Assessing a Monitor's Accounts is not a Rubber Stamp Exercise: *Re: Winalta Inc.*

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Background

Re Winalta Inc. (*Winalta*) was a restructuring under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 as amended (*CCAA*) involving nine (9) companies, assets worth $95 million and liabilities in excess of $73 million.[1] The proceedings took a mere six (6) months from commencement to the implementation of the plan.[2] The monitor's accounts totalled $1,155,206.05.

Deloitte & Touche Inc. acted as monitor. Their appointment was a requirement for HSBC Bank Canada's (HSBC) support as primary lender.

The monitor brought application for its discharge and sought approval of its fees.[3] Winalta identified several issues which caused it concern and sought a $275,000 downward adjustment of the fees. In addition to a breach of duty,[4] Winalta raised concerns regarding:

i. Charges for support and professional staff other than partners' services/inadequately particularized service (Non-Partner Services);

ii. Duplication;

iii. A six per cent (6%) administration fee charged in lieu of disbursements ($50,000);

iv. Mathematical errors ($47,979.39); and

v. Charges for internal quality reviews.[5]

Issues regarding the mathematical errors and the internal quality review charge were resolved. The remaining issues were contested.

General Principles

Legislation

Legislation addressing an insolvency professional's fees is limited.

Under the *Bankruptcy and Insolvency Act* (*BIA*)[6] the trustee's remuneration is governed by s. 39 of the *BIA*.

The remuneration of a receiver and its legal counsel are subject to the court's discretion. The provisions of section 243(6) and 248(2) of the *BIA* offer limited guidance. Section 11.52(1)(a) of the CCAA speaks to the granting of security or a charge for the fees and expenses of a monitor and others engaged by the Monitor in the performance of its duties. The *CCAA* does not provide any further guidance.

Jurisprudence

There have been very few contested applications on the passing of the monitor's accounts.[7]

Guidance is sought from cases respecting fees of receivers and trustees.[8] The court referred to *Belyea v. Federal Business Development Bank,*[9] respecting receiver's fees, and in a bankruptcy context, the principles in *Hess (Re)*[10] were noted.

The conclusion: the assessment of fees must be guided by the basic principles of fairness and reasonableness.

The Findings in *Winalta*

The monitor asserted that its fees for services rendered were reasonable in the circumstances.[11] The monitor also took the position that in the absence of evidence from Winalta to prove its fees were unreasonable, the court ought to approve them.

The court disagreed. There is no presumption of regularity in relation to an insolvency professional's fees.[12] The onus rests with

1. *Re Winalta Inc.*, 84 C.B.R. (5th) 157, ABQB (2011) (*Winalta*)
2. *Winalta* at para 3
3. *Winalta* at para 19
4. Commented on by others: The Honourable James Farley, QC, *Professional Fees and Conflicts of Interest after Re: Winalta Inc.,* I.I.C. ART. 202-4 (Thompson Reuters Canada Limited); John M. MacLean and David P. Bowra, *Conflicts in the Modern CCAA Monitor,* in Janice. P. Serra, ED, Annual Review of Insolvency Law 2011 (Toronto: Thompson Carswell, 2012) 479; Rick T.G. Reeson, QC, with the assistance of Thomas L. Gusa, *Re Winalta Inc: The Duties and Obligations of Monitors in CCAA Proceedings*, CAIRP 2012 Annual Conference
5. *Winalta* at para 4
6. *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (*BIA*)
7. *Winalta* at para 18
8. *Winalta* at para 24-25
9. *Belyea v. Federal Business Development Bank* (1983), 46 C.B.R. (N.S.) 244 (N.B. C.A.) at para 3
10. *Hess, Re* (1977), 23 C.B.R. (N.S.) 215 (Ont. S.C.) at 218-220
11. *Winalta* at para 17
12. *Winalta* at para 32

the monitor seeking to have its accounts passed to provide evidence its fees were fair and reasonable.[13]

Non-Partner Services

Respecting the fees and charges attributed to clerical, administrative and IT staff (non-partner services) Winalta argued they should form part of the hourly rates charged out by the senior partners of the monitor, similar to the billing practice for lawyers. The court referred to *Northland Bank*,[14] in which the court disagreed with the proposition. Conversely, the Alberta Court of Appeal rendered a decision, implicitly overruling *Northland Bank*, finding that charges similar to the non-partner services must be reviewed to determine if they are properly overhead, which should be included within the hourly rate of the professionals.[15]

Applying these cases, the *Winalta* Court determined the appropriate comparator was neither of the legal or accounting professions. Rather, the appropriate comparator was that of the standard billing practices of the insolvency practitioner.[16]

The court was not satisfied that there was sufficient evidence before her with respect to the non-partner services and directed the monitor to adduce evidence of the industry standard for insolvency professionals charging for non-partner services. Failure to provide such evidence would result in a disallowance of those fees.

Administration Fee

Pre-filing, HSBC and the Monitor entered into a private monitoring agreement which provided that a six per cent (6%) flat administration fee would be charged by the monitor in lieu of "customary disbursements such as postage, telephone, faxes and routine photocopying." This charge was paid by Winalta pursuant to HSBC's security. The practice of billing the fee continued through the *CCAA* proceedings. Winalta argued that this charge was an unfair "up charge."[17]

The monitor did not inform Winalta of its intention to charge on the same basis that it billed HSBC, it simply continued as it had previously.[18] The court acknowledged Winalta's pre-filing obligation to pay the administration charge pursuant to the terms of HSBC's security. However, she found no evidence of an agreement on the part of Winalta to pay the administration charge in the context of the *CCAA* engagement.[19]

The monitor argued that Winalta knew about the administration charge as it was provided for in the private monitor agreement between HSBC and the monitor and was paid throughout.

Justice Topolniski disagreed. She reviewed the initial order to determine if the administration fee was appropriate.[20] The initial order utilized the Alberta template language which allowed the monitor its "reasonable fees and disbursements." There was no mention of the administration charge in the initial order. As a result, the court was not prepared to approve this charge as falling within the definition of "reasonable fees and disbursements."[21]

The monitor was directed to review its records and account for its actual disbursements by Affidavit within sixty (60) days at its own expense.

Conclusion

The conclusions to be taken from *Winalta* are not new. They are a reminder to all involved in insolvency proceedings that insolvency is generally a losing proposition and that the integrity of the system requires its administration to be seen as for the benefit of the stakeholders and not, as it sometimes may appear to the outside observer, for the benefit of trustees and solicitors.[22]

The key takeaways from this decision are that:

1) The burden of proof to establish the fee is fair and reasonable rests with the professional seeking to have its fees allowed. The party raising issues with the fee need not bring forward evidence to establish that the fee is unreasonable. Do not presume the fee will be accepted as presented;

2) If a firm has particular billing practices then affirm them in writing prior to the engagement and, if possible, have them incorporated into the initial order. The court ultimately has discretion in assessing fees at the end of the proceeding. However, including particular billing arrangements within the initial order may go some way to assisting the court in determining what is fair and reasonable;

3) The standard comparator for billing practices to be applied is that of the insolvency practitioner, not the standard billing practice of a chartered accountancy firm or a law firm. This will necessarily require some evidence; and

4) The manner of presentation of the information should not be in a report but rather in the form of an Affidavit. This practice has been required to be followed in at least two subsequent cases that the author is aware of.[23]

The court's primary concern is protecting the integrity of the process. As participants in the process, whether as an insolvency practitioner or insolvency counsel, the integrity of the system remains paramount. Being mindful of the court's expectations, and taking steps to address them from the outset, will go a significant way to alleviating any concerns. RS

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13. *Winalta* at para 32
14. *Northland Bank v. G.I.C. Industries Ltd.* (1986), 60 C.B.R. (N.S.) 217, 73 A.R. 372 (Alta. Master) as cited in *Winalta* at para 36
15. *Columbia Trust Co. V. Coopers & Lybrand Ltd.* (1986), 76 A.R. 303 (Alta. C.A.) as cited in *Winalta* at para 37
16. *Winalta* at para 40
17. *Winalta* at para 58
18. *Winalta* at para 59
19. *Winalta* at para 60
20. *Winalta* at para 91
21. *Winalta* at para 62
22. *Re: Hess*, supra, at 220
23. *Piikani Nation v. Piikani Energy Corp.* (2011) Carswell Alta. 1311 (ABQB); *Stepco Holdings Inc. and Jimco Holdings Inc. v. 364075 Alberta Ltd., Dico Holdings Inc. and Marilyn Dianne Rukavina*, Action No. 0603 11235 (July 25, 2012) - unreported