

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.

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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 *Belyea* 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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money or the value affected by the controversy or involved in the employment. Thus, **in cases where a professional is aware of the amount at issue**, courts will impose an underlying or implied limit or maximum on the professional fees it will allow based on what is reasonable **in relation to the dollar amount involved in the particular case** (at para 11, emphasis mine).

[66] Clearly then, assessing the fees of counsel to the Receiver should not just be a matter of calculating the number of hours spent times a reasonable hourly rate. There should be some correlation of the costs to the benefits derived from the receivership. This cost-benefit analysis need not be precise or based upon the advice of expert analysis⁶

[67] I recognize however, that as observed by Bennett, referring to the trial decision in *Belyea*, that the court "should not necessarily penalize a receiver [and by extension the receiver's counsel] who expends considerable time in administering the estate, although recovery may be small". This point was not dealt with on appeal. Bennett goes on to state that when the receiver is appointed, the receiver may find the debtor's business affairs somewhat chaotic and the receiver may have to spend considerable time, which may not be productive from a financial point of view, organizing the affairs in order to be in a position to administer the receivership properly.⁸ Accordingly the time spent must be viewed in the context of the Receiver's duty to preserve the assets of the debtor and realize on those assets and administer the estate and the Receiver's ability to retain the services of legal counsel to assist in those duties as required.

[68] The first question then is when counsel for the Receiver was aware of the amount involved in this case, namely the estimated size of the receivership estate. In the First Report to Farley J. dated December 13, 2005 the Receiver estimated that the victims of the alleged frauds were owed in total, approximately \$14.6 million. As for assets, that First Report estimated the equity in real estate to be anywhere from \$654,000 to \$1.3 million. The claim by Pahwa had been asserted and the position of RECO was known. Although further information on the assets and claims became known to the Receiver and its counsel as the receivership progressed, it was certainly clear from the outset that subject to litigation with RECO, the assets of the estate were modest, particularly relative to the quantum of the claims.

[69] The numbers have not changed that much. Based on the statement of assets and liabilities filed before Mesbur J., the estimate of the net assets to be realized from the defendants is approximately \$1.8 million. This estimate assumes a \$500,000

⁶ Re Hoskinson (1976), 22 C.B.R. (N.S.) 127 at para. 26 (Ont. S.C.)

⁷ Bennett, supra at p. 474

⁸ Bennett, supra at pp. 474-475

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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 breakdown 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.

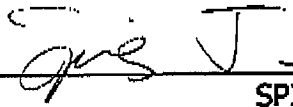
[119] I must add that this order as to costs is not an invitation for counsel who did not participate on the assessment of the costs on this motion to appear on future

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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.



SPIESS 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