NO. S-217202
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

THE BANK OF NOVA SCOTIA

PETITIONER

AND:

COMMUNITY MARINE CONCEPTS LTD., VICTORIA INTERNATIONAL MARINA LTD., ETERNALAND YUHENG INVESTMENT HOLDING LTD. AND 0736657 B.C. LTD.

RESPONDENTS

BOOK OF AUTHORITIES

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HEARING DATE: APRIL 22, 2022

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CASE LAW

LEGISLATION

2014 ONSC 365
Ontario Superior Court of Justice

Bank of Nova Scotia v. Diemer

2014 CarswellOnt 666, 2014 ONSC 365, 237 A.C.W.S. (3d) 112

Bank of Nova Scotia, (Plaintiff) and Daniel A. Diemer o/a Cornacre Cattle Co., (Debtor)

A.J. Goodman J.

Heard: January 3, 2014
Judgment: January 22, 2014
Docket: 35-1537675T

Counsel: J. Cooke, for Debtor
D. Smith, for Receiver

Subject: Corporate and Commercial; Civil Practice and Procedure; Insolvency

MOTION to settle counsel's fees in relation to receivership of debtor.

***A.J. Goodman J.*:**

1 This is a motion to settle counsel's fees in relation to the receivership of Daniel Diemer o/a Cornacre Cattle Co. ("the Debtor"). PricewaterhouseCoopers Inc., in its capacity as court-appointed receiver "(the Receiver") of the debtor seeks an order approving the fees and disbursements of its counsel, Borden Ladner Gervais LLP ("BLG").

2 On October 23, 2013, I approved the Second Report as well as the activities and fees of the receiver. While BLG's interim fees of $100,000.00 were approved, the parties were directed to return to court on January 3rd for the purposes of a determination with respect to the approval of the balance of BLG's fees and disbursements plus any original estimates to completion.

General Principles

3 One of the leading authorities dealing with approval of the fees of a receiver is found in the case of *Confectionately Yours Inc., Re*, [2002] O.J. No. 3569 (Ont. C.A.). In *Confectionately Yours Inc., Re*, the Ontario Court of Appeal held that when a receiver asks the court to approve its compensation, there is an onus on the receiver to prove that the compensation for which it seeks the court's approval is fair and reasonable and a court could adjust the fees and charges of the receiver.

4 In *Confectionately Yours Inc., Re* Borins J.A. discussed the purpose in passing the receiver's accounts and opined that the process is established to afford the debtor, the security holder and any other interested person the opportunity to question the receiver's activities and conduct. On the passing of accounts, the court has the inherent jurisdiction to review and approve or disapprove of the receiver's present and past activities even though the order appointing the receiver is silent as to the court's authority. In determining what is fair and reasonable remuneration, Borins J.A. observed that there is no guideline controlling the quantum of fees.

5 The Court of Appeal outlined principles that a court ought to adopt when passing the accounts of a receiver. They include: the accounts must disclose in detail the name of each person who rendered services, the dates on which the services were rendered, the time expended each day, the rate charged and the total charges for each of the categories of services rendered. The accounts should be in a form that can be easily understood by those affected by the receivership (or by the judicial officer), and the receiver and its solicitor's accounts should be verified by an affidavit.

6 In *BT-PR Realty Holdings Inc. v. Coopers & Lybrand*, [1997] O.J. No. 1097 (Ont. Gen. Div. [Commercial List]) Farley J. held at paras 22 & 23:

> The issue on a s. 248(2) hearing is whether the fees charged by the receiver are fair and reasonable in the circumstances as they existed - that with the benefit of the receivership going on, not with the benefit of hindsight. I would also note that it would be an unusual receivership and an unusual receiver where a receiver was able to be up to full speed instantaneously upon its appointment. There is a learning curve for the particular case and probably a suspicion equation to solve. The receiver must demonstrate that it acted in good faith and in the best interests of the creditor as opposed to its own interest or some third party's interests. The receiver must also demonstrate that it exercised the reasonable care, supervision and control that an ordinary man would give to the business if it were his own: see *Re Ursel Investments Ltd.* (1992), 10 C.B.R. (3d) 61 (Sask.C.A.). The receiver is not required to act with perfection but it must demonstrate that it acted with a reasonable degree of confidence: see *Ontario Development Corp. v. I.C. Suatac Construction Ltd.* (1978), 26 C.B.R. (N.S.) 55 (Ont. S.C.).
>
> While sufficient fees should be paid to induce competent persons to serve as receivers, receiverships should be administered as economically as reasonably possible. Reasonably is emphasized. It should not be based on any cut rate procedures or cutting corners and it must relate to the circumstances. It should not be the expensive foreign sports model; but neither should it be the battered used car which keeps its driver worried about whether he will make his destination without a breakdown.

7 In an authoritative case from New Brunswick, the Court of Appeal in *Belyea v. Federal Business Development Bank*, [1983] N.B.J. No. 41, 46 C.B.R. (N.S.) 244 (N.B. C.A.), (cited with approval by the Ontario Court of Appeal in *Confectionately Yours Inc., Re*), held that the

underlying premise for compensation is "usually allowed either as a percentage of receipts or a lump sum based upon time, trouble and degree of responsibility involved". The governing principle is that compensation allowed a receiver should be measured by the fair and reasonable value of his service; and while sufficient fees should be paid to induce competent persons to serve as receivers, receiverships should be administered as economically as reasonably possible.

8 In *Belyea* Stratton J.A. - in referring to *Williston on Contracts* (3rd ed. Vol. 10) - stated at para. 11:

> ...even though a professional is entitled to a fair, just and reasonable compensation measured by the reasonable value of the services rendered, the fees charged must bear some reasonable proportion to the amount of money or the value affected by the controversy or involved in the employment. Thus, in cases where a professional is aware of the amount at issue, courts will impose an underlying or implied limit or maximum on the professional fees it will allow based on what is reasonable in relation to the dollar amount involved in the particular case.

9 The jurisprudence from *Belyea* advances factors that a court ought to consider in assessing the compensation of a receiver, (albeit the discussion in the case was in the context of *quantum meruit*). They 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 and 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.

11 I note a similar approach in addressing the appropriate principles and factors to be considered is found in the British Columbia Court of Appeal case of *Bank of Montreal v. Nican Trading Co.*, [1990] B.C.J. No. 340 (B.C. C.A.).

Position of the parties

12 Mr. Smith submits that the Receiver and its counsel played an integral role in maximizing value for the assets by finalizing an agreement of Purchase and Sale for the sale of substantially all of the debtor's assets in respect of a transaction that was entered into prior to the receiver's appointment and which the receiver only found out about after its appointment. The receiver and its counsel took significant steps to ensure that the transaction was closed in short order so that each of the secured creditors would be repaid in order to reduce additional costs and interest in regards to their respective debts.

13 Mr. Smith submits that the receiver faced many challenges in this proceeding as set out in the Second Report, including: being advised on Labour Day that the debtor had taken it upon himself to have 60 additional cows delivered to the farm the next day; the debtor's delays in providing the receiver with a plan for relocating the livestock and which was required to be removed from the farm by the closing date; the conclusion of an agreement with the purchasers of the farm whereby the equipment that did not form part of the transaction would remain at the farm for a period of 60 days at no cost to the estate; dealing with the debtor's relocation of the excluded assets to two farms owned by different parties and inquiries that had to make as a result of same; the unilateral removal of a piece of equipment by the debtor from the farm (after the close of the transaction) and inquiries that the receiver and its counsel had to make in respect of same; and responding to debtor's counsel in respect of his instructions to bring a motion to seek a change of venue from London to Windsor. The receiver spent considerable time dealing with various steps required to obtain the consent of the Dairy Farmers of Ontario for the transfer of the milk quota to the purchaser.

14 In addressing the McNevin affidavit, Mr. Smith argues that the affidavit provides information with respect to the rates of partners, associates, students-at-law and law clerks who are practicing in either London or Windsor, Ontario. As such, the McNevin Affidavit does not provide any information with respect to professionals practicing in Toronto, much less professionals practicing in the Toronto market in the area of insolvency and restructuring.

15 In furtherance of his argument, Mr. Smith provided various affidavits in support of BLG' counsel's fees claimed for this receivership. These included, amongst others, the affidavit of Melaney J. Wagner sworn July 4, 2013, in support of a motion for the approval of the fees and disbursements of Goodmans LLP in connection with the insolvency proceedings commenced by Extreme Fitness, Inc. under the *Companies' Creditors Arrangement Act*. Ms. Wagner's hourly rate is $775.00 per hour. The affidavit of Adam M. Slavens sworn October 12, 2011 in support of a motion for the approval of the fees and disbursements of Torys LLP in connection with the receivership proceedings of Voyageur Maritime Trading Inc. As the Slavens Affidavit discloses, David Bish, a partner at Torys practicing in the area of insolvency and restructuring has an hourly rate of $800.00. The affidavit of Robin B. Schwill sworn December 3, 2012, in support of a motion for the approval of the fees and disbursements of Davies Ward Phillips & Vineberg LLP in connection with proceedings under the *Business Corporations Act* for the winding-up of Coventry

Inc. As a partner, Mr. Schwill's hourly rate is $825.00 per hour and he practices in the area of insolvency and restructuring. The affidavit of Derek Powers sworn July 15, 2013 in support of a motion for the approval of fees and disbursements of BLG in respect of a receivership of Interwind Corp. Mr. Power's rate is $750.00 per hour. The affidavit of Mary Arzoumanidis sworn November 13, 2013 in support of a motion for the approval of fees and disbursement of BLG under insolvency proceedings commenced by TBS Acquiereco. Ms. Arzoumanidis' hourly rate is $750.00.

16 Mr. Jaipargas, BLG's principal counsel on the file submitted an affidavit wherein he states, *inter alia*, "the Original Estimate to Completion needs to be revised such that the estimate to completion is $30,000.00, plus disbursements. He goes on to state that "the last date that I entered a docket on this matter was October 14, 2013. Since that date I have done additional work on this matter including, but not limited to, the following: finalizing the motion materials in respect of the motion heard by the Court on October 23, 2013; (ii) dealing with the issues arising at the hearing on October 23, 2013; (iii) dealing with an issue raised by counsel for the Debtor in respect of the scope of the Approval and Vesting Order dated September 17, 2013 of Madam Justice Leitch made in these proceedings; and (iv) preparing this affidavit in response to the McNevin Affidavit. I have not entered a docket for dealing with all of these matters, nor do I intend to do so. Further, I do not intend to record any further time in connection with this matter, unless there is significant additional work required by BLG in connection with the motion returnable before Mr. Justice Goodman on January 3, 2014."

17 Mr. Cooke submits that receiver and receiver's counsel effectively completed their task without delay or significant problems. While Mr. Cooke does not take issue with the work performed by counsel, he submits that the rates charged by counsel and his firm are excessive and unreasonable. Although Mr. Cooke takes specific issue with BLG counsel's rates, I glean from submissions that the thrust of his argument evolved from a complaint about the rates being charged to an overall dispute of the unreasonableness of the entirety of the fees (and by extension- the hours) submitted for reimbursement.

Analysis

18 As a general principle, the assessment of fees are in the discretion of the court. There is no fixed rate or tariff for determining the amount of compensation to pay a receiver or receiver's counsel. Similar to the approach in assessing costs, in approving a receiver's accounts, a determination should be made as to whether the remuneration and disbursements incurred in carrying out the receivership were fair and reasonable, rather than an amount fixed by the actual costs charged by receiver's counsel. The court must, first and foremost, be fair when exercising its discretion on awarding fees.

19 In my view, in an assessment of fees, there must be practical and reasonable limits to the amounts awarded and those amounts should bear some reasonable connection to the amount

that should reasonably have been contemplated. It is not necessary for me to have to go through the dockets, hours, the explanations or disbursements, line by line, in order to determine what the appropriate fees are. Nor is the court to second-guess the amount of time claimed unless it is clearly excessive or overreaching. The appellate courts have directed that judges should consider all the relevant factors, and should award costs (or fees) in a more holistic manner. However, when appropriate and necessary, a court ought to analyze the Bill of Costs or dockets in order to satisfy itself as to the reasonableness of the fees submitted for consideration.

20 Indeed, the fixing of costs is not an unusual task for the court. Superior Court judges are expected to fix costs following not only routine motions but also lengthy trials. Although the factors for assessing costs may be different, the type of analysis required for assessing fees is similar in approach. The assessment of counsel's fees should not just be a matter of calculating the number of hours spent times a reasonable hourly rate. There should be some correlation of the costs to the benefits derived from the receivership. This cost-benefit analysis need not be precise or based upon the advice of expert analysis.

21 When a receiver is appointed, the receiver may find the debtor's business affairs somewhat chaotic and the receiver may have to spend considerable time, organizing the affairs of the business in order to be in a position to administer the receivership properly. Accordingly, the time spent must be viewed in the context of the receiver's duty to preserve the assets of the debtor and realize on those assets and administer the estate and the receiver's ability to retain the services of legal counsel to assist in those duties as required. However, as I will discuss momentarily, that is not the case here.

22 The relevant clauses in Carey J.'s order of August 20, 2013 include:

> 17. THIS COURT ORDERS that the Receiver and counsel to the Receiver shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, and that the Receiver and counsel to the Receiver shall be entitled to and hereby granted a charge (the "Receiver's Charge") on the Property, as security for such fees and disbursements, both before and after the making of this Order in respect of these proceedings, and that the Receiver's Charge shall form a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subject to sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.
>
> 18. THIS COURT ORDERS that the Receiver and its legal counsel shall pass its accounts from time to time, and for this purpose the accounts of the Receiver and its legal counsel are hereby referred to a judge of the Ontario Superior Court of Justice.

23 The Order is clear and unambiguous. The Order contemplates standard rates, namely the hours expended times the lawyer's rate.

24 As outlined in the discussion in both *Belyea* or *Nican*, the factors in play for my consideration include, a) the nature, extent and value of the assets handled; b) the complications and difficulties encountered; c) the degree of assistance provided by the company, its officers or its employees, and d) the cost of comparable services when performed in a prudent and economical manner.

25 In this receivership we are talking about a family farm of an approximate value of $8.3 million. The secured creditors have been paid out in full and there are excess funds remaining from the receivership. Unsecured creditors have filed claims and that process is now engaged and ongoing. [1]

26 Mr. Smith argues that Mr. Cooke did not employ the "come-back" provision to vary the terms of the rates. In response, Mr. Cooke submits that he placed BLG on notice about his concerns about the escalation of fees very early on in the receivership. Mr. Smith takes no issue with that assertion and I am satisfied that BLG was put on notice about this issue. In any event, It seems to me that the very limited duration of this receivership nullifies the impact of this submission.

27 In a similar vein, Mr. Cooke complains that the quantum of the fees of receiver's counsel has caught his client by surprise, as no accounts were rendered. The same limited duration of this receivership also addresses, to a degree, this argument. However, while there is no obligation on receiver's counsel to come to the court often in order to seek approval of fees, when counsel waits for several months to do so, particularly in a case like this where significant costs are running up relative to the size of the estate, counsel for the receiver is at risk that when they do come to court, the fees incurred may legitimately be criticized. This is true especially in a case such as this where the tenure of the receivership is limited and the involvement of the receiver and counsel had a 'shelf-life' of approximately two months.

28 In my view, it is not enough in these circumstances to rely on the fact that the work done was approved in a general way by an order of the court with the acknowledgment that the term "standard rates" is included. When counsel wait to bring their accounts to the court for approval, they do so at their own risk.

29 Turning to the various affidavits filed in support of BLG's fees, I find the rates charged by other counsel as outlined in the materials referring to other insolvency work conducted by Toronto firms to be unhelpful in my assessment. For example, in the Extreme Fitness case Mr. Cooke advised that this case involved an estate of a value of $57 million and the business had 900 employees. In the winding-up of Coventry Inc. there were $73 million in assets and the fees were $139,000.00. In the Commercial list matter of Interwind Corp the assets were $311 million and there was over 6 months of involvement in the receivership with fees of $131,000.00. In the TBS Acquireco matter, the estate was valued at $147 million with 8 months of work required and the fees were $556,000.00. Interestingly, I am advised by counsel that the Voyager Maritime case

is very similar in nature to the one before me with legal fees assessed at $73,000.00. Mr. Smith did not dispute any of Mr. Cooke's assertions about these accounts. As mentioned, this particular case deals with $8.3 million in assets. The quantum and scale of effort required in the other cases presented for comparative purposes pale significantly in comparison to this receivership.

30 In my view, the assumption that the court will automatically approve a "usual" hourly rate for Receiver's counsel, whether it stems from the commercial list practice or from a geographical region like Toronto is a faulty one. As Spies J. opined in *Pandya v. Simpson*, [2006] O.J. No. 2312 (Ont. S.C.J. [Commercial List]), the court, with the assistance of opposing counsel, has to play the role of what a client would ordinarily do, namely consider whether the hourly rate is fair and reasonable in light of the nature of the work involved and the amounts in issue.

31 It is also important to note that the receiver and its counsel have been assisted by the fact that the debtor has cooperated. In fact, in this receivership, the debtor continued to operate the farm pursuant to an agreement made on August 30, 2013. There was little involvement expended by the receiver or counsel requiring the day-today management of the business or seeking out a potential purchaser. The agreement of Purchase and Sale had already been completed and was substantially finalized prior to the receiver's involvement.

32 I find that the entire scope of the receivership here was modest. All of the secured claimants have recovered and early on in the receivership receiver's counsel should have considered whether or not the firm's usual hourly rates were suitable for this receivership. In fact, the usual rates, (which Mr. Cooke argues are at the extreme "high end" of the scale), are in my view, not even warranted from the outset. As Farley J. opined in *BT-PR Realty*, an agreement or order respecting a receivership "is not a licence to let the taxi meter run without check".

33 With this background in mind, I have considered both the hourly rates charged by the Receiver's counsel, the time spent and the work done, in assessing the reasonableness and fairness of the accounts. Clearly, the size of the receivership estate should have some bearing on the hourly rates of counsel.

34 In this matter, I am persuaded that the amount of counsel's efforts and work involved may be disproportionate to the size of the receivership. I am of the view that an adjustment ought to be made to reflect the fact that, particularly after the size of the estate became known, the "usual' or "standard" rates of counsel were too high relative to the size of the estate.

35 Many of the matters listed such as the sale and disposition of the property, and communication with various Boards or interested parties and matters of that sort is work that I would have expected the receiver's junior lawyers or staff to take care of at a lower cost. I query why a senior partner had to travel from Toronto to attend court in London when the motions were unopposed by all interested parties. The only dispute in this case was whether Windsor or London was the appropriate venue, an issue that was quickly addressed and resolved.

36 Mr. Prince on behalf of the receiver deposed that he had reviewed the fees, and he relied on his knowledge that the rates charged by the receiver and BLG are comparable to the rates charged for the provision of similar services by other accounting and law firms. I do not fully accept Mr. Prince's opinion endorsing the fees rendered by BLG as outlined in para 10 and 12 of his affidavit.

37 While, an assessment of the fees in this matter is a difficult task given the information that I have to consider and the breadth of materials filed, it is not impossible. It would have been preferable, if time and expense would permit, to have opposing counsel cross-examine Mr. Jaipargas on his affidavit with respect to the accounts.

38 I do not accept the assertions raised in Mr. Jaipargas' affidavits. In my review of the fees found in Appendix "X" of the October 23rd Motion Record, there appears to be excessive work done by senior counsel on routine matters. I also have concerns about the amount of hours expended for matters that on the face of the dockets appear to be administrative and not requiring the amount of hours docketed. I also note that senior real estate partner was engaged to conduct what appears to be relatively modest or routine work on this file.

39 The fact work was done by lawyers at higher hourly rates exacerbates the problem of the fees, as the rates claimed for senior lawyers involved in this case are as high as $750.00 and $760.00 per hour. In my view, other lawyers should have done much of this work at significantly lower rates.

40 Mr. Smith qualified his submission by claiming that while this receivership was not complex, there were "challenges raised by the debtor". I reject his assertions about any difficulties or complexities which arose in this receivership. In my view, the materials filed and counsel's submissions were an attempt to exaggerate and justify the fees by asserting a degree of complexity or difficulty that clearly did not arise in this case. This receivership was unlike a case where the receiver steps in as an administrator or manager and runs the business. We have the divestment of the farm and assets with some modest ancillary work.

41 Bills for legal fees have been submitted to the date of the hearing. I reject Mr. Jaipargas' contention that there was a substantial write-down or reduction of fees. BLG claims approximately $30,000.00 for matters as yet unascertained or contingent. Frankly, this position is not only conflicting to Mr. Jaipargas' assertion that he had foregone additional work post October 2013, but in view, the entire submission is somewhat disingenuous.

42 Consideration must be given to the number of hours docketed to accomplish particular tasks. Nonetheless, in considering the number of hours and the nature of the work done on this matter, I am of the view that the sheer number of hours put in, given the nature and scope of this receivership, reflects a significant degree of inefficiency when I consider what work has been done. Part of my concerns about the inefficiencies and whether all of the work done was warranted, can be explained by the fact that 11 different lawyers charged time to the file. Although some of that

can be justified on the basis that different expertise was needed (particularly insolvency versus real estate), this always raises a concern about duplication of effort. In that regard, I reviewed and considered the dockets of M.B. Shopiro, M. Arzoumanidis and R. Jaipargas found in Appendix "X" of the motion materials filed for the October 23rd hearing. In my view, some of the work could have been done at a lower hourly rate and with due regard to the hours being expended on various tasks.

43 To illuminate his point, Mr. Cooke calculated the average fee rate for counsel juxtaposed with the total amounts charged by BLG. He submits that the entire quantum sought by BLG as reflected in the dockets would translate to 5.76 hours of work a day for each and every single day of the 69 day receivership; or $3,700.00 per day for an $8.3 million estate with $500,000.00 in assets remaining to be distributed.

44 As mentioned, in this case, I have concerns about the fees claimed that involve the scope of work over the course of just over two months in what appears to be a relatively straightforward receivership. Frankly, the rates greatly exceed what I view as fair and reasonable.

45 Although I could have easily reduced the entire amount of hours charged to arrive at a just result, I accept Mr. Cooke's analysis and approach to the quantum of fees to be assessed in relation to counsel's activities for this receivership. As there are several methods to achieve what I believe is a reasonable amount for receiver's counsel's fees, in arriving at such an approach, I accept the affidavit of Tanya McNevin. I find that comparable rates charged by counsel and law clerks in London and environs, as illustrated in the affidavit, to be applicable in arriving at a just compensation. Frankly, in this case, it matters little whether I reduce the fees based on the rates charged or cut the overall number of hours expended. The net result is the same, which is to address the lack of proportionality and reasonableness of BLG's fees in this case.

46 Hence, I adopt the average London rate of $475.00 for lawyers of similar experience and expertise as proffered by Mr. Cooke and apply it to reduce the amounts claimed accordingly. Indeed, the application of these rates to my overall assessment is not an exact science. I pause to add that had Mr. Cooke not provided an approach to the quantum, I may have been persuaded to further reduce counsel's fees to reflect what I find are just and reasonable.

47 My decision is not be construed in any fashion to express that the rates charged by lawyers in Toronto have no applicability in matters arising in the Southwest Region. Nor am I discounting the sage and instructive principles that are provided by authorities arising out of the Commercial List in Toronto on the subject of appropriate remuneration for counsel involved in insolvency matters. However, I have not lost sight of the importance that the position of the receiver and its counsel and their correlative responsibilities should not be made into a means of absorbing money of creditors, debtors and others whose interest this court must protect. This case is fact specific and I am considering the overall reasonableness of the fees presented here.

Conclusion

48 This receivership deals with the life savings of a farmer. All secured creditors have been fully reimbursed. No doubt, the debtor will be impacted by the legal fees charged and, at the end, there will be very little left for him. In considering the ambit of Carey J.'s order and having conducted a review of the scope of BLG's fees in the context of this receivership, it seems to me that BLG had not assessed their reasonableness of their fees and had failed to minimize duplication or effect efficiencies.

49 In my opinion, BLG's claim of $255,955.00 for its fees in this relatively straightforward receivership with the actual amount of work involved here is nothing short of excessive. A significant reduction of receiver's counsel's fees is warranted. Fees claimed for any revised estimates to completion are denied.

50 In the exercise of my discretion, BLG's fees are assessed in the total amount of $157,500.00 (all inclusive). From this total, the amount of $100,000.00 is to be deducted as provided in the October 23rd Order approving BLG's interim payment. BLG is entitled to its disbursements of $4,434.92 plus applicable HST.

51 Given the nature of this hearing, and my reticence to have any costs extracted out of the remainder of the estate, it is my view that each party shall bear their own costs of this motion.

Order accordingly.

Footnotes

1 In my October 23, 2013 order I substituted BDO Canada Limited as receiver.

1983 CarswellNB 27
New Brunswick Court of Appeal

Belyea v. Federal Business Development Bank

1983 CarswellNB 27, [1983] N.B.J. No. 41, 116 A.P.R. 248,
18 A.C.W.S. (2d) 19, 44 N.B.R. (2d) 248, 46 C.B.R. (N.S.) 244

BELYEA and FOWLER v. FEDERAL BUSINESS DEVELOPMENT BANK

Hughes C.J.N.B., Ryan and Stratton JJ.A

Judgment: January 18, 1983
Docket: No. 31/82/CA

Subject: Corporate and Commercial; Insolvency

Action by secured creditors against debtor for deficiency owing under guarantee; claim that receiver's remuneration excessive.

***Stratton J.A.* (*Hughes C.J.N.B.* concurring):**

1 I have had the benefit of reading the judgment prepared by my brother Ryan and regret that I am unable to agree in all respects with his proposed disposition of this appeal [from 40 C.B.R. (N.S.) 157, 38 N.B.R. (2d) 162, 100 A.P.R. 162].

2 In his factum counsel for Messrs. Belyea and Fowler raises two grounds of appeal, namely, the reasonableness of the refusal by the Federal Business Development Bank to accept an offer made by Mr. Sam Gamblin to purchase the inventory of Chase Camera & Supply Limited for $40,000, and the reasonableness of the receiver's account of $11,730. I agree with Ryan J.A. that the refusal by the bank to accept the Gamblin offer was not, in the circumstances, unreasonable. However, I do not agree that the receiver satisfactorily established that its account for services was fair and reasonable.

3 There is no fixed rate or settled scale for determining the amount of compensation to be paid a receiver. He is usually allowed either a percentage upon his receipts or a lump sum based upon the time, trouble and degree of responsibility involved. 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.

4 The principles applicable in fixing the remuneration to be allowed a receiver have been discussed in a number of decisions. In the frequently quoted case of *Campbell v. Arndt* (1915), 8 Sask. L.R. 320, 9 W.W.R. 57, 24 D.L.R. 699 (S.C.) , it was pointed out that a receiver is generally paid by a commission on the gross amount of his receipts, the rate of which varies from 2 to 5 per cent in proportion to the care and trouble involved. The court in that case concluded that, although the receiver must have spent considerable time and experienced a good deal of trouble, there did not appear to have been any very exceptional difficulties entitling him to exceptionally larger fees and, accordingly, he was awarded as a fair remuneration a commission of 5 per cent of the funds coming into his hands.

5 A lump sum was awarded to receivers by the Nova Scotia Court of Appeal in *Eastern Trust Co. v. N.S. Steel & Coal Co. Ltd.* (1938), 13 M.P.R. 237 . In making their award, the court said at p. 240:

> As we view it, we are entitled, in order to fix the remuneration of both receivers and liquidators, to survey the entire operations under their charge since their appointment, to take into consideration the time each of them gave to the work and the responsibilities resting on them as receivers and liquidators, and to determine what the work necessarily done should cost, if conducted prudently and economically.

6 A lump sum was also awarded a receiver as fair compensation for his services in *Indust. Dev. Bank v. Garden Tractor & Equipment Co. Ltd.*, [1951] O.W.N. 47 (H.C.) . In that case, Marriott, Master, said at p. 48:

> In fixing the compensation of a receiver, the Court always has had complete jurisdiction to allow what is fair and reasonable under all the circumstances, but a receiver has no *prima facie* right to any fixed rate as a trustee in bankruptcy has under The Bankruptcy Act. In Kerr on Receivers, 11th ed. 1946, at p. 279, it is stated: "In the case of receivers and managers there is no fixed scale. They are sometimes allowed 5 per cent on the receipts: in other cases their remuneration is fixed at a lump sum or regulated by the time employed by the receiver, his partners and clerks." In *Re Fleming* (1886), 11 P.R. 426 , Chancellor Boyd stated: "Five per cent commission may be a reasonable allowance in many cases, but where the estate is large and the services rendered are of short duration and involving no very serious responsibility, such a rate may be excessive."

7 In fixing a lump sum rather than a percentage fee for a receiver's compensation in *Ibar Devs. Ltd. v. Mount Citadel Ltd.* (1978), 26 C.B.R. (N.S.) 17 (Ont. S.C.) , Saunders, Master, concluded that remuneration on a 5 per cent basis was just too high. He held that the receiver was entitled to a fair fee on the basis of a quantum meruit according to the time, trouble and degree of responsibility involved.

8 It should perhaps be noted that there is American authority for the proposition that where the duties of the receiver consist in liquidating assets, a commission on the fund is a more appropriate method of compensation than that based on a fair price for the labour and time employed, and is the one commonly used. Where the compensation is so computed, 5 per cent is the usual and customary rate in ordinary cases. However, the rate varies according to the degree of difficulty or facility in the collection of different receipts: see 75 C.J.S. 1067.

9 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.

10 Experienced counsel know that it can be a matter of some difficulty to prove that an account for services is fair and reasonable. In many cases, counsel attempt to establish this fact by calling as witnesses persons who are engaged in the same profession or calling to testify that the charges made by the plaintiff are the usual and normal charges for similar services made by members of that particular profession or calling in their locality. In the present case, where the receiver was a chartered accountant, no evidence was tendered by any member of the accounting profession as to the usual and normal charges made for services similar to those performed by the receiver nor, indeed, was any evidence called other than that of the receiver, to establish the reasonableness of the charges which he unilaterally made for his services.

11 One of the compelling factors referred to in Williston on Contracts, 3rd ed. (1967), vol. 10, pp. 928-29 as a determinant of the reasonable value of services performed by lawyers is the amount involved. To state this proposition another way, even though a professional is entitled to a fair, just and reasonable compensation measured by the reasonable value of the services rendered, the fees charged must bear some reasonable proportion to the amount of money or the value affected by the controversy or involved in the employment. Thus, in cases where a professional is aware of the amount at issue, courts will impose an underlying or implied limit or maximum on the professional fees it will allow based on what is reasonable in relation to the dollar amount involved in the particular case: see *J.W. Cowie Enrg. Ltd. v. Allen* (1982), 26 C.P.C. 241, 52 N.S.R. (2d) 321 (C.A.) .

12 Generally speaking, courts have been reluctant to award remuneration based solely upon the time spent by the appointee in performing his duties: see *Re Amalg. Syndicates*, [1901] 2 Ch. 181, 17 T.L.R. 486 . They have preferred to award either a lump sum or a commission upon the amount collected or realized by the receiver. However, whether the commission or lump sum method is used in computing the compensation to be paid to a receiver, the compensation awarded must be

fair and reasonable having regard to all of the material facts and circumstances of the particular case. In determining the fairness and reasonableness of a receiver's remuneration it is, I think, well to keep in mind what was said by Barker J. on this subject as long ago as 1894 in *Hall v. Slipp*, 1 N.B. Eq. 37 -39:

> ... while it is important that a remuneration consistent with the responsibility of the position should be allowed, it is of equal importance that the position should not be made a means simply of absorbing the moneys of creditors and others whose interests it is the duty of this Court to protect.
>
> ... while, as a general rule, a commission of five per cent. on receipts is allowable, exceptions are made in special cases, both in the way of increasing the amount where unusual work is required, or diminishing it where the amounts are large or the trouble is insignificant.
>
> ... It is evident, if the necessary expenses of administering estates in this Court bear so large a proportion to the amount involved as this, the practical result is simply to enrich the Court's officers at the expense of the suitors. In my opinion, however, the practice of the Court warrants no such result; and I think it only right to point out that it is a mistake to support that those who act as receivers are entitled to charge, or will be allowed, a remuneration made up on a scale of fees applicable to leading counsel.

13 In the present case, there was no evidence tendered of any express agreement regarding the remuneration to be paid to the receiver. Nor do I think that this is an appropriate case in which to limit the compensation payable to the receiver to a reasonable percentage of the assets handled. On the other hand, were I to uphold the finding of the trial judge, I would in effect be allowing the receiver a fee equivalent to 35 per cent of the amount realized on the sale of the assets.

14 The record discloses that the receiver sold the inventory of Chase Camera & Supply Limited for $30,075 and that the total receipts from all sources were $36,566. The receiver charged a fee for its services of $11,730 which it deducted from the funds in its hands, remitting the balance to the bank. There was no evidence that this receivership was in any way complex. Indeed, the evidence was that the officers of Chase Camera & Supply Limited provided a good deal of assistance to the receiver in the disposition of the assets. In all of the circumstances, it is my opinion that the fee deducted by the receiver, categorized by one of the employees of the bank as "high", was unreasonable in relation to the dollar amount realized on the sale of the inventory and ought to have been reduced. In failing to make that reduction, I think the trial judge erred in principle.

15 Counsel for the Federal Business Development Bank did not call as witnesses the persons who actually performed the work in this receivership, other than Mr. Fowler who supervised it, nor did he tender in evidence any "record or entry of an act, condition or event made in the regular course of" the business of the receiver. In the absence of such evidence, it is difficult to see how s. 49 of the Evidence Act, R.S.N.B. 1973, c. E-11, can be of any assistance to the receiver in establishing

its account. Moreover, the only evidence, other than that of Mr. Fowler, as to the reasonableness of the receiver's account was that of the in-house solicitor for the bank who testified that in a case such as this present one he "would have expected a receiver's bill of approximately $5,000.00, say in the range of $4,000.00 to $6,000.00, which would be something which we would reasonably anticipate". In view of this evidence, it is my opinion that a reasonable remuneration to the receiver in this case would be $6,000.

16 As my brother Ryan points out, the reasonableness of a demand for payment given on the same day that the bank was informed of a potential sale of the company's inventory was not in issue before us nor, for that matter, was it made clear what act of default by the company was relied upon by the bank as entitling it to crystallize its debenture. Therefore, these matters were not considered on this appeal.

17 I would allow the appeal and reduce the judgment at trial to $4,591.03. The defendants are entitled to the costs of this appeal which I would fix at the sum of $750.

Ryan J.A. **(dissenting):**

18 This is an appeal by the defendants from a decision of a judge of the Court of Queen's Bench, wherein he directed judgment for the plaintiff against the defendants, jointly and severally, in the sum of $10,249.03 together with costs. In its action the plaintiff claimed against the defendants for a deficiency which it alleged was owing to it under a guarantee given by the defendants to secure a loan of $40,000 advanced by the plaintiff to Chase Camera & Supply Ltd.

19 The following facts are set out in the decision of the trial judge reported in (1982), 40 C.B.R. (N.S.) 157, 38 N.B.R. (2d) 162 at 163 -64, 100 A.P.R. 162 :

> In the summer of 1978 the plaintiff lent $40,000.00 to the company. To secure the loan the plaintiff took a debenture which gave it the right to appoint a receiver. The defendants guaranteed the loan. Both the debenture and guarantee were received in evidence.
>
> Relations between the company and the plaintiff were uneventful until August 27, 1979 when events started happening quickly. That morning Mr. Belyea visited Donald O'Leary, a senior credit officer of the plaintiff, and informed him that the company was in poor financial shape and that Mr. Sam Gamblin, of Gem Photo, was accompanied Mr. Belyea to the meeting, was prepared to pay $40,000.00 for the company's inventory. Mr. Belyea pointed out that this amount would more than satisfy the company's indebtedness to the plaintiff which then stood at approximately $34,000.00. Mr. Belyea requested the plaintiff's permission for this transaction.
>
> By the afternoon of the same day the plaintiff had concluded that it could not consent to the transaction and instead appointed H.R. Doane Ltd. as receiver and requested them to take

steps to liquidate the inventory. A partner of the Doane firm, Mr. Bev Fowler, was the Doane representative responsible for this task.

Mr. Fowler described the various options open to him at that time and described his efforts in arranging a sale, which took place after tender, to a Bridgewater, N.S. company for $30,000.00. In addition the plaintiff realized $4,925.24 apart from the receiver's efforts. A balance of $7,749,03 remained owing on the $34,231.85 due at the date of demand. Mr. O'Leary made mention of a balance of $8,279.30 as of November 10, 1981 but gave no details of this higher figure.

20 At a pre-trial conference the parties agreed that the issues to be determined by the trial judge were:

a) Did the plaintiff act reasonably in its refusal to accept the Gamblin offer? and

b) Was the receiver's fee of $11,730 reasonable?

The same issues were raised on this appeal.

21 As to the first issue the trial judge held the plaintiff was justified in refusing to accept the Gamblin offer of $40,000 for the inventory of Chase Camera & Supply Ltd. because a substantial amount was owing to the plaintiff, the value of the inventory on which it held its security was unknown to it and because the defendant Belyea disclosed to the plaintiff the company's poor financial situation. These factors no doubt appeared to the plaintiff to jeopardize its position as a creditor. In my opinion, the refusal to accept the Gamblin offer was a business judgment which I cannot say was unreasonable.

22 In his submission counsel for the defendants contended that, not only was the receiver's account unreasonable, but that the receiver had failed to prove that the work charged for was in fact performed. Mr. Fowler, a chartered accountant and licensed trustee, was an audit partner with H.R. Doane Limited specializing in insolvency work. He explained that each of Doane's employees is required to keep a time card upon which the employee enters the hours which he had spent each day on whatever accounts he works on. Mr. Fowler stated that at the end of each week the cards are "extended" and the information thereon is entered in each client's ledger account. He produced photocopies of all time cards and ledger sheets of the Chase Camera account which, by agreement of counsel, were used to establish the time spent by each employee who worked on the account.

23 In seeking to prove the reasonableness of the receiver's account, counsel for the plaintiff did not enter in evidence the employees' time cards or the client's ledger sheets, nor did he avail himself of s. 49 of the Evidence Act, R.S.N.B. 1973, c. E-11, which provides that:

> A record or entry of an act, condition or event made in the regular course of a business is, insofar as relevant, admissible as evidence of the matters stated therein if the court is satisfied as to its identity and that it was made at or near the time of the act, condition or event.

24 Notwithstanding the fact the photocopies of the time cards and the client's ledger sheets were not entered in evidence, counsel for the defendants cross-examined Mr. Fowler at length on their contents as though they had been entered in evidence. For this reason and because counsel for the parties agreed at a pre-trial conference that the issue to be decided by the trial judge with respect to the account was whether or not it was reasonable and fair, I am satisfied that the trial judge was entitled to rely on the entries made in the cards as well as the viva voce testimony of Mr. Fowler in determining whether the account was reasonable and fair. The trial judge's finding that the receiver's account was fair and reasonable is a finding of fact supported by the evidence. Moreover, no evidence was tendered by the defendants to prove that the charges were unreasonable, or that the work was not actually performed. As there was no palpable or overriding error in his finding this court will not interfere with it.

25 This appeal did not raise the issue of the requirement of reasonable notice to which a debtor is entitled when a debt is payable on demand. This requirement was illustrated by the decision of the Supreme Court of Canada in *Ronald Elwyn Lister Ltd. v. Dunlop Can. Ltd.*, [1982] 1 S.C.R. 726, 41 C.B.R. (N.S.) 272, 18 B.L.R. 1, 135 D.L.R. (3d) 1, 65 C.P.R. (2d) 1, 42 N.R. 181 delivered 31st May 1982 after the present appeal had been argued. The question whether or not the circumstances of the instant case give rise to a cause of action against the plaintiff is one which we need not consider on this appeal.

26 In the result, I would dismiss the appeal with costs to be taxed in accordance with the schedule of costs in force at the time the action was commenced.

Directions given.

2014 BCSC 2245
British Columbia Supreme Court

HSBC Bank Canada v. Maple Leaf Loading Ltd.

2014 CarswellBC 3557, 2014 BCSC 2245, [2015] B.C.W.L.D. 446, 247 A.C.W.S. (3d) 571

HSBC Bank Canada, Petitioner and Maple Leaf Loading Ltd., Pro-Trans Ventures Inc., Caterpillar Financial Services Limited, Element Fleet Management Inc., GE Canada Equipment Financing G.P., GE Canada Leasing Services Company, General Electric Canada Equipment Finance G.P., Ge Canada Asset Financing Holding Company, Getechology Finance, GE VFS Canada Limited Partnership, GE Capital Canada Equipment Financing & Leasing Company, Mercedes-Benz Financial Services Canada Corporation, Daimler Truck Financial, Finning International Inc., National Leasing Group Inc., Coast Capital Savings Credit Union, ATCO Structures & Logistics Ltd., Knight Manufacturing Ltd., Dynamic Capital II Corporation, Canadian Western Bank Leasing Inc., James Western Star Truck & Trailer Ltd., Zeemac Vehicle Lease Ltd., Inland Kenworth and Premium Truck & Trailer Inc., Respondents

D.M. Masuhara J.

Heard: November 5, 2014
Judgment: November 28, 2014
Docket: Vancouver S144996

Counsel: V. Tickle, for Petitioner
H.L. Williams, for Receiver Ernst & Young Inc.
D. Dhaban (Agent), for J.M. Duncan, for Road Link
D.B. Hyndman, for Crites
C.M. Cash, for Inland Kenworth
W.B. Milman, for General Electric entities
H. Sevenoaks, for Caterpillar Financial

Subject: Corporate and Commercial; Insolvency

RULING on approval of fees and disbursements of receiver and receiver's counsel.

***D.M. Masuhara J.*:**

1 On November 5, 2014, various applications were brought forward in this insolvency matter. Given the period of time allotted, only a few of the applications were heard and the balance adjourned to a future date. As per the request of the parties I have agreed to be seized of this proceeding.

2 In the hearing, I granted an order declaring Maple Leaf Loading Ltd. ("MLL") bankrupt and appointed Ernst & Young Inc. as Trustee of the estate of the Debtor.

3 I also received submissions on applications to approve::

(a) the five reports of the Receiver of the assets, undertakings, and properties of the Debtor;

(b) the fees and disbursements of the Receiver and the Receiver's legal counsel, Davis LLP in the amounts of $491,973.82 and $98,776.56, respectively; and

(c) the Receiver's proposed interim distribution of proceeds to MLL's creditors as listed in the Receiver's 5th Report in the amount of $9,913,550.

4 HSBC and the General Electric entities supported the applications.

5 During the hearing, I was advised that the Receiver had made arrangements with HSBC and Roadlink Transport Ltd. (who is not named in this proceeding but who has an interest) to ensure Roadlink's claim to certain proceeds in a proposed separate action is not prejudiced by the interim distribution and as a result, Roadlink does not oppose the Receiver's applications.

6 Caterpillar Financial Services Limited ("Caterpillar") opposed the application for the approval of fees and disbursements.

7 Inland Kenworth ("Inland") opposed the application for the interim distribution in respect to the withholding of 15% of any distribution to it.

8 At the end of the hearing, I approved the proposed interim distribution.

9 The arguments of Caterpillar and Inland in my view relate to allocation issues; or raise legal and factual issues that do not need to be decided at this point. Caterpillar's and Inland's issues should be raised in the allocation hearing.

10 I turn now to the fees and disbursements of the Receiver and its counsel.

11 The factors in assessing reasonableness of a receiver's fees include:

(a) the nature, extent and value of the assets;

(b) the complications and difficulties encountered by the receiver;

(c) the time spent by the receiver;

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

(e) the diligence and thoroughness displayed by the receiver;

(f) the responsibilities assumed; the results of the receiver's efforts; and

(g) the cost of comparable services.

(See: Frank Bennett, *Bennett on Receiverships*, 3rd ed. (Toronto: Carswell, 2011) at 595.)

12 Similar factors are considered on the assessment of the legal accounts of a receiver:

(a) the time expended;

(b) the complexity of the receivership;

(c) the degree of responsibility assumed by the lawyers;

(d) the amount of money involved, including the amount of proceeds after realization and the payments to the creditors;

(e) the degree and skill of the lawyers involved;

(f) the results achieved; and

(g) the client's expectations as to the fee.

(Frank Bennett, *Bennett on Receiverships*, 3rd ed. (Toronto: Carswell, 2011) at 600.)

13 The 5th Report of the Receiver indicates that the activities of the Receiver to date include:

(a) taking possession of various equipment of MLL located at multiple mine sites;

(b) ongoing supervision and management of the remaining employees;

(c) termination of employees;

(d) ongoing discussions with MLL's former customers;

(e) collecting and settling outstanding accounts receivable;

(f) reviewing security held by the secured creditors of MLL;

(g) negotiating equipment and real property sales; and

(h) preparing reports to this court.

14 The report also indicates that the activities of Davis LLP, include:

(a) reviewing security documentation and providing opinions and advice regarding same;

(b) negotiating and drafting various asset purchase agreements;

(c) corresponding with creditors and their legal counsel; and

(d) attending in court for various applications.

15 The Receiver believes that the fees of Davis LLP are fair, reasonable and consistent with the market for similar legal services in British Columbia.

16 I have considered the various factors for reasonableness and have reviewed the activities of the Receiver and counsel described in the materials. I find the fees and disbursements of the Receiver and counsel to be fair and reasonable. Accordingly, they are approved.

Order accordingly.

2014 BCSC 1855
British Columbia Supreme Court

Leslie & Irene Dube Foundation Inc. v. P218 Enterprises Ltd.

2014 CarswellBC 2916, 2014 BCSC 1855, [2014] B.C.W.L.D. 7241, [2014] B.C.W.L.D. 7242, [2015] 1 W.W.R. 606, 17 C.B.R. (6th) 41, 245 A.C.W.S. (3d) 21, 72 B.C.L.R. (5th) 294

Leslie & Irene Dube Foundation Inc. and 1076586 Alberta Ltd., Petitioners and P218 Enterprises Ltd., Wayne Holdings Ltd., Okanagan Valley Asset Management Corporation, Willow Green Estates Inc., BMK 112 Holdings Inc., 0720609 B.C. Ltd., 0757736 B.C. Ltd., 0748768 B.C. Ltd., Dr. T. O'Farrell Inc., Pinloco Holdings Inc., 602033 B.C. Ltd., Andrian W. Bak, MD, FRCPC, Inc., Interior Savings Credit Union, Valiant Trust Company, Mara Lumber (Kelowna) (2007) Ltd., Rona Revy Inc., Rocky Point Engineering Ltd., Mitsubishi Electric Sales Canada Inc., BFI Canada Inc., John Byrson & Partners, Winn Rentals Ltd., 0964502 B.C. Ltd., Denby Land Surveying Limited, Mega Cranes Ltd., Weq Britco LP, Roynat Inc., Mcap Leasing Inc., Bodkin Leasing Corporation, HSBC Bank Canada, and Bank of Montreal, Respondents

G.C. Weatherill J.

Heard: September 24, 2014
Judgment: October 2, 2014
Docket: Vancouver S-139627

Counsel: J.D. Schultz, J.R. Sandrelli, for Receiver, Ernest & Young Inc.
D.E. Gruber, for Petitioners
J.D. Shields, for Valiant Trust Company
C.K. Wendell, for 0964502 B.C. Ltd.
S.A. Dubo, for Interior Savings Credit Union
R.H. Harrison, for Maynards Financial Ltd.

Subject: Corporate and Commercial; Insolvency; Property

APPLICATION by receiver for approval of "stalking horse" bid and other relief.

***G.C. Weatherill J.*:**

Introduction

1 This proceeding concerns the receivership of a retail, office and residential real estate development in Kelowna, British Columbia called "Sopa Square" (the "Development").

2 The Receiver (the "Receiver") of the Respondents, P218 Enterprises Ltd., Wayne Holdings Ltd. and The Sopa Square Joint Venture (collectively the "Debtors"), seeks the following orders:

> a) approval of a stalking horse bidding process in respect of the sale of the assets of the Development in the form of the Bidding Procedures Order attached as Schedule B to the Notice of Application;
>
> b) a vesting of title to the Development in the stalking horse bidder, subject to the outcome of the stalking horse bidding process;
>
> c) approval of a pre-stratification contract for purchase and sale of one of the proposed strata lots in the retail/office phase of the Development;
>
> d) an increase in the Receiver's borrowing charge by $1 million from $2.5 million to $3.5 million; and
>
> e) approval of the Receiver's activities as set out in the Receiver's First Report dated January 30, 2014 and the Receiver's Second Report dated August 26, 2014.

3 The Receiver also seeks an order sealing an appraisal of the Development dated March 3, 2014 on the basis that it may unduly prejudice the marketing of the Development.

Background

4 The Development consists of two phases: Phase 1 is a two story building comprised of retail outlets on the first floor and office space on the second floor and Phase 2 is a multi-story residential tower.

5 The Respondent, Valiant Trust Company ("Valiant Trust"), is the trustee for 36 original investors in the Development, each of whom holds a bond from the Debtors entitling the bondholder to purchase a unit in the Development (the "Bond Holders").

6 The Development ran into financial difficulty several times over the course of its development and construction. Builders liens were filed and the project was halted due to lack of financing. As part of a recapitalization plan, these lien claimants (the "Lien Claimants") agreed to discharge their liens and consolidate the amounts they were owed into a subordinated mortgage, which allowed additional financing to be provided by the lead lender, the Petitioner, Leslie & Irene Dube Foundation Inc. ("Dube Foundation").

7 Ultimately the recapitalization plan failed prior to completion of Phase 1, resulting in the commencement of this receivership proceeding in December 2013. The Receiver was appointed on January 27, 2014.

8 The Receiver is empowered by its appointment to market the Development and to negotiate such terms and conditions of sale as it, in its discretion, deems appropriate.

9 The Receiver determined that the best course of action to preserve value was to complete Phase 1 of the Development and to market it without completing Phase 2. It did so, at least substantially, and has begun to market the units in Phase 1. Construction of Phase 2 has not yet commenced.

10 In order to complete Phase 1, the Receiver borrowed $2.5 million from Maynards Financial Ltd. ("Maynards") secured by a priority Receiver's Borrowing Charge subordinate only to the existing first mortgage of Interior Savings Credit Union ("ISCU"). This borrowing charge was approved by a court order dated February 6, 2014.

11 The Receiver has entered into various leases of the first floor retail space. It has also entered into a contract of purchase and sale with respect to proposed Strata Lot 6 in the second floor office space with Dr. Keith Yap. Dr. Yap has spent substantial money on improvements to that space and, pursuant to an arrangement with the Receiver, is currently occupying the space for his medical practice awaiting stratification and completion of the purchase and sale agreement.

12 The major creditor in the receivership, Dube Foundation, is currently owed approximately $21.3 million and has made it clear to the Receiver that it will oppose any sale of the Development that results in it receiving less than substantially all of its mortgage security. Dube Foundation's mortgage ranks behind the ISCU mortgage (approx. $5.0 million), the Maynards mortgage ($2.5 million) and property taxes owing of approx. $275,000. In order for Dube Foundation to be paid out in full, sale proceeds for the Development of at least $29 million will be required.

13 An appraisal of the Development dated April 22, 2013, nine months before the appointment of the Receiver and prior to the completion of Phase 1, valued the Development as follows:

a) Phase 1:	$21,575,000
b) Phase 2:	$6,830,000
	$28,405,000

14 The Receiver obtained a second appraisal of Phase 2 by Altus Group dated March 3, 2014 which was based upon an inspection of the Development on December 30, 2013. The Receiver seeks an order that this appraisal be sealed on the basis that it may compromise any future bidding process in respect of the sale of the Development.

15 Instead of implementing a tender process in which bidders can submit a bid within a specific period without knowledge of other bids, the Receiver concluded that the most effective and efficient way to sell the Development was through a stalking horse sale process. That process involves the receiver identifying a potential buyer (the "stalking horse") and negotiating an agreement with the stalking horse for the purchase of the assets. The stalking horse's purchase price becomes the floor price for a subsequent bidding process which takes place to determine if a better price can be achieved. The premise is that the stalking horse has undertaken considerable due diligence for determining the value of the assets and other bidders can then rely, at least to some extent, on the value attached by the stalking horse to those assets. If no bid is received during the bidding process that exceeds the stalking horse's bid, the stalking horse becomes the purchaser. If a qualified bid is received that exceeds the stalking horse bid, the stalking horse receives a termination or break fee.

16 In July 2014, Dube Foundation, with the assistance of the Receiver, entered into a Term Sheet with an experienced real estate developer known as the Aquilini Investment Group ("Aquilini"). It contemplated that Aquilini would submit a stalking horse bid to the Receiver and Dube Foundation would provide financing to Aquilini if its bid was successful, on terms to be negotiated.

17 By agreement dated August 12, 2014 (the "SH Agreement"), Aquilini (through an entity called AD Sopa Limited Partnership) entered into a stalking horse bid agreement with the Receiver, the key terms of which are:

> a) a purchase price of $29.5 million;
>
> b) a deposit of $1.0 million;
>
> c) the bid is conditional on approval of the court, the granting of a conditional vesting order and the completion of a stalking horse bidding process with no better bid being submitted; and
>
> d) a termination fee of $1.5 million if a better bid is submitted in the bidding process (the "Termination Fee").

18 The SH Agreement includes detailed stalking horse bidding procedures (the "Bidding Procedures").

19 The Receiver seeks an order approving the SH Agreement and vesting the assets in Aquilini, subject to the Bidding Procedures and no better bid being received.

Analysis

The Stalking Horse Bid

20 The use of stalking horse bids to set a baseline for a bidding process in receivership proceedings has been recognized by Canadian courts as a legitimate means of maximizing recovery in a bankruptcy or receivership sales process: *CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd.*, 2012 ONSC 1750 (Ont. S.C.J. [Commercial List]) at para. 7 [*CCM*]; *Bank of Montreal v. Baysong Developments Inc.*, 2011 ONSC 4450 (Ont. S.C.J.) at para. 44 [*Baysong*]; *Digital Domain Media Group Inc., Re*, 2012 BCSC 1567 (B.C. S.C. [In Chambers]).

21 The factors to be considered when determining the reasonableness of a stalking horse bid are those used by the court when determining whether a proposed sale should be approved: *CCM* at para. 6. Some of those factors were set out in *Royal Bank v. Soundair Corp.*, [1991] O.J. No. 1137 (Ont. C.A.) at para. 16:

> a) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;
>
> b) the efficacy and integrity of the receiver's sale process by which offers were obtained;
>
> c) whether there has been unfairness in the working out of the process; and
>
> d) the interests of all parties.

22 The Receiver submits that the SH Agreement is reasonable based upon the appraisals it has received. If the SH Agreement is approved, the Receiver proposes to follow the Bidding Procedures by publishing several newspaper advertisements and retaining the firm of Colliers International ("Colliers"), a well know firm that provides a variety of real estate services, to assist in the marketing of the project to potential bidders. The Receiver has populated a detailed data room to streamline due diligence by potential bidders.

23 The Receiver submits that the stalking horse bidding process will provide a public and transparent process under which potential purchasers will be identified and the Development will be marketed. The Receiver has put forward a detailed timetable by which it expects the Bidding Procedures to be completed.

24 The Receiver submits that each of the factors set out in *Soundair* has been or will be met in this case. It says that the process has been designed to obtain the highest price for the assets because the SH Agreement sets a floor price that is at least sufficient to pay the majority of the claims of the major creditors in a reasonable period of time.

25 The Receiver submits further that the Termination Fee is reasonable because it not only reflects the expenses that Aquilini has incurred in conducting its due diligence and the structuring of the transaction, which will be of benefit to any other bidder that submits a bid exceeding that set out in the SH Agreement, but also provides compensation to Aquilini for having committed the

deposit funds, thereby foregoing the use of the funds for other potential opportunities. It says that the Termination Fee also provides value for the cost of stability that is being achieved through the process. It also submits that the Termination Fee in this case is within the range for termination fees of 1% to 5% that have been approved in other stalking horse cases: *Baysong* at para. 44.

26 Mr. Shields, counsel for Valiant Trust, strenuously opposes an approval by the court of the SH Agreement. He submits that there is a complete absence of evidence that would allow the court to make a determination as to whether the SH Agreement is reasonable. He argues that there is no evidence from the Receiver regarding what, if any, alternate marketing steps have been considered or taken or why, if any were considered or taken, they were rejected. He points out that the first appraisal is approximately 18 months old, was done before Phase 1 was completed and has not been updated. The second appraisal report is based upon an inspection of the Development that took place over nine months ago, also before Phase 1 was completed. Moreover, he says that the veracity of the second appraisal cannot be tested due to the non-disclosure restrictions placed upon it by the Receiver.

27 He argues that the Receiver has, to date, not marketed the Development at all. Instead, the Receiver identified three potential developers, who are all located in Western Canada, entered into negotiations with two of them and chose Aquilini to be the stalking horse. It has not provided the court with any particulars of how the three developers were chosen or why, what was discussed or what took place during the negotiations. As a result, he argues, the court is in no position to say that the proposed stalking horse bidding process will likely result in a more favourable outcome.

28 Moreover, Mr. Shields argues that the Receiver's submission that the Termination Fee is justified because it will minimize the due diligence costs of other potential bidders cannot be supported. Plainly, he says, Aquilini is not about to disclose to competitors its strategies or the due diligence it performed and, as a result, all other bidders will have to do their own due diligence, saving them nothing. Moreover, he emphatically submits that the Termination Fee of $1.5 million will put a "millstone" around the necks of potential bidders because they will have to bid at least $1.5 million more than the SH Agreement price in order to qualify. This, he argues, effectively gives Aquilini a $1.5 million credit in the bidding process.

29 Simply put, Mr. Shields submits that, while the SH Agreement may be in the best interests of the ISCU and the Dube Foundation, the Receiver has not properly considered the interests of the Bond Holders and Lien Claimants who will lose everything if the SH Agreement completes.

30 There are many stakeholders in this matter. They include the Bond Holders and the Lien Claimants who will likely end up with nothing if significantly better bids are not received and the Stalking Horse Bid ultimately completes.

31 To be effective for such stakeholders, the sale process must allow a sufficient opportunity for potential purchasers to come forward with offers, recognizing that a timetable for the sale of

the project requires that interested parties move relatively quickly in order that the value of the project is preserved and not allowed to deteriorate. The timetable must be realistic.

32 In this case, I have several concerns.

The Stalking Horse Process

33 No course of action other than a stalking horse bidding process appears to have been considered, including the traditional tendering process. There is no evidence that the Receiver has attempted to market the Development beyond discussions with three developers. There is no evidence regarding the extent to which the Receiver attempted to identify other developers who might be interested in bidding through a stalking horse bid. There is no evidence from which the court can assess whether the economic incentives behind the SH Agreement are fair and reasonable or whether they are excessive given the circumstances of the Bond Holders and the Lien Claimants.

The Appraisals.

34 The accuracy of the stalking horse bid is key to the integrity of the stalking horse bid process because it establishes the benchmark against which other potential bidders will decide whether or not to submit a bit. One of the few tools available to the court for assessing the reasonableness of the stalking horse bid is a comparison of the bid to a valuation of the asset in question. Accordingly, an accurate valuation is also key to the integrity of the process.

35 The appraisals of the Development are dated. Neither of them was prepared after the completion of Phase 1. I am not satisfied that the appraisals accurately reflect the current value of the Development.

Termination Fee

36 While I accept that the SH Agreement effectively serves as a guaranteed floor bid over the course of the proposed marketing process and that a termination fee is warranted if a higher qualified bid is approved, the mere fact that the proposed Termination Fee is within the "range of reasonableness" as determined in other cases does not mean that it is reasonable in this case. The court has a gatekeeping function to ensure that the fee is reasonable in each case. The court is not simply a rubber stamp for the agreement that was made.

37 The foregoing notwithstanding, given the Receiver's function and role, the Court will often defer to the Receiver's recommendation unless there is a compelling reason to reject it. In Frank Bennett's *Bennett on Receiverships*, 3d ed (Toronto: Carswell, 2011) at 329, the learned author writes:

> ...The court should be very cautious before deciding that the receiver's conduct was improvident based upon information which has come to light after it has made its decision. If

> the receiver's recommendation is challenged, the court should have evidence of other offers that are significantly or substantially higher before it can adjudicate on this point. The court should readily accept the receiver's recommendation on the motion for court approval and reject the receiver's recommendation only in the exceptional cases since it would weaken the role and function of the receiver. The receiver deserves respect and deference.

38 In this case, there is no evidence regarding how the Termination Fee was arrived at or how the $1.5 million fee compares to the expenses incurred by Aquilini in respect of its due diligence, the SH Agreement or its lost opportunity cost with respect to the deposit. Indeed, there is no evidence whatsoever upon which the court is able to gauge whether the Termination Fee is reasonable other than that it is within the "range", albeit the high end of the range. In my view, such evidence is required. A termination fee of $1.5 million may well have a substantial adverse effect on the Bond Holders and the Lien Claimants.

39 I accept that the court must balance the expenses, efficiencies and delays that will necessarily result if the Receiver has to go through what may prove to be a fruitless additional process due to the possibility that a more provident bid will be received which results in some recovery for the Lien Claimants and Bond Holders. However, the dearth of evidence regarding (i) the extent to which marketing processes other than a stalking horse process have been considered; (ii) the value of the Development; and (iii) the basis upon which the Termination Fee was arrived at is such that the court has no benchmark against which to assess the reasonableness of the SH Agreement.

40 There is no evidence before me of any urgency regarding the sale of the Development.

41 Accordingly, I conclude that the Receiver has not demonstrated that the SH Agreement is in the best interests of the creditors as a whole. The application for a Bidding Procedures Order is dismissed.

Conditional Vesting Order

42 Given my finding regarding the reasonableness of the SH Agreement and my decision regarding the Bidding Procedures Order, there is no need to consider this issue.

The SL6 Purchase Agreement

43 At the time of the Receiver's appointment, the Debtors had entered into a contract of purchase and sale with Dr. Keith Yap and 0720609 B.C. Ltd. ("Dr. Yap") in respect of certain office space, known as SL 6, in Phase 1 of the Development (the "SL 6 Purchase Agreement"). The space is intended to become Strata Lot 6 following stratification of the building.

44 Prior to the Receivership and in anticipation of completion of construction of the Development, Dr. Yap spent considerable sums improving SL 6.

45 The Receiver has entered into an addendum to the SL 6 Purchase Agreement on terms that it considers to be commercially reasonable. The addendum contemplates a sale of SL 6, after stratification, at a price of $628,000. Before entering into the SL 6 Purchase Agreement, the Receiver considered comparable sales for strata office property in the Kelowna marketplace.

46 The Receiver seeks court approval of the addendum. The Bond Holders and the Lien Claimants oppose such an order on the basis that a further appraisal is required.

47 On the basis of the evidence before me, particularly that Dr. Yap has already installed fixtures and has set up a specialized office for his medical practice, that the terms of the SL 6 Purchase Agreement are considered reasonable by the Receiver and Aquilini and that Dr. Yip will be paying his portion of the Development's operating costs thereby not only reducing, at least to a small degree, the overall operating costs being paid by the Receiver but also adding occupancy to the Development which will undoubtedly assist in the lease or sale of other portions, I am satisfied that the SL 6 Purchase Agreement should be approved.

Increasing the Receiver's Borrowing Charge

48 The Receiver has provided to the court a breakdown of the additional expenses it anticipates will be incurred through to the end of the stalking horse process as follows:

a)	Phase 1 completion costs:	
	i. completion payables:	$200,000
	ii. parking lot and courtyard landscaping:	$100,000
b)	interest and fees on financing:	
	i. Interest accrued to date:	$150,000
	ii. future fees and interest:	$100,000
c)	Professional fees:	$450,000
d)	fees from leasing activities:	$125,000
e)	engagement of Colliers for SH Process:	$50,000
f)	other consulting fees:	$75,000
g)	office, utility and operating expenses:	$52,500
h)	contingency:	$55,000
	TOTAL	$1,357,500

49 The Receiver seeks to amend the Receivership Order pronounced January 27, 2014, as amended February 6, 2014 such that its permitted borrowing charge is increased from $2.5 million to $3.5 million.

50 The Bond Holders and the Lien Claimants oppose the increase on the basis that there is no evidence as to where the increase in financing will come from or what the rate will be and that no particulars have been provided as to who the money will be paid to or why.

51 I agree that approval of an increase in the borrowing charge in a vacuum is not desirable. However, I understand that negotiations are underway with the lender. I am satisfied that there is a need for the Receiver's borrowing charge to be increased, particularly given that more work will be required regarding the valuation and marketing of the Development.

52 I am prepared to allow the increase on the condition that the financial terms for the increase are no less favourable to the creditors than the current terms of the Receiver's borrowing charge.

Approval of the Receiver's Activities to Date

53 The Receiver seeks approval of its activities as set out in its first and second reports to the Court dated January 30 and August 14, 2014, respectively.

54 The court has inherent jurisdiction to review and approve or disapprove the activities of a court appointed receiver. If the receiver has met the objective test of demonstrating that it has acted reasonably, prudently and not arbitrarily, the court may approve the activities set out in its report to the court: *Bank of America Canada v. Willann Investments Ltd.*, [1993] O.J. No. 1647 (Ont. Gen. Div.) at paras. 3-5, aff'd [1996] O.J. No. 2806 (Ont. C.A.); *Lang Michener v. American Bullion Minerals Ltd.*, 2005 BCSC 684 (B.C. S.C.) at para. 21.

55 I accept that the Receiver has essentially fulfilled its mandate with respect to completion of Phase 1. Its activities as set out in its first report are approved.

56 After completion of Phase 1, the Receiver commenced on a sale process in an attempt to maximize the return for the creditors. It may well be that the Receiver will be able to demonstrate that the steps it took in this regard were objectively reasonable. However, given my previous comments, I am not satisfied that the Receiver has shown that the stalking horse bid process it entered into was done prudently. It is premature to approve its activities in this regard.

Sealing Order

57 Given my ruling on the SH Agreement and my comments that the Altus Group's appraisal dated March 3, 2014 is outdated, there is no need to consider this issue.

Conclusion

58 The Receiver's applications for a Bidding Procedures Order and a Conditional Vesting Order approving the stalking horse bid subject to the procedures set out in the Bidding Procedures Order is dismissed.

59 The Receiver's application for an order approving the SL 6 Purchase Agreement is granted.

60 The Receiver's application for an order amending Paragraphs 19 and 20(c) of the Receivership Order pronounced January 27, 2014, as amended February 6, 2014, such that the term "$2.5 million" is changed to "$3.5 million" is allowed on the condition that the terms of such increase will not be less favourable than the existing terms of the Receiver's borrowing charge.

61 The activities of the Receiver as set out in its first report dated January 30, 2014 are approved. Approval of the Receiver's activities as set out in its second report dated August 14, 2014 is premature.

62 The Receiver's application for an order sealing the appraisal of the Development dated March 3, 2014 by Altus Group is adjourned.

Application granted in part.

2016 BCSC 188
British Columbia Supreme Court

Redcorp Ventures Ltd., Re

2016 CarswellBC 290, 2016 BCSC 188, [2016] B.C.W.L.D. 1714, [2016] B.C.W.L.D. 1715, [2016] B.C.W.L.D. 1716, 263 A.C.W.S. (3d) 646, 33 C.B.R. (6th) 239

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

In the matter of the Canada Business Corporations Act, R.S. 1985 c. C-44

In the Matter of the British Columbia Business Corporations Act, S.B.C. 2002, c. 57

In the Matter of Redcorp Ventures Ltd. and Redfern Resources Ltd.

Burnyeat J., In Chambers

Heard: December 14, 2015
Judgment: February 9, 2016
Docket: Vancouver S091670

Counsel: H.L. Williams, for Alvarez & Marsal Canada Inc., Receiver of Redcorp Ventures Ltd. and Redfern Resources Ltd.
N. Renner, for Secured Noteholders Whitebox Advisors LLC, GMP Investment Management LP, Sandleman Partners LP and VR Global Partners LP

Subject: Civil Practice and Procedure; Corporate and Commercial; Estates and Trusts; Insolvency

APPLICATION by receiver for order approving its actions and conduct and ordering release and discharge; approving its accounts and those of counsel; and authorizing it to destroy records of companies.

***Burnyeat J., In Chambers*:**

1 Alvarez & Marsal Canada Inc. ("Alvarez") in its capacity as a Court appointed Interim Receiver and Receiver ("Receiver") of the assets, undertakings and properties of Redcorp Ventures Ltd. ("Redcorp") and Redfern Resources Ltd. ("Redfern") applies for a number of Orders including that:

(a) The reports of the Receiver filed in these proceedings, including the Tenth Report of the Receiver dated December 8, 2015 ("Tenth Report"), and the actions and conduct of the Receiver as particularized therein be approved;

(b) The fees and disbursements of the Receiver and its counsel as set out in the Tenth Report, be approved;

(c) The Receiver be authorized to destroy any and all records of the Companies.

(d) Upon the filing of a Receiver's Discharge Certificate, the Receiver shall be discharged as Receiver of the assets, undertaking and property of the Companies, provided that notwithstanding its discharge herein: (a) the Receiver shall remain Receiver for the performance of such incidental duties as may be required to complete the administration of the receivership herein; and (b) the Receiver shall continue to have the benefit of the provisions of all Orders made in this proceeding, including all approvals, protections and stays of proceedings in favour of Alvarez in its capacity as Receiver.

(e) Alvarez be hereby released and discharged from any and all liability that it now has or may hereafter have by reason of, or in any way arising out of its acts or omissions while acting in its capacity as Receiver herein. Without limiting the generality of the foregoing, Alvarez be hereby forever released and discharged from any and all liability relating to matters that were raised, or which could have been raised, in the within receivership proceedings.

(f) Notwithstanding any provision herein, this Order shall not affect any person to whom notice of these proceedings was not delivered as required by the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 and regulations thereto, any other applicable enactment or any other Order of this Court.

Background

2 Redcorp and Redfern made a filing under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 and the *British Columbia Business Corporations Act*, R.S.B.C. 2002, c. 57. An Order was made on March 4, 2009 in response to the filing ("Initial Order").

3 On May 29, 2009, Alvarez was appointed Receiver, without security, of the current and future personal assets, undertakings and properties of Redcorp and Redfern ("Appointment Order"). Under the Appointment Order, the sum of $1,000,000 (exclusive of any interest earned thereon) as secured by the Administration Charge set out in the Initial Order was to be held and administered by the Receiver. The sum of $5,000,000 (exclusive of any interest earned thereon) as secured by the Directors' Charge set out in the Initial Order was also to be held and administered by the Receiver.

4 The Appointment Order contained the following provision limiting the liability of Alvarez as Receiver:

> THIS COURT ORDERS that the Receiver shall incur no personal liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Receiver by Section 14.06 of the B.I.A. [*Bankruptcy and Insolvency Act*, R.S.C, 1985, c. B-3] or by any other applicable legislation.

Discussion, Case Authorities and Decision

(a) Approval of the "Actions and Conduct of the Receiver" and the Release and Discharge of the Receiver

5 What is requested in (a) and (e) above amounts to insurance for the Receiver in addition to any liability insurance that may be available to Alvarez. Not only are the "actions and conduct" of the Receiver as "particularized" in all of the ten Reports of the Receiver approved but also the Receiver is to be released and discharged from "any and all liability that it now has or may hereafter have by reason of, or in any way arising out of its acts or omissions..."whether or not the "actions and conduct" are particularized in any of the ten Reports filed with the Court by the Receiver.

6 While the personal liability and obligation of the Receiver is protected in the Initial Order save and except for gross negligence or wilful misconduct, the effect of the release and discharge sought in (e) above goes beyond what is set out in the Initial Order and does not make it clear that "gross negligence or wilful misconduct" are not released or discharged. The effect of (e) is that the Receiver is to be released from personal liability or obligations arising as a result of its appointment including any liability for gross negligence or wilful misconduct. Pepall J. in *Ed Mirvish Enterprises Ltd. v. Stinson Hospitality Inc.*, [2009] O.J. No. 4265 (Ont. S.C.J. [Commercial List]) made this statement in that regard:

> It seems to me that as a matter of principle, on discharge, a receiver should not be granted a release that encompasses gross negligence or willful misconduct. It may be that such conduct only comes to light after a receiver has been discharged. In such circumstances, a receiver should be liable for its actions.
>
> (at para. 14)

7 The combined effect of what is sought in (a) and in (e) above is so broad as to attempt to protect the Receiver from any and all liability. There is no obvious inherent jurisdiction to exempt even its own officer from the general operation of statutes or to excuse liability for negligence or willful misconduct. That is why the standard appointment order excludes "gross negligence or wilful misconduct" from the exclusion given to a receiver for any "personal liability or obligation."

8 The position of a court appointed Receiver was set out in *Ed Mirvish*, *supra*, where Pepall J. stated:

> A Court appointed receiver is an officer and instrument of the Court. Liability it incurs is for its own account. It is for this reason that, subject to certain exceptions, a receiver typically receives a first charge over the assets under receivership. This secures its fees and disbursements and any liability it may incur with the exception of gross negligence and willful misconduct. The receiver is fully compensated by the estate once it has realized on the assets. A receiver wishes to be discharged once it has completed the substance of its mandate. Creditors typically support the requested discharge as they wish a final distribution of the remaining funds in the estate and do not wish additional receivership expenses to be incurred which would reduce the funds available for distribution. A receiver often is concerned that if it is discharged without a full release, it may be required to spend time and money defending an unmeritorious action. Once discharged, there is no ability for the receiver to recover its costs from the estate. Absent a discharge and if there are funds in the estate, a receiver may be protected and compensated by the estate.
>
> Unlike a trustee in bankruptcy, a receiver is unable to look for statutory assistance. Section 41(8) of the *Bankruptcy and Insolvency Act* provides that the discharge of a trustee discharges him [or her] from all liability in respect of any act done or default made by him [or her] in the administration of the property of the bankrupt and in relation to his conduct as trustee but any discharge may be revoked by the Court on proof that it was obtained by fraud or by suppression or concealment of any material fact. A receiver's discharge is not addressed by statute. For all of these reasons, requests for full releases are made of the Court.
>
> (at paras. 8 and 9)

9 Counsel for the Receiver indicated that the shortfall to creditors is in the neighbourhood of $110 million and those creditors who will already suffer a shortfall had agreed to the passing of accounts of the Receiver, the passing of accounts of counsel for the Receiver, and for the releases sought by the Receiver.

10 I am satisfied that this is not a sufficient answer to the questions raised by the applications of the Receiver. The Receiver is a Court appointed officer and the Court retains and must exercise a reasonable review of the actions taken by the Receiver and of the seriousness of any omissions relating to actions not taken by the Receiver. The Court cannot be bound by the corporate "monetary" decision taken by a creditor or by creditors who will have to bear the cost of an appropriate review by the Court.

11 An order following the format of the "Model Discharge Order" does not automatically include such a broad release and discharge as is contemplated in (e) above. Rather, if such a broad

release and discharge is to be included, that inclusion must be drawn to the attention of the Court. The B.C. Model Insolvency Order Committee provided this comment in this regard:

> The BCMIOC was divided as to whether a general release might be appropriate. On the one hand, the Receiver has presumably reported its activities to the Court, and presumably the reported activities have been approved in prior Orders. Moreover, the Order that appointed the Receiver likely has protections in favour of the Receiver. These factors tend to indicate that a general release of the Receiver is not necessary. On the other hand, the Receiver has acted only in a representative capacity and as the Court's officer, so the Court may be of the view that it is appropriate to insulate the Receiver from liability by way of a general release. Some members of the BCMIOC felt that, absent a general release, Receivers might hold back funds and/or wish to conduct a claims bar process, which would unnecessarily add time and cost to the receivership.
>
> Without intending to express an opinion as to whether a general release is appropriate, the BCMIOC has decided not to include the general release language in the body of the model order. Whether such language is appropriate is a matter to be considered by the presiding Judge based on the specific circumstances of the case. If this relief is being sought, stakeholders should be specifically advised and given ample notice.
>
> If a general release is ordered, the language approved by the BCMIOC is as follows:
>
> [RECEIVER'S NAME] is hereby released and discharged from any and all liability that [RECEIVER'S NAME] now has or may hereafter have by reason of, or in any way arising out of, the acts or omissions of [RECEIVER'S NAME] while acting in its capacity as Receiver herein. Without limiting the generality of the foregoing, [RECEIVER'S NAME] is hereby forever released and discharged from any and all liability relating to matters that were raised, or which could have been raised, in the within receivership proceedings.

12 In requesting this provision, counsel could not confirm that all "stakeholders" had been "specifically advised and given ample notice". Rather, notice was only provided to "Secured Noteholders" who will suffer a shortfall as a result of the receivership. Even if all stakeholders had been notified, I cannot be satisfied that the breadth of the release sought is appropriate even though it is the wording that is set out in the Model Discharge Order. Despite the suggested wording, it could not have been contemplated by the drafters that "any and all liability relating to matters that were raised, or which could have been raised" would include a release and discharge of liability for gross negligence or wilful misconduct. First, it would be contrary to what was set out in the Appointment Order. Second, the Court should not countenance the release and discharge of any gross negligence or wilful misconduct of its own officer.

13 Regarding the request that the Receiver be released and discharged from any liability it "may hereafter have", I am satisfied that it is inappropriate for the Receiver to make such a request.

First, such a request would include a release and discharge of claims for gross negligence or wilful misconduct. Second, what is contemplated is that the Receiver will be discharged upon filing a "Receiver's Discharge Certificate" so that the Court will not necessarily have the benefit of a further Report from the Receiver about future activities.

14 The Tenth Report of the Receiver sets out a number of matters that remain unresolved and which will require further action by the Receiver. It is inappropriate to request that any future "acts or omissions" be released and discharged in view of this ongoing activity of the Receiver. Once all outstanding matters have been completed, the Receiver can re-apply for its discharge. At that time, the Court can take into account all activities of the Receiver and whether a claims bar process has been undertaken.

15 Once the further actions contemplated in the Tenth Report are completed by the Receiver, the Receiver will be in a position to apply for what is requested in (d) above. In this regard, the Explanatory Notes attached to the Model Discharge Order note the following regarding what is requested by the Receiver in (d) above: "Counsel should consider including this provision only if the Receiver's Report identifies any outstanding matters that should be completed before the Receiver's discharge. "As well, what is requested in (d) above does not include the necessary phrase: "...upon the Receiver filing a certificate certifying that it has completed the remaining outstanding activities described in the Report". Here, it is not clear whether all "outstanding matters that should be completed before the Receivers' discharge" are specifically set out in the Tenth Report.

16 So that the Court is in a position to confirm that all creditors and interested parties are aware of the effect of any release and discharge requested by the Receiver, the Receiver is in the position to establish "claims bar process" whereby all creditors and interested parties are notified that they will lose any rights to claim against the Receiver after a suitable period of time has elapsed and no application has been made to the Court to seek leave to proceed against the Receiver. In this regard, the Initial Order provided the following protection:

> THIS COURT ORDERS that no proceeding or enforcement process in any court or tribunal (each, a "Proceeding"), shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of the Court.
>
> (para. 7)

17 Receiver will be at liberty to reapply for its release and discharge.

The Accounts of the Receiver and Its Counsel

18 The Appointment Order provided the following regarding the accounts of the Receiver and its counsel:

> THIS COURT ORDERS that any expenditure or liability which shall properly be made or incurred by the Receiver, including the fees of the Receiver and the fees and disbursements of its legal counsel, incurred at the standard rates and charges of the Receiver and its counsel, shall be allowed to it in passing its accounts and shall form a first charge on the Property (the "Receiver's Charge") in priority to all security interests, trusts, liens, charges and encumbrances, statutory of otherwise, in favour of any Person, but excluding the charge on the ERIP Monies, the Administration Charge and the Directors' Charge.
>
> THIS COURT ORDERS that the Receiver and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Receiver and its legal counsel are hereby referred to a judge of the Supreme Court of British Columbia and may be heard on a summary basis.

19 Regarding the question of the duty of a Court appointed receiver to report to the Court and to pass its accounts, the following statements were made in *Confectionately Yours Inc., Re* (2002), 219 D.L.R. (4th) 72 (Ont. C.A.) [hereinafter Bakemates] by Borins J.A. on behalf of the Court:

> A thorough discussion of the duty of a court-appointed receiver to report to the court and to pass its accounts is contained in F. Bennett, *Bennett on Receiverships*, 2nd ed. (Scarborough: Carswell, 1999) at 443 *et seq*. As Bennett points out at pp. 445-446:
>
> > ...the court-appointed receiver is neither an agent of the security holder nor of the debtor; the receiver acts on its own behalf and reports to the court. The receiver is an officer of the court whose duties are set out by the appointing order...Essentially, the receiver's duty is to report to the court as to what the receiver has done with the assets from the time of the appointment to the time of discharge.
>
> A report is required because the receiver is accountable to the court that made the appointment, accountable to all interested parties, and because the receiver, as a court officer, is required to discharge its duties properly. Generally, the report contains two parts. First, the report contains a narrative description about what the receiver did during a particular period of time in the receivership. Second, the report contains financial information, such as a statement of affairs setting out the assets and liabilities of the debtor and a statement of receipts and disbursements. At p. 449 Bennett provides a list of what should be contained in a report, which does not include the remuneration requested by the receiver. As Bennett states at p. 447, the report need not be verified by affidavit.
>
> The report is distinct from the passing of accounts. Generally, a receiver completes its management and administration of a debtor's assets by passing its accounts. The court can adjust the fees and charges of the receiver just as it can in the passing of an estate trustee's accounts; the applicable standard of review is whether those fees and charges are fair and reasonable. As stated by Bennett at p. 471, where the receiver's remuneration includes the

amount it paid to its solicitor, the debtor (and any other interested party) has the right to have the solicitor's accounts assessed.

I accept as correct Bennett's discussion of the purpose of the passing of a receiver's accounts at pp. 459-60:

> One of the purposes of the passing of accounts is to afford the receiver judicial protection in carrying out its powers and duties, and to satisfy the court that the fees and disbursements were fair and reasonable. Another purpose is to afford the debtor, the security holder and any other interested person the opportunity to question the receiver's activities and conduct to date. On the passing of accounts, the court has the inherent jurisdiction to review and approve or disapprove of the receiver's present and past activities even though the order appointing the receiver is silent as to the court's authority. The approval given is to the extent that the reports accurately summarize the material activities. However, where the receiver has already obtained court approval to do something, the court will not inquire into that transaction upon a passing of accounts. The court will inquire into complaints about the calculations in the accounts and whether the receiver proceeded without specific authority or exceeded the authority set out in the order. The court may, in addition, consider complaints concerning the alleged negligence of the receiver and challenges to the receiver's remuneration. *The passing of accounts allows for a detailed analysis of the accounts, the manner and the circumstances in which they were incurred, and the time that the receiver took to perform its duties. If there are any triable issues, the court can direct a trial of the issues with directions.*
>
> [Emphasis added.]

(at paras. 34-36)

(a) Receiver's Accounts

20 Attached as an appendix to the Tenth Report of Receiver is a "summary of the receiver's professional fees and disbursements for the period May 26, 2009 to September 27, 2014...." Those accounts total $2,244,414.45 including out-of-pocket disbursements of $123,408.26 and applicable taxes of $153,611.29. What was attached in the appendix set out the following information relating to the 43 invoices issued by Alvarez: (a) invoice number; (b) invoice date; (c) invoice period/description; (d) total hours; (e) fees; (f) disbursements; (g) HST; and (h) invoice total. Despite the inclusion of the word "description", no description of the services was included. As well, there is no detail regarding the date when services were rendered and no breakdown of the "total charges for each of the categories of services rendered".

21 Also attached as an appendix to the Tenth Report is a list of the seven "Staff Members" who had worked on the receivership with the following included in that appendix: (a) staff member names; (b) title of the staff member; (c) the total hours spent by the staff member; (d) the billing rate

of the staff member; and (e) the amount billed. The total of hours billed is 3,705.8. The average of the rates charged is $530.90, and the total billed is $1,967,394.90. There is no indication whether the billing rates changed during the period of May 26, 2009 through September 27, 2014. As well, there is no indication of the seniority of the staff members who worked on the matter.

22 The purpose of a Receiver passing its accounts is to afford all interested parties the opportunity to question the Receiver's activities and conduct. In order to be in a position to ascertain whether the fees and disbursements of the Receiver were "properly made or incurred" and are "fair and reasonable" what was done should be set out. In *Confectionately Yours Inc., Re* (2002), 36 C.B.R. (4th) 200 (Ont. C.A.), Borins J.A. on behalf of the Court, dealt with the accounts of a Court appointed receiver and manager and made the following statement in that regard:

> The accounts must disclose in detail the name of each person who rendered services, the dates on which the services were rendered, the time expended each day, the rate charged and the total charges for each of the categories of services rendered. See, e.g., *Hermanns v. Ingle* (1988), 68 C.B.R. (N.S.) 15 (Ont. Ass. Off.); *Toronto Dominion Bank v. Park Foods Ltd.* (1986), 77 N.S.R. (2d) 202 (S.C.). The accounts should be in a form that can be easily understood by those affected by the receivership (or by the judicial officer required to assess the accounts) so that such person can determine the amount of time spent by the receiver's employees (and others that the receiver may have hired) in respect to the various discrete aspects of the receivership.
>
> Bennett states that a receiver's accounts and a solicitor's accounts should be verified by affidavit (at pp. 462-63). I agree.
>
> (at paras. 37 and 38)

23 In addressing the appropriate principles and factors to be considered in assessing the appropriate compensation for a receiver, Taggart J.A. on behalf of the Court in *Bank of Montreal v. Nican Trading Co.* (1990), 43 B.C.L.R. (2d) 315 (B.C. C.A.), made the following statements:

> The principles which guided the Registrar were those set out in the Belyea [*Belyea and Fowler v. Federal Business Development Bank* (1983), 46 C.B.R. (n.s.) 244 (N.B.C.A.) case to which he referred. He applied the relevant considerations listing them at the end of his recommendations. They included: (a) the value of the assets; (b) complications and difficulties encountered by the Receiver; (c) degree of assistance provided by Nican; (d) time spent by the Receiver; (e) Receiver's knowledge, experience and skill; (f) diligence and thoroughness; (g) responsibilities assumed; (h) results; (i) cost of comparable services
>
> In addition to those factors the Registrar took into the account the estimates made by the Receiver as to the cost of the receivership with particular reference to the various fee estimates provided from time to time.

(at pp. 320-321)

24 In *BT-PR Realty Holdings Inc. v. Coopers & Lybrand*, [1997] O.J. No. 1097 (Ont. Gen. Div. [Commercial List]), further "relevant considerations" were added including the existence of an indemnity agreement, the secured position for priority for payment, the demanding of efficiency by a debtor, and with special emphasis on the parties agreeing to a charged based on the number of hours times an hourly rate of the persons involved.

25 In *Bakemates*, *supra*, Borins J.A. made the statement regarding what information should be available to the Court in the passing of accounts of a receiver.

> When a "receiver asks the court to approve its compensation, there is an onus on the receiver to prove that the compensation for which it seeks court approval is fair and reasonable.
>
> (at para. 31)

26 Here, the accounts of the Receiver were not verified by Affidavit. Such an Affidavit should include what is set out in *Nican*, *BT-PR Realty*, both *supra*. As well, there is no description of what was done by each of the personnel who worked on the file and whose time is reflected in the 43 invoices which were issued. There is no information regarding the "standard rates and charges" of each of the personnel. There is no ability to ascertain whether what was charged was at the "standard rates and charges" of the Receiver. It is not possible to ascertain whether the liability for the fees of the Receiver were expenditures or liabilities which were "...properly be made or incurred...." I adopt the statement made by Borins J.A. in *Bakemates*, *supra* regarding what should have been available:

> Thus, the practice that requires a court-appointed receiver to verify its statement of fees and disbursements on the passing of its accounts conforms with the general practice in the assessment of the fees and disbursements of solicitors and trustees.
>
> (at para. 38)

27 Because any accounts actually rendered by the Receiver were not attached, because there was no actual description available to the Court about what the Receiver had accomplished, and because very few of the "relevant considerations" were provided to the Court, what was presented on behalf of the Receiver does not meet the requirements set out in *Nican*, *BT-PR Realty*, or *Confectionately Yours Inc., Re*, *all supra*. What should be presented must include copies of any invoices issued, information regarding the standard rates and charges of each of the personnel who had worked on the receivership, and an indication of seniority within the profession, a narrative description about what was done, statement of affairs setting out the assets and liabilities of the debtor, statement of receipts and disbursements, and time that the Receiver took to perform its duties. This information would allow the Court to determine the appropriateness of any standard rates and charges imposed.

If there is any information in the invoices which is confidential, such information could be redacted or sealed in the records of the Court. The reference to a "summary basis" does not relate to reduced information that should be before the Court. Rather, the phrase relates to the basis to have the Court rather than the Registrar consider the materials that would ordinarily be before the Registrar.

28 I cannot interpret the phrase "pass their accounts from time to time" as meaning only once in the six years since the Receiver was appointed and close to the time when the activities of the Receiver have come to an end. Where total receipts of Redcorp and Redfern amount to in excess of $39,500,000, an appropriate passing of accounts cannot be interpreted as being once in six years. The same goes for the total fees and disbursements of the Receiver of in excess of $2,200,000. It is not unreasonable to expect that the passing of accounts "from time to time" would at least every two years. In this regard, s. 99(1) of the *Trustee Act, R.S.B.C. 1996 c. 464* provides for an "executor, administrator, trustee under a will" to pass his or her accounts every two years unless the accounts are approved and consented to in writing by all beneficiaries, or "the court otherwise orders". While the Receiver is not an executor, administrator, or trustee, I see no reason why it would not be appropriate for a Receiver to pass his or her accounts at least every two years. If necessary, a Court application could be made to extend that period if the circumstances justify such an extension.

29 If a lengthier time goes by, a Receiver will not have the benefit of any comments about the form of the accounts which can then be incorporated into later passing of accounts. By waiting six years, the Receiver has run the risk that what was presented was in a format which was unacceptable and lacking in the required detail.

30 The Receiver will be at liberty to re-apply for the passing of its accounts.

(b) The Accounts of Counsel for the Receiver

31 Attached as a further appendix to the Tenth Report is a "summary of the professional fees and disbursements for the Receiver's legal counsel" for the period of May 30, 2009 through November 9, 2015. The total fees are $1,065,788.24 including out-of-pocket disbursements of $18,545.43 and applicable taxes of $113,492.71. Also attached is a break-down of the 57 invoices rendered by counsel which include information under the following headings: (a) invoice number; (b) invoice date; (c) fees; (d) disbursements; (e) HST; and (f) invoice total. There was a breakdown of the personnel by "Staff Member" which included the following categories: students, associates, paralegals, partners, tax advisors, associate counsel, and "Word Processing". There was also a break-down under the following headings: (a) name of staff member; (b) their title; (c) their total hours; (d) their billing rate which included varying rates depending on the year that the services were rendered; and (e) amount billed attributable to each of them. There is no indication as to what services were rendered by any of those listed.

32 Regarding the "fees and disbursements" of legal counsel for the Receiver, the same comments can be made relating to what was presented. First, the accounts should have been verified by Affidavit. Second, there is nothing which would allow me to conclude that what was incurred for legal services was at the "standard rates and charges" of counsel. Third, because there is no description of the services rendered, it is not possible to ascertain whether this liability for legal fees was "properly...made or incurred". Fourth, the assessment of fees should not be just a matter of calculating the number of hours spent times an hourly rate. There should be some correlation of the cost to the benefits derived by the receivership: *Bank of Nova Scotia v. Diemer*, 2014 ONSC 365 (Ont. S.C.J.) at para. 20. Fifth, counsel should keep in mind Rule 14-1(31) of the *Supreme Court Civil Rules* which provides: "A lump sum bill must contain a description of the nature of the services and of the matter involved as would, in the opinion of a Registrar, afford any lawyer sufficient information to advise a client on the reasonableness of the charge made." Sixth, the Court should not automatically approve the "usual" hourly rates for counsel. In this regard, see *Diemer*, *supra*, where Goodman J. made the following statement:

> In my view, the assumption that the court will automatically approve a "usual" hourly rate for Receiver's counsel, whether it stems from the commercial list practice or from a geographical region like Toronto is a faulty one. As Spies J. opined in *Pandya v. Simpson*, [2006] O.J. No. 2312, the court, with the assistance of opposing counsel [if there is one], has to play the role of what a client would ordinarily do, namely consider whether the hourly rate is fair and reasonable in light of the nature of the work involved and the amounts in issue.
>
> (at para. 30)

33 Regarding the fees and disbursements of counsel, I adopt the statement in *Bennett On Receiverships*, *supra*, where the learned author states:

> The court must scrutinize the accounts carefully to assure that the appropriate lawyers are performing services to the receiver on the same basis and factors as the receivers. Where legal accounts have no relevance to the receivership, the court will reduce the fees. Similar factors are considered on the taxation or assessment of the legal accounts, namely:
>
> (1) the time expended;
>
> (2) the complexity of the receivership;
>
> (3) the degree of responsibility assumed by the lawyers;
>
> (4) the amount of money involved, including reference to the debt, amount of proceeds after realization, payments to the creditors;
>
> (5) the degree and skill of the lawyers involved;

(6) the results achieved;

(7) the ability of the client to pay; and

(8) the client's expectations as to the fee.

34 What should have been presented on behalf of legal counsel would be that which would have been presented to the Registrar on the assessment of an account being rendered to a client. As it was not, the Receiver will be in a position to reapply to have the fees and disbursements of the counsel for the Receiver approved.

(c) Should there be a Reference to the Registrar?

35 The question which arises is whether it is appropriate to refer the question of the passing of accounts of the Receiver and the passing of accounts of the counsel for the Receiver to the Registrar or whether it is appropriate to assess costs summarily as is provided in the Appointment Order. In this regard, Rule 14-1(15) of the *Supreme Court Civil Rules* provides that a Court may award costs "of a proceeding" and "...in ordering those costs the court may fix the amount of costs, including the amount of disbursements". In the context of a trial and an order made for costs, Donald J.A. made these statements on behalf of the Court in *Graham v. Moore Estate*, 2003 BCCA 497 (B.C. C.A.):

> There remains the issue whether the Plaintiffs' costs should have been assessed before the Registrar rather than by the trial judge. It is said that Mr. Campa was denied the procedural protections of a Registrar's hearing, and he did not have an adequate opportunity to challenge items in the solicitor's bill. The Registrar's hearing would have involved more litigation in a losing cause; a problem that underlies all of Mr. Campa's process arguments.
>
> It is well settled that a trial judge has the authority to determine the quantity of the award although it is a power to be exercised sparingly: *Harrington was Royal Inland Hospital* (1995) 131 D.L.R. (4th) 15 [B.C.C.A.]. As in *Harrington*, the trial judge in the present case did not want to burden the parties with the task of acquainting the Registrar with the complexities of the case when he was fully familiar with all aspects of it.
>
> Mr. Campa was unable to demonstrate any denial of the opportunity to address the reasonableness of the bill. (at paras. 45-47)

36 In view of the Appointment Order and in view of the desire to provide appropriate expediency to the procedures adopted by the Court, I am satisfied that the present Rule allows a summary determination by the Court rather than a reference to the Registrar on the question of costs. Such a summary determination by the Court is contemplated by the Appointment Order. This view is confirmed in the decision in *Gichuru v. Smith* (2014), 65 B.C.L.R. (5th) 17 (B.C. C.A.) where

Harris and Goepel JJ.A. made these statements regarding the principles under which an assessment before a judge should take place:

> The principle governing cost assessments under the Rules is simple: parties are only entitled to their objectively reasonable legal costs as determined according to the particular costs scale that they were awarded. This principle applies equally to assessments made by the registrar under Rules 14-1(2) or 14-1(3) and assessments made by a judge under R. 14-1(15). It applies whether costs are awarded pursuant to a final judgement or interlocutory application. This principle follows from the plain and ordinary meaning of the Rules and the basic principles of natural justice, as discussed below. It reflects the requirement in Rules 14-1(2) and 14-1(3) that only those costs proper and reasonably necessary to conduct the proceeding may be allowed. Lastly, it applies with equal force regardless of the method used to assess costs; that is, whether it is done pursuant to a hearing or summarily. (at para 101)
>
> The decision to fix the quantum of costs under R. 14-1(15) is a matter of judicial discretion that should be sparingly exercised. The court officer best placed to conduct an assessment is usually the registrar, whose knowledge and experience in assessing legal bills is extensive and seldom matched by that of a trial judge. An exception may arise in cases when the judge is intimately familiar with the litigation or the time and cost of a registrar's hearing cannot be justified or where the parties consent. The fact that a judge has heard the trial does not necessarily lead to the conclusion that the best use of judicial resources is for the judge to assess costs. A concern that a party who might have to pay costs will prolong the costs assessment by requiring a microscopic review of the services provided by counsel must be balanced against the right of that party to challenge the reasonableness of the proposed costs. (at para. 154)

37 In protracted proceedings dealing with the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36 proceedings or a receivership, where a judge has heard each of the applications that have come before the Court, and has received regular reports, the assigned Judge can ascertain whether the accounts should be approved summarily without a reference to the Registrar. That is the most expeditious way of determining that question and is consistent with the Appointment Order. However, this decision should be made by the assigned Judge after the form and the completeness of the materials filed in support of the application can be reviewed so that, if the materials do not meet the criteria set out above, the matter can be referred to the Registrar with directions regarding the materials that must be produced. It would also depend on the question of whether notice has been provided to all, not some, stakeholders and whether a claims bar process has been undertaken and completed.

(d) Destruction of Records

38 The application contained the following request: "The Receiver is authorized to destroy any and all records of the Company in its possession." I am satisfied that this request runs contrary

to the requirements set out in Provincial and Federal legislation regarding retention of records including the requirements of the Superintendent of Bankruptcy, of the Canada Revenue Agency, and of Provincial Legislation dealing with corporations. There is also an important reason "any and all records" of Redcorp and Redfern should not be destroyed. If, in the future, a party obtains the consent of the Receiver or the approval of the Court to proceed against the Receiver, the destruction of records means that the discovery process available pursuant to the *Supreme Court Civil Rules* would be meaningless. In the absence of the expiry of a limitation period, a claims bar process or a Court Order, the records of Redcorp and Redfern should be retained in accordance with Provincial and Federal legislation.

Costs

39 Receiver will be at liberty to speak to the question whether the costs of this application should be born by the creditors of Redfern Resources Ltd. and Redcorp Ventures Ltd.

Application dismissed.

Canada Federal Statutes
Bankruptcy and Insolvency Act
Part XI — Secured Creditors and Receivers (ss. 243-252)

R.S.C. 1985, c. B-3, s. 243

s 243.

Currency

243.

243(1)Court may appoint receiver

Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

(a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;

(b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or

(c) take any other action that the court considers advisable.

243(1.1)Restriction on appointment of receiver

In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

(a) the insolvent person consents to an earlier enforcement under subsection 244(2); or

(b) the court considers it appropriate to appoint a receiver before then.

243(2)Definition of "receiver"

Subject to subsections (3) and (4), in this Part, **"receiver"** means a person who

(a) is appointed under subsection (1); or

(b) is appointed to take or takes possession or control — of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt — under

(i) an agreement under which property becomes subject to a security (in this Part referred to as a "security agreement"), or

(ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.

243(3)Definition of "receiver" — subsection 248(2)

For the purposes of subsection 248(2), the definition "receiver" in subsection (2) is to be read without reference to paragraph (a) or subparagraph (b)(ii).

243(4)Trustee to be appointed
Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(b).

243(5)Place of filing
The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

243(6)Orders respecting fees and disbursements
If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

243(7)Meaning of "disbursements"
In subsection (6), **"disbursements"** does not include payments made in the operation of a business of the insolvent person or bankrupt.

Amendment History
1992, c. 27, s. 89(1); 2005, c. 47, s. 115; 2007, c. 36, s. 58

Judicial Consideration (7)

Currency
Federal English Statutes reflect amendments current to December 8, 2021
Federal English Regulations Current to Gazette Vol. 155:24 (November 24, 2021)

End of Document

Canada Federal Regulations
Bankruptcy and Insolvency Act
Can. Reg. 368 — Bankruptcy and Insolvency General Rules
General

C.R.C. 1978, c. 368, s. 4

s 4.

Currency

4.
If a period of less than six days is provided for the doing of an act or the initiating of a proceeding under the Act or these Rules, calculation of the period does not include Saturdays or holidays.

Amendment History
SOR/98-240, s. 1; SOR/2007-61, s. 63(a)

Currency
Federal English Statutes reflect amendments current to March 2, 2022
Federal English Regulations Current to Gazette Vol. 156:5 (March 2, 2022)

Canada Federal Regulations
Bankruptcy and Insolvency Act
Can. Reg. 368 — Bankruptcy and Insolvency General Rules
General

C.R.C. 1978, c. 368, s. 6

s 6.

Currency

6.

6(1) Unless otherwise provided in the Act or these Rules, every notice or other document given or sent pursuant to the Act or these Rules must be served, delivered personally, or sent by mail, courier, facsimile or electronic transmission.

6(2) Unless otherwise provided in these Rules, every notice or other document given or sent pursuant to the Act or these Rules

(a) must be received by the addressee at least four days before the event to which it relates, if it is served, delivered personally, or sent by facsimile or electronic transmission; or

(b) must be sent to the addressee at least 10 days before the event to which it relates, if it is sent by mail or by courier.

6(3) A trustee, receiver or administrator who gives or sends a notice or other document shall prepare an affidavit, or obtain proof, that it was given or sent, and shall retain the affidavit or proof in their files.

6(4) The court may, on an *ex parte* application, exempt any person from the application of subsection (2) or order any terms and conditions that the court considers appropriate, including a change in the time limits.

Amendment History
SOR/98-240, s. 1; SOR/2007-61, ss. 3, 63(b)

Currency
Federal English Statutes reflect amendments current to March 2, 2022
Federal English Regulations Current to Gazette Vol. 156:5 (March 2, 2022)

End of Document