

**IN THE EASTERN CARIBBEAN SUPREME COURT
COMMONWEALTH OF DOMINICA**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. DOMHCV2001/0266

IN THE MATTER OF THE LIQUIDATION OF COCONUT BEACH HOTEL LTD

AND

IN THE MATTER OF THE COMPANIES ACT 1994

BETWEEN:-

COCONUT BEACH RESIDENCE LTD

Claimant

And

COCONUT BEACH HOTEL LTD (In Liquidation)

Defendant

RULING

Appearances:

Mrs Dawn Yearwood – Stewart for the Liquidator
Mr Michael Bruney for the Claimant Company

**2017: April 20
June 21**

[1] **STEPHENSON J.:** Coconut Beach Hotel Ltd is a company in liquidation by virtue of Order of Court dated 26th July 2002 under the hand of Mr Justice Dunbar Cenac. (hereinafter “the Company”) Initially, Mr Austin Nevin Winston was appointed liquidator, he resigned and Mr Clayton Munro was appointed in his place¹.

¹Mr Munro was appointed on the 27 January 2004

- [2] The property of the company has been sold with the approval of the court and the Royal Bank of Canada the secured creditor has been paid off.
- [3] The total property left in the hands of the Liquidator is insufficient to pay off the debts of the company.
- [4] The liquidator has now filed his proposed scheme of division of the remaining assets of the company. The remaining balance being held on account by the liquidator is \$901,059.95 which he wants to pay out to conclude the liquidation.
- [5] The following persons and or entities have been identified as the persons to be paid:
- a. The Liquidator
 - b. The Liquidator's Solicitor
 - c. Government taxes
 - d. Social Security payments
 - e. Redundancy benefits
 - f. Acme Garage (Karam) Ltd
 - g. Coconut Beach Residence Ltd
 - h. The Estate of Ashton Henry - A Judgment Debt
- [6] When a company goes into liquidation the costs of the proceedings are paid out of its assets. The creditors, who hope to recover some of their debts out of the assets, have a direct interest in the quantum of costs, and in particular the remuneration of the liquidator and his lawyer. The Court in exercising its discretion to approve the fees to be paid to the liquidator and to the lawyer for the liquidator will inevitably wish to ensure that the assets of the company in liquidation is not prejudiced, also to ensure that there are suitable safeguards to prevent further loss to the assets through excessive remuneration being paid.

[7] The sole purpose of this ruling is to deal with the remuneration to be paid to Learned Counsel Mrs Dawn Yearwood-Stewart who has acted as the liquidator's solicitor for the duration of the liquidation which covers some 15 years of work. It is noted that to date Counsel has received no payments for work done thus far.

[8] Mr Michael Bruney Counsel on behalf of Coconut Beach Residents Ltd the petitioners in the winding up (hereinafter "The Petitioners") at the hearing of the application brought by the liquidator to have the proposed scheme of payments approved by the court, made objections to the proposed scheme of division including the proposed payments to the Solicitor and to Acme Garage (Karam) Ltd *inter alia*.

[9] The court, therefore, ordered that submissions be made on the following issues:

- I. Can the solicitor acting for the liquidator who is selling land owned by the company in liquidation charge fees pursuant to sections 163 – 165 and the fifth schedule of The Title by Registration Act Chapter 56:50 of the Laws of Dominica that is, fees for the preparation of documents for the sale of encumbered land?
- II. If the Solicitor is permitted to charge the fees under the Title by Registration Act can the solicitor also charge under the liquidation for the preparation of the documents for the said sale of land?
- III. On whether or not the debts of Acme Garage (Karam) Limited as presented to the liquidator can be paid by the liquidator;
- IV. Whether the claim for redundancy payments can be paid by the liquidator.

[10] Thereafter it was ordered that the court shall rule on the following issues:

- a) On the submissions made by the Lawyers as ordered;
- b) On whether or not the debts of Acme Garage (Karam) Limited as presented to the liquidator can be paid by the liquidator;
- c) Whether the claim for redundancy payments can be met by the liquidator.

[11] Subsequent to the last hearing on the 20th April 2017. The liquidator filed a supplementary affidavit averring that the balance of funds in hand is \$901,059.95 and not \$980,054.08 as stated previously. He averred that the purchaser's solicitor in the sale of the real assets of the company deducted \$78,994.13 as vendor's fees based on the value of the property and not the purchase price. This deduction was accepted by the liquidator and the court assumed he received advice on same.

[12] The liquidator further averred that he accepted this deduction from the purchaser's solicitor.

The fees to be paid to the solicitors for the Liquidator

[13] Mrs Dawn Yearwood-Stewart, solicitor on behalf of liquidator, has subsequent to the hearing aforesaid, submitted a revised bill of costs, which bill of costs was exhibited to the liquidator's supplementary affidavit. Learned Counsel revised the bill of costs down from the bill that was previously presented by removing the hourly billing for the preparation of documents and replacing same with fixed costs for preparation of same, also all fees that were in excess of \$200.00 as stated in the fifth schedule of the Title By Registration Act² sections 5(1) and (2). Mrs Yearwood Stewart's bill of costs also included a 3% ad valorem fee on the sale of land being an agreed fee between learned Counsel and the liquidator.

[14] The bill of costs as presented by Counsel to the liquidator has been accepted by him and he is seeking the court's approval of same.

[15] Mr Michael Bruney Learned Counsel on behalf of the petitioner objected to the bill of costs submitted by Mrs Yearwood-Stewart. He submitted that the sale of the land fell to be considered under the TBRA and that pursuant to section 164 of the Act the Solicitor is entitled to charge fees as set out in Schedule 5 of the TBRA and pursuant to section 5 of that schedule the solicitor can charge a 3%

² Chapter 56:50 of the Laws of Dominica

fee based on the sale value of the property sold and each additional application for of incidental to the sale not exceeding \$200.00.

[16] Mr Bruney, however, questions whether the land which was sold fits the description of encumbered land within the contemplation of the TBRA.

[17] Learned Counsel Mr Bruney submitted that when one reads the provisions relating to the sale of incumbered land/estates (sections 74-97 of TBRA) one would see that section 5 of the 5th schedule (which allows the 3% charge) is only when the land is being sold pursuant sections 74 to 97 of the TBRA.

[18] Section 74-97 of the TBRA is found in that part of the act which deals with “Sale of incumbered Land or Estates”. A review of these provisions reveals that the sale of incumbered property is as a result of a default in mortgage payments. It is clear that the sale of incumbered property as provided in this part of the act relates to the sale of mortgaged property by the mortgagor as a result of a defaulting mortgage.

[19] In the case at bar, the sale of the property owned by the company was subject to a mortgage but it is clear that the property in question was not sold within the provisions and procedure set out in that part of the Act which provides for the sale of incumbered property and it is therefore safe to find that when part 5 of Schedule 5 makes provision for the fees of 3% based on the sale value of the property does not apply.

[20] I have reviewed the affidavit filed, it was clear that there was no work of an exceptional nature done by the solicitors warranting approval of the court as provided by section 165.

[21] I agree with learned counsel Mr Michael Bruney that fees, as provided for the 3% charge under section 165, are not permissible and will not allow same.

[22] I have looked at part 6(3) of the 5th Schedule of the TBRA which states

“ Any work performed under this act not provided for by this schedule such fee as may be allowed by the court”.

Therefore the court has the jurisdiction and discretion to allow fees for any work performed under this act. I agree with the submissions of learned counsel Mr Michael Bruney that in fixing the fees I ought to do that which is fair and reasonable in the circumstances of the case. There is no doubt in my mind that I have a broad discretion in the circumstances of this case.

[23] In fixing the fees for liquidator’s solicitor (counsel) I will take into consideration the following:

- (i) The Description of the work done by Counsel as listed in her bill of costs;
- (ii) The length of time she has been retained by the liquidator;
- (iii) The averments made by the liquidator regarding his arrangements with counsel;
- (iv) The nature, extent and quality of the service provided to the liquidator;
- (v) The Conduct of the parties as is evidenced in a review of the liquidation file;

[24] I must come to my own view as to the solicitor’s costs to be approved in this case which depends on all the circumstances of the case. The costs must reflect the different aspects and nature of the courts of the proceedings before the court, the cumulative effect the facts taken into account and I will approve a total costs to the solicitor for the services rendered in the liquidation at in the sum of \$90,000.00 plus vat.

[25] There are the outstanding matters of the approval of the liquidator's fees and the payments of the other debts including possible payment to Acme Garage (Karam) Ltd. I will address those issues in a ruling to follow.

**M.E. Stephenson
High Court Judge**

By the Court

Registrar