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

D E C I S I O N

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;
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> * 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;
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> * 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