



SUPERIOR COURT OF JUSTICE
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Date: May 29, 2009

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From: The Honourable Madam Justice Pepall

Total No. of Pages: 7 (including cover)

Message:

Re: *Ed Mirvish Enterprises Ltd. et. al v. DSM Leasing Ltd et. al.*
Court File No.: CV-08-CL-7368
 CV-07-CL-6913

Please see the attached Cost Endorsement

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COURT FILE NO: CV-08-CL-7368
COURT FILE NO: CV-07-CL-6913
DATE: 20090529

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

RE: Ed Mirvish Enterprises Limited and 1 King West Inc. v. Stinson
Hospitality Inc., Dominion Club of Canada Corporation and Harry Stinson

-AND-

Segura Investments Ltd., 1392964 Ontario Limited and Tim Kwan v.
Stinson Hospitality Inc., Stinson Properties Inc., Harry Stinson, Harry
Stinson Realty Corp., High Park Lofts Ltd. and Ira Smith Trustee &
Receiver Inc. in its capacity as receiver and manager of Stinson
Hospitality Inc., Dominion Club of Canada Corporation, The Suites at
1 King West Inc. and 2076564 Ontario Inc.

BEFORE: Pepall J.

COUNSEL: *Margaret R. Sims*, for the Applicants Ed Mirvish Enterprises Limited and
1 King West Inc. (the "Mirvish parties")
Antonin I. Pribetic, for the Applicants Segura Investments Ltd., 1392964
Ontario Limited and Tim Kwan (the "Segura parties")
Fred Myers and Lauren Butti, for the Respondents Ira Smith Trustee &
Receiver Inc.,
Anthony J. Frost, for J. Robert Verdun
Harry Stinson appearing personally

COSTS ENDORSEMENT

[1] Although on the service list since approximately October, 2007, Robert Verdun brought a motion in February, 2009 to lift the August 24, 2007 stay to permit him to issue a Statement of Claim that challenged Ed Mirvish Enterprises' ("EME") secured claim. The motion was scheduled to be heard on March 11, 2009. On March 3, Mr. Verdun delivered a notice of abandonment. The Mirvish parties, the Segura parties, and the Receiver are now seeking costs on

a substantial or full indemnity scale from Mr. Verdun. The Mirvish parties claim \$53,621.01; the Segura parties claim \$6,455.00; and the Receiver seeks \$41,580.70.

[2] Rule 37.09 provides that where a motion is abandoned, a responding party on whom the notice of motion was served is entitled to the costs of the motion forthwith unless the court orders otherwise. The scale of costs is not specified and therefore it is in the discretion of the court.

[3] Substantial indemnity costs are only awarded in rare and exceptional circumstances: *McBride Metal Fabricating Corp. v. H&W Sales* (2002), 59 O.R.(3d) 97 (C.A.). The Mirvish parties claim that such an award is appropriate because, amongst other things:

- they put Mr. Verdun on notice of their position on the merits before he brought the motion and asked him to reconsider;
- he had never raised issues with respect to the EME secured claim until he brought his motion;
- the motion sought to enjoin any distribution to EME on its secured claim pending determination of Mr. Verdun's proposed claim on the merits;
- as a result of the serious allegations that sought to impugn the EME security and the importance of receiving a distribution in the current credit markets, the Mirvish parties prepared and delivered a comprehensive 4 volume responding motion record. The record disclosed that the court had already approved the EME security and the allocation of \$12.86 million to the EME secured claim on notice to Mr. Verdun in 2008; and
- the proposed claim had no foundation, was frivolous, vexatious, and an abuse of process.

[4] The Segura parties claim that such a substantial indemnity award is appropriate because the motion was untimely and unmeritorious and served to increase the costs of the responding parties and the Receiver thereby reducing the amount available for distribution to creditors.

[5] The Receiver claims that a full indemnity award is appropriate because, amongst other things,

- shortly after learning of the Verdun claim, the Receiver received a sudden influx of e-mail correspondence from unit holders and other unsecured creditors of the debtors proffering support for the Verdun claim and expressing concern that the Receiver had not considered the interests of the unsecured creditors. Counsel for the Receiver responded in writing to each of the complaints received;
- time and effort was spent unnecessarily given the abandonment of the motion;
- the Verdun claim was brought at the last possible moment in a manner that caused excess costs to be incurred, and at a time when it had become apparent that there was not likely to be any distributions available for unsecured creditors. In these circumstances, the Receiver submits that creditors with legitimate expectations of receiving distributions should not have their recovery eroded.

[6] While Mr. Verdun's delay in bringing his motion was inappropriate, I am not persuaded that his conduct meets the necessary threshold for an award of substantial or full indemnity costs. Accordingly, the scale should be partial indemnity.

[7] That said, in determining quantum, reasonable expectations of costs would be informed in part by the significance of the issues to the parties and the possible impact of the motion on the parties' positions. Put differently, having brought this motion so late in the proceedings and after the EME security and distribution had been approved, it would be reasonable to anticipate that significant costs would be incurred to respond to such a motion.

[8] Dealing firstly with the applicants, their costs on a partial indemnity scale amount to \$45,192.95 and consist of fees of \$30,720, GST of \$1,843.20 and disbursements of \$12,629.75.

The amount at stake for them was \$12.86 million and the issues in play were of some complexity. I accept that the motion was of great importance to the Mirvish parties. In addition, counsel for the applicants provided counsel for Mr. Verdun with a detailed letter describing in an organized and comprehensive manner the hurdles facing Mr. Verdun in advancing his claim.

[9] Mr. Carhart was called in 1984 and therefore has 25 years of experience. Ms. Sims was called in 1997 and therefore has 12 years of experience. Their partial indemnity rates are described as being \$450 and \$350 respectively, the law clerk's as \$80, and the student's as \$100. I recognize that the Cost Guideline is not binding, is somewhat dated and does not account for any inflation. Given that the Guideline maximum hourly rate for partial indemnity costs for someone with in excess of 20 years experience is \$350 and for someone with in excess of 10 years is \$300, I regard counsels' proposed rates as being high. More appropriate rates would be \$350 for Mr. Carhart and \$300 for Ms. Sims. The law clerk's should be \$70, and the student's should be \$50. I do not propose to allow Mr. Marechaux's time. The need for his involvement in addition to that of Mr. Carhart and Ms. Sims is unclear. These adjustments result in total fees of \$22,000. While the total fees are high, given the factors described, I am satisfied that the time was appropriately incurred. Fees of \$22,000 would have been within the reasonable expectations of Mr. Verdun in the circumstances and such an award is fair and just. I also allow the disbursements of \$12,629.75 that are claimed. Accordingly, the total award to be paid to the applicants amounts to \$35,949.75 consisting of fees of \$22,000, GST of \$1320, and disbursements of \$12,629.75.

[10] Turning to the request of the Segura parties, while no claim was made against them, they did have a material interest in the impact and outcome of the motion on the receivership. Correctly in my view, they felt obliged to attend and did attend at court. Given their modest role, however, their entitlement is limited to \$2000 inclusive of fees, GST and disbursements.

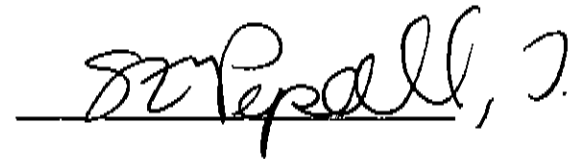
[11] Turning next to the Receiver's costs, time had to be spent responding to Mr. Verdun's unfounded allegations relating to the conduct of the receivership. Mr. Myers for the Receiver submits that Mr. Verdun's conduct unnecessarily lengthened the proceedings, made them more expensive for others, and his timing was calculated to interfere with the timetable for

- 5 -

distributions. Mr. Myers submits that the Estate should be held harmless and no creditor should be prejudiced as a result of Mr. Verdun's conduct. The Receiver was required to spend time and effort reviewing and responding to Mr. Verdun's draft claim and motion, attending the scheduling hearing and the settlement conference, and responding to all of the correspondence delivered in support of the Verdun claim. The Receiver estimates that at least 50% of its time in preparing the 10th report was spent addressing Mr. Verdun's claim and its supporters.

[12] In my view, Mr. Verdun should be responsible for the Receiver's costs on a partial indemnity basis. Partial indemnity rates are not outlined in the Receiver's bill of costs. I am satisfied that the time was properly incurred and have applied rates of \$350 for Mr. Myers (a 1986 call), \$325 for Mr. Latham (a 1991 call), \$215 for Ms. Butti (a 2002 call) and \$100 for Ms. Arthurs (a 2008 call). \$70 is appropriate on a partial indemnity scale for the law clerk.

[13] The work that was required to be done by the Receiver was substantial. I am of the view that a fair and reasonable award on account of the Receiver's fees on a partial indemnity scale is \$18,000.00 together with GST of \$1080 and disbursements of \$1,981.00 for a total award of \$21,061. This sum would be within Mr. Verdun's reasonable expectations. Mr. Verdun is to pay all of the sums ordered within 30 days of today.

A handwritten signature in black ink, appearing to read "J. Pepall", is written over a horizontal line. The signature is cursive and includes a large flourish at the end.

Pepall, J.

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COSTS ENDORSEMENT

PEPALL J

Released: May 29, 2009