SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY

Citation: *Atlantic Sea Cucumber Ltd. (re)*, 2023 NSSC 325

Date: 20231013
Docket: 525172
Registry: Halifax

RE: Atlantic Sea Cucumber Ltd.

Decision on Costs

Judge:	The Honourable Justice Peter Rosinski
Heard:	July 13, 2023, in Halifax, Nova Scotia
Counsel:	Joshua Santimaw, for the Trustee (MSI Spergel) Darren O'Keefe, for Atlantic Sea Cucumber Ltd. Gavin MacDonald and Meaghan Kells, for Weihai

By the Court:

Introduction

[1] This is a costs decision in relation to my merits decision: 2023 NSSC 231 (presently under appeal).

[2] Therein, Atlantic Sea Cucumber Ltd. ["ASC"] had filed an Application in Chambers in an attempt to convert the existing proceeding under the *Bankruptcy and Insolvency Act* ["*BIA*"] to one under the *Companies Creditors Arrangement Act* ["*CCAA*"].

[3] I exercised my discretion not to abridge the time for filing and service of the Application and supporting documents upon Weihai Taiwei Haiyang Aquatic Food Company Limited ["WTH"], and consequently dismissed the Application.[1]

[4] Both parties agree with the principles cited by WTH, when it stated:

> "As noted by the Alberta court in a 2020 costs decision, '**The starting point on *CCAA* insolvency matters is that, as a matter of practice, as distinct from substantive law, each party will often bear its own costs. The Court does, however, consider cost**

[1] WTH summarized the facts in its July 20, 2023, Brief as: "WTH, which holds roughly 40% of the third-party unsecured debt of Atlantic Sea, opposed the motion.… WTH was required to respond to the Application without the benefit of reviewing submissions or evidence presented by Atlantic Sea… The prior actions of Atlantic Sea left WTH with no confidence that the insolvent company was acting in good faith. Key areas of concern included: 1-the within Application being brought on an emergency basis, when the relevant deadline had been known since May 31, 2023; 2-grants of security covering all assets of Atlantic Sea to a related party in the weeks after a judgment of this Court was granted in favour of WTH (on February 2, 2023); 3-concerns surrounding the credibility and reliability of Atlantic Sea's principal, Mr. Gao."

> **awards where appropriate** [citations omitted" (*Canada North Group Inc. (Companies Creditors Arrangement Act)* 2020 ABQB 12, at para. 10. Some **circumstances which may justify a costs award were canvassed at paragraph 11 and include 'unusual applications, unreasonable positions, [and] unnecessary steps…**'".

[5] Both parties herein agree that if costs are to be awarded, the relevant governing framework is contained within the *Nova Scotia Civil Procedure Rules*, Rule 77.

Position of the parties

[6] WTH's position is as follows:

1. although the starting point is that each party will bear its own costs, it suggests that costs should nevertheless be awarded in cases where there are "unusual applications, unreasonable positions, [and] unnecessary steps…" (para. 11 *Canada North*).

2. CPRs 77.05 – 77.08 invoke Tariff C in the Rules as a starting point, although CPR 77.08 does permit "lump-sum costs instead of tariff costs".

3. typically for this Application which required slightly more than one half day, but less than a full day, WTH should be entitled to between $1,000-$2,000 before any multiplier, and thus as a maximum would

permit a total costs award of $8,000 – "WTH submits that a cost award outside of Tariff C is appropriate and necessary in this matter to achieve the Court's cost mandate of doing 'justice between the parties'."

4. WTH relies upon several factors (complexity of the matter; multi-counsel involvement, and pre-Chambers process; and the Applicant's conduct of the case) derived from the reasons in *Richards v. Richards*, 2013 NSSC 269, to argue that even the maximum $8,000 permitted by Tariff C is insufficient, as it would not constitute a "substantial contribution" toward its reasonable legal fees, and therefore should be departed from in favour of a lump-sum award.

[7] WTH states in its brief:

> [WTH's] actual legal costs incurred solely responding to the within Application total $27,566.65 (inclusive of HST) plus disbursements of $1195.99. We note that, subsequent to the Court's decision, a further emergency motion was brought before and heard by the Registrar on Monday, July [17] 2023. Based on the foregoing, WTH seeks $15,000, payable forthwith. This represents only 54.4% of actual legal fees incurred by WTH to respond to this Application. Also, recovery will likely be limited to a proportionate share of actual proceeds distributed to unsecured creditors of Atlantic Sea in its bankruptcy.… The short notice, lack of disclosure, and general behaviour of the Applicant and its principal warrant such an award.[2]

[2] In my opinion, if a litigant wishes to rely upon its actual legal fees/disbursements incurred in relation to a matter when seeking costs, unless the representations made are agreed to by the other party, an affidavit in support of that assertion is required. Since I accept that the standard insolvency practice of "each party bears its own costs" should prevail, this is not an issue in the present case.

[8] In contrast, ASC says that:

1. costs should not be awarded in this case; and

2. in the alternative, if the court determines that costs are appropriate, the quantum of costs is limited by Tariff C

A Costs are not appropriate

… [Based on the reasons in *Canada North*] the starting point on CCAA insolvency matters is that, as a matter of practice, as distinct from substantive law, each party will often bear its own costs… Circumstances justifying a costs award may arise in a variety of ways, including unusual applications, unreasonable positions, unnecessary steps, or misconduct which impacts the timing of or costs associated with winding up the estate. The same principles apply to a BIA proceeding… There are no unusual circumstances that justify a costs award in favour of WTH:

a-ASC's motion was brought in good faith… ASC met the test for conversion under *Clothing for Modern Times*[3]

[3] Given that the matter is under appeal, I am somewhat reluctant - but feel compelled - to address ASC's statement. I did not expressly decide that latter issue. Therefore, I fail to understand how ASC can make the claim that it "met the test for conversion…". Moreover, the circumstances in (*Re) Clothing for Modern Times Limited*, 2011 ONSC 7522, upon which ASC relies in part for that statement, were much different, and the Court's comments must be seen in that context: "a retailer of fashion apparel… operated 116 retail stores from leased locations across Canada". This is an instance of "comparing apples and oranges". In *(Re) Clothing for Modern Times*, Justice Brown did reference *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, while considering whether the proposed continuation of the *BIA* proceedings under the *CCAA* "would be consistent with the purposes of the *CCAA*… As the Supreme Court noted in *Century Services*, proposals to creditors under the *BIA* serve the same remedial purpose, though this is achieved 'through a rules-based mechanism that offers less flexibility'". There is no universal bright line separating the appropriateness of proceeding under the *BIA* as opposed to the *CCAA*. In my written decision I stated at para. 22: **"**Ultimately, I see very little prejudice to the Applicant, as a result of my decision to not abridge the relevant time periods for filing and service of documents in support of the Application in Chambers to convert the proceeding from the *BIA* to the CCAA. [Footnote (in the original) – While an argument can be made that there is substantive prejudice to the Applicant to the extent that ASC will not have the benefit of what it referred to as the 'flexibility' or advantages of the *CCAA* as opposed to the *BIA*, these are presently speculative, or at best not provably ascertainable, and the burden is upon ASC in this Application.]**"** ASC stated in July that it sought the "flexibility" of the *CCAA* (which provides the debtor greater opportunity to control the process) in preference to the processes under the *BIA*. Regarding providing ASC greater flexibility under the *CCAA*, I agreed with WTH that there were grounds for WTH's articulated "concerns" regarding (as set out in its present Brief) the "Grants of security covering all assets of Atlantic Sea to a related party in the weeks after a judgement of this Court was granted in favour of WTH on February 2, 2023, and Concerns surrounding the credibility and reliability of Atlantic Sea's principal, Mr. Gao." Moreover, at the hearing in July, ASC relied upon there being a recently envisaged "stalking horse proposal" under the *CCAA* regime that would be greatly advantageous. Whatever the precise differences between that and what the record will reflect were earlier instances of reference by ASC/The

b-the policy rationale for the parties often bearing their own costs in insolvency proceedings is exemplified where the party being asked to pay costs is a debtor bringing a motion in good faith and which it was entitled to bring under legislation;

c-ASC did not take any unreasonable positions or unnecessary steps in this motion;

d-WTH has not pointed to any misconduct by ASC. Although ASC may have filed its material late, late filing does not raise to the level of misconduct necessary to warrant a cost award against a debtor in an insolvency proceeding. Your Lordship's decision also does not note any misconduct on the part of ASC.

e-The material filed by both parties and the motion was not onerous or atypical;

f-there were no cross-examinations on any of the affidavits; and

g-the hearing was only half a day.

B In the alternative, the Quantum of Costs is limited by Tariff C

…

ASC also acknowledges that the presiding Judge has the discretion to increase the quantum of costs specified in Tariff C <u>if there are special circumstances requiring a sufficient level of exceptional legal services</u>… Complexity… Public interest… Pre-Chambers process… Unsettled questions of law… Conduct or misconduct of a party and or solicitor… Failing to use an alternative and less costly process to determine the dispute… The need for additional counsel… The presence of multiple counsel, unless the additional Counsel have limited participation… The presence of expert witnesses [footnote – ***Richards v. Richards*** 2013 NSSC 269 at para. 6] … ASC submits that no special circumstances exist to warrant a departure from the quantum of costs provided for in Tariff C. In particular, the following factors militate <u>against</u> a finding that there are special circumstances in this case:

a- Complexity and unsettled questions of law … The complexity of the within motion is distinguishable from the jurisprudence WTH relies upon to support its argument that the Court should exercise its discretion to award more costs than specified by Tariff C

b-Preparation and participation by the party seeking costs… ASC did not file particularly lengthy materials for the motion… No cross examinations, expert

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Monitor to a "stalking horse proposal" under the *BIA*, I cannot say. Generally, I was <u>unsatisfied</u> by the materials before me, that the *CCAA* regime would provide material advantages over the *BIA* for ASC's creditors. I stated in my Decision (para. 23): "I am not persuaded that my declining to abridge the time periods, even if my decision will trigger the assignment into bankruptcy under the *BIA* or merely continuation under the *BIA*, will jeopardize the interests of the stakeholders collectively."

witnesses or preliminary motions to cause an extraordinary expense to WTH. The oral hearing lasted three hours and did not involve oral evidence.

c-Conduct or misconduct of the parties… No finding that ASC participated in any misconduct by bringing the within motion… file its materials late, the motion still proceeded on July 13, 2023… WTH was able to file the material required… was ultimately successful on the motion

d-failing to use an alternative and less costly process – ASC was required to seek its requested relief through this process.

C In the further alternative if your Lordship exercises discretion to increase the costs awarded to WTH, ASC submits that a multiplier of two, three, or four, as contemplated by subsection (4) of Tariff C could be applied ['depending on the following factors: (a) the complexity of the matter,(b) the importance of the matter to the parties, (c) the amount of effort involved in preparing for and conducting the Application'].

Conclusion

[9] Although it was a close call whether to deviate from the starting point practice in bankruptcy/insolvency proceedings, I am satisfied that there is no sufficiently cogent reason(s) to depart from the practice that each party will bear its own costs.

[10] I direct that counsel for ASC draft an Order regarding my decision on the merits of the Application and costs (to be consented to as to form by WTH).

Rosinski, J.