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May 8, 2025

The Honourable Justice Presiding in Chambers
Supreme Court of Nova Scotia
The Law Courts
1815 Upper Water Street
Halifax, NS B3J 1S7

The Honourable Justice Presiding in Chambers

Re: Business Development Bank of Canada v. Atlantic Oriental Wholesale ("AOW") Inc.
Hfx No. 532179

This is the submission of Deloitte Restructuring Inc. ("**Deloitte**") in its capacity as the Court appointed Receiver in support of its motion for, *inter alia*, an order:

a. approving the activities of the Receiver

b. approving the proposed distribution of funds held by the Receiver, as set out in the Fourth Report of the Receiver dated April 15, 2025

c. approving the fees and disbursements of the Receiver and its legal counsel; and

d. discharging Deloitte from its duties and as Receiver when it completes the remaining activities set forth in its Fourth Report and filing the Discharge Certificate with this Honourable Court

A. Concise Statement of Facts

On April 11, 2024, this Honourable Court issued an Order appointing Deloitte as Receiver without security of all the assets, undertakings and properties of Atlantic Oriental Wholesale (AOW) Inc. ("**AOW**") acquired for or used in relation to its business and authorized and approved Deloitte to proceed with a Sales and Investment Solicitation Process ("**SISP**").

On August 8, 2024, this Honourable Court granted an Order approving the sale of the Purchased Assets of AOW contained in the Second Report of Deloitte. And on December 20, 2024, this Honourable Court issued an Order approving the sale of the residence. Deloitte filed an assignment of Bankruptcy pursuant to section 49(1) of the BIA for AOW.

Deloitte has completed its liquidation of the assets of AOW and seeks approval of the proposed final distribution, approval of its accounts and those of its counsel, approval of its activities, and discharge from its duties as Court appointed Receiver once the remaining activities are completed by it which are enumerated at paragraph 40 of Deloitte's Fourth Report.

B. Issues

The issues to be determined on this motion is whether this Honourable Court should:

a. approve the activities of the Receiver

b. approve the proposed distribution of funds held by the Receiver, as set out in the Fourth Report of the Receiver dated April 15, 2025

c. approve the fees and disbursements of the Receiver and its legal counsel; and

d. discharge Deloitte from its duties and as Receiver when it completes the remaining activities set forth in its Fourth Report and files the Discharge Certificate with this Honourable Court

C. Law and Argument

Distribution of Funds

The Receivership Order permits this Honourable Court to make an order with respect to the distribution of funds, as set out at paragraph 15 therein:

> **Receiver to Hold Funds**
>
> All funds, monies, cheques, instruments, and other forms of payments received or collected by the Receiver from and after the making of this Order from any source whatsoever, including without limitation the sale of all or any of the Property and the collection of any accounts receivable in whole or in part, whether in existence on the date of this Order or hereafter coming into existence, shall be deposited into one or more new accounts to be opened by the Receiver (the "**Post Receivership Accounts**") and the monies standing to the credit of such Post Receivership Accounts from time to time, net of any disbursements provided for herein, shall be held by the Receiver to be paid in accordance with the terms of this Order or any further order of this Court.
>
> [Emphasis added]

As set out in the Fourth Report, Deloitte is currently holding $937,365.00 in receivership funds (the "**Receivership Funds**").

In addition, to the Receivership Funds, Deloitte anticipated the collection of $26,000.00 of HST refunds that will be available for distribution once received. This will increase the distribution amount to $963,650.00 (following the transfer House Proceeds to the Bankruptcy Estate).

Deloitte is also aware of potential priority and competing claims that require the Receiver to create a reserve against the Receivership Funds (the "**Priority Claims**") which is in the amount of $40,000.00 to pay for professional fees and operating costs of Deloitte.

Deloitte is continuing its discussions with the insurance adjuster following the fire at the premises of AOW but, at this time, is unaware of any funds being paid by the insurance company.

Deloitte respectfully submits that the proposed distribution of proceeds is appropriate, and the Receivership Funds should be disbursed as set out at paragraph 25 of its Fourth Report.

Approval of fees and Disbursements

Rule 3 and 6 of the *Bankruptcy and Insolvency General Rules* state as follows:

> 3. In cases not provided for in the Act or these Rules, the courts shall apply, within their respective jurisdictions, their ordinary procedure to the extent that that procedure is not inconsistent with the Act or these Rules.
>
> ...
>
> 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.
>
> (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.

(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.

(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.

Nova Scotia Civil Procedure Rule 73.11 addresses a Receiver. Specifically:

Passing accounts and discharge
73.11 (1) A receiver who completes the tasks for which the receivership order was granted must make a motion for an order passing the receiver's accounts, approving fees and expenses not yet approved, and discharging the receiver.

(2) A judge who hears a motion for a discharge may do any of the following:

(a) pass the accounts or order repayment of an expense not approved;

(b) approve the receiver's fees and disbursements and allow payment of them or, if advances exceed the amount approved, order repayment;

(c) discharge the receiver wholly, or on conditions.

In *Arnold v. Rockwood*, (1989), 93 N.S.R. (2d) 14, [1989] N.S.J. No. 307 at paragraph 2, Davison J. stated the following with respect to the remuneration of a receiver:

The remuneration of the receiver should not be fixed totally on the amount of time spent on the affairs of the debtor. The factors to be considered in fixing the remuneration should also include the result obtained, the responsibility assumed, the quality of service rendered, the nature, extent and value of the assets handled, the complications and difficulties encountered, the receiver's knowledge, experience and skill, the diligence and thoroughness displayed, and the responsibilities assumed. The purpose of passing accounts of a receiver is to afford judicial protection to the receiver with respect to the performance of his duties and to permit interested parties to question the activities of the receiver. The court will protect the receiver in pursuit of his remuneration and should pass accounts which are fair and reasonable . . .

In *Toronto-Dominion Bank v. Karlsen Shipping Co.*, 2015 NSSC 204, McDougall J. adopted the comments of Goodman J. of the Ontario Supreme Court of Justice in *Bank of Nova Scotia v. Diemer*, 2014 ONSC 365, concerning the remuneration of a receiver:

> [29] Counsel for No. Co. referred the Court to a relatively recent case of the Ontario Superior Court of Justice in *Bank of Nova Scotia v. Diemer*, 2014 ONSC 365 (Ont. S.C.J.). The Honourable Andrew J. Goodman, at para. 3 of his decision, said this:
>
> > 3 One of the leading authorities dealing with approval of the fees of a receiver is found in the case of *Re Bakemates International Inc.*, [2002] O.J. No. 3569. In Re Bakemates, 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.
>
> ...
>
> [32] Before getting into an analysis of the case that was before him, Justice Goodman also cited from a case penned by Justice Farley of the Ontario General Division [Commercial List] at para. 6 of *Belyea, supra*:
>
> > 6 In *BT-PR Reality Holdings Inc. v. Coopers & Lybrand*, [1997] O.J. No. 1097 (Sup. Ct.) 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.

[33] In his analysis, Justice Goodman, at para. 18 and 19, commented as follows:

> 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.

[34] I accept what Justice Goodman had to say and adopt what he borrowed from the various other cases cited

Accordingly, it is respectfully submitted that Deloitte's fees and disbursements and that of its counsel should be approved, unless there is evidence that the activities of Deloitte as Receiver and the associated fees and disbursements were unfair or unreasonable in the circumstances. It is respectfully submitted that there is no evidence that Deloitte

acted unfairly or in a commercially unreasonable manner in administering the receivership of the Companies.

It is further respectfully submitted that the time and disbursements incurred by Deloitte and its counsel in the course of its duties are fair and reasonable in a receivership of the nature described herein, and that the hourly rates charged by Deloitte are consistent with the average hourly rates billed by Deloitte on its other engagements, and consistent with other insolvency firms of comparable size engaged on similar receivership matters.

It is respectfully submitted that the fees and expenses submitted by Deloitte in its capacity as Receiver and those of its counsel are fair and reasonable and reflect the work that was done and the quality of the service provided.

Approval of Receiver's Activities

The activities of Deloitte since its last appearance before this Honourable Court are set out in Deloitte's Fourth Report at paragraph 10, and include the following:

i. working with the purchaser of the House to close the transaction contemplated by the House Sale Approval and Vesting Order (the "**Transaction**")

ii. continuing discussions relating to insurance claims filed by AOW prior to the appointment of the Private Receiver

iii. holding discussions with its legal counsel regarding administrative matters relevant to the administration of the estate

iv. holding discussions with RBC and its legal counsel regarding options relating to the Shareholder Payments

v. filing an assignment in bankruptcy in respect of AOW

vi. maintaining the Receiver's Website, and

vii. preparing and filing this Fourth Report with the Court.

Should this Honourable Court approve the proposed order sought by Deloitte in this motion, Deloitte intends to complete its statutory duties, which include, but not limited to, the final reporting to CRA and the Office of the Superintendent of Bankruptcy.

It is respectfully requested that the activities of Deloitte as set out above, and in the Fourth Report, are appropriate and should be approved by this Honourable Court.

Discharge of Receiver

The Receivership Order provides, among other things, that the Receiver shall be discharged with notice to such secured creditors and other parties as the Court directs (at paragraph 38). Proof of service upon creditors receiving notice of prior motions in this proceeding is on file with this Court and the following service of the within motion will be provided.

As set out in the Fourth Report, Deloitte has concluded the majority of its administration relating to the receivership of AOW. The remaining activities for Deloitte to conclude the receivership are set out in the Fourth Report at paragraph 40 (the "**Remaining Activities**").

The Remaining Activities are as follows:

i. filing of corporate tax returns of AOW

ii. filing and collection of excise tax refunds, the proceeds of which will be distributed as part of the Distribution Order

iii. collection of any insurance proceeds (if applicable), the proceeds of which will be remitted to RBC as part of the Distribution Order

iv. paying all outstanding invoices of Deloitte and BOYNECLARKE LLP

v. distributing funds pursuant to the Discharge Order, if the Court sees fit to grant

vi. filing the Receiver's final report pursuant to section 246(3) of the BIA; and

vii. filing the Receiver's Discharge Certificate with the Court.

It is respectfully submitted that the work of Deloitte as Receiver will be completed upon its completion of the Remaining Activities and as such, the Receiver should be discharged pending confirmation that it has completed such activities (such confirmation to be provided upon Deloitte filing the Receiver's discharge certificate in the form attached to the proposed order sought by the Receiver in this motion).

D. Relief Sought

Deloitte respectfully submits the motion should be granted in its entirety.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

BOYNECLARKE LLP

Joshua J. Santimaw

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1986 S.H. No. 55728

89235 004

IN THE SUPREME COURT OF NOVA SCOTIA

TRIAL DIVISION

BETWEEN:

PETER R. ARNOLD, CARL T. BOSWICK, FRED HANSEN and FRANCIS DUNSWORTH, in their own right and as representatives of all the limited partners in One Oak Street Limited Partnership, Invesco Developments Limited Partnership and Kencrest Estates Limited Partnership and in their own right and also as representatives of all the beneficial owners of property held in trust by Templeton Woods Limited and Skyline Apartments Limited

Plaintiffs

- and -

PERRY N. ROCKWOOD, GEOFFREY P. CHRISTOPHERSON, DIVERSIFIED EQUITIES LIMITED, a body corporate (formerly known as Rockwood Real Estate Limited); RESCOM PROPERTY INVESTMENTS LIMITED, a body corporate (formerly called Rockwood Management Group Limited); ONE OAK STREET LIMITED PARTNERSHIP, a limited partnership, ONE OAK STREET LIMITED, a body corporate; INVESCO DEVELOPMENTS LIMITED PARTNERSHIP, a limited partnership, INVESCO DEVELOPMENTS LIMITED, a body corporate, KENCREST ESTATES LIMITED, a body corporate, TEMPLETON WOOD LIMITED, a body corporate and SKYLINE APARTMENTS LIMITED, a body corporate

Defendants

HEARD: at Halifax, Nova Scotia, before the Honourable Mr. Justice J. M. Davison, in Chambers on April 5th and 6th, 1989

DECISION: August 3, 1989

COUNSEL: Darrel I. Pink, Esq.
Janet M. Chisholm, Esq.
- for the Receiver, Coopers & Lybrand Limited

Michael S. Ryan, Q.C.
Phillip Jenkins, Articled Clerk
- for the general partner of Invesco, B & R Holdings Limited

IN THE SUPREME COURT OF NOVA SCOTIA

TRIAL DIVISION

BETWEEN:

PETER R. ARNOLD, CARL T. BOSWICK, FRED HANSEN and FRANCIS DUNSWORTH, in their own right and as representatives of all the limited partners in One Oak Street Limited Partnership, Invesco Developments Limited Partnership and Kencrest Estates Limited Partnership and in their own right and also as representatives of all the beneficial owners of property held in trust by Templeton Woods Limited and Skyline Apartments Limited

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PERRY N. ROCKWOOD, GEOFFREY P. CHRISTOPHERSON, DIVERSIFIED EQUITIES LIMITED, a body corporate (formerly known as Rockwood Real Estate Limited); RESCOM PROPERTY INVESTMENTS LIMITED, a body corporate (formerly called Rockwood Management Group Limited); ONE OAK STREET LIMITED PARTNERSHIP, a limited partnership, ONE OAK STREET LIMITED, a body corporate; INVESCO DEVELOPMENTS LIMITED PARTNERSHIP, a limited partnership, INVESCO DEVELOPMENTS LIMITED, a body corporate, KENCREST ESTATES LIMITED, a body corporate, TEMPLETON WOOD LIMITED, a body corporate and SKYLINE APARTMENTS LIMITED, a body corporate

Defendants

DAVISON, J.:

This is an application by Coopers & Lybrand Limited (Coopers), a court appointed receiver of the defendants (except Perry N. Rockwood), to fix a proper remuneration pursuant to

Civil Procedure Rule 46.03 and for an order providing for distribution of the remaining funds in the hands of the receiver and discharging the receiver. The amounts submitted for remuneration of the receiver and the amounts submitted as an account for Patterson Kitz, solicitors for the receiver, are vigorously contested by B & R Holdings limited, the general partner of Invesco Development Limited Partnership (Invesco).

The defendants, Perry N. Rockwood and Geoffrey P. Christopherson, were promoters of a number of business ventures in the Halifax and Dartmouth area. The other defendants were the general and limited partners of various properties in the area. By an order of this court dated February 26th, 1986, Coopers was made receiver and manager of the properties and assets of the partnership defendants including Invesco. The appointment was extended by further orders of the court, the last being dated the 1st day of March, 1988, which provided that the appointment should terminate on the 1st day of June, 1988, unless extended. No further steps were taken to extend the appointment of the receiver beyond June 1st, 1988. In addition, the general partner takes the position there was a period between October 26th, 1986, and December 1st, 1987, when the receiver acted without authority because an order of the court in August, 1986, stipulated the appointment was to terminate October 26th, 1986, and there was no further order until December 1st, 1987, which provided the appointment would terminate on

March 1st, 1988.

The work for which the receiver and its solicitors seek compensation all relate to services performed in connection with Invesco. At the time the receiver was appointed, the only asset of Invesco was raw land situate at Lake Banook in Dartmouth, Nova Scotia.

Marcus Wide was a vice-president of Coopers who conducted the receivership and he described the situation at the time the receiver was appointed. He said the mortgages on the properties of the various defendants were, for the most part, in arrears and there was co-mingling of funds between the various projects. While the books and records of the companies were incomplete, it was apparent that the defendant companies were not meeting their obligations and that the property stood in jeopardy of being lost for the investors.

Invesco had granted a mortgage to Dover Mortgage Corporation Limited whereby its sole asset was used to secure the advance of a sum of $300,000.00 at 16½%. In addition, lands owned by Perry Rockwood at Liscomb Court in Dartmouth were used as security for the advance under the mortgage. The Dover mortgage was actually second to a mortgage in favour of Atlantic Trust Company but there was default under both mortgages and an action for foreclosure and sale was commenced on February

12th, 1986.

The present proceeding (the receivership action) was commenced on February 26th, 1986, whereby Coopers was appointed receiver and manager of the property and assets of Invesco and its general partner, Invesco Developments Limited.

On April 12th, 1986, Coopers, with the assistance of their solicitor, arranged for a meeting with the investors with a view to giving the investors information as to the status of their investments and an estimate of the costs required to keep the various projects in operation. One of the objectives of the meeting for the receiver was to obtain instructions from the investors and, in particular, a decision as to whether they wanted to advance sufficient funds to maintain the properties or have the properties sold. There was no consensus at the meeting. It was clear that there was sufficient value in the properties to cover the mortgages. Only the investment of the investors was in jeopardy. At that meeting, there was a discussion about the Dover mortgage. Concern was expressed by the receiver about the validity of the mortgage. Generally, the meeting concluded with instructions given to the receiver to solicit proposals from prospective new general partners and to seek purchase proposals with respect to the various enterprises.

Mr. Wide gave evidence as to what took place with

respect to each of the businesses and the extent of success achieved in attaining general partners and arrangements for the sale of the various properties.

The next meeting of investors took place on May 26th, 1986. After a discussion, two resolutions were passed. It was resolved that Coopers would take steps to challenge the validity of the Dover mortgage and that Cocper should obtain court approval to borrow funds and sell the mortgaged property.

One of the positions taken by the general partner (B & R) in the proceeding before me is the amount of the fees of Patterson Kitz which should be allowed in defending the Dover mortgage action in view of comments which took place at the meeting of May 26th, 1986. Lecnard A. Kitz, Q.C., senior partner of Patterson Kitz, attended at the meeting as an observer. Mr. Kitz was not an investor nor was he acting as a solicitor. The members of the firm who were acting as solicitors for the receiver and for the investors were Douglas A. Caldwell, Q.C. and Darrell Pink. At a time when the cost of the forclosure was being discussed, Mr. Kitz rose and advised the assembled investors that if the defence of the Dover mortgage action did not succeed, the law firm which bears his name would only charge $5,000.00. It is common ground that the defence did not succeed and Patterson Kitz claims for fees, as it relates to the defence of that action, the amount of $38,333.12.

Evidence is before me by way of affidavit and viva voce from various persons as to what took place at the meeting. B & R filed the affidavits of two solicitors and a chartered accountant of Halifax, all of whom were representing investors. These three affidavits are consistent in stating that there was considerable concern expressed by the investors about the costs being incurred by the receiver and its solicitor. Mr. Caldwell, who was chairing the meeting, was asked as to the extent of the anticipated costs of the action involving the Dover mortgage. He suggested a figure in the vicinity of $30,000.00 to $50,000.00. When this seemed to receive a negative reaction from the persons assembled, Mr. Kitz rose and advised that if the action was lost, the law firm would charge no more than $5,000.00 but if the defence was successful, they would be paid on a full solicitor and client basis. One of the solicitors, in his affidavit, deposed that Mr. Caldwell took no steps to distance himself from Mr. Kitz's statement after it was made. The chartered accountant deposed to the view that he believed that the affirmative resolution to challenge the Dover mortgage was made on the strength of Mr. Kitz's undertaking.

Mr. Wide, in his testimony, described how Mr. Caldwell had given the meeting a range of $20,000.00 to $50,000.00 for the anticipated fees. At that point, the investors had difficulty making up their mind if they wanted to commit themselves to that amount of money. At this point, Mr. Kitz interjected with

his suggestion. Mr. Wide said he was surprised at this suggestion and wondered if Mr. Caldwell would permit "that to stand, that offer of Mr. Kitz". Mr. Wide then testified as follows:

> The conversation very quickly continued and it was my perception that Mr. Caldwell indicated that he did not necessarily agree with his partner, Mr. Kitz, or recognizing him as a senior partner in the firm and I believe he restated the range of values that he thought it would take and the meeting moved on.

On cross-examination, Mr. Wide agreed that the solicitor, whose affidavit was filed, had probably had a better recollection than that of Mr. Wide.

Mr. Douglas A. Caldwell, Q.C. in his affidavit stated that, after Mr. Kitz made his comment, he informed the meeting that Mr. Kitz's estimate was not realistic and the fees depended upon the complexity of the proceedings. Mr. Caldwell was cross-examined on his affidavit and he testified that he believed that Mr. Kitz attended the April 12th meeting and not the May 26th meeting, even though he and all of the other deponents stated that Mr. Kitz attended at the May 26th meeting. Mr. Caldwell said that he came to this conclusion after he reviewed his files and found a letter dated April 28th which he directed to the investors and which made reference to the costs of defending the foreclosure action having been discussed at the April 12th meeting and the statement in the letter was - "We suggested that the order of magnitude would be $50,000.00 rather

than $5,000.00. However, as we review the matter, we can forsee that the costs might be in the order of $15,000.00 to $25,000.00." As this evidence contradicted all of the existing affidavits, including Mr. Caldwell's own affidavit, counsel for B & R requested an adjournment to have this issue thoroughly canvassed. Subsequently, I was advised both parties accept the fact that the remarks of Mr. Kitz were made at the meeting of May 26th, 1986.

Following the meeting on May 26th, 1986, solicitors for the receiver proceeded to defend the action for forclosure and sale on the Dover mortgage. The matter was originally set for trial for April 1987 but adjourned until December 8th and 9th, 1987. On December 5th, 1987, there was a meeting of the investors of Invesco and B & R was appointed as the new general partner of Invesco and instructed to take all necessary steps to settle the Dover forclosure action even if it was necessary to consent to judgment. At the same meeting, B & R were instructed to apply to the court to discharge Coopers as receiver and Patterson Kitz as solicitors for the partnership. The trial which had been set for December 8th and 9th was adjourned.

The affidavit evidence would indicate that during the fall months of 1987, Dover solicited and purchased units in Invesco with a view to calling a meeting which eventually

took place on December 5th, 1987, for the purpose of discontinuing Invesco's defence of the foreclosure action.

By letter dated January 6th, 1988, Mr. Ryan, solicitor for B & R, wrote to Mr. Wide requesting details of the outstanding accounts for the receiver and the receiver's solicitor. In that letter, Mr. Ryan suggested that because the rate of interest on the Dover mortgage was 16%, the balance on the mortgage should be paid against an irrevocable letter of credit. Mr. Ryan suggested that there had been a substantial depletion of monies by reason of the difference between the rate of interest earned on monies held by the solicitors in trust for the eventual payment of the mortgage, if necessary, and the rate of interest that was accruing on the Dover mortgage in a compound fashion. The receiver replied by letter dated January 13th, 1988, advising that at the time the Invesco lands were sold in July of 1986, the funds were invested in term deposits and that the solicitors for the receivers had obtained the consent of the court to leave these funds invested in that manner. The receiver went on to say that even if the funds were not under the control of the court, he had difficulty in agreeing to pay off the mortgage because they took the view that the mortgage was invalid and if the mortgage was paid off, the investors would lose the interest that accrues on the term deposits. In his evidence, the receiver suggested that the court was not prepared to take a substitute security and that any letter of credit was subject

to negotiation. On cross-examination, Mr. Wide admitted that it would probably have been prudent to have changed the security if the court had permitted such a change and that terms could be arranged which would be acceptable to the receiver. The issue had never been brought to the attention of the limited partners or discussed with the limited partners.

Mr. Caldwell said that he and the receiver had frequent discussions concerning the differential in the interest rates between the mortgage and the term deposits. Mr. Caldwell said that he felt the court had found that the money should go to the Accountant General. On discovery examination, Mr. Caldwell advised that he did not give any consideration to approaching Dover to ascertain if some solution could be reached including payment against security by way of letter of credit or guarantee.

In his affidavit, Mr. Caldwell stated that by February of 1988, the general partner had taken no steps to discharge the receiver. On March 23rd, 1988, the receiver applied to the court for directions and, by an order of that date, Mr. Justice Grant declared that the resolutions passed on December 5th, 1987, at the meeting of the limited partners involving the appointment of B & R as general partner and the instructions to the general partner to take necessary steps to conclude the Dover forclosure action and to make application for the court to discharge Coopers, were all binding resolutions in full force and effect.

On May 25th, 1988, Coopers applied to Mr. Justice Nathanson in Chambers for an order discharging Cocpers as receiver and directions regarding the approval and payment of the accounts of the receiver and the solicitor for the receiver. The affidavit of Michael S. Ryan, Q.C. indicates that at the time of this hearing, Patterson Kitz applied for a charging order in respect of its fees and disbursements, which application was opposed by counsel for B & R and counsel for Dover. The matter was adjourned without day.

On June 16th, 1988, the solicitor for Dover applied before Mr. Justice Richard of this court who heard and allowed an application to strike a defence by Coopers in the foreclosure action commenced by Dover. At the same time, the court granted an order for judgment in Dover's favour in the foreclosure action. An appeal from this decision was heard by the Appeal Division on November 14th, 1988, and the appeal was dismissed. This concluded and resolved the Dover mortgage litigation and, at the same time, concluded all of the outstanding matters with respect to the receivership.

In November of 1986, the Receiver received, pursuant to an order of the court, fees in the amount of $118,316.50 and disbursements in the amount of $48,629.47. These disbursements included the account to date of Patterson Kitz. In this application, the receiver seeks fees in the amount of

$56,867.00 under the following headings:

Advice to investors	$24,761.25
R.C.M.P. investigation	11,141.25
Dover Foreclosure Action	5,142.50
Alternate Recovery	7,252.50
General Administration	8,569.50

The receiver also seeks approval for accounts of Patterson Kitz in the amount of $59,251.53 attributable to the following:

Dover mortgage foreclosure action	$21,792.77
Alternate recovery	14,465.84
Other general matters	22,992.92

In addition, the receiver seeks $4,000.00 for fees for the discharge and Patterson Kitz has rendered a account of $15,012.49 with respect to time spent by solicitors of that firm on the present application.

It is the position of B & R that the account of the receivers should not exceed $10,000.00 and that the account of Patterson Kitz should be confined to $5,000.00 and a reasonable amount for the discharge application. In particular, it is the submission of B & R that:

1) The receiver engaged in activities for which it had no authority by reason of the determination of the appointment.

2) The receiver engaged in activities which exceeded the powers given to it by the court order. B & R also take the position that the fees of Patterson Kitz should be reduced where it acted as solicitor for the receiver on matters where the receiver exceeded his authority.

3) The receivers acted negligently and in breach of a fiduciary duty which it owed to the limited partners and thereby caused them a loss that should be deducted from any fees to which the receiver would be entitled.

4) Finally, the law firm undertook to charge the limited partners no more than $5,000.00 in the event that the receiver was unsuccessful in defending the Dover foreclosure action and the fees to the firm should be confined to $5,000.00.

By virtue of the Judicature Act, s. 39(9), the court can appoint a receiver "in all cases where it appears to the court to be just or convenient that such an order should be made ..." A receiver is an officer of the court who has the duty to discharge his powers in a bona fide fashion and also has a fiduciary duty with respect to all interested parties to act in the best interest of those parties. See Parsons et

al v. Sovereign Bank of Canada, [1913] A.C. 160 at 167; Kerr on Receivers, 16th ed. at p. 114.

A receiver derives his authority from the order of a court and does not have an inherent power. If he exceeds the power enumerated in the court order, "he may be deprived of his indemnity for fees and expenses" (emphasis added). See Bennett, Receiverships, 1985, p. 116. On the other hand, if the receiver does act beyond the terms of the order of the court, and he does so on such terms where he can demonstrate that he did so bona fide, "and that such actions were required to discharge his duties and were a benefit to the operations", the court would have discretion to indemnify him for such services (See Bennett, Receiverships, 1985, p. 19).

In Belyea and Fowler v. Federal Business Development Bank (1983), 46 C.B.R. (N.S.) 244, the New Brunswick Court of Appeal stated that the fixing of a fee for a remuneration should be based on what was a fair and reasonable value of the services. The court pointed out that sufficient fees should be paid to encourage competent persons to act as receivers but that the receivership should be administered as economically as reasonably possible. The court indicated that the considerations applicable in determining the reasonable remuneration to be paid to the receiver should include the nature, extent and value of the assets handled, the complications and difficulties encountered,

the degree of assistance provided by the debtor, the time spent, the receiver's knowledge, experience and skill, the diligence and throughness displayed, the responsibilities assumed, the results of the receiver's efforts and costs of comparable services when performed in a prudent and economical manner.

With respect, I fully endorse the comments of the New Brunswick Court of Appeal.

I realize that those engaged in the speciality of management of professions advocate the fixing of remuneration almost totally on the amount of time spent on the affairs of clients, but in my view, such a barometer should be tempered with the factors referred to by the New Brunswick Court of Appeal including the result obtained, the responsibility assumed and the quality of service rendered. These are the same factors to which the Code of Professional Conduct published by the Canadian Bar Association makes reference as proper criteria to use in fixing legal fees. In the proceeding before me, I am advised that the fees and disbursements of the receiver and its counsel were in excess of 30% of the monies recovered by the sale of the properties. Undoubtedly, there are occasions when the extent of the value of the assets or the complexity of the issues render such a ratio appropriate but, on my examination of the material before me, it did not appear that that situation existed in the present case.

The purpose of passing accounts of a receiver is to afford judicial protection to the receiver with respect to the performance of his duties and to permit interested parties to question the activities of the receiver. The court will protect the receiver in pursuit of his remuneration and should pass accounts which are fair and reasonable, but should not "rubber stamp" accounts for persons who are acting as officers of the court. As stated by Mr. Justice Stratton in **Belyea and Fowler v. Federal Business Development Bank** (supra) at p. 246, the allowances for services "must be just, but nevertheless moderate rather than generous".

In his text, Bennett at p. 304, discussed two techniques employed in assessing the reasonableness of remuneration. He stated that the first technique was on a percentage of the proceeds of realization and the second was on a quantum meruit basis according to the time, trouble and degree of responsibility involved. With respect to the first technique, he pointed out that the court may look to the rate afforded to trustees in bankruptcies as a guideline and went on to state:

> In a bankruptcy, the trustee's remuneration of seven and one-half percent of receipts after payment to secured creditors can be varied by the court depending on the time involved and the complexity of the estate. In receiverships, the seven and one-half percent rule appears to be high especially where receipts are generated easily. In older cases, it has been held that if the receiver had not encountered exceptional difficulties during his administration, he was entitled to a commission of five percent of the funds coming into his hands.

On the other hand, it is clear that if a chartered accountant is appointed as a receiver, consideration should be given to his normal hourly charge as he would have been earning that hourly rate if he had not been expending the time as receiver. Highly qualified people should not be discouraged from accepting work as receivers. It would seem that the court should take care to consider all of the factors when passing accounts and exercise its discretion by applying a fair balance between the various applicable considerations when arriving at a reasonable remuneration.

The issues raised before me did not include complaints as to the hourly rate charged by the receiver or its solicitors nor did they include a general complaint about the time expended by the receiver or its solicitors. In the proceedings before me, B & R is specific in its complaints with respect to the receiver's activities and accounts and I will deal with each of them.

1) Services performed after the lapse of the Receivership Order.

B & R suggest that the receiver was functus and without power to act between October 26th, 1986 and December 1st, 1987, and after June 1st, 1988.

A receiver has no inherent powers and derives its

authority from the order appointing it. It is important that the receiver comply with the terms of the order and report to the court on its activities on a regular basis. Normally, the term of the appointment is confined to a period of less than a year to require timely reporting and to enforce the control the court has over the activities of the receiver.

In my view, it was poor practice to permit the order to lapse. The failure of the receiver to continue the terms of appointment may have adversely affected some of the acts and duties performed by the receiver during the hiatus periods but I am not required and do not intend to make any finding on that issue. Notwithstanding the view I express, I am not prepared to reduce the receiver's remuneration for these periods. I am convinced, on the evidence before me, that the acts of the receiver during these periods were bona fide and were for the benefit of the interested parties. (Reference is made to Bennett, Receiverships, 1985, p. 19).

It is obvious that the receiver still had the duties and responsibilities of his position as a receiver during these periods and that he had not been discharged from these duties and responsibilities by the court. I am not prepared to reduce the remuneration because the receiver failed to apply to the court in a timely fashion for an order continuing its appointment.

2) <u>The allegation that the receiver exceeded the authority set out in the Order of the court</u>.

B & R take the position that the receiver did not have the authority to prepare operating statements, give tax advice, provide services to the R.C.M.P. and seek to recover monies from solicitors and accountants.

Under the terms of the order of Mr. Justice Richard dated the 26th day of February and under the terms of successive orders, the receiver was authorized to manage the properties and assets of the defendants and to retain agents and solicitors "for the purpose of preserving and utilizing on the property ... and carrying on the business and undertaking of the property and to enter into agreements with any person respecting the said business or property".

The order goes on to grant authority to the receiver to borrow monies, not exceeding $10,000.00, and to advance monies to itself and its solicitors in payment of fees and disbursements.

The order is short on specifics. Its main operative clause has the effect of appointing Coopers as receiver and manager of the property and the assets of the named defendants "with authority to manage the properties and assets as hereinafter authorized and to act at once and until further order of this court". There is little that follows in the order to assist in interpreting the words "as hereinafter authorized" except

that clause which permits it to retain agents, solicitors, assistance, employees and auditors as it considers necessary "for the purpose of preserving and utilizing on the property as provided herein and carrying on the business and undertaking of the property and to enter into agreements with any person respecting the said business or property". The order, which is the sole source of authority for the receiver, should be clear in enunciating the receiver's authority but, on the other hand, the general provision should be given a liberal interpretation to avoid the necessity and expense of needless applications to the court to amend the order. In my view, under the terms of the order, I can examine the activities to ascertain if they were necessary or desirable:

1) For the purpose of preserving and utilizing the property;
2) For the purpose of carrying on the business and undertaking of the property;
3) For the purpose of entering into agreements with any person respecting the business or property.

In my view, the time spent and charges made for examination of the issue of possible recovery from other sources fall within the terms of the order. The possibility of recovery against auditors and lawyers involved in the investments was the subject of discussion on several occasions, including discussions at the meetings with the investors. These activities clearly fell within the broad terms of the order requiring the

trustee or its agents to preserve the property and to carry on the business and undertaking of the property.

Nor would I consider deducting from the remuneration of the receiver the time spent in preparing tax statements. The trustee has a duty to conduct its affairs and to protect the business to the same extent as an ordinary businessman would supervise his own affairs. Mr. Wide testified that he considered it part of the principal obligations of the general partner and, therefore, of the receiver to operate the buildings as business enterprises which would include duties in respect to the preparation of financial statements and reporting to investors on the financial results of the operations and showing the share of losses or profits for income tax purposes. The obligations upon the general partner were set forth in the Limited Partnership Agreement because Coopers was receiver and manager for both the limited partnerships and, as the general partner, it assumed these responsibilities.

I can find no authority under the order for the work performed by the receiver at the request of the R.C.M.P. These activities were sufficiently divorced from the ordinary management of the properties that it was encumbent upon the receiver to apply to the court for authorization to conduct these activities.

I categorically reject the suggestion in the written

submission of the solicitor for the receiver that, should the court not allow the receiver's fees for assisting in the investigation, "it will be by the hand of the court, the very party having control of the receivership assets and judicial process, that will bring the administration of justice into disrepute". I find such a submission to be erroneous and inappropriate.

Obviously, it was desirable for those involved in criminal investigations to have the cooperation of the receiver and I would expect that a court would be quick to extend authorization if it had been requested (which is not to say that the court would necessarily authorize the receiver to charge a fee at its normal hourly rate). On the other hand, the investors have the right to be protected and to have control exercised over the expenditure of funds in the hands of the receiver. The duty was clearly with the receiver, if it wished to be remunerated for its services, to make the application to the court for authority to work with the investigation officials.

Any services performed by the receiver or its solicitor in connection with activities in cooperation with the R.C.M.P. will not be allowed.

3) The allegations of negligence on the part of the Receiver.

B & R submits that the receiver should not have permitted the interest on the mortgage in favor of Dover to accumulate but should have applied to the court to pay out the mortgage and take other security and, in particular, a letter of credit. The Affidavit of John Hickey, secretary of Dover Mortgage Corporation Limited, stated that from the date of the sale of the Invesco land (July 6th, 1986) to the date the mortgage was paid (August 8th, 1988) interest in the amount of $102,528.01 accrued. During the same period, an amount of $72,434.47 was earned on the sale proceeds. B & R suggest a reduction in the receiver's fees of $30,000.00 because of the failure of the receiver to mitigate this expense, particularly after the specific request to do so by the solicitor for B & R in his letter of January 6th, 1988, which request took this form:

> We are instructed that the rate of interest payable on the Dover mortgage is 16%. Our client as general partner suggests to Coopers & Lybrand Limited as receiver and manager that it would be a prudent act of management to pay out to Dover the amount presently due against an irrevocable letter of credit, all without prejudice to the rights of the defendants in the forclosure action. It is our client's position that if this can be done the receiver, manager can prevent further depletion of any residue of funds available for distribution to the limited partners. Our client is of the view that to date there has been a substantial depletion of monies because of the difference between the rate of interest earned on monies held by the solicitors in trust and the rate of interest payable on the Dover Mortgage.

By letter dated January 13th, 1988, Mr. Wide replied to Mr. Ryan's letter and stated his opinion that it would be imprudent to pay off the mortgage because, according to the advice from the receiver's solicitor, the mortgage was invalid and if the funds on hand were used to pay out the mortgage, the investors would lose the benefit of the interest on these funds.

During an examination for discovery, Mr. Wide said that the difference in interest rates was the subject of discussion with the receiver's solicitor but never discussed with the investors, the first general partner, B & R's predecessor, or with Dover. Mr. Wide admitted that if Dover had offered to substitute an irrevocable letter of credit in return for the payout of the mortgage, the proposal would have been a "sensible business arrangement".

During the hearing before me, Mr. Wide advised that when the Invesco lands were sold and the placement of funds in an interest bearing account was effected, "Dover had indicated several times that they felt that we should pay the mortgage out because of the high rate which it accrued" but that the receiver refused and adopted the "usual receiver's way of dealing with these things", that is, sell the asset and put the funds aside until the dispute is resolved. He said B & R's suggestion was refused because, first, it wasn't the usual arrangement

made by a receiver, second, the key part to the arrangement was the terms which could be negotiated in the letter of credit and, third, that it was his understanding that the court was not prepared to substitute the security.

I find these reasons unconvincing. No attempt was made by the receiver to seek permission of the court or to negotiate terms with Dover with respect to the letter of credit. On cross-examination, Mr. Wide agreed the substitution of a letter of credit would have been prudent if acceptable terms could have been negotiated.

In **Doncaster v. Smith** (1987), 65 C.B.R. 133, the receiver-manager sold an asset and thereby incurred substantial tax liability without seeking professional advice on the tax consequences. The evidence indicated that an amalgamation of three companies before the sale would have resulted in decreased tax liability and the trial court found that a prudent person would have effected the amalgamation but that the defendant was not liable for the breach of his duty because he did not have the right, without seeking additional power to effect the amalgamation. On appeal, the British Columbia Court of Appeal held that the prime duty of the receiver-manager was to seek such powers as he considered necessary to perform his duties. Mr. Justice Hinkson, in referring to **Plisson v. Duncan** (1905), 36 S.C.R. 647 stated at p. 137:

> ... the duty of the receiver-manager is to manage the companies' affairs with the same prudence and supervision as an ordinary man would give his own business. If he does not, he is liable for his failure to take such care.

The court rejected the suggestion that the obligation to seek further powers is as much that of those who appointed the receiver as it is that of the receiver. The Court of Appeal agreed with the trial judge that an appropriate remedy if the receiver breached his duty was to deduct from his compensation the amount of tax which had been paid as a result of the breach.

In my opinion, the ordinary man in the position of the receiver, in managing his own business, would have taken steps to reduce the interest liability which was accruing on the Dover mortgage and I find that the failure of the receiver to seek permission of the court and to make further inquiries as to the terms of a letter of credit to be a breach of its duties as receiver-manager and that the appropriate remedy to the investors is to reduce the fee of the receiver. In view of the contingencies which existed, I am not prepared to reduce the fee for this breach by more than $15,000.00.

4) <u>The appropriate fee due Patterson Kitz for the defence of the foreclosure action</u>.

It is the position of the general partner that the fees of Patterson Kitz with respect to the defence of the action

on the Dover mortgage should be restricted to $5,000.00 because of the comments made by L. A. Kitz, Q.C. at the meeting of investors on May 24th, 1986.

It is the position of the law firm that because the receiver does not question the solicitor's fees and because there was no "condition" placed on the firm's retainer - "that should be the end of the matter". This argument is tantamount to saying the court has no control over the fees of the solicitors. The law firm says that none of the affidavits filed referred to an "undertaking" and "no commitment" was given to the investors to limit fees to $5,000.00.

The affidavits filed by B & R in this proceeding were unchallenged. The solicitor for the receiver advised the court that there was no request to cross-examine the deponents. I have for consideration on this issue, the affidavits of two lawyers who attended the meeting on behalf of clients, the affidavit of a chartered accountant and the viva voce evidence of Mr. Wide and Mr. Caldwell, together with the discovery evidence of Mr. Kitz.

There is little dispute as to what was said by Mr. Kitz and the main differences arise from what was intended by the comment and what was the effect of the comment in law.

In his affidavit, Robin McDonald, a member of the

Nova Scotia Barristers' Society, said that great concern was expressed at the meeting by a number of investors as to ongoing costs and that a number of questions came from the floor concerning the costs incurred, to date, by the receiver and its solicitor and the costs of future proceedings. McDonald said that it was his impression that the mood of the meeting "varied from concerned to hostile". He stated that a number of investors had signed documents authorizing the retention of Patterson Kitz "which they felt might make them responsible for future legal fees in an open-ended sense". The Dover mortgage action was discussed and Mr. Douglas Caldwell was asked how much it would cost to challenge the mortgage and Caldwell said "it might be as much as $50,000.00". Mr. McDonald said the general mood of the room appeared reluctant to authorize this sort of expenditure and I quote from Mr. McDonald's affidavit as follows:

> 12. THAT at this time the room was a little unruly and there was generally negative conversation going on with respect to the costs of proceedings to date and the projected costs for the future. At this point, Mr. Kitz stood up and said generally to the audience words to the effect as follows:
>
> > "Are you gamblers? I am a gambler and am prepared to take the risk on this--I know that my partners won't like this but we'll do the file on the basis that if we lose, we'll charge no more than $5,000.00 but, if we win, we will want to be paid full solicitor and client costs as taxed. How much is it worth it to you to challenge $300,000.00? Surely it is worth $5,000.00? You have to look at this from a business point of view."

13. THAT the statement set forth in quotations above is not intended to be a literal quotation from Mr. Kitz but, in my opinion, sets forth the substance of what he said and generally in the words that he said as I remember them. He spoke for slightly longer than the quotation reads but not substantially longer.

14. THAT subsequent to this statement by Mr. Kitz, Mr. Caldwell took no steps that I could notice to distance himself from this statement or to suggest that Patterson Kitz would not be bound by it. I paid close attention to the proceedings.

15. THAT I was present from that point forward until the eventual close of business of the meetings late in the evening and at no time heard any clarification, retraction, or qualification from Mr. Caldwell or Darryl Pink of the assurance given by Mr. Kitz.

16. THAT on behalf of my clients, I was left with the impression that Patterson Kitz had agreed that, if it pressed forward the claim against Dover, it would do so on the basis that it would not be paid any more than $5,000.00 unless it was successful in increasing the return to the investors available from immediate settlement.

17. THAT I had the impression that Patterson Kitz was of the view that the Dover claim was probably worth challenging.

18. THAT I had the impression that the mood of the room would not have authorized proceedings against Dover without the assurance provided by Mr. Kitz.

Mr. Lawrence Freeman was at the meeting as solicitor for Dover and he stated Mr. Caldwell and Mr. Pink quoted a fee for challenging the mortgage of between $20,000.00 and $40,000.00 and that the investors appeared "disinterested" in challenging the mortgage as it related to such legal costs. Mr. Freeman

said that Mr. Kitz stood on behalf of his firm and advised the investors that if the law firm was not successful in challenging the security, the investors would not be charged more than $5,000.00 for the legal fees. Mr. Freeman's affidavit goes on to state:

> 7. THAT the Limited Partners of Invesco Developments Limited Partnership then proceeded to vote on what appeared to be that basis to challenge the mortgage and instructed Patterson Kitz to proceed.

The affidavit of Terry Degen, President of B & R Holdings Limited, also referred to the meeting and the comments made by Mr. Kitz. Mr. Degen deposed that neither Mr. Pink nor Mr. Caldwell made any comment whatsoever to the meeting regarding the comments of Mr. Kitz.

Allan Conrod is a chartered accountant of Halifax, Nova Scotia who deposed that there was a discussion about the anticipated fees of Patterson Kitz at the meeting and that Mr. Kitz advised the meeting that if the law firm was unsuccessful, the fees would be $5,000.00 and if successful, the fees would be charged in accordance with the normal rate. Mr. Conrod went on to state:

> 7. THAT I do verily believe that the limited partners agreed to instruct the Receiver to challenge the Dover mortgage on the strength of the undertaking given by L. A. Kitz. That was my understanding at the conclusion of the meeting.

It is clear from these affidavits that an undertaking was made by Mr. Kitz that the law firm, which bears his name, would not charge more than $5,000.00 if the defence of the action on the Dover mortgage was unsuccessful. It is also clear from the affidavits that reliance was placed on this undertaking and that probably the motion to proceed with the defence was based, to some extent, on the representation made by Mr. Kitz.

In his evidence given by way of discovery, Mr. Kitz testified that the comments made by him were similiar to that set out in the affidavits and there appears this question and answer:

> Q. What do you say as to what you're entitled to by way of fees for the services you rendered in the defence of the Invesco foreclosure action?
>
> A. Oh, I think we are entitled to all of our fees saving that which is attributable to the trial action with a cap of Five thousand dollars.

Earlier in this judgment I made specific reference to the evidence of Mr. Wide on this issue when he was speaking of the possibility that Mr. Caldwell had negated the impression left by Mr. Kitz, he spoke in terms of his "perception" and his "belief" of what Mr. Caldwell said. It was my view that Mr. Wide was attempting to be as accurate as possible in his evidence and he was not able to state with any degree of certainty what transpired after Mr. Kitz made his comments to the meeting.

Mr. Caldwell said that he informed the meeting that Mr. Kitz's estimate was not realistic and that the fees depended upon the complexity of the proceedings. Nevertheless, it is clear to me from the evidence before me, which remains undisputed, that Mr. Kitz gave an undertaking to those who were assembled with respect to the limits to be placed on the fees by the Patterson Kitz firm if the defence was unsuccessful. I also find that the investors relied on this undertaking when they agreed to carry on with the defence of the action. It is common ground that the defence failed and the fees of Patterson Kitz, with respect to the action on the mortgage, will be set at $5,000.00 plus reasonable disbursements.

The solicitor for the receiver, in his written submission, refers to the exhibits on file and the sum of $38,928.35 fees and $5,857.33 in disbursements and states that "an analysis of the fees preferred by the receiver's counsel indicates that the total fees associated with the Dover mortgage action exclusively are $18,942.59 or forty-eight per cent of the total fees. The equivalent percentage of disbursements is $2,850.18 for a total of $21,792.77."

There was no evidence before me to support this submission. Furthermore, it is not clear to me, from the written submission, how counsel was distiguishing between services relating to the Dover mortgage action and services with respect

to other matters. In my view, the sum of $5,000.00 should be substituted for the fee which has been charged for the services required as a result of the decision made at the meeting on May 24th, 1986, to defend the forclosure action.

CONCLUSION

I have spent considerable time reviewing the accounts and time charges which were filed with the court in the hope I could set out definitive figures in this judgment. Unfortunately, there appears to be accounts rendered which relate to services in more than one area. Also, it is difficult to relate the submissions of counsel to the figures before me in some instances. I would prefer to permit counsel to attempt resolution of the arithmetic matters based on the principles and findings made herein and to incorporate the figures in an order. If there is no agreement, I will hear further argument.

To assist counsel in reaching agreement on the calculations, I will set out my conclusions with further observations:

1. The receiver's account will be reduced by
   (a) The sum of $15,000.00 representing the amount assessed for breach of duty.
   (b) Fees and disbursements incurred with respect to the R.C.M.P. investigation.

2. With respect to the solicitor's account:

   (a) It will be reduced by the amount which relates to the R.C.M.P. investigation.

   (b) The sum of $5,000.00 will be substituted for the fee, exclusive of disbursements, charged for the services required for the defence of the foreclosure action.

   (c) Little attention was given to the claim for fees of the solicitors for service relating to the present application before me. I understand an amount in excess of $15,000.00 is requested and I would require further submissions on this point.

An order will issue fixing the remuneration of the receiver and its solicitors, providing for the distribution of the remaining funds in the hands of the receiver and discharging the receiver.

J.

Halifax, Nova Scotia
August 3, 1989

1986 S.H. No. 55728

IN THE SUPREME COURT OF NOVA SCOTIA

TRIAL DIVISION

BETWEEN:

PETER R. ARNOLD, CARL T. BOSWICK, FRED HANSEN and FRANCIS DUNSWORTH, in their own right and as representatives of all the limited partners in One Oak Street Limited Partnership, Invesco Developments Limited Partnership and Kencrest Estates Limited Partnership and in their own right and also as representatives of all the beneficial owners of property held in trust by Templeton Woods Limited and Skyline Apartments Limited

Plaintiffs

- and -

PERRY N. ROCKWOOD, GEOFFREY P. CHRISTOPHERSON, DIVERSIFIED EQUITIES LIMITED, a body corporate (formerly known as Rockwood Real Estate Limited); RESCOM PROPERTY INVESTMENTS LIMITED, a body corporate (formerly called Rockwood Management Group Limited); ONE OAK STREET LIMITED PARTNERSHIP, a limited partnership, ONE OAK STREET LIMITED, a body corporate; INVESCO DEVELOPMENTS LIMITED PARTNERSHIP, a limited partnership, INVESCO DEVELOPMENTS LIMITED, a body corporate, KENCREST ESTATES LIMITED, a body corporate, TEMPLETON WOOD LIMITED, a body corporate and SKYLINE APARTMENTS LIMITED, a body corporate

Defendants

D E C I S I O N

2

SUPREME COURT OF NOVA SCOTIA
Citation: Toronto-Dominion Bank v. Karlsen Shipping Company Ltd., 2015 NSSC 204

Date: July 13, 2015
Docket: Hfx No. 348504
Registry: Halifax

Between:

The Toronto-Dominion Bank

v.

Karlsen Shipping Company Limited

DECISION

Judge:	The Honourable Justice Glen G. McDougall
Heard:	September 25, 2014, in Halifax, Nova Scotia
Counsel:	Stephen Kingston, Esq. and John D. Stringer, Q.C. for PricewaterhouseCoopers Inc. Christopher Robinson, for 3264741 Nova Scotia Limited

By the Court: McDougall, J.

INTRODUCTION:

[1] PricewaterhouseCoopers Inc. ("PwC") was appointed Receiver of all assets, undertakings and properties of Karlsen Shipping Company Limited ("Karlsen Shipping") by virtue of a Receivership Order granted by the Honourable Justice Arthur J. LeBlanc of this court on the 17th day of May, 2011.

[2] PwC acted in its capacity as Receiver for Karlsen Shipping until 14 September, 2012 at which time it was discharged. Grant Thornton Limited ("GTL") was then substituted to assume the role of Receiver in place of PwC.

[3] The discharge of PwC and the appointment of GTL was done at the request of 3264741 Nova Scotia Limited ("No. Co.") which acquired the debts and security of the Toronto-Dominion Bank ("T-D Bank") by way of assignment.

MOTION / BACKGROUND:

[4] PwC now seeks approval of its fees and disbursements as Receiver along with those of its legal counsel, McInnes Cooper.

[5] In support of its motion PwC relies on the affidavit of Mr. Derek Cramm, Senior Vice-President of PwC, sworn to on November 20, 2012 (filed on November 21, 2012) and a subsequent affidavit sworn to on January 17, 2014 (filed on March 7, 2014).

[6] PwC further relies on the Fifth Report of Receiver dated August 15, 2012 which was filed with the court on August 16, 2012.

[7] A review of the five Reports filed by PwC sets out the work carried out by the Receiver during the period commencing from the date of its appointment on May 71, 2011 until the date of discharge on September 14, 2012 – a period of approximately 16 months.

[8] The Fifth Report of the Receiver attaches copies of the accounts rendered by it as Receiver along with the accounts of its counsel. Copies of subsequent accounts are attached as exhibits to Mr. Cramm's affidavit of November 20, 2012.

[9] PwC rendered one additional invoice for $9,262.14 (includes HST) covering a period ending November 27, 2012. There remains an outstanding balance on this invoice of $8,247.98 according to paragraph 14 of the Cramm affidavit of January 17, 2014. I believe this is incorrect. When one looks at paragraph 14 of the November 20, 2012 affidavit, it reports a remaining trust balance of $1,017.16. When this amount is applied to the November 28, 2012 invoice it results in an outstanding balance of $8,244.98. A slight difference, I admit, but a difference nonetheless.

[10] PwC's legal advisors, McInnes Cooper, rendered one further invoice after November 21, 2012. It totals $3,622.32 which includes disbursements and HST. Payment remains outstanding for this amount and for invoices dated May 31, 2012 ($4,296.80), June 29, 2012 ($5,152.23), July 31, 2012 ($2,665.70), August 31, 2012 (8,659.21), and September ($2,183.16). In total some $26,579.42 remains unpaid. [Reference para. 17 of the January 17, 2014 affidavit of Derek Cramm].

[11] McInnes Cooper has additional unbilled work-in-progress of approximately $2,000.00 plus taxes and disbursements [See para. 18 of the January 17, 23014 "Cramm" affidavit].

[12] PwC reports unbilled work-in-progress of approximately $1,800.00 plus taxes and disbursements. [See para. 19 of the January 17, 2014 "Cramm" affidavit].

[13] The terms of the Order discharging PwC as Receiver included the following provision, at para. 3:

> 3. PWC is hereby discharged as Receiver and is relieved of its obligations under the Receivership Order, provided that all privileges and protections afforded by the Receivership Order granted to the Receiver shall continue to accrue to the benefit of PWC. [sic] for any and all activities undertaken by PWC prior to its discharge, including but not limited to that charge provided for in section 17 of the Receivership Order over all the assets of the Respondent, charging same with respect to the fees of PWC and its counsel, which shall remain a first charge.

[14] Counsel for No. Co. opposes the granting of an order approving the fees of the former Receiver and its' counsel and requests a reduction of the fees claimed. He submits that the fee sought to be approved by PwC "*are excessive, unreasonable, and bear no resemblance to the size of the state and the revenues*

realized solely through the efforts of the receiver and its counsel." [Page 4 of the Respondent's Memorandum of Law filed on September 22, 2014].

[15] Counsel further argues that approximately 58% of the total revenues realized (approximately $910,000.00) were derived from:

Cash in the Bank:	$652,352.77
Insurance Claim:	$236,036.15
HST collected:	$ 21,000.00

[16] He suggests that the realization of these funds "*involved little if any effort on the part of PWC or its counsel.*" [Page 4 of Respondent's counsel's Memorandum of Law filed September 22, 2014]. In his memorandum of Law filed on behalf of PwC on March 7, 2014, Mr. Stephen Kingston summarized the activities performed by PwC in fulfilling its assignment "*which included (but were not limited to):*"

1. Meeting with Karlsen's President and making other inquiries to identify and locate Karlsen's property and assets;
2. Taking possession of Karlen's [sic] books and records;
3. Reviewing claims regarding monies held by Karlsen on deposit at the time of the appointment of the Receiver;
4. Securing and maintaining Karlsen's commercial office property at 55 Crane Lake Drive, Halifax Regional Municipality pending sale by the Receiver;
5. Obtaining advice re the valuation of Karlsen's commercial office property, and conducting a sale process to identify interested parties;
6. Concluding the sale of Karlsen's commercial office property, including a Motion to obtain the approval of this Honourable Court;
7. Obtaining advice regarding the valuation of Karlsen's yacht "Polar Sun", and conducing a sale process to identify interested parties;
8. Concluding the sale of the "Polar Sun", including a Motion to obtain the approval of this Honourable Court;
9. Obtaining advice re the valuation of properties owned by Karlsen in Chester and New Harbour, Lunenburg County, and conducting a sale process to identify interested parties;

10. Concluding the sale of Karlsen's property at 3389 North Street, Chester, including a Motion to obtain the approval of this Honourable Court;

11. Obtaining advice regarding various priority claims, including claims pursuant to the *Pensions Benefits Standards Act*, R.S.C. 1985, c. 32;

12. Conducting detailed inquiries regarding Karlsen's motor vessel 'Polar Star', which was situate at a shipyard in the Canary Islands, Spain;

13. Obtaining advice regarding the physical condition and value of the 'Polar Star', possible further repairs, required sea trials and regulatory approval regarding future operation of the vessel;

14. Obtaining advice regarding the Spanish legal process involved in seeking recognition of the Receiver in the Canary Islands;

15. Obtaining advice regarding various maritime lien claims and other *in rem* claims regarding the 'Polar Star' in the Canary Islands and other jurisdictions, including the Spanish shipyard where the vessel was situate;

16. Conducting a sale process seeking to identify interested parties as regards the purchase of the 'Polar Star';

17. Determining whether the 'Polar Star' had any net value which could be realized for the benefit of Karlsen's creditors;

18. Bring a Motion before this Honourable Court to obtain approval for a Partial Distribution of Funds by the Receiver to creditors;

19. Participating in the Motion regarding the discharge of PWC as Receiver, and dealing thereafter with the new Receiver as regards transition arrangements, transfer of trust funds, transfer of documentation and records, etc.

[Pages 2 and 3 of the Memorandum of Law, *supra*]

These activities are described in greater detail both in the Reports of the Receiver as well as in the two affidavits of Mr. Cramm referred to earlier.

[17] Counsel for No. Co., in his submissions, acknowledged other receipts in addition to:

(i) Cash in bank,

(ii) Insurance claim,

(iii) HST referred to earlier

[18] The additional revenues are:

- Sale of 55 Crane Lake Drive -- $485,000.00
- Sale of Yacht (Beneteau) -- $140,000.00
- Sale of Land (Chester) -- $42,500.00

Altogether these receipts add up to $1,576,888.92. This figure does not include two other insurance claims paid directly to two of the original secured creditors one of which was the T-D Bank. No. Co.'s counsel suggests these latter payments should be ignored as these claims were already in progress when the Receivership Order was first made. Counsel contends that very little effort had to be expended by PwC to realize on these claims.

[19] No. Co. also questions the efforts required to sell company-owned property in Chester and the Beneteau yacht since, respectively, a real estate agent and a yacht broker were retained to sell these assets.

[20] Furthermore, No. Co. challenges the fees incurred by PwC before finally deciding that there was no point in pursuing buyers for the MV Polar Star which had been towed to Las Palmas in the Canary Islands for repairs. PwC determined that there was little chance of generating sale proceeds in excess of the maritime lien claims attached to the vessel. Eventually the MV Polar Star was acquired by No. Co. for approximately $200,000.00.

[21] PwC also had to devote a considerable amount of time and effort to determine if there might be any net realizable value in the company's shares in Karlsen Norway SA. Unfortunately, there was nothing. It could not, however, have been ignored by the Receiver. It is easy to criticize PwC, in hind-sight, for having nothing to show for their efforts. But is it fair? I do not believe it is. If the Receiver had not pursued these assets without first doing their due diligence then, yes, they could be criticized. By doing the prudent and correct thing they should not now be expected to forego remuneration for its *bona fide* efforts in trying to maximize revenues for distribution amongst company creditors.

[22] Nor should PwC be criticized for retaining the services of qualified real estate brokers or agents and yacht brokers to sell company assets after having first attempted to solicit offers on their own. This is standard practice. To try to sell these assets without the advice and guidance of industry experts would only open

up PwC to legitimate criticism and potential allegations of negligence in carrying out their court-ordered duties.

[23] Some of the other complaints and criticisms directed towards PwC and its legal advisors concerned billing for time of more than one individual for in-house discussions involving two or more team members. PwC and McInnes Cooper lawyers had to deal with a number of complex issues including deposits made towards the cost of future travel by customers of Karlsen Shipping, the claims of company employees to pension funds, HST rebates, and tracking company assets in different parts of the world to name a few.

[24] McInnes Cooper law firm is of a size and composition that it can offer expert advice in pretty well any area of the law. Likewise, PwC has a stable of qualified business and financial experts such that it does not have to regularly consult outside experts save for legal advice.

[25] It is quite common for more than one individual to work on a file of the complexity of the one now before the court. Oftentimes the principal assigned to the task delegates different aspects of the file to other professionals within the organization. Very often the delegated work does not require the same level of intellectual sophistication or expertise as some other work might and so can be produced at a lower cost.

[26] Sometimes a pooling of resources produces a synergy that might well result in an overall reduction in the ultimate cost.

[27] It should also be noted that the lawyers at McInnes Cooper who worked on this file agreed to reduce their regular hourly fees in an effort to address a concern raised by the T-D Bank. They did not have to but they did and the savings were passed on for distribution to the creditors.

LAW:

[28] The Motion was brought pursuant to Civil Procedure Rule 73.11 which states:

> 73.11 - Passing accounts and discharge
>
> (1) A receiver who completes the tasks for which the receivership order was granted must make a motion for an order passing the receiver's accounts, approving fees and expenses not yet approved, and discharging the receiver.

(2) A judge who hears a motion for a discharge may do any of the following:

(a) pass the accounts or order repayment of an expense not approved;

(b) approve the receiver's fees and disbursements and allow payment of them or, if advances exceed the amount approved, order repayment;

(c) discharge the receiver wholly, or on conditions.

(3) A judge who is satisfied that a receiver delays in bringing a receivership to conclusion or in making a motion to pass accounts, set remuneration, and be discharged may do any of the following:

(a) replace the receiver;

(b) refuse some or all remuneration;

(c) order the receiver to pay expenses caused by the delay.

[29] Counsel for No. Co. referred the Court to a relatively recent case of the Ontario Superior Court of Justice in *Bank of Nova Scotia v. Diemer*, 2014 ONSC 365. The Honourable Andrew J. Goodman, at para. 3 of his decision, said this:

> 3 One of the leading authorities dealing with approval of the fees of a receiver is found in the case of *Re Bakemates International Inc.*, [2002] O.J. No. 3569. In *Re Bakemates*, 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.

[30] At para. 7, Justice Goodman also referred to a New Brunswick Court of Appeal case in this fashion:

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

[31] Borrowing further from the *Belyea* case, *supra*, Justice Goodman said the following at para. 9:

> 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.

[32] Before getting into an analysis of the case that was before him, Justice Goodman also cited from a case penned by Justice Farley of the Ontario General Division [Commercial List] at para. 6 of *Belyea*, *supra*:

> 6 In *BT-PR Reality Holdings Inc. v. Coopers & Lybrand*, [1997] O.J. No. 1097 (Sup. Ct.) 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.

[33] In his analysis, Justice Goodman, at para. 18 and 19, commented as follows:

> 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.

[34] I accept what Justice Goodman had to say and adopt what he borrowed from the various other cases cited.

ANALYSIS AND CONCLUSION:

[35] I do not propose to repeat all of No. Co.'s various concerns regarding the former Receiver's charges or those of its counsel. I will, however, mention one in particular. That is the manner in which PwC handed the MV Polar Star – a refurbished ice breaker that Karlsen Shipping used for Arctic, Antarctic and Northern Canada expeditions.

[36] In the Second Report of Receiver filed on September 27, 2011 the MV Polar Star was reported as being in drydock at the Astican Shipyard in Las Palmas, Canary Islands, Spain. Section 5, starting on page 4 of the Second Report, provides the following explanation of the Receiver's efforts in dealing with what appeared to be Karlsen Shipping's principle asset:

> At the date of the receivership, the Receiver determined that the Ship's crew were still on-board and that they had not been paid wages or salaries for almost two months. In addition, supplies on the Ship were running out. Over the next two weeks the Receiver, with the assistance of its office located in Las Palmas, performed the following duties:
>
> - Met with the Captain and crew and advised of the Receivership;
> - Acted as a liaison with the Astican shipyard officials;
> - Upon receipt of funds advanced by the Toronto-Dominion Bank, arranged for airline tickets, visas and spending money for the crew to complete their repatriation to their home countries, which included Poland, the USA and the Phillipines [sic];
> - With the assistance of the Ship's captain, arranged for the disposition to the authorities of the medical drugs and weapons which were on board; and Took possession of critical documentation including Ship's logs, certificates etc..
>
> Since the receivership, the Receiver, with the assistance of Martin Karlsen, has been actively pursuing a purchaser for the Ship. This included placing advertisements in the international trade magazines "The Tradewinds" and "Lloyd's List". As a result of these efforts the Receiver received interest from all over the globe, including Canada, Iceland, Belgium, Germany, UK, Australia, New Zealand, The Netherlands, Norway, Austria, India and Hong Kong. The serious buyers and the results of sales discussions are as follows:

- A Dutch shipowning concern involved in the polar expedition business, conducted two inspections of the Ship in Las Palmas. The Receiver and this party agreed to a sale price of US$6 million (subject to Court approval), but, in the end, the Receiver was informed that no bank would finance the acquisition on acceptable terms, despite the buyer's willingness to invest 50% equity. The Receiver was advised that the financing difficulties were related to the age of the Ship and the realisation that the Ship's engines would soon have to be replaced.
- Another apparently serious inquiry came forward through a broker representing a Swedish-Bermuda shipowning group. The Receiver and this party also agreed to a sale price of US$6 million (subject to Court approval), and the offer was not "subject to financing", according to the broker. Negotiations were quite advanced and an inspection was scheduled but never conducted, as the arrangement between the buyer and an ultimate user fell through. In the course of negotiations, the broker noted that all of the vessels presently engaged in the Arctic/Antarctic expedition business would have to be re-powered or replaced by 2014 due to new' restrictions on the use of heavy fuels in Arctic and Antarctic waters. The broker also reported that he has also been in touch with certain other shipping companies operating in the Arctic and Antarctic as regards the purchase of the Ship, but nothing concrete has arisen from the broker's efforts to date.
- A Canadian adventure travel firm, also had expressed interest, bitt continued to reduce their offer price and no deal was struck.
- The Ship was viewed by a scrap buyer, who offered $332.28 per lightship MT in late July, which amounts to approximately US$1.5 million.

All potential sales depended on the Receiver being in a position to deliver the ship free from liens and encumbrances and duly certified for passenger operations (except for the scrap offer). This was problematic, and would require substantial funding to bridge the gap between a firm sale agreement and closing. The Ship remains on dry land at the yard in Las Palmas. The shipyard is owed approximately 1,187,768 EUROS (approximately CDN$1.6 million) as at August 31, 2011.

Several seizure Orders have been issued by the Spanish Court, including the bunker supplier's claim.

The known Orders in addition to the shipyard are as follows:

Claimant	Main/Principal Amount Euros	Additional fees, interest, etc.	Total Amount Claimed
Crew	171,247.85	25,000.00	196,247.85
Bunkering AS	52,916.23	17,000.00	69,916.23
Suisca SLU	31,032.15	9,309.64	40,341.79
Wilhelmsen Ship S.	19,728.76	5,000.00	24,728.76
TOTAL	**274,924.99**	**56,309.64**	**331,234.63**

This represents approximately CDN$450,000.

In addition to the above, DNV (the Ship's Classification Society) made it clear that it would have to be paid in full before any certifications would be issued. DNV claims to be owed US$216,548 for prior work. The crew would also have to be paid out of any sale proceeds, since they are entitled to a maritime lien that takes priority over all other claims. Assuming the Ship could be extracted from Las Palmas based on some combination of agreements with the creditors, payments and/or posting security, the plan was to organise a quick judicial sale through the Gibraltar Court. This process would have the benefit of clearing the title to the Ship and by all accounts could be accomplished much more quickly than a judicial sale through the Spanish Court system.

In order to get the ship to Gibraltar (approximately two days steam from Las Palmas), however, additional start-up costs have been estimated at 338,230 EUROS (approximately CDN$460,000) as summarized in Schedule J.

The total of the above expenses amounts to approximately CDN$2,510,000. This does not include additional fees payable to DNV to recertify the Ship.

Other relevant considerations include:

- Confirmation from the secured lenders that they are not willing to fund any further protective disbursements or bridge financing to cover any of the above — noted costs;
- The Receivership Order was issued in the Supreme Court of Nova Scotia and no application has been made to have the Order recognized in the Spanish Courts.
- The shipyard has a possessory lien and has indicated that they will be proceeding to a judicial sale in the Spanish Courts.

> Based upon the above, the Receiver has concluded that there is little prospect of any significant return to creditors by continuing to actively pursue the sale of the Ship. The net proceeds are unlikely to exceed the amounts owed to the lien holders.
>
> Therefore the Receiver has concluded that the Ship be abandoned to the Astican Shipyard and the Receiver shall assist the shipyard, if required, as regards any local judicial sale of the Ship.

[37] PwC was criticized for sending a representative to Las Palmas to assess the situation instead of simply relying on personnel in its off-shore office. I see no reason to find fault with how PwC handled this situation. Indeed, if they had not travelled to Las Palmas to deal with the very important job of repatriating the crew and to liaise with shipyard officials as well as other lien holders they might otherwise have merited some criticism. But they do not, in my opinion, warrant any criticism for doing a good job.

[38] It should also be noted that the T-D Bank, as principal secured creditor, did not question the work done by the Receiver. It did challenge some of the legal fees which resulted in an across-the-board reduction in fees charged by legal counsel.

[39] I find that the time and effort expended on the Receivership, both by PwC and McInnes Cooper, were necessary and reasonable in the circumstances.

[40] Given the complexity of the problems that had to be handled including those connected to the MV Polar Star, the employee pension funds, the shares in Karlsen Norway SA and the sale of the various assets of Karlsen Shipping, I accept and approve the amounts charged for fees and disbursements by both PwC and McInnes Cooper Lawyers. I further approve payment of any amounts billed but not yet paid.

[41] I invite counsel for PwC to prepare an order approving the Receiver's Fifth Report along with its', and the Receiver's, final accounts which I will tax and approve if found satisfactory.

McDougall, J