Court File No. CV-18-601307-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE - COMMERCIAL LIST

IN THE MATTER OF THE RECEIVERSHIP OF SAGE GOLD INC.

AND

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, C. B-3, AS AMENDED; AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, C. C.43, AS AMENDED.

BOOK OF AUTHORITIES OF THE RECEIVER
(returnable December 18, 2020)

McMillan LLP
Brookfield Place
181 Bay Street, Suite 4400
Toronto, ON, M5J 2T3

Wael Rostom
LSUC# 43165S
Tel: 416.865.7790
Email: wael.rostom@mcmillan.ca
Fax: (416) 865-7048

Stephen Brown-Okruhlik
LSUC# 66576P
Tel: 416.865.7043
Email: stephen.brown-okruhlik@mcmillan.ca

Counsel for the Receiver

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Tab 1

1997 CarswellOnt 1246
Ontario Court of Justice (General Division) [Commercial List]

BT-PR Realty Holdings Inc. v. Coopers & Lybrand

1997 CarswellOnt 1246, [1997] O.J. No. 1097, 29 O.T.C. 354, 69 A.C.W.S. (3d) 1003

BT-PR Realty Holdings Inc., Applicant v. Coopers & Lybrand, Respondent

Farley J.

Judgment: February 26, 1997
Docket: B249/96

Counsel: *Kirk Baert*, for the applicant.
Jonathan Lisus, for the respondent.

Subject: Corporate and Commercial

***Farley J.*:**

1 The application was dismissed at the end of the hearing and these are the promised reasons.

2 Section 248(2) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3, as amended ("*BIA*") provides as follows:

> s.248(2) On the application of the Superintendent, the insolvent person, the trustee (in case of a bankrupt) or a creditor, made within 6 months after the statement of accounts was provided to the Superintendent pursuant to subsection 246(3), the court may order the receiver to submit the statement of accounts to the court for review, and the court may adjust, in such manner and to such extent as it considers proper, the fees and charges of the receiver as set out in the statement of accounts.

3 Both counsel wished to proceed today on the basis of the record before me - i.e. without *viva voce* evidence.

4 BT-PR Realty Holdings Inc. ("BT") brought this s.248(2) application seeking a reduction of the fees and charges of Coopers & Lybrand Ltd. ("C&L") in its capacity as receiver of the property of three companies involved in the baking and distribution business (the "Debtors"). The Toronto-Dominion Bank ("Bank") held a prior charge over the property. Each of the Bank and BT privately appointed C&L as receiver/manager over the property of the Debtors on January 25, 1996. Prior to that time BT and the Bank had had a discussion with C&L as to the nature of the receivership being in essence a liquidation. At that time C&L advised as to the three major participants from its side - namely a partner, a manager/principal and a senior associate/specialist with their hourly rates - as to which BT takes no objection. However it appears that Seleena Miller ("Miller") being the person in charge for BT of this receivership wished for C&L to minimize its involvement as she desired her consultant Roland Nimmo ("Nimmo"), BT's law firm and the personnel at the Debtors to do a great deal of the liquidation. The indemnity agreement for C&L provided that BT undertook to:

> Guarantee payment of Coopers & Lybrand Limited's professional fees and disbursements for services provided by Coopers & Lybrand Limited with respect to the appointment as Receiver of each of the Companies. It is understood that Coopers & Lybrand Limited's professional fees will be determined on the basis of hours worked multiplied by normal hourly rates for engagements of this type.

This is not a license to let the taxi meter run without check. The professional must still do the job economically. He cannot take his fare from the Courthouse to the Royal York Hotel via Oakville.

5 The debt of the Debtors to the Bank was approximately $525,000 and to BT approximately $3.5 million. Until discharged in mid April 1996 after the Bank had been paid out, C&L collected $911,421.83 and disbursed $169,636.53 yielding a surplus of $741,785.30 before fees to distribute to the Bank in a priority position and the residue to BT.

6 Nimmo was the eyes and years of Miller on site. He attended the Debtors premises daily during the first ten days during which time C&L raked up $40,450 in charges or about 60% of their total charges of $68,482.50.

7 At the same time as Miller was engaged in this receivership (apparently calling Nimmo some 10 to 15 times a day as well as frequently discussing the matters with C&L personnel) Miller was also engaged in supervising as well for other receiverships relating to loans of approximately $10 million each. I am of the view that this type of distanced "supervision" and the splitting of functions off is not truly conducive to minimizing the expenses of a receivership but probably will increase them to a fair degree. While Miller takes pride in the collection of accounts receivable - the actual collection of which is acknowledged by C&L as not involving them, it should be noted that only approximately $356,000 was collected by the persons designated by Miller including Nimmo's involvement notwithstanding the due diligence of BT through Miller and Nimmo prior to acquiring this loan in January 1996. BT estimated the value of accounts receivable at $500,000 to $600,000. This due diligence also valued the equipment at $450,000 based on Nimmo's estimate without an appraisal. The estimate was a fortunate one as the equipment was sold for $338,000 U.S. which is the equivalent to approximately $450,000 Cnd. I think this realization to be quite fortunate as the appraisal obtained valued the equipment at $200,000 Cnd. However through a connection made by C&L (as verified by the buyer) the bakery equipment was sold to a specialized buyer. I think it a reasonable inference that this connection allowed for an enhancement over the general appraisal. The connection was not however one made by BT notwithstanding its claim that according to Miller that BT: "obtained the buyer and negotiated a sale with little or no involvement from Coopers". On cross examination Miller conceded that when she swore her affidavit that the C&L affidavit was misleading. She was not relying upon any information other than an assumption that Fox responded to an advertisement for the sale of the equipment.

8 I think it unfortunate that Miller would take such great umbrage with C&L (and its account) when notwithstanding her definitive assertions in her affidavits she had to retreat on cross examination to advise that she made assumptions - assumptions that would seem without checking as to the reasonableness of same.

9 BT took issue with the fact that C&L charged about $5,000 for personnel designated as "Estate Administrators" at the rate of $80 per hour. I do not think that any one should be surprised that more routine or minor matters were handed off to C&L personnel who were charged out at substantially lower rates than that charged by the three identified personnel. If that were not done, then I would be of the view that Miller would complain that work was being done by over qualified persons (at higher than needed rates) and she would have been correct in that. That observation is subject to one qualification - for small intermittent matters, it may be more expensive to have a senior person instruct a junior with the junior doing the work than for the senior person to do it.

10 On February 8, Miller, on finding out the charges incurred to date, erupted indicating that it was outrageous and ridiculous. She wanted a daily time analysis and on being advised that that would cost extra, she advised that was fine. She also required draft invoices and forecasts of future work for her review on a periodic basis. I think it unfortunate that C&L somewhat down played Miller's concern over the size of their fees in their material. In any event, in accordance with its statutory duty, C&L did not draw any of its fees from the receivership account until specific approval was given by Miller in mid April. On April 12, 1996 Miller agreed with the C&L fees and was sent a confirmatory letter to that effect by C&L:

> This letter confirms the matters discussed in two telephone conversations of April 12, 1996 between the writer and your Miss Seleena Miller ... will approve Coopers' fees as receiver of the companies for the period from January 25, 1996 to the date we are formally discharged as receiver, and will authorize payment of same from the receiver's account.

Miller was fully aware of the magnitude of the accounts at this time. It is puzzling why Miller did not disclose this approval in her original affidavit. However when C&L responded with it, Miller swore in her supplementary affidavit that she did not approve of the payment and that she had been informed by C&L that it would withhold the file if payment were not forthcoming. In cross-examination Miller testified that she "did not have a choice in the matter" and that C&L "put a gun to my head" and further that C&L had acted in bad faith and unprofessionally. Then in another previously undisclosed revelation Miller further testified that a Mr. Page of the replacement receiver attended a meeting at C&L's office in which C&L made this threat (which would not apparently be at the same time as Miller alleges she was threatened since that was over the telephone). No evidence was tendered from Mr. Page. Notwithstanding this alleged outrageous behaviour, Miller took no action and made no complaint about this to anyone. There does not seem to be an air of reality to this late breaking news.

11 Miller complains about C&L misleading her as to the size of the surplus. However C&L has provided material which was sent to Miller after being shown to her at a meeting wherein the surplus was accurately predicted. Puzzling enough, again Miller did not mention this confirmatory calculation being sent to her in her first affidavit.

12 C&L in its material provides a detailed account of the steps taken throughout the receivership including particularized invoices. It is unfortunate that C&L did not immediately tender its dockets. They were not offered until the cross-examinations. However BT did not wish them at that time but only advised they should be sent to counsel. This unfortunately again was not done until a few days before this hearing. This is a rather casual attitude toward crucial information. However on the other hand, it speaks volumes that BT had no particular interest in them at any time, not even to the extent of complaining that they had not been sent over after her cross-examination. It appears that Miller was content to complain in generalities but did not wish to examine the specifics, notwithstanding that her position was that the bill be slashed by 75%.

13 Miller was aware of the long hours that the receivership field staff worked in the initial ten days. In fact Miller was insistent that all of the Debtors' inventory be sold at the earliest opportunity and she was aware that C&L devoted extensive time to negotiating for the sale of the inventory. Miller asserted that this could have been done by Nimmo with some help from one C&L representative. However in cross-examination she had to advise that it was merely an assumption that one C&L person would be able to count and liquidate the inventory.

14 Miller asserted that the steps taken by C&L were excessive and unreasonable, but her knowledge was indirect:

> Q. It is fair to say that the extent of your knowledge of what went on at the premises in the first nine days of the ... receivership is based entirely on what Mr. Nimmo might have provided to you and the information provided to you by the representative of Coopers. Correct?
>
> A. That is correct.

Miller advised that Nimmo was on site for approximately ten days for 10-12 hours a day. On the one hand she asserted that much of the work for which C&L billed BT was in fact performed by Nimmo. However on cross-examination she testified that Nimmo did not report to her about the steps which C&L was taking in the administration of the receivership and that he did not involve himself in the work being undertaken by C&L. One may well question then how Miller can be so certain that C&L was wasting time and doing inappropriate work if she had no direct knowledge and no indirect knowledge and did not care to review the dockets. It is of no assistance for her to assert that Nimmo advised her that C&L was duplicating his work. Not only is this hearsay but no explanation was given as to why Nimmo could not have given his evidence directly.

15 Miller swore that her group handled the sale of all the goods in the first five days and that the accounting and sale of inventory was performed by Nimmo not C&L. But on cross-examination she had to concede that she had no direct knowledge on this point and she did not know the extent of the inventory and the 30 day goods.

16 While Miller denied the legitimacy of Coopers fee for responding to creditors demands she does not have any direct knowledge in this area. She testified that Nimmo could have done this with the assistance of one C&L person. She indicated that she was relying on her lawyers and Nimmo for this. However her lawyers were not on site either to meet with any creditors. Miller deposed that her side "analyzed the claims of" and corresponded with and negotiated settlement with each of the 400 creditors, but she refused to provide any evidence in support of this statement.

17 C&L personnel (the partner and the principal/manager) testified as to the fees incurred. This included the organizing and updating of the accounts receivable sub ledger, a necessary step before accounts receivable could be pursued with certainty. Miller deposed that "Coopers never did this work". On cross examination she indicated that she had no direct knowledge and was only making an assumption.

18 She similarly swore that C&L never did the work of reviewing the Debtors' records for undisclosed assets. She did not rely on Nimmo for this conclusion and had to advise that she merely assumed they had not done the work.

19 Miller alleged C&L continued to bill time to the receivership after the termination of its appointment. Again this appears to have been another assumption.

20 It seems to me that Miller's assertions that C&L did not do the work, or were wasting time or otherwise acting inappropriately vis a vis its charges are merely that. They are not grounded in fact but are merely her unsubstantiated opinion, relying on assumptions in part and otherwise upon Nimmo's advice which clearly gets into contentious hearsay. This should be contrasted with the rather four square direct evidence given by the two C&L senior persons with backup detail and the (unfortunately late appearing) offered dockets.

21 It also seems to me that Miller overlooks that C&L was the receiver of the Bank, which Bank had priority. She could not reasonably expect the Bank to accede to her usurping C&L and in effect her side (she, Nimmo, her lawyers, etc.) becoming the Bank's receiver. Miller complained that C&L was spending most of its time (80%) reporting to the Bank. She makes this bald assertion without checking the dockets. I would also note that Miller had no hesitation in being in constant communication with Nimmo and C&L so she can scarcely complain about reasonable amount of reporting to the Bank by C&L. Of course if she was so certain that the liquidation would pay out the Bank with no problem, she could have had an easy way out of avoiding tolerating the Bank's receiver (if notwithstanding BT's appointment of C&L, C&L is so characterized as the "Bank's" receiver") by purchasing the Bank's position. Then she could have put in any receiver she liked and negotiated any terms with that receiver.

22 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.).

23 While sufficient fees should be paid to induce competent persons to serve as receivers, receiverships should be administered as economically as *reasonably* possible: see *Belyea v. Federal Business Development Bank* (1983),

46 C.B.R. (N.S.) 244 (N.B.C.A.). *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.

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

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

(b) the complications and difficulties encountered;

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

(d) time spent by the receiver;

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

(f) diligence and thoroughness;

(g) responsibilities assumed;

(h) results achieved; and

(i) the cost of comparable services.

However I would add (j) other material considerations - for example in this case: (i) the April 12 agreement to the fees; (ii) the priority receivership of the Bank in this co-receivership relationship; and (iii) the apparent diversionary and distracting excessive hands on requirements of Miller who all the while is demanding efficiency (more accurately a low fee at any price). I would think however that where there is a retainer given which indicates that the fee will be based upon the multiplicand of hourly rates and time expended this factor should receive special emphasis as it is what the parties bargained for. See above for my views about allowing the taxi meter to run without taking the passenger along the appropriate route. In the subject case C&L charged on the multiplicand basis. Given their explanation and the lack of any credible and reliable evidence to the contrary, I see no reason to interfere with that charge. It would also seem to me that on balance C&L scores neutrally as to the other factors and of course, the agreement as to the fees should be conclusive if there is no duress or equivalent.

25 I would say that I found it inappropriate for Miller to give so much hearsay evidence without in any way justifying it. The argument that she was acknowledged as being involved in the situation (since this was by remote through information from Nimmo and C&L personnel) as overcoming this deficiency, especially when she appears to rely on Nimmo (or bald assumptions) and does not appear to rely on anything positive to C&L as to anything said to her by C&L or others.

26 Rules 4 and 21 of the *BIA* Rules state:

> 4. The practice of the court in civil actions or matters, including the practice in chambers, shall, in cases not provided for in the act or these rules, and so far as it is applicable and not inconsistent with the Act or the Rules, apply to all proceedings under the Act or these Rules.
>
> 21. An affidavit on behalf of a corporation may be made by an officer or employee thereof *who has personal knowledge of the facts and deposes to that knowledge in the affidavit*. (emphasis added)

Rule 39.01(5) of the Rules of Civil Procedure states:

> 39.01(5) An affidavit for use in an application may contain statements of the deponent information and belief with respect to facts that are not contentious, if the source of the information and the fact of the belief are specified in the affidavit.

Miller's affidavits are highly contentious and largely based upon hearsay information and assumptions. It would be inappropriate to rely on any such offending parts of her affidavits: see *Saskatchewan Economic Development Corp. v. Michalyca Management Limited* (1991), 12 C.B.R. (3d) 277 (Sask. Q.B.); 539618 *Ontario Inc. v. Olympic Foods (Thunder Bay) Ltd.* (1987), 22 C.P.C. (2d) 195 (Ont.Master); *York Condominium Corp No. 335 v. Cadillac Fairview Corp Ltd.* (1983) 42 O.R. (2d) 219 (Master); *Ontario (Attorney General) v. Paul Magder Furs Ltd.* (1989), 71 O.R. (2d) 513 (H.C.J.); *York Condominium Corp. No. 63 v. Barrington-Rockwood Investment Corp.*, [1991] O.J. No, 2673 (Gen.Div.); *Smith v. Adams*, [1986] O.J. No. 2064 (Dist.Ct.); *D'Amore v. Russ*, [1991] O.J. No. 749 (Gen.Div.). No explanation was offered as to why Nimmo or any of the others referred to by Miller did not provide direct affidavit evidence: see *Air Canada v. McDonnell Douglas Corp.* (1994), 19 O.R. (3d) 537 (Master).

27 Miller's allegations against C&L are serious accusations of bad faith and misconduct. It is therefore particularly unfortunate that virtually all of her allegations are based on hearsay and assumptions. Even if such were admissible, it is inherently unreliable and does not come close to satisfying the special scrutiny that such evidence deserves where there is an allegation in a civil case of serious misconduct (even though the test remains at the balance of probabilities). See also *Re H. Flagal (Holdings) Ltd.*, [1965] O.R. 33 (H.C.J.).

28 It may be that BT was annoyed at C&L and the Bank for withholding the net surplus thought to be attributable to BT. BT sued both C&L and the Bank. This was settled apparently on terms favourable to BT. While one may appreciate the natural human reaction of wanting to get back at the other side, one must appreciate that the settlement wipes the slate clean in law as to the issue in litigation. Thus *if* that were a part of BT's s.248(2) proceedings against C&L, it would be an inappropriate basis or consideration.

29 The application is dismissed. Given the flimsy basis on which BT founded its case and the serious misconduct allegations, such is deserving of a sanction in costs. I would not however award full solicitor and client costs in this situation because of the failure of C&L to provide the dockets right off the bat in the case. BT is to pay $9,000 to C&L forthwith.

End of Document

Tab 2

1992 CarswellOnt 3213
Ontario Court of Justice (General Division)

MacPherson (Trustee of) v. Ritz Management Inc.

1992 CarswellOnt 3213, [1992] O.J. No. 506, 32 A.C.W.S. (3d) 241

In the Matter of the Business Corporations Act, S.O. 1982, c.4 as am. ss. 160-163 and 244-247

In the Matter of Highstyle Investments Ltd.

Honor MacPherson in Trust; Shiraz Karmali; Noorali E. Khoja and Khairunissa N. Khoja; Valerie Kuinka; Isa B. Munshi and Noorruddin Munshi; Abdulsultan A. Datoo and Yasmin A. Datoo; Nizar Hooda and Esmail Samji; Abdulsultan A. Datoo and Abdulrahim W. Kassam; Badrudin Mawji and Gulshan Mawji; Nancy Mabee; Joseph Wong and Lillian Chang; William Arvanitis; Kwong Hon Chiu; Shirley Hill; Calvert M. Woodruff; Zelma Simmons; Shirley Yeoman; Wayne Goldberg: Jennifer Pilz, Elaine Zuck, Susan Zuck and Victor Zuck; Veen Gupta, Luigi Bulgaretti; Rory Blundell, Applicants and Ritz Management Inc., Amal Stone, Albert Marchand, Eufrosina Doelle, Edward McKenna, and Grubner, Krauss, a Firm, Successors to Krauss & Associates; Siavash Setarehnejad; Highstyle Investments Ltd., Respondents

D. Lane J.

Heard: September 25, 1991 - February 14, 1992
Judgment: March 16, 1992
Docket: 61959/90Q

Counsel: *Igor Ellyn, Q.C.* and *Jeffrey E. Goodman*, for Applicants.
Lloyd D. Cadsby, Q.C., for Deloitte & Touche Inc.

***Dennis Lane J.*:**

1 This is the assessment of the accounts of Deloitte & Touche as Receiver and Manager of the co-tenancy of an apartment building at 63 Roehampton Avenue, Toronto, including the account of its solicitors.

2 The applicants are the owners of some 27 apartments in a 56-unit building which is organized as a co-tenancy. The respondents Ritz Management Inc. (a bankrupt) and Amal Stone are the owners of all but four or five of the remaining apartments. Ritz and Stone established the co-tenancy, sold units to the applicants and managed the building. In 1989 questions arose about the way in which the building was being managed and the accuracy of the accounts submitted by Ritz. Litigation was begun in October 1989 and on May 30, 1990 Carruthers J. directed that a Receiver be appointed. Counsel for the applicants and for Ritz and Stone jointly selected Deloitte & Touche. The Receiver took over the management of the building through a building manager, and undertook to "...take charge of and account for all financial affairs of the co-tenancy from 1987 forward..." and to report at the earliest opportunity.

3 The receivership did not run smoothly. Between the Receiver's appointment on May 30, 1990 and its discharge on March 11, 1991, there were 13 motions or other attendances in this court, all of them disputatious. Mrs. Stone adopted a confrontational and disruptive attitude involving stubborn non-co-operation with the Receiver; disobedience to court orders; changes of counsel at tactically convenient times; withholding of books and records; countermanding the Receiver's Notice to Attorn; stopping payment on a cheque; refusing money owed and needed to meet the building's expenses and ultimately a suit against the Receiver. I am satisfied, having presided over much of this maneuvering as case management judge, that Mrs. Stone set out to prevent

the Receiver, and hence the applicants, from learning the truth about her management of this project. Unhappily she succeeded in large measure in achieving her objective at the cost of destroying the enterprise. She has left Canada and when last heard of was residing in Egypt. Her only known assets in this country are her interests in 63 Roehampton in which she has little equity in the current market. Ritz made a voluntary assignment in bankruptcy on February 26, 1991.

4 By contrast the applicants for the most part have largely met the cash calls levied by the Receiver and have generally co-operated with it throughout.

5 In these circumstances it is not surprising that Mr. Ellyn should argue strenuously that the costs of the receivership should not be borne by his clients. He proposes that these costs should be payable severally and should be apportioned among the parties, with the bulk being payable by Mrs. Stone as the party responsible for the need for the receivership and for its high cost and unhappy results. As between the applicants and Mrs. Stone that would be an equitable result but not for the Receiver. Those assets of Mrs. Stone that are available to the Receiver will fall far short of paying her share on such a basis. In the end the Receiver would go unpaid. In my view that is not an acceptable result. The Receiver was appointed by the court and must be protected by it. I have previously made an order charging the building as security for the Receiver's fees and disbursements in priority to the interests of the parties. Mr. Ellyn further proposes that the Receiver's recovery be limited to whatever is realized upon that charge.

6 Neither of these proposals on behalf of the applicants is acceptable in my view. The applicants, not the Receiver, chose Stone and Ritz to be their co-tenant and building manager. Upon what basis can they now ask that the Receiver bear the burden of their unfortunate choice of business partner? After a year of quarrelling and eight months of litigation the parties were so far unable to work together in their own common business interest that the court had to appoint a Receiver to attempt to rescue the situation. When the parties met with representatives of Deloitte & Touche to discuss the proposed receivership, no agreement was made that the Receiver could look only to the building, or only to the losing side for its costs. The Receiver took office with only the charging order as security but there was no agreement limiting its recovery to the amount of its security. I agree with the decision of Master Clark in *Genelcan Realty Ltd. v. Wiseman et al.* (1987), 17 C.P.C. (2d) 97 when he held that there was no legal foundation for limiting the Receiver's recovery by the size of the fund it is administering or to some proportion of the amount at stake. As he said at p. 102:

> The purpose of the assessment procedure is to put a fair value on the efforts of the receiver without regard to what, if any, amount may be left for the creditors.
>
> How could it be otherwise? If the receiver's fair compensation were to be linked in some indeterminate way with a fund that may or may not exist in the future, there would soon be no receivers available.

7 In my opinion the costs of the receivership are properly borne jointly and severally by Ritz, Stone and all the parties who are co-tenants. For reasons already noted, the applicants are entitled to be indemnified by Stone and Ritz to the full extent of the fees and disbursements, paid or to be paid by the applicants to the Receiver. The Receiver's recovery will not be restricted to its security. The charging order contained in my order of March 11, 1991 is confirmed and made permanent as against all parties. The Receiver makes no claim against those co-tenants who are neither applicants nor respondents and their interests will not be subject to the charging order.

8 The Receiver's account is for $159,031 and its solicitor's account to it was an additional $43,824.84 to the end of the receivership and $22,573.02 thereafter up to February 11, 1992, largely in connection with this assessment of the Receiver's costs.

9 As to the Receiver's bill, Mr. Ellyn did not object to the hourly rates charged by the Receiver, conceding that the rates were the "going" rates. He objected to (1) the Receiver's docketing practices; (2) the proportion of time spent at the top hourly rates; (3) the presence of more than one person from Deloitte & Touche at some meetings and court hearings; (4) time allegedly spent defending the Receiver rather than advancing the receivership; (5) the lack of benefit to the parties from the Receiver's work; (6) the sheer size of the bill in relation to the modest means of the paying parties and the modest size of the enterprise;

(7) the retention of counsel; (8) charges for time spent regarding the motion to discharge the Receiver; and (9) charges for time spent preparing the Receiver's account for the court's approval.

10 As to (1), I find no fault with the docketing methods described in the evidence. I do not agree that they will inevitably over-estimate the time spent.

11 A specific objection related to docketing was taken to the docketed cost of preparation of the Receiver's First Report. Analysis of the Receiver's dockets led Mr. Ellyn to the conclusion that this report cost $22,389 in fees to prepare, which he said was grossly excessive. Mr. Schonfeld pointed out that $5,500 of N. Gibson's time was in Mr. Ellyn's figure but was time spent doing accounting analysis, not preparing the report. The remaining $16,889 is his and Mr. Moulton's time under the docket heading of preparing the report, but he said that throughout the time so recorded, other issues were addressed. The process of preparing the report was thus intermingled with doing some of the work reported on. Even $16,000 is far too high for the report in question and even accepting, as I do, Mr. Schonfeld's evidence that other matters were dealt with, it is a fair inference that report preparation was the dominant matter on the days in question. I think the report was over-prepared. Since the docketing method does not enable a closer allocation to be made, I must select a figure and I think a reduction of about 20% of the docketed time is called for. A reduction of $3,300 will be made for this item.

12 As to (2), Mr. Schonfeld explained the extent of his delegation of tasks to persons with lower hourly rates and the assignment of the forensic part of the receivership to Mr. Moulton because of his expertise in investigative accounting. Once the Property Manager was in place, efforts were made to divide the work to avoid duplication of his work. On the evidence I am satisfied that the arrangements made for distributing the work to an appropriate cost level were reasonable and the amount of time put in by the senior people was not undue, particularly considering the contentious nature of this receivership.

13 Objection (3) relates to the presence of both Moulton and Schonfeld at certain meetings and court appearances. While alternative arrangements might have been possible, it must be remembered that when two people are working, each on his own aspect of a matter, there is a cost to be paid in having one report to the other as to events in which both are interested. This cost can include not only the necessary memo, meeting or call to report, but also inefficiencies in the transmission of information and reduced effectiveness at the meeting or appearance in question. It is not at all clear that Mr. Schonfeld was wrong in his judgment that on a few occasions Mr. Moulton should accompany him. In addition, as relations with Mrs. Stone became increasingly contentious, a second person at meetings with her was a wise precaution and in the interests of the receivership.

14 The fourth objection falls into two parts: certain letters (July 9 and August 7) written by Mrs. Stone complaining about the actions of the Receiver and making threats; and the action begun by her against the Receiver. Mr. Ellyn proposed that the Receiver's bill be reduced because, in dealing with Mrs. Stone's challenging letters, Mr. Schonfeld was defending himself rather than advancing the receivership. I do not agree. Responding to such letters is, as Mr. Schonfeld said, something one just does and gets on with the job. It is artificial to try to separate such complaints from the ongoing work of the receivership. For example, Mr. Schonfeld testified that the August 7 letter was triggered by Mrs. Stone's disappointment at the results of the Receiver's analysis of the accounts for October - December 1989. Responding to such a complaint is part of the work of the receivership.

15 A different set of considerations emerged when the lawsuit was begun. A judgment had to be made as to whether to treat the action purely as a tactical move by Mrs. Stone within the receivership, or as a serious potential liability. By December 1990 time was being spent and docketed with reference to the defence of the action as an action and Mr. Ellyn submitted that the receivership should not be charged with such fees as were properly attributable to the defence of Deloitte & Touche against charges of negligence. I agree with that submission. The evidence is that meetings on December 17, 18, 19, 20 and February 25 & 27 were in part devoted to this subject. Mr. Schonfeld estimated 14 hours which worked out to $3,990. There may also have been a short time on December 21 involved. I think there should be a deduction of $4,000 for this item.

16 The fifth objection to the account is based on the proposition that the Receiver's work was of no benefit to the parties. It is true that many objectives of the receivership were not realized. The accounts could not be completed, for Mrs. Stone withheld vital data, particularly supporting documents for her disbursements. The roof was not repaired, for Mrs. Stone refused to pay her snare. But much was done: candidates were interviewed and a property manager engaged, put in place and supervised; the roof

condition was investigated, an engineering report received, a recommendation made, an order obtained and a fund collected, albeit too small a fund to do the work. Mrs. Stone's rents were attorned to pay for expenses; accounts were reviewed and missing periods re-created; fire safety issues were addressed; and much other on-going work was done in the face of constant challenges. While the overall result was disappointing, that in my view was not the fault of the Receiver but resulted from the actions of Mrs. Stone, exacerbated by the fall in real estate values which made sales of her units difficult and the nature of the dispute. The Receiver was dropped into the middle of a difficult situation in which the protagonists were dug in to entrenched positions. Mr. Schonfeld said that never in his career had he seen so much anger on both sides. Mrs. Stone was undeniably very difficult, but the Receiver found some of the applicants also difficult to deal with. The Receiver soldiered on even after being sued by Mrs. Stone and was criticized by counsel for so doing. But it had the court's mandate to perform; it could not just stop work. As well, as Mr. Moulton said, it was important to get the work to a stage where someone taking over would be able to use it. Measured against what was reasonably achievable in the circumstances, the Receiver's performance is far better than Mr. Ellyn painted it. I do not agree with the submission that the Receiver's performance is a basis for reducing its account.

17 The sixth objection was that, viewed in the light of the modest means of the parties and the modest size of the building being managed, the Receiver's account is simply too large.

18 It was not suggested that there had been any actual agreement between the parties and the Receiver as to the scale of the latter's charges, or the likely total amount. However, Mr. Ellyn pressed the argument that the applicants were persons of modest means and were known to be such by Mr. Schonfeld. He called his colleague Mr. Goodman to testify about the meeting of June 11, 1990 when the Receiver accepted the appointment. Mr. Goodman said that Mr. Ellyn had told Mr. Schonfeld that the parties could not afford a cash retainer and Mr. Schonfeld said a charge on the building would be satisfactory. Mr. Ellyn then stated some concerns regarding the ability of the applicants to pay large fees, but there was no discussion of what the fees would be or how they would be determined, nor could Mr. Goodman recall any response to the remark about the ability of the clients to pay. For his part Mr. Schonfeld said that there was nothing speculative about the job; he expected to be paid his ordinary charges.

19 There is little actual evidence about the means of the parties. Some of the applicants reside in their units and others have tenants. I am prepared to assume that their means are relatively modest and that for some of them their unit is their major asset. The building is a 3-storey walk-up with 56 units and a cash flow said in argument to be about $30,000 per month. But that is a deceptive over-simplification of the problem faced by the Receiver, as will be apparent from previous portions of these reasons.

20 I have already noted the remarks of Master Clark in *Genelcan* that the Receiver's fees are not to be linked in some indeterminate way to the size of the fund. In *Belyea et al. v. Federal Business Development Bank* (1983), 46 C.B.R. 244 (N.B.C.A.) it was said (at p. 246):

> There is no fixed rate or settled scale for determining the amount of compensation to be paid a receiver. He is usually allowed either a percentage upon his receipts or a lump sum based upon the time, trouble and degree of responsibility involved. The governing principle appears to be that the compensation allowed a receiver should be measured by the fair and reasonable value of his services and while sufficient fees should be paid to induce competent persons to serve as receivers, receiverships should be administered as economically as reasonably possible. Thus, allowances for services performed must be just, but nevertheless moderate rather than generous.

21 And (at p. 247):

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

22 And (at p. 248):

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

23 In *Olympic Foods (Thunder Bay) Ltd. v. 539618 Ontario Inc.* (1989), 40 C.P.C. (2d) 280 at 286 (Ont. H.C.J.), Wright L.J.S.C. adopted the principles quoted above from pp. 246 and 247 of *Belyea*. He did not quote the passage from p. 248 which is to some extent at odds with the decision in *Genelcan*. In *Belyea*, the Receiver was privately appointed by a security holder to liquidate the assets of the debtor company and conducted a more or less orderly liquidation. The decision must be read with this context in mind.

24 In my view the considerations in *Belyea* are appropriate to Receivers generally, but there must be great caution exercised in applying the passage from p. 248 which I have quoted to a Receiver appointed by the court in a litigation context. Such a Receiver is duty bound to do whatever is reasonably necessary to perform the task assigned to it. The position of a Receiver appointed in the midst of a bitter litigation is to be distinguished from one acting in the orderly liquidation of a business. The latter has far more control over events than the former. In the litigious situation the Receiver often must react to events over which it has no influence, as was the situation here. In such a case court-appointed Receivers cannot be expected to function in an atmosphere of uncertainty as to payment of their reasonable accounts for responding to the acts of the contenders. By way of example, in the present case the relatively straightforward issue of authorizing roof repairs demanded by the insurer and collecting the necessary funds involved five court appearances. The Receiver had done its work properly and none of the four additional appearances were in any sense its fault, nor could they have been reasonably anticipated if one were budgeting the receivership. They were a result of the contentiousness of the litigation and the stubbornness of Mrs. Stone. Should the Receiver not be paid for all five appearances?

25 In my view a court-appointed Receiver in the midst of a bitter litigation is entitled to be paid its reasonable fees for responding to events affecting the receivership as they occur, however unnecessary, obstructionist or irrational may be the conduct of the party responsible for such events. The innocent party's remedy is indemnity from the wrong-doer, not from the Receiver.

26 It has been said that courts are reluctant to award remuneration based solely on the time spent by the Receiver in performing its duties — *Belyea*, supra, p. 248; *Olympic*, supra, p. 287. In the present case neither a percentage of the cash flow, nor a percentage of the value of the building provide a rational basis for remunerating the Receiver whose functions went well beyond managing the former and did not involve sale of the latter. Nor do I have evidence to establish the market value of the asset as a starting point, although it was said in argument that its value in today's market may not exceed the first mortgage or about 1.3 million dollars.

27 In any event I do not think that the percentage approach is a useful one in these circumstances. It cannot begin to take into account the particular circumstances of this receivership.

28 Bearing these principles in mind and noting that the work claimed for was all performed, the hourly rate is not challenged, the unhappy result is not the Receiver's doing and the serious difficulties under which the Receiver laboured, I am of the view that the Receiver has earned the fee it has submitted, save as noted above.

29 Nor do I agree that in spite of being earned it is just too large for these litigants to be asked to bear. There are some 50 units involved so that the Receiver's unadjusted fee amounts to $3,180 per unit plus a claim for solicitors' fees (to be dealt with below) which, as claimed, amounts to a further $1,325 per unit. These amounts are not small, but neither are they so large that

one could say that no reasonable owner would have contemplated such an expenditure to obtain management and accounting assistance in resolving the serious disputes among the co-tenants. A reasonable owner would hope to spend less but should not be surprised at the total if he was well informed of the circumstances.

30 It was pressed upon me that these applicants had in many cases already contributed to the levies for the interim payments made to the Receiver, that they stood to lose their investments in the units and that most of them were of very modest means. I am deeply conscious that these facts are no doubt true of many of the people so antiseptically referred to as "the applicants". Many of them have sat in my court through the long hours of motions. I know they are real people and that they are hurting. But if I react to their plight by making it a principle that Receiver's fees are to be reduced because the account necessarily incurred simply got to be more than was expected or can conveniently be paid; or because the receivership did not turn out well, through no fault of the Receiver, who will then want to be a Receiver? At the least, Receivers will find it necessary to refuse some assignments, to demand large cash retainers or substantial security and to take other steps to protect themselves which will adversely affect the ability of the Courts and parties to employ the useful remedy of appointing a Receiver. This would be a great pity, for the vast majority of receiverships turn out better for the parties than this one did. In the final analysis, I am being asked to expound a doubtful principle in order to require the Receiver to bear part of the cost of the applicant's poor choice of business partner and that I cannot do.

31 The seventh objection to the Receiver's bill is that the Receiver engaged counsel. It is argued that counsel was unnecessary for the purposes of the receivership itself, and was only necessary for the defence of Deloitte & Touche against the allegations made by Mrs. Stone. The evidence as to the engagement of counsel from Mr. Schonfeld was that in June, shortly after he was appointed, he accepted the joint advice of counsel for the parties that the Receiver did not need counsel. Soon difficulties arose in interpreting the mandate of the Receiver — was he to in effect arbitrate the differences between the parties or just report what they were? Mr. Schonfeld went on vacation. On his return he found that Deloitte & Touche had received Mrs. Stone's letter of August 7. A meeting was held with counsel on August 24 to discuss the whole position of the Receiver. It lasted about 2 $^{1}/_{2}$ hours. Messrs. Schonfeld and Moulton met with Mr. Cadsby and his colleague Mr. Mark Adilman. Mr. Schonfeld said this was probably the single most important meeting on the receivership file. The whole picture was canvassed and the Receiver was able to chart a future course. He denied counsel's suggestion in cross-examination that this was purely a meeting on how Deloitte & Touche would defend itself against Mrs. Stone. That was part of it, he said, but to a lesser extent than the resolution of the mandate issue and advice as to how to press forward with the receivership. In cross-examination there was put to Mr. Schonfeld a letter to him from Mr. Ellyn on August 8 taking the position that the Receiver did not need counsel and should not waste the parties' money. He responded that in retrospect he felt the Receiver should have engaged counsel earlier and that the receivership could not have proceeded further without counsel, quite apart from the problem of Mrs. Stone. Mr. Cadsby said he regarded Mr. Ellyn's letter as unpersuasive and self-serving. He felt there were very real problems concerning which the Receiver needed counsel including the first mortgage arrears, the scope of the Receiver's mandate, the demands being made on the Receiver by the parties and Mrs. Stone's strong and emotional letters.

32 In my view the Receiver is not to be faulted for turning to counsel for advice given the severe problems with which it was faced. In the circumstances of a bitter litigation, a Receiver expected to hold an even hand can scarcely rely upon counsel for the parties for advice. As to Mr. Ellyn's correspondence, it is true that it was more than a little self-serving as he sought to stake out the position that his clients would not pay for counsel for the Receiver, nor for the Receiver's own costs in dealing with Mrs. Stone on matters raised by her. I do not think that it is realistic to attempt to divide the Receiver's time in this way. Responding to Mrs. Stone's expressed concerns was a necessary part of the receivership even though Mr. Ellyn's clients thought her unreasonable. Nor do I think that the Receiver could have gone forward without counsel or that Mr. Cadsby's function was largely to protect Deloitte & Touche's reputation. Mrs. Stone's strategy was to use every means available to defeat the receivership; Mr. Cadsby's function was largely to thwart this strategy so as to enable his client to perform its appointed task. Even if he gave some consideration to the protection of the Receiver's reputation, that would be an integral part of the task of advising the Receiver in the receivership. I find that the decision to engage counsel was a necessary one for the purposes of the receivership and the cost is a legitimate charge to the parties.

33 Different considerations apply to counsel's time spent on the actual litigation begun in December by Mrs. Stone. That was recognized by Mr. Cadsby who opened a new file and time docket for the defence of that litigation. No claim is made that the receivership should bear any part of that time. I will deal with the quantum of the solicitor's account later. For the moment, I hold that the retention of counsel was reasonable and is a proper charge to the receivership.

34 The eighth objection to the Receiver's bill is that it contains charges for the process of the Receiver being discharged upon its own motion from its duties. It is argued that this is all Mrs. Stone's doing. Mr. Cadsby argues that it is not for the Receiver to pay the price of the applicant's choice of business partner. The termination of a receivership, he says, is as much a part of it as is any other aspect and should not be treated differently. In my view the evidence shows that the Receiver withdrew in part because of the harassing law suit filed by Mrs. Stone, but also in part because it could see no way in which it could expect to be paid for further work by either party. I do not agree that this part of the bill should be disallowed in those circumstances.

35 The Deloitte & Touche account of February 4, 1992 contains charges for preparing for these assessment proceedings. Mr. Ellyn's ninth objection is to those amounts. It is part of the Receiver's obligation to prepare and defend its accounts as part of the receivership. However, in *Olympic Foods (No. 2)* O.C.G.D. June 11, 1990, unreported, J. deP. Wright J. said that the Receiver was under a duty to report to the court, was entitled to be remunerated and for this purpose to prepare an account. But he declined to charge the full cost of preparation of the account to the client because it was for the benefit of the Receiver only and should be absorbed in overhead. I do not think that I should differ from the view expressed by deP. Wright J. The account dated February 4, 1992 will not be allowed.

36 I turn now to the quantum of the solicitor's bill. The first objection is to the fact that in the main the services, including all appearances, were performed by Mr. Cadsby at a rate appropriate to the very senior and expert practitioner that he is. He was supplemented within his office by others at lesser rates. He defended his participation largely on the basis that although the amounts at issue were not huge, they were significant enough, and the course of events turbulent enough, that a mature and experienced judgment was called for. I agree. I do not fault the Receiver for retaining Mr. Cadsby nor do I fault him for remaining personally involved. His having his colleague Mr. Adilman at the meeting of August 24 was a reasonable step. It was a first meeting to explore the situation and having Mr. Adilman present gave counsel the flexibility to assign tasks to him knowing that he had as full an understanding of the situation as counsel did. Mr. Cadsby came to the court hearings alone and the dockets certainly do not reveal excessive duplication of effort within the office. If work is to be delegated to the most cost-effective level, it is inevitable that there will be meetings of the various delegatees with the delegator. I do not accept that every time two lawyers meet to discuss a case there is duplication of effort that ought not to be charged to the client. Mr. Ellyn's second objection — that there were too many meetings — is not borne out.

37 The third objection is that much of what is billed was of benefit only to Deloitte & Touche and not to the receivership. I have already commented on the similar argument advanced in connection with the Receiver's bill. In my view Mrs. Stone set out to destroy the receivership and her attacks upon the Receiver, particularly her July 9 and August 7 letters, were elements of this strategy. The legal advice given to the Receiver to combat this strategy was directly related to and of benefit to the receivership even though the protection of the reputation of Deloitte & Touche was one of the considerations involved.

38 As noted earlier, Mr. Cadsby opened a new docket once Mrs. Stone's counterclaim against Deloitte & Touche was served. His intention was that time accumulated on that docket would form no part of the accounts now presented for payment. However, it appears from the cross-examination of Mr. Adilman that initially at least there was some understandable difficulty in allocating time appropriately and some time appears in these accounts that ought to have been on the other docket. As well, Mr. Adilman said he was working simultaneously on the Receiver's motion for its own discharge and the draft defence to counterclaim since the problems caused by Mrs. Stone were central to both endeavours. He did not allocate his time between the two dockets. In the period February 12-26 he spent some time on the pleading itself. On February 26 and 27 he spent 2 hours each day on the action and some time also on the 28th. On March 3 he researched the effect of the bankruptcy of Ritz which affected both proceedings. The defence was served on March 4 and the affidavit to be removed as Receiver was sworn on March 5. From February 1 to March 4, Mr. Adilman docketed 29 hours to the receivership of which 9.25 is referable to the motion for discharge, 2.0 is unknown and 17.75 is mixed motion and pleading. Lumping the latter two categories makes a total

of almost 20 hours. I think the only fair course is to deduct half of those hours as being allocable to the pleading. At $170/hr. that leads to a reduction of $1,700. No doubt Mr. Cadsby also saw the pleading before it was served. A global reduction of $2,000 should suffice to cover the pleading aspect in full including the December 1990 period.

39 The fourth objection was to the cost of the motion for the discharge of the Receiver. A similar objection was made to the Receiver's time charges for this motion and for the reasons I there expressed I do not think the item should be disallowed.

40 The final objection was that the solicitors' bill was just too large for what was accomplished and the means of the parties. The same argument was made regarding the Receiver's bill and many of the same considerations apply. Mr. Cadsby appeared in court or chambers on 12 occasions, many of which related to more than one motion. His hourly rate is appropriate to his standing in his profession and, except to the limited extent already noted, the hours spent were properly allocated. The total account for fees, as presented is $61,250.75 in seven rendered accounts. Accounts 1-5 incl. total $40,600 and relate to the receivership. Accounts 6 & 7 relate to the post-receivership motions to assess the costs and to direct by whom they should be paid — i.e. this present proceeding. Certain adjustments must be made to reach the net account for the receivership itself:

Accounts 1 - 5 (fees only):	$40,600
Add: from account 7 - 10.9 hours @ $300 omitted from earlier accounts	$ 3,270
Subtract: reduction for Adilman/Cadsby re pleading preparation:	
Solicitors net fee account for the receivership:	$41,870

41 Considering the number of appearances, the issues considered and problems encountered, I cannot say that this fee is simply too high for the matter.

42 Solicitor's accounts 6 and 7 relate to this proceeding and will be dealt with as costs of the proceeding together with any account for services after account 7.

Summary

43 The Receiver's account (including its solicitor's accounts 1 through 5) will be payable jointly and severally by Ritz, Stone and all of the co-tenant parties to this litigation. The other cotenant parties will be indemnified by Stone and Ritz to the full extent of the sums paid by them in respect of these accounts.

44 The Receiver's fee and disbursement account is approved as follows:

Account as submitted		$159,031
Less: withdrawn amounts:	$ 3,707	
Less: amount disallowed re first report	$ 3,300	
Less: amount disallowed for Receiver's defence of action	$ 4,000	
Less: amount disallowed for preparation of Receiver's account and attendance at hearing	$10,685	
Total disallowed:		$ 21,692
Account allowed at:		$137,339

45 The solicitor's fee and disbursement account is approved as follows:

Account as submitted:		$ 66,397.86
Less: accounts #6 & 7	$ 8,366.75	
(to be dealt with as costs of this proceeding)	$14,206.27	
Less: pleading preparation	2,000.00	

Add: from account #7 — hrs. omitted		$ 3,270.00

Total disallowed:	$24,573.02	
Net solicitors's account for the receivership:		$ 45,094.84

46 Costs of this proceeding may be spoken to in light of these reasons.

Tab 3

1987 CarswellOnt 187
Ontario Supreme Court

Genelcan Realty Ltd. v. Wiseman

1987 CarswellOnt 187, [1987] C.L.D. 1002, 17 C.P.C. (2d) 97, 5 A.C.W.S. (3d) 21, 65 C.B.R. (N.S.) 108

GENELCAN REALTY LIMITED v. WISEMAN et al.

Assessment Officer Clark

Judgment: June 17, 1987
Docket: No. RE 613/86

Counsel: *J.H. Grout*, for Genelcan Realty Limited.
R.M. Rothbart, for all defendants.
G.B. Morawetz, for Price Waterhouse Limited.

Assessment Officer *Clark*:

1 This is the assessment of:

2 (i) The account of Price Waterhouse Limited, interim receiver and manager of the property, assets and undertaking of Black Moss Holdings Limited, which carried on business as South Haven Nursing Home; and

3 (ii) The account of Borden & Elliot solicitors to Price Waterhouse Limited in this receivership.

4 Dealing first with the solicitors' account, it is assessed and allowed at $41,067.53 including fees and disbursements. The bill was not consented to, but neither was it opposed in its substance with any conviction.

5 The receiver's account totals $195,466.69, including $9,153.69 for disbursements. Since, on the evidence produced on behalf of the receiver, I am satisfied that the disbursements were all properly incurred, and the cross-examination did not uncover any reason to disallow any part of them, they are assessed and allowed as claimed.

6 The real issue in this assessment is the amount claimed by the receiver for fees: $186,313.

7 The amount represents 2,742 hours of time docketed by partners, managers, seniors and accounts for the period from and including 10th March 1986 to and including 23rd January 1987. Opposing counsel did not attempt to establish that the docketed time was not in fact spent and the hourly rates charged in respect of the four employment categories were not seriously questioned either: i.e., $168.37, $122, $70.92 and $33.86 respectively.

8 Rather, opposing counsel made two points:

9 (i) It would not have been necessary to spend the amount of time claimed if the receiver had been a more efficient receiver; and

10 (ii) In any event the receiver's compensation must bear some relationship to the size of the fund from which that compensation will be paid.

11 In order to come to grips with the question of efficiency, it is necessary to understand exactly what the receiver was faced with in this case.

12 By virtue of the order of The Honourable Chief Justice of the High Court, made on 10th March 1986, Price Waterhouse Limited became responsible for the operation of a 60 bed nursing home with a full complement of patients. Immediately, one realizes the significantly more onerous responsibilities attached to this receivership than, say, those attached to taking possession of an apartment building, or a dress shop, or a warehouse.

13 Some ten months later, on 27th January 1987, the receiver was able to report that the nursing home had been sold as a going concern and without inconvenience to the patients. That accomplishment was no mean feat, as is evident from reading all the previous reports of the receiver.

14 (All the following words in quotation marks are excerpts from the receiver's reports.)

Financial

15 Upon taking possession of the nursing home, in March 1986, the receiver found very few financial records, not even "what would be considered standard accounting books and records". "The most recent set of financial statements we found were unaudited and for the fiscal year ended 30th June 1983."

16 Shortly thereafter, an accounting firm who had done work for Black Moss Holdings Limited was able to provide "a copy of the unaudited financial statements of Black Moss for the nine months ended 31st March 1984".

17 This was hardly an easy start, or a desirable situation. Without such records, it was more difficult to assess the cost-effectiveness of the many different patient care programs required, to know who owed money to the home and who was owed money by the home.

18 Above all, the receiver had to ensure that the patients continued to receive adequate care and medication, and that was accomplished by retaining the services of independent health care professionals and ensuring that suppliers were paid.

19 As well, there was money held in trust for the patients, and that had to be accounted for.

20 The first report of the receiver dated in March 1986 also states that there were "four individuals listed in the payroll records who the book-keeper cannot identify. Price Waterhouse Limited staff are distributing the payroll cheques to ensure that only individuals working at the nursing home are being paid."

21 Paragraph 4(b) of the receiver's sixth report, dated 27th January 1987, describes the financial condition of the home in the following words:

> (b) the nursing home business was insolvent. P.W.L. needed to ensure that the necessary unsecured trade creditors continued to supply the nursing home, set up new supply arrangements and to enter into banking arrangements in order to borrow funds against interim receivers certificates.

Licensing

22 The South Haven Nursing Home was licensed under the Nursing Homes Act, R.S.O. 1980, c. 320, and the regulations thereunder.

23 In order to keep that licence in good standing, it was necessary that the facilities and staff pass frequent inspection tours by both the Ministry of Health and health officials of the regional municipality of Durham. During the ten months of the receivership there were more than a dozen such inspections.

24 As the receiver's sixth report says "each inspection required P.W.L. to respond to written reports, requests for information and specific directives".

25 Had the licence been cancelled, the value of the assets in the estate would have been drastically reduced.

Labour

26 The home employed an average of 45 persons at any one time, and this group was largely represented by the Canadian Union of Public Employees, although some employees were outside the bargaining unit. Apparently, labour relations had not been satisfactory for some time because as the receiver reported:

> ... pursuant to arbitration awards outstanding at the date of P.W.L.'s appointment, those employees were owed the approximate amount of $300,000.00. As well, the union had other outstanding grievances against Black Moss which it wished to take to arbitration. P.W.L. had to hold many discussions and meetings with representatives of the union and the employees to gain their continued co-operation on an ongoing basis.

27 Obviously any disruption in patient care would have put the patients in jeopardy and was to be avoided if humanly possible. The receiver succeeded in this task, through skilful negotiation and management.

28 I have set out in some limited detail the situation inherited by the receiver because it is important to have an understanding of the nature and extent of its responsibilities in order to properly assess its fees. This is especially important in circumstances such as these where, unlike the fees assessed to a trustee in bankruptcy, there is no statutory tariff for guidance.

29 As to the value of the assets handled, it seems to me that, all things considered, the sum of $1,200,000 is proper, and I so find. However, should I be wrong in that amount, it would not affect my final assessment of fees in this matter for the reason that they have been assessed more on the basis of the value of the work done than on the value of the assets.

30 Despite the lengthy and detailed cross-examination by Mr. Rothbart, it was not made evident to me that there was any duplication of effort or unnecessary work performed by the receiver's employees.

31 Mr. Rothbart argued that the presence of professional health care personnel from Carescent Care and Memorial Hospital meant necessarily that the work of the receiver was being duplicated by those professionals, or vice-versa.

32 That is not how I understood the evidence. It was made clear to me in the evidence of Ms. Rosebrugh that the receiver exclusively took care of the business management of the nursing home's affairs and that Carescent Care and Memorial Hospital personnel oversaw the patient care programs and that there was no duplication of effort whatsoever. I accept Ms. Rosebrugh's evidence in that regard.

33 I find that the hours docketed and claimed by the receiver were all properly spent in fulfilling its duties. I also find that the rates charged are fair and reasonable as I have indicated above.

34 Mr. Grout made an argument that has caused me some concern. While he made no submissions concerning either the operations of the home or the sale itself, he urged upon me that the fee claimed by the receiver was simply too high.

35 He stated flatly that he did not consider this to be an appropriate case in which to apply a percentage rate of compensation, and I agree with that submission. However, he went on to say that the fee allowed should bear some relationship to the "pot" available from which to pay the fees. (In the within case Mr. Grout's client was to receive $255,000 from the proceeds of the sale, subject only to the receiver's fees, disbursements and costs.)

36 In any given situation, and barring further orders, a receiver's fees and disbursements are limited to the size of the fund from which payment is to be made. However, that is not the basis on which I ought to proceed when assessing the receiver's account unless I am so directed by the order authorizing the assessment. No such direction exists in either para. 18 of the order of The Honourable Chief Justice, or of the order of Mr. Justice McRae amending that order, or the order of Mr. Justice Catzman allocating the proceeds of the sale of the nursing home.

37 Aside from the practical consideration that the receiver may have no other source from which to collect his account (and in that sense its remuneration is limited to the size of the fund), I can think of no legal foundation for my placing any such limitation on its fees.

38 The purpose of the assessment procedure is to put a fair value on the efforts of the receiver without regard to what, if any, amount may be left for the creditors.

39 How could it be otherwise? If the receiver's fair compensation were to be linked in some indeterminate way with a fund that may or may not exist in the future, there would soon be no receivers available.

40 The cases have held that in certain instances a percentage charge is appropriate, and in other circumstances quantum meruit is the appropriate basis.

41 For the following reasons I find that, in the within case, a percentage fee is far less satisfactory than a lump sum fee based on quantum meruit.

42 1. The amount of money flowing through the receiver's hands was not large and was not the main responsibility of the receiver. A percentage of that amount would not be an appropriate basis on which to assess remuneration.

43 2. The main responsibilities concerned intangible matters such as preserving the nursing home licence issued by the provincial government, maintaining the level of patient care, and earning the co-operation of the trade unions. The cost of fulfilling these duties bears no relationship to the income of the nursing home or the sale price.

44 3. The receiver spent considerable time creating an accounting and business records system in order to make the assets saleable as a going concern. That work did not increase the cash flow or the net income, and compensation for it should not be based on a percentage fee.

45 In the result, therefore, the receiver's bill is assessed in the amount of $195,466.69 including fees and disbursements, and I herewith issue my report for that amount.

46 My report will also include the solicitor's account for $41,067.53.

47 Costs of this assessment are awarded to Price Waterhouse Limited on a solicitor-client basis, payable out of same fund as the receiver's account. If the amount cannot be agreed upon, I will fix the amount upon further motion by the solicitors for Price Waterhouse Limited.

Order accordingly.

IN THE MATTER OF THE RECEIVERSHIP OF SAGE GOLD INC.

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED; AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43, AS AMENDED

Court File No. CV-18-601307-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE - COMMERCIAL LIST

Proceeding commenced at Toronto

BOOK OF AUTHORITIES OF THE RECEIVER (RETURNABLE DECMBER 18, 2020)

McMILLAN LLP
181 Bay Street, Suite 4400
Brookfield Place
Toronto, ON M5J 2T3

WAEL ROSTOM
Tel: 416.865.7790
Email: wael.rostom@mcmillan.ca
LSUC# 43165S

STEPHEN BROWN-OKRUHLIK
Tel: 416.865.7043
Email: stephen.brown-okruhlik@mcmillan.ca
LSUC# 66576P

Counsel for the Receiver