

Exhibit F



Michael J. Quilling
BOARD CERTIFIED
BUSINESS BANKRUPTCY LAW
AND CIVIL TRIAL LAW
TEXAS BOARD OF LEGAL SPECIALIZATION

Telephone: 214.871.2100
Facsimile: 214.871.2111

October 17, 2008

RE: Courtney Wallis Simpson

Dear Claimant:

This letter is to update you on the litigation with RECO. As you know I made a claim to RECO and its insurers on each of your behalf seeking payment of your losses. The RECO insurance policy has a limit of liability of \$100,000.00 per claim and an aggregate liability for each "occurrence" or "series of related occurrences" in the amount of \$500,000.00. RECO and its insurer took the position that this limit of liability applied and that they would only pay out to each of you a *pro rata* share of \$500,000.00. Your claims exceed \$2 million. With advice from Bennett Jones I took the position that the limit of liability of \$500,000.00 ought not to apply to your claims. I instructed Bennett Jones to bring an application to have this issue determined by the court.

Bennett Jones has successfully argued that the \$500,000.00 liability does not apply and that each of you can claim up to the limit of liability of \$100,000.00 per claim. This is a great result. It is subject to any appeal RECO may bring. In addition, I anticipate that RECO's insurers will pay some portion of the legal fees incurred in bringing the application. This has yet to be determined.

Assuming that RECO does not lodge a successful appeal, the amount of your claim, up to \$100,000.00, will be paid directly to you by RECO. I do not know when this will occur.

I anticipate that I will be making my final report to the court shortly. To the extent your claim exceeds \$100,000.00 and is not paid in full by RECO, there will be very limited funds to disburse to you in addition to the funds you will be receiving from RECO. My final report which I hope to file before the end of the year will provide you with the particulars of the other Recoveries and expenses.

Enclosed are Justice Lederman's reasons dated October 8, 2008.

Sincerely,

A handwritten signature in black ink, appearing to read "MJQ", with a long, sweeping underline that extends to the right.

Michael J. Quilling

MJQ/ja

Enclosures

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

MICHAEL J. QUILLING, IN HIS CAPACITY AS) *Lincoln Caylor & David Rainsberry,*
COURT APPOINTED RECEIVER FOR COURTNEY) for the Applicant
WALLIS SIMPSON)
Applicant)
- and -)
NICHOLAS SMITH ATTORNEY IN FACT IN) *Robert L. Falby, Q.C.,*
CANADA FOR LLOYD'S UNDERWRITERS) for the Respondent
Respondent)
Heard: August 25, 2008

LEDERMAN, J.

Nature of Application

[1] This application seeks the interpretation of the limits of liability of an insurance policy held by the Real Estate Council of Ontario to cover losses of consumer deposits. The policy provides that each claim has a limit of liability of \$100,000, but that the aggregate liability for each "occurrence" or "series of related occurrences" is \$500,000. The question is whether the claims at issue constitute separate occurrences, and if so, are any of these occurrences part of a series of related occurrences.

Facts

[2] Michael J. Quilling ("Applicant") is the court-appointed receiver of Courtney Wallis Simpson ("Simpson"). He acts on behalf of victims of a real estate deposit scheme, which is one of two different fraudulent schemes put in place by Simpson and her company, York Region

Realty Inc. The deposit scheme involved the purported purchase and sale of real property. Simpson stole 25 deposits, ranging in size from \$5,000 to \$400,000 from 22 different victims (3 of the victims are claiming twice).

[3] In addition to the deposit thefts, Simpson created a 'Ponzi' scheme, soliciting money from individuals to "invest" in "interim occupancy mortgages". She used the misappropriated deposits to fund her mortgage scheme. Simpson was convicted and sentenced to five years in jail and a restitution order for \$4.5 million was issued. The trial judge described the victims of both schemes as individual investors, not institutions, many of whom lost their life savings.

[4] Victims of the deposit thefts are covered by consumer real estate deposit insurance, held by the Real Estate Council of Ontario ("RECO"). RECO administers the *Real Estate and Business Brokers Act, 2002*, S.O. 2002, c. 30. ("*Act*") on behalf of the Ontario government. Its mandate is to regulate the activity of trade in real estate in the public interest. The insurance policy is provided by Lloyd's Underwriters ("Respondent").

[5] The policy stipulates in the "Consumer Deposit Insurance Extension" section that the insurer agrees:

To pay on behalf of the Insured the amount of any Claim for Loss sustained by a Claimant in a trade in real estate in the Province of Ontario arising out of an Occurrence discovered during the Policy Period.

[6] However, there are coverage limits built into the policy. Each claim is limited to a \$100,000 recovery, where a "claim" is a demand of money arising out of an "Occurrence". An Occurrence is defined as:

"Occurrence" means the insolvency of a Registrant or the theft, fraud, misappropriation or wrongful conversion directly or indirectly by a Registrant or present or former employee, director, officer or manager of a Registrant of moneys or other property entrusted to or received by the Registrant in the Registrant's Professional Capacity.

[7] In addition, there is a \$500,000 aggregate limit for any one Occurrence or series of related Occurrences. The policy states:

The Limit of Liability – aggregate each Occurrence stated in the DECLARATIONS shall be the maximum liability of the Insurer and the Named Insured in any one Occurrence or series of related Occurrences. If the total amount of all Claims in any one Occurrence exceeds the aggregate Limit of Liability, then all Claims will be settled on a pro-rata basis in the same proportion that the aggregate Limit of Liability bears to the total amount of all Claims.

[8] The Applicant argues that each deposit theft was a separate, unrelated Occurrence. The Respondent argues that they constitute a single Occurrence, and in the alternative, that they are a “series of related Occurrences” such that the \$500,000 limit applies.

Issues

1. Do the 25 deposit thefts constitute a single Occurrence within the meaning of the policy?
2. If not, do they, or a subset of them, constitute a series of related Occurrences, triggering the aggregate limit of liability?

I. Single Occurrence or Separate Occurrences?

Positions of the Parties

[9] Both the Applicant and the Respondent argue that the policy definitions are sufficiently clear on their face, but each holds they mean a different thing.

[10] The Applicant submits that Occurrence under the policy is defined in the singular. It is “...the theft” not “thefts”. To consider all 25 separate acts of theft as one would stretch the singular “theft” to mean “thefts” which is beyond what the word can bear. The Applicant points out that there are no words *within* the definition of Occurrence to the effect of “an act or series of acts”, nor indeed “the theft or series of thefts”.

[11] The acts by Ms Simpson were separate, perpetrated on different days in relation to different transactions, with many different victims. The Applicant relies upon Hilliker’s *Liability Insurance Law in Canada*, in which it states that all injuries flowing from one cause are one occurrence, but “[w]here, however, separate injuries result from separate acts, even though the acts may be of the same nature, each act constitutes a separate occurrence.”¹

[12] The Respondent also relies upon the definition of Occurrence but points to the use of the plural word “moneys”. The plural, it is claimed, indicates that Occurrence includes a scheme involving multiple instances of theft of money, or a single theft encompassing several transactions. It was agreed between the parties that the thefts by Ms Simpson were a fraudulent scheme. Therefore, the Respondent argues that they are a single “Occurrence”.

The thefts are not a single Occurrence

[13] That the deposit thefts were part of a scheme does not make them a single Occurrence. The wording of the policy is plain: an “occurrence” means “...the theft, fraud, misappropriation or wrongful conversion” of deposits. To find that the 25 thefts perpetrated by Ms Simpson are a single Occurrence stretches the singular into plural and may also render the aggregate limit of liability meaningless.

¹ Gordon Hilliker, *Liability Insurance in Canada*, 3d ed. (Butterworths, 2001) pp. 63-4.

[14] The use of the word “moneys” does not change this. “Moneys” is also used in the definition of “Loss”, which states: “‘Loss’ means loss of deposit in the form of moneys or other property...” It would seem that the policy is merely defining Occurrence with reference to its definition of Loss. In protecting consumer real estate deposits, the policy does not wish to limit coverage to deposits in the form of a single amount of money. So too, the definition of Occurrence is not limited to deposits in the form of a single amount of money, but extends to “...the theft...of moneys or other property...”, mirroring the definition of Loss.

[15] Therefore, each of the 25 deposit thefts is a separate Occurrence.

2. *Do the 25 thefts constitute a series of related Occurrences, triggering the aggregate limit of liability?*

[16] Having found each theft to be a separate Occurrence, it is necessary to determine whether they constitute a series of related thefts. This policy contains a coverage limit of \$500,000 in any one Occurrence or “series of related” Occurrences. If this limit applies, all 22 victims will share *pro rata* in the \$500,000.

Positions of the Parties

[17] The Applicant argues that the deposit thefts are separate, unrelated occurrences, relying on *Pacific Rim Nutrition Ltd. v. Guardian Insurance Co. of Canada*². In that case, a bookkeeper stole cash portions of daily deposits, and on one occasion, stole money from the vault. The employer’s employee theft insurance policy read:

“Occurrence” means any act or series of related acts involving one or more persons (or one or more “employees”...) which results in a loss insured by this Section.

[18] The trial judge found the deposit thefts to be a series of related acts, but held the vault theft was not part of the series, as the crime was dissimilar.

[19] To arrive at this conclusion, the trial judge reviewed a U.S. case which found that “...the common understanding of the word ‘related’ covers a very broad range of connections, both causal and logical”.³ He then turned to the dictionary definition of “related” as “any connection, correspondence, or association” and held that “related” was not ambiguous. Since the deposit thefts were all by the same person, against the same employer, using the same method, they were all related because there was “no doubt a connection or association between each”. However, he

² *Pacific Rim Nutrition Ltd. v. Guardian Insurance Co. of Canada*, [1995] 8 W.W.R. 74, [*Pacific Rim*], aff’d [1998] B.C.J. No. 1852 (C.A.) [*Pacific Rim Appeal*].

³ See *Gregory v. The Home Insurance Co.*, 876 F.2d 602 (7th Cir. 1989).

found that the vault theft "was not in any way related" to the deposit thefts, because of the change in method of operation.⁴

[20] On appeal, the British Columbia Court of Appeal upheld the decision, noting that the decision in *American Commerce Insurance Brokers Inc. v. Minnesota Mutual Fire and Casualty Co.*⁵ supported the trial judge's approach. That case dealt with an employee of American Commerce who stole premiums paid in cash to the company, and who forged payroll cheques to herself. The policy had a limitation deeming all loss resulting from an act or series of related acts to be one occurrence. The court rejected a strict causal interpretation of "related" and said:

that a court may consider several factors in concluding whether dishonest acts are part of a "series of related acts," including whether the acts are connected by time, place, opportunity, pattern, and, most importantly, method or *modus operandi*.

[21] On that basis, the *Minnesota Mutual* court found that the premium thefts and payroll frauds were separate, unrelated occurrences.

[22] The Applicant submits that, similar to *Pacific Rim* and *Minnesota Mutual*, the deposit thefts are not related because Simpson's *modus operandi* was different in each case: different purchase and sale agreements, different warranties and representations, different properties, were used to secure a deposit from each victim.

[23] The Applicant also argues that the identity of the victim is germane. Counsel referred to professional liability cases as examples of this analysis. These cases have policies which limit recovery per occurrence, deeming "more than one act, error or omission...in relation to the same professional service" to be one occurrence. In *Yang v. Canadian Lawyers' Insurance Assn*⁶, the trial judge held that a lawyer who had negligently invested the money of individuals unknown to each other in a shopping centre development had committed errors in separate professional services provided to each investor. In coming to this conclusion, the judge reviewed a Canadian case, *Royal Trust Corp of Canada v. American Home Assurance Co.*,⁷ and several U.S. cases. All the cases cited focused on who the client was, and if there were more than one, whether a distinct duty or service could be discerned.⁸ Similarly, here, the Applicant argues, the thefts were perpetrated against different victims, and must therefore be unrelated.

⁴ *Pacific Rim*, *supra* note 2, at paras. 53-56.

⁵ 551 N.W. 2d 224 (Minn. 1996) [*Minnesota Mutual*].

⁶ (1996) 133 D.L.R. (4th) 228, [1996] A.J. No. 172 (Q.B.), *aff'd* (1996) 147 D.L.R. (4th) 31, (C.A.), leave to appeal to S.C.C. refused, [1997] SCCA No. 318.

⁷ (1992) 90 D.L.R. (4th) 582, [*Royal Trust*], *aff'd* (1993) 100 D.L.R. (4th) 447 (N.S.C.A.).

⁸ *Royal Trust* was decided on the basis that the same service was provided to the same client, using the same instructions, between the same borrower and lender, albeit involving five properties. The properties were all subject to the same prior mortgage interest; the lawyer was supposed to have sought postponement agreements on them. The court found it "highly unlikely" that the lawyer would have been negligent with respect to one set of mortgages and not for the others (See p.604).

[24] The Respondent counters that the plain, dictionary, meaning of "related" includes "associated or connected", and "of the same type", which would include the deposit thefts at issue. In addition, prior case law has centered upon whether the perpetrator was the same in each theft, or in the case of multiple thieves, whether there was a conspiracy. According to the Respondent, Simpson was the sole thief, and so the thefts must be related. In *482467 Ontario Ltd. v. Wellington Insurance Co.*⁹ there were multiple thieves. Five or six employees of a Mr. Submarine shop had stolen cash deposit money; one employee had committed deposit thefts on three occasions. In holding the thefts were not related, the court noted there were "nine discrete transactions involving at least five different (and maybe a sixth) employees." The court went on to say at para. 11:

It has not been argued, nor do the circumstances reasonably invite the inference, that the employees were involved in any form of conspiracy such as to constitute the prima facie discrete acts into a "series of related acts". The most cogent argument that could be made on behalf of the responding party is to urge that the transactions associated with "A.M.P." be treated as "a series of related acts".

[25] *Pacific Rim*, in the Respondent's view, also supports the conclusion that the deposit thefts are related occurrences. In that case, the deposit thefts were "part of a systemic or continuing ongoing plan to steal cash from the insured"; here, too, the thefts were part of such a scheme.

Meaning of the word "related"

[26] The facts of the case clearly provide a series of Occurrences, so the meaning of "related" must be determined in the context of this policy. The dictionary definitions of the word "related" are as follows:

Canadian Oxford Dictionary lists "associated or connected with" and "of the same type; in the same group, category".¹⁰

Shorter Oxford English Dictionary: "having relation; having mutual relation; connected", where "relation" is defined as "the existence or effect of a connection, correspondence, or contrast between things; the particular way in which one things stands in connection with another; any connection or association conceivable as naturally existing between things."¹¹

[27] If we take the definition to be "of the same type; in the same group, category, etc.", any two acts of theft are related, merely in their being thefts, without need for any other connection in time, place, or person. By this definition, the aggregate limit would apply to all thefts of all deposits by any Registrant for the duration of the policy. This would be an unreasonable

⁹ [1991] O.J. No. 1206 (Gen. Div.) [Wellington].

¹⁰ *Canadian Oxford Dictionary*, 2d ed., s.v. "related".

¹¹ *Shorter Oxford English Dictionary*, 5th ed., s.v. "related" and "relation".

interpretation of the policy. Clearly, then, not just any relation is necessary, but a particular kind of relation.

[28] As the word is broad in meaning, we must determine what its scope is in the context of this policy. The term "related" implies degree: things can be closely or tangentially related. The goal, then, is to determine what degree of relatedness fits with the intention of the parties to this insurance contract, given the objective of the contract and the facts surrounding it.

[29] As a reminder, the word appears under Coverage Limits, section 3(b):

The Limit of Liability – aggregate each Occurrence stated in the DECLARATIONS shall be the maximum liability of the Insurer and the Named Insured in any one Occurrence or series of related Occurrences.

[30] The provision is contained in a section entitled "Coverage Limits" within a "Consumer Deposit Insurance Extension" to RECO's Errors & Omissions Insurance policy. The thrust of the policy is that the insurer agrees

To pay on behalf of the Insured the amount of any Claim for Loss sustained by a Claimant in a trade in real estate in the Province of Ontario arising out of an Occurrence discovered during the Policy Period.

[31] In the definitions, the following terms are germane:

"Claim" means a demand for money arising out of an **Occurrence**.

"Claimant" means a customer or client of a **Registrant** and includes an individual or any proprietorship, partnership, co-operative, society, business, association, joint venture, syndicate, company, corporation, firm, or other legal or commercial activity.

"Loss" means loss of deposit in the form of moneys or other property which has been entrusted to or received by a **Registrant** in his/her **Professional Capacity** from a customer or client arising out of a trade in real estate but does not include **Commission**.

"Occurrence" means the insolvency of a **Registrant** or the theft, fraud, misappropriation or wrongful conversion directly or indirectly by a **Registrant** or present or former employee, director, officer or manager of a **Registrant** of moneys or other property entrusted to or received by the **Registrant** in the **Registrant's Professional Capacity**.

[32] These definitions paint a clear picture of the intention of the parties to create protection for consumers who provide deposits to a registered real estate agent or broker. This impression is reinforced by the circumstances surrounding the contract. The Statement of Agreed Facts

explains that RECO, who maintains the policy, administers the *Real Estate and Business Brokers Act, 2002*¹² on behalf of the province. RECO's mandate is to "regulate the activity of trade in real estate in the public interest".¹³ The *Act* requires deposit insurance for consumers.¹⁴

[33] These facts, and the wording of the above definitions, point to the conclusion that the identity of the consumer claimant would be an important factor in interpreting the wording of the policy.

[34] *Pacific Rim* and *Minnesota Mutual* identified other factors to be considered, including time, place, opportunity, pattern, and most importantly, method. The Applicant provided affidavits of two victims outlining the various documents, conditions, and representations used by Simpson in perpetrating the various thefts, in an effort to show that each transaction was varied from the others. This was likely in light of the emphasis placed in both those cases on *modus operandi* as a controlling factor. That factor might have more importance in employee theft cases, but in the case at bar, involving consumer deposit insurance, the identity of the victim is the key determinant, because this accords with the intentions of the parties to protect consumers, as discerned from the wording and origin of the policy. In this regard, the professional liability cases such as *Yang* and *Royal Trust* are analogous. They turn upon the duty and service rendered separately to each client, just as here the definition of relatedness should turn upon the identity of the client.

[35] The Respondent argued that *Wellington* and *Pacific Rim* demonstrate that where the identity of the perpetrator is the same, or the perpetrators were acting in a conspiracy, the resulting thefts are related. However, as noted above, the relatedness must be determined in light of the policy and its purpose. Both of those cases involved a policy designed to manage the risk of one party, the employer. In so far as the identity of the party suffering the loss is part of the matrix of factors to be considered, the identity was fixed. The policy at issue manages the risks faced by consumers of real estate, so the fact that all thefts were perpetrated by one person must be weighed against the fact that there were many different and unrelated victims, all of whom were clients of Simpson.

[36] From the material provided, it would appear that 22 of the 25 transactions would be unrelated from the next, involving different victims and different properties. The cases of multiple fraud against a single victim would, however, be captured by the aggregate limit, given the information available. In those cases, the thief is the same, the victim is the same, and the type of occurrence causing the loss is the same.

[37] It should be noted that in other circumstances, much like in *Pacific Rim*, multiple losses of one victim might not be related.

¹² S.O. 2002, c. 30, Schedule C [the *Act*].

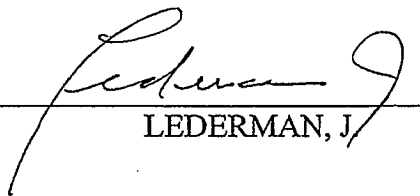
¹³ Statement of Agreed Facts, Application Record, Tab B, paras. 11, 12.

¹⁴ See O. Reg. 579/05, s. 11, enacted under the *Act*. Other provinces have created statutory assurance funds to achieve a similar purpose.

Conclusion

[38] Therefore, an order will go declaring that each of the deposit thefts in respect of the 22 victims made by Simpson are separate occurrences of "theft, fraud, misappropriation or wrongful conversion" of funds and, except for the additional deposit thefts of 3 of the victims, they do not constitute a "series of related occurrences" within the meaning of the policy.

[39] If the parties cannot otherwise agree as to costs of the application, they may make written submissions within 30 days.


LEDERMAN, J

DATE: October 8, 2008

COURT FILE NO: 07-CL-7122
DATE: 20081008

**SUPERIOR COURT OF JUSTICE
ONTARIO
Commercial List**

MICHAEL J. QUILLING, IN HIS CAPACITY AS COURT
APPOINTED RECEIVER FOR COURTNEY WALLIS
SIMPSON

- AND -

NICHOLAS SMITH ATTORNEY IN FACT IN CANADA
FOR LLOYD'S UNDERWRITERS

BEFORE: THE HONOURABLE MR. JUSTICE
SIDNEY N. LEDERMAN

REASONS FOR JUDGMENT

LEDERMAN, J.

DATE: October 8, 2008

EXHIBIT "G"

Endorsement / disposition January 31 2008

Ms Macmillan for ∇
Mr Falley for Δ .

Full day settlement conference scheduled,
on consent, for April 21, 2008.

Settlement conference briefs to be served/
filed by March 31, 2008.

Alexander for ∇
(HOX).

April 21/08.

Mr Carter, Mr. Bainsberry for Receiver,
& Mr Udayan Pandya, proposed
rep ∇ for class.

Mr Falley for the ~~Receiver~~ Insurer,
Settlement not reached. Matter to proceed to
determination on the merits. $\frac{1}{2}$ day should be
sufficient. Counsel to prepare an agreed statement
of facts. Counsel for Insurer points out, & counsel
for the Receiver agrees, that if the Receiver is
successful, proceeds are paid to the individuals
who were defrauded (members of the ~~proposed~~
'deposit' class in the proposed class proceeding),
& not the Receiver. ~~As such~~ The insurer
concedes that the Receiver has standing, qua
Receiver of a "Resistant", to seek the declaratory
relief in issue. The individuals have all
filed direct claims w/ the Insurer. Hence,

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if the Receiver succeeds, then the Insurer
can (& will) make payments directly to

each of the individuals, & there will
be no need for the proposed class
proceeding & Parties to proceed to
discovery & trial. Schedule
(10/2) heavy.

EXHIBIT "H"

Court File No.
Commercial Court File No. 07-CL-7122

COURT OF APPEAL FOR ONTARIO

BETWEEN:

MICHAEL J. QUILLING, in his capacity as Court appointed receiver for
COURTNEY WALLIS SIMPSON

Applicant
(Respondent in Appeal)

- and -

NICHOLAS SMITH ATTORNEY IN FACT IN CANADA FOR
LLOYD'S UNDERWRITERS

Respondent.
(Appellant in Appeal)

NOTICE OF APPEAL

THE RESPONDENT appeals to the Court of Appeal from the Order of the Honourable Justice Lederman, dated October 8, 2008, made at Toronto.

THE APPELLANT asks that the Order be set aside and that an Order be granted declaring that the provisions of the insurance policy in issue limit the sum payable to Claimants under the Consumer Deposit Insurance Extension of the policy is limited to \$500,000.00 on a pro rated basis.

THE GROUNDS OF APPEAL are as follows:

1. The learned judge erred in his interpretation of the insurance policy in issue by failing to find that the events giving rise to the claim were a single occurrence within the meaning of the policy.
2. In the alternative, the learned judge erred in his interpretation of the insurance policy in issue by failing to find that the events giving rise to the claim were a series of related occurrences within the meaning of the policy.
3. And such further and other grounds as counsel may advise and this Honourable Court permit.

THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS:

1. *Courts of Justice Act*, R.S.O. 1990, c.C.43 S. 6(1)(b);
2. judgment is final;
3. no leave to appeal is required; and
4. the amount in issue exceeds \$500,000.00.

Dated: November 4, 2008

MILLER THOMSON LLP
Scotia Plaza, P.O. Box 1011
40 King Street West, Suite 5800
Toronto, ON M5H 3S1

Robert Falby, Q.C. - LSUC#: 11504V
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Solicitors for the Respondent
(Appellant in the Appeal)

TO: BENNETT JONES LLP
One First Canadian Place
Suite 3400, P. O. Box 130
Toronto, ON M5X 1A4

Lincoln Caylor / David Rainsberry
LSUC #: 37050L/49890Q
Tel: 416.777.6121 / 416.777.6236
Fax: 416.863.1716

Solicitors for the Applicant
(Respondent in the Appeal)

Court File No:
Commercial Court File No.: 07-CL-7122

MICHAEL J. QUILLING v. NICHOLAS SMITH

COURT OF APPEAL FOR ONTARIO

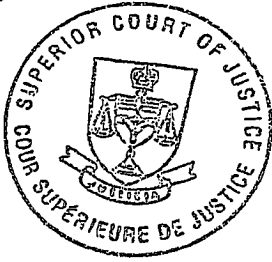
NOTICE OF APPEAL

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Solicitors for the Respondent
(Appellant in the Appeal)

EXHIBIT "I"



Court File No. 07-CL-6843

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

THE HONOURABLE MR.) THURSDAY , THE 2ND DAY
JUSTICE CAMPBELL) OF OCTOBER , 2008

BETWEEN:

MICHAEL J. QUILLING, RECEIVER FOR
COURTNEY WALLIS SIMPSON

Plaintiff

- and -

ZAPFE HOLDINGS INC. AND MICHAEL SOURLIS

Defendants

ORDER

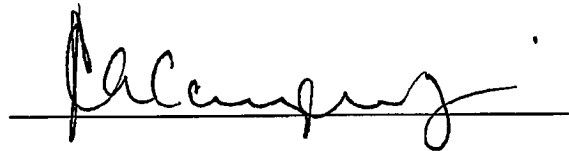
THIS MOTION, made by the plaintiff, Michael J. Quilling (the "Receiver") for an order approving the Receiver's recommendations as set out in the Receiver's report, was heard this day.

ON READING the materials filed, the consent of the defendants filed, and on hearing the submissions of counsel for the Receiver,

1. **THIS COURT ORDERS** that the Receiver has authority to fully and finally resolve the matters at issue in this action on the following terms:


- (a) Zapfe Holdings Inc. and Michael Sourlis or any one of them shall pay to the Receiver's counsel, Bennett Jones LLP, in trust certified funds in the amount of \$80,493.67;

- (b) To the extent necessary, the Receiver shall assist in facilitating transfer of ownership of 519,314 common shares of Dianor Resources Inc. (the "Dianor Shares") to one or more of the defendants, as directed by the defendants;
- (c) The parties shall exchange a full and final mutual release in the form annexed hereto as schedule "A"; and
- (d) the settlement funds referred to in paragraph 1(a) above shall be held in escrow by the Receiver's counsel, Bennett Jones LLP, pending completion of the obligations described in paragraphs 1(b) and 1(c) above.
2. **THIS COURT ORDERS** that RBC Dominion Securities Inc. may do all things necessary in order to facilitate the fulfillment of the obligation described at paragraph 1(b) above.
3. **THIS COURT ORDERS** that the Dianor Shares freeze order originally granted on March 9, 2006 by order of Justice Mesbur and extended by endorsement of Justice Spies dated April 26, 2006 is hereby lifted.
4. **THIS COURT ORDERS** that the within action is dismissed without costs.



ENTERED AT / INSCRIT A TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

OCT 02 2008

PER/PAR:  Joanne Nicoara
Registrar, Superior Court of Justice

Schedule "A"

MUTUAL RELEASE

BETWEEN:

MICHAEL J. QUILLING, in his capacity as court appointed
receiver of Courtney Wallis Simpson

Of the First Part

- and -

ZAPFE HOLDINGS INC. and MICHAEL SOURLIS

Of the Second Part

FOR AND IN CONSIDERATION of payment of the sum of Eighty Thousand Four Hundred and Ninety Three Dollars and Sixty Seven Cents (\$80,493.67) by Zapfe Holdings Inc. and Michael Sourlis (collectively, the "Releasers") to Michael J. Quilling in his capacity as a court appointed receiver of Courtney Wallis Simpson ("Simpson") in Superior Court of Justice Commercial List court file nos. 05-CL-6159 and 07-CL-6843 (the "Dianor Shares Action") (the "Receiver"), the transfer of ownership in share certificate no. 0-01476 representing 301,923 common shares of Dianor Resources Inc. and share certificate no. 0-01630 representing 217,391 common shares of Dianor Resources Inc. (the "Dianor Shares") to one or more of the Releasers as they may direct and the covenants contained herein, the receipt and sufficiency of which is hereby acknowledged, the undersigned on their own behalf and on behalf of their executors, heirs, administrators, representatives, barristers, solicitors, directors, officers, principals and assigns do hereby irrevocably release, acquit, remise and forever discharge each other, the receivership estate of Simpson and their respective executors, heirs, administrators, representatives, partners, employees, barristers, solicitors directors, officers, principals and assigns (collectively, the "Releasees"), from any and all actions, causes of action, claims, suits, penalties, indemnities,

proceedings, prosecutions, charges, complaints and demands for damages, losses, injuries, indemnification, penalty, interest or costs, that the undersigned had, now have, can, will or may hereafter have respecting any of the Releasees by reason of any act, cause, matter or thing that were or could have been brought or raised with respect to the Dianor Shares Action or the receivership of the Dianor Shares.

AND FOR THE SAID CONSIDERATION, the undersigned represent and warrant that they have not assigned to any persons, firm or corporation, any of the actions, causes of action, claims, suits or demands which they release by this release, or with respect to which they may agree not to make any claim or take any proceedings herein.

AND FOR THE SAID CONSIDERATION the undersigned further agree not to commence any claim against any other person or corporation who might claim contribution or indemnity under the provisions of any statute or otherwise from the Releasees.

AND IT IS FURTHER UNDERSTOOD AND AGREED that this release shall be binding upon and enure to the benefit of the parties to this release and their respective affiliated or related companies, executors, heirs, administrators, partners, shareholders, directors, officers, employees, agents, associates, representatives, predecessors, successors, barristers, solicitors and assigns.

AND IT IS FURTHER UNDERSTOOD AND AGREED that this release may be executed in any number of counterparts, each of which when executed and delivered, including any counterpart executed by a party and transmitted by facsimile transmission, shall be considered as an original, and that such separate counterparts shall constitute together one and the same instrument, notwithstanding their date of actual execution.

AND IT IS UNDERSTOOD AND AGREED that the acceptance of the said consideration is in full accord and satisfaction of the disputed claim, and that the payment of the said consideration is not an admission of liability.

THE UNDERSIGNED DECLARE that they have read this release and fully understand the terms of this settlement, that the consideration stated herein is the sole consideration for this release and that they have voluntarily accepted the said consideration for the purpose of making full and final compromise, adjustment and settlement of all claims as aforesaid.

THE UNDERSIGNED DECLARE that they have obtained independent legal advice with respect to the matters addressed in this release and the terms of settlement which have been agreed to by the undersigned and that they fully understand this release and the terms of settlement. The undersigned hereby voluntarily accept the said terms for the purpose of making full and final compromise, adjustment and settlement of all claims as aforesaid.

IN WITNESS WHEREOF, the undersigned have hereunto executed this release personally.

Date:

Zapfe Holdings Inc.
Per:

Date:

Michael Sourlis

Date:

Michael J. Quilling, court appointed receiver to
Courtney Wallis Simpson

Michael J. Quilling, Receiver for Courtney Wallis Simpson
Plaintiff

v.

Zapfe Holdings Inc. et al.
Defendants

Court File No.: 07-CL-6843

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at
Toronto

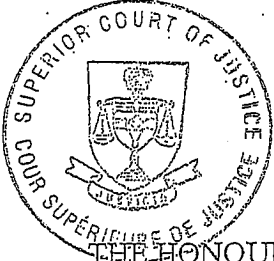
ORDER

BENNETT JONES LLP
One First Canadian Place
Suite 3400, P.O. Box 130
Toronto, ON M5X 1A4

Lincoln Caylor / David Rainsberry
LSUC Nos. 37030L / 49890Q
Tel: 416-777-6121 / 6236
Fax: 416-863-1716

Solicitors for the Plaintiff

EXHIBIT "J"



Court File No. 05-CL-6159

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE MR
JUSTICE Farley

) THURSDAY, THE 23rd DAY OF
)
) DECEMBER, 2005

BETWEEN:

UDAYAN PANDYA

Plaintiff

- and -

COURTNEY WALLIS SIMPSON, YORK REGION
REALTY INC., WALLIS SIMPSON & ASSOCIATES,
COURTNEY WALLIS SIMPSON c.o.b. as YORK MANAGEMENT GROUP
AND CAMEO INVESTMENTS

Defendants

In the Matter of the *Class Proceedings Act, 1992*

SECOND AMENDED AND RESTATED INITIAL ORDER

THIS MOTION made by the plaintiff for an order appointing a receiver of Courtney Wallis Simpson ("Simpson") personally and for York Region Realty Inc. ("York Reality") pursuant to s. 101 of the *Courts of Justice Act* with investigatory and preservation powers was heard by the court this day at 393 University Avenue, Toronto.

UPON READING the First Report of the Receiver dated December 13, 2005 and on hearing the submissions of counsel for the Receiver,

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion Record is hereby abridged so that this motion is properly returnable today and dispenses with further service thereof.

2. **THIS COURT ORDERS** that Michael J. Quilling be appointed a receiver (the "Receiver") over the assets of Simpson, Courtney Wallis Simpson c.o.b. as York Management Group and York Realty (the "Defendants") pursuant to s. 101 of the *Courts of Justice* Act with the powers and duties hereinafter set out.

3. **THIS COURT ORDERS** that the defendants be given leave on three days notice to the plaintiff and the Receiver to bring any motion they might see fit to vary this order.

4. **THIS COURT ORDERS** that Bennett Jones LLP be appointed as counsel to the Receiver, that the Receiver shall, in its discretion be entitled to share information received by it with the plaintiff but that the information obtained under this order shall not, without further direction and order, of this Court, be used in any criminal proceedings.

5. **THIS COURT ORDERS** that the Receiver shall have the power to engage consultants, agents, employees, experts, auditors, accountants, managers, solicitors and counsel and such other assistants from time to time and on whatever basis, including on a temporary basis, as it may consider an the business of any of the defendants or generally exercising the powers and duties conferred by this Order.

6. **THIS COURT ORDERS** that the Receiver may apply to this Court for advice and directions relating to the proper exercise of its powers hereunder, or for any variations to this Order.

Preservation of Assets

7. **THIS COURT ORDERS** that the Receiver is hereby empowered and authorized for and on behalf of and in the name of any of the Defendants to take possession and control of all of the present and future assets, undertaking and property of the Defendants and any funds, proceeds or other assets directly or indirectly related to the funds allegedly raised by the Defendants as alleged in the statement of claim (the "Property") and any and all proceeds, receipts and

disbursements arising out of or from the Property, until further order of this Court, and to act at once in respect of the Property. Without in any way limiting the generality of the foregoing and in furtherance thereof, the Receiver is hereby expressly empowered and authorized on the Receiver's behalf, but not obligated:

- (a) to take such steps as in the opinion of the Receiver are necessary or appropriate to receive, preserve, protect and maintain control of the Property, or any part or parts thereof, including, but not limited to, the changing of locks and security codes, the relocating of Property to safeguard it, the engaging of independent security personnel, the taking of physical inventories and the placement of such insurance coverage as may be necessary or desirable, provided that the Receiver shall not evict or dispossess any occupant of any residential dwelling without further order of this Court made on notice to such occupant;
- (b) to take such steps as in the opinion of the Receiver are necessary or appropriate to maintain control over all receipts and disbursements arising out of or from the Property;
- (c) to receive and collect all monies, debts, claims, choses in action and accounts now owed or hereafter owing to any of the Defendants in respect of the Property and to exercise all remedies of any of the Defendants in collecting all such monies, including, without limitation, to enforce any security held by any of the defendants and to receive and recover all funds, monies, cash, cash equivalents, negotiable securities, accounts and any other assets on deposits to banks, brokerages and other financial or other institutions;
- (d) to join in and execute, assign, issue and endorse such transfers, conveyances, contracts, leases, deeds, bills of sale, cheques, bills of lading or exchange, or other documents of whatever nature in respect of any of the Property, in the name and on behalf of any of the Defendants, which are necessary, desirable or convenient in, the opinion of the Receiver for any purpose pursuant to this Order;

- (e) to initiate, prosecute and continue the prosecution of any and all proceedings as may in its judgment be necessary or desirable to properly protect or realize upon the Property and to defend all proceedings now pending or hereafter instituted against any of the Defendants or the Receiver, the prosecution of or defence of which will, in the judgment of the Receiver, be necessary to properly protect or realize on the Property or to protect the administration by the Receiver of the affairs of any of the defendants and the Property, and to settle or compromise any such proceedings which in the judgment of the Receiver should be settled;
- (f) to market any or all of the Property, including advertising and soliciting offers in respect of the Property or any part thereof and negotiate such terms and conditions of sale as the Receiver in its discretion may deem appropriate, provided that any such sale or disposition of Property shall, if the Defendants do not consent to the same, be subject to the Court's approval;
- (g) to report to, meet with and discuss with such creditors of the Defendants and their advisors, including the Mortgage Fraud Scheme victims who are class members in court file no. 05-CL-6178, as the Receiver deems appropriate including holding town hall or other meetings on all matters relating to the Property and receivership; and
- (h) to register this order in any public registry against title to any of the Property. Without limiting the generality of the foregoing this court orders that this order be registered against the real property and other assets described at Schedules "B" and "C" hereto.

8. **THIS COURT ORDERS** that no person having notice of this order shall interfere with, obstruct or in any way hinder the Receiver in the fulfillment or pursuit of its duties hereunder and that all such persons are under an obligation to deliver up to the Receiver any Property or other thing to which the Receiver is entitled to under this order. In the event that any person contests that any asset, document or thing is Property under this order or is document or record properly producible to the Receiver then that person shall first deliver up the asset in question to the Receiver or to such third party as the Receiver in its discretion may agree for safekeeping and

the person contesting the Receiver's right may thereafter, if so advised, bring an application to this Court for directions.

9. **THIS COURT ORDERS** that the Receiver may receive information from persons as to the details of their deposit of trust funds investments with Simpson and the other Defendant but that the Receiver shall not be under any obligation to call for claims, validate claims or make recommendations with respect the disbursement of funds to investors without further order of this Court.

10. **THIS COURT ORDERS** that no demands, actions, motions, steps, registrations, perfections, administrative proceedings, self-help remedies, or any other acts, proceedings or private remedies whatsoever in respect of the Property, including without limitation, the enforcement of security, liens or collection of any debt or liability, the exercise of any debt or liability, the exercise of any landlord's right to distrain or terminate any lease, the acceleration, amendment or termination of any contract, including any contract of insurance, the exercise of any right of set-off or combination of accounts, the exercise of any construction, mechanics' repair, storage or other lien, or the commencement or continuation of any proceedings under any Environmental Laws (as hereinafter defined) in any jurisdiction in which the Property may be located, shall be taken against the Receiver, with respect to the Property or any part thereof, without the prior written consent of the Receiver or leave of this Court first being obtained upon not less than seven days' notice to the Receiver.

11. **THIS COURT ORDERS** that the Defendants and anyone having knowledge of this order be and they are hereby restrained, pending consent of all parties or further order of this Court:

- (a) from removing from Ontario or in any way disposing, dealing with or diminishing the value of any of the Defendants' property, whether real or personal, present or future, held in Ontario or elsewhere, whether held in the Defendants' names or not, pending the final determination of this action or further order of this Court;
- (b) from withdrawing or causing or permitting the withdrawal of or transferring of funds or issuing of cheques or other instruments from any of the defendants' bank

accounts or investment accounts of any nature whatsoever, whether held individually or jointly with any other person, pending the final determination of this action or further order of this Honourable Court, provided that the defendants shall have leave to seek variation of this order in order to permit the withdrawal of a reasonable amount as ordinary living expenses provided that if any such order is sought the Defendants must have fully complied with this order in all respects including the provision to the Receiver of the information required to be provided to the Receiver.

Documents and Investigations

12. **THIS COURT ORDERS** that the Receiver shall forthwith be entitled to take possession of and examine the Defendants' books and records and make such inquiries as it deems prudent and necessary of the Defendants' bankers, accountants, auditors, advisors, managers, experts, solicitors, agents, officers, employees and others in order to determine the financial status of the Defendants, and shall conduct a review and, if necessary, a detailed examination of the financial records of the Defendants.

13. **THIS COURT ORDERS** that the Receiver shall report to this Court at such times and in such fashion as this Court may direct.

14. **THIS COURT ORDERS** that the Defendants and their accountants, auditors, advisors, agents, managers, experts, solicitors, agents, officers and employees, including, without limitation, any accountants, bankers or financial, legal, advisors and the persons set out in Schedule "A", (the "Affected Persons") shall forthwith provide to the Receiver all of the books and records relating to the Defendants' financial history and dealings, including, without limitation, all ledgers, bank statements and records, cheques, financial statements, receipts, vouchers, deposit slips, contracts, agreements, accounting records, computer records (including but not limited to tapes and/or discs) or other documents or records of any kind or nature, howsoever stored or maintained, relating to the Defendants (the "Documents"). Provision of the Documents to the Receiver shall not breach any confidentiality or other non-disclosure obligations the Affected Persons might otherwise have to the Defendants and it shall be deemed that the Defendants shall have consented to the release of the Documents. The Receiver shall

allow the Defendants and their advisors reasonable access to and the ability to make copies of any and all such books and records in the possession of the Receiver. The defendants shall allow the Receiver to make, retain and take away copies of any or all of the Documents and shall forthwith grant to the Receiver access to and use of accounting, computer, software and physical facilities relating thereto promptly at the request of the Receiver.

15. **THIS COURT ORDERS** that if any of the Documents is stored or otherwise contained on a computer or other electronic system of information storage, the Defendants and all Affected Persons shall forthwith give unfettered access to the Receiver for the purpose of allowing the Receiver to obtain a full copy of the Documents, whether by way of printing same onto paper or making copies of computer discs or such other manner of retrieving and copying same as the Receiver in its discretion deems expedient. For the purposes of this paragraph, the defendants and the Affected Persons shall provide the Receiver with all such assistance in gaining access to the Documents as the Receiver may in its discretion require, including, without limiting the generality of the foregoing, forthwith providing the Receiver with instructions on the use of any computer or other system and providing the Receiver with any and all access codes, passwords or other codes as may be required to gain access to the Documents.

16. **THIS COURT ORDERS** that Internet service providers or persons, corporations or individuals who provide e-mail, World Wide Web, file transfer protocol or other Internet connection services to the defendants and/or its present and former directors, officers, employees and agents to access the Internet or World Wide Web e-mail or other similar services, deliver to the Receiver, documents, server files, archive files or any other information in any form in any way recording messages, emails or other information sent or received by the Defendants and/or its present and former directors, officers, employees and agents in the course of their association and in conducting their duties related to the operations and affairs of the defendants.

17. **THIS COURT ORDERS** that the Receiver shall have ongoing access to the Defendants' current and future bank account statements and other financial records, copies of which shall be provided to the Receiver as and when demanded by the Receiver. The Defendants and the third parties shall co-operate and consent to the distribution of such records to the Receiver.

18. **THIS COURT ORDERS** that the Receiver is empowered to demand production from third parties (including but not limited to the Defendants' advisors, banks, financial institutions and the persons set out in Schedule "A") of documents relating to:

- (a) the Defendants' financial affairs;
- (b) the deposit of funds received in connection with the sale of commercial real estate;
- (c) the identities of the persons who have provided deposit funds to Simpson and the other defendants;
- (d) the bank accounts or other financial records referable to the accounts into which such funds were deposited including documents referable to any withdrawal, transfer or dissipation of funds in such accounts; and
- (e) commissions, fees, expenses or other amounts paid to any persons in connection with the sale of such securities and any agreements, arrangements or any other communication with respect to the payment of such amounts;
- (f) and further directs that all such third parties (including all Affected Persons) shall co-operate fully with the Receiver, subject to claims of legal privilege.

19. **THIS COURT ORDERS** that the Receiver is empowered to compel the attendance, on two clear days written notice by letter from the Receiver or its counsel, of persons believed by the Receiver to have knowledge of the Defendants' affairs for the purpose of being examined under oath by the Receiver or by such person as to whom the Receiver has or may delegate this power. In particular, and without limiting the general nature of the power conveyed by this paragraph, the Receiver is empowered for the purposes of performing its duties hereunder to examine under oath the persons named in Schedule "A" to this order and any persons who may have received transfers of assets or funds from the defendants, provided that nothing herein shall apply, without further order of this Court, to compel any person who has been actually charged with a criminal offence to so testify and that any persons who so testify shall have the right to invoke the protections of the *Canada Evidence Act* and the *Canadian Charter of Rights and*

Freedoms. If the persons to be examined have a personal residence or regular place of business within 60 kilometres of an office of Bennett Jones LLP (Toronto, Edmonton or Calgary) such examination shall take place at such office failing which it shall take place at any place where an examination of discovery may take place under the *Rules of Civil Procedure* in the province where the examination is conducted.

20. **THIS COURT ORDERS** that Simpson shall provide to the Receiver within 7 days of service of this order an affidavit under oath specifying her knowledge on the following matters:

- (a) specifics of all corporations, partnerships, or other entities in which she has a direct or indirect interest with particulars of the nature of such interest;
- (b) specifics of all bank, brokerage or other accounts, wherever situate, in her name, the name of York Region Realty Inc., the name of any of the entities in (a) hereof or over which she has any signing authority or any other direct or indirect control;
- (c) specifics of all bank, brokerage or other accounts, where funds were deposited, all accounts to which such funds may have been transferred and the present whereabouts of such funds;
- (d) whether any assets were purchased or acquired in whole or in part with such funds and, if so, the particulars of such assets and their present location with particulars of the assets involved name of the person or entity who holds title to such assets, the date of acquisition, acquisition cost and a current estimate of value; and
- (e) specifics of any disposition of assets (including transfer of funds) in excess of \$10,000 in the last 2 years and that this affidavit shall be deemed to have been provided by compulsion of law and its further use in any other court proceeding be subject to the protections of the *Canada Evidence Act* and the *Canadian Charter of Rights and Freedom*.

21. **THIS COURT ORDERS** that the Receiver is authorised to enter upon the business premises of the persons set out in Schedule "A" (collectively the "Premises") and to examine

anything and take away any documents or record found at the premises that the Receiver is authorised hereunder to require to be produced to it.

22. **THIS COURT ORDERS** that the Receiver shall have full power to investigate any gift, transfer, conveyance, settlement or any other disposition (a "Conveyance") of any interest in any assets, funds or any other property by the defendants to third parties (the "Conveyed Property") and to compel the production of information from any person with respect to such Conveyed Property and the circumstances surrounding the Conveyance as if such Conveyed Property was Property under this order and that the Receiver shall be at liberty to apply to the Court for any appropriate order relating to the preservation of any such Conveyed Property.

Other

23. **THIS COURT ORDERS** that no proceedings shall be brought against the Receiver in any Court or other tribunal unless leave of this Honourable Court is first obtained on motion on at least seven days notice to the Receiver and the parties.

No Proceedings Against the Debtor or the Property

24. **THIS COURT ORDERS** that no proceeding against or in respect of the Defendants or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court and any and all proceedings currently under way against or in respect of the Defendants or the Property are hereby stayed and suspended pending further Order of this Court.

No Exercise of Rights or Remedies

25. **THIS COURT ORDERS** that all rights and remedies against the Defendants, the Receiver, or affecting the Property, are hereby stayed and suspended except with the written consent of the Receiver or leave of this Court, provided however that nothing in this paragraph shall (i) empower the Receiver or the Defendants to carry on any business which the Defendants are not lawfully entitled to carry on, (ii) exempt the Receiver or the Defendants from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent

the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

26. **THIS COURT ORDERS** that the Receiver shall incur no liability or obligation as a result of its appointment or the fulfilment of its duties in carrying out the provisions of this order, save and except for any gross negligence or wilful misconduct on its part.

27. **THIS COURT ORDERS** that all the costs of this receivership including without limitation the Receiver's fees and disbursements (including the amounts which the Receiver is obliged to pay others) and the fees and disbursements incurred by Bennett Jones LLP in carrying out its duties herein shall be a first charge on any assets recovered in the receivership herein, subject to approval of the quantum of costs by the Court. The Receiver shall have the right to apply to the Court for approval and payment of its fees and disbursements on an interim basis provided that 15 days notice shall be given to the defendants of any such application. The Receiver shall also have the power, if so advised, to move to have the receivership terminated and to be discharged as Receiver.

28. **THIS COURT ORDERS** that the plaintiff's costs of this motion shall be allowed in the same manner as the Receiver's fees and disbursements and shall be paid out by the Receiver as a second charge on any assets recovered in the receivership.

29. **THIS COURT ORDERS** that the Receiver be granted leave to apply to the Court for approval to borrow and to provide whatever security as may be appropriate, if so advised.

30. **THIS COURT ORDERS** that, except as otherwise specified herein, the Receiver is at liberty to serve any notice, form or other document in connection with these proceedings by forwarding copies by prepaid ordinary mail, courier, personal delivery or electronic transmission to the defendants or other appropriate parties at their respective addresses or other contact particulars as last indicated in the records of the defendants and that any such service shall be deemed to be received on the date of delivery if by personal delivery or electronic transmission, on the following business day if delivered by courier, or three business days after mailing if by ordinary mail.

31. **THIS COURT ORDERS** that the Receiver may serve any court materials in these proceedings (including, without limitation, application records, motion records, facta and orders) on all represented parties electronically, by e-mailing a PDF or other electronic copy of such materials (other than any book of authorities) to counsels' e-mail addresses as recorded on the service list, and posting a copy of the materials to an internet website to be hosted by Quilling Selander Cummiskey Lownds (the "Website") as soon as practicable thereafter, provided that the Receiver shall deliver hard copies of such materials to any party requesting same as soon as practicable thereafter.

32. **THIS COURT ORDERS** that any party in these proceedings may serve any court materials (including, without limitation, application records, motion records, facta and orders) electronically, by emailing a PDF or other electronic copy of all materials (other than any book of authorities) to counsels' e-mail addresses as recorded on the service list; provided that such party shall deliver both PDF or other electronic copies and hard copies of full materials to counsel to the Receiver and to any other party requesting same and the Receiver shall cause a copy to be posted on the Website, all as soon as practicable thereafter.

33. **THIS COURT ORDERS** that the Receiver be permitted to (i) enter into a new listing agreement with John Walley of Sutton Group in Stouffville, (ii) sell Simpson and York Realty's real property assets and contents, and (iii) make it a condition of the new listing agreement that all sales are subject to court approval and to hold all proceeds from the sales in an interest bearing account;

34. **THIS COURT ORDERS** that the Receiver, if so advised, be permitted to bring a lawsuit as against Lia Hurst and seek a certificate of pending litigation in order to regain possession of the properties alleged to be rightfully owned by Simpson and if successful, to sell those properties, the proceeds of which will be deposited into an interest bearing account;

35. **THIS COURT ORDERS** that the Receiver deal directly with the Real Estate Council of Ontario on behalf of all of the victims for the benefit of the estate who have submitted claims;

36. **THIS COURT ORDERS** that the Receiver or Receiver's counsel may examine Adam Cox and compel production of documents relevant to the real estate deposit scheme;

37. **THIS COURT ORDERS** that leave is granted to the Receiver to assert challenges to the validity, quantum and priority of the mortgages held by Ajay Pahwa as described in Schedule "D" to this Order (the "Pahwa Mortgages"). The exercise of power of sale under Part III of the Mortgages Act or other enforcement upon the Pahwa Mortgages is hereby restrained, pending further order of the Court. The Receiver shall proceed forthwith by commercially reasonable steps to market the properties that are the subject of the Pahwa Mortgages and the Receiver shall seek court approval of any Agreement of Purchase and Sale upon five days' prior written notice to Ajay Pahwa, at which time directions may be given for discharge of the applicable Pahwa Mortgage on closing and vesting in the court approved purchaser, subject to payment of applicable real property taxes, utilities and prior encumbrances, with the amounts that are claimed by Ajay Pahwa pursuant to the Pahwa Mortgages or such amount as directed by the court to be held in a separate interest-bearing Receiver's bank account pending further order of the court. Pending sale of the properties that are the subject of the Pahwa Mortgages, the Receiver shall be responsible for ensuring that real estate taxes and fire insurance coverage are maintained in good standing. The Receiver's charge as described in paragraph 27 hereof upon the Simpson assets shall not rank in priority to the Pahwa Mortgages, but shall be subordinate to the amounts claimed by Ajay Pahwa pursuant to the Pahwa Mortgages or such amounts as directed by the court, pending final determination of the validity, quantum and priority of the Pahwa Mortgages;

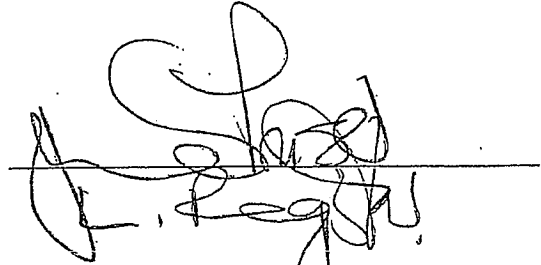
38. **THIS COURT ORDERS** that a bank account be opened in Toronto at a bank selected by the Receiver in Courtney Wallis Simpson's name, which account may accept deposits from Simpson but from which funds can be accessed only by the Receiver through Bennett Jones LLP;

39. **THIS COURT ORDERS** that all proceedings as against Simpson, York Realty, Wallis Simpson & Associates and York Management Group be stayed and that any and all consents to judgment endorsed by Simpson in her personal capacity or as director of York Realty or York Management Group, be deemed ineffective;

40. **THIS COURT ORDERS** that the posting of information on the Receiver's website be approved;

41. **THIS COURT ORDERS** that the claim form as filed with the court be approved;
42. **THIS COURT ORDERS** that the Statutory Declaration form may be posted on website and distributed to potential claimants;
43. **THIS COURT ORDERS** that, unless otherwise provided herein or by this Court, no document, order or other material need be served on any person in respect of these proceedings unless such person has served a Notice of Appearance on the solicitors for the Receiver and has filed such notice with this Court.
44. **THIS COURT ORDERS** that neither the making of this order nor anything in this order shall deem the Receiver to be an owner of any of the Property for any purpose and that neither the making of this order nor anything in this order shall vest in the Receiver the care, ownership, control, charge, occupation, possession or management or require or obligate the Receiver to occupy or to take control, care, charge, occupation, possession or management of any of the Property which may be environmentally contaminated, or a pollutant or a contaminant, or cause or contribute to spill, discharge, release or deposit of a substance contrary to any to occupy or to take control, care, charge, occupation, possession or management of any of the Property which may be environmentally contaminated, or a pollutant or a contaminant, or cause or contribute to spill, discharge, release or deposit of a substance contrary to any legislation enacted for the protection or preservation of the environment including, without limitation, the *Canadian Environmental Protection Act*, the *Transportation of Dangerous Goods Act (Canada)*, the *Environmental Protection Act (Ontario)*, the *Emergency Plans Act 1963 (Ontario)*, the *Ontario Water Resources Act*, the *Occupational Health and Safety Act (Ontario)* or the regulations hereunder, or any federal or provincial legislation, or rule of law or equity in any jurisdiction affecting the environment, the transportation of goods, or hazardous waste (collectively, "Environmental Laws"). The Receiver shall not be deemed as a result of this order to be in control, charge, occupation, possession or management of any of the Property within the meaning of any Environmental Laws.
45. **THIS COURT SEEKS AND REQUESTS** the aid and recognition of any court or any judicial, regulatory, or administrative body in any province of Canada and the Federal Court of Canada and any judicial, regulatory or administrative tribunal or other court constituted pursuant

to the Parliament of Canada and any court or any judicial, regulatory or administrative body of any other nations and states and the provinces, states or other subdivisions of such nations and states to act in aid of and to be complementary to this Court in carrying out the terms of this order.

A handwritten signature in black ink, appearing to be 'L. P. ...', written over a horizontal line.

ENTERED AT / INSOBIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

DEC 23 2005

PER/PAR: AB

Schedule "A"

1. Wayne Simpson
587 Cam Fella Boulevard
Stouffville, Ontario
L4A 7H3
2. York Management Group
587 Cam Fella Boulevard
Stouffville, Ontario
L4A 7G9
3. Royal Bank of Canada
Transit No. 02982
47 Main Street
Markham, Ontario
4. Royal Bank of Canada
Davis and Highway 404 Branch
Toronto, Ontario
5. Canadian Imperial Bank of Commerce
Transit No. 01642
4360 Highway 7
Unionville, Ontario
6. Bank of Montreal
Town Square Branch
Richmond Hill, Ontario
7. TD Canada Trust
Town Square Branch
Richmond Hill, Ontario
8. TD Canada Trust
Davis and Highway 404 Branch
Toronto, Ontario
9. Bank of Nova Scotia
Davis and Highway 404 Branch
Toronto, Ontario
10. HSBC
Richmond Hill
11. Laurentian Bank
Newmarket, Ontario

Schedule "B"

1. 587 Cam Fella Boulevard
Stouffville, Ontario
L4A 7H3

Legal Description:

PCL 19-1 SEC 65 M2296: LT 19 PL 65R2296: Whitchurch-Stouffville

2. PIN 03715-0004
Whitechurch, Ontario

Legal Description:

PT LT 30 PL 54 Stouffville; PT LT 31 PL54 Stouffville, PT LT 40 PL 54 Stouffville; PT
LT 41 PL 54 Stouffville PTS 1, 7 65R2555; S/T R221467, R221469

3. 1038 Kawagama Lake Road
Dorset, Ontario

Legal Description:

Con. 13 PT LOT 1 RP19R3154, Parts 1, 6, 7
Dorset, Algonquin Highlands Township

4. PIN 03710-0193/0194
Stouffville, Ontario

Legal Description:

PT LTS 49 & 50
PL 70 Stouffville PT 2 65R256J4 Whitchurch-Stouffville

Schedule "C"

1. Royal Bank of Canada
Transit No. 02982
47 Main Street
Markham, Ontario
2. Royal Bank of Canada
Davis and Highway 404 Branch
Toronto, Ontario
3. Canadian Imperial Bank of Commerce
Transit No. 01642
4360 Highway 7
Unionville, Ontario
4. Bank of Montreal
Town Square Branch
Richmond Hill, Ontario
5. TD Canada Trust
Town Square Branch
Richmond Hill, Ontario
6. TD Canada Trust
Davis and Highway 404 Branch
Toronto, Ontario
7. Bank of Nova Scotia
Davis and Highway 404 Branch
Toronto, Ontario
8. HSBC
Richmond Hill
9. Laurentian Bank
Newmarket, Ontario

Schedule "D"

Mortgages Held By Mr. Ajay Pahwa

1. \$210,000 mortgage registered on February 10, 2005 on:
PIN 03715-0004, PT LT 30 PL 54 Stouffville; PT LT 31 PL 54 Stouffville; PT LT 40 PL 54 Stouffville; PT LT 41 PL 54 Stouffville PTS 1, 7 65R2555; S/T/ R221467, R221469 (the 6072 Main Street Property);

2. \$220,000 mortgage registered on March 9, 2005 on:
PIN 03710-0193/0194, PT LTS 49 & 50, PL 70 Stouffville PT 2 65R256J4 (the Stouffer Street Property); and

3. \$220,000 mortgage registered on March 8, 2005 and a Notice of Agreement Amending the Charge registered on June 28, 2005 increasing the principal amount to \$440,000:
1038 Kawagama Lake Road, Dorset, ON, Con 13, PT LT 1 RP19R3154, Parts 1, 6, 7 (the Kawagama Property)

Udayan Pandya
Plaintiff

v.

Courtney Wallis Simpson *et al.*
Defendants

Court File No.: 05-CL-6159

**ONTARIO
SUPERIOR COURT OF JUSTICE**
(Commercial List)

In the matter of the *Class Proceedings
Act, 1992*

Proceeding commenced at Toronto

**SECOND AMENDED AND
RESTATED INITIAL ORDER**

BENNETT JONES LLP
One First Canadian Place
Suite 3400, P.O. Box 130
Toronto, Ontario
M5X 1A4

Lincoln Caylor / M. Joanne MacMillan
Tel: (416) 777-6121 / 4629
Fax: (416) 863-1716
LSUC Reg. No. 37030L/43529J

Solicitors for the plaintiff

Exhibit K

COURT FILE NO.: 05-CL-6159

DATE: 2006-06-08

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: UDAYAN PANDYA, Plaintiff

A N D:

COURTNEY WALLIS SIMPSON, YORK REGION REALTY INC., WALLIS, SIMPSON & ASSOCIATES, COURTNEY WALLIS SIMPSON c.o.b. as YORK MANAGEMENT GROUP and as CAMCO DEVELOPMENTS and as YORK GROUP, Defendants

BEFORE: SPIES J.

COUNSEL: *Lincoln Caylor* for the Plaintiff/Receiver

Gregory Govedaris, for the Plaintiffs in Action # 05-CL-6178, Glenn E. Cohen for Atlas Holdings, D.R. Rothwell for Ajay Pahwa and Courtney Wallis Simpson in person

HEARD: April 26, 2006

DECISION ON MOTION

OVERVIEW

[1] This is a motion by the court appointed Receiver for an order that the Interim fees, disbursements and GST of counsel for the Receiver, for the period October 11, 2005 to April 12, 2006, be approved and be paid to counsel by the Receiver as the first charge on the receivership estate.

[2] By order of Ground J. dated November 17, 2005, Michael J. Quilling was appointed Receiver, pursuant to s. 101 of the Courts of Justice Act and Rule 41.02 of the Rules of Civil Procedure, over the assets of Courtney Wallis Simpson and York Region Realty Inc. (the "Initial Order").

[3] The Receiver subsequently provided four reports to the court, on four separate attendances. As explained further below, those reports set out in summary fashion the

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activities of the Receiver and its counsel Bennett Jones LLP. It was not until the motion returnable March 9, 2006, that the Receiver sought court approval of the fees and disbursements of the Receiver and its counsel.

[4] At the attendance before Mesbur J. on March 9, 2006, the Receiver sought approval for its own fees in the amount of \$35,253.39 and for the fees and disbursement of Bennett Jones in the amount of \$234,434.79 (\$207,537.50 for fees and \$11,674.31 for disbursements plus GST).

[5] The material filed in support of the approval of the fees of Bennett Jones was only an invoice, which simply stated that the fees and disbursements were for "professional services rendered" for the period in question. Counsel also filed a one page "Summary of Time and Fees" which listed the lawyers/students who worked on the matter, their position within the firm, year of call, the total hours spent and hourly rate.

[6] Objection was taken to the fees of the Receiver and its counsel, by counsel for some of the claimants to the assets of the estate. Mesbur J. adjourned the Receiver's motion so that its counsel could particularize the fees and deliver particulars of the fees to the other parties.

[7] Further to the order of Mesbur J., the matter came on before me on April 6, 2006. At that time, after hearing the submissions of counsel appearing, I approved the interim fees and disbursements and GST of the Receiver for the period November 17, 2005 to February 28, 2006 in the amount of \$35,253.39.

[8] The motion with respect to the approval of the fees and disbursements of Bennett Jones was adjourned to April 26, 2006. The difficulty was that the Receiver had prepared a summary of counsel fees, which summarized the work done by each lawyer, but it did not set out the date on which the work was done and more importantly did not break down the work done into various categories of services rendered. Furthermore, no dockets were provided.

[9] Because of the way that the summary was prepared, it was impossible for counsel and for the court to assess the reasonableness of the fees and so unfortunately the motion to approve the fees and disbursements of Bennett Jones had to be adjourned again. Counsel for the Receiver was directed to provide to counsel appearing that day copies of dockets of Bennett Jones, redacted if necessary if there were concerns about solicitor/client privilege, along with a summary of the fees, grouping the time by lawyer in accordance with the main areas of work undertaken, so that an assessment of the fees could be made. The dockets and summary of fees were to be served by April 13, 2006. For any dockets that were redacted, counsel for the Receiver was directed to file unredacted copies in a sealed envelope with the court.

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[10] The motion returned before me on April 26th. Counsel for the Receiver had prepared a new motion record with a summary of counsel fees broken down into some categories of services rendered, along with copies of the dockets. No dockets were redacted.

ISSUES

[11] Pursuant to the Initial Order, the fees of Bennett Jones LLP, counsel for the Receiver, form a first charge from the assets recovered in the receivership, subject to approval of the quantum of costs by the court.

[12] On the return of the motion before me, the Receiver sought approval of the fees of its counsel in the amount of \$207,537.50 and disbursements in the amount of \$11,674.31 for a total with GST of \$234,434.79 for the period October 11, 2005 to February 21, 2006 and \$153,985 for fees and \$5,146.46 for disbursements for a total of \$170,230.30 with GST for the period from February 21, 2006 to April 12, 2006. The grand total that is submitted for approval is \$404,665.09 of which \$361,522.50 is fees.

[13] Counsel opposing the motion objected to the approval of the fees, asserting that the fees are excessive, particularly given the recovery and size of the receivership estate and that the hourly rates charged are too high in all of the circumstances. There was no real issue with the disbursements, nor was it asserted that the Receiver or his counsel had exceeded their jurisdiction.

[14] The issues before me are what principles should I apply in considering the fees of counsel to the Receiver and what quantum of fees should I approve?

THE FACTS

[15] There are currently at least two proceedings against the defendants and both are class proceedings. They each relate to alleged fraudulent activity on the part of Simpson and her companies. The plaintiff in the class action herein, (the "Deposit Fraud Class Action"), first approached Bennett Jones in the fall of 2005 alleging that Simpson, who is a real estate agent, and her companies, defrauded him by retaining his deposit for the purported purchase of a commercial property. It is alleged that Simpson purported to "sell" the same two commercial properties in excess of a hundred times each and as a result there are many claimants in this class who claim for deposits paid on purchases that were a sham.

[16] Mr. Govedaris is counsel for plaintiffs in class action #05-CL-6178 (the "Mortgage Fraud Class Action"). In that action, it is alleged that Simpson and others defrauded the victims through the operation of a "Ponzi Scheme", convincing people to "invest" in interim occupancy mortgages that never existed.

Initial Order

[17] The Initial Order of Ground J. approved the appointment of Bennett Jones LLP as counsel to the Receiver but hourly rates were not approved. The order gives the Receiver the usual powers to preserve property of the defendants including investigatory powers and the Receiver is of course permitted to apply to this Court for advice and directions related to the proper exercise of its powers or for any variations to the order.

The First Report

[18] Counsel for the Receiver attended before Farley J. on December 13, 2005 and filed the First Report of the Receiver of the same date. That report summarized the nature of the two alleged frauds. At that time the Receiver estimated that there were eighteen victims of the deposit scheme fraud owed approximately \$3.6 million and at least 54 victims of the Ponzi Scheme/mortgage fraud with a total loss of approximately \$11 million.

[19] At that stage, counsel for the Receiver had issued the statement of claim in the Deposit Fraud Class Action. In the First Report, the Receiver recommended that the Mortgage Fraud Class Action be tried together with the Deposit Fraud Class Action and that the Initial Order be amended to add the mortgage fraud victims as a class of creditors to be considered by the Receiver.

[20] The Receiver reported on the various activities undertaken by the Receiver and its counsel since the date of the Initial Order, which included serving the Initial Order on all banks to which Simpson and York Realty had a relationship, asking that the bank accounts be frozen, registering the Initial Order on title to all properties owned by Simpson, attending at all properties owned by Simpson, (with the exception of the cottage property), speaking to the agent who had listed the real properties for sale (at the request of Simpson), reviewing Simpson's business records, examining Simpson under oath, communicating with the York Regional Police and dealing with claimants.

[21] The Receiver was in attendance with counsel for the examination of Simpson on November 29, 2005. On the same date the Receiver, accompanied by counsel, met with a detective from York Regional Police and conducted a cursory review of documents in the possession of the police as a result of the criminal charges pending against Simpson. Simpson consented to the Receiver reviewing this material.

[22] Simpson also co-operated with the Receiver in identifying the real property that she owned and in fact advised the Receiver of two properties that were registered in the name of Lia Hurst that Simpson claimed ownership to. The report stated that it appeared that the equity in the real property owned by Simpson might be

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anywhere from approximately \$654,000 to approximately \$1.3 million depending on whether the Receiver was successful in setting aside certain charges.

[23] At that time, the Receiver recommended listing the real property with the agent that Simpson had already listed the properties with and that the proceeds from sale be deposited and held in an interest bearing account, that the Receiver, in consultation with counsel, determine whether a law suit was warranted against Hurst, including certificates of pending litigation, in order to regain those two properties, reviewing documents in the possession of York Regional Police (17 boxes), selling the contents of Simpson's business premises and conducting an examination of a third party, Adam Cox, who had been identified by Simpson as someone who likely had relevant information.

[24] At the time of this First Report, the Receiver was aware that the members of the Deposit Fraud Class Action had made claims to the Real Estate Council of Ontario ("RECO") with respect to their deposits, and had been informed by RECO that it was its position that Simpson's actions constituted one "occurrence" and that therefore there was a \$500,000 limit to the amount to be paid by RECO for all class members. The Receiver recommended that he deal directly with RECO and assist individuals who had yet to make a claim to do so and then report to the court. He reported that any payments from RECO be used for the benefit of the deposit fraud class only. I am advised by Mr. Govedaris however, that the claimants in the Mortgage Fraud Class Action may also have claims against RECO and so the Receiver and counsel for the Receiver will need to be concerned about this conflict, as Bennett Jones also represents the Deposit Fraud Class.

[25] The First Report also disclosed an issue concerning Ajay Pahwa who has asserted a claim in the receivership estate as a secured creditor. The Receiver takes the position that the three mortgages Pahwa has on properties belonging to Simpson have been paid off, or, in the alternative, are not valid because of illegal rates of interest.

[26] The Receiver also advised the court at this time that it had established a website to post information regarding the case.

[27] Farley J. by order dated December 15, 2005, authorized the Receiver to amend the statement of claim to add Simpson carrying on business as York Management Group as a defendant and to try the Mortgage Fraud Class Action together or immediately after the Deposit Fraud Class Action (subject to confirmation by the appointed judge in the class proceedings).

[28] A second order of Farley J. of the same date headed "First Amended and Restated Initial Order" restated all of the relief granted by Ground J. in the Initial Order and added other terms, which authorized the Receiver to enter into new listing agreements to sell the real property owned by Simpson, deal directly with RECO on

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behalf of all victims of the Deposit Fraud scheme, examine Cox, and open a bank account to accept deposits from Simpson. That order also stayed all proceedings in respect of the defendants and their properties and approved a claim form and its distribution¹.

The Second Report

[29] The matter returned again before Farley J. on December 22, 2005 with the Second Report of the Receiver of the same date. In that report, the Receiver reported that the Receiver's counsel had continued to follow up with banks to ensure that accounts were frozen, met with Simpson for further investigation, that a separate interest bearing bank account had been opened to receive the proceeds from the sale of Simpson's assets and any funds that Simpson might be receiving, as Simpson was still working (subject to a living allowance for Simpson), that counsel had communicated with the agent that Simpson had already arranged, regarding the sale of various Simpson properties pursuant to a new listing agreement, and that a real estate agent had been retained to undertake a fair market assessment of the cottage property. Furthermore contact with Cox in order to compel his attendance at an examination had been made, the Statutory Declaration to be utilized as a claim form had been prepared and Information had been posted to the website.

[30] With respect to the Hurst action, the Receiver reported that the properties were valued at between \$250,000 and \$275,000 each, but that there were mortgages registered on each of the properties in the amount of approximately \$221,000 and \$225,000. The Receiver advised it would continue to investigate to determine if there was sufficient equity to merit a lawsuit and, if in consultation with counsel, a lawsuit was warranted, that Hurst would be sued.

[31] With respect to RECO, the Receiver advised the court that the Receiver and its counsel had met with the manager of Investigations of RECO. It appears the purpose of that meeting was simply to inform the manager of the activities of the Receiver to date and the orders that had been made.

[32] With respect to the Pahwa mortgages, counsel for Pahwa had served a notice of sale under mortgage with respect to one property. Based on the Receiver's investigation, which included a review of all documents registered on title, the Receiver recommended that the validity of the mortgages be challenged, that in the mean time no proceeds from any sale be paid to Pahwa and that funds claimed by Pahwa be held in the Receiver's bank account pending further order of the court.

¹ As I advised counsel for the Receiver, particularly as the amended Initial Order is not black lined, in order to determine the relief granted by Farley J. as compared to the relief previously granted by Ground J., it is necessary to do a paragraph by paragraph review of the two orders. Preferably the new order should have simply stated the additional relief and any amendments without restating the Initial Order.

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[33] The Second Amended and Restated Initial Order of Farley J. dated December 23, 2005, authorized the Receiver to assert challenges to the validity, quantum and priority of the Pahwa, restrained Pahwa's power of sale proceedings and provided that upon approval of the sale of properties, that the amount claimed by Pahwa be held in a separate bank account pending further order.

Third Report

[34] The Receiver attended in court again on January 20, 2006 before Cumming J. with the Receiver's Third Report dated January 13, 2006. In that report, the Receiver reported that bankruptcy proceedings had been commenced against Simpson and York Realty and two receiving orders dated December 30, 2005 had been obtained. The Receiver recommended and obtained an order from Cumming J. that the bankruptcy proceedings be stayed, as were the related receiving orders.

[35] The Receiver also reported on its on-going review of Simpson's bank accounts, but there was still no statement that any of those accounts had contained funds.

[36] A new issue arose in this report concerning certain shares of Dianor Resources Inc. that had been owned by Simpson and had been transferred into two individual accounts held at RBC Dominion Securities, allegedly in breach of the Initial Order. This information came to the Receiver from a detective of the York Regional Police squad. Counsel for the Receiver requested that the share transfers be reversed and currently that is a further issue for the Receiver to pursue. RBC is holding approximately 500,000 shares which fluctuate in value and could be worth anywhere from \$.255 (the rolling 52 week low price) to \$2.18 (the rolling 52 week high) per share.

[37] The Third Report to the court also updated the court with respect to the progress on the sale of the various properties owned by Simpson which had all been listed for sale, with the exception of the cottage property, and the fact that an action had been commenced against Hurst and that certificates of pending litigation on title had been obtained. The Receiver recommended acceptance of an offer concerning one property.

[38] With respect RECO, the report disclosed that counsel for the Receiver had sent a letter requesting disclosure of information and that there had been no response. By that point it was estimated that eighteen victims of the Deposit Fraud had made claims to RECO.

[39] With respect to Cox, after several attempts, he finally attended at an examination but then refused to answer questions once he realized he was there to give evidence about the Simpson fraud. The Receiver had continued its review of

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Simpson documents and discovered the existence of two other corporations for which it sought amendment, to have them added to the receivership.

[40] The Receiver also reported that counsel had written to the Crown assigned to the Simpson case requesting that a Restitution Order be sought against Simpson in the amount of approximately \$14.6 million representing the estimated loss occasioned by both the fraudulent deposit and mortgage schemes.

[41] Based on the report, the Third Amended and Restated Initial Order of Cumming J. dated January 20, 2006 directed that one property be sold with the amount of \$336,080, which is the amount of Pahwa's claim, to be held in a separate bank account to await the outcome of the Pahwa claim. A separate order of the same date added Simpson carrying on business as York Group and as Camco Developments as defendants.

Fourth Report

[42] When the matter proceeded before Mesbur J. on March 9th, she had the Fourth Report of the Receiver dated March 3, 2006. In that report the Receiver advised that it was using documents recovered from the police to verify and validate the claims of potential class members, particularly the alleged Mortgage Fraud class, in order to determine whether each Individual investor had received less or more than their principal investment back. This was described as a complicated task for various reasons.

[43] By that date the actual claims made by members of both classes totaled approximately \$3.7 million. The Receiver stated that he had been in touch with the majority of the victims known to that date and had distributed the claim form to those individuals.

[44] The Receiver's estimate of the value of the assets in the estate at that time was set out in a chart outlining assets and potential recovery through the receivership. This chart listed total assets at \$3,225,000 with total liabilities at \$1,416,809 with a net estate total of \$1,808,191. The only assets listed were the real properties owned by Simpson, including the Hurst properties, the RECO claim at \$500,000 and the Dianor Resources shares at \$400,000, which appears to be a conservative number. The Pahwa claim was taken into account in the amount of \$336,080. As set out below, the interest of Simpson's husband in the matrimonial home was not considered.

[45] With respect to the Dianor Resources shares, the Receiver had communicated further with counsel for RBC Dominion. They were advised that the shares were frozen and that RBC would require a court order before complying with the

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Receiver's request to reverse the transfer. RBC had not produced the requested documents to the Receiver by that date.

[46] The Receiver provided further reports with respect to the real property and the court approved the sale of a second property. He recommended that the sale price of the sale approved by Cumming J. be reduced because of substantial issues disclosed in the property inspection. The Receiver recommended listing the cottage property in the spring. With respect to the Hurst properties, the Receiver reported that Hurst was willing to sign an acknowledgement and direction transferring title and the properties back to Simpson. The Receiver recommended that once that was done, that the properties be sold.

[47] With respect to RECO, the Receiver reported that twenty victims of the Deposit Fraud class had made claims to RECO totaling \$3,215,000. RECO agreed to provide disclosure of certain documents but continued to maintain its position that Simpson's actions constituted "one" occurrence and that therefore no more than \$500,000 would be available to all claimants under RECO's Consumer Deposit Insurance coverage. The Receiver stated that after reviewing the documentation, it would seek directions from the court regarding commencing an action against RECO's insurer.

[48] The Receiver reported on the examination of Cox and advised that based on that examination, it was not recommended that Cox be added as a defendant. The Receiver also reported on obtaining bank records from the ten bank branches, which the defendants were known to have used, which had been served with the Initial Order. By this point the Receiver had a complete compilation of the bank records for the past 6 years and stated that he was confident that he would be able to discern some patterns from the movement of funds.

[49] Pursuant to the order of Mesbur J., RBC Dominion Securities was ordered to produce documents related to the Dianor Resources shares to the Receiver, and the shares were frozen until April 6, 2006. In addition, the sale of one property was approved, as was a listing of the Hurst properties after they had been reconveyed to Simpson.

Affidavit of M. Joanne MacMillan sworn March 31, 2006

[50] When the matter proceeded on April 6, 2006 before me, no further report was filed but I did have the Affidavit of M. Joanne MacMillan sworn March 31, 2006. Further information was provided on the Dianor Resources shares issue and the fact that RBC had provided the Receiver's counsel with documents related to the transfer of the shares. Copies of these documents had been provided to the transferees of the shares and Mr. Govedaris in accordance with Justice Mesbur's order.

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Receiver's Action Plan

[51] In accordance with my endorsement of April 6, 2006, the Receiver served and filed a proposed Action Plan. A review of this plan assists in considering the work the Receiver and its counsel has done and what is yet to be done in order to realize all of the assets of the receivership estate and determine and pay out the claims.

[52] The proposal with respect to the various issues is as follows:

- (a) **Dianor Resources Inc. Shares**-the Receiver recommends challenging the share transfer and ask that it be reversed and that the shares be returned to the receivership estate on the basis that the transfer took place after the freezing order had taken effect. The method of determining this issue is to be resolved at a 9:30 appointment to be scheduled on notice to all interested parties.
- (b) **The Pahwa Mortgages**- the Receiver proposes examining the lawyer who assisted placing the mortgages on title to Simpson's properties and then challenging the validity of the Pahwa mortgages and proceeding via an application seeking to discharge the Pahwa mortgages on various grounds. Various alternative relief is also proposed. A draft application was included with the Plan. This is another matter that is to be timetabled at a 9:30 appointment on notice to all interested parties.
- (c) **RECO Claim**- RECO's has an insurance policy with Lloyds that has limits of \$100,00 per claim and \$500,000 for each "occurrence". Twenty-six claims have been made to RECO. If they are characterized as individual claims, the maximum possible insurance coverage would be \$1,965 million. The Receiver is considering proceeding against RECO and Lloyds by adding them as defendants to the Deposit Fraud Class Action and a draft Fresh as Amended Statement of Claim was provided to the court. Research that considered the merits of such a claim was summarized in the affidavit of Ms. MacMillan. A decision on this claim was deferred. Recovery from RECO will raise other issues in that the Receiver is only proposing to distribute any recoveries to the Deposit Fraud Class. These issues were also deferred.
- (d) Finally a proposal for claims administration was set out. A statutory declaration that was approved by Farley J. has been provided to each claimant requiring claimants to indicate whether they are part of the Deposit or Mortgage Fraud classes. The Receiver will review each claim along with supporting documents and decide whether to reject, approve or amend the claim. Only the principal amount of the deposit or mortgage

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investment will be validated. No procedure has yet been determined for claimants to contest the Receiver's determination.

THE LAW

[53] Counsel did not provide any law to me with respect to the principles that I should consider in deciding this matter. It is my understanding that the leading case, at least in terms of the approval of the fees of a receiver, is *Re Bakemates Int'l Inc.*², a decision of the Ontario Court of Appeal.

[54] In the *Bakemates* case Borins J.A., speaking for the court, stated that when a receiver asks the court to approve its compensation, there is an onus on the receiver to prove that the compensation for which it seeks the court's approval is fair and reasonable (at para. 31). That is the test that I intend to apply, along with the other principles set out in *Bakemates*, in determining the approval of the Receiver's counsel's fees.

[55] Borins J.A. stated that the court could adjust the fees and charges of the receiver, just as it can in the passing of an estate trustee's accounts, and that the applicable standard of review is whether those fees and charges are "fair and reasonable" (at para. 35). He went on to refer to Bennett on Receiverships³ with approval and accepted as correct Bennett's discussion of the purpose of the passing of a receiver's accounts:

to afford the debtor, the security holder and any other interested person the opportunity to question the receiver's activities and conduct to date. On the passing of accounts, the court has the inherent jurisdiction to review and approve or disapprove of the receiver's present and past activities even though the order appointing the receiver is silent as to the court's authority (at para. 36 quoting Bennett at pp. 459-60)

[56] In determining what is fair and reasonable remuneration, Borins J.A. observed that there is no guideline controlling the quantum of fees as there is in respect to a trustee's fees. He referred to what he described as the "leading case" in the area of receiver's compensation, *Belyea & Fowler v. Federal Business Development Bank*⁴, a decision of the New Brunswick Court of Appeal, and adopted with approval the observations of Stratton J.A. in *Belyea* that compensation is

usually allowed either as a percentage of receipts or a lump sum based upon time, trouble and degree of responsibility involved. The governing

² [2002], O.J. 3569

³ F. Bennett, 2nd Ed. (Scarborough Cohen Carswell, 1999)

⁴ (1983) 46 C.B.R. (N.S.) 244

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principle appears to be that the compensation allowed a receiver should be measured by the fair and reasonable value of his service and while sufficient fees should be paid to induce competent persons to service receivers, receiverships should be administered as economically as reasonably possible (at para. 44).

[57] Where a percentage of receipts is used, a court may look to the rate afforded to a trustee in bankruptcy as a guideline, which is seven and one-half percent of receipts after payment to secured creditors, subject to variation by the court.⁵ As I explain below however, this is not a receivership where in my view a fixed percentage would be fair to counsel for the Receiver. In my view the fees in this case must be assessed on a *quantum meruit* basis.

[58] The court in *Bakemates* approved of the *Beylea* factors to be applied when using a *quantum meruit* basis to assess a receiver's compensation, which include:

the nature, extent and value of the assets handled, the complications and difficulties encountered, the degree of assistance provided by the company, its officers or its employees, the time spent, the receiver's knowledge, experience and skill, the diligence and thoroughness displayed, the responsibilities assumed, the results of the receiver's efforts, and the cost of comparable services when performed in a prudent and economical manner (at para. 45).

[59] Although Borins J.A. stated that the factors in *Beylea* are a "useful guideline", he was careful to point out that they should not be considered as exhaustive of the factors to be taken into account, as other factors may be material depending on the circumstances of the receivership (at para. 51).

[60] With these principles in mind, I turn to the positions of counsel in this case and the fees I have been asked to approve.

ANALYSIS

[61] Opposing counsel complained that the additional billing summaries prepared by counsel for the Receiver were not provided within the time that I specified, which left counsel with inadequate time to prepare for this motion. It appears from the Affidavits of Service, that the Summaries of Counsel Fees were not served until April 18th. The Motion Record was served on April 20th by email but part of the transmission was unsuccessful and so it was sent by same day courier on April 21st. No explanation was given for why the timeline in my order was not complied with. This is unfortunate

⁵ Bennett, supra at p. 472

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as the court relies on parties with an interest in the receivership estate to act as a check on the activities of the Receiver and its counsel. However opposing counsel did not request an adjournment and so I have considered the matter based on the evidence before me.

[62] Opposing counsel did not suggest that the hours claimed by counsel for the Receiver had not been spent, but challenged the hourly rates and whether or not the work was done efficiently and whether all the time spent was warranted, particularly as it was argued that counsel for the Receiver should have known the nature of Simpson's assets and the value of the estate early on. As counsel observed, if the fees sought are approved as claimed, a very significant portion of the proceeds from the real estate assets will be committed to the legal fees incurred to date and recoveries for the claimants in the two class actions will largely depend upon the outcome of litigation concerning the Dianor Resource share issue, the Pahwa mortgage issue and the proposed action against RECO.

[63] Opposing counsel noted that up to the time of the Initial Order granted by Ground J. on November 17, 2005, counsel for the Receiver had incurred approximately \$40,000 in fees and there is not much dispute about that amount. The fees quickly escalated however and opposing counsel had no idea of how expensive the receivership had become until served with the motion record returnable March 9, 2006, which was served on March 4th. This meant that they did not have an opportunity to complain about the escalating costs before they were incurred. Counsel also complained that the Receiver's counsel has still left too much time unallocated to a particular category of work, leaving it difficult to assess the reasonableness of the time spent.

[64] Having considered the submissions of all counsel, and having reviewed the evidence filed in support of the fees claimed, including a line by line review of the actual dockets, and having considered the activities of the Receiver and its counsel as reflected in the Receiver's reports to the court, I have concluded that the Receiver's fees should be reduced by \$102,000 before GST. Counsel for the Receiver has not satisfied me that the hourly rates charged and all of the time spent is "fair and reasonable", given the factors I have considered that are relevant to the approval of the fees in this matter. My reasons are as follows.

[65] In coming to my decision, a significant consideration has been the amount of the fees to date, considering where we are in the receivership and the prospect of recovery for the claimants. In a passage from the *Behya* case, not referred to by the Court of Appeal in *Bakemates*, Stratton J.A. stated:

Even though a professional is entitled to a fair, just and reasonable compensation measured by the reasonable value of the services rendered, the fees charged must bear some reasonable proportion to the amount of

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recovery from the RECO insurance policy, which is the minimum recovery from RECO and the Dianor Resources shares claim at a value of the shares at \$400,000. This estimate of the share value may be conservative because the shares have recently been worth in excess of \$900,000, but the strength of this claim is unknown. With respect to the real estate, the estimate takes into account a liability with respect to Pahwa in the amount of \$336,080, which could be reduced if the Receiver is successful challenging the Pahwa mortgages. Simpson advised at the time of the argument of this motion that her husband was asserting his half interest in the matrimonial home, which is one of the properties to be sold by the receiver. The Receiver had not taken this into account before and this claim is not reflected in this estimate.

[70] Although precise amounts cannot be known at this time, it seems clear that the quantum of claims will by far outstrip the available assets. Furthermore, as I have already stated, the available assets are modest, particularly considering the quantum of fees sought by the receiver. Apart from the sale of Simpson's real estate, which represents approximately \$900,000 of the approximate amount of the estimated \$1.8 million recovery, which is subject to reduction by the claim of Simpson's husband, the disputes concerning RECO, the Dianor Resources shares and Pahwa are still to be litigated. Although this court can control the efficiency of the manner in which the Pahwa and Dianor Resources disputes are determined, it is likely that pursuit of the RECO insurance will require a full-blown lawsuit. Furthermore the quantification of the claims is ongoing but not completed, nor have any disputes resulting from that process been determined. In other words, there is still considerable cost to be incurred before all of the possible assets of the estate have been realized and the claims paid.

[71] It is also important to note that the Receiver and its counsel have been assisted by the fact that Simpson has cooperated. She identified all of her assets for the Receiver and has consented to the police sharing the information they have obtained in their investigation of the criminal charges. Furthermore she is not defending the class actions. Her co-operation was somewhat of a problem however, when she decided to consent to individual judgments early on. The Receiver's counsel has dealt with that.

[72] Finally it is important to observe that the complaints of opposing counsel, that the quantum of the fees of counsel for the Receiver has caught them by surprise, are legitimate. There is no obligation on counsel for the Receiver to come to the court more often in order to seek approval of fees, but when counsel wait for several months to do so, particularly in a case like this where significant costs are running up relative to the size of the estate, counsel for the Receiver is at risk that when they do come to court, the way in which they have done the work and the fees incurred may legitimately be criticized. It is not enough in these circumstances to rely on the fact that the work done was approved in a general way by the various orders of the court already referred to. When counsel wait to bring their accounts to the court for approval, they do so at their own risk.

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[73] With this background in mind, I considered both the hourly rates charged by the Receiver's counsel, the time spent and the work done, in assessing the reasonableness and fairness of the accounts.

[74] I was advised by counsel for the Receiver, that the rates charged, are the usual rates charged by the various members of the firm in these matters. He acknowledged that they are at the "high end of the scale". Counsel advised however, that notwithstanding the Deposit Fraud Class Action was commenced by way of class action; counsel would not be seeking a multiplier or premium.

[75] The rates charged range from \$150.00 per hour for students at law to \$725.00 per hour for a tax partner (although I am told that that time has been written off). The bulk of the work was done by Lincoln Caylor, a 1995 call, at the rate of \$575.00 per hour (98 hours-\$78,000), M. Joanne MacMillan, a 2000 call, at the rate of \$450.00 per hour (160 hours-\$132,000), and Emily Atkinson, a 2005 call, at the rate of \$275.00 per hour (208 hours-\$114,000). All three lawyers are litigation counsel. There is some supervisory time by James Patterson, a 1988 call, at \$625.00 per hour. As well a real estate partner, who is a 1992 call, has time on the file at the rate of \$550.00 per hour. Other lawyers with specialty in bankruptcy and insolvency (\$650.00 per hour), class actions (\$525.00 per hour), as well as real estate law clerks at \$150.00 per hour, a litigation law clerk at \$175.00 and students at law ranging from \$150.00 to \$175.00 per hour have all worked on the file.

[76] Mr. Cohen, counsel for a deposit fraud claimant, argued that the hourly rates claimed should be reduced by as much as a third, and referred to the old cost grid. Counsel for the Receiver responded that this was not relevant to the task before me. I agree, in the sense that the cost grid reflects, in terms of substantial indemnity costs, costs that the opposing party is ordered to pay, and those rates are not necessarily reflective of the costs as between the lawyer and his or her own client. Normally, with competition in the marketplace and informed clients, rates will be established as between a lawyer and a client that are reasonable in all of the circumstances, although some clients I am sure will disagree with that proposition. Here, however the client is a member of a class and he is not paying the fees personally. The plaintiff in this action and a few others had retained Bennett Jones individually at the outset and as submitted by opposing counsel, it is extremely unlikely that they could have afforded or would have agreed to pay the hourly rates now charged by counsel for the Receiver.

[77] There are many "clients" who will be impacted by the fees charged. They did not negotiate the hourly rates, nor did the court ever approve them. The assumption that the court will automatically approve a "usual" hourly rate for Receiver's counsel is a faulty one in my view. In a case like this, the court, with the assistance of opposing counsel, has to play the role of what a client would ordinarily do, namely

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consider whether the hourly rate is fair and reasonable in light of the nature of the work involved and the amount in issue.

[78] Although I accept the submissions of counsel for the Receiver, that this case is not a typical receivership, neither is the case complex. Setting aside whether or not two separate class actions or for that matter any class actions are needed, this case is primarily involved in the investigation and preservation of assets, dealing with victims and considering how best to pursue the litigation concerning the issues in dispute. This however, is a case where the amount of work involved may be somewhat disproportionate to the size of the receivership estate and so a percentage of the recovery would not be fair to counsel.

[79] The size of the receivership estate however should have some bearing on the hourly rates of counsel. I am of the view that an adjustment ought to be made to reflect the fact that, particularly after the size of the estate became known, the "usual" rates of counsel were too high relative to the size of the estate. Although the first statement of assets and liabilities was not put before the court until March 9, 2006, it is clear from the reports of the Receiver, that the Receiver and his counsel, had a general sense of the of the assets and liabilities of the defendants well before that. Certainly in early December, when preparation of the First Report dated December 13, 2005 was well underway, although the precise value of the estate would not have been known, the fact that the estate was a relatively modest one and that the potential claims were significant and would by far outstrip the amount of the estate, ought to have been known to the Receiver's counsel. Certainly at that point counsel should have considered whether or not the firm's usual hourly rates were suitable for this receivership. In fact in my opinion the usual rates, which Mr. Caylor acknowledged are at the "high end" of the scale, were not warranted from the outset.

[80] Although I would not reduce the hourly rates as significantly as suggested by opposing counsel, in my view they ought to be reduced by approximately 15%. Based on these considerations I find that there should be a reduction of the fees before GST in the amount of \$46,000 to reflect the fact that the hourly rates claimed are too high for this matter. In arriving at this amount, I have not applied a 15% reduction to the time docketed before early December 2005 of approximately \$80,000, by which point the information in the First Report was clearly known to counsel. I have however made an adjustment of 5% to that \$80,000 as well, as the rates were too high from the outset.

[81] I come then to the amount of time that is claimed.

[82] Counsel for the Receiver has not filed an affidavit that deals with any of the factors in the *Bakemates* case. The affidavits of Ms. Atkinson and Ms. MacMillan filed in support of this motion only identify the accounts, the summaries and the

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dockets and depose that they accurately reflect the time spent, fees incurred and disbursements made in conjunction with this matter. The onus however is on counsel for the Receiver to satisfy me that the amount claimed for fees is fair and reasonable.

[83] Counsel for the Receiver has filed a Summary of Counsel Fees for the period of November 4, 2005⁹ to February 21, 2006 and a similar summary for the period February 21, 2006 to April 12, 2006. These summaries break the time spent by counsel for the Receiver into the following categories and amounts:

- (a) The total fees claimed with respect to real property is \$46,750.
- (b) The total fees claimed with respect to RECO is \$25,295.
- (c) The total fees claimed with respect to the Dianor shares is \$5,642.50.
- (d) The total fees claimed with respect to the Pahwa mortgages is \$17,585.
- (e) The total fees claimed with respect to "general receivership activities" comprises the balance claimed of \$227,745.¹⁰

[84] With respect to the fees claimed with respect to real property, according to the summary this reflects the time spent maintaining properties, communicating with insurance companies, utilities companies, real estate agents, land registry office, counsel for purchasers, dealing with power of sale issue and inquiries (i.e. Pahwa), dealing with mortgages, registering orders on title, obtaining and registering certificates of pending litigation on title, transferring properties into receivership, obtaining vesting orders and getting the title of the properties cleared.

[85] As I have already stated, Simpson identified the properties and a decision was made to use her agent as she had already listed some of the properties. Time was spent finalizing the sale of two of those properties, although only one sale had closed in the time frame of the accounts submitted. In addition it appears that the time spent on the Hurst action, which included obtaining certificates of pending litigation, and some of the time spent on Pahwa is included in this category.

[86] Many of the matters listed such as maintaining the properties, communicating with insurance and utilities companies and matters of that sort is work which I would have expected the Receiver's staff to take care of at a lower cost¹¹. The fact that the Receiver is from Texas likely explains this, which is consistent with the fact that the Receiver's account was a small fraction of the fees of counsel for the Receiver. Counsel for the Receiver however, chose the Receiver and clearly counsel for the

⁹ I note that this is after the date when the fees claimed began to be incurred of October 11, 2005.

¹⁰ These amounts total \$323,017.50, which is almost \$40,000 less than the total fees claimed of \$361,522.50. The difference was explained on the basis that the summaries were estimates of the break down of fees. I expect that most of the explanation is that these summaries commence November 4, 2005 whereas the fees claimed commence October 11, 2005.

¹¹ The Receiver's hourly rate is \$400 US/hour so presumably its staff would be at lower rates.

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Receiver chose to do much of the Receiver's work. This however exacerbates the problem of high rates, as the rates claimed for the lawyers involved in these activities are as high as \$575 and \$450. In my view others should have done much of this work at significantly lower rates. I have considered this in my reduction for inefficiency discussed further below.

[87] The real estate partner who presumably was mostly responsible for the work done on the sale of the properties is Scott Martyn and his rate is \$550. He was assisted by two real estate law clerks at the rate of \$150 per hour. This time however only reflects \$10,595 of the fees. It is impossible to determine how much of the time claimed relates to the Hurst action but clearly the total fee claimed for this category of work done seems excessive.

[88] With respect to the fees claimed with respect to RECO, again the amount claimed seems high. RECO's position was known by the time of the First Report and essentially what has happened since then is a meeting and correspondence with RECO, demanding and receiving documents in response to a request for disclosure of documents, a consideration of the legal issue including research (over \$8,000 for research done by two students is part of this category) and assisting victims with making claims. It is not clear how much of the time claimed includes the time spent preparing the opinion that was filed with the court concerning the RECO action, but I expect that some of that time is not part of the time claimed now, as the cut off for fees was April 12, 2006. I note that the costs of this aspect of the matter will have to be carefully considered before any further work is undertaken given that it is unclear whether or not the RECO claim benefits both class actions or not.

[89] I do not have any difficulty with the quantum of time claimed with respect to the Dianor Resource shares issue and the Pahwa mortgages issue, which, if successful, will benefit all victims.

[90] The most difficult issue arises with respect to the heading "general receivership activities". Although some effort has been made to break out some of the motion time and the dealings with the banks in that category, it essentially is a category reserved for all of the other time spent that is not included in the other categories set out. Opposing counsel complain that this is in breach of my direction and does not give them a real opportunity to assess the value of the work done. I agree. We do not know for example, how much time was spent preparing the statement of claim or the Hurst action or a particular Report for the court. This means, for example, that we can not assess the value of the work done in connection with the Hurst action relative to the limited equity in the two properties at issue in that action.

[91] The court in the *Bakemates* case stated that although there is no prescribed process, the accounts must be detailed including the total charges "for each

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of the categories of services rendered" and in a form that can be easily understood by those affected by the receivership so that such persons can determine the amount of time spent by the receiver's employees and others that the receiver may have hired in respect to the "various discrete aspects of the receivership" (at para. 37). This was not done with respect to this general category and as a result the task of opposing counsel and the court is that much more difficult. It was not an option however to ask counsel for the Receiver to particularize this category further, as that would have necessitated yet another adjournment.

[92] The general receivership activities category includes, but is not limited to, commencing the proceedings, obtaining the receivership order, contacting victims, disseminating, collecting, processing and validating claim forms, obtaining bank records, reviewing bank records, tracing funds, reviewing records in the possession of York Regional Police, examining parties (Simpson and Cox), preparing reports for the court (4), reporting to the court and obtaining approval for steps taken (6 court attendances up to and including the attendance before me on April 6th), communicating with various parties including clients and class members and "developing and carrying out strategy for recovery". Again the Receiver's staff should have done some of this work if distance had not been an issue, such as the work done contacting victims and disseminating and processing claim forms. Again the fact this was done by lawyers at higher hourly rates means a deduction is required.

[93] The assessment of the fees in this category is a difficult task given the information that I have to consider. However, no one suggested that an assessment before an assessment officer or a line-by-line review was warranted, as the cost of that would be astronomical. Furthermore, opposing counsel did not go to the expense of cross-examining Ms. Atkinson on her affidavit or otherwise questioning counsel for the Receiver with respect to the accounts. That however, is understandable, as opposing counsel represent various claimants and do not have any certain access to the estate to cover their costs. Furthermore, the material in question was delivered too late to permit cross-examination without a further adjournment.

[94] Notwithstanding these concerns, fixing costs is not an unusual task for the court. Judges are expected now to fix costs following not only routine motions but also lengthy trials. Although the factors for assessing party and party costs may be different, the type of analysis required is similar and in fact the overriding direction now from the Court of Appeal is to assess what in our view is fair and reasonable in all of the circumstances.¹²

[95] In considering the number of hours and the nature of the work done on this matter, I am of the view that the sheer number of hours put in, given where we

¹² See *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291

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are in this receivership, reflects a significant degree of inefficiency when I consider what work has been done based on the material filed. They are excessive and greatly exceed what I view as fair and reasonable.

[96] Part of this concern about efficiency and whether all of the work done was warranted, can be explained by the fact that eighteen different professionals charged time to the file. Although some of that can be justified on the basis that different expertise was needed (particularly litigation versus real estate), this always raises a concern about duplication of effort. In that regard I considered particularly the dockets of Mr. Caylor, Ms. MacMillan and Ms. Atkinson, as they have by far, the most time on the file and they all worked on the very same matters. In other words it cannot be said that either Ms. MacMillan or Ms. Atkinson handled discreet issues under the supervision of Mr. Caylor. Based on my review of the dockets, it appears that there was, as a result, unnecessary duplication. Mr. Caylor delegated many tasks to Ms. MacMillan who in turn delegated them to Ms. Atkinson.

[97] For example, with respect to materials for court including the Receiver's Reports, although Ms. Atkinson would usually bear the main responsibility for drafting the materials, both Ms. MacMillan and Mr. Caylor would review and often revise these materials, (see for example pp. 134-135, 138, 149-150, 153, 154, 219-220 of the Motion Record returnable April 26, 2006). In addition, although Ms. Atkinson was the one who typically accompanied Mr. Caylor on court attendances or on examinations, this necessitated bringing Ms. MacMillan (or in some cases Ms. Atkinson, where it was Ms. MacMillan who went to court or Mr. Caylor when Ms. MacMillan conducted the examination of Cox) up to speed after those attendances and this is reflected in the dockets, (see for example pp. 132, 140, 149, 224 of the Motion Record). In some cases all three attended court, (see page 142 of the Record) and naturally there were many occasions when all three met together to review the matter. These are intended only as examples. Clearly with all three lawyers working on the very same issues, coupled with the extraordinary number of other lawyers and students who worked on this file, duplication was inevitable.

[98] Furthermore there does not appear to have been a very clear demarcation if at all, between the various tasks undertaken by Ms. MacMillan and Ms. Atkinson. There are many references to Ms. MacMillan doing research, notwithstanding that she is more senior than Ms. Atkinson and of course the students at law who worked on the file, (see for example pp.124, 129, 140, 145, 150, 222, 223, 230 of the Motion Record).

[99] Although I accept that it may have been necessary for all three lawyers to work on the file at the early stages, when it was important to move quickly to freeze assets, once that phase was over, in my view much of the litigation work should have been delegated to Ms. Atkinson under the supervision of Mr. Caylor. This would have resulted in less unnecessary duplication and much of the work done by Ms. MacMillan

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would have been done at a lower rate. Alternatively Ms. MacMillan should have been given more responsibility so that Mr. Caylor's time could be significantly reduced. Although three levels of counsel of varying experience may be warranted in a complex and large (in monetary terms) receivership, it is not warranted here. I have already commented on the particular need to conduct this receivership efficiently given the quantum of claims and the size of the estate. Furthermore, the matter is not complex. Accordingly, a deduction for this unnecessary duplication must be made.

[100] In considering the amount of this deduction, I have considered the fact that the duplication of effort reflects primarily on the time spent by Mr. Caylor, Ms. MacMillan and Ms. Atkinson and that accordingly the time they have spent should be reduced to eliminate this duplication, and as well a deduction should be made to reflect the fact that some of the work done by Mr. Caylor could have been done by Ms. MacMillan or alternatively a great deal of her work could have been done by Ms. Atkinson, under the direct supervision of Mr. Caylor, at a significantly lower hourly rate. Either way, unnecessary duplication would have been reduced and work would have been done at a lower hourly rate.

[101] In addition, consideration must be given to the number of hours docketed to accomplish particular tasks. As I have already noted, the time for the real property category seems high. Furthermore the time in the general category is excessive given the nature of the work done. For example a great deal of time was spent preparing the various reports of the Receiver to the court and the time seems high particularly given that each report repeated a great deal of the early report(s). I note that Ms. Atkinson docketed time to reviewing precedents for these reports (see Record at page 129). That is to be expected for inexperienced counsel, but all of that time should not have been billed to the file.

[102] It is apparent from reviewing the dockets that there was no consideration given to whether or not some docketed time should have been written off. I was advised that in the final analysis, approximately \$3,000 has been written off which in part reflects the time of the tax partner and presumably other time, although that has not been specified. Nevertheless, in my view there ought to have been a more substantial write-off of time. There are numerous examples of dockets where lawyers have recorded time spent to research and ascertain what type of procedure was necessary in order to accomplish a particular step in the proceeding.

[103] For example, Ms. Atkinson docketed time determining how to bring a motion in the Commercial List to appoint a receiver (page 125 of the Motion Record) and researching between the role of a trustee in bankruptcy and a court appointed receiver (page 144 of the Motion Record. Ms. Atkinson also docketed time to reviewing the protocol to obtain fee approval and determining the requirements of vesting orders (pp. 208, 235 of the Record). There was also repeated research done on class actions

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by Ms. MacMillan notwithstanding that I am advised that Mr. Hoaken has expertise in that area and worked on the file.

[104] This type of basic information may not be known to inexperienced counsel but is fundamental knowledge that a client can reasonably expect his or her lawyer to know. It is not time that can be billed to the file. In commenting on this, I do not wish to be critical of the lawyers in question, as they need to take time to consider what to do when the process is unfamiliar to them. That is how one gains experience in the practice of law. That, however, cannot be at the expense of the client when it involves the fundamentals. I would have expected that the supervising lawyer would have written off these types of dockets and not include them in the accounts when rendered. That clearly was not done in this case and so again an adjustment to the fees claimed on this basis is warranted.

[105] In summary counsel for the Receiver has not satisfied me that the fees submitted are fair and reasonable. Simply put, in my opinion, counsel for the Receiver has not properly staffed or administered the work and resulting billing on this file. Considering all of these various deductions that in my view are necessary, I find that a deduction in the amount of \$50,000 of fees before GST for duplication and overall inefficiency is warranted. In arriving at this amount, I have taken into account the fact that I have already made a reduction to the hourly rates so that I do not "double count".

[106] I am also of the view that there must be a further reduction for the time spent by counsel for the Receiver in seeking court approval of its fees. The information provided to opposing counsel and the court before Mesbur J. was woefully inadequate and there is no explanation for why proper materials were not prepared at that time. Accordingly part of the time spent for that attendance was wasted in terms of this issue. Similarly, the problems opposing counsel raised with the further material provided in the first attendance before me on April 6, 2006 were predictable as well and so much of the time spent in court on that occasion was wasted. In addition, as already stated the third draft of the materials in support of this motion is still problematic and was served late. Had counsel for the Receiver prepared the necessary information for consideration by Mesbur J., a great deal of cost for all concerned would have been spared. Certainly the time spent by counsel for the Receiver for these wasted efforts should not be compensated.

[107] Accordingly there will be a further reduction of the fees (before GST) to take this consideration into account in the amount of \$6,000. The time spent with respect to the approval of fees was not separately categorized. I have calculated this amount by including some of the time spent by K. McPhie, who prepared the summaries, and part of the time spent by litigation counsel preparing for and attending

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before Mesbur J. and again before me on April 6, 2006 and some of the time spent by counsel preparing the information that I directed.

[108] For these reasons, the fees claimed by Bennett Jones will be reduced by these various deductions in the total amount of \$102,000 before GST, in order to arrive at an amount for fees that in my opinion is fair and reasonable in all of the circumstances.

DISPOSITION

[109] Accordingly, the fees and disbursement of Bennett Jones LLP for the period from October 11, 2005 to April 12, 2006 are approved in the amount of \$259,522.50 for fees plus GST in the amount of \$18,166.58 and disbursements, inclusive of GST, in the amount of \$17,998.22 for a total of \$295,687.30.

[110] I do not intend to impose hourly rates on counsel for the Receiver with respect to future accounts submitted to the court but I trust that the conclusions that I have come to in reaching this decision will be taken into account. I expect that the number of lawyers working on this matter will be pared down significantly and that my concern about duplication will be dealt with.

[111] As for the approval of future accounts, I expect counsel for the Receiver to follow the procedure in the *Bakemates* decision. That decision makes it clear what information is required to support such a motion and I expect that counsel will include all of that information in the material filed with the court on the next motion for approval and that that motion record will be served well in advance and posted on the website so that all interested parties may make an informed assessment of the reasonableness of the fees claimed and if necessary, prepare to defend the motion. The categories for all services rendered must be more refined so that in addition to assessing the reasonableness of the future accounts, consideration can be given to what a client would normally want to know, namely, is the cost to pursue a particular course of action warranted given the likely outcome and the amount in issue. This will be necessary to determine how the remaining issues should be dealt with.

[112] Mr. Cohen, counsel for Atlas Holdings and Investments Inc., one of the claimants in the Deposit Fraud Class Action who has made a claim for a deposit of \$200,000, requested costs of his attendance on the motion in the amount of \$2,000 on a substantial indemnity basis, to be paid from the estate when Receiver's counsel is paid. He submits that this is fair if his efforts reduced the quantum of costs payable to Receiver's counsel. Atlas has been on the service list since the Initial Order and counsel has appeared on certain motions brought by the Receiver, including the attendances

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before me on April 6th and 26th. He submits that his client has a direct and substantial interest in the outcome of the motion and that I have the discretion to award costs pursuant to both section 131 of the *Courts of Justice Act* and Rule 57 of the Rules of Civil Procedure.

[113] Counsel for Atlas submits that these proceeding may be compared to pension surplus distribution litigation and estate litigation where it is not unusual for the court to allow cost to all persons interested in the fund and who made submissions of assistance to the court, to be paid out of the fund.

[114] Counsel for the Receiver submits that it is unusual for a creditor to seek legal costs for court attendances in the context of a receivership unless the receiver has acted beyond his authority or inconsistent with his appointment. Typically, if a creditor has to attend or bring a motion, the creditor bears his own costs. This prevents multiple creditors' counsel from attending on the receiver's motions and seeking fees. It is submitted that the court ought not to encourage creditors by a cost award to unnecessarily attend at future hearings. No issue is taken as to the quantum claimed.

[115] Mr. Govedaris submits that there is no authority that he is aware of to support costs paid to third parties who retain counsel after a receiver has been appointed unless there has been impropriety *inter alia* by the receiver, which has been identified, by that third party. He agrees with the submission of counsel for the Receiver that even if I have the discretion to award costs I ought not to as it would encourage other parties to seek costs and that would increase costs for all potential claimants.

[116] In my view I have the discretion to make a costs award pursuant to section 131 of the *Courts of Justice Act*. Atlas is clearly a party affected by the relief sought. Although it is not usual for counsel for creditors to ask for costs, in these circumstances, the submissions from opposing counsel were of some assistance, although since they did not have adequate time to prepare, unfortunately most of the detailed review of the accounts was left to me.

[117] I see no reason why Mr. Cohen's client, who chose to have counsel attend to contest the accounts, should bear all of the expense for the benefit of all claimants to the estate. In my view however, costs on a partial indemnity basis for this attendance is warranted, particularly as Mr. Cohen had not previously asserted an intention to ask for costs.

[118] For these reasons, I award costs to Atlas Holdings and Investments Inc. in the amount of \$1,500 on a partial indemnity basis, to be paid from the estate when Receiver's counsel is paid.

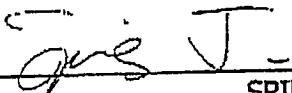
[119] I must add that this order as to costs is not an invitation for counsel who did not participate on the assessment of the costs on this motion to appear on future

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motions and seek such an award. If more claimants wish to be represented on future motions to approve the fees, they will need to choose and rely on one counsel to represent all of their interests on the issue of costs.

[120] That brings me to Mr. Govedaris who has not asked for costs and in fact opposed the request by Mr. Cohen for costs. Had Mr. Govedaris sought costs, I would have awarded costs to him on the same basis. Going forward, I expect Mr. Cohen to cooperate with Mr. Govedaris on the issue of the fees and I will only be prepared to consider awarding one set of costs on future motions to approve fees. Mr. Cohen represents a member of the class represented by counsel for the Receiver. As Mr. Govedaris represents the Mortgage Fraud Class Action, I would prefer to hear from him given the potential for conflict with the Deposit Fraud Class Action that I have already referred to.

[121] Finally, I ask that counsel for the Receiver ensure that this decision is posted on the Receiver's website as soon as possible.



SPIERS J.

RELEASED: JUNE 8, 2006

COURT FILE NO.: 05-CL-6159

DATE: 2006-06-08

**SUPERIOR COURT OF JUSTICE -
ONTARIO**

RE: UDAYAN PANDYA, Plaintiff

A N D:

COURTNEY WALLIS SIMPSON,
YORK REGION REALTY INC.,
WALLIS, SIMPSON &
ASSOCIATES, COURTNEY
WALLIS SIMPSON c.o.b. as
YORK MANAGEMENT GROUP
and as CAMCO DEVELOPMENTS
and as YORK GROUP, Defendants

COUNSEL: *Lincoln Caylor* for the
Plaintiff/Receiver

Gregory Govedaris, for the
Plaintiffs in Action # 05-CL-6178,
Glenn E. Cohen for Atlas
Holdings, D.R. Rothwell for Ajay
Pahwa and Courtney Wallis
Simpson in person

DECISION ON MOTION

SPIES J.

JUN - 8 2006

Exhibit L

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Udayan Panda

Plaintiff(s)

AND

Courtney Wallis Smyson et al

Defendant(s)

Case Management Yes No by Judge: _____

Counsel	Telephone No.:	Facsimile No.:

- Order Direction for Registrar (No formal order need be taken out)
- Above action transferred to the Commercial List at Toronto (No formal order need be taken out)
- Adjourned to: _____
- Time Table approved (as follows): _____

Items 5 + 6 of the notice of motion originally returnable Oct 10, 06 were adjourned to be heard by me today so that additional materials could be placed before the court.

The Receiver + Receiver's counsel had originally sought approval of their interim accounts before Spies J. In her decision of June 8, 06 she observed that there was duplication of legal work + also suggested that the hourly rates should be reduced by about 15%. She also noted that others should have done much of the work for which fees were claimed at lower rates. She also noted that the accounts should be detailed + include total charges for each category of services. She reduced the fees claimed substantially.

Counsel for the Receiver now seeks approval of its fees for the period Apr 1, 2006 to July 31, 2006 in the amount of \$103,893.15. This does

Nov 15, 06

Date

St Russell J

Judge's Signature

Additional Pages 3

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsement Continued

not include disbursements. A separate outline of these has not been provided + are to be addressed on the next occasion that the receiver is in court. The fees of the receiver have not been adequately addressed + approval is also similarly adjourned. A breakdown of time is required.

The receiver's ~~the~~ counsel have done much to attempt to address the issues raised by Order 10. In this regard, the fees allocated to the planor shares, the Palomas mortgages + the General Receivership Activities have all been reduced by 15%. In addition, with respect to the real property realizations, a flat fee of \$10,000 is requested rather than the full fees of \$23,492.50. Although significant time was devoted to this category, recovery was disappointing. An effort was also made to reduce the number of timekeepers on the file + to replace work done by a lawyer with work done by articling students for which there has been no charge.

I must be satisfied that the fees claimed are fair + reasonable. For the most part I am but I am of the view that the numbers of lawyers working on the file for the relevant time periods was excessive. In light of the size of the estate, I am hard pressed to understand the need for a litigation counsel called in 2000 + another in 1995. I accept that special expertise may be required for real estate + insolvency matters. In all of these circumstances, I am reducing the fees claimed by \$10,000. Accordingly fees of \$93,893.75 are approved as disbursements of the fees of receiver's counsel.

On Oct 10, 200, I granted the receiver

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsement Continued

authority to resolve Mr Simpson's Family Law Act claim. The Receiver advised the court + fees that for a period of time, Mrs. Simpson had moved back into the family home at 587 Cam Kella Blvd in Strathville. The Receiver continues to recommend that he proceed with the agreement in principle reached with Mr. Simpson. Both Mr + Mrs. Simpson advise the Receiver + the court that they are separated + living separate + apart; that the separation agreement entered into by them is not a sham; that Mrs. Simpson has moved out + that Mr. Simpson has brought proceedings for divorce. Both were advised by me of the provisions of R 59.06 + that a court order may be set aside on the grounds of fraud or facts arising or discovered after the order was made. Both assured me that the representations made to the court are accurate. On that basis, the Receiver is at liberty to complete the settlement with Mr. Simpson. Both Mr + Mrs. Simpson were also told that they should not construe my comments as suggesting that they should be separated or divorced. They must simply be forthright + honest with the Receiver + the court.

Lastly with respect to the written request of Mr Geredans which I authorized in the interests of reducing costs, Mr Couper did file an affidavit + as mentioned, further supporting materials are required before I approve the Receiver's

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsement Continued

fees.
not including the planor shares which
currently would have a value of
\$410,000 the estimated value of the
estate is \$1.4 million before any fees or
other expenses.

SEP

Exhibit M

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

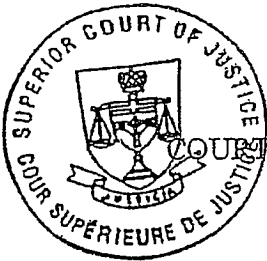
THE HONOURABLE MR.) MONDAY, THE 5th DAY OF
JUSTICE CAMPBELL) MARCH, 2007

BETWEEN:

UDAYAN PANDYA

Plaintiff

-and-



COURTNEY WALLIS SIMPSON, YORK REGION
REALTY INC., WALLIS, SIMPSON & ASSOCIATES,
COURTNEY WALLIS SIMPSON c.o.b. as YORK MANAGEMENT GROUP
and as CAMCO DEVELOPMENTS and as YORK GROUP

Defendants

In the matter of the *Class Proceedings Act, 1992*

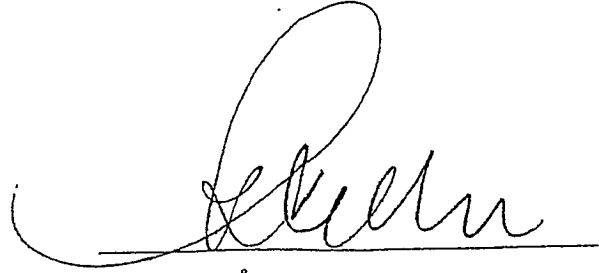
M ✓ *without notice* ✓ ORDER

THIS MOTION, made by the receiver for an Order approving the receiver's interim fees, disbursements and GST and the disbursements of counsel for the receiver, Bennett Jones LLP, was heard this day *at Toronto*.

ON READING the materials filed,

1. THIS COURT ORDERS that the receiver's interim fees in the total amount of \$35,808.00, disbursements in the total amount of \$6,585.72 and GST thereon are approved and are to be paid to the receiver, Michael J. Quilling, as a first charge on the receivership estate.

2. THIS COURT FURTHER ORDERS that the disbursements of the counsel for the receiver, Bennett Jones LLP, in the total amount of \$8,887.24 and GST thereon, are approved and are to be paid to counsel for the receiver by the receiver, Michael J. Quilling, as a first charge on the receivership estate.



A-K Fedson
Registrar

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

DEC 12 2007

PER/PAR:



Udayan Pandya
Plaintiff

v.

Courtney Wallis Simpson *et al.*
Defendants

Court File No.: 05-CL-6159.

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

In the matter of the *Class Proceedings*
Act, 1992

Proceeding commenced at Toronto

ORDER

BENNETT JONES LLP
One First Canadian Place
Suite 3400, P.O. Box 130
Toronto, Ontario
M5X 1A4

M. Joanne MacMillan
LSUC Reg. No. 43529J
Tel: 416-777-4629
Fax: 416-863-1716

Solicitors for the receiver

EXHIBIT "N"

Udayan Pandya
Plaintiff

v.

Courtney Wallis Simpson *et al.*
Defendants

Apr. 9/08

This motion proceeded in writing but appears in notice to the other parties as best as in the affidavit of service.

I have no hesitation in opposing the fees of the Receiver & the disbursements of the Receiver of the accountants fee. This latter item of \$30.00 does not have any back up material in support to explain what was done & what time was involved. Assuming I am satisfied with the fee on Order 11/07

there when forwarded for signing

Phelan J.

Court File No.: 05-CL-6159

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

In the matter of the *Class Proceedings Act*, 1992

Proceeding commenced at Toronto

MOTION RECORD
(Motion Returnable in Writing)

BENNETT JONES LLP
One First Canadian Place
Suite 3400, P.O. Box 130
Toronto, Ontario
M5X 1A4

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Solicitors for the receiver

