-operative debtor.

3. <u>Duplication of work by partners</u>

[52] The Winalta Group also contends that there was duplication of work by two of Deloitte & Touche Inc.’s partners, Messrs. Keeble and Rodriquez.

[53] HSBC held a figurative Sword of Damocles over the Winalta Group's head before and during the *CCAA* proceedings. Many concessions were made by the Winalta Group, including its agreement to Mr. Rodriguez being the partner "in charge" for the Monitor, despite his residence being in Vancouver while the Winalta Group's assets and operations were located in Alberta and Saskatchewan. Freed from HSBC's control, the Winalta Group belatedly questions Mr. Rodriguez's general involvement.

[54] It is undisputed that Mr. Keeble was the Monitor’s "hands on" partner. Mr. Rodriquez, who was familiar to HSBC's special credits branch located in Vancouver, doubtless performed many useful tasks, but as the known entity and more experienced partner, his main raison d'être was to liaise with and provide comfort to HSBC.

[55] Both Messrs. Rodriquez and Keeble signed (and presumably carefully prepared or, at a minimum, carefully considered) all twenty of the Monitor's reports to the court. Report preparation underwent three stages. The initial drafts were prepared by the Winalta Group (at the Monitor's request). Next, a review was conducted by one or two of the Monitor's managers. Finally, the reports were delivered to Messrs. Rodriquez and Keeble.

[56] The Monitor's accounts do not specify what portion of the fees charged for Mr. Rodriquez ($127,000.00) and for Mr. Keeble ($209,992.00) relates solely to report preparation. Similarly, the Monitor’s accounts do not aid in determining if there was any other duplication of work by the two partners.

[57] The Winalta Group is entitled to know exactly what it is paying for. That said, it thoroughly questioned the Monitor about the respective roles of Messrs. Rodriquez and Keeble. No evidence was presented to show that there was, in fact, any duplication or that any of the work that they undertook was unreasonable. These charges, therefore, are approved.

4. The administration charge

[58] The Winalta Group contends that the Monitor's $50,000.00 administration charge (calculated as six percent of all accounts) in lieu of “customary disbursements” is an unfair "upcharge" with no correlation to reality. In response, The Monitor submits that the Winalta Group implicitly agreed to the administration charge. It further argues that the Winalta Group bears the onus of showing that this charge is offside current industry practice.

[59] The Monitor did not inform the Winalta Group of its intention to charge on the same basis as it had billed HSBC. It simply picked up as the *CCAA* monitor where it had left off as HSBC's private monitor. The Monitor points to the Forbearance Agreement, which referred to the administration fee in the Monitor's retainer letter with HSBC as some evidence of the

Winalta Group's knowledge and implicit agreement to pay any administration charge in the *CCAA*.

[60] Under the terms of HSBC's security, the Winalta Group was liable for the charges of the private monitor. However, it was not a party to the agreement between Deloitte & Touche Inc. and HSBC. In any event, there is no basis for imputing any agreement on the part of the Winalta Group to pay the administration charge in the context of Deloitte & Touche Inc.'s work as *CCAA* Monitor. Even if it were otherwise, I am far from satisfied that such charges are fair and reasonable in all of the circumstances.

[61] A "disbursement" is defined as "the payment of money from a fund" or "a payment, especially one made by a solicitor to a third party and then claimed back from the client" (*Oxford Dictionaries Online*).

[62] The administration charge may be more or less than the Monitor's actual disbursements. While it may be convenient for the Monitor to apply a flat percentage charge rather than keep track of disbursements, that does not mean that it is fair and reasonable. Indeed, even if a *CCAA* debtor expressly agreed to the administration charge, such agreement and the circumstances in which it was made simply are factors that the court should consider in determining whether the administrative charge is fair and reasonable in all of the circumstances.

[63] The Monitor has failed to establish that the administration charge is fair and reasonable in all of the circumstances. The Monitor shall issue an account to the Winalta Group for actual disbursements incurred within 60 days. Whether the Winalta Group will be pleasantly surprised or disappointed will then be seen.

[64] The disbursement account will be prepared at the Monitor's own cost.

5. Mathematical errors

[65] The parties have resolved the alleged mathematical errors.

6. Internal quality reviews

[66] At the hearing of this matter, the Monitor quite properly conceded that the $10,000.00 charged for internal quality reviews should be deducted from its Fees.

B. Breach of Fiduciary Duty/Conflict of Interest

[67] A monitor appointed under the *CCAA* is an officer of the court who is required to perform the obligations mandated by the court and under the common law. A monitor owes a fiduciary duty to the stakeholders; is required to account to the court; is to act independently; and must treat all parties reasonably and fairly, including creditors, the debtor and its shareholders.

[68] Kevin P. McElcheran describes the monitor's role in the following terms in *Commercial Insolvency in Canada* (Markham, Ont.: LexisNexis Butterworths, 2005) at p. 236 :

> The monitor is an officer of the court. It is the court's eyes and ears with a mandate to assist the court in its supervisory role. The monitor is not an advocate for the debtor company or any party in the *CCAA* process. It has a duty to evaluate the activities of the debtor company and comment independently on such actions in any report to the court and the creditors.

[69] The Winalta Group contends that the Monitor breached its fiduciary duty (and implicitly placed itself in a conflict of interest position) by providing HSBC with the September NVR without its knowledge or consent. The onus of establishing the allegation of breach of fiduciary duty lies with the Winalta Group.

[70] The September NVR was sent to HSBC via e-mail. It included a summary of the Monitor’s analysis and backup spreadsheets for the following two scenarios:

(1) the bank appoints a receiver for all companies on September 7, 2010;

(2) the bank supports the company through the *CCAA* and is paid out on October 31, 2010 through a refinancing of the assets of Oilfield and Carriers.

The author of the e-mail asked the recipient to confirm his availability to discuss the scenarios with Messrs. Rodriquez and Keeble the next day.

[71] Mr. Keeble’s responses to questioning, filed March 18, 2011, reference three other reports from the Monitor to HSBC dated June 7, August 12, and August 18, 2010, all of which discussed the estimated value of HSBC’s security in various scenarios (Other NVRs). The Winalta Group neither complained of nor referred to the Other NVRs in its evidence or submissions. In the absence of any complaint and evidence, the sole focus of this inquiry is on the September NVR.

[72] The Winalta Group's complaints concerning the September NVR are that it was prepared and issued without its knowledge and it lead to HSBC’s refusal to fund its takeout financing costs. Articulated in the language used to describe a *CCAA* monitor's duties, the Winalta Group is saying that the Monitor favoured HSBC (placing it in an advantageous position over other creditors) and failed to avoid an actual or perceived conflict of interest.

[73] Accusations of bias and breach of fiduciary duty can harm the public's confidence in the insolvency system and, if unfounded, the insolvency practitioner's good name. A careful investigation into allegations of misconduct is, therefore, essential. The process should entail the following steps:

1. A review of the monitor's duties and powers as defined by the *CCAA* and court orders relevant to the allegation.

2. An assessment of the monitor's actions in the contextual framework of the relevant provisions of the *CCAA* and court orders.

3. If the monitor failed to discharge its duties or exceeded its powers, the court should then:

   (a) determine if damage is attributable to the monitor's conduct, including damage to the integrity of the insolvency system; and

   (b) ascertain the appropriate fee reduction (bearing in mind that other bodies are charged with the responsibility of ethical concerns arising from a *CCAA* monitor's conduct).

Step 1: <u>Reviewing the monitor's duties and powers as defined by the *CCAA* and court orders relevant to the allegation</u>

(a) *The monitor's fiduciary and ethical duties*

[74] Section 25 of the *CCAA* provides that:

> 25. In exercising any of his or her powers in performing any of his or her duties and functions, the monitor must act honestly and in good faith and comply with the *Code of Ethics* referred to in section 13.5 of the *Bankruptcy and Insolvency Act*.

[75] Section 13.5 of the *Bankruptcy and Insolvency Act*, 1985 R.S.C. 1985, c. B-3 ("*BIA*") provides that a trustee shall comply with the prescribed *Code of Ethics*. The *Code of Ethics* is found in Rules 34 to 53 of the *Bankruptcy and Insolvency General Rules*, C.R.C., c. 368 under the *BIA*. These Rules provide in part that:

(a) Every trustee shall maintain the high standards of ethics that are central to the maintenance of public trust and confidence in administration of the Act (Rule 34).

(b) Trustees shall be honest and impartial and shall provide interested parties with full and accurate information as required by the Act with respect to the professional engagements of the trustees (Rule 39).

(c) Trustees who are acting with respect to any professional engagement shall avoid any influence, interest or relationship that impairs, or appears in the

> opinion of an informed person to impair, their professional judgment (Rule 44).

[76] In addition, *CCAA* monitors are subject to the ethical standards imposed on them by their governing professional bodies.

[77] A recurring theme found in the case law is that the monitor's duty is to ensure that no creditor has an advantage over another (see ***Siscoe & Savoie v. Royal Bank of Canada*** (1994), 29 C.B.R. (3d) 1 at 8 (N.B.C.A.); ***Re Laidlaw Inc.*** (2002), 34 C.B.R. (4th) 72 at para. 2 (Ont. S.C.J.); ***Re United Used Auto & Truck Parts Ltd.*** (1999), 12 C.B.R. (4th) 144 at para. 20 (B.C.S.C.); and ***Re 843504 Alberta Ltd.***, 2003 ABQB 1015 at para. 19, 351 A.R. 223). The following observations made by Farley J. in ***Re Confederation Treasury Services Ltd.***, (1995), 37 C.B.R. (3d) 237 at 247 (Ont. Ct. (Gen. Div.)) about a bankruptcy trustee's duty of impartiality resonate:

> The appointment is not a franchise to make money (although a trustee should be rewarded for its efforts on behalf of the estate) nor to favour one party or one side. The trustee is an impartial officer of the Court; woe be to it if it does not act impartially towards the creditors of the estate.

[78] In his article, *Conflicts of Interest and the Insolvency Practitioner: Keeping up Appearances* (1996), 40 C.B.R. (3d) 56, Eric O. Peterson tackles the issue of conflict of interest in circumstances where an insolvency practitioner wears two hats. At p. 74, he states:

> ... The duties of a *CCAA* monitor are defined by standard terms in the court order, and are typically owed to the court, the creditors and the debtor company. Therefore, a private monitor or receiver would have a potential conflict of interest in accepting an engagement as *CCAA* monitor of the same debtor. The engagements are at cross purposes.

[79] Mr. Peterson cautions (at p. 75) that even if an experienced business person consents to the insolvency practitioner wearing two hats, the insolvency practitioner should bear in mind Mr. Justice Benjamin Cardozo's statement that a fiduciary must be held to something stricter than the morals of the marketplace.

[80] Not surprisingly, there may be heightened sensitivity about the work of a *CCAA* monitor who has chosen to wear two hats. Unfounded accusations may be made due to an honestly held suspicion about where the monitor's loyalties lie rather than out of spite or malice.

[81] Common sense dictates that *CCAA* monitors should conduct their affairs in an open and transparent fashion in all of their dealings with the debtor and the creditors alike. The reason is simple. Transparency promotes public confidence and mitigates against unfounded allegations of bias. Secrecy breeds suspicion.

[82] Public confidence in the insolvency system is dependent on it being fair, just and accessible. Bias, whether perceived or actual, undermines the public's faith in the system. In order to safeguard against that risk, a *CCAA* monitor must act with professional neutrality, and scrupulously avoid placing itself in a position of potential or actual conflict of interest.

(b) *The Monitor's legislated and court ordered duties*

[83] One of a monitor's functions is to serve as a conduit of information for the creditors. This did not, however, give the Monitor here *carte blanche* to conduct the analysis in the September NVR and issue it to HSBC. Such authority must be found in the *CCAA* or the court orders made in the proceeding.

[84] Subsections 23(h) and (i) of the *CCAA* deal with the monitor's duty to report to the court. Subsection 23(h) requires the monitor to promptly advise the court if it is of the opinion that it would be more beneficial to the creditors if *BIA* proceedings were taken. Section 23(i) requires the monitor to advise the court on the reasonableness and fairness of any compromise or arrangement that is proposed between the debtor and its creditors. Typically, this report is shared with the creditors just before or at the creditors' meeting to vote on the proposed compromise or arrangement.

[85] The provisions in the Initial Order describing the Monitor's reporting functions are central to this inquiry. They must be read contextually.

[86] HSBC was an unaffected creditor that continued to provide financing to the Winalta Group by an operating line of credit and overdraft facility. There was no DIP financing as HSBC was, in effect, the interim financier. Clause 22 of the Initial Order speaks to HSBC's role as a financier during the *CCAA* process.

[87] Clause 28(d) of the Initial Order reads, in part, as follows:

> 28. The Monitor, in addition to its prescribed rights and obligations under the *CCAA*, is hereby directed and empowered to:
>
> (d) advise the Applicants in their preparation of the Applicant's cash flow statements and reporting required by HSBC or any DIP lender, which information shall be reviewed with the Monitor and delivered to HSBC or any DIP lender and its counsel on a periodic basis, but not less than weekly, or as otherwise agreed to by HSBC and any DIP lender. [Emphasis added.]

[88] Clause 30 of the Initial Order states:

> The Monitor shall provide HSBC and any other creditor of the Applicants' and any DIP Lender with information provided by the Applicants in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Applicants is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by the Court or on such terms as the Monitor and the Applicants may agree. [Emphasis added.]

[89] The Monitor's capacity to report to HSBC was limited to the parameters of these provisions.

Step 2: Assessing the Monitor's actions

(a) *Principles of interpretation*

[90] The interpretation of clauses 28(d) and 30 of the Initial Order lies at the heart of this stage of the analysis. Before undertaking that task, it is helpful to review the principles governing interpretation of the *CCAA* and *CCAA* orders.

[91] In ***Smoky River Coal Ltd.***, 2001 ABCA 209, 299 A.R. 125, the Alberta Court of Appeal cautioned that as *CCAA* orders become the roadmap for the proceedings, they must be drafted with clarity and precision, and the purpose of the legislation must be kept at the forefront in both drafting and interpreting *CCAA* orders (at para. 16).

[92] The issue in ***Smoky River Coal Ltd.*** was the scope of a provision in an order that did not define a post-petition trade creditor's charge. The court stressed (at para. 17) the importance of clearly defining the scope of charges created by the order. Since the parties had failed to do so, the court balanced the parties' interests, presuming that creditors would understand the purpose of the *CCAA* and would expect that the disputed charge would be interpreted to accord with the commercial reality that the debtor would be operating in its ordinary course. In the circumstances, the court interpreted that requirement on "commercially reasonable terms" (at para. 19).

[93] The provision at issue in ***Re Afton Food Group Ltd.*** (2006), 21 C.B.R. (5th) 102, 18 B.L.R. (4th) 34 (Ont. S.C.J.) was the scope of a director's and officers' indemnification. At para. 23, Spies J. ruled that the ***Smoky River Coal Ltd.*** considerations (a liberal interpretation, consideration of the purpose of the *CCAA*, the attempt to balance the parties' interests, and a commercially reasonable interpretation) apply only if the provision is ambiguous, or if there is a gap or omission. In all other circumstances, the court should:

(i) assume that the parties carefully drafted the terms of the order;

(ii) assume that the terms of the order reflect the parties' agreement within the parameters imposed by the court, and that such agreement was codified in the order and approved by the court; and

(iii) interpret a clear and unambiguous provision in accordance with its plain meaning.

[94] The different approaches employed by the courts in ***Smoky River Coal Ltd.*** and ***Afton Food Group Ltd.*** are easily reconciled given the degree of ambiguity in and the nature of the provisions being interpreted in each case.

[95] In my view, the interpretation of *CCAA* orders requires a case-specific and contextual approach. In interpreting *CCAA* orders, the court should consider the objects of the *CCAA*, recognizing that the importance of the objects will vary with the circumstances of the case at bar. Other considerations include the degree of clarity of the provision, its nature, and its consequences for affected parties.

[96] I adopt the reasoning in ***Afton Food Group Ltd.*** that the words of the provision should be given their plain and ordinary meaning, that the court is entitled to assume that the terms of orders [granted as presented] reflect negotiated agreements, and that the terms were crafted carefully. I add to this that the provision being interpreted should be read in the context of the order as a whole, not in isolation.

[97] The modern approach to statutory analysis was summarized as follows by Elmer A. Driedger in his text, *The Construction of Statutes*, 2d ed.(Toronto: Butterworths, 1983) at p. 87, as cited in many cases, including ***Bell ExpressVu Limited Partnership v. Rex,*** 2002 SCC 42, [2002] 2 S.C.R. 559 at para. 26:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

(b) ***Interpreting the relevant provisions of the Initial Order and the CCAA***

[98] The object of the *CCAA* is to enable insolvent companies to carry on business in the ordinary course or to otherwise deal with their assets so that a plan of arrangement or compromise can be prepared, filed and considered by their creditors and the court. While this object does not play as significant a role in interpreting clauses 28(d) and 30 of the Initial Order as it might in other cases, nevertheless it is relevant.

[99] Section 23 of the *CCAA* sets out certain reporting requirements for a court- appointed monitor. None of these authorized the Monitor in this case to provide HSBC with the analysis

contained in the September NVR, without the knowledge and consent of the Winalta Group or the court.

[100] Clause 28(d) of the Initial Order empowers and obliges the Monitor to give advice to the Winalta Group about its preparation of cash flow statements and reports required of it by HSBC or any DIP lender. It is clear from the plain and ordinary language of the provision that it applies to instances where the Winalta Group reports to HSBC. It is the Winalta Group's job to do the reporting. The Monitor's job is to assist the Winalta Group and to review the reports before they are delivered to the relevant lender. A contrary finding would render the words "and reviewed with the Monitor" nonsensical.

[101] If there is any ambiguity in clause 28(d), it is about who is to deliver the reports. The use of the word "and" after the words "shall be reviewed with the Monitor" is open to the interpretation that the Monitor is to deliver the reports. As nothing turns on that point, I need not decide it.

[102] I am entitled to and do assume that the parties' affected by clause 28(d) carefully crafted that provision and agreed to its terms. Had they intended the Monitor to undertake the analysis contained in the September NVR and to provide it to HSBC, they would have said so. Whether such a provision would have been granted is another question altogether.

[103] This interpretation is supported by contrasting clause 28(d) with the unambiguous language of clause 30, which refers to the Monitor providing information to HSBC (given to the Monitor by the Winalta Group and declared by it to be non-confidential). Unlike clause 28(d), clause 30 absolves the Monitor of responsibility and liability for its acts. Presumably, the parties would have included similar protection in clause 28(d) if it was intended that the Monitor have the authority it claims.

[104] Interpreting clause 28(d) as referring to reports by the Winalta Group rather than the Monitor also is supported by reading the Initial Order as a whole. Clause 22 speaks to HSBC continuing to provide operating and overdraft facilities to the Winalta Group. As HSBS, in effect, is an interim lender, it is logical that the Winalta Group is obliged under the Initial Order to provide it (and any DIP lender) with cash flow statements and any other required reports on a weekly basis (after having the information reviewed by the Monitor, presumably for accuracy).

[105] Finally, this interpretation is supported by reference to the object of the *CCAA*, which is to have debtors remain in and control their business operations throughout the term of the restructuring. The debtor is the party that reports to its interim lenders.

[106] The Monitor's interpretation of clause 28(d) as authorizing it to prepare and deliver the September NVR to HSBC does not withstand scrutiny. That clause neither expressly nor implicitly authorized the Monitor's conduct in that regard. If the Monitor had any hesitation about the scope of its authority under this clause (which I am of the clear view it ought to have had), its obligation was to seek clarification from the court before proceeding as it did.

[107] Clause 30 is unambiguous. To a degree, it supports the Monitor's action as its plain and ordinary language permits the Monitor to release to HSBC (or any DIP lender) information provided by the Winalta Group which it did not declare to be confidential. The Monitor's notes to the September NVR refer to estimated asset realizations, closing dates for certain transactions, and accounts receivable. Presumably, the Monitor obtained that information from the Winalta Group.

[108] However, the Monitor's estimate of receivership fees, its various calculations, and its analysis stand on a completely different footing. By definition, that is not “information provided by the Winalta Group." Clause 30 does not authorize the Monitor to take information legitimately obtained from the Winalta Group and to use it as the basis for preparing and issuing the type of analysis contained in the September NVR report. Presumably, this provision (which was granted as presented) reflects a negotiated agreement and was carefully crafted.

[109] The Monitor says that it would have prepared and given any creditor the type of analysis contained in the September NVR on demand, irrespective of the creditor’s stake. That may be so (or not), but it does not mean that it is authorized or appropriate for it to do so, particularly without the knowledge and consent of the Winalta Group.

[110] The Monitor's interpretation of clause 30 as authorizing it to prepare and deliver the September NVR to HSBC fails to withstand full scrutiny. Clause 30 did not authorize the Monitor to provide anything over and above the information provided by the Winalta Group. Again, if the Monitor had any hesitation about the scope of its authority under this clause (which I am of the clear view it ought to have had), its obligation was to seek clarification from the court before proceeding as it did.

[111] Read contextually, neither the express language nor the spirit of clauses 28(d) and 30 of the Initial Order authorized the Monitor to issue certain of the information contained in the September NVR. Its authority was limited to relaying non-confidential raw data obtained from the Winalta Group. HSBC could then have interpreted the data (alone or with the assistance of another insolvency practitioner).

[112] The Monitor was not transparent in its dealings with HSBC surrounding the September NVR.

[113] Regrettably, and despite any well intentioned motivation that might be imputed to the Monitor, I find that theMonitor lost sight of the bright line separating its duties as an impartial court officer and a private consultant to HSBC when it provided HSBC with the analysis in the September NVR, thereby creating a perception of bias.

[114] In circumstances where the Monitor ought to have been keenly attuned to heightened sensitivity about perceptions of bias, it should have sought clarification of the reporting provisions in the Initial Order before conducting the analysis in the September NVR and issuing it

to HSBC. The Monitor failed to recognize the need to do so. Instead, it elected to rely on an unsustainable interpretation of clauses 28(d) and 30 of the Initial Order.

Step 3

(a) Determining if damage is attributable to the Monitor's conduct, including damage to the integrity of the insolvency system

[115] HSBC's refusal to fund the Winalta Group's costs for procuring takeout financing appears to have fallen on the heels of it receiving the September NVR. Whether that was a mere coincidence or not has not been established by the Winalta Group.

[116] No authority was cited for the proposition that the court is entitled to reduce a court-appointed monitor's fees on a basis "akin to punitive damages." However, ***Murphy v. Sally Creek Environs Corp. (Trustee of)***, 2010 ONCA 312, 67 C.B.R. (5th) 161 is informative, although distinguishable on its facts.

[117] ***Murphy*** concerned the reduction of a trustee in bankruptcy's fees for misconduct where the relationship between the trustee and largest unsecured creditor had spoiled. The trustee rationalized acting without the approval of two inspectors he considered to be the "handmaidens" of the largest unsecured creditor. At times, the trustee acted contrary to the inspectors' express wishes. Concluding that the trustee had sided against it, the creditor complained to various regulatory bodies, alleging serious wrongdoing and mismanagement by the trustee.

[118] On taxation, the registrar found the trustee guilty of 15 acts of misconduct ranging from multiple breaches of statutory duties to lying to regulatory bodies about the conduct of the estate. The registrar reduced the trustee's fees from $240,000.00 to $1.00 and disallowed or reduced many disbursements. The registrar's decision was appealed to Ontario's Superior Court of Justice and, in turn, to the Ontario Court of Appeal, which directed (at para. 125) that in preventing unjustifiable payments, the court should begin by considering discrete deductions for misconduct that cost the estate quantifiable amounts. The court also directed (at para. 126) that the court should consider the degree and extent of the misconduct, and its effect on the estate, the affected creditors, and the integrity of the bankruptcy process in general.

[119] These directives apply equally to a court-appointed *CCAA* monitor.

[120] In the present case, there is no quantifiable loss, nor is there evidence of damage to the estate. However, the Monitor's failure to scrupulously avoid a conflict of interest negatively impacts the integrity of the insolvency system.

(b) Ascertaining the appropriate fee reduction

[121] There is very little guidance on how the court is to assess an appropriate fee reduction where there is no quantifiable loss (***Re Nelson*** (2006), 24 C.B.R. (5th) 40 at para. 31 (Ont. S.C.J.)).

[122] Reducing a court-appointed officer's fee is not intended to be punitive, but rather is an expression of the court's refusal to endorse the misconduct (***Murphy*** at para. 112; ***Re Nelson*** at para. 31).

[123] Placing a value on the erosion of the public's confidence is an extremely difficult task, particularly given that the object of the exercise is not to punish the offending party. Arbitrarily choosing a figure as a means of refusing to endorse the misconduct is unfair. In the circumstances of this case, I am of the view that the fairer approach is to deprive the Monitor of any charges associated with its misconduct.

[124] Accordingly, the Monitor is to provide affidavit evidence within 60 days particularizing all charges associated with its analysis in the September NVR, following which I will determine the appropriate fee reduction. Should the Monitor fail to provide this information, I will have no alternative but to reduce the Fee otherwise.

IV. Conclusions

[125] The onus on this application rested with the Monitor to establish that its Fee was fair and reasonable. It has fallen short of doing so in a number of respects.

[126] The Monitor exceeded it statutory and court ordered authority by conducting the analysis in the September NVR and providing it to HSBC. The Monitor failed to act with transparency in its dealings with its former client and blurred the bright line dividing its duties as a court-appointed *CCAA* monitor and a private monitor.

[127] In the result:

(i) The Monitor will be afforded a further opportunity to provide better evidence concerning the separate charges for clerical, administrative and IT staff, as discussed above, failing which the charges are disallowed.

(ii) The Monitor is to provide affidavit evidence within 60 days particularizing all charges associated with the analysis in the September NVR, failing which I will otherwise reduce the Fee.

(iii) All affidavits will be prepared at the Monitor's own cost, and the costs of any further application will be addressed at the appropriate time.

(iv) The administration charge is disallowed, and the Monitor will issue an account for actual disbursements within 60 days.

(v) The $10,000.00 charged for internal quality reviews is to be deducted from the Fee.

(vii) Subject to reductions for work connected with the analysis in the September NVR, charges for (non-partner and partner) professional services are approved.

(viii) If the parties cannot agree on costs, they may speak to me at the next application or within 120 days, whichever occurs first.

Heard on the 21st day of March, 2011
Dated at the City of Edmonton, Alberta this 24th day of June, 2011.

J.E. Topolniski
J.C.Q.B.A.

Appearances:

Kentigern Rowan
For Deloitte & Touche Inc.

Darren Bieganek
For the Winalta Group