File No. CI 20-01-26627

THE QUEEN'S BENCH
WINNIPEG CENTRE

IN THE MATTER OF: **THE APPOINTMENT OF A RECEIVER PURSUANT TO SECTION 243 OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985 c. B-3, AS AMENDED AND SECTION 55 OF *THE COURT OF QUEEN'S BENCH ACT*, C.C.S.M. c. C280**

BETWEEN:

WHITE OAK COMMERCIAL FINANCE, LLC,

Applicant,

- and -

NYGÅRD HOLDINGS (USA) LIMITED, NYGARD INC., FASHION VENTURES, INC., NYGARD NY RETAIL, LLC, NYGARD ENTERPRISES LTD., NYGARD PROPERTIES LTD., 4093879 CANADA LTD., 4093887 CANADA LTD., and NYGARD INTERNATIONAL PARTNERSHIP,

Respondents.

SUPPLEMENTARY MOTION BRIEF OF THE RECEIVER (NET RECEIVERSHIP PROCEEDS ORDER)

Thompson Dorfman Sweatman LLP
Barristers and Solicitors
1700 – 242 Hargrave Street
Winnipeg, MB R3C 0V1
(Matter No. 0173004 GBT)
(G. Bruce Taylor: 204-934-2566)
(Ross A. McFadyen: 204-934-2378)
(Melanie M. LaBossiere: 204-934-2508)
(Email: gbt@tdslaw.com / ram@tdslaw.com / mml@tdslaw.com)
(Toll Free: 1-855-483-7529)

THE QUEEN'S BENCH
WINNIPEG CENTRE

IN THE MATTER OF: **THE APPOINTMENT OF A RECEIVER PURSUANT TO SECTION 243 OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985 c. B-3, AS AMENDED AND SECTION 55 OF *THE COURT OF QUEEN'S BENCH ACT*, C.C.S.M. c. C280**

BETWEEN:

WHITE OAK COMMERCIAL FINANCE, LLC,

Applicant,

- and -

NYGÅRD HOLDINGS (USA) LIMITED, NYGARD INC., FASHION VENTURES, INC., NYGARD NY RETAIL, LLC, NYGARD ENTERPRISES LTD., NYGARD PROPERTIES LTD., 4093879 CANADA LTD., 4093887 CANADA LTD., and NYGARD INTERNATIONAL PARTNERSHIP,

Respondents.

SUPPLEMENTARY MOTION BRIEF OF THE RECEIVER (NET RECEIVERSHIP PROCEEDS ORDER)

I. LIST OF DOCUMENTS

1. The First Report of the Receiver dated April 20, 2020;
2. The Supplementary First Report of the Receiver dated April 27, 2020;
3. The Second Report of the Receiver dated May 27, 2020;
4. The Supplementary Second Report of the Receiver dated May 31, 2020;
5. The Third Report of the Receiver dated June 22, 2020;
6. The Fourth Report of the Receiver dated June 27, 2020;
7. The Supplementary Third Report of the Receiver dated June 29, 2020;
8. The Fifth Report of the Receiver dated July 6, 2020;
9. The Sixth Report of the Receiver dated August 3, 2020;
10. The Seventh Report of the Receiver dated September 10, 2020;
11. The Supplementary Seventh Report of the Receiver dated September 14, 2020;
12. The Eighth Report of the Receiver dated September 28, 2020;
13. The Supplementary Eighth Report of the Receiver dated October 12, 2020;
14. The Ninth Report of the Receiver dated November 2, 2020; and
15. The Supplementary Ninth Report of the Receiver dated November 10, 2020;
16. The Second Supplementary Ninth Report of the Receiver dated December 30, 2020;

17. The Tenth Report of the Receiver dated January 21, 2021;

18. The Eleventh Report of the Receiver dated February 24, 2021;

19. Twelfth Report of the Receiver dated June 4, 2021;

20. The Supplementary Twelfth Report of the Receiver dated September 14, 2021;

21. The Second Supplementary Twelfth Report of the Receiver dated November 30, 2021; and

22. Notice of Motion of the Receiver dated June 4, 2021 with attached draft form of Net Receivership Proceeds Order.

II. LIST OF AUTHORITIES

Tab

1. *Kaptor Financial Inc. v. SF Partnership, LLP,* 2016 ONSC 6607.

III. POINTS TO BE ARGUED

Introduction

1. The Receiver files this brief in order to respond to certain matters raised in the Report of Albert Gelman Inc. dated October 28, 2021 dealing with the Receiver's Separate Corporation Analysis (the "**AGI Report**", as included in the Affidavit of Joe Albert affirmed October 29, 2021), and certain authorities relied upon by the Debtors in their Brief dated October 29, 2020 (the "**NPL Brief**").

2. The Receiver is also filing its Second Supplementary Twelfth Report of the Receiver dated November 30, 2021 (the "**Second Supplementary Twelfth Report**") concurrently with this brief.

3. The Receiver repeats and relies on its Motion Brief dated June 21, 2021. Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Receiver's previous Motion Brief dated June 21, 2021 and in the Second Supplementary Twelfth Report.

4. In the NPL Brief, the Debtors request the exclusion of NPL and NEL from any Order made permitting substantive consolidation of the Debtors' estates and subsequent bankruptcy. The Receiver submits that the Debtors have not provided a proper basis for this Honourable Court to grant this request.

Subrogation and Contribution in Receivership

5. The principles of law set out in the authorities relied upon by the Debtors as it relates to the application of the principles of subrogation in the context of a receivership

are not controversial. However, the application of the authorities to the facts of this matter does not lead to the conclusion that NPL and NEL ought to be excluded from any Order made permitting substantive consolidation of the Debtors' estates and/or permitting the Receiver to assign each of the Debtors into bankruptcy (on either a consolidated, or separate corporation basis).

6. The Debtors rely upon *Bank of Montreal v. Ladacor AMS Ltd.*, 2019 ABQB 985, for the proposition that a co-guarantor has rights of subrogation and contribution against the principal borrower to recover the whole of its contribution towards repayment of the indebtedness, and against its co-guarantor(s) to the extent that the payments made exceed its proportionate liability as between co-guarantors.

Bank of Montreal v. Ladacor AMS Ltd., 2019 ABQB 985, NPL Brief, Tab 7 [*Ladacor*]

7. In the Second Supplementary Twelfth Report, the Receiver sets out various incorrect assumptions made by the Debtors in their analysis as to the extent of any subrogated rights that NPL may have, including that, *inter alia*, $28.5 million of NPL Asset Sale Proceeds were used to repay the Credit Facility. However, even if the Debtors were correct and all NPL Asset Sale Proceeds were paid to the Lender and applied against the Credit Facility indebtedness, if the remaining assumptions are corrected to properly (i) exclude Receiver's Borrowings from the subrogation calculations and (ii) factor NEL in as a co-guarantor, then the outcome for NPL following a claims process and future distribution order is worse.

8. In *Ladacor*, the court found as follows with respect to the respective subrogation and contribution rights of certain co-guarantor debtors:

(a) the two co-guarantor debtors, 2367147 Ontario Inc. ("**236**") and Nomads Pipeline Consulting Ltd. ("**Nomads**"), had rights of subrogation as against the principal debtor, Ladacor AMS Ltd. ("**Ladacor**"), to the extent that the proceeds from the sale of 236 and Nomads' respective assets were paid to the lender;

(b) 236 had a claim for contribution against Nomads to equalize the contributions made by each of them to the lender; and

(c) as a function of 236's right to subrogation and contribution as a guarantor, the remaining receivership proceeds (after holdbacks for administrative costs) were properly allocated to 236.

Ladacor, supra at paras 47-52 and 55, NPL Brief, Tab 7

9. However, the fact that 236 had rights of subrogation and contribution which entitled it to certain receivership proceeds did not end the Court's analysis. Ultimately, Graesser J. approved the assignment of 236, along with Ladacor and Nomads, into bankruptcy, finding that:

> … the Receiver's work in allocating assets and employees between Ladacor and Nomads may not have resulted in a perfect allocation. That is not because the Receiver's work was deficient or flawed. Rather, it was because of the corporate mess that existed at the time of the Receivership Order. …
>
> The reality is that any reallocation of assets would be moot….
>
> What is left with the three debtor corporations is a paucity of assets and a mountain of claims against them. Only the Liberty Mutual claim involves all three corporations. Total claims (counting Liberty Mutual only once) exceed $7,000,000. None of the claims have been proven. There may

> be defences to some or many of the claims, and some of the claims may be excessive in amount.
>
> Getting to the bottom of all of this will be time consuming and very expensive. …The only effective way of dealing with the numerous claims is through a statutory process such as bankruptcy. While there are possible ways of dealing with claims in a receivership, no one other than Mr. Klisowsky is recommending that the receivership continue. The Receiver's recommendation is to use the bankruptcy process to deal with the few remaining assets and myriad of claims.

Ladacor, supra at paras 139-144, NPL Brief, Tab 7

10. As such, even if the Debtors are correct and certain of the Net Receivership Proceeds should be allocated to NPL, any portion of the Net Receivership Proceeds which would stand to the credit of NPL are subject to claims of NPL creditors which clearly exceed the proceeds available to satisfy those claims. As such, NPL and NEL cannot escape an Order for substantive consolidation and/or a bankruptcy (on either a consolidated or separate corporation basis) simply because certain Net Receivership Proceeds are allocable to NPL, which, in any event is denied by the Receiver for the reasons set out in the Second Supplementary Twelfth Report.

11. The Debtors' analysis is also predicated on the incorrect assumption that NPL's rights of subrogation and contribution arise in relation to amounts paid to the Lenders to repay the Credit Facility Indebtedness and amounts to repay the Receiver's Borrowings.

12. The Receiver's Borrowings are secured against the Property, as defined in the Receivership Order (as amended by the General Order) pursuant to the Receiver's Borrowings Charge. The Receiver's Borrowings were advanced to the Receiver in accordance with the Term Sheet forming part of the Receivership Order (and not the

Credit Facility), and the repayment of the Receiver's Borrowings from the proceeds of the sale of the Debtors' assets was the result of the enforcement of the Receiver's Borrowings Charge, not enforcement of the security under the Credit Facility.

13. Moreover, in *Wong v Field*, 2012 BCSC 1141, the court considered the proportionate liability of certain co-guarantors where one of the guarantees was a limited guarantee. In calculating the extent of the guarantor's rights of subrogation and contribution the court only included amounts actually paid to the lender pursuant to the guarantee to reduce the indebtedness of the principal debtor to the lender. As such, the enforcement costs incurred by the receiver did not form part of the amount the court concluded gave rise to rights of subrogation and contribution:

> The receiver sold Parcel E in March 2011 for $525,000. After adjustments the net amount of approximately $499,000 was paid to Morbank, pursuant to Wong's guarantee. This reduced 644's indebtedness by that amount. Insofar as the assignment of rents is concerned, the receiver collected approximately $114,500 in rent and it incurred approximately $93,000 in expenses, including management fees. The net income of $21,281 was paid to Morbank pursuant to the Wong guarantee in order to reduce 644's indebtedness.
>
> Accordingly, the total amount received by Morbank to reduce 644's indebtedness pursuant to the plaintiff's guarantee was $520,593.

Wong v Field, 2012 BCSC 1141 at paras 14-15, NPL Brief, Tab 8

14. As such, the costs of enforcement ought to be excluded when determining the extent of the rights of subrogation and contribution of both NPL and NIP.

15. Finally, the Debtors assert that NIP's unsecured claim against NPL cannot be set-off against any amounts that may stand to the credit of NPL as a result of NPL's rights of subrogation and contribution.

16. Even if this is true, the conclusion reached in *Ladacor*, as set out above, is still appropriate given that any portion of the Net Receivership Proceeds allocated to NPL are subject to claims of NPL creditors which clearly exceed the proceeds available to satisfy the claims of NPL's creditors. Thus, the most appropriate way to deal with the claims of NPL creditors is through a claims process.

Allocation

17. The principles of law set out in the authorities relied upon by the Debtors as it relates to the allocation of receivership proceeds and costs do not lead to the conclusion that NPL and NEL ought to be excluded from any Order made permitting substantive consolidation of the Debtors' estates and/or permitting the Receiver to assign each of the Debtors into bankruptcy (on either a consolidated or separate corporation basis)

18. As noted above, the Debtors' position on allocation is premised on the incorrect assumption that "what actually happened" was that all NPL Asset Sale Proceeds (in the amount of $28.5 million) were paid to the Lender. On that basis, the Debtors assert that the Receiver has somehow improperly allocated to NIP payments that were actually made to the Lenders by NPL.

19. The Debtors reference the case of *Royal Bank of Canada v. Atlas Block Co. Limited*, 2014 ONSC 1531 for the proposition that there is a distinction between the allocation of sale proceeds, and the allocation of receivership expenses. However, the portion of the decision which deals with the allocation of sale proceeds does not set out any overriding legal principles to be employed in allocating sale proceeds. Rather, the decision was based on certain facts before the court in that case. To that end, the Court ultimately accepted the receiver's proposed allocation of the sale proceeds amongst the

debtors, which was based on the express allocations made in the relevant purchase agreements.

Royal Bank of Canada v. Atlas Block Co. Limited, 2014 ONSC 1531, NPL Brief, Tab 14

20. Additionally, the Debtors rely upon the decision in *Re Nortel Networks Corp.*, 2015 ONSC 2987 which dealt with a unique fact situation that arose in connection with a complex multi-jurisdictional insolvency proceeding. The court was tasked with determining how some $7.3B in “lockbox funds” (representing the bulk of the proceeds of sale of the various debtor entity assets) should be allocated as amongst the debtor entities. Based on the particular circumstances in that case, the Court determined that the funds should be allocated to the credit of each of the debtor entities on a *pro rata* basis, having regard to the amount of the accepted claims against each particular debtor entity.

Re Nortel Networks Corp., 2015 ONSC 2987, NPL Brief, Tab 15

21. Respectfully, the above noted authorities have no application to the present case. The Separate Corporation Analysis of the Receiver begins with a separate accounting of the realizations achieved from the assets of each of NIP, NI and NPL. There is no evidence suggesting that there is any issue with how the Receiver has allocated to each of NIP, NI and NPL the proceeds generated from the sale of their respective assets (indeed, the position asserted by the Debtors in the NPL Brief appears to begin with the assumption the sale proceeds allocated to NPL by the Receiver are correct). The issues raised by the Debtors relate to both the allocation of receivership costs, and the allocation of the repayment of the Credit Facility.

22. As set out in the Second Supplementary Twelfth Report, what actually happened was that none of the NPL Asset Sale Proceeds were used to repay the Credit Facility, and that approximately $11.9 million of NPL Asset Sale Proceeds were used to repay the Receiver's Borrowings pursuant to the Receiver Term Sheet authorized by the Receivership Order. The allocation of Receiver's costs and the repayment of the Credit Facility is intended to recognize that payment of such costs based on the actual timing of the receipt of receivership proceeds from various assets (in which various stakeholders may have interests), and the actual timing of the payment of receivership expenses may be unfairly detrimental to particular stakeholders and not result in an equitable sharing of the burden of such costs among stakeholders. The allocation does not involve any transfer of assets or proceeds as between NI, NIP and NPL.

Substantive Consolidation

23. There does not appear to be any dispute between the Debtors and the Receiver as to the established authorities dealing with the matter of substantive consolidation. However, the application of the guiding authorities to the facts of this matter does not lead to the conclusion that NPL and NEL ought to be excluded from any Order made permitting substantive consolidation.

24. The Debtors assert that the fact NPL's alleged subrogated secured claim would be eliminated by substantive consolidation by itself militates against substantive consolidation.

25. While it is agreed that prejudice to particular creditors is a key factor to be considered, the fact that a creditor might be prejudiced by consolidation is not a bar to an order of consolidation. As stated by the court in *Bacic v. Milleneum Educational &*

Research Charitable Foundation, 2014 ONSC 5875 (Tab 11 of the Receiver's Motion Brief) "… consolidation by its very nature will benefit some creditors and prejudice others …" (with reference to *PSINet Ltd.* (2002), 33 C.B.R. (4th) 284 (Ont. S.C.J.), Tab 16 of Receiver's Motion Brief). The overall question to be answered by the Court is whether the benefits of consolidation *outweigh* any harm that may be suffered by particular creditors.

26. The Debtors also attempt to rely upon *In re Republic Airways Holdings, Inc.,* 565 B.R. 710, 716 (Bankr. S.D.N.T. 2017) (Tab 14 of the Receiver's Motion Brief) ("*Republic Airways"*), for the proposition that NPL and NEL ought to be "carved out" of any Order for substantive consolidation of the Debtors.

27. In *Republic Airways,* the Debtors were substantively consolidated. However, the order for substantive consolidation included a carve-out for one particular creditor. The creditor had claims against two debtors, a claim against a debtor that was directly liable as lessee under certain leases with the creditor, and a claim against one of the debtors pursuant to an unconditional guaranty of the lessee debtor's obligations under the lease. The guaranty claim was potentially worth substantially more than the claim against the lessee debtor. As a result, the order for substantive consolidation of the debtors included a carve-out of the creditor's claim, which provided that if the larger guaranty claim was accepted, the creditor would be entitled to recover what may be a greater percentage of its claim (as if substantive consolidation had not occurred) based on its *pro-rata* share from the assets of the guaranty debtor or it could choose to have its claim satisfied from the consolidated pool of assets, whichever treatment was preferred by the creditor after the value of the claims were determined.

In re Republic Airways Holdings, Inc., 565 B.R. 710, 716 (Bankr. S.D.N.T. 2017), aff'd, 582 B.R. 278 (S.D.N.Y. 2018), Receiver's Brief, Tab 14

28. In any event, *Republic Airways* did not provide for a Debtor entity to be carved out of the order for substantial consolidation, but rather provided a mechanism to reduce potential prejudice to one creditor arising out of substantive consolidation.

Costs

29. As noted in the Second Supplementary Twelfth Report of the Receiver, the Debtors have made serious allegations regarding the Receiver's conduct, including that:

(a) the Receiver has chosen to apply an "arbitrary allocation";

(b) the Receiver has "simply moved numbers around to build a case against NPL's right of subrogation";

(c) the Receiver has never provided the Court or the Debtors with details of the remittances to the Lenders;

(d) the Receiver has "manifestly *chosen* not to reveal those details" to prefer a certain outcome in these Receivership Proceedings; and

(e) the Receiver's "arbitrary allocation" and "constitutes a breach of the Receiver's duty to NPL and NEL 'to exercise reasonable care in the disposal of the [receivership] assets'" and is a "breach of the Receiver's duty to 'be impartial, disinterested and able to deal with the rights of all interested parties in a fair and even-handed manner, [and to] appear to have those qualities'".

30. In *Kaptor Financial Inc. v. SF Partnership, LLP,* 2016 ONSC 6607, the trustee/receiver was awarded costs on a substantial indemnity basis against an individual

who had previously been involved in the control of certain debtors who were put into receivership and subsequently assigned into bankruptcy. In making the award for costs, Newbould J. stated:

> The normal rule is that costs are to be paid on a partial indemnity basis. However, conduct of a party that is reprehensible, scandalous or outrageous are grounds for costs to be awarded on a substantial or complete indemnity basis. …
>
> Unfounded allegations of improper conduct seriously prejudicial to the character or reputation of a party can give rise to costs on a substantial indemnity scale…
>
> Regarding the Trustee, Mr. Inspektor's motion materials made several serious and unsubstantiated allegations against the Trustee/Receiver designed to discredit Crowe Soberman. These allegations which were completely unrelated to the relief sought, included allegations that Crowe Soberman was part of a conspiracy with Steven Uster to expose Mr. Inspektor's theft of funds from the Kaptor Group, ignored material facts in its reports to the Court, and in fulfilling its Court ordered duties and statutory obligations as Court-Appointed Receiver of the Kaptor Group engaged in "creative accounting" and disregarded generally accepted accounting (GAPP) principles.
>
> Mr. Inspektor's allegations have been filed in the public record. To make reckless allegations with respect to the integrity of a court-officer occupying a position of public trust is a serious matter. This is not the first time that Mr. Inspektor has brought proceedings in his fight with the litigation committee. The Trustee/Receiver says that this motion was part of a troubling trend in the receivership/bankruptcy proceedings of the Kaptor Group, in which Crowe Soberman has been forced to spend considerable time and resources at the expense of the estates in addressing and responding to Mr. Inspektor's efforts to advance his own personal interests. In this the Trustee/Receiver appears to be right. In the circumstances the Trustee/Receiver is entitled to costs on a substantial indemnity basis.

Kaptor Financial Inc. v. SF Partnership, LLP, 2016 ONSC 6607 at paras 3-4 and 6-7 [Tab 1]

31. Based on the foregoing, the Receiver submits that this Honourable Court should grant the Net Receivership Proceeds Order in the form attached as Schedule “A” to the Receiver’s Notice of Motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 30th day of November, 2021.

THOMPSON DORFMAN SWEATMAN LLP

Per: “G. Bruce Taylor”
G. Bruce Taylor / Ross A. McFadyen /
Mel M. LaBossiere
Lawyers for Richter Advisory Group Inc.,
the Court-Appointed Receiver

2016 ONSC 6607, 2016 CarswellOnt 17052, 272 A.C.W.S. (3d) 25, 41 C.B.R. (6th) 262

2016 ONSC 6607
Ontario Superior Court of Justice [Commercial List]

Kaptor Financial Inc. v. SF Partnership, LLP

2016 CarswellOnt 17052, 2016 ONSC 6607, 272 A.C.W.S. (3d) 25, 41 C.B.R. (6th) 262

KAPTOR FINANCIAL INC., 2025610 ONTARIO LIMITED and INSIGNIA TRADING INC. (Plaintiffs) and SF PARTNERSHIP, LLP, SHORE NEWMAN & ROSE LLP, ERIC INSPEKTOR, LYNETTE INSPEKTOR, RICK ARNONE, JACK BARKIN, ALAN BIRNBAUM, MOMIR DEJANOVIC, HARVEY GOLDBERG, KLARA ROMM, BARBARA SHUSTER, DARREN INSPEKTOR and RUSSEL INSPEKTOR (Defendants)

Newbould J.

Judgment: October 24, 2016
Docket: CV-12-463214

Proceedings: additional reasons to *Kaptor Financial Inc. v. SF Partnership, LLP* (2016), 2016 ONSC 5459, 2016 CarswellOnt 13838, 40 C.B.R. (6th) 53, Newbould J. (Ont. S.C.J. [Commercial List])

Counsel: Jeffery Larry, for Plaintiffs
Alex MacFarlane, for Crowe Soberman Inc., Trustee in Bankruptcy and Receiver of 2025610 Ontario Ltd., Kaptor Financial Inc. and Insignia Trading Inc.
Eric Inspektor, for himself

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency

Headnote

Bankruptcy and insolvency --- Practice and procedure in courts — Costs — Miscellaneous
Defendants previously controlled plaintiff group, which was put into receivership and adjudged bankrupt — Trustee assigned interest in derivative action to those creditors who wished to fund it against defendants — Plaintiff entered settlement agreement with settling defendants, including responding husband I, his wife and children, and parties signed broad release prohibiting settling defendants and any company related to them from taking part in bankruptcy proceedings — Bank assigned its security interests and claims to T Inc., which filed proof of claim in bankruptcy proceedings — Plaintiff brought motion to have claim by company T Inc. filed in bankruptcy proceedings declared barred — Defendant I brought cross-motion for order requiring plaintiff's receiver to be examined by defendant — Motion judge granted plaintiff's motion and dismissed defendant's cross-motion — Parties made submissions on costs — Plaintiffs were awarded costs of $35,668.06, and trustee was awarded costs of $14,197.79, both inclusive of fees, disbursements and HST — Position of defendant I that settlement release was no bar to claim of T Inc. was doomed to fail and abuse of process in attempt to circumvent settlement, which entitled plaintiffs to their costs on substantial indemnity basis — Defendant I's motion materials made several serious and unsubstantiated allegations against trustee and receiver designed to discredit receiver, which were completely unrelated to relief sought — To make reckless allegations with respect to integrity of court-officer occupying position of public trust was serious matter, so trustee and receiver was entitled to costs on substantial indemnity basis.

Table of Authorities

Cases considered by *Newbould J.*:

Bisyk (No. 2), Re (1980), 32 O.R. (2d) 281, 1980 CarswellOnt 779 (Ont. H.C.) — referred to

Bisyk, Re (1981), 1981 CarswellOnt 2694 (Ont. C.A.) — considered

Davies v. Clarington (Municipality) (2009), 2009 ONCA 722, 2009 CarswellOnt 6185, 77 C.P.C. (6th) 1, 254 O.A.C. 356, (sub nom. *Davies v. Clarington (Municipality))* 312 D.L.R. (4th) 278, 100 O.R. (3d) 66 (Ont. C.A.) — followed

Ford Motor Co. of Canada v. Ontario (Municipal Employees Retirement Board) (2006), 2006 CarswellOnt 1526, 208 O.A.C. 125, 17 B.L.R. (4th) 169, 263 D.L.R. (4th) 450 at 512 (Ont. C.A.) — referred to

Mortimer v. Cameron (1994), 19 M.P.L.R. (2d) 286, 17 O.R. (3d) 1, 68 O.A.C. 332, 111 D.L.R. (4th) 428, 1994 CarswellOnt 601 (Ont. C.A.) — referred to

Young v. Young (1993), [1993] 8 W.W.R. 513, 108 D.L.R. (4th) 193, 18 C.R.R. (2d) 41, [1993] 4 S.C.R. 3, 84 B.C.L.R. (2d) 1, 160 N.R. 1, 49 R.F.L. (3d) 117, 34 B.C.A.C. 161, 56 W.A.C. 161, [1993] R.D.F. 703, 1993 CarswellBC 264, 1993 CarswellBC 1269 (S.C.C.) — referred to

131843 Canada Inc. v. Double "R" (Toronto) Ltd. (1992), 7 C.P.C. (3d) 15, 1992 CarswellOnt 437 (Ont. Gen. Div.) — referred to

ADDITIONAL REASONS respecting costs of judgment reported at *Kaptor Financial Inc. v. SF Partnership, LLP* (2016), 2016 ONSC 5459, 2016 CarswellOnt 13838, 40 C.B.R. (6th) 53 (Ont. S.C.J. [Commercial List]), granting plaintiff's motion to have claim by company filed in bankruptcy proceedings declared barred, and dismissing defendant's cross-motion for order requiring plaintiff's receiver to be examined by defendant.

***Newbould J.*:**

1 On August 30, 2016 I ordered that the plaintiffs and the Trustee/Receiver were entitled to costs of the motions brought by the plaintiffs and the cross-motion brought by Mr. Inspektor.

2 The plaintiffs seek costs on a substantial indemnity basis, as does the Trustee/Receiver.

3 The normal rule is that costs are to be paid on a partial indemnity basis. However, conduct of a party that is reprehensible, scandalous or outrageous are grounds for costs to be awarded on a substantial or complete indemnity basis. See *Young v. Young*, [1993] 4 S.C.R. 3 (S.C.C.). The conduct giving rise to such an award can be conduct either in circumstances giving rise to the cause of action or in the proceedings themselves. See Orkin, *The Law of Costs*, 2nd ed. at para. 219.1; *Ford Motor Co. of Canada v. Ontario (Municipal Employees Retirement Board)* (2006), 17 B.L.R. (4th) 169 (Ont. C.A.) and *Mortimer v. Cameron* (1994), 17 O.R. (3d) 1 (Ont. C.A.).

4 Unfounded allegations of improper conduct seriously prejudicial to the character or reputation of a party can give rise to costs on a substantial indemnity scale. See *131843 Canada Inc. v. Double "R" (Toronto) Ltd.* (1992), 7 C.P.C. (3d) 15 (Ont. Gen. Div.) per Blair J. (as he then was). In *Bisyk (No. 2), Re* (1980), 32 O.R. (2d) 281 (Ont. H.C.); aff'd [1981] O.J. No. 1319 (Ont. C.A.), Robins J. (as he then was), held that unproven allegations of undue influence in the preparation of a will were allegations of improper conduct seriously prejudicial to the character or reputation of a party deserving of costs on a solicitor and client basis. Both of these cases were referred to with acceptance in *Davies v. Clarington (Municipality)* (2009), 100 O.R. (3d) 66 (Ont. C.A.) at para. 47.

5 In this case, the position of Mr. Inspektor that the settlement release was no bar to the claim of Trendi Dezign Incorporated was doomed to fail and an abuse of process in an attempt to circumvent the settlement. As stated in my endorsement allowing the motion of the plaintiffs, what Mr. Inspektor was attempting to do amounted to an end-run around the clear terms of a release negotiated to protect the participants from this very situation. This entitles the plaintiffs to their costs on a substantial indemnity basis. Moreover, the completely unsubstantiated allegations of Mr. Inspektor in his argument regarding costs of Mr. Larry breaching an undertaking given to the court are grounds for the higher level of costs.

6 Regarding the Trustee, Mr. Inspektor's motion materials made several serious and unsubstantiated allegations against the Trustee/Receiver designed to discredit Crowe Soberman. These allegations which were completely unrelated to the relief sought, included allegations that Crowe Soberman was part of a conspiracy with Steven Uster to expose Mr. Inspektor's theft of funds from the Kaptor Group, ignored material facts in its reports to the Court, and in fulfilling its Court ordered duties and statutory obligations as Court-Appointed Receiver of the Kaptor Group engaged in "creative accounting" and disregarded generally accepted accounting (GAPP) principles.

7 Mr. Inspektor's allegations have been filed in the public record. To make reckless allegations with respect to the integrity of a court-officer occupying a position of public trust is a serious matter. This is not the first time that Mr. Inspektor has brought proceedings in his fight with the litigation committee. The Trustee/Receiver says that this motion was part of a troubling trend in the receivership/bankruptcy proceedings of the Kaptor Group, in which Crowe Soberman has been forced to spend considerable time and resources at the expense of the estates in addressing and responding to Mr. Inspektor's efforts to advance his own personal interests. In this the Trustee/Receiver appears to be right. In the circumstances the Trustee/Receiver is entitled to costs on a substantial indemnity basis.

8 Mr. Inspektor has not taken issue with the amounts claimed by the plaintiffs and the Trustee/Receiver. His argument is that neither should be awarded any costs because he says that Mr. MacFarlane breached an undertaking to the Court regarding an unredacted TD Bank document and that Mr. Jeffery was complicit in this. I do not agree. There was no breach of an undertaking by providing a copy of the document to the Court at my request.

9 The amounts claimed by the plaintiffs and by the Trustee/Receiver are very reasonable. I fix the costs of the plaintiffs at $35,668.06 inclusive of fees, disbursements and HST and the costs of the Trustee/Receiver at $14,197.79 inclusive of fees, disbursements and HST. These costs are to be payable within 30 days.

Order accordingly.

End of Document