Court File No. CV-23-00696362-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

BETWEEN:

CHIEF EXECUTIVE OFFICER OF THE FINANCIAL SERVICES REGULATORY AUTHORITY OF ONTARIO

Applicant

- and -

FIRST SWISS MORTGAGE CORP.

Respondent

APPLICATION UNDER SECTION 37 OF THE *MORTGAGE BROKERAGES, LENDERS AND ADMINISTRATORS ACT, 2006*, S.O. 2006, C. 29, AS AMENDED, AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, C.C.43, AS AMENDED

FACTUM OF THE RECEIVER

June 20, 2024

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TO: THE SERVICE LIST

PART I: OVERVIEW

1. KSV Restructuring Inc. ("**KSV**"), in its capacity as the Court-appointed receiver (in such capacity, the "**Receiver**") of First Swiss Mortgage Corp. (the "**Company**"), is seeking the following orders:

(a) an approval and vesting order (the "**AVO**"), among other things:

(i) approving an agreement of purchase and sale (the "**APS**") in respect of a transaction (the "**Transaction**") between the Receiver and Zayoun Group Inc. ("**Zayoun**"), pursuant to which Zayoun will purchase the property located at 8457 Highway 17, Rockland, Ontario (the "**Rockland Property**") over which the Company holds a first mortgage;

(ii) authorizing the Receiver to complete the Transaction; and

(iii) vesting the Rockland Property in Zayoun, free and clear of all encumbrances other than Permitted Encumbrances (as defined in the AVO) upon execution and delivery of a certificate by the Receiver confirming completion of the Transaction; and

(b) an order (the "**Second Ancillary Order**"), among other things:

(i) approving the proposed distributions described in the Third Report of the Receiver dated June 13, 2024 (the "**Distributions**");

(ii) approving the fees and disbursements of the Receiver and its counsel, Bennett Jones LLP ("**Bennett Jones**"), as set out in the fee affidavits

appended to the Third Report, and an accrual of $100,000, plus HST and disbursements, for fees incurred or to be incurred by the Receiver and Bennett Jones to the completion of these proceedings (the "**Fee Accrual**");

(iii) approving the Receiver's Third Report and its activities set out therein; and

(iv) discharging the Receiver upon the filing of a certificate after the Transaction has closed and the Distributions have been completed.

2. Following the closing of the Transaction, it will be appropriate for the Receiver to make the Distributions and to be discharged as the Receiver in these proceedings. All other assets of the Company – potential litigation claims against various parties and remaining mortgage investments – will then vest in the Trustee (as defined below) and can be pursued by the Trustee as directed by the inspectors in the bankrupt estate and if there is sufficient funding to do so.

3. The relief sought on this motion has been discussed in detail with the ad hoc committee of representatives from five large Investors (as defined below) (the "**Investor Advisory Committee**"), and the Receiver's proposed approach with respect to the Distributions was included in its First Report dated March 31, 2023 (the "**First Report**") (as well as subsequent materials filed with this Court). The Receiver is not aware of any opposition to the relief. The Receiver believes that the relief sought is reasonable and appropriate in the circumstances, and for the reasons set forth herein, respectfully requests that this Court grant the AVO and the Second Ancillary Order.

PART II: FACTS

4. The facts underlying these proceedings are more fully set out in the Third Report.[1] Capitalized terms not otherwise defined herein have the meanings ascribed to them in the Third Report.

A. Background to these Proceedings

5. The Company was incorporated on September 16, 2004 under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 and, until May 4, 2023, was registered under the *Mortgage Brokerages, Lenders and Administrators Act*, 2006, S.O. 2006, c. 29, as amended (the "**MBLAA**").[2] The Receiver understands that, prior to the commencement of these proceedings, the Company operated as a mortgage lender and assessed applications for mortgages in Ontario and British Columbia. If the applications were approved, the Company would raise funds from one or more parties (the "**Investors**"), and in some cases advance the funds to the borrower and register a mortgage on the subject property.[3] The Company earned an upfront fee and/or a spread on the interest charged on each of the mortgages.

6. Prior to KSV's appointment, the Company filed an assignment in bankruptcy on March 15, 2023, pursuant to which Goldhar & Associates Ltd. was appointed as the licensed insolvency trustee of the Company's bankrupt estate (the "**Trustee**").[4] Following an application brought by the Chief Executive Officer of the Financial Services Regulatory Authority of Ontario ("**FSRA**"), KSV was appointed as the Receiver under section 37 of the *Mortgage Brokerages, Lenders and*

[1] Third Report of the Receiver dated June 14, 2024 [Third Report], Motion Record of the Receiver dated June 14, 2024 at Tab 2 [Motion Record].
[2] *Ibid* at section 2.0, para 1; Motion Record at Tab 2.
[3] *Ibid* at section 2.0, para 3; Motion Record at Tab 2.
[4] *Ibid* at section 1.0, para 2; Motion Record at Tab 2.

Administrators Act, 2006, S.O. 2006, c. 29, as amended (the "**MBLAA**"), and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended (the "**CJA**") pursuant to an Order granted by this Court on March 17, 2023 (the "**Appointment Order**"). The application to appoint the Receiver was precipitated by complaints made to FSRA by certain Investors, including allegations that:

(a) the Company did not make registrations on title in connection with certain funds Investors advanced for specific mortgages;

(b) the Company discharged mortgages Investors had funded, without their knowledge, and without such funds being paid to them; and

(c) the Company was not current in making interest payments to Investors.[5]

7. The Receiver's initial mandate was focused on conducting an investigation into these complaints, and was more limited than typical receivership orders. Pursuant to an order dated May 19, 2023 (the "**Amended Appointment Order**") the Receiver was granted additional powers typically granted in receivership proceedings.[6]

8. The principal purposes of this receivership proceeding were to allow the Receiver to:

(a) investigate allegations of wrongdoing against the Company and/or its principals; and

[5] *Ibid* at section 2.0, para 7; Motion Record at Tab 2.
[6] *Ibid* at section 1.0, para 3; Motion Record at Tab 2.

(b) take possession and control of the Company's property in order to maximize recoveries for the Investors and the Company's other creditors.[7]

9. The Receiver's investigation suggests significant wrongdoing on the part of the Company and its Principals. As summarized in the First Report, only a fraction of the mortgages reported to Investors were actually registered on properties. As of the receivership, there was a difference of $13.1 million between the mortgages as reported to the group of Investors, that at the time, had provided their information to FSRA compared to the registrations on title in favour of the Company for the properties corresponding with this group of Investors.[8] Moreover, there appears to have been no consistency or rationale as to which mortgages were actually registered.[9] Relatedly, the Company did not operate its bank accounts in a manner that would be consistent with a trust, and funds were collected from Investors for a mortgage to be placed only for the Company to transfer it to separate accounts used to pay expenses, monthly interest to other Investors or to parties related to the Company and its principal.[10]

10. To fund its activities in these proceedings, the Receiver relied on (i) recoveries from the mortgage portfolio; (ii) funds advanced pursuant to a loan agreement entered into between the Receiver and certain of the Investors (the "**Loan Agreement**"); and (iii) a loan made to the Receiver by FSRA (the "**FSRA Loan**").[11] The Receiver's activities in these proceedings undertaken since May 1, 2023 are discussed in detail in the Third Report.[12]

[7] *Ibid* at section 1.0, para 6; Motion Record at Tab 2.
[8] *Ibid* at Appendix "C", First Report of the Receiver dated March 31, 2023 at section 6.0, para 3; Motion Record at Tab 2.
[9] *Ibid* at section 5.0, para 6; Motion Record at Tab 2.
[10] *Ibid* at section 5.0, para 6; Motion Record at Tab 2.
[11] *Ibid* at section 1.0, para 5; Motion Record at Tab 2.
[12] *Ibid* at section 6.0; Motion Record at Tab 2.

B. The Transaction

11. In connection with its mandate to maximize recoveries for the Company's creditors, the Receiver undertook a power of sale proceeding pursuant to the *Mortgages Act*, R.S.O. 1990, c. M.40 in respect of a non-performing first mortgage loan held by the Company over the Rockland Property, a 1.5 acre commercial lot located at 8457 Highway 17, Rockland, Ontario, east of Ottawa.[13]

12. Pursuant to the power of sale, the Rockland Property was listed for sale on an "as is, where is" basis. The Receiver retained Royal LePage Team Realty ("**Royal LePage**"), a realtor with an office located near the Rockland Property and experience selling commercial properties in that market, to carry out a sale process.[14]

13. Royal LePage prepared an offering summary (the "**Offering Summary**") that was distributed on December 7, 2023 to an extensive list of prospective purchasers, including local and national builders, developers and investors. The acquisition opportunity was also listed on the Multiple Listing Service and a large "for sale" sign was placed in front of the property. The listing price initially provided, based on the recommendation of Royal LePage, was $649,000, which price was reduced to $599,000 on January 24, 2024.[15]

14. An initial offer for the Rockland Property was made by Zayoun on March 10, 2024, and following further diligence and negotiations between the parties, the Receiver and Zayoun executed the APS on May 22, 2024. The key terms of the APS are set out below:

[13] *Ibid* at section 3.0, para 1; Motion Record at Tab 2.
[14] *Ibid* at section 1.0, para 5; Motion Record at Tab 2.
[15] *Ibid* at section 1.0, paras 2-5; Motion Record at Tab 2.

(a) Purchase Price: $565,000, including a deposit of $20,000 that has been paid to the Receiver.

(b) Property: All of the Property Owner's (as defined in the APS) right, title and interest in the Rockland Property.

(c) Closing: August 6, 2024.

(d) Material Condition to Closing: closing of the Transaction is conditional on the Receiver obtaining the AVO and there being no notice of appeal or related application, motion or proceeding with respect to the AVO.[16]

C. The Claims Process and Proposed Distribution

15. During the receivership, approximately $1.9 million in mortgage principal repayments have been collected by the Receiver. In addition to funding the Receiver and its counsel's activities, these funds have been used to repay amounts owing pursuant to the Loan Agreement and the FSRA Loan, both of which have now fully been repaid.[17]

16. The Receiver discussed with the Investor Advisory Committee its views on the use of the remaining funds held by the Receiver following repayment of the amounts advanced under the Loan Agreement and the FSRA Loan. Based on those discussions, the Receiver determined that it would be appropriate to distribute the remaining funds and those to be received upon closing of the Transaction, net of a reserve for incremental professional fees, to the Company's creditors.[18]

[16] *Ibid* at section 3.2; Motion Record at Tab 2.
[17] *Ibid* at section 4.0, para 5; Motion Record at Tab 2.
[18] *Ibid* at section 5.0, para 1; Motion Record at Tab 2.

17. On April 8, 2024, the Receiver issued letters (the "**Claims Letters**") to each Investor, among other things, informing them of the intention to make a distribution and identifying the balances owing to each.[19] The Receiver reiterated its view that Investors should be treated equally on a distribution, which view had previously been provided in detail in the Receiver's First Report and Second Report dated May 12, 2023 (the "**Second Report**").[20] The Claims Letters included a form of dispute notice that was required to be returned by May 24, 2024. No disputes have been received.[21]

18. As set out in the First Report, Second Report, Claims Letter, and Third Report, the Receiver continues to be of the view that the Company did not operate its bank accounts or manage funds it received in a way that would meet any characteristics or legal requirements of a trust, and that regardless as to whether the legal requirements for trust were present, the most appropriate outcome is for Investors to be treated equally.[22]

19. The Receiver is therefore seeking approval of the Distributions:

(a) first, for the legal fees incurred by certain Investors who contributed evidence to FSRA in connection with the Appointment Order (as contemplated by para 31 of the Amended Appointment Order); and

(b) second, *pro rata*, to the Investors and four other creditors that filed claims in the bankruptcy. [23]

[19] *Ibid* at section 5.0, para 3; Motion Record at Tab 2.
[20] *Ibid* at section 5.0, para 6; Motion Record at Tab 2.
[21] *Ibid* at section 5.0, para 4; Motion Record at Tab 2.
[22] *Ibid* at section 5.0, para 6; Motion Record at Tab 2.
[23] *Ibid* at section 5.2; Motion Record at Tab 2.

D. Discharge of the Receiver

(i) The Discharge of the Receiver

20. The Receiver is proposing that it be discharged upon the filing of a discharge certificate (the "**Discharge Certificate**") as, subject to completion of the Transaction and distributing the proceeds therefrom, its duties and responsibilities under the Amended Appointment Order will have been materially completed.[24] At that time, all remaining assets of the Company, including any causes of action against its principals or auditor (among others) will vest in the Trustee.[25]

(ii) Approval of Activities, the Third Report and Fees and Disbursements

21. In addition to seeking approval of the Third Report and the activities of the Receiver referred to therein, the Receiver is also seeking approval of the fees and disbursements incurred by it and its counsel as set out in the Fee Affidavits.[26] Additionally, the Receiver and its counsel are seeking approval of the Fee Accrual which approval will avoid the need for a separate fee approval motion in the future and thereby minimize further professional fees.[27]

PART III: ISSUES

22. The sole issues on this motion are whether the AVO and the Second Ancillary Order should be granted.

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[24] *Ibid* at section 8.0, para 1; Motion Record at Tab 2.
[25] *Ibid* at section 8.0, para 4; Motion Record at Tab 2.
[26] *Ibid* at section 7.0, para 1; Motion Record at Tab 2.
[27] *Ibid* at section 7.0, para 4; Motion Record at Tab 2.

PART IV: LAW AND ARGUMENT

A. The AVO Should be Granted

23. Section 100 of the CJA, as amended, authorizes this Court to grant an order vesting "in any person an interest in real or personal property that the Court has authority to order be conveyed".[28] Additionally, the Amended Appointment Order empowers and authorizes the Receiver to sell, convey, transfer, lease or assign the Company's property with the approval of the Court in respect of any transaction exceeding $250,000.[29] As such, this Court has jurisdiction to grant the proposed AVO.

24. The principles to be applied when determining whether to approve a sale transaction were articulated by the Court of Appeal for Ontario in *Royal Bank of Canada v Soundair Corp*. ("***Soundair***"):

(a) whether the party made a sufficient effort to obtain the best price and to not act improvidently;

(b) the interests of all parties;

(c) the efficacy and integrity of the process by which the party obtained offers; and

(d) whether the working out of the process was unfair.[30]

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[28] *Courts of Justice Act*, RSO 1990, c. C.43, s 100.
[29] *Chief Executive Officer of the Financial Services Regulatory Authority of Ontario and First Swiss Mortgage Corp.* (May 19, 2023), Toronto, Court File No. CV-23-00696362-00CL, [Amended and Restated Appointment Order] (ONSC) (Commercial List), (Steel J).
[30] *Royal Bank of Canada v Soundair Corp*, [1991] 46 OAC 321 (ONSC) at para 16; *Elleway Acquisitions Limited v. 4358376 Canada Inc.*, 2013 ONSC 7009 at para 31; *Home Trust Co v 2122775 Ontario Inc*, 2014 ONSC 1039 at para 11; *Romspen Investment Corp v 6176666 Canada Ltée*, 2012 ONSC 1727 at para 18 [*Romspen*].

25. Deference is to be afforded to a receiver respecting its proposed sale process. Absent a violation of the *Soundair* principles or other exceptional circumstances, the court should uphold the business judgment of the receiver, as its court officer.[31]

26. The proposed Transaction satisfies the *Soundair* principles given that:

(a) the sale process undertaken by the Receiver was commercially reasonable and conducted in a similar manner to comparable real estate sale processes in insolvency contexts;

(b) Royal LePage has extensive experience selling commercial and residential properties in and around the Ottawa area and widely canvassed the market for prospective purchasers for approximately five months;

(c) the APS is the highest and best offer obtained for the Property following a wide canvassing of the market, and therefore maximizes value in the circumstances;

(d) the Receiver and Royal Lepage believe that that the Transaction is the best available in the circumstances, and that further time spent marketing the Rockland Property would not result in a superior transaction;

(e) the Receiver believes that the approval of the APS and the Transaction contemplated thereunder is in the best interests of the Company's stakeholders; and

(f) the Receiver is not aware of any opposition to the Transaction.[32]

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[31] *Crown Trust Co. et al. v. Rosenberg et al.*, 1986 CanLII 2760 (ONSC) at paras 83-84 [*Crown Trust*].
[32] Third Report, *supra* note 1 at section 3.3.

27. In granting approval and vesting orders, courts have made clear that the recommendation of the Court-appointed receiver in respect of the proposed sale transaction should only be ignored in exceptional circumstances.[33] As previously noted, the Receiver believes that the approval of the APS and the Transaction contemplated thereunder is in the best interests of the Company and its stakeholders.

B. The Distribution and Discharge Order

1. The Receiver Should be Authorized to Make the Proposed Distributions

28. The Receiver is seeking authorization to make the Distributions as set out in the Third Report. Orders granting distributions are routinely granted by Canadian Courts in insolvency proceedings, including receiverships.[34] The Receiver notes that distributions are expressly contemplated by the Commercial List Model Discharge Order.[35]

29. Pursuant to the doctrine of jurisdiction by necessary implication, in granting this Court the statutory authority to appoint a receiver pursuant the MBLAA and the CJA, the legislature necessarily implicitly granted the statutory authority to make orders essential to that receivership.[36] Further, this Court may exercise its inherent jurisdiction whenever it is just and equitable to do so.[37] As such, the Court has jurisdiction to approve the requested Distributions.

30. As noted above, the Distributions are proposed to go first to the legal costs of Investors that contributed evidence to FSRA (as contemplated by the Amended Appointment Order), and

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[33] *Romspen*, *supra* note 30 at para 18, citing to *Crown Trust*, *supra* note 31.
[34] *Re Windsor Machine & Stamping Limited*, 2009 CanLII 39772 (ONSC) at paras 8 & 13; *AbitibiBowater inc. (Arrangement relatif à)*, 2009 QCCS 6461 at paras. 70-75 [*AbitibiBowater*].
[35] Commercial List Model Receiver Discharge Order.
[36] *ATCO Gas And Pipelines Ltd v Alberta (Energy and Utilities Board)*, 2006 SCC 4 at para 51; *Business Development Bank of Canada v Astoria Organic Matters Ltd*, 2019 ONCA 269 at para 50.
[37] *Urbancorp Cumberland 1 GP Inc. (Re)*, 2020 ONSC 7920 at para 33 (citing *Stephen Francis Podgurski (Re)*, 2020 ONSC 2552); *Hickman Equipment (1985) Ltd, Re*, 2005 NLTD 146 at para 13.

next to all Investors and other creditors on a *pro rata* basis. There were no secured claims, and as such a security review by the Receiver is not necessary in respect of the Distributions.

31. The Receiver believes that a *pro rata* distribution of the remaining funds is the most fair and equitable result in the circumstances, and that it would not be just in the circumstances to apply the strict rules of trust law to this case. As the Receiver has noted in its Reports:

(a) certain Investors had no mortgages registered on title on the investments they funded while other Investors had up to all of their investments reflected as being active mortgages. There did not appear to be any consistency or rationale for the percentage of actual mortgages any Investor held;

(b) the Investors who would stand to benefit from trust principles were not more diligent than the other Investors; they were simply the relatively lucky ones for whom the funds provided to the Company were appropriately used;

(c) certain funds that had been advanced by Investors were never advanced to a borrower. Similarly, various funds that were repaid to the Company when a mortgage was repaid were not provided to the Investor that funded the mortgage with no apparent consistent or rationale; and

(d) the bank accounts were not used in a manner that would be consistent with a trust.[38]

32. This Court has noted that the application of strict legal rules may be set aside in certain circumstances for rateable sharing, including where investors suffered as a result of fraud.[39]

[38] Third Report, *supra* note 1 at section 5.0, para 3.
[39] *Millard v. North George Capital Management Ltd*., [2000] O.J. No. 1535 at para 49 (attached at Schedule C hereto).

Indeed, in cases involving "ponzi schemes", courts have found that innocent investors should not suffer, and have emphasized that circumstances differ from cases involving poorly performing investments.[40] Courts have also found that the recommendations of the court officer and views of the participants are relevant factors in determining whether to distribute from pooled funds.[41]

33. This is not a case where some Investors would suffer as a result of a "poorly performing investment". In this case, Investors selected specific investments (i.e., properties to be mortgaged) – however, without their knowledge and through no fault of their own, many Investors have not been repaid and do not have (and never had) the benefit of the mortgages that purportedly secured their investment. It would be unfair to the Investors whose funds were inappropriately used or who do not have the benefit of the mortgages they were promised, if the Investors who were lucky enough not to have suffered from the Company's wrongdoing were to be favoured by the Distributions. Practically, and separate from the patent unfairness of a non-pooled distribution, it would also be next to impossible to attribute funds to particular Investors given the way the Company operated its cash accounts.

34. The Receiver has been clear and consistent since it issued its First Report that it is of the view that Investors should share equally on a distribution, and it has received no notices of dispute or opposition of any kind following the issuance of its Claims Letters confirming this approach.

35. The Receiver therefore respectfully submits that the Distributions are appropriate in the circumstances and should be authorized in accordance with the Second Ancillary Order.

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[40] *Re Titan Investments Limited Partnership, (Judicature Act)*, 2005 ABQB 637 at paras 22-23
[41] *Taylor Ventures Ltd.*, 2007 BCSC 654 at para 55.

2. The Court Should Approve the Third Report and the Receiver's Activities Described Therein

36. The Court has the inherent jurisdiction to review and approve the activities of a court appointed receiver as set out in the receiver's reports.[42]

37. It has become common practice for court officers to bring motions to seek approval of their reports and the activities set out therein.[43] Court approval, among other things, allows the court officer to bring its activities before the court and presents an opportunity to address concerns of stakeholders, while enabling the court to satisfy itself that the court officer's activities have been conducted in a prudent and diligent matter.[44]

38. The activities of the Receiver described in the Third Report were all necessary and undertaken in good faith pursuant to the Receiver's duties and powers set out in the Amended Appointment Order and were in each case in the best interest of the stakeholders of the Company.

39. The Receiver therefore respectfully submits that the Third Report and the activities described therein should be approved.

40. The Receiver notes that approval of the reports of the receiver, along with its activities referred to therein, is expressly contemplated by the Commercial List Model Discharge Order.

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[42] *Bank of America Canada v. Willann Investments Ltd*., 1996 CanLII 2782 (ONCA).
[43] *Target Canada Co. (Re)*, 2015 ONSC 7574 at para 2 [*Target Canada*]; *Triple-I Capital Partners Limited v 12411300 Canada Inc*., 2023 ONSC 3400 at paras 65-66 [*Triple-I Capital*].
[44] *Target Canada*, *ibid* at para 23; *Triple-I Capital*, *ibid* at paras 65-66.

3. The Court Should Approve the Fees and Disbursements of the Receiver and its Counsel

41. The Receiver is seeking approval of the professional fees and disbursements incurred by it and its legal counsel as well as the Fee Accrual, as described in the Third Report and the fee affidavits appended thereto.[45]

42. The Amended Appointment Order provides that the Receiver and its counsel shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges unless otherwise ordered by the Court on the passing of accounts.[46]

43. In determining whether to approve the accounts of a Court-appointed receiver and its counsel, the Court will consider the overall value contributed, taking into account (a) the nature, extent and value of the assets, (b) the complications encountered, (c) the degree of assistance provided by the debtor, (d) the time spent, (e) the receiver's knowledge, experience and skill, (f) the diligence and thoroughness displayed, (g) the responsibilities assumed, (h) the results of the receiver's efforts and (i) the cost of comparable services when performed in a prudent and economical manner.[47]

44. On a motion to pass accounts, "[…] it is evident that the fairness and reasonableness of the fees of a receiver and its counsel are the stated lynchpins."[48]

45. The fees and disbursements are fair and reasonable and have been properly incurred, specifically when bearing in mind the considerations set forth in paragraph 43, and the approval of the Fee Accrual will avoid the need for a separate fee approval motion in the future and minimize

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[45] Third Report, *supra* note 1 at section 7.0, paras 2-4.
[46] Amended and Restated Appointment Order, *supra* note 29 at para 16.
[47] *Bank of Nova Scotia v Diemer*, 2014 ONCA 851 at para 33 [*Diemer*].
[48] *Diemer*, *ibid* at para 35.

further professional fees. The hourly rates charged by the Receiver and its counsel are consistent with comparable firms practicing in the area of insolvency in the applicable market. [49]

4. The Discharge of the Receiver and the Release of the Receiver Should Be Approved

46. Subject to completion of the Transaction and distributing the proceeds therefrom, the Receiver's duties and responsibilities under the Receivership Order will have been materially completed.[50] The Receiver respectfully submits that it is appropriate to discharge the Receiver upon the filing of the Discharge Certificate.

47. The Receiver respectfully submits that it is also appropriate to grant a limited release in favour of it. In *Pinnacle v Kraus*, this Court granted an Order discharging and releasing a court-appointed receiver. In doing so, the Court noted that such a release is expressly contemplated by the Commercial List Model Discharge Order and that in the absence of improper or negligent conduct on the part of the Receiver, such releases should be granted.[51]

48. Throughout the Receivership Proceedings, the Receiver has acted prudently and contributed substantially to the administration of these proceedings, with the activities of the Receiver having been thoroughly disclosed throughout. Accordingly, the Receiver respectfully submits that the requested release is reasonable in the circumstances, will provide the Receiver with finality, and should be granted.

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[49] Third Report, *supra* note 1 at section 7.0, para 5.
[50] *Ibid* at section 8.0 at para 2.
[51] *Pinnacle v Kraus*, 2012 ONSC 6376 at para 47.

PART V: RELIEF REQUESTED

49. The Receiver respectfully requests that this Court grant the proposed form of AVO and Second Ancillary Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Bennett Jones LLP

June 20, 2024

SCHEDULE A – LIST OF AUTHORITIES

Cases Cited

1. *AbitibiBowater inc. (Arrangement relatif à)*, 2009 QCCS 6461
2. *ATCO Gas And Pipelines Ltd v Alberta (Energy and Utilities Board)*, 2006 SCC 4
3. *Bank of America Canada v. Willann Investments Ltd.*, 1996 CanLII 2782 (ONCA)
4. *Bank of Nova Scotia v Diemer*, 2014 ONCA 851
5. *Business Development Bank of Canada v Astoria Organic Matters Ltd.*, 2019 ONCA 269
6. *Chief Executive Officer of the Financial Services Regulatory Authority of Ontario and First Swiss Mortgage Corp.* (May 19, 2023), Toronto, Court File No. CV-23-00696362-00CL, [Amended and Restated Appointment Order] (ONSC) (Commercial List), (Steel J).
7. *Crown Trust Co. et al. v. Rosenberg et al.*, 1986 CanLII 2760 (ONSC)
8. *Elleway Acquisitions Limited v. 4358376 Canada Inc.*, 2013 ONSC 7009
9. *Home Trust Co v 2122775 Ontario Inc*, 2014 ONSC 1039
10. *In Re Hickman Equipment (1985) Ltd.*, 2005 NLTD 146
11. *Pinnacle v Kraus*, 2012 ONSC 6376
12. *Re Titan Investments Limited Partnership, (Judicature Act)*, 2005 ABQB 637
13. *Re Windsor Machine & Stamping Limited*, 2009 CanLII 39772 (ONSC)
14. *Romspen Investment Corp v 6176666 Canada Ltée*, 2012 ONSC 1727
15. *Royal Bank of Canada v Soundair Corp*, [1991] 46 OAC 321 (ONSC)
16. *Stephen Francis Podgurski (Re)*, 2020 ONSC 2552
17. *Target Canada Co. (Re)*, 2015 ONSC 7574
18. *Taylor Ventures Ltd.*, 2007 BCSC 654
19. *Triple-I Capital Partners Limited v 12411300 Canada Inc.*, 2023 ONSC 3400
20. *Urbancorp Cumberland 1 GP Inc. (Re)*, 2020 ONSC 7920

SCHEDULE B – STATUTES RELIED ON

***Courts of Justice Act*, R.S.O. 1990, c. C.43**

Section 100

Vesting Orders
A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed.

Section 101

Injunctions and receivers
101 (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

Terms
(2) An order under subsection (1) may include such terms as are considered just.

***Mortgage Brokerages, Lenders and Administrators Act*, 2006, S.O. 2006, c. 29**

Section 37

Appointment of Receiver
(1) The Chief Executive Officer may apply to the Superior Court of Justice for an order appointing a receiver, receiver and manager, trustee or liquidator of property that is in the possession or under the control of a licensee or person or entity who the Chief Executive Officer believes, on reasonable grounds, is or was required to have a licence (the "designated person").

Order
(2) If the court is satisfied that the appointment is in the public interest, the court may make the appointment and may impose such conditions as the court considers appropriate. 2006, c. 29, s. 37 (2).

Period of appointment
(3) The court shall specify the period of the appointment in the order, but if the court makes the order on an application without notice, the period of the appointment shall not exceed 15 days. 2006, c. 29, s. 37 (3).

Same
(4) If an order is made without notice, the Chief Executive Officer may apply to the court within 15 days after the date of the order to continue the order or for such other order as the court considers appropriate. 2006, c. 29, s. 37 (4); 2018, c. 8, Sched. 17, s. 2.

Powers of appointee
(5) The appointee has the powers specified in the order and, if so directed by the court, has the authority to wind up or manage the affairs of the designated person. 2006, c. 29, s. 37 (5).

Effect of appointment
(6) When an order is made, the directors of the designated person are no longer entitled to exercise the powers that are given to the appointee; when the appointee is discharged by the court, the directors become entitled to exercise those powers once again. 2006, c. 29, s. 37 (6).

Fees and expenses
(7) The appointee's fees and expenses are in the discretion of the court. 2006, c. 29, s. 37 (7).

Variation or discharge of order
(8) The court may vary or discharge an order made under this section. 2006, c. 29, s. 37 (8).

SCHEDULE C – NON-HYPERLINKED CASE LAW

2000 CarswellOnt 1450
Ontario Superior Court of Justice [Commercial List]

Millard v. North George Capital Management Ltd.

2000 CarswellOnt 1450, [2000] O.J. No. 1535, [2000] O.T.C. 305, 47 C.P.C. (4th) 365, 97 A.C.W.S. (3d) 604

Claude Millard and Roger Grisé, Plaintiffs and North George Capital Management Limited, Triple A Financial Services Inc., North George Capital Limited Partnership, North George Capital II Limited Partnership, North George Capital III Limited Partnership, North George Capital IV Limited Partnership, North George Capital V Limited Partnership, Lionaird Capital Corp., Roderick Alton, Michael Magee, Robert McGillen, Kenneth Gill, Anne Gilmour, Michael Goselin, Goselin & Associates, Stewart and Associates, McColl Turner, Irv Dyck and M.R.S. Trust Company, Defendants

Farley J.

Heard: September 27, 28, 1999, March 3, 2000
Judgment: April 11, 2000
Docket: 98-CL-3048

Counsel: *Steven Sofer*, *Jeffrey D. Glatt* and *Shani Briffa*, for Plaintiffs.
W.R. Maxwell, Q.C., for Alton, Magee.
Benjamin Zarnett and *Carolyn Silver*, for McGillen.
Eric Fournie, for Gill, Gilmour.
Ann Dinnert, for Goselin, Goselin & Associates.
Robert J. Potts and *Robert Muir*, for Stewart & Associates.
Karen Groulx, for McColl Turner.
J. Owen N. Bury, for Dyck.
Christopher D. Bredt and *Benjamin T. Glustein*, for M.R.S. Trust Company.
John O'Sullivan, for Interim Receiver, Lindquist, Avey, MacDonald, Baskerville Company.

Subject: Civil Practice and Procedure
Related Abridgment Classifications
Civil practice and procedure
V Class and representative proceedings
V.2 Representative or class proceedings under class proceedings legislation
V.2.b Certification

V.2.b.i Plaintiff's class proceeding
V.2.b.i.C Common issue or interest
Civil practice and procedure
V Class and representative proceedings
V.2 Representative or class proceedings under class proceedings legislation
V.2.d Orders, awards and related procedures
V.2.d.iii Termination of proceedings
Civil practice and procedure
XVI Disposition without trial
XVI.7 Settlement
XVI.7.a General principles
Civil practice and procedure
XXIII Practice on appeal
XXIII.10 Leave to appeal
XXIII.10.b Application
XXIII.10.b.ii Grounds

Headnote

Practice --- Disposition without trial — Settlement — General

Pursuant to court order, interim receiver was appointed for defendant limited partnerships and corporate defendants — Plaintiffs alleged they were two of approximately 200 investing members who were victims of fraud perpetrated by defendants' principles — Portion of defendants settled after resolution proceedings held before retired judges — Plaintiffs brought motion for certification of action as class proceeding and approval of settlement — Motion granted — Settlement reached was time and cost effective for parties, was conducted by experienced counsel and judges, and was not prejudicial or unfair to those parties not consenting to settlement — Consultation with more of class members was not absolute prerequisite — Settlement was fair and reasonable and in best interests of all concerned on balance in litigation, including specific individual defendants as well as plaintiffs.

Practice --- Parties — Representative or class actions — General

Pursuant to court order, interim receiver was appointed for defendant limited partnerships and corporate defendants — Plaintiffs alleged they were two of approximately 200 investing members who were victims of fraud perpetrated by defendants' principles — Portion of defendants settled after resolution proceedings held before retired judges — Plaintiffs brought motion for certification of action as class proceeding — Motion granted — Allegations of proposed members of class demonstrated common issues, disclosed cause of action and proposed classes, and subclasses were identifiable — Fact that there may be need to bifurcate proceedings into resolution of individual issues and resolution of common issues was not fatal to certification — Claims of members were generally small in relation to complexity of litigation and judicial economy would result if common issues only had to be decided once — Two proposed representative plaintiffs had no conflict of interest with other members of class — Proposed representative plaintiffs produced workable plan

to advance proceedings on behalf of class and to notify class members of proceeding — Class proceeding was preferable procedure.

Table of Authorities

Cases considered by *Farley J.*:

Abdool v. Anaheim Management Ltd. (1995), 21 O.R. (3d) 453, 31 C.P.C. (3d) 197, 78 O.A.C. 377, 121 D.L.R. (4th) 496 (Ont. Div. Ct.) — referred to

Anderson v. Wilson (1999), 122 O.A.C. 69, 175 D.L.R. (4th) 409, 44 O.R. (3d) 673, 36 C.P.C. (4th) 17 (Ont. C.A.) — considered

Bendall v. McGhan Medical Corp. (1993), 16 C.P.C. (3d) 156, 14 O.R. (3d) 734, 106 D.L.R. (4th) 339 (Ont. Gen. Div.) — considered

Bywater v. Toronto Transit Commission (1998), 27 C.P.C. (4th) 172 (Ont. Gen. Div.) — applied

Campbell v. Flexwatt Corp. (1997), 98 B.C.A.C. 22, 161 W.A.C. 22, 15 C.P.C. (4th) 1, [1998] 6 W.W.R. 275, 44 B.C.L.R. (3d) 343 (B.C. C.A.) — referred to

Campbell v. Flexwatt Corp. (1998), 228 N.R. 197 (note), 120 B.C.A.C. 80 (note), 196 W.A.C. 80 (note) (S.C.C.) — referred to

Carom v. Bre-X Minerals Ltd. (1999), 44 O.R. (3d) 173, 46 B.L.R. (2d) 247, 35 C.P.C. (4th) 43 (Ont. S.C.J.) — referred to

Chace v. Crane Canada Inc. (1997), 14 C.P.C. (4th) 197, 164 W.A.C. 32, 101 B.C.A.C. 32, 44 B.C.L.R. (3d) 264 (B.C. C.A.) — referred to

Chadha v. Bayer Inc. (1999), 45 O.R. (3d) 29, 36 C.P.C. (4th) 188 (Ont. S.C.J.) — referred to

Dabbs v. Sun Life Assurance Co. of Canada, [1998] I.L.R. I-3575, 40 O.R. (3d) 429, 22 C.P.C. (4th) 381, 5 C.C.L.I. (3d) 18 (Ont. Gen. Div.) — applied

Dabbs v. Sun Life Assurance Co. of Canada (1998), 165 D.L.R. (4th) 482, 113 O.A.C. 307, [1999] I.L.R. I-3629, 41 O.R. (3d) 97, 7 C.C.L.I. (3d) 38, 27 C.P.C. (4th) 243 (Ont. C.A.) — referred to

Dabbs v. Sun Life Assurance Co. of Canada (1998), 235 N.R. 390 (note), 118 O.A.C. 399 (note) (S.C.C.) — referred to

Epstein v. First Marathon Inc. / Société First Marathon Inc. (2000), 2 B.L.R. (3d) 30, 41 C.P.C. (4th) 159 (Ont. S.C.J.) — distinguished

Fisher v. C.H.T. Ltd., [1966] 2 Q.B. 475 (Eng. C.A.) — considered

Harrington v. Dow Corning Corp., 48 C.P.C. (3d) 28, 22 B.C.L.R. (3d) 97, [1996] 8 W.W.R. 485, 31 C.C.L.T. (2d) 48 (B.C. S.C.) — referred to

Hunt v. T & N plc, 4 C.C.L.T. (2d) 1, 43 C.P.C. (2d) 105, 117 N.R. 321, 4 C.O.H.S.C. 173 (headnote only), *(*sub nom. *Hunt v. Carey Canada Inc.)* [1990] 6 W.W.R. 385, 49 B.C.L.R. (2d) 273, *(*sub nom. *Hunt v. Carey Canada Inc.)* 74 D.L.R. (4th) 321, [1990] 2 S.C.R. 959 (S.C.C.) — referred to

Mouhteros v. DeVry Canada Inc. (1998), 22 C.P.C. (4th) 198, 41 O.R. (3d) 63 (Ont. Gen. Div.) — referred to

Nantais v. Telectronics Proprietary (Canada) Ltd. (1995), 127 D.L.R. (4th) 552, 40 C.P.C. (3d) 245, 25 O.R. (3d) 331 (Ont. Gen. Div.) — referred to
Nantais v. Telectronics Proprietary (Canada) Ltd. (1995), 40 C.P.C. (3d) 263, 129 D.L.R. (4th) 110, 25 O.R. (3d) 331 at 347 (Ont. Gen. Div.) — referred to
Ontario New Home Warranty Program v. Chevron Chemical Co. (1999), 46 O.R. (3d) 130, 37 C.P.C. (4th) 175 (Ont. S.C.J.) — considered
Ontario (Securities Commission) v. Consortium Construction Inc. (1993), 1 C.C.L.S. 117 (Ont. Gen. Div. [Commercial List]) — considered
Parsons v. Canadian Red Cross Society (1999), 40 C.P.C. (4th) 151 (Ont. S.C.J.) — considered
Peppiatt v. Nicol (1993), 20 C.P.C. (3d) 272, 16 O.R. (3d) 133 (Ont. Gen. Div.) — referred to
Robertson v. Thomson Corp. (1999), 171 D.L.R. (4th) 171, 85 C.P.R. (3d) 1, 43 O.R. (3d) 161, 30 C.P.C. (4th) 182 (Ont. Gen. Div.) — referred to
Winnipeg Mortgage Exchange Ltd. v. Mortgage Holdings Ltd. (1982), [1983] 1 W.W.R. 213, 19 Man. R. (2d) 1, 43 C.B.R. (N.S.) 119 (Man. C.A.) — considered

Statutes considered:

Class Proceedings Act, 1992, S.O. 1992, c. 6
Generally — pursuant to

s. 1 "common issues" — considered

s. 5 — considered

s. 5(1) — considered

s. 6 — referred to

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)
Generally — considered

Securities Act, R.S.O. 1990, c. S.5
Generally — referred to

Rules considered:

Rules of Civil Procedure, O. Reg. 560/84
R. 20 — referred to

R. 21 — referred to

Regulations considered:

Securities Act, R.S.O. 1990, c. S.5
General, R.R.O. 1990, Reg. 1015

Form 20

MOTION by plaintiffs for approval of settlement and certification of class proceeding.

***Farley J.*:**

1 This was a certification motion by the proposed representative plaintiffs Claude Millard and Roger Grise in respect of these proceedings under the *Class Proceedings Act*, 1992, S.O. 1992, c. 6. ("CP Act"). The test for certification is set out at s. 5 of that legislation:

> s. 5(1). The Court shall certify a class proceeding on a motion under sections 2, 3 or 4 if,
>
> (a) the pleadings or the notice of action disclose a cause of action;
>
> (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
>
> (b) the claims or defences of the class members raise common issues;
>
> (c) a class proceeding would be the preferable procedure for the resolution of the common issues, and
>
> (e) there is a representative plaintiff or defendant who:
>
> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of identifying class members of the proceeding; and
>
> (iii) does not have on the common issues for the class, an interest in conflict with the interests of the other class members.

2 Pursuant to the Order of Ground J. dated September 23, 1998, Lindquist, Avey, MacDonald, Baskerville Company was appointed interim receiver ("IR") of the various defendant limited partnerships and of North George Capital Management Limited and Lionaird Capital Corp.

> Claude Millard — "Millard"
>
> Roger Grise — "Grise"
>
> North George Capital Management Limited — "Management"
>
> Triple A Financial Services — "AAA"
>
> North George Capital Limited Partnership — "LP1"
>
> North George Capital II Limited Partnership — "LP2"
>
> North George Capital III Limited Partnership — "LP3"

North George Capital IV Limited Partnership — "LP4"

North George Capital V Limited Partnership — "LP5"

LP1, LP2, LP3, LP4, LP5 collectively — "Partnerships"

Lionaird Capital Corp. — "Lionaird"

Management as General Partner of the Partnerships — "GP"

Roderick Alton — "Alton"

Michael Magee — "Magee"

Robert McGillen — "McGillen"

Kenneth Gill — "Gill"

Anne Gilmour — "Gilmour," wife of Gill

Michael Goselin — "Goselin"

Goselin & Associates — "Gosco"

Stewart and Associates — "Stewco"

McColl Turner — "McCollco"

Irv Dyck — "Dyck"

M.R.S. Trust Company — "MRS"

Alton, Magee, Bill and Gilmour collectively — "Principals"

3 Millard and Grise assert that they are two of approximately 200 members who were victims of fraud or Ponzi schemes allegedly perpetrated by the Principals and as a result these members lost money invested in units ("Units") of the Partnerships or notes ("Notes") issued by Lionaird. They also allege that the professional defendants, lawyers McGillen and Stewco, the accounting firm McCollco and the trust company MRS were aware or ought to have been aware of the unlawful conduct of the Principals and did not merely "do nothing" but in fact took steps which in fact facilitated the ability of the Principals to perpetrate the schemes or they otherwise breached duties owed to their clients.

4 It is asserted that Alton owned and controlled AAA, a registered securities dealer authorized to sell mutual funds and private placement securities. Goselin and Dyck were registered as salespersons for AAA.

5 Millard and Grise assert that many purchasers of Partnership Units or of Lionaird Notes have either insufficient funds to pursue an individual action against the defendants or the costs of pursuing such an action are too high relative to the damages which they suffered. In the result, they assert that without certification of this action, many of the alleged victims will be denied fundamental access to justice. I think it is fair to observe that the IR has had great difficulty in receiving cooperation from the Principals, specifically as to payment of investigation costs awarded against Alton and Magee and in being able to trace (in the sense obtain) funds which were sent out of the jurisdiction to Switzerland and California and as to which litigation will have to be pursued in an attempt to recover same.

6 Millard and Grise made the further allegations as follows:

(a) Alton and Magee created the Partnerships as vehicles through which they would perpetrate the fraudulent or Ponzi scheme on the investors in Ontario.

(b) LP1 hired McGillen as its solicitor. He drafted the Offering Memorandum for LP1, a modified version of which was provided to all who purchased Units in any of the Partnerships following.

(c) The subscription form for investors in the LP1 Units provided for monthly earning payments of 5%.

(d) The LP1 partnership agreement, drafted by McGillen, provided that Management as GP (which made only a nominal capital contribution) would receive a 40% share of income earned by LP1; this was not disclosed in the Offering Memorandum.

(e) The business plan described in the Offering Memorandum effectively required the Partnership to lend the money supplied by the investors to the Partnership out on a fully secured basis to unnamed "Borrowers" at a rate in excess of 60% per annum (without even taking into account the 40% share of income referred to in (d) above) to meet the payments due to the investors. It would appear that on a bumped up basis, the effective rate of interest would be in excess of that rate legislated to be "criminal."

(f) In the LP1 Offering Memorandum, McGillen included various provisions which made him personally responsible as the Partnership's solicitor, for satisfying various conditions to secure the investors' investments. Examples of this include that the Offering Memorandum provided:

> (i) [LP1] will only release [LP1's] funds upon receipt of a fully negotiable Letter of Credit or Bank Guarantee ... issued by one of the top 25 European Banks or one of the top 100 World Banks. The terms of the Letter of Credit must meet with the satisfaction of [LP1's] Canadian Schedule A bank and lawyer to [LP1] [McGillen];

(ii) that all conditions to the transfer of funds out of the [LP1] must be met to the satisfaction of the [LP1's] Canadian banker and to its lawyer [McGillen].

(g) Goselin and Dyck were salespersons registered with AAA, a dealer owned and controlled by Alton. They agreed to sell Units to their clients for commissions as high as 4% per month. It would not appear that there was any detailed investigation of how this plan would work out in practice. Dyck in his affidavit has stated: "I do not do due diligence on the financial products I market."

(h) Goselin and Dyck sold most of the Units employing what might be generally referred to as a "common sales pitch." They claim that they essentially repeated information about the Partnerships provided to them by Alton which they believed to be true — namely: high returns, secure principal, high liquidity.

(i) LP1 was cloned into four more offerings as to the other Partnerships, raising a total of US$4 million from more than 100 investors. Alton and Magee received more than $350,000 Cdn from the funds of the Partnership. Magee received an additional US$125,000 from Primesorb USA, one of the parties to which substantial amounts of the unrecovered funds of the Partnerships were purportedly transferred. Goselin and Dyck received the most material share of the $475,000 Cdn paid as sales commissions by the Partnerships. The remainder of the moneys put up by the investors was purportedly "loaned" to debtors of highly questionable quality under suspicious circumstances. As of this date, it is not apparent that any of such funds will be recoverable.

(j) No prospectus was prepared in respect of the offering of any of the Units of the Partnerships. Although Alton, AAA, Goselin and Dyck are registered securities dealers or salespersons, it is alleged that the securities laws of Ontario were ignored. The Principals were apparently relying on an exemption to the prospectus requirements but it is asserted that none of the requirements for such exemption were complied with.

(k) Year end financial statements and tax reports were prepared by McCollco which was retained as the accountants of the Partnerships. It is asserted that McCollco through such review would be able to see that funds were being transferred back and forth in such a way to assist "misappropriation" and further that payments being made to investors were being financed from the moneys invested by subsequent investors and not primarily from any earnings of the Partnerships as booked. It is asserted that disgruntled investors were being paid off for amounts in excess of their actual capital accounts balances so as to hide the fact of the balances being diminished by losses as payouts. It is further asserted that McCollco prepared the financial statements in two parts, allegedly contrary to normal industry practice, such that the investors would not be able to easily detect the Ponzi scheme.

(l) At Gill's suggestion, the Partnerships retained Stewco to resolve certain *Securities Act* violations. Stewco knew or ought to have known that Alton and Magee had done more than one partnership offering in the previous 12 months in breach of the *Securities Act*. Nevertheless Stewco prepared and filed a Form 20 for LP4 as if everything were in regular order and almost immediately thereafter Stewco was consulted on LP5 as to its offering.

(m) It is alleged that the Principals created Lionaird for the purpose of tapping into a new source of funds — namely RRSP funds which investors wished to invest. Lionaird offered returns of 12% to 24% per annum on its Notes.

(n) Stewco was retained to incorporate and organize Lionaird and assist in the preparation of documents to offer for sale Lionaird Notes to investors for RRSP and non-RRSP investments. Notwithstanding Stewco's actual or reputed knowledge (i) of the non-resolution of the Partnerships' deficiencies under the *Securities Act*, (ii) that the promoters had no prospectus exemption available to them, and (iii) that the Lionaird Notes would not be eligible investments for an RRSP account and Stewco's advice to this effect with Lionaird indeed selling Notes to investors for RRSP purposes, Stewco accepted the retainer and prepared documents to facilitate Lionaird raising funds from the public.

(o) The Principals then approached MRS to act as a financial institution to accept the Lionaird Notes as an eligible investment for RRSP purposes.

(p) MRS had sent a brochure to its customers wherein it described itself as a specialist in the field of RRSP administration. This brochure stated inter alia:

> Because of the complexity of today's financial world, with its changing products and global opportunities, you need financial specialists to help you through the maze.
>
> . . . . .
>
> With your Financial Advisor as a partner ... we can give you access to a greater range of RSP eligible investment alternatives than traditionally found through banks and trust companies.
>
> . . . . .
>
> [W]e make it simple to modify your holdings as new qualified investment products appear.

(q) The service of MRS as RRSP trustee for the RRSP purchases of Lionaird Notes became part of the "package" offered to prospective investors. MRS had no or limited dealings with the investors of the RRSP subclass proposed, but rather, it dealt with the salespersons, Stewco and Lionaird.

(r) On or about July 31, 1997 Stewco received cheques from MRS for the purchase by some investors of Lionaird Notes for their RRSP accounts. Stewco's concern was that it did not believe the Notes qualified as RRSP eligible investments. Stewco did not deposit the cheques

in its trust account but on September 5, 1997 it sent MRS a letter returning these cheques. MRS issued new cheques payable to Lionaird on September 8, 1997, purchasing Notes for these clients' RRSP accounts.

(s) It is alleged that the Lionaird documentation which MRS received contained sufficient red flags that MRS ought never to have subscribed to purchase Notes as trustee for the investors' RRSP accounts without due diligence to clear away such concerns as ought to have been raised by the red flags — or in the alternative that it ought to have warned its clients, the RRSP investors. An instance of a red flag was Stewco's return of the cheques after a month.

(t) Despite MRS's view that it had no obligation to examine the issue of whether the Notes were RRSP eligible investments, it is alleged that MRS, with its expertise and experience in the RRSP field, ought to have determined forthwith that the Lionaird Notes were not qualified as eligible investments for the RRSP accounts.

(u) While the Lionaird Offering Memorandum contained no information as to how Lionaird would earn sufficient income to pay investors at least 12% interest per annum, but rather it stated that the promoters through Lionaird could do as they wished with the funds and that the principal was not guaranteed, nevertheless the "sales pitch" of Goselin and Dyck is alleged to have remained the same as for the Partnership Units — namely: high returns, secure principal, liquidity.

(v) Lionaird raised over $4 million from over 100 investors. More than half of this was accounted for by RRSP accounts, all held at MRS. While Lionaird earned only $104,000 before it was brought to a halt by these proceedings (approximately a year after startup), it paid Alton $425,000, Magee $185,000, Gill (who was in prison during the most part of the offering) and Gilmour $533,000 and the salespersons (including Goselin and Dyck) $365,000.

(w) The balance of the Lionaird funds were either placed in an offshore account in Alton's name or sent to an offshore corporation created by Gill which was neither a subsidiary of, nor controlled by, Lionaird. As a result of these proceedings, a portion of the Lionaird funds has been recovered.

(x) On the basis of an initial Lindquist, Avey, MacDonald, Baskerville report dated September 22, 1998, Ground J. concluded in appointing that firm IR that

> ...If the Report doesn't indicate intentional fraud, it must indicate total and complete incompetence of the highest order on the part of those responsible for the management of the affairs and investments of the Corporation and the Partnerships.

(y) Alton is the president, a director and significant shareholder of Management, the GP of the Partnerships; he is also the president, a director and a significant shareholder of Lionaird; he also represents himself as a self-employed limited market dealer, operating through his controlled corporation AAA.

(z) Magee is an officer, a director and a significant shareholder of Management; he is an officer and significant shareholder of Lionaird.

(aa) Gill was at all material times an officer, a director and significant shareholder of Lionaird.

(bb) Gilmour was at all material times an officer of Lionaird.

(cc) Goselin is a financial planner operating through his company Gosco which has the slogan "Professional Management of Your Money." Goselin is a shareholder of and salesperson with AAA.

(dd) Stewco is a law firm practising in Ontario.

(ee) McGillen is a lawyer practising in Ontario.

(ff) McCollco is an accounting firm partnership.

(gg) Dyck is an independent financial planner and a salesperson with AAA.

(hh) MRS is an Ontario headquartered trust company offering its services as a trustee for RRSP plan accounts.

As to how the various defendants view matters, they made the following observations:

(a) Alton and Magee submit that the investors were greedy.

(b) McGillen submits that Millard has indicated that he purchased Partnership Units on the basis of Goselin's oral representations and assurances as to earning 5% on his money per month, that his principal was guaranteed and his investment was redeemable on 30 days' notice. There was no allegation that Millard was provided with a draft Offering Memorandum regarding the Partnerships or that he relied on the Offering Memorandum. Rather Millard advised that he did not understand much of what he read in the draft Offering Memorandum. McGillen points out that the draft Offering Memorandum indicated that the investment was speculative and subject to risk. Millard advised that Goselin advised him that the references in the draft to risk and speculative investment was merely "legal jargon" but that Goselin said his money was 100% guaranteed, would earn high returns and have a high liquidity. Millard based his decision to invest on what Goselin told him which he viewed as superseding what was in the draft Offering Memorandum. McGillen submits that the core of the claim concerning the Partnership Units was oral representations and not anything which relied on the documentation he prepared.

(c) McGillen submits that the investors were buying Units from the Partnerships and that McGillen was not alleged to have been acting as a lawyer for any investors. There

was no allegation that any investor relied on what McGillen said or relied on McGillen in any way for legal advice or otherwise.

(d) McGillen observes that there is no reference in the draft Offering Memorandum to anything being a statement of McGillen, but rather the statements were of those issuing the Units, namely the Partnerships.

(e) Goselin and Gosco observe that no Letter of Credit or Bank Guarantee was obtained by the Partnerships before the funds were released. The Lindquist report stated that Management had taken or borrowed large sums from the funds of the Partnership; that funds received by one Partnership were used by Management as GP to pay money to investors in another Partnership or were simply paid back to the investors so that they would think the investments were continuing as successful; that large amounts had been placed by Management with a Swiss notary who had been arrested in Switzerland on fraud charges; and that moneys had been otherwise placed by Management in other questionable investment schemes and the monies appeared to be unrecoverable.

(f) Goselin points out that his wife was an investor and therefore a victim of the fraud.

(g) Goselin denies that there was a "common sales pitch" and further that he did due diligence (although he does not advise what due diligence he did do).

(h) Goselin observes that the only *written* evidence of a "common sales pitch" was obtained through an investigator (Woodruff) who apparently obtained the sheet at Tab 0 to Millard's affidavit from an unnamed investor in California who indicated he got it from Dyck or a salesman associated with Dyck. Goselin observes that Millard was not told of all the items on this sheet.

(i) Stewco observes that it was retained by LP4 for the express and limited purpose to prepare and file a Form 20 with the Ontario Securities Commission. Management certified the accuracy of the contents of Form 20. All of the securities referred to in this Form 20 had been sold and the monies disbursed before Stewco was retained. Stewco had no direct contact with any of the investors.

(j) Stewco was retained to incorporate Lionaird and thereafter to prepare an Offering Memorandum and subscription agreement in connection with the sale of Promissory Notes by Lionaird. In anticipation of the initial closing Stewco received cheques on behalf of nine investors ($330,000 aggregate) which were processed through Stewco's trust account and ultimately disbursed to Lionaird on closing. Stewco received no further moneys from investors other than the cheques received from MRS re RRSP accounts of MRS (these cheques were subsequently returned to MRS because of discrepancies with the Offering Memorandum and subsequent agreements).

(k) Stewco prepared Form 20s for the Lionaird transactions, the contents of which were certified by Lionaird.

(l) Stewco observes that it had no direct contact with any investors or that any investor sought or received legal or other advice from Stewco.

(m) McCollco observes that it was retained by the Partnerships as accountants, not auditors. However Millard made no allegation that he relied on the financial statements prepared by McCollco as to making his investment in Units of the Partnerships. McCollco states that if Millard had reviewed the Schedule of Partners' Capital received by him Millard would have known that he lost money in the year ending December 31, 1995 and that his capital account was being reduced.

(n) McCollco used cautionary language in its Notice to Reader attached to the financial statements: that the statements were prepared "from information provided by management" and that McCollco "have not audited, reviewed or otherwise attempted to verify the accuracy or completeness of such information." In preparing the Schedule of Partners' Capital and Schedule of Income for income tax purposes, McCollco cautioned that they "have not audited, reviewed or otherwise attempted to verify the accuracy or completeness of such information."

(o) Dyck denies that there was a "common sales pitch" employed.

(p) Dyck and his wife invested $220,000 US in the Partnerships' Units and $227,000 in Lionaird Notes. In that respect Dyck submits that he and his wife are victims of a fraud if the Principals perpetrated such.

(q) Dyck advises that in selling the investments in issue he relied on documents and information provided to him by AAA, the Principals and documents prepared with the assistance of solicitors for the Partnerships and Lionaird and by MRS.

(r) MRS notes that it is proposed that certification is only sought against it as to the Lionaird RRSP subclass where MRS acted as custodian trustee for self directed RRSP plans. MRS notes that Grise alleges that he would not have invested in Lionaird Notes if he had not been advised by Dyck (his investment advisor) that the Notes were RRSP eligible.

(s) MRS notes that there is no allegation that MRS ought to have known of the alleged fraud of the Principals. Rather it is alleged that MRS ought to have known that the Notes were not a qualified investment for self directed RRSP accounts and therefore MRS should have rejected any Notes being presented for investment in an RRSP account.

(t) MRS observes that it does not offer investment advice to annuitents who hold self directed RRSP accounts at MRS and that MRS does not manage these self directed accounts. Rather MRS proclaims that it provides custodian trustee services for a "nominal fee."

(u) MRS notes that each investor was a party to a revised declaration of trust ("DOT"). The application forms signed by each investor provided that the investor had read the DOT. The DOT contains inter alia the clause in bold

> **Planholder's Responsibility: You alone are responsible for ensuring that: (i) contributions to your Plan do not exceed the maximum limits permitted by the Act; (ii) the investments held in your Plan are qualified investments for your Plan under the Act; and (iii) monitoring the amounts of foreign property held in your Plan. You acknowledge and accept sole responsibility for the above-mentioned matters**.

The DOT went on to provide that if an investment were not qualified for an RRSP account, MRS could realize upon the investments in the account to pay all tax, interest or penalties. As well the DOT indicated that MRS would not be liable for any loss suffered as a result of any acts done by MRS in reasonable reliance on the investor's authority, or the authority of the investor's properly authorized agent.

(v) The subscription agreement provides that MRS was to be indemnified against any claims arising from the investment in Lionaird Notes.

(w) The Letter of Indemnity for Investment in Small Business Property in a Self-Directed Registered Retirements Savings Plan also provided an indemnity to MRS.

(x) MRS was not involved in drafting any Lionaird documentation, although MRS did have the DOT prepared.

(y) MRS submits that there is no prohibition in the *Income Tax Act* (or in the DOT) against acquiring non-qualified investments in a self directed RRSP account. Rather the *Income Tax Act* provides specific rules directed as to the acquisition and disposition of non-qualified investments by an RRSP Account.

(z) MRS submits that there are many circumstances where debt issued by small business corporations may be a qualified investment for an RRSP account under the *Income Tax Act*. Rather the final determination on "qualified investment status" may turn on very specific facts which may be within the knowledge and control of the principals and promoters of the investment offering and/or the annuitant.

(aa) MRS observes that the offering memorandum of the Lionaird Notes describes the speculative nature of the investment, that the principal and interest of the Notes are not guaranteed by any third party, that the Notes will only be secured against the assets of Lionaird (which prior to the offering had no significant assets) and there was no assurance Lionaird would be able to repay the principal or interest on the Notes when they came due.

(bb) It was noted that investors would invest for varying reasons.

7 In between the submissions relating to certification on September 27-28, 1999 and a return to Court on March 3, 2000, the parties engaged in resolution discussions before firstly the Hon. R. Montgomery and then the Hon. Sidney Robins. During this period, I was requested not to render a decision. As a result of the resolution discussions before these two retired judges and further negotiations, the plaintiffs have reached settlements with certain of the defendants ("Settling Defendants"), namely (i) McGillen and Stewco as to $100,000 re all claims of North George Class members; (ii) Stewco as to $100,000 re all claims of Lionaird Class members; and (iii) MRS as to $400,000 re all claims of the Lionaird RRSP Subclass members; all subject to court approval.

8 The Hon. Robert Montgomery viewed the case against the lawyers as somewhat weak in absolute and relative terms. The Hon. Sidney Robins dealt only with the MRS aspect and he observed certain weaknesses in the case against MRS. Both retired judges counselled settlement at or below the settlement figures.

9 A bar order has been requested as part of the settlement so that the settling defendants and the non-settling ones would be precluded from making a claim of contribution or indemnity against each other. However, the settling defendants would participate in the continuing litigation to permit the court to assess their relative liability to the plaintiffs, as compared with the non-settling defendants. As well, it was agreed that as against the plaintiffs, the non-settling defendants would have the benefit of any claims for contribution and indemnity which they may have as against the settling defendants.

10 All Lionaird Class members would share in the settlement proceeds contributed by Stewco; however only the RRSP subclass would share the settlement proceeds contributed by MRS. It was proposed that with respect to the approximately $1 million otherwise recovered by the IR of Lionaird that because it was not entirely clear who was entitled to such funds amongst the investors in Lionaird after the interim receiver's first charge for its fees and disbursements, that all available assets be pooled and these investors share equally and rateably in the pooled assets. The North George settlement does not contemplate that any monies be paid directly to the North George investors out of the $100,000 proposed to be paid by McGillen and Stewco. Rather it was proposed that these funds be used to pursue claims against the notary in Switzerland (including a better understanding of what was happening in the Swiss proceedings and whether there was any realistic and reasonable opportunity of recovering any money there and if so, covering the costs of

submitting an appropriate claim to recover the North George class members' share of the missing funds). In this regard, plaintiffs' counsel advised that they would defer seeking their fee out of this settlement in order to allow these funds to advance the interests of the North George class. Plaintiffs' counsel and Millard have been in touch with 26 North George class members and 44 Lionaird class members (of which 29 are also RRSP subclass members); all contacted have been in favour of the Settlement Agreement and the proposed distribution of proceeds.

11 The records of North George and Lionaird have been reviewed as to attempting to determine who are the North George and Lionaird class members. Since most of the investors appear to come from the greater Peterborough and North Bay areas, it was proposed to give notice by publication in newspapers circulated in those areas. Each investor has the opportunity of opting out of the class proceedings and thus the Settlement Agreement. Should any do so, the settling defendants have the option of withdrawing from the settlement.

12 I will now proceed to determine whether the proceedings should be certified as a class action according to the criteria set out in s. 5(1) of the CP Act. This will be broken down as to the Settling Defendants and the rest of the defendants.

13 For the purpose of settlement only, the Settling Defendants have conceded that as against them the plaintiffs' claims in negligence and otherwise state a cause of action against the Settling Defendants. The proposed North George Class (of which it is alleged that each member has a claim against the settling defendants McGillen and Stewco as well as against Alton, Magee, the applicable partnership, Management and McCollco) is essentially comprised of all purchasers of Units in the Partnerships other than the defendants or relatives of the defendants. Similarly the Lionaird Class (of which it is alleged that each class member has a claim against the Settling Defendant Stewco as well as against Alton, Magee, Gill, Gilmour and Lionaird) is essentially comprised of all of the purchasers of Notes of Lionaird other than the defendants or relatives of the defendants; the proposed RRSP subclass is essentially comprised of investors who held Lionaird Notes in an RRSP account with MRS other than the defendants or relatives of the defendants.

14 Section 1 of the CP Act defines "common issues" as:

> (i) common but not necessarily identical issues of fact, or
>
> (ii) common but not necessarily identical issues of law that arise from common but not necessarily identical facts.

15 For settlement purposes only, the Settling Defendants have acknowledged the following to be common issues:

> (i) what role was played by the Settling Defendants in the creation of Lionaird and/or the Partnerships and the marketing and sales of the securities issued by these entities? and

(ii) are the Settling Defendants liable for the losses suffered by the class members?

16 For settlement purposes only the Settling Defendants have acknowledged that a class proceeding is the preferable way to resolve the common issues above. It was submitted that certification of the action in this respect would advance the following objectives of the CP Act, namely access to justice and judicial economy. As for access to justice it was noted that many of the claims were for under $50,000 and as such it would generally be uneconomic for any one investor to litigate his or her claim given the cost and length of such relatively complex litigation and its uncertainties. In addition, it was to be recognized that for many investors, their investment represented a significant amount of their life or retirement savings so that their access to litigation funds to pursue their actions would be constrained. While at trial, the relative liabilities of the Settling Defendants would have to be determined and in this respect witnesses for the Settling Defendants would be available for examination. It was submitted that the more passive approach to the trial of the Settling Defendants would result in judicial economy as to a class action trial; in addition it should be observed that to deal with the matter as a class proceeding would assist in judicial economy as opposed to a slew of individual actions, but as well it should also be observed that the settlement if approved would tend to eliminate further interlocutory proceedings vis-à-vis the Settling Defendants (and as well, of course, any appeals by the Settling Defendants).

17 As for the representative plaintiff, it was observed that he need not share every characteristic of every other class (and subclass) member. The key was submitted to be that he have no conflict of interest on the common issues with the members of the class and that he be shown to be an individual who will fairly and adequately advance the class claims. The Settling Defendants did not challenge the suitability of the plaintiffs as representative plaintiffs.

18 In assessing whether a settlement should be approved, the court should consider a number of factors. These include the likelihood of recovery or success, the amount and nature of discovery, evidence and investigation, the settlement terms and conditions, the recommendations and experience of counsel, the future expenses and likely duration of the litigation, the recommendation of any neutrals, the nature of the objections and the force behind such objections and the presence of arm's length bargaining and the absence of collusion. See *Dabbs v. Sun Life Assurance Co. of Canada* (1998), 40 O.R. (3d) 429 (Ont. Gen. Div.) at pp. 439-44, affirmed (1998), 41 O.R. (3d) 97 (Ont. C.A.), leave to appeal to S.C.C. dismissed October 22, 1998 [reported (1998), 235 N.R. 390 (note) (S.C.C.)]; *Parsons v. Canadian Red Cross Society* (1999), 40 C.P.C. (4th) 151 (Ont. S.C.J.) at para. 71; *Ontario New Home Warranty Program v. Chevron Chemical Co.* (1999), 46 O.R. (3d) 130 (Ont. S.C.J.). Winkler J. in *Parsons* at para. 72 also considered the degree and nature of communication by counsel and the representative plaintiff with class members during the litigation and information conveying to the Court the dynamics of and the position taken by the parties during the negotiations. He did note at para. 73 that:

> Indeed, in a particular case, it is likely that one or more of the factors will have greater significance than others and should accordingly be attributed greater weight in the overall approval process.

In *Ontario New Home Warranty Program*, Winkler J. stated at p. 147 that "the settlement of complex litigation is encouraged by the courts and favoured by public policy."

19 It would appear that the settling defendants have vigourously denied liability to the plaintiffs; they have strenuously opposed certification before the settlement and indicated that they would strongly oppose the claims. It is likely that this litigation including appeals could take a number of years. A significant percentage of the class members are older and have expressed a desire to resolve this matter earlier rather than later, with an attendant flow of funds. With this litigation having progressed over the past 1 $^{1}/_{2}$ years, it would appear that through the certification process and the ADR process including the oldest and most important focus of ADR — negotiation — that there has been a reasonable amount of "discovery" and investigation of the claims against the Settling Defendants.

20 What is reasonable in a settlement? What is the range that is tolerable? The Court should not expect perfection (see *Ontario New Home Warranty Program* at p. 151) nor should it hesitate to make reasonable assumptions about the future (in other words, the decision is to be made now on the basis of known facts as opposed to delaying the decision to take advantage of 20-20 hindsight). Sharpe J. at p. 440 of *Dabbs* reminded us that

> all settlements are the product of compromise and a process of give and take and settlements rarely give all parties exactly what they want. Fairness is not a standard of perfection. Reasonableness allows for a range of possible resolutions. A less than perfect settlement may be in the best interests of those affected by it when compared to the alternative of the risks and costs of litigation.

Plaintiff's counsel noted that the settlement provides benefits to the plaintiff class such as (at para. 57 of their factum):

> (i) in the case of Lionaird, an immediate return of about 40% of their original investment to elderly investors, without the time, expense and risks of trial and possible appeal;
>
> (ii) for the North George class members, the settlement monies can be used to pursue the North George class members' claim against a notary in Switzerland who allegedly received a significant portion of the monies invested by the Class members. To date these claims have not been pursued because North George has no funds and the former interim receiver for North George was unable to obtain any from North George class members to retain counsel in Switzerland.

21 I would also note that Alton and Magee have not respected court orders to fund certain investigations. The notice and opt out provisions contemplated would appear to provide adequate protection for those class members who are not before the court and who do not wish to be bound. Plaintiffs' counsel have many years of experience in litigation generally; as well they have been involved in other class proceedings. They recommend that the settlement be approved. Their offer to defer their fee with respect to the North George settlement would tend to demonstrate that this is not a "take the money and run" exercise by counsel. The settlement is at least as favourable as that recommended by the retired judges who have considerable trial and class proceedings experience. Over 60 class members have been consulted as to the settlement and they are unanimously in favour of it. The settlement has been reached after extensive arm's length negotiations over several months as facilitated by the mediations presided over by the two retired judges.

22 It is recognized that the lawyers McGillen and Stewco could well be successful at trial in circumscribing their duty of care to the investors. With respect to MRS, it is noted that the RRSP subclass members signed documentation purporting to indemnify MRS, which documentation may provide MRS with a defence at trial.

23 The only party to strenuously oppose the settlement was McCollco as to the North George Settlement proposal concerning McGillen and Stewco. At paragraph 3 of the McCollco factum it was stated:

> 3. The Settlement Agreement is not "fair, reasonable or in the best interests of those affected by it." Specifically:
>
> > (a) the Settlement Agreement prejudices McColl Turner, as the only reasonably "pecunious defendant," by precluding McColl Turner from its right to share the burden of any insolvent defendants' portion of liability with the Settling Lawyers, in proportion to their respective degrees of fault;
> >
> > (b) the Settlement Agreement prejudices McColl Turner by its loss of procedural rights in respect of collecting discovery evidence and presenting evidence at trial as against the Settling Lawyers;
> >
> > (c) the Settlement Agreement prejudices McColl Turner by the proposal that McColl Turner pay the costs of seeking leave to obtain both documentary and oral discovery of the Settling Lawyers and to pay any legal costs incurred by the Settling Lawyers as a result of being involved in the North George proceeding either through discovery or trial;
> >
> > (d) no advantage is gained for the proposed class members by the Settlement Agreement for the surrender of their litigation rights against the Settling Lawyers;

> (e) the Settlement Agreement does not provide the plaintiffs with an "expedited recovery" of its losses or a portion of its losses;
>
> (f) the proposed plaintiff class members have not been provided with adequate notice of the terms of the proposed Settlement Agreement or the effect of surrendering rights against the Settling Lawyers so as to put this Honourable Court on notice of any potential objections to the proposed Settlement Agreement;
>
> (g) no judicial economy is achieved by the terms of the proposed Settlement Agreement.

24 The plaintiffs have alleged that the lawyers McGillen and Stewco breached their fiduciary duty by not properly advising with respect to the securities laws regarding the setup and offerings of North George and in preparing the partnership agreement and offering memorandum and in failing to protect the Partnership from being used as a vehicle for fraud by its promoters. The Principals retained McCollco to complete annual financial statements on an (unaudited) Notice to Readers basis for each of the Partnerships. The claims made against McCollco include those based on the alleged breach of fiduciary duties to the limited partner investors including a duty to warn that amounts received were principally a return of capital and not income, failing to withdraw from its engagement, and by releasing misleading financial statements. McCollco notes that Millard makes no allegation that he relied on financial statements prepared by McCollco in determining whether to invest in the Units and that he and a number of others purchased units before McCollco prepared any financials.

25 McCollco advanced *Epstein v. First Marathon Inc. / Société First Marathon Inc.* (2000), 41 C.P.C. (4th) 159 (Ont. S.C.J.) as an example of a court following the criteria stated by Sharpe J. in *Dabbs* in dismissing a settlement proposal. However I would think that an analysis of the *Epstein* case would satisfy anyone that Cumming J. was there dealing with an abuse of process matter where the strike litigant — or perhaps more accurately put, the strike counsel — had the respondent corporation over a time barrel. If Cumming J. had approved that "settlement," everyone (but strike counsel who had protected his fees and disbursements of $190,000) would have been worse off including the justice system. The present case under review bears absolutely no similarity to the *Epstein* case on a facts and circumstances basis.

26 McCollco asserts that the proposed bar order is unfairly prejudicial to it since it asserts that the order will prevent it from obtaining contribution against the settling lawyers to cover the gap caused by the impecuniousity costs of any non-settling defendant. Citing Fleming John G., *The Law of Torts* 8th ed. (1992) at p. 264 and *Fisher v. C.H.T. Ltd.*, [1966] 2 Q.B. 475 (Eng. C.A.) at pp. 481 and 483, McCollco asserts at para. 29 of its factum:

> 29. Where there are more than two wrongdoers, and at least one wrongdoer is insolvent or otherwise unavailable to satisfy his or her share of liability, the *Negligence Act* is

> silent regarding how the burden of the insolvent or unavailable wrongdoers' portion of liability is to be absorbed as between the solvent wrongdoers. The liability of a concurrent wrongdoer who is unable to satisfy their share of liability should be divided between the concurrent wrongdoers in proportion to their respective degree of fault. In other words, where there are three or more tortfeasors, the share of liability attributable to one insolvent tortfeasor should be distributed proportionally among the remaining tortfeasors.

However what McCollco overlooks is that if that proposition is accepted as governing in Ontario, then the application of *Fisher* would result not in McCollco having to dip into its pockets for the *total* share of the impecunious defendant(s) but only its proportional share. Rather it is the plaintiffs who have to bear the burden of not getting anything extra from the settling defendants. Therefore I do not see that this aspect is unfair or prejudicial to the legal rights of McCollco.

27 McCollco also objects in that it is circumscribed as to its rights in respect of discovery and evidence at trial concerning the settling defendants. It objects to the requirement of having to obtain leave of the Court in order to conduct examinations for discovery and to obtain documentary discovery from the settling lawyers. I would note that Winkler J. observed at pp. 148-9 of *Ontario New Home Warranty Program* that failure to approve the integral prohibitive provision of the settlement agreement would mean that the entire settlement would fail. He then proceeded to weigh the advantages and disadvantages accruing to the plaintiffs and the objecting defendants. He noted at p. 148:

> The *Class Proceedings Act* is *sui generis* legislation which envisions the balancing of interests between the parties. Through legislative foresight, the court has been given the necessary power to adapt procedures to ensure that the interests of all parties can be adequately protected in situations where those interests conflict. Here the benefits of the settlement to the plaintiffs favour the approval of the settlement as presented, including the contentious prohibitive provisions. As I have stated above, these provisions do not occasion any substantive prejudice to the defendants. The procedural concerns may be adequately addressed through the terms on which the settlement is approved.
>
> . . . . .
>
> These terms, generally described, are that the non-settling defendants may, on motion to this court, obtain:
>
> . . . . .

Again, I do not see that in taking this balance that McCollco is being dealt with unfairly or is otherwise being prejudiced in relative terms. The court in any such leave motion would be able to deal with the request to ensure that McCollco was able to obtain what it reasonably required in the circumstances (prior discussions amongst counsel would likely be very helpful for all concerned)

and the court would be able to deal with any actual or likely abuse on any side. The court continues to have full control over the process and costs.

28 The statement of claim alleges that McCollco has a duty of care to the investors in the circumstances of this case and that it has failed to live up to that standard. McCollco has gone to great pains to attempt to show that it is blameless. However, it seems to me that on the basis of the pleadings, there is a cause of action established against McCollco and that it would be improper *at this stage* to determine on the "evidence" which McCollco asserts is true and correct that McCollco should be held blameless. I would merely comment in passing that the defences which McCollco has raised and its analysis of same may be helpful to it if it wishes to re-engage in meaningful resolution discussions (but, I wish to emphasize that I do not intend to suggest by that comment that I have concluded — or even suggested, that it has not already done so); however, I would observe that counsel and their clients have an ongoing obligation to continuously canvass the possibility of settlement. That would involve a self-assessment of risks and rewards and the question of uncertainties as well as expense and time in the sense of duration, with the recognition that there are various opportunities to reassess exposure.

29 I note that formal discoveries have not occurred; however each case should be determined in accord with its own circumstances. Here I do not see that the issues between the plaintiffs and the settling lawyers would be materially affected by requiring these parties to exhaust the discovery route. I think it a fair observation that the proposed settlement vis-à-vis North George would not put the $100,000 in the hands of the class members; however that should be viewed in perspective. What is proposed is that this $100,000 fund further the pursuit of funds said to have gone to the Swiss notary. In other words, these litigation funds of a limited amount would be "invested" with the thought that they may be recovered manifold if the foreign litigation were to prove out. What is certain is that without these funds, the opportunity of attempting to recover substantial amounts said to have gone to the Swiss notary would be frustrated. While I note that everyone contacted appears to feel that this is a satisfactory use of the funds, I do not see that this is an integral part of the settlement arrangement. What is proposed would appear reasonable at first blush. However, I am mindful that other investors who have not been contacted may have different views which may be persuasive. I would propose to authorize the use of those funds as proposed, but subject to any affected North George investor being able to utilize the come back clause before a specified time after notice has being given in the Notice to object to that use, if there is in fact any objection.

30 As discussed above, I do not see the proposed bar order as being unfair or prejudicial to McCollco in the circumstances of this case.

31 McCollco has attempted to minimize the weight to be given to the plaintiffs' counsel's recommendation. However, while McCollco has noted that class counsel are not "experts" in class proceedings, I would observe that their recommendation appears to make reasonable sense on

balance in these circumstances. Their opinion is certainly supported by the views of the 2 retired judges.

32 It is true that it is entirely conceivable that the litigation will have a duration as long as might have been expected if there were no settlement approved. However, I would observe that it is a start and may provide encouragement for principled settlement of other claims against the non-settling defendants. Secondly, I would observe that while the Settling Defendants are to participate by way of being witnesses as opposed to exposed parties, this will likely have a salutary effect on the matter getting on for trial in an expeditious way and at trial to be dealt with by the continuing parties not having to counter trial tactics of exposed litigants (now not exposed because of the settlement).

33 McCollco criticizes the plaintiffs and their counsel for not having advised more of the class members and on a more timely basis of the terms of the proposed settlement. I am of the view that this consultation is a desirable element but complete consultation is not an absolute prerequisite. As for appropriate information, I am certain that the plaintiffs' counsel will have had the opportunity to and the benefit of reflecting as to whether the proposed Notice is sufficient in the circumstances, especially when they will now have the opportunity of discussing the pros and cons of utilizing the $100,000 in the further pursuit of the Swiss notary issues. No doubt the class members once bitten shall be a little more cautious in reviewing the Notice where they may not have been so diligent in timely reading of any other material.

34 I would note that McCollco attempted inappropriately in my view, to obtain information as to the litigation strategy (as that term should be correctly used as opposed to tactics) of the plaintiffs vis-à-vis the other defendants and particularly McCollco. While this type of disclosure may be desirable when there is an overall settlement as to all defendants, it would be asking the plaintiffs to conduct the balance of this litigation against the non-settling defendants including McCollco with at least one hand tied behind their backs. I think it sufficient as well to observe that the Hon. Robert Montgomery felt that the weakest case relatively was against the settling lawyers.

35 With respect to the use of the $100,000 settlement funds regarding North George, I think it a generally fair observation as to what the draft Notice states:

> As noted above, the total amount available pursuant to the Settlement Agreement for the North George Class is $100,000. There are no other funds available for distribution at the present time. Accordingly, there are insufficient funds to warrant the expense of calling for claims by the North George Class, verifying the claims and distributing the funds *pro rata* to the North George Class.

36 Allow me then to go back to the question of the general question of certification over and above these elements I have discussed vis-à-vis the Settling Defendants. As to the s. 5 criteria,

Montgomery J. stated at p. 744 of *Bendall v. McGhan Medical Corp.* (1993), 14 O.R. (3d) 734 (Ont. Gen. Div.) that:

> In my opinion, the court should err on the side of protecting people who have a right of access to the courts. There is remedial legislation and it should be addressed with a purposive approach. This is not inconsistent with the duty to look carefully at the facts to see if they meet the requirements of s. 5.

Case by case procedures should be adopted. It is not legislation which requires a cookie-cutter approach. In *Anderson v. Wilson* (1999), 36 C.P.C. (4th) 17 (Ont. C.A.), the Court stated at para. 32:

> Any potential efficiency in advancement of [the plaintiff's] claims through the flexibility provided by the [Act] should, where reasonable, be utilized.

The Court in examining the s. 5 criteria should keep in mind the objectives of this legislation — namely of advancing access to the courts, judicial economy and behaviour modification. See *Abdool v. Anaheim Management Ltd.* (1995), 21 O.R. (3d) 453 (Ont. Div. Ct.) at p. 461 and p. 472. The acknowledgement of the plaintiff that there may be need to bifurcate the proceedings into (i) a resolution of the individual issues and (ii) a resolution of common issues, such as reliance, is not fatal to certification; individual issues are contemplated in the CP Act. See *Mouhteros v. DeVry Canada Inc.* (1998), 41 O.R. (3d) 63 (Ont. Gen. Div.) at p. 73; *Peppiatt v. Nicol* (1993), 16 O.R. (3d) 133 (Ont. Gen. Div.) at p. 142. I think it obvious that a proceeding taken to conclusion on the common issues would have a significant influence on whether or not the individual issues need to be determined at trial. As well, the trial of a single case of the individual issues would be able to focus so that the outstanding issues could be dealt with in a very short hearing.

37 Do the pleadings disclose a cause of action? This is an extremely low threshold to deal with. This is a R. 21 test (see *Hunt v. T & N plc*, [1990] 2 S.C.R. 959 (S.C.C.)) standard; the standard is not a R. 20 one. That is the pleadings are presumed to state a cause of action unless it is "plain and obvious" that they do not. See *Anderson* at para. 18 where the Court of Appeal adopted the "plain and obvious" test. The view of the plaintiff's case must be given a very liberal purposive analysis. Here the pleadings against the Principals, Management and AAA are based on fraud, breach of the securities laws and other breaches of common law and statutory duties. The claims against the salespersons are based on negligent misrepresentation, breaches of the *Securities Act* and other breaches of duty. I pause to note that some objected on the basis that there was no proof that any of the salespersons read from a prepared script, a copy of which was said to be indirectly obtained in the United States. I do not see this as relevant with respect to the common issues below since the allegation appears to be that there was a common approach generally taken in selling the securities to the investors — this need not be a script, it could well be a menu (whether or not reduced to written form) from which the salesperson would address what the salesperson saw might be of interest or what might address a question or concern to the potential investor. The claims against

the law firm and accounting firm are based on negligence and breaches of fiduciary duties. The claims against MRS are based on negligence and breaches of trust. I do not see that these claims are of the nature and quality (quality in their pleading) that it is plain and obvious that they will fail.

38 As to identifiable classes, it appears to me that the proposed classes and sub classes meet the criteria set out by Winkler, J. in *Bywater v. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172 (Ont. Gen. Div.) at p. 175. See above as to the proposed North George class and the proposed Lionaird class. The MRS subclass is dealt with as a subclass since only those with RRSP accounts in Lionaird also dealt with MRS. Similarly, the claims against Dyck and Goselin should be dealt with in subclasses since those defendants dealt with their "own" investors. I would concur with the identifiable classes and subclasses.

39 Are there common issues which will be advanced by proceeding in class litigation? The common issues need not be determined in the sense that liability be established now. It should be obvious that certification should be neutral as between the two sides — that is, where the common issue is later decided one way or the other, that result will either benefit the plaintiffs or conversely, the defendants. Issues should be certified as common issues if their resolution would move the litigation forward. See *Anderson* at para 35; *Campbell v. Flexwatt Corp.* (1997), [1998] 6 W.W.R. 275 (B.C. C.A.) at pp. 291-3, leave to appeal to S.C.C. refused *Campbell v. Flexwatt Corp.* (1998), 228 N.R. 197 (note) (S.C.C.). When certifying common issues, it is preferable that the issues be generally stated as opposed to setting out a detailed list of issues which details would refer to all elements of all contemplated causes of action. See *Chadha v. Bayer Inc.* (1999), 36 C.P.C. (4th) 188 (Ont. S.C.J.) at para. 21; *Robertson v. Thomson Corp.* (1999), 43 O.R. (3d) 161 (Ont. Gen. Div.) at p. 173. Schedule A to the September 1999 factum of the plaintiffs in my view sets out the appropriate common issues. The plaintiffs seek relief against the Principals in the form of punitive damages; class proceedings, especially as to their aspect of behaviour modification, are well suited to deal with punitive damages. See *Chace v. Crane Canada Inc.* (1997), 14 C.P.C. (4th) 197 (B.C. C.A.) at pp. 204-5; *Carom v. Bre-X Minerals Ltd.* (1999), 35 C.P.C. (4th) 43 (Ont. S.C.J.) at para. 84.

40 Is a class proceeding here in keeping with the objectives of the CP Act; is a class proceeding a preferable procedure? Will it advance the objectives of the CP Act? If certification is denied, will the result be that effectively the investors (or many of them) will be denied access to the courts since their individual claims could not be economically litigated? See *Ontario New Home Warranty Program* at paras. 84 and 96. In my view the claims here are generally small in relation to the complexity of the litigation and the dedication of the defendants to fighting those claims on a variety of issues. I note that for many of the investors, these losses which they have presently incurred would be of a nature and magnitude that they would discourage all but the most dedicated and relatively well heeled from pursuing them individually. These losses have cut out substantial underpinnings in the foundations these investors have to finance their life up to and including retirement. There would not appear to be any appetite amongst the investors to pour more money

into this area, an area which has caused them considerable financial loss and heartache already. I note that no investor was willing to now reach into their pocket in the North George situation to finance litigation as to the Swiss notary situation abroad. I agree with Sharpe J's observations at p. 434 of *Dabbs* and feel that his views have equal merit in this case. Where there are common issues which would take up a considerable amount of any individual case against the defendants, it is obvious that there will be judicial economy if these common issues need only be determined once, not many or as here hundreds of times. See *Anderson* at paras. 22-35; *Nantais v. Telectronics Proprietary (Canada) Ltd.* (1995), 127 D.L.R. (4th) 552 (Ont. Gen. Div.) leave for appeal refused (1995), 129 D.L.R. (4th) 110 (Ont. Gen. Div.). Even if individual issues have to be separately and individually determined, the amount of time required will be in the aggregate substantially reduced. See also *Campbell* at p. 295; *Anderson* at para. 32-6. See *Chace* and *Peppiatt* as to the question of behaviour modification. Where the risk of any one individual taking a defendant to court is remote, a defendant may feel secure and continue wrongful conduct. If the Principals here have engaged in fraud, then they should recognize that a bankruptcy discharge will not release them from a debt/judgment founded in fraud. The absence of funds from Canada (or their being hidden here) has made it very difficult to pursue these offshore "investments" in Switzerland and California. There appears to have been extremely limited cooperation in tracing and recovering such funds. A collective judgment, if given, may allow for further collective action to be taken in recovering these funds. Dyck apparently feels no particular obligation to any of his customers: the plaintiffs have portrayed this as a "buyer beware" attitude. Securities dealers are operating in a regulated industry in which there are certain duties and obligations. The determination of those duties and obligations in this case will assist others similarly situate in knowing where the lines are drawn. Similarly there appears to be merit as to the professionals and MRS that others similarly situate should conduct themselves appropriately; the plaintiffs here allege that these other parties carried out their activities with one eye (or both) closed to the obvious harm being dished out by the others and rather than taking an appropriate level of caution, these other parties took a narrow blinkered analysis of their responsibility (preferring to rely on possibly exculpatory language for instance in the case of MRS as opposed to being alert and sensitive to some obvious alarms going off).

41 Winkler J. in *Bywater* at pp. 181-2 observed:

> The court in reaching its decision on preferable procedure must if necessary consider all of the common and individual issues as part of the factual matrix.

42 In consideration of the s. 6 factors, I would note that it would generally appear that compensatory damages can be calculated by the application of a simple formula and all the contracts in issue are what one might characterize as "standard forms."

43 Are Millard and Grisé appropriate representative plaintiffs? There is no requirement that the representative plaintiff be a clone of all the members of the class; it is sufficient that he or

she has no conflict of interest and is shown to be an individual who will fairly and adequately advance the class claims. See *Abdool* at p. 465, *Bywater* at p. 183, *Campbell* at p. 296. Both Millard and Grisé appear to me to be without conflict and they appear to have been industrious to date in advancing this litigation in the interests of all affected investors, among whom they are two who have suffered. There is no requirement that the representative plaintiffs have a cause of action against every defendant, provided that he or she can adequately advance the class interests against all defendants with respect to the common issues. See *Campbell* at p. 289; *Harrington v. Dow Corning Corp.* (1996), 48 C.P.C. (3d) 28 (B.C. S.C.) at p. 47. The representative plaintiff need not be the representative witness in the sense of being the sole witness. The court will maintain a supervisory role of the action: See *Anderson* at para 39; *Chace* at p. 203. Millard and Grisé did not get early redemptions at the expense of the rest of the remaining investors.

44 It appears to me that the proposed representative plaintiffs have produced a workable plan to advance the proceedings on behalf of the class and to notify the class members of the proceeding.

45 Given the alleged role taken by Dyck, I do not think it material or relevant that he and his wife apparently lost money on their investments; I do not see that this fact should transfer them into the class that the other investors are in who did not participate in the sales process.

46 I am therefore of the view that when all the pros and cons of certifying this as proposed as a class action with Millard and Grisé as representative plaintiffs to advance the identical common issues on behalf of the identifiable classes against the defendants, it will be recognized that a class proceeding is the preferable procedure. I so find that on balance. Further I am of the view that the proposed settlement should be approved. In my view it is fair and reasonable and in the best interests of all concerned on balance in this litigation, including the specific individual defendants as well as those investors who are in the various classes.

47 As discussed above, the question of what should be done with the North George settlement funds of $100,000 is to be subject to the come back clause arrangement discussed above. If there are no objections or if at a hearing the objections are not sufficient to change the proposed course of action (any such hearing to be on a non-onus basis to the objector), then the proposed (and now authorized) use is to be put into action.

48 The IR wished to have an adjustment to the draft order submitted. However, it appears to me that paragraph 12 should be viewed as to the settlement providing compensation to the investors and not to the Partnerships directly. It appears that the change in paragraph 18 is all right. At this stage, but subject to review in the future, I would not see any realistic benefit as to the IR dealing with claims for unsecured creditors since it appears that this is a deep insolvency.

49 I note that there is some question of priority as to funds of approximately $1 million held by Lionaird's IR as a result of various PPSA registrations as more investors were revealed from a review of the records of Lionaird. Further the RRSP subclass investors did not receive secured

notes, but because of the allegation of fraud, their sub class could claim *pari passu* treatment. I also am mindful of cases such as *Ontario (Securities Commission) v. Consortium Construction Inc.* (1993), 1 C.C.L.S. 117 (Ont. Gen. Div. [Commercial List]) at paras 76-8; *Winnipeg Mortgage Exchange Ltd. v. Mortgage Holdings Ltd.* (1982), [1983] 1 W.W.R. 213 (Man. C.A.) at p. 218 where (a) investors were intended to rank equally; (b) fairness in the result necessitated that they have equality, so that the application of strict legal rules has been set aside by rulings that all available assets be pooled and all investors share equally and rateably in the pooled assets. In these circumstances and especially where priority disputes would delay proceedings and eat away at the available funds, it would generally appear appropriate to apply this rateable sharing concept. However, I am of the view that procedural fairness would dictate that the affected investor parties have the opportunity to utilize the come back clause to object to such treatment. This should be incorporated in the order and in the Notice in the same way as the $100,000 settlement proceeds in North George is dealt with *mutatis mutandis*.

50 I would be grateful if counsel would provide me with a revised draft order and Notice early next week. Given that I have not had any earlier opportunity to get this decision out after the March 3, 2000 hearing, it may be necessary to adjust some of the contemplated dates which may have been advanced in expectation of an earlier release. Counsel can arrange to see me at 9:30 or a 10 a.m. appointment next week as is seen fit by them.

Motion granted.

End of Document

CHIEF EXECUTIVE OFFICER OF THE FINANCIAL SERVICES REGULATORY AUTHORITY OF ONTARIO	and **FIRST SWISS MORTGAGE CORP.**	
Applicant	Respondent	Court File No.:CV-23-00696362-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced in Toronto

Factum of the Receiver
(Returnable June 24, 2024)

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