IN THE SUPREME COURT OF BRITISH COLUMBIA

IN BANKRUPTCY

Citation: *0409725 B.C. Ltd. (Bankruptcy of)*, 2019 BCSC 451

Date: 20190328
Docket: B131552
Registry: Vancouver

In the Matter of the Bankruptcy of

0409725 B.C. Ltd.

Before: The Honourable Mr. Justice Grauer

Reasons for Judgment
In Chambers

Counsel for the Claims Administrator:	Geoffrey H. Dabbs
Counsel for the Trustee:	Magnus C. Verbrugge
Counsel for the Respondent Standard Building Supplies Ltd.:	Adnan N. Habib
Appearing as Agent for the Respondent Langley Door Crazy:	Daniel J. Healey
Place and Date of Hearing:	Vancouver, B.C. December 14, 2018
Place and Date of Judgment:	Vancouver, B.C. March 28, 2019

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1.0 INTRODUCTION

[1] On December 16, 2013, five years ago, the bankrupt, 0409725 BC Ltd ("0409"), made its assignment in bankruptcy under section 49 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [*BIA*]. The applicant, as both court-appointed claims administrator and trustee in bankruptcy in these proceedings, now seeks an order approving its activities and accounts, and directing the payment into court of the balance of funds realized. The application is opposed by two creditors/lien claimants.

[2] 0409 had formerly carried on business as Odenza Homes Ltd ("Odenza"), and was involved primarily in the construction of new single-family homes, and in residential renovations. At the time of its assignment, it had underway 17 homebuilding projects and a number of renovation projects in and around Vancouver.

[3] Left in the lurch, of course, were both the owners of the projects under construction and all of the unpaid suppliers and subcontractors. This latter group were not only creditors, but, pursuant to section 10 of the *Builders Lien Act*, SBC 1997, c 45 [*BLA*], also had trust claims against any receivables, and were entitled to register liens against the various job sites to which they provided labour and materials.

[4] The *BIA* provided a single forum to deal with the unsecured claims of 0409's creditors. There was, however, no similar process available for dealing with the trust and lien claims that arose in respect of Odenza's projects, resulting in a number of significant potential problems: the projects would be tied up in disputes and lien actions, preventing their efficient completion; costs, inconsistencies and inefficiencies would likely result from creditors dealing with trust claims, lien claims and unsecured claims in different forums; and collecting accounts receivable would be more difficult in circumstances where liens were filed against the properties.

[5] In this situation, the trustee proposed a single procedure for the assessment, processing, adjudication and payment out of all claims against 0409. To accomplish

this, the trustee sought an order appointing it as claims administrator to deal with trust and lien claims in a claims process, called the Trust Claims Settlement Program, or "TCSP", to be undertaken in conjunction with, and complementary to, the claims process under the *BIA*. The trustee would thereafter act in two capacities: as claims administrator administering the TCSP under the *BLA*, and as trustee of the bankrupt estate under the *BIA*.

[6] I pronounced that order on December 19, 2013, and modified it by order pronounced February 18, 2013.

[7] Issues subsequently arose concerning the character of funds held by the bankrupt at the date of bankruptcy, and other funds collected by the receiver. I dealt with these issues in reasons for judgment delivered June 30, 2014 (2014 BCSC 1196), April 14, 2015 (2015 BCSC 561), and July 16, 2015 (2015 BCSC 1221). The road has not been smooth.

[8] We are now at the end of it. Extensive fees and expenses have been incurred by the applicant and by the solicitors retained by it in its two capacities (Gehlen Dabbs acting for the claims administrator, and Borden Ladner Gervais acting for the trustee). In the result, even after discounting the applicant's fees, the proposed amount available for distribution to the trust and lien claimants is $100,000. The claims filed were in the range of $3,000,000.

[9] The respondents do not take issue with the fees and expenses charged by the two sets of solicitors. They accept that those accounts are fair and reasonable. Having considered the evidence of the applicant and of the solicitors, I agree.

[10] The respondents do, however, take issue with the fees charged by the applicant. In this regard, I should note that the respondent Langley Door Crazy, represented by Daniel James Healey, a "consumer advocate" who is not a lawyer, abandoned the relief it sought, and the application proceeded on the basis of the objections raised by the respondent Standard Building Supplies Ltd. Hereafter, I will refer simply to the "respondent" unless a distinction is necessary.

2.0 COMMENTS OF THE SUPERINTENDENT OF BANKRUPTCY

[11] Pursuant to section 152(3) the *BIA*, the trustee forwarded his final statement of receipts and disbursements (as trustee only, not as claims administrator) to the Office of the Superintendent of Bankruptcy ("OSB"). By section 152(4):

> (4) The Superintendent may comment as he sees fit and his comments shall be placed by the trustee before the taxing officer for his consideration on the taxation of the trustee's accounts.

[12] The Superintendent's comments were issued and filed on February 25, 2019. I have taken them into account, together with the responsive comments of the Trustee/Claims Administrator.

[13] As I discuss below, the Superintendent raised a concern in relation to the inclusion of a shortfall on the statement of receipts and disbursements ("SRD"). The position of the OSB is that the trustee is not entitled to do so until there are sufficient monies in the estate to make good the loss in fees. After further inquiry by the trustee, it is evident that this contemplates an administrative preference of the OSB, rather than a requirement, and in the circumstances of this case, including the assurance of the trustee, I am satisfied that the OSB's concern that this state of affairs will be used to avoid submitting a supplementary SRD does not arise here. The trustee has performed all of the work in question, and it is appropriate to have it reviewed at this time.

3.0 SUMMARY OF RECEIPTS, AND FEES AND EXPENSES CLAIMED

[14] The cash balance in Odenza's bank accounts at the time of bankruptcy was $527,506.22 (the "initial cash balance"). In my July 16, 2015 Reasons For Judgment, I found that these monies constituted trust funds under the *BLA*, and did not form part of the bankrupt estate. The applicant as claims administrator, through the TCSP I approved, collected a further $1,047,933.91 in trust funds and holdbacks, and earned interest of $11,138.00 for a total available for distribution of $1,597,572.94.

[15] Disbursements come to $1,552,090.54. These comprise bookkeeping, supplies, rent, etc. of $19,477.84, fees and disbursements of the claims administrator of $903,300.85, fees and disbursements of the trustee referable to the TCSP of $106,389.26, fees, disbursements and taxes of Borden Ladner Gervais of $394,174.57, and fees, disbursements and taxes of Ghelen Dabbs of $128,748.02.

[16] The balance available for distribution comes to $45,482.40.

[17] To increase the balance available for distribution to the trust and lien claimants, the claims administrator proposes to reduce its fees. That reduction comes to $54,517.58.

[18] The result is a proposed balance for distribution of $100,000.

[19] The respondent is unhappy with this. At first glance, one can understand why. Receipts of $1,722,000 were eaten up by fees and disbursements of $1,622,000, yielding only $100,000 for the trust and lien claimants.

[20] There is no proposed balance for distribution from the bankrupt estate. Expected total receipts after expenses that include the statutory trust claim for employee wages, further legal fees, disbursements and taxes, and inspector fees, come to $124,705.85. Outstanding trustee fees come to $170,081.55. This would leave the trustee with a shortfall of $45,375.70. As I noted above, the OSB takes the position that the trustee is not entitled to include the fees that comprise this shortfall in this taxation. The concern is that if the trustee should receive further funds in the estate, then it should file a supplemental statement of receipts and disbursements (”SRD”) to the extent it seeks to apply such further funds to a portion of the shortfall. The trustee has assured the OSB that he will file a supplemental SRD in the extremely unlikely event that further funds are received. In these circumstances, to leave the review of this portion of the trustee’s accounts for another hearing would, in my view, only add to the expense of what has already been a very expensive process. It would benefit no one.

4.0 THE RESPONDENT'S ANALYSES

[21] The respondent refers to the principles applicable in assessing the appropriate compensation for receiver, as described in *Redcorp Ventures Ltd (Re)*, 2016 BCSC 188 at para 23:

> In addressing the appropriate principles and factors to be considered in assessing the appropriate compensation for a receiver, Taggart J.A. on behalf of the Court in *Bank of Montreal v. Nican Trading Co.*(1990), 43 B.C.L.R. (2d) 315 (C.A.), made the following statements:
>
> > The principles which guided the Registrar were those set out in the Belyea [*Belyea and Fowler v. Federal Business Development Bank* (1983), 46 C.B.R. (n.s.) 244 (N.B.C.A.) case to which he referred. He applied the relevant considerations listing them at the end of his recommendations. They included: (a) the value of the assets; (b) complications and difficulties encountered by the Receiver; (c) degree of assistance provided by Nican; (d) time spent by the Receiver; (e) Receiver's knowledge, experience and skill; (f) diligence and thoroughness; (g) responsibilities assumed; (h) results; (i) cost of comparable services.
> >
> > In addition to those factors the Registrar took into the account the estimates made by the Receiver as to the cost of the receivership with particular reference to the various fee estimates provided from time to time.
> >
> > (at pp. 320-321)

[22] The respondent asserts, correctly, that the overriding consideration is whether the compensation sought is fair and reasonable. This requires the consideration of all of the factors discussed above, with particular attention to value: *Bank of Nova Scotia v Diemer*, 2014 ONCA 851 at para 45.

[23] In light of these principles, the respondent contends, the court should be very concerned about the value received by the trust and lien claimants in relation to the value of the assets and the very sizable fees charged by the applicant. Accordingly, the respondent submits, the court should "eyeball" the accounts in order to determine what is fair and reasonable.

[24] To assist the court in this regard, the respondent has specified particular objections and has put forward two alternative analyses for arriving at a fair and

reasonable claim. Each analysis is based upon specific complaints, and both include a deduction of $11,880 for "unclaimable administrative fees" being fees to cover overhead, administrative costs, and so on, which, the respondent submits, should be covered by the hourly fees charged.

[25] The first analysis proposes deductions based on (a) alleged misrepresentation of professional fees in the claims administrator's first report, dated February 16, 2014, (b) excessive billing in the period from February 1, 2014 through June 6, 2014, and (c) an alleged failure to exercise a cost-benefit analysis.

[26] Turning to point (a), the claims administrator stated in his first report that the "estimated professional costs of the claims administrator and recoverable costs of the trustee due January 31, 2014 are $180,000…. Estimated legal costs are $47,000". The respondent points out that the actual professional fees claimed over the period in question, including the claims administrator, the trustee and the lawyers, come to $339,280, not the $227,000 estimated. The claimed fees should accordingly be reduced, the respondent contends, by the difference of $112,280.

[27] Moving to point (b), the respondent complains that the fees of $442,000 billed during this period appear to include a lot of duplication and were excessive. There were just too many people working on the matter. The period covers 92 working days, and the respondent proposes allowing seven billable hours per day at $480 per hour (the claims administrator's highest hourly rate), yielding $309,120, for a reduction of $133,462. Unfortunately, this calculation does not back out the fees and expenses of the lawyers over the period in question, which the respondent concedes were fair and reasonable.

[28] With respect to point (c), the respondent objects that the claims administrator gave no cost estimates at all after the first report, so that the creditors and trust and lien claimants were not in a position to judge the viability of going forward. By the end of 2014, the respondent observes, the total amount recovered was $965,962, while fees and expenses came to $1,159,129. At this point, the respondent submits, the claims administrator ought to have stepped back to have a hard look at the cost

and benefit of proceeding further. Because he did not, says the respondent, he ought to be denied the fees of $209,070 incurred thereafter.

[29] On the respondent's first analysis, then, the fees of the claims administrator would be reduced by $466,692, including the administration fees. The respondent submits that I should "eyeball" the invoices to obtain a "gut reaction" as to the fairness and reasonableness of what was charged, employing this analysis as a guide.

[30] The second analysis, as an alternative, looks at what the respondent alleges was excessive overbilling on owner holdback settlements.

[31] The respondent relies on a list of the projects that Odenza was working on at the time of bankruptcy, broken down as to the number of lien claimants for each project, the amount recovered for each project with the date of recovery, the payments from owners on each project, and the professional fees attributed. The total professional fees (again including the lawyers' fees) come to $1,149,353.

[32] From this list, the respondent identifies 12 projects where the attributable professional fees, it alleges, appear excessive in relation to the amount recovered. With one on Point Grey Road, for instance, involving 26 lien claimants, the amount recovered was $136,154.57, while the professional fees attributed come to $127,572.92.

[33] The respondent proposes that this aspect of the claim should be reduced by allowing a flat rate fee of $50,000 per project, resulting in an overall reduction of $561,233.48, including administrative fees. On this analysis, once again that the trustee would have to take the hit for the lawyers' fees, which are not in issue.

[34] As noted, the respondent Langley Door Crazy withdrew its own application and supported the application of the respondent Standard Building Supplies. Mr. Healey did wish to make the point, however, that if the claims administrator had just listened to him during the course of the administration, things would have worked out much better.

5.0 DISCUSSION

[35] It comes as no surprise that the respondents are disappointed in the result of the administration of this estate, and find the size of the fees and expenses involved a bitter pill to swallow. There was tension right from the beginning thanks to what was, in retrospect, perhaps an ill-considered proposal by a relative of 0409's principal to fund the completion of Odenza's projects through another entity, Odenza Homes West Vancouver Ltd. The new Odenza, it was proposed, would engage all of Odenza's subcontractors to finish the projects quickly and efficiently. Right from the first meeting, this proposal, together with the bankruptcy itself, were viewed with anger, suspicion and hostility (and still are, as Mr. Healey made clear).

[36] That proposal, if accepted, may have made things go much more smoothly from the point of view of administering the claims and the bankruptcy estate. But it was not accepted, and things did not go smoothly at all.

[37] There is no doubt that when we get to this stage, the onus is on the claims administrator and trustee (and lawyers) to establish that their accounts are fair and reasonable in accordance with the principles discussed above: *Confectionately Yours Inc (Re)* (2002), 36 CBR (4th) 200 (Ont CA) at para 31. As Mr. Justice Burnyeat discussed in the *Redcorp Ventures* case at para 22, this requires the filing of materials showing what was done with appropriate detail, verified by affidavit.

[38] Here, the applicant has filed all the material one could wish in that regard, duly verified by affidavit.

[39] The question of whether, on the materials, the applicant's accounts are fair and reasonable must be based on more than a gut reaction. The applicant has set out in its reports and affidavits a very thorough review and discussion of what it did and why, the problems and difficulties encountered, and the unforeseen challenges that arose in this complicated administration. The last category is discussed in considerable detail in the administrator's fourth report, dated September 17, 2018. All of this is consistent with my own experience and observations over the five years I have managed this bankruptcy. The applicant followed a specific process that I

approved, was obliged to reconstruct Odenza's books, deal with 533 lien claims, and face a number of questions from the OSB and the RCMP due to fraud issues raised largely by Mr. Healey, discussed further below.

[40] In retrospect, the TCSP did not produce all of the efficiencies that were anticipated at the time I approved it. But it is not helpful now to compare a process where many difficulties were encountered with hypothetical alternatives that imagine no such difficulties. That was never in the cards.

[41] Of considerable importance is the work of the inspectors who were involved in this bankruptcy. They performed not only all of the usual tasks required of them in a bankruptcy, but also approved every agreement reached by the claims administrator, because only the trustee could sign on behalf of 0409, and the trustee could not do so without inspector approval. The inspectors approved all of the fees incurred by the trustee and, indirectly, by the claims administrator, and two of them have confirmed in letters to the administrator put in evidence before me the significant unanticipated challenges that the applicant faced in this process. They, too, were unhappy with the process outcome, but were satisfied with the administration of the estate. Their views should be given a great deal of deference: *Re Costello* (2001), 32 CBR (4th) 22 (Ont Sup Ct J); *Public Eyecare Management Inc (Re)* (1998), 7 CBR (4th) 255 (Ont Sup Ct J).

[42] On the basis of the applicant's evidence, including the comments of the inspectors, I am satisfied that in the unusual and rancorous circumstances surrounding this bankruptcy, the process followed and steps taken by the applicant were necessary and appropriate, and that an even more dismal result would likely have resulted otherwise.

[43] Nowhere do the respondents identify work that was carried out improperly, or steps that were not taken in good faith. While Mr. Healey took the position during the course of the administration that the administrator failed to take sufficient steps to investigate or pursue fraud he alleged was committed by the former owners of Odenza, his client was never prepared to take an assignment of any claim in that

regard, and his refusal to accept the results of the considerable investigation carried out by the administrator significantly added to the complexity and expense of the process.

[44] The respondent made much of the failure of the applicant to produce any further fee estimates after the first report. The respondent referred to the discussion in *Redcorp Ventures* of the failure of the receiver appointed in that case to pass its accounts "from time to time" (a standard term in receivership and bankruptcy orders, including the one I granted on December 19, 2013), which Burnyeat J. interpreted as meaning every two years in the absence of a particular reason to the contrary.

[45] I agree that in a process as lengthy as this one, it would have been better practice for the applicant to produce further fee estimates, or pass interim accounts. But two points are important.

[46] First, it should be remembered that in *Redcorp Ventures*, the problem identified as arising from the receiver's failure to pass any accounts until the end of the administration was this:

> [29] If a lengthier time goes by, a receiver will not have the benefit of any comments about the form of the accounts which can then be incorporated into later passing of accounts. By waiting six years, the receiver has run the risk that what was presented was in a format which was unacceptable and lacking in the required detail.

[47] In the result, the receiver in *Redcorp Ventures* was given liberty to reapply for the passing of its accounts once it had put them into an appropriate form, with all of the required detail verified by affidavit. That is not a problem in this case.

[48] Second, in this case, the bulk of the fees and expenses had already been incurred by the end of 2014, the time when the respondent argues that the applicant should have sat back and reassessed matters. Thereafter, the expenses increased relatively little, while it was not until the middle of 2016 that expectations for further realization had to be reduced.

[49] When I look at the timing in relation to the work undertaken, the complexities that emerged, and the difficulties that arose, I am unable to say that it would have made any difference at all to the bottom line had additional estimates been given. Indeed, the information from and approval by the inspectors suggests the contrary if one views matters in real-time instead of retrospectively. The fighting over who would get what among all the many claimants was not conducive to a prescient cost benefit analysis at any stage.

[50] In this context, it is useful to note that, as matters progressed beyond 2014, it became increasingly clear that the estate did not have the resources to prepare more reports, and undertake more court applications, than were absolutely necessary. To report on difficulties with realization while litigation efforts with owners were continuing could have given owners an incentive to stall on the expectation that the trustee might not have sufficient funds to pursue them. In this regard, the business judgment of the applicant comes into play, and should not be second-guessed even if, in hindsight, more regular fee estimates or accounts would have been preferable.

[51] I agree with counsel for the applicant that the specific analyses raised on behalf of the respondent amounts to a form of reverse engineering, which is unhelpfully arbitrary. They are tendered without any reference to specific examples of unfairness or unreasonableness and ignore the detailed explanations put forward by the applicant.

[52] Looking, for instance, at the alleged misrepresentation in the first estimate (point (a)), the applicant points out that at the time the estimate was given, it was based on billings as of that date, when cross-billing between the trustee and the claims administrator, and allocation, had yet to be sorted out. While it would have been preferable for an accurate estimate to have been given once the allocation information was available, the only ground offered for reducing the fees at that time is the fact that the reality exceeded the estimate. No basis was put forward that

would allow me to conclude that the amount of expenses actually incurred was unfair or unreasonable.

[53] Turning to the allegation of excessive billing in the first half of 2014 (point (b)), the respondent asserts that there were too many people involved, and proposes an hourly rate for one person, seven hours per day. But the respondent did not identify which persons' work was unnecessary, what work was duplicated or why only one person needed to be working at that time. Based on my own review of the accounts and the applicant's reports, I am unable to agree that the billing in that period is excessive. This was not a straightforward matter, and the first half of 2014 was perhaps the most active period during the administration, with the applicant having to fight battles on multiple fronts.

[54] I have already addressed the question of a cost-benefit analysis at the end of 2014 (point (c)). Turning to the second analysis, it seems to ignore the difficulties discussed in the three sets of Reasons for Judgment I issued on the subject of dealing with the projects, the owners and the lien claimants. While the lien claims with respect to each project had to be viewed as independent silos in terms of the application of trust funds, the reality is that the costs of the general bankruptcy and the TCSP activities had to be allocated among the construction projects.

[55] Further, one of the principal difficulties facing the applicant was that it did not have the benefit of a client (0409) who could provide good information and records for each project. As already noted, the applicant was obliged to undertake a good deal of accounting and record reconstruction. I am unable to see from the records before me any basis upon which I could conclude that the expenses claimed are not fair and reasonable, whether viewed in relation to individual projects or overall.

[56] There remains, however, one minor matter raised by the respondent that, in my view, has merit. This concerns the administrative fees claimed in the total of $11,879.99, which I round to $11,880.

[57] The respondent correctly points out that the matters covered by the administrative fees are, in accordance with current standards, matters properly covered by the hourly rate charged. The applicant accepts this, but submits that this was not the case in 2013. That may be so, but since the applicant chose not to pass accounts until now, it is the current standards that I intend to apply. That is the risk the applicant took in waiting until now to pass all of its accounts.

[58] The only question is whether I should nevertheless approve the accounts as submitted without deduction of the administrative fees of $11,880 on the basis that the applicant has already discounted its fees as administrator, and is facing a shortfall in its fees as trustee. I am not inclined to do so. I have already implicitly permitted the applicant to reduce its shortfall by some $10,000 in late receipts not credited to the amount available to the trust and lien claimants, and I consider that, in the circumstances, fairness requires the deduction of the administrative fees, which ought not to have been included.

6.0 CONCLUSION

[59] The applicant is entitled to an order in the terms sought, except that the fees and disbursements of the claim administrator are to be reduced by $11,880, with a corresponding increase to the amount to be disbursed in accordance with my order of July 16, 2015, as modified based upon the recommendations of the claims administrator in his fourth and fifth reports.

[60] The applicant is at liberty to apply if further directions are required, and is further at liberty to submit its form of order without endorsement by the other parties appearing at the hearing of this matter.

"GRAUER, J."