

The Receiver's Action Plan

Pursuant to Justice Spies' endorsement dated April 6, 2006, this is the receiver's proposal for dealing with the issues arising from the Dianor Resources Inc. shares, Ajay Pahwa's mortgages (the "Pahwa Mortgages") and the potential claim against the Real Estate Council of Ontario ("RECO"). The receiver proposes to deliver a proposal for dealing with the claims process after consultation with counsel for the interested parties.

A. Dianor Resources Inc. Shares

Background Information

1. On January 10, 2006 the receiver was advised by Detective Brian Morrison of the York Regional Police Fraud Unit that certain shares owned by the Simpson had been transferred into two individuals' RBC accounts in what was suspected to be a breach of the Initial Order. When one of the individuals to whom the shares were transferred attempted to withdraw all of the funds, it raised red flags and the investigative services department at RBC was alerted. RBC, in turn, alerted Detective Morrison.
2. Greg Nawakowski ("Nawakowski") at RBC Dominion Securities confirmed that the original share certificates at issue were in fact in Simpson's name and had been transferred into two separate accounts in early December 2005.
3. Counsel for the receiver wrote to Nawakowski providing copies of the Initial Order and the First Amended and Restated Initial Order and notifying him that as of November 17, 2005, Simpson did not have authority to transfer the shares as all of her assets were frozen. The receiver requested that the transfer be reversed and the funds held by the receiver for the estate.
4. Nawakowski confirmed by telephone conversation that there were approximately 500,000 Dianor A Resources Inc. shares.

5. Counsel for the receiver spoke with Simpson who reported that in December 2004 or January 2005, she bought a number of shares directly from the treasury of Dianor A Resources Inc. Simpson stated that it was in the first week of April 2005 that she signed the share certificates over to Vern Zapfe ("Zapfe") and Michael Sourlis ("Sourlis"). Simpson could not recall how many shares she signed over to each.
6. The receiver's counsel brought a motion and obtained an order, the Fourth Amended and Restated Initial Order dated March 9, 2006, compelling RBC Dominion Securities to produce all documents and particulars relating to the transfer of the Dianor A Resources share certificates from Simpson to Vern Zapfe and Michael Sourlis.
7. RBC Dominion Securities provided the supporting statements on March 29, 2006.
8. By notice of motion, the receiver put Mr. Zapfe and Mr. Sourlis on notice that he challenges the share transfer and requires that it be reversed on the basis that the transfer took place after the receivership order was in effect. Attached hereto as **Schedule "A"** is the notice of motion (returnable April 6, 2006).
9. At Mr. Sourlis' and Mr. Zapfe's request, counsel for the receiver agreed to an adjournment of this issue.
10. At the appearance before Justice Spies on April 6, 2006, Mr. Govedaris informed Justice Spies that Mr. Zapfe and Mr. Sourlis had retained independent counsel (Mr. Gus Alexiou) and the matter was adjourned to April 26, 2006.
11. Counsel for the receiver and Messrs Sourlis and Zapfe have agreed to extend the freeze order and to attend at a 9:30 a.m. shortly to schedule the determination of this issue.

Proposed Action

12. The receiver recommends challenging the share transfer and requests that the transfer be reversed and the shares returned to the receivership estate on the basis that the transfer took place after the freezing order had taken effect.

13. Counsel for the receiver has filed the Affidavit of M. Joanne MacMillan (sworn March 31, 2006) in support of his position. See Tab 2 of the Supplementary Motion Record (Originally Returnable March 9, 2006, adjourned to April 6, 2006).

Updated Share Value Information

14. 519,314 @ \$1.74 (April 24, 2006) = \$903,606.36

B. The Pahwa Mortgages

Background Information

15. Ajay Pahwa obtained mortgages in the total amount of \$870,000 with respect to three of Simpson's properties as security on advances of \$665,000. The underlying debt instruments provided as consideration for the mortgages were promissory notes. Simpson has paid to Pahwa not less than \$1,084,500 on the advances of \$665,000. It is the receiver's position, therefore, that the Pahwa Mortgages have been paid in full and should be discharged.

Proposed Action

16. The receiver recommends the following steps:
- (a) Examination of Ms Debra Sweetman, the lawyer who, it appears, assisted in placing the Pahwa Mortgages on title to Simpson's properties.
 - (b) Challenging the validity of the Pahwa Mortgages and proceeding via application seeking to discharge the Pahwa Mortgages on the grounds that the mortgages have been paid. Attached hereto and marked as **Schedule "B"** is a copy of the draft notice of application.
 - (c) In the alternative, the receiver will seek to have the Pahwa Mortgages set aside as unconscionable transactions. In the further alternative, the receiver will seek to have the Pahwa Mortgages discharged on the basis that the Pahwa Mortgages were unlawful arrangements, which required Simpson to pay interest at a criminal rate.
 - (d) The receiver will seek an order pursuant to subsection 6(2) of the *Land Registration Reform Act*, subsection 102(1) of the *Land Titles Act* and subsection

12(2) of the *Mortgages Act* that the Pahwa Mortgages should be discharged on the basis that they have been paid in full.

- (e) In the further alternative, the receiver will seek an order under section 2 of the *Unconscionable Transactions Relief Act*, that the Pahwa Mortgages be reopened and an account taken on the basis that the cost of borrowing the advances from Mr. Pahwa was excessive and the loan transactions were harsh and unconscionable.
- (f) In the further alternative, the receiver will seek an order pursuant to section 347 of the *Criminal Code* that the Pahwa Mortgages be discharged on the basis that the Pahwa Mortgages were unlawful arrangements, which required Simpson to pay interest at a criminal rate.
- (g) In the further alternative, the receiver will seek an order pursuant to sections 4 and 12 of the *Assignments and Preferences Act* that the security taken by Pahwa is a fraudulent preference, should be declared void, and all amounts paid pursuant to such security should be repaid to the receiver for the benefit of all unsecured creditors.

C. RECO Claim

Background Information

- 17. Each member of Class 1 has made a claim to RECO for payment of the deposit to Simpson that was not refunded. The Receiver is considering submitting an omnibus claim on behalf of the class.
- 18. RECO has a Consumer Deposit Insurance program in place. The policy names Lloyd's of London ("Lloyd's") as the insurer and Aon Reed Stenhouse Inc. ("Aon") as the insurance broker.
- 19. The Consumer Deposit Insurance program is in place to pay, on behalf of RECO, the amount of any claim for loss sustained by the claimant in a trade in real estate.
- 20. The deposits claimed to date total \$3,215,000.
- 21. The policy's limits are: \$100,000 for each claim and \$500,000 for each occurrence.
- 22. Twenty-six claims have been made to RECO. If they are characterized as individual claims, the maximum possible insurance coverage would be \$1,965,000.

23. Lloyd's will likely take the position that Simpson's fraudulent acts constitute "an occurrence" and that the maximum payout under the insurance is \$500,000 total on a pro rata basis.

Proposed Action

24. The receiver is considering commencing proceedings against RECO and Lloyd's by naming them as defendants to the main action. A copy of the draft Fresh as Amended Statement of Claim is attached hereto at **Schedule "C"**.

(a) *Claim Against RECO*

25. The receiver is considering further amending the amended statement of claim so as to name RECO as a defendant and to seek damages for its failure to pay out the claims made to date.
26. In the alternative, the receiver is considering claiming damages against RECO for negligence in its failure to adequately monitor and regulate Simpson.
27. Civil liability of public and regulatory agencies is fairly rare. Such liability is determined by application of the *Anns/Kamloops* two-step principle for determining if liability should be found in a novel claim.

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- (i) First, the plaintiff must establish a prima facie duty of care (this requires demonstration of both (a) reasonable foreseeability of harm and (b) proximity of the plaintiff to the defendant); and
- (ii) Second, the court will consider if there are any policy reasons that militate against the finding of a duty of care.

28. It has traditionally been held that, while regulatory bodies are required to uphold the public interest, a general private law duty of care is not generally owed to the public even when individual harm may be reasonably foreseeable. Consequently, an individual aggrieved or even harmed by a regulatory body's action or inaction is generally without recourse in terms of civil damages. Two Supreme Court of Canada decisions - *Edwards v. The Law Society of Upper Canada (No. 2)*, [2001] 3 S.C.R. 562 and *Cooper v. Hobart*, [2001] 3 S.C.R. 537) stand for this proposition that public bodies charged with

"protecting the public" generally do not owe a common law duty of care to individual members of the public who are arguably harmed when the public body has failed to protect the public.

29. In *Cooper, supra*, the Supreme Court considered whether the Registrar of Mortgage Brokers (a regulatory body under the *Mortgage Brokers Act*, R.S.B.C. 1996, Ch.313) owed a private law duty of care to members of the public who chose to participate in investment ventures carried out by a licensee company. Acting upon information that the impugned broker was improperly using the investment money, the Registrar took steps to suspend the broker's license and to freeze its assets. The plaintiffs brought an action in negligence against the Registrar alleging that the Registrar breached a duty of care owed to the investors when it failed to act earlier to either suspend the broker or cancel its license. It was contended that the losses sustained by the plaintiffs would have been less substantial or non-existent had the Registrar acted in a timely manner. At trial, a cause of action was identified. The trial decision was reversed by the Court of Appeal and unsuccessfully appealed to the Supreme Court of Canada. The Supreme Court stated that absent a duty of care, a finding of liability was not possible. In relying on the *Anns/Kamloops* test, the Court held that although it was reasonably foreseeable that a failure to carry out its duties could result in a loss to the plaintiff, reasonable foreseeability alone was insufficient to establish proximity. As such, no finding of liability was made.
30. The Supreme Court of Canada in *Edwards, supra* applied the decision in *Cooper, supra*. The claim in *Edwards* arose from the plaintiffs' participation in a gold delivery scheme that required them to deposit funds into a solicitor's trust account. The plaintiffs suffered a loss when they did not receive their gold. They contended that it was the duty of the Law Society, upon discovering the atypical use of the solicitor's trust account, to ensure that it was utilized properly, or to warn of the activities involving the trust account. The Supreme Court of Canada rejected the plaintiffs' claim. Applying the *Anns* test, the Court determined at the first stage of the analysis that foreseeability and proximity were not demonstrable in this circumstance, thus a duty of care could not be identified. Proximity

was assessed through an examination of whether the statute governing the regulatory body implicitly or explicitly authorized a private law duty.

31. The general conclusion that can be derived from *Cooper* and *Edwards* is that there are limits on a regulatory agencies' duty of care to individual members of the public, even when it is reasonably foreseeable that harm might result from the agencies' alleged failure to meet its statutory duty to protect the public.
32. The approach taken in *Cooper* and *Edwards* was challenged by the Supreme Court of Canada's decision in *Finney v. Barreau du Quebec*, [2004] 2 S.C.R. 17. The plaintiff in this case submitted a complaint with the Barreau based upon the conduct of a lawyer. The lawyer was entered on the roll in 1978. Between 1981 and 1987 he had been found guilty of disciplinary offences on three separate occasions. In 1990, he was deemed incompetent. Two years later the Barreau directed that he complete a refresher course and it was not until 1994 that he was struck off the roll. The plaintiff's problems with the lawyer began in 1991. While unsuccessful at trial, the court of appeal awarded the plaintiff \$25,000 in "moral damages". The finding was based on the Court's conclusion that the Barreau's delays in dealing with the plaintiff's complaints were negligent and constituted civil faults for which it was liable. These findings were upheld by the Supreme Court of Canada. The Court discussed the scope of statutory immunity provisions in the governing legislation. The statute protected the Barreau from liability "for acts done in good faith in the performance of their duties." The Court rejected the argument that this language precluded liability except in cases when the plaintiff could prove some form of intentional fault. Rather, the Court accepted that recklessness or complete lack of care may constitute "bad faith". The *Finney* decision can be interpreted to suggest that there is a public law duty to an individual when that public body has a statutory obligation to respond to an individual's complaint. This statutory obligation may give rise to civil liability when the body fails to discharge its statutory obligations.
33. The British Columbia Court of Appeal decision, *V.M. v. Stewart* [2004] B.C.J. No. 1852 was rendered three months after *Finney*. In this case, the British Columbia College of Physicians and Surgeons ("College") brought a motion to have the claim against it struck

on the basis that it disclosed no reasonable cause of action. Based on the reasoning from *Finney*, the Court of Appeal permitted the claim to proceed against the College for its alleged failure to protect individual members of the public from the intentional conduct of one of its members. It was alleged that between 1969 and 1996 the defendant, Stewart, committed sexual assaults on the plaintiffs. It was further alleged that the defendant, the College, had knowledge of circumstances, which ought to have triggered an inquiry relating to the assaults. In sum, the allegation against the College was that it was reckless and negligent in failing to investigate or adequately investigate the allegations and circumstances it was aware of in respect of Stewart. Had the College properly exercised its duty to investigate, it was alleged that it would have discovered the misconduct at an early date and Stewart's license could have been suspended or cancelled thereby reducing the number of victims. Applying traditional common law negligence principles, the court held that the College owed a duty of care to Stewart's patients. The College appealed the decision and the British Columbia Court of Appeal rendered a unanimous decision dismissing the appeal noting that the law of Canada on the liability of regulatory bodies is the same in the common law provinces as it is in Quebec (wherein the *Finney* decision was rendered).

34. The receiver is satisfied that a cause of action as against RECO and Lloyd's exists. He recommends proceeding with these claims. It is acknowledged, however, that any claim against RECO will likely be defended thereby increasing costs against the estate. Finally, RECO advises the majority of Simpson's books and records had been doctored by Simpson. This is an obvious defence to any negligence claim against RECO.

Proposal for Claims Administration

A. Claim Intake

1. A statutory declaration form was approved by Justice Farley in the Second Amended and Restated Initial Order dated December 23, 2005. This statutory declaration serves as the claim form for the claimants in both class actions 05-CL-6159 ("Class 1") and 05-CL-6178 ("Class 2"). Potential claimants in both classes are able to access the receiver's website to obtain information about submitting a claim form. Additionally, claims administrators have been designated in Toronto at Bennett Jones LLP and in Texas at Quilling, Selander, Cumminsky & Lownds. The claims administrators are available to answer any questions about the status of individual claimants or the proceedings on whole. Simpson and the York Regional Police Fraud Unit have advised Bennett Jones LLP of a number of potential claimants. Bennett Jones LLP, in turn, has contacted each of those potential claimants to ensure that they understand the process and are in receipt of a claim form.
2. After the claim form has been completed and submitted by the claimant and all of the substantiating documents are in order, Bennett Jones LLP assigns the claimant a number and provides the receiver with a copy of the forms and substantiating documentation. The claimant from this point forward is able to contact Bennett Jones LLP or the receiver directly, cite his/her claim number and learn the status of his/her claim. The receiver continues to collect, process and validate the claim forms as they are submitted. Further, the receiver will continue to work to maximize the total recoveries to the estate.

B. Separating Claims

3. The claim form described above requires the claimant to specify whether he/she is a victim of the real estate deposit scheme (Class 1) or the mortgage investment scheme (Class 2). A chart, attached as **Schedule "D"** hereto illustrates clearly, the number of claimants in each class. "D" denotes a deposit victim or a Class 1 victim and "M" denotes a mortgage investment victim or a Class 2 victim. Note that certain claimants are victims of both schemes but in such cases, the monies owed are clearly distinguishable.

C. Validation of Claims

4. The receiver reviews each claim form that is submitted along with the supporting documents. After independently verifying the information in the claim forms and the supporting documents with bank records, promissory notes, mortgage documents etc., the receiver comes to a determination as to whether the claim should be:

- (a) approved;
- (b) rejected; or
- (c) amended.

5. The receiver proposes to set forth his classification of each and every claim along with evidence to support the classification in the form of a report, which will be delivered to every claimant. This report will also be submitted to the court for approval with a time and date to be set for the court's approval of the receiver's assessment of the claims. Every claimant will be able to contest the classification of their claims. The receiver will be available on this date to give reasons and evidence as to why he classified claims as set out in his report.

D. All Claim Forms Submitted

6. The receiver and his counsel will take all steps to ensure and ascertain that all potential claimants have submitted claim forms. It is proposed that this be done by:

- (a) placing a final notice for submission of claim forms on the receiver's website; and
- (b) contacting each potential victim that the receiver is aware of and who has yet to submit a claim form.

E. Quantification & Payout of Claims

Claimed Amount

7. In both classes, it is proposed that only the principle amount of the deposit or "investment" is to be validated. All interest earned (if any) will not form part of the quantum of the claim.

Recovery from RECO

8. It is recommended that any recoveries against RECO would be to the credit of Class 1 only (as would be the related costs). The *pro rata* distribution of the total estate (exclusive of RECO funds) should remain the same. Counsel for Class 2 has suggested that the Class 1 recoveries, if any, against RECO, should reduce the Class 1 victims' recovery from the Simpson estate. Double recovery is prohibited of course, but there may be an issue between the two classes with respect to timing of the distribution from the Simpson estate. Class 2 may require that the RECO matter be dealt with prior to any distribution to Class 1 members.

Priority Issues

9. Once the receiver has determined that the estate has been maximized, the valid claims have been separated from the invalid claims, and the recovery from RECO has been carved out, it is recommended that the receiver distribute the estate on a *pro rata* basis by class. Timing of any distribution can be dealt with after the litigation set out in the proposal has been commenced and timetables set.

Schedule "A"

Court File No. 05-CL-6159

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

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*

**NOTICE OF MOTION
(Motion Returnable April 6, 2006)**

The court appointed receiver will make a motion on April 6, 2006 at 10:00 a.m. to a judge presiding over the Commercial List at 393 University Avenue in Toronto or as soon after that time as a motion can be heard.

PROPOSED METHOD OF HEARING: The motion is to be heard orally.

THE MOTION IS FOR:

1. An order that the Dianor Resources Inc. shares are part of the receivership estate and subject to the Fourth Amended Order of Justice Mesbur dated March 9, 2006.

2. An order that real estate commissions owing to York Region Realty Inc. and its former agents currently being held by the Real Estate Council of Ontario be released to the Receiver to be held in an interest bearing bank account pending further order of this court.
3. An order that the interim fees, disbursements and G.S.T. are approved and are to be paid to counsel for the receiver, Bennett Jones LLP, by the receiver Michael J. Quilling, as a first charge on the receivership estate.
4. An order that the interim fees and disbursements are approved and are to be paid to the receiver, Michael J. Quilling, as a first charge on the receivership estate.
5. Leave of the court to bring this motion, if necessary.
6. Such further and other Order as this Honourable Court may deem just.

THE GROUNDS FOR THE MOTION ARE:

Background

1. The defendant, Simpson, is a member of the Real Estate Council of Ontario ("RECO"), a broker under the *Real Estate and Business Brokers Act* and is the principal broker and controlling mind of the defendant, York Region Realty Inc. ("York Realty") and also of the defendant entities known as Wallis Simpson & Associates ("Simpson & Associates") and York Management Group ("York Management").
2. This proceeding has been commenced as a class action against the defendants for fraud, unjust enrichment, breach of fiduciary duty and/or misrepresentation with respect to a large number of victims or class members.
3. By Order of the Honourable Mr. Justice Ground dated November 17, 2005 (the "Initial Order"), Michael J. Quilling (the "Receiver") was appointed receiver, pursuant to section 101 of the *Courts of Justice Act* and rule 41.02 of the *Rules of Civil Procedure*, over the assets of Courtney Wallis Simpson ("Simpson") and York Region Realty Inc. ("York Realty").

Dianor Resources Inc. Shares

4. As of November 17, 2005, pursuant to the Order of Justice Ground, the assets of the defendants were frozen.

5. On November 23, 2005, Simpson transferred certain of the Dianor Resources Inc. shares out of her name and into the names of two individuals, Vern Zapfe and Michael Sourlis.

6. Given that the transfer took place after the freezing order had taken effect, the shares properly form part of the assets of the receivership estate and should be returned to the estate.

Release of Real Estate Commissions

7. Commissions from the sale of properties that closed in 2005 and owing to York Region Realty and its former agents are being held by the Real Estate Council of Ontario.

8. These commissions form part of the assets of the estate.

9. Counsel for the Receiver requested that the commissions be released so that they can be held in an interest bearing account for the benefit of the estate.

Counsel Fees

10. Subject to paragraph 27 of the Order of Justice Farley dated December 23, 2005, the fees of Bennett Jones LLP, counsel for the Receiver, form a first charge from the assets recovered in the receivership herein.

Receiver's Fees

11. Subject to paragraph 27 of the Order of Justice Farley dated December 23, 2005, the fees of Bennett Jones LLP, counsel for the Receiver, form a first charge from the assets recovered in the receivership herein.

Further Grounds

12. Rule 2 of the *Rules of Civil Procedure*.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

1. The Fourth Report of the Receiver dated March 3, 2006;
2. The affidavit of Emily Atkinson (sworn March 3, 2006);
3. The receiver's interim account and itemized services;
4. A summary of the receiver's counsel fees;
5. The affidavit of M. Joanne MacMillan (sworn March 31, 2006); and
6. Such other material as counsel may advise and this Honourable Court may permit.

DATE: March 31, 2006

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AND TO: York Region Realty Inc.

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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

MOTION RECORD
(Returnable April 6, 2006)

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Solicitors for the plaintiff

DRAFT

Schedule "B"

Court File No. ●

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

**MICHAEL J. QUILLING, RECEIVER FOR
COURTNEY WALLIS SIMPSON**

Applicant

-and-

AJAY PAHWA

Respondent

NOTICE OF APPLICATION

TO THE RESPONDENT

A LEGAL PROCEEDING HAS BEEN COMMENCED by the applicant. The claim made by the applicant appears on the following pages.

THIS APPLICATION will come on for a hearing on a date to be fixed by the Court at 10:00 am at the Court House at 393 University Avenue, Toronto, Ontario M5G 1E6

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the Rules of Civil Procedure, serve it on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the applicant's lawyer or, where the applicant does not have a

lawyer, serve it on the applicant, and file it, with proof of service, in the court office where the application is to be heard as soon as possible, but at least two days before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO OPPOSE THIS APPLICATION BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

DATE:

Issued by: _____

Local Registrar

Address of Court Office: 393 University Avenue
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Solicitors for the respondent

APPLICATION

1. The applicant, Michael J. Quilling, receiver for Courtney Wallis Simpson ("Simpson"), makes an application for the following:

- (a) a declaration that mortgages in favour of Ajay Pahwa ("Pahwa Mortgages") against three properties owned by Simpson (described in **Schedule "A"** hereto) in the total amount of \$870,000 were registered by Ajay Pahwa ("Pahwa") to secure loans in the total amount of \$665,000;
- (b) a declaration that Simpson paid no less than \$1,084,500;
- (c) a declaration that the loans as secured by the Pahwa Mortgages have been paid in full; and
- (d) an order discharging the Pahwa Mortgages;
- (e) in the alternative, a declaration that the cost of borrowing the advances from Pahwa was excessive and the loan transactions were harsh and unconscionable;
- (f) an order that the Pahwa Mortgages be reopened and an account taken;
- (g) an order that the applicant be relieved from payment of any sum in excess of the sum adjudged by this court to be due;
- (h) in the further alternative, a declaration that the Pahwa Mortgages are unlawful arrangements which required Simpson to pay interest at a criminal rate; and
- (i) an order that the Pahwa Mortgages be discharged;
- (j) in the further alternative, a declaration that any amounts secured by the Pahwa Mortgages constitute a fraudulent preference pursuant to the *Assignments and Preferences Act*, R.S.O. 1990, c. A. 33;

- (k) an order that the Pahwa Mortgages are void;
- (l) an order that the Pahwa Mortgages be set aside and the amounts paid by Simpson pursuant to the mortgages shall be repayed to the receiver for the benefit of all the creditors;
- (m) the applicant's costs of this application on a substantial indemnity basis, plus G.S.T.; and
- (n) such further and other relief as counsel may advise and this Honourable Court deems just.

2. The grounds for the application are as follows:

- (a) Between December 2004 and June 2005 the respondent, Pahwa, advanced Simpson loans in an amount in excess of \$665,000 ("Pahwa Loans").
- (b) The loans were secured by mortgages registered on title of Simpson's properties (described in **Schedule "A"**).
- (c) Simpson was under pressure from external sources, was desperately in need of the money and could not obtain a loan from a financial institution. Hence, with no other options, she borrowed from Pahwa under the exorbitant terms of the promissory notes and agreed to have mortgages placed on her properties.

The Promissory Notes

- (d) The Pahwa Loans were evidenced by promissory notes executed by Simpson. There were two promissory notes.
- (e) Pursuant to the promissory note dated February 10, 2005 ("Promissory Note 1"), Pahwa demanded a fee of \$5,000 on a \$100,000 loan due weekly upon renewal of the note.

- (f) In the event of non-payment, under Promissory Note 1, 10 per cent interest per day compounded was charged in addition to the \$5,000 fee.
- (g) The promissory noted dated June 21, 2005 ("Promissory Note 2"), acknowledged three outstanding promissory notes, each with a value of \$100,000 and all subject to the even more harsh terms discussed below.
- (h) Pursuant to Promissory Note 2, Pahwa demanded a fee of \$10,000 on each \$100,000 loan due weekly upon renewal of the note. Simpson would pay \$1,440,000 to borrow \$300,000 for one year.
- (i) In the event of non-payment under Promissory Note 2, 10 per cent interest per day compounded was charged in addition to the \$10,000 fee. An "additional late fee" of \$1,000 per day would accrue for every day that payment was not received.
- (j) The applicant pleads that, having regard to all the circumstances, the cost of the loans are excessive and the transactions are harsh and unconscionable. Simpson paid Pahwa approximately \$50,000 per week every week for approximately six months pursuant to these notes.
- (k) Between January 21, 2005 and September 13, 2005, Simpson paid Pahwa no less than \$1,084,500.

The Pahwa Mortgages

- (l) Pahwa obtained mortgages in the total amount of \$870,000 against three of Simpson's properties (described below). The underlying debt instruments provided as consideration for the mortgages were the promissory notes.
- (m) Pahwa obtained and registered the following mortgages as set out in **Schedule "B"** hereto:

- (i) On February 10, 2005, Pahwa registered a mortgage in the amount of \$210,000 on title of Lot 14 Stouffer Street, Stouffville. This mortgage secured a loan of \$200,000 from Pahwa to Simpson. This loan was advanced on February 11, 2005 to Simpson.
- (ii) On March 8, 2005, Pahwa registered a mortgage in the amount of \$220,000 on title of 9 Kawagama Lake Road, Dorset. This mortgage secured a loan of \$100,000 from Pahwa to Simpson. This loan was advanced on February 24, 2005 to Simpson.
- (iii) On March 8, 2005, Pahwa registered a mortgage in the amount of \$220,000, later increased to \$440,000 on June 28, 2005 on title of 6072 Main Street, Stouffville. This mortgage secured loans in the amounts of \$200,000, \$40,000 and \$125,000 respectively totaling \$365,000. These loans were advanced to Simpson on March 8, June 22 and June 28, 2005 respectively.
- (n) The Pahwa Mortgages relate to loans in the total amount of \$665,000. The Pahwa Mortgages are in the total amount of \$870,000. The purported security is for an unconscionable amount.

Cessation and Discharge of Mortgages

- (o) Simpson paid Pahwa not less than \$1,084,500 on advances of \$665,000 pursuant to the Pahwa Mortgages. The amounts she has paid on the loans secured by the Pahwa Mortgages greatly exceed the amounts advanced to her by Pahwa on those loans.
- (p) The applicant pleads that the amounts secured by the Pahwa Mortgages have been paid in full and the mortgages should be discharged.

- (q) To the extent that funds were advanced in excess of the amount of \$665,000, there was no security taken for those advances.

Pahwa Mortgages are Unconscionable Transactions

- (r) Simpson was desperate to borrow money.
- (s) Pahwa unfairly took advantage of Simpson as a borrower.
- (t) Pahwa charged excess amounts for the loans that were not reasonably consistent with the prevailing lender market nor required to secure his loan.
- (u) The applicant pleads that it is unfair and unconscionable to take a mortgage for an amount that is more than twice the amount of the loan. Further, the applicant pleads that, like the mortgages, the terms of the promissory notes underlying the Pahwa Mortgages were grossly excessive.
- (v) The applicant pleads that the underlying promissory notes and the mortgages to which they are tied are oppressive and unconscionable and as such, the mortgages should be set aside.

Criminal Rate of Interest

- (w) As set out in subparagraphs (d) to (j) above, the amount charged by Pahwa pursuant to Promissory Note 1 and Promissory Note 2 exceeds the criminal rate of interest.
- (x) Under Promissory Note 1, Simpson was required to pay a fee of \$5,000 weekly on the \$100,000 loan, failing which, she would be required to pay the full amount of the loan forthwith (in this case \$100,000 plus the renewal fee of \$5,000).
- (y) Pursuant to Promissory Note 1, Simpson was required to pay 260 per cent as the cost of borrowing \$100,000 for one year.

- (z) Under Promissory Note 2, Simpson was required to pay a fee of \$10,000 weekly on the \$100,000 loan, failing which, she would be required to pay the full amount of the loan forthwith (in this case \$100,000 plus the renewal fee of \$10,000).
- (aa) Pursuant to Promissory Note 2, Simpson was required to pay 520 per cent as the cost of borrowing \$100,000 for one year.
- (bb) Simpson was therefore paying between 260 per cent and 520 per cent annually on the promissory notes underlying the mortgages.
- (cc) The applicant pleads that the amount charged by Pahwa in respect of the sum actually lent is excessive. The applicant alleges that the interest charged on the Pahwa Mortgages violates section 347 of the *Criminal Code* as it far exceeds the criminal rate of interest of 60% annually.

Fraudulent Preference

- (dd) In 1998, Simpson devised a scheme in which investors provided her with funds for the purpose of investing in "interim occupancy mortgages." Simpson told the investors that she had a guaranteed investment vehicle in which the investor would provide funds to facilitate a purchaser moving into a condominium (prior to closing of the condominium purchase). She represented to the investors that prior to moving into the condominium that purchasers were required to put down a 25% deposit. Simpson told her investors that her company funded these interim occupancy funds for a return of \$800 to \$1,000 per \$5,000 deposit required. Simpson promised remarkably high percentage returns ranging from 25% per week to 25% per month on the principal invested.
- (ee) Investors would give Simpson money under the auspices of funding condominium purchases. Simpson would then redirect these funds to previous investors to repay their principal investment with profit.

- (ff) To date, the receiver is aware of approximately 33 investors who have received either no payments, or payments that are not sufficient to cover their initial investment with Simpson.
- (gg) The investors under Simpson's scheme qualify as creditors because they were induced by fraud to invest in the mortgage investment scheme such that Simpson is liable in equity to each investor to the extent of the amount invested. The applicant pleads that Pahwa was an investor in Simpson's ponzi scheme and he is thereby classified as one of Simpson's creditors.
- (hh) Pahwa advanced \$665,000 to Simpson and took security for \$870,000.
- (ii) By registering the mortgages, Simpson gave Pahwa security as contemplated under the *Assignment and Preferences Act*.
- (jj) Given that the mortgage investment scheme was operated as a Ponzi scheme, it was insolvent from its inception. As such, Simpson gave security in the form of the Pahwa Mortgages while she was insolvent.
- (kk) Simpson's deliberate decision to ignore the requests of certain investors for repayment of their funds and to instead give Pahwa security for his advances demonstrates that Simpson intended to prefer Pahwa.
- (ll) The applicant pleads that the \$870,000 in security taken by Pahwa, a creditor, constitutes a fraudulent preference, is void, should be set aside and any amounts paid pursuant to the Pahwa Mortgages should be repaid to the receiver for the benefit of all creditors.
- (mm) Section 6 of the *Land Registration Reform Act* R.S.O. 1990, c.L.4;
- (nn) Section 102(1) of the *Land Titles Act* R.S.O. 1990, c.L.5;
- (oo) Section 12(2) and (8) of the *Mortgages Act* R.S.O. 1990, c.M.40;

- (pp) Section 2 of the *Unconscionable Transactions Relief Act* R.S.O. 1990, c.U.2;
- (qq) Section 347 of the *Criminal Code of Canada* R.S. 1985, c.C-46; and
- (rr) Section 4 and 12 of the *Assignments and Preferences Act* R.S.O. 1990, c.A.33

3. The following documentary evidence will be used at the hearing of the application:

- (a) Affidavit of Ajay Pahwa (sworn December 22, 2005);
- (b) Supplementary Responding Motion Record of Ajay Pahwa (returnable March 9, 2006);
- (c) Such further and other material as counsel may advise and this Honourable Court may permit.

DATED:

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

Lincoln Caylor (LSUC #37030L)
Tel: 416.777.6121
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Emily R. Atkinson (LSUC #50682L)
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Solicitors for the Applicant

Schedule "A"

Property		Legal Description
1.	Lot 14 Stouffer Street, Stouffville	PIN: 03710-0193 (LT) and 03710-0194 (LT); PT LTS 49 & 50, PL 70 Stouffville, PT 2, 65R25634; Whitchurch-Stouffville; PT LTS 49 & 50, PL 70 Stouffville, PT 3, 65R25634; Whitchurch-Stouffville
2.	9 Kawagama Lake Road, Dorset	Firstly: PL 1, Concession 13, Designated as Parts 1 and 7, Plan 19R-3154 Secondly: Part of the OSRA in front of Lot 1, Concession 13, Designated as Part 6, Plan 19R-3154, Closed by By-Law 36, Registered as No. 12, Township of Sherborne, County of Haliburton
3.	6072 Main Street, Stouffville	PIN: 03715-0004 (LT); LT 30 PL 54 Stouffville; Lot 31 PL 54 Stouffville; PT LT 40 PL 54 Stouffville; PT LT 41 PL 54 Stouffville PTS 1, 7, 65R2555; Whitchurch-Stouffville

Schedule "B"

Sums Advanced by Pahwa	Date Advanced	Security Taken	Sums Paid by Simpson
\$100,000	Feb 11, 2005	\$210,000 mortgage on Lot 14 Stouffer Street registered on February 10, 2005 as Mortgage No. YR598943	
\$100,000	Feb 11, 2005		
\$100,000	Feb 24, 2005	\$220,000 mortgage on 9 Kawagama Lake Road registered on March 8, 2005 as Mortgage No. 259537	
\$200,000	March 8, 2005	\$220,000 mortgage on 6072 Main Street registered on March 8, 2005 as Instrument No. YR608874 Subsequently amended increasing the mortgage to \$440,000 on June 28, 2005 by Notice YR695333	
\$40,000	June 22, 2005		
\$125,000	June 28, 2005		
Total Advanced		Total Securities	Total Paid by Simpson
\$665,000.00		\$870,000	\$1,084,500

DRAFT

Michael J. Quilling, Receiver
Applicant

v.

Ajay Pahwa
Respondent

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

NOTICE OF APPLICATION

BENNETT JONES LLP
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LSUC Reg. No. 37030L/50682L

Solicitors for the applicant

DRAFT

Schedule "C"

Court File No.: 05-CL-6159

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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,
REAL ESTATE COUNCIL OF ONTARIO
and LLOYD'S OF LONDON

Defendants

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

FRESH AS AMENDED STATEMENT OF CLAIM

TO THE DEFENDANTS

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service, in this court office, **WITHIN TWENTY DAYS** after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date: November 15, 2005

Issued by "Local Registrar"
Local registrar

Address of court office: 393 University Avenue
Toronto, Ontario
M5G 2J6

TO: COURTNEY WALLIS SIMPSON
587 Cam Fella Boulevard
Stouffville, ON L4A 7H3

AND TO: YORK REGION REALTY INC.
19 Thicketwood Boulevard
Stouffville, ON L4A 1K1

AND TO: WALLIS SIMPSON & ASSOCIATES
37 Sandiford Drive
Suite 301
Stouffville, ON L4A 7X5

AND TO: COURTNEY WALLIS SIMPSON (c.o.b. as YORK MANAGEMENT
GROUP)
587 Cam Fella Blvd
Stouffville, Ontario
L4A 7G9

AND TO: COURTNEY WALLIS SIMPSON c.o.b. as YORK GROUP
587 Cam Fella Blvd
Stouffville, Ontario
L4A 7G9

AND TO: COURTNEY WALLIS SIMPSON c.o.b. as CAMCO DEVELOPMENTS
587 Cam Fella Blvd
Stouffville, Ontario
L4A 7G9

AND TO: REAL ESTATE COUNCIL OF ONTARIO
3250 Bloor Street West
East Tower, Suite 600
Toronto, Ontario
M8X 2X9

Robert Maxwell
Tel: 416.207.4829
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Counsel for the Real Estate Council of Ontario

AND TO: MILLER THOMSON LLP
Scotia Plaza
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P.O. Box 1011
Toronto, Ontario
M5H 3S1

Robert L. Falby O.C.
Tel: 416.595.8173
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Email: rfalby@millერთhompson.com

Counsel for Lloyd's of London

CLAIM

1. The plaintiff claims against the defendants, Courtney Wallis Simpson ("Simpson"), York Region Realty Inc., Wallis Simpson & Associates, Courtney Wallis Simpson (c.o.b. as York Management Group) and as Camco Development and as York Group (collectively the "Simpson Defendants") as follows:

- (a) An order certifying this action as a class proceeding and appointing the plaintiff as representative plaintiff of the class, being those persons who are Canadian residents and who provided deposit monies in trust to the defendant Simpson and to the other defendants pursuant to fraudulent agreements of purchase and sale;
- (b) A declaration that the defendants have been unjustly enriched as a result of the above conduct and hold all proceeds raised by them, or assets referable to such proceeds, as constructive trustees for the class and in particular a declaration that Simpson and the other defendants hold the property described at Schedules "A" and "B" hereto in trust for the class;
- (c) damages for fraud, misrepresentation and breach of fiduciary duty in the amount of \$6,000,000;
- (d) The appointment of a receiver (or alternatively, inspector) pursuant to Section 101 of the *Courts of Justice Act* with full power to investigate all matters pertaining to the raising of funds by the defendants as hereinafter set out, including powers to investigate the whereabouts of such funds (or assets referable to such funds), to compel the production of documents and examine third parties and full power to hold and preserve such funds or assets once ascertained pending further order of the court or, alternatively an interim pre-trial discovery order (a *Norwich Pharmacal* order) requiring persons with knowledge or documents relating to the matters in this action to provide such information to the plaintiff;

- (e) Punitive, aggravated and exemplary damages in the amount of \$10,000,000;
- (f) Pre-judgment and post-judgment interest pursuant to the *Courts of Justice Act*;
- (g) The plaintiff's costs of this action on a substantial indemnity basis; and
- (h) Such further and other relief as to this Honourable Court appears just.

1.1 The plaintiff claims against the defendant, Real Estate Council of Ontario ("RECO"), as follows:

- (a) damages in the amount of \$3,215,000 for losses sustained by the plaintiff and by each of the class members in individual trades in real estate;
- (b) in the alternative, damages in the amount of \$3,215,000 for negligence in carrying out its public protection function plus such further amounts as this Honourable Court may award;
- (c) Pre-judgment and post-judgment interest pursuant to the *Courts of Justice Act*;
- (d) The plaintiff's costs of this action on a substantial indemnity basis; and
- (e) Such further and other relief as to this Honourable Court appears just.

1.2 The plaintiff claims against the defendant, Lloyd's of London ("Lloyd's"), as follows:

- (a) a declaration that the Consumer Deposit Insurance applies such that every agreement of purchase and sale on which a loss was occasioned is an occurrence;

- (b) damages in the amount of \$1,965,000 representing the amount payable to the plaintiff and claimants pursuant to the maximum payout per claim under the Consumer Deposit Insurance policy;
- (c) Pre-judgment and post-judgment interest pursuant to the *Courts of Justice Act*;
- (d) The plaintiff's costs of this action on a substantial indemnity basis; and
- (e) Such further and other relief as to this Honourable Court appears just.

The Parties

2. The plaintiff is a resident of the City of Mississauga, Ontario.

3. The defendant Simpson is a member of the Real Estate Council of Ontario ("RECO"), a broker under the *Real Estate and Business Brokers Act* and is the principal broker and controlling mind of the defendant "York Region Realty Inc." ("York Realty") and also of the defendant entities known as "Wallis Simpson & Associates" ("Simpson & Associates"), Courtney Wallis Simpson (c.o.b. as York Management Group) ("York Management") and as Camco Developments and as York Group. It is not known to the plaintiff at present whether Simpson & Associates and Cameo are trade names of corporations and, if so, the jurisdictions of their incorporations.

3.1 The defendant, RECO, is a corporation incorporated pursuant to the laws of Canada. RECO administers the *Real Estate and Business Brokers Act, 2002, S.O. 2002, c.30* ("REBBA") and associated regulations on behalf of the Ontario Ministry of Government Services. RECO's mandate is to regulate the activity of trade in real estate in

the public interest pursuant to its designation under the *Safety and Consumer Statutes Administration Act, 1996, S.O. 1996, c.19.*

3.2 RECO maintains an insurance program and a claims process specifically for misappropriated deposit funds. The Consumer Deposit Insurance policy is designed to protect the consumer for losses due to the theft, fraud, misappropriation, wrongful conversion directly or indirectly of moneys or property held on deposit for the consumer by the salesperson or broker.

The Fraudulent Scheme

4. In September 2005 Simpson, acting as a real estate broker induced the plaintiff to enter into an agreement of purchase and sale (the "Agreement") with respect to a commercial property in Stouffville, Ontario. It was a term of the Agreement that the plaintiff and his business partner, Mukesh Morar, provide deposit funds in the total amount of \$200,000 to York Realty. The plaintiff and Mr. Morar provided the deposit funds in trust to York Realty as required under the Agreement. These deposit funds were to be held by York Realty in trust pending completion or termination of the Agreement. Similar arrangements were made by the defendants with the other class members.

5. The receipt of deposit funds referenced at paragraph 4 above was made in furtherance of a fraudulent scheme perpetrated by the defendant Simpson. The purported vendors who are the actual property owners have denied signing the purported agreements of purchase and sale. Many of the agreements of purchase and sale purported

to sell the same property. The defendants collected the deposits associated with the agreements of purchase and sale from more than one class member with respect to the sale of the same property. The agreements of purchase and sale entered into by the class members at the inducement of Simpson and the other defendants were fraudulent.

6. In particular Simpson represented to the plaintiff and to other class members that:
 - (a) She was the broker or agent with the authority to negotiate the purchase and sale of various commercial properties;
 - (b) Their deposit funds would be held in trust by York Realty pending completion or termination of the Agreements of Purchase and Sale;
 - (c) She acted on the authority of the various vendors involved in the Agreements of Purchase and Sale;
 - (d) She was in the process of obtaining the documents necessary to complete the commercial real estate transactions; and
 - (e) She could return their deposit funds or had already sent them a cheque in the amount of their deposit funds.
7. All class members relied upon the representations set out in paragraph 6 above.
8. All of the representations set out in paragraph 6 above were untrue. There were no valid agreements of purchase and sale with respect to the various commercial properties.

9. The plaintiff states that representations made by Simpson were made for the purpose of inducing the class members to invest in various commercial real estate ventures, were made with the intention that they would be relied upon by class members in investing and were relied upon by class members to their detriment in their real estate investments with Simpson and the other defendants.

10. In the event the defendant entities involved are incorporated in Canada, the plaintiff states that it is fit and proper that an order for restitution or damages be made against Simpson personally given her leading role in the fraudulent conduct and as her actions were designed to secure personal benefit. The plaintiff states that Simpson has personally received benefits from the deposit funds, the particulars of which are known to Simpson.

Breach of Fiduciary Duty

11. The plaintiff pleads that Simpson owed a fiduciary duty to him and to the class members to perform her duties faithfully, honestly, diligently and in good faith. The plaintiff pleads that Simpson breached those duties by wrongfully converting the plaintiff's and the class members' deposit funds.

RECO Claim

(a) Payout of Claims

11.1 RECO maintains a Consumer Deposit Insurance program. The policy names Lloyd's of London ("Lloyd's") as the insurer and Aon Reed Stenhouse Inc. ("Aon") as the insurance broker. The Consumer Deposit Insurance program is in place to protect the consumer for loss of deposits caused by real estate broker fraud, misappropriation of funds or insolvency.

11.2 Claimants under the Consumer Deposit Insurance program, pursuant to the process set out on RECO's website, must submit a Notice of Claim form to RECO's insurance department. The claim form authorizes RECO and Lloyd's to investigate the claim. RECO conducts a preliminary investigation before forwarding the claim to RECO.

11.3 The plaintiff and each class member have submitted claim forms to RECO seeking the return of their deposits as alleged in paragraphs 4-6 above.

11.4 The deposits claimed to date total \$3,215,000.

11.5 RECO has refused to pay the claims in the amount of \$3,215,000.

Negligence

(a) Duty of Care

11.6 RECO, pursuant to the REBBA and the Regulations thereto, regulates and supervises the conduct of real estate brokers and agents in Ontario. Among RECO's objectives are:

- (a) fostering confidence and upholding the integrity in real estate transactions;
- (b) regulating the activity of trade in real estate in the public interest; and
- (c) building and sustaining public trust in the real estate marketplace.

11.7 RECO has the duty to serve and protect the public and to exercise its powers and discharge its duties and responsibilities under all enactments in the public interest. These duties include, without limitation:

- (a) establishing, monitoring and enforcing standards of practice;
- (b) educating brokers;
- (c) conducting inspections;
- (d) addressing concerns and complaints; and
- (e) enforcing the code of ethics.

11.8 RECO has duty to take reasonable care in carrying out its activities.

11.9 RECO maintains a public website on which, among other things, information about complaints, inspections and regulatory activities is posted.

11.10 The plaintiff and class members visited this website and relied on the information posted thereon. As such, they are closely and directly affected by RECO's acts or failure to act.

11.11 RECO could reasonably foresee that if it failed to properly investigate, monitor and regulate the activities of real estate agents and brokers, its failure to act could result in injury to the plaintiff, the class members, and the general class of individuals seeking to purchase or sell real estate.

(b) Standard of Care

11.12 Since at least July of 2004, RECO, either directly, or through its employees or representatives, including but not limited to employees taking calls from the public relating to complaints against real estate brokers and through information provided by other agents or the general public, became aware or ought to have become aware of complaints about the Simpson Defendants and the possible violations of the REBBA.

11.13 At all material times, RECO had a duty to accept the information it was provided, record the information provided and conduct thorough and meaningful investigations of the allegations or concerns communicated to it.

11.14 RECO conducted a minimum of four inspections of the Simpson Defendants between July 22, 2004 and March 28, 2005. Following at least three of these inspections, deficiency notices were issued listing a number of contraventions including improper designation of bank accounts, untimely deposit of trust funds, untimely return of deposit money, incomplete trade record sheets and failure to keep business/accounting books at the registered place of business.

11.15 On December 8, 2004, RECO received a complaint that Simpson had failed to return deposit money after signing a mutual release. An inspection regarding this issue was held on January 28, 2005 and contraventions in respect of the Simpson Defendants' banking practices and accounting records were found, among other things.

11.16 Even after four inspections, RECO failed to suspend, revoke or apply conditions to Simpson's registration. Consequently, the Simpson Defendants continued to operate in contravention of the REBBA.

11.17 The plaintiff pleads that RECO acted recklessly and carelessly, failing to exercise the requisite standard of care in conducting its inspections and in exercising its disciplinary authority over the Simpson Defendants. By permitting the Simpson Defendants to continue to carry on business and trade in real estate with the knowledge that they were operating in contravention of the REBBA to the detriment of the public, RECO demonstrated a total disregard for the interests of others.

11.18 On its website, RECO posts public advisories regarding freeze orders and disciplinary actions being taken in respect of individual brokers, agents or companies in violation of REBBA. It was not until December 15, 2005, eighteen months after the first inspection was completed that RECO posted a public advisory about York Region Realty Inc. and Simpson on its website.

11.19 In addition to the public advisories, this plaintiff and these class members accessed information on RECO's website as to whether particular sales agents and/or brokers are in good standing with RECO prior to working with them. As of April 18, 2006, the RECO website continues to list Simpson as a valid registrant meaning that she is permitted to trade in real estate.

11.20 The plaintiff pleads that, by failing to inform the public earlier of the numerous inspections and contraventions of the Simpson Defendants, RECO failed to exercise the reasonable care required of a regulatory body with a public notice function. Further, the plaintiff pleads that this breach of the standard of care is exacerbated by the fact that Simpson remains listed as a registered broker who is permitted to buy and sell real estate.

11.21 The plaintiff pleads that RECO breached its duty of care to the plaintiff and the other class members by, in the absence of good faith:

- (a) failing to take steps to suspend, revoke or apply conditions to the Simpson Defendants' license in a timely manner;

- (b) failing to warn the public upon becoming aware of the misconduct; and
- (c) failing to meaningfully investigate the concerns RECO was aware of respecting the propriety of the Simpson Defendants' conduct.

11.22 The plaintiff pleads that RECO was not acting in good faith in carrying out its legislative objectives. By breaching its duties, RECO failed to protect individual members of the public from the conduct of the Simpson Defendants.

(c) **Resultant Injury**

11.23 RECO was reckless and grossly negligent in failing to investigate or adequately investigate the conduct of the Simpson Defendants as alleged in paragraph 11.21 above, wrongly protecting the interests of the Simpson Defendants over the protection of the public in general and the plaintiff and class members in particular.

11.24 Further RECO was negligent by failing to monitor and regulate the Simpson Defendants as it is so charged under the REBBA. RECO conducted several audits of Simpson and York Region Realty Inc. during the material time. RECO was negligent in its conduct of the audits and as a result Simpson and York Region Realty Inc. continued to conduct business and the plaintiff, and each of the class members, sustained losses in individual trades in real estate.

11.25 The plaintiff and each class member pleads that RECO's failure to properly supervise the Simpson Defendants and to permit them to continue in turn caused the losses to the class members.

Lloyd's Claim

11.31 RECO has a Consumer Deposit Insurance policy in place to pay claimants who have lost deposit funds in a trade in real estate. Lloyd's is the insurer.

11.32 The policy was entered into by RECO on behalf of and for the benefit of people who give deposits to registrants, including the claimants. The plaintiff and these claimants are legitimate third party beneficiaries of the policy and are thereby entitled to step into the shoes of RECO and assert their claim as against Lloyd's.

11.33 The policy's limits are: \$100,000 for each claim and \$500,000 for each occurrence.

11.34 The plaintiff and each class member have submitted claim forms to RECO seeking the return of their deposits as alleged in paragraphs 4-6 above.

11.35 Counsel for Lloyd's has advised that it intends to pay valid claims up to the aggregate coverage limit of \$500,000 per occurrence on a pro rata basis.

11.36 Each claim is based upon a different agreement of purchase and sale and involves different purchasers. The plaintiff pleads that each misappropriated deposit is a separate

occurrence or event, therefore, each claimant is entitled to a maximum of \$100,000 from Lloyd's for each misappropriated deposit.

11.37 Twenty six claims have been made to RECO to date. Based on the amounts claimed by each claimant, the total amount owing by Lloyd's is \$1,965,000 .

Appointment of a Receiver

12. The plaintiff at present has no present knowledge as to the whereabouts of the approximately \$6,000,000 raised by the Simpson Defendants ~~defendants~~ or proceeds pursuant to the scheme above. The plaintiff pleads that it is just and convenient for the Court to appoint a person as receiver (or alternatively, as inspector) in order to ascertain the whereabouts of the funds raised (or assets referable to the funds) to preserve the funds or assets referable to the deposit funds pending final disposition of the action herein, and the ascertain and pursue any insurance proceeds such as that which might be available through RECO.

13. The plaintiff pleads that he is entitled to an accounting of the property as it came into the hands of the Simpson Defendants ~~defendants~~ and that he is entitled to trace the same and charge the Simpson Defendants' ~~defendants'~~ property to the extent that the class members' property is traced thereto.

14. The plaintiff pleads that it is just and correct for the receiver to assess all claims by the class members and to advise the court on the distribution of the Simpson Defendants' ~~defendants'~~ assets to the class members.

Constructive Trust

15. The Simpson Defendants ~~defendants~~ have been unjustly enriched as a result of their raising of approximately \$3,000,000 to \$6,000,000 in funds and that they hold any such funds (or assets referable to such funds) as constructive trustees for the class members.

This Action Survives Bankruptcy

16. The plaintiff pleads that the liability of the Simpson Defendants ~~defendants~~ arises out of their fraud, misappropriation or defalcation while acting in a fiduciary capacity and the plaintiff pleads and relies upon Section 178 of the *Bankruptcy and Insolvency Act* with respect to same.

Punitive Damages

17. The Simpson Defendants' ~~defendants'~~ actions were intentional, reckless, criminal, highhanded and callous and the plaintiff pleads that the class members are entitled to an award of punitive and exemplary damages in respect of same.

Joint and Several Liability

18. The plaintiff claims that the defendants are jointly and severally liable for the damages suffered by the class members.

19. The plaintiff proposes that this action be tried at Toronto.

Date of Issue: November 15, 2005

BENNETT JONES LLP

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LSUC No. 28199C / 37030L / 43529J

Solicitors for the plaintiff

Schedule "A"

587 Cam Fella Boulevard
Stouffville, Ontario
L4A 7H3

PIN 03715-0004
Whitchurch, Ontario

1038 Kawagama Lake Road
Dorsett, Ontario

PIN 03710-0193/0194
Stouffville, Ontario

Schedule "B"

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

DRAFT

Udayan Pandya
Plaintiff

v.

Courtney Wallis Simpson et al.
Defendants

Court File No.: 05-CL-6159

ONTARIO
SUPERIOR COURT OF JUSTICE
(Simplified Procedure)

Proceeding commenced at Toronto

FRESH AS AMENDED
STATEMENT OF CLAIM

BENNETT JONES LLP
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Solicitors for the defendants

Schedule "D"

Udayan Pandya v. Courtney Wallis Simpson et al.
 Court File No. 05-CL-6159

Simpson – Complete List of Victims Contacted
 Updated April 21, 2006

Name	Notes	Claim Form Date	Claim No.	M	D
J. Altanopoulos	Awaiting information from G. Govedaris \$35,000 claimed			<input checked="" type="checkbox"/>	
M. Anderson		Jan 5/06 Sent by reg'd mail			
A. Arent	\$200,000 plus interest claimed	Jan 5/06 Sent by reg'd mail	CWS – 0014	<input checked="" type="checkbox"/>	
Atlas Holdings & Investments Inc.	\$200,578.63 claimed	Jan 5/06 Sent by email to counsel	CWS- 0005		<input checked="" type="checkbox"/>
T. Augustine	Victim of Real Estate Deposit Scheme	Jan 5/06 Sent by reg'd mail			<input checked="" type="checkbox"/>
G. Baldesarra	\$100,000 claimed	accessed online	CWS-0008		<input checked="" type="checkbox"/>
H. Barth	Awaiting information from G. Govedaris \$28,500 claimed			<input checked="" type="checkbox"/>	
L. Black		Jan 5/06 Sent by reg'd mail			
P. Brar & C. Brar	\$50,000 plus interest claimed	Jan 5/06 Sent by reg'd mail	CWS-0017		<input checked="" type="checkbox"/>

Name	Notes	Claim Form Date	Claim No.	M	D
D. Casuscelli	\$15,000 deposit owed. Obtained name from RECO list of claimants.	Feb 13/06			<input checked="" type="checkbox"/>
C. Cheng	\$15,000 deposit owed Obtained name from RECO list of claimants	Feb 13/06 Sent by mail			<input checked="" type="checkbox"/>
J. Deneau	\$14,000 claimed	Jan 10/06 Sent by email	CWS-0019	<input checked="" type="checkbox"/>	
N. Dohan		Feb 21/06 by mail			
F. Etherden	\$180,000 claimed		CWS-0026	<input checked="" type="checkbox"/>	
A. Fantinato	\$100,000 claimed		CWS-0007		<input checked="" type="checkbox"/>
Four Seasons Drywall Systems & Acoustics Limited (Verne Zapfe)	Awaiting information from G. Govedaris \$570,000 claimed			<input checked="" type="checkbox"/>	
H. Ghizas	Awaiting information from G. Govedaris \$35,000 claimed			<input checked="" type="checkbox"/>	
A. Grossi & R. DiMateo	Victims of Real Estate Deposit Scheme	Jan 5/06 Sent by reg'd mail			<input checked="" type="checkbox"/>

Name	Notes	Claim Form Date	Claim No.	M	D
T. Hall	Awaiting information from G. Govedaris \$70,000 claimed			<input checked="" type="checkbox"/>	
H. Hirsch	\$250,600 claimed	Jan 5/06 Sent by reg'd mail	CWS-0015	<input checked="" type="checkbox"/>	
H. Huisman	\$20,000 deposit owed Obtained name from RECO list of claimants				<input checked="" type="checkbox"/>
K. Johansen	Victim of Mortgage Investment Scheme	Jan 11/06 Sent by email		<input checked="" type="checkbox"/>	
B. Killer		Jan 5/06 Sent by email			
G. Kolas	Awaiting information from G. Govedaris \$25,000 claimed			<input checked="" type="checkbox"/>	
R. Kwasniewicz and 2007311 Ontario Ltd.	\$200,000 claimed for deposit \$50,000 claimed for investment	Jan 5/06 Sent by email	CWS-0003	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
B. Ladkin	Victim of both schemes	Jan 10/06 Sent by email		<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
M. Letsos	\$400,000 claimed	Jan 5/06 Sent by email to counsel	CWS-0002		<input checked="" type="checkbox"/>
E. Manning	\$75,000 owed	Jan 5/06 Sent by email		<input checked="" type="checkbox"/>	
C. Martins		Jan 5/06	CWS-0024	<input checked="" type="checkbox"/>	

Name	Notes	Claim Form Date	Claim No.	M	D
		Sent by reg'd mail			
T. Mauro	Awaiting information from G. Govedaris \$40,000 claimed			<input checked="" type="checkbox"/>	
K. Mouldsdaile	\$75,000 owed Phone call from Kim on Feb 9, 2006; she will be sending claim form shortly – delays re getting bank info.	Jan 5/06 Sent by reg'd mail		<input checked="" type="checkbox"/>	
G. Nicholson	\$510,000 claimed	Jan 5/06 Sent by reg'd mail	CWS - 0012	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
A. Ojo c/o Affordable Drugmart	\$200,000 claimed	Jan 5/06 Sent by email	CWS-0010(a) CWS-0010(b)		<input checked="" type="checkbox"/>
S. Oldham	\$38,000 owed	Jan 5/06 Sent by reg'd mail	CWS - 0023	<input checked="" type="checkbox"/>	
Omnivore Inc.	\$100,000 claimed	Jan 5/06 Sent by email to counsel	CWS - 0013		<input checked="" type="checkbox"/>
U. Pandya	\$200,000 claimed	Jan 5/06 Sent by email	CWS-0016		<input checked="" type="checkbox"/>

Name	Notes	Claim Form Date	Claim No.	M	D
K. Papakonstantinou	Awaiting information from G. Govedaris \$380,000 claimed			<input checked="" type="checkbox"/>	
T. Pettit	\$24,500 claimed	Jan 5/06 Sent by email to counsel		<input checked="" type="checkbox"/>	
B. Prakash c/o Global Quality Institute	\$200,000 claimed	Jan 5/06 Sent by email			<input checked="" type="checkbox"/>
M. Rolbin	\$5,000 deposit owed. Obtained name from RECO list of claimants	Feb 13/06 Sent by mail			<input checked="" type="checkbox"/>
H. Rotenburg	\$52,000 claimed	Jan 10/06 Sent by email	CWS-0004	<input checked="" type="checkbox"/>	
B. Sahadev c/o REO Global Ventures Ltd.	\$100,000 claimed	Jan 5/06 Sent by reg'd mail	CWS-0009		<input checked="" type="checkbox"/>
A. Schick	Total in: \$800,000 Total out: \$600,000	Feb 1/06 Sent by mail		<input checked="" type="checkbox"/>	
S. Seymour	\$250,000 claimed	accessed via G. Govedaris	CWS-0006	<input checked="" type="checkbox"/>	

Name	Notes	Claim Form Date	Claim No.	M	D
K. Simpson	Awaiting information from G. Govedaris Claiming one half of the equity in each of Simpson's properties				
S. Smit	\$25,000 claimed	Jan 5/06 Sent by reg'd mail	CWS-0020	<input checked="" type="checkbox"/>	
B. Snaper	\$90,000 owed	Jan 5/06 Sent by reg'd mail	CWS-0022	<input checked="" type="checkbox"/>	
M. Sourlis	Awaiting information from G. Govedaris \$1,228,565.46 claimed			<input checked="" type="checkbox"/>	
R. Tapley	\$110,000 claimed	Jan 5/06 Sent by reg'd mail	CWS-0011	<input checked="" type="checkbox"/>	
E. Tsilkas	Awaiting information from G. Govedaris \$75,000 claimed			<input checked="" type="checkbox"/>	
W. Walker			CWS-0021	<input checked="" type="checkbox"/>	
B. Walmsley	\$300,000 deposit.	CWS-0027(a) (b)			<input checked="" type="checkbox"/>

Name	Notes	Claim Form Date	Claim No.	M	D
	Obtained information from RECO list of claimants.	(c)			
W. Wiwchar		Jan 5/06 Sent by email to counsel and to individual			
K. Wasielewitsch		Feb 15/06 Sent by mail			
C. Wasielewitsch-Fairbrother		Feb 15/06 Sent by mail			
J. Wildman	\$45,000 claimed	Mar 20/06 Sent by email	CWS-0025	<input checked="" type="checkbox"/>	
Zapfe Holdings Inc. (V. Zapfe)	Awaiting information from G. Govedaris \$100,000 real estate deposit claimed; \$2,320,000 investment claimed			<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
1329093 Ontario Ltd.	\$100,000 deposit. Obtained information from RECO list of claimants.				<input checked="" type="checkbox"/>

Name	Notes	Claim Form Date	Claim No.	M	D
1491015 Ontario Ltd.	Awaiting information from G. Govedaris \$60,000 claimed			<input checked="" type="checkbox"/>	

Totals

Total Claimed (Both Classes)	Total Claimed (Real Estate)	Total Claimed (Mortgage Investment)
\$9,461,744.00	\$2,405,578.60	\$7,056,165.40