O'KEEFE & COMPANY

NEWFOUNDLAND AND LABRADOR SUPREME COURT DISALLOWS LAW FIRMS ADMINISTRATION FEES IN INSOLVENCY

June 1st, 2022

In Re: Great North Data Ltd.

Background

This was an application by a law firm ("BB"), as independent legal counsel to PricewaterhouseCoopers ("PWC") in its capacity as receiver of Great North Data Ltd. ("GND"), a failed cryptocurrency hosting company formerly based in Labrador City.

Section 18 of the Bankruptcy and Insolvency General Rules, C.R.C, c. 368, says that "[a]ll bills of costs for legal services – other than those that do not exceed $2,500 in aggregate, excluding applicable federal and provincial taxes – must be taxed by the taxing officer". In accordance with this provision, BB submitted two statements of account for taxation. Each account included an "Administration Charge" calculated at 5% of the total legal fees ($625 and $117.90, respectively). The Administration Charges are not itemized. PWC had certified both of the statements of account with the following endorsement:

That we have examined the bill, the services have been duly authorized and rendered and in our opinion the charges of [$15,282.06 or $2,808.90] are fair and reasonable. PricewaterhouseCoopers Inc., Trustee. The taxing master disallowed the charges. He found that they were "not properly chargeable as a disbursement, as it [the 5% levy] reflects an arbitrary percentage amount of the legal services rendered, to be added on top of those services".

Appeal

BB appealed the taxations, claiming that the taxing master acted on a wrong principle when he disallowed the charges. BB claimed that it was unable to itemize the disbursement list because this would "necessitate an investment and upgrade in [our] information technology system or additional professional time". BB further stated in a lengthy Memorandum of Fact and Law filed on the appeals that, "It could be argued that in and of itself is not an efficient use of client resources".

Discussion

Justice Handrigan noted that the "established principle" for taxation appeals is, as a general rule, "not to interfere with a decision made by the taxing master in the exercise of his discretionary powers on taxation, unless it can be shown that

he acted upon a wrong principle", however, that a court may conclude that the master must have acted on a wrong principle where the amount allowed is either "so excessive" or "inordinately low".

Justice Handrigan relied on Mercer, Orsborn, Benson, Myles v. Lundrigan (1991), 89 Nfld. & P.E.I.R. 33 (NLSCTD), for the factors to consider when deciding whether a taxing master acted on a wrong principle:

1. the time expended by the solicitor;
2. the legal complexity of the matters to be dealt with;
3. the degree of responsibility assumed by the solicitor;
4. the monetary value of the matters in issue;
5. the importance of the matter to the client;
6. the degree of skill and competence demonstrated by the solicitor;
7. the results achieved;
8. the ability of the client to pay; and
9. the client's expectation as to the amount of the fee.

Counsel for BB argued only the last factor was relevant because PWC had agreed to a "Schedule Of hourly Rates & Engagement Terms" which stated that BB would charge the additional 5% of the invoiced fees to cover "internal expenses associated with courier services, long distance telephone and facsimile charges, photocopying, duplication, printing, and binding of materials for filing or presentation".

BB argued that the taxing master proceeded on a wrong principle because he ignored this "contractual relationship" with PWC. BB's logic was as follows:

- PWC accepted their terms, so it follows implicitly that the fees and disbursements they charge PWC are fair and reasonable;
- BB and PWC are "sophisticated entities whose freedom to agree to reasonable contractual terms must be recognized and protected"; and
- while each of the "...listed services can be tracked and attributed to a file from the outset of the retainer and are properly disbursements", that is not what the parties agreed to.

In effect, BB argued that it simply charged what PWC expected to pay and that the taxing master should not have inquired further. To establish this point, BB cited Cameron J.'s statement in Mercer that "[t]he real issue in this case is what part should the clients' [sic] expectations play in determination of costs" (para 17).

Justice Handrigan noted that the Mercer appeal was dismissed because, although the appellant had agreed that her fee might go “a little” over the $75 she had agreed on, the actual bill was over eight times larger. This resulted in the fee being limited to the expected $75. Justice Handrigan differentiated this because the taxing master’s ruling was based on a contract between the law firm and individual client. PWC had a different relationship to BB because PWC was acting as GND’s receiver.

Decision

Justice Handrigan found that, while that PWC had the authority to engage BB and could incur fees, expenses and disbursements on its account, the taxing master was not bound by PWC and BB’s agreement. He stated:

It may be self-evident but there is a simple reason for the scrutiny that all accounts which are rendered to receivers appointed under the BIA receive: receivers do not own the property and goods they receive and the funds they draw on to pay for legal services. That property belongs to the bankrupt estates of which they are receivers, and they are simply custodians of that property and are obliged by
law to manage and dispose of it in the best interests of those entitled to the estate.

The taxing master, in his written reasons, indicated that BB’s request had implied that “if a charge such as the Administration Fee in question is agreed to by the Trustee, and if the Trustee approves the account”, then the taxing master had no discretion to disallow such a charge. He disagreed with this and stated in paragraph 14 as follows:

14. Ultimately, the taxing master disallowed the administration charge because it “was not properly chargeable as a disbursement, as it reflects an arbitrary percentage amount of the legal services rendered, to be added on top of the charges for those services”. Several of the category of items [telephone, fax, photocopy, delivery, postage, and printing charges] “more properly represent fixed charges attributable to the running of a law practice and are not disbursements incurred with respect to a specific file”.

Some of the costs BB claimed were covered by its administration charge may actually be allowable disbursements, depending, of course, on how they were incurred, how much they are, and if it can be said they contributed to the “furtherance of an individual le”. Charges under the rubric of “overhead” are especially vexing to taxing masters, particularly where, as here, they are unspecified.

Justice Handrigan did not accept this. He held that all accounts rendered under the BIA and Rules must be taxed and are liable to close scrutiny, especially when unspecified disbursements are billed.

The taxing master did not act on a wrong principle when he disallowed BB's claim for administration charges on the two accounts. "In fact, he acted according to the principles stated or implied in the governing legislation and according to his mandate". Justice Handrigan dismissed the appeals and made no order as to costs.

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