File No. CI20-01-26627

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., C.B-3, AS AMENDED, AND SECTION 55 OF THE COURT OF QUEEN'S BENCH ACT, C.C.S.M.,C.C280, AS AMENDED

BETWEEN:

WHITE OAK COMMERCIAL FINANCE, LLC,

Applicant,

- and -

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

Respondents.

MOTION BRIEF OF NYGARD PROPERTIES LTD.
HEARING DATE:
BEFORE THE HONOURABLE MR. JUSTICE EDMOND

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QB Box 105

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PART I: ISSUE TO BE DETERMINED

Are the accounts of Levene Tadman Golub Law Corporation reasonable?

PART II: DOCUMENTS TO BE RELIED UPON

1. Affidavit of Wayne Onchulenko, affirmed October 3, 2022;
2. Affidavit of Greg Fenske affirmed September 13, 2020 (QB Document 122);
3. Affidavit of Brian Greenspan affirmed December 9, 2021 (QB Document 227);
4. Receiver's First Report (QB Document 39);
5. Reasons for Judgment Edmond, J. March 10, 2022 (QB Document 237);
6. Documents 207 – 236 all relate to the December hearing and the March decision but will not be directly referred to during submissions;
7. Such further and other documents as may be submitted by counsel and considered by this Honourable Court.

PART III: AUTHORITIES

King Petroleum Ltd. (1973), 18 C.B.R. (N.S.) 270 (Ont. S.C.) **TAB A**

C.J. Wilkinson Ford Mercury Sales Ltd. (1986), 60 C.B.R. (N.S.) 289 (Ont. S.C.). **TAB B**

Friesen v Bennell, 1999 CanLii 14202 (MBQB) https://canlii.ca/t/1qwt0 **TAB C**

Plazavest Financial Corporation v National Bank of Canada, 2000 CanLII 5704 (ON CA) **TAB D**

PART IV: STATEMENT OF FACTS

1. Levene Tadman Golub Law Corporation (LTGLC) was retained by the Respondents to represent them with respect to the litigation herein.

2. LTGLC has issued monthly bills to the Respondents, which bills have been sent to the Respondents director, Greg Fenske. Greg Fenske has approved for payment the December to August bills that are before the court.

3. In a March 10, 2022, judgment of this court the court decided at Paragraph 138:

> "The same governing legal principle as noted above applies in connection with the second issue. In my view, providing statements of account for legal fees and disbursements are submitted to the Receiver or Trustee in bankruptcy for approval and are reasonable, the fees and disbursements may be paid from the Net Receivership Proceeds. The respondents are entitled to mount a defence and advance legal positions challenging the Receiver and if they elect to do so, the respondents may proceed with an appeal of this decision. If the legal fees and disbursements remaining balance of the Preserved Proceeds, a portion of the Net Receivership Proceeds may be set aside to cover reasonable fees and disbursements incurred by the respondents. "

Documents 207 – 236 all relate to the December hearing.

4. The original bills have been amended to take out any time that Levene Tadman is not asking be paid from the proceeds of sale of Fieldstone and Falcon Lake or from the Receiver's funds. The resulted in a reduction of approximately $57,000.00 CDN dollars. The amended bills have been filed attached to the affidavit of Wayne Onchulenko.

5. As of the writing of this affidavit, the receiver has not advised your deponent what portion of the accounts they are prepared to pay other than to indicate it will not be

zero. They have advised" the Receiver accepts that the accounts from your firm referenced in that correspondence clearly reflect some work relating directly to the receivership for which your firm should be paid in accordance with the Order of Justice Edmond. "

6. The bills work product is broken down in the following categories:

    1) Communications with receiver, counsel and the court

    2) Where you see a 2 it should read 7

    3) Communications with Toronto South Detention Centre (TSDC)

    4) Communications dealing with Building in China

    5) Intercompany debt communications

    6) Tax communications

    7) Matters related to the consolidation order and appeals

    8) Director's fees communications

    9) Review of asset ownership

    10) Matters dealing with the December hearing

7. There is a more detailed description in Exhibit "K'" to the Affidavit of Wayne

Onchulenko affirmed October 3, 2022.

8. The December 2021 Statement of Account (November 29-December 20) covers part of the period of time of the two-day (December 20 and Dececember 22) contested motion. In December the following documents were filed: Dec 1 Motion by the Receiver and a supplemental report number 12; December 14 Motion by the Respondents, an affidavit in support and Motions briefs by the Respondents and the AG of Canada; and December 17 a motion filed by the Receiver; The first day of the two day hearing occurred on December 20.

9. Mr. Peter Nygard is the sole shareholder of Nygard Enterprises Ltd. (NEL) which is the sole shareholder of Nygard Properties Ltd. (NPL).

10. Greg Fenske is the sole director of the Respondent corporations.

11. In December of 2020 Mr. Nygard was arrested and was held in custody at the Headingly Correctional Centre (HCC) until September 2021 when he was transferred to the Toronto South Detention Centre (TSDC). In order to communicate with Mr. Nygard, we had to make arrangements through TSDC. The two ways in which we can communicate with Mr. Nygard are by phone and through video conferencing. Their video conferencing program is referred to as the Judicial Video Network (JVN). It is a proprietary software of the Ontario government and is restricted to lawyers and their clients who are in detention in Ontario.

12. When LTGLC first became involved, we were advised that only Ontario lawyers could participate in JVNs. After further negotiations it was agreed that lawyers

from other jurisdictions could also participate in JVNs.

13. As set out in Exhibit "K" to the Affidavit of Wayne Onchulenko affirmed October 3, 2022, when we first became involved, Mr. Nygard's communication with lawyers was limited to a lawyer calling TSDC and then determining if Mr. Nygard was available to come to the phone. Through negotiations between September and the end of December 2021, we were able to increase his telephone access to approximately four hours a day between 9:30 and 1:30 p.m.

14. With respect to the JVNs Mr. Nygard was originally allowed twenty minutes per day. Through negotiations that has been incrementally increased to the point where since January of 2022 he has been receiving 50 minutes of JVN time per weekday and 100 minutes of JVN time per weekend day.

15. LTGLC are continuing to try to increase his phone time and JVN time to the equivalent amount of time that he received at the HCC which was eleven hours of phone time per day and two hours of JVN time per weekday and three hours of JVN time per weekend day.

16. LTGLC are in the process of putting together a court application to make this request on Mr. Nygard's behalf so he can have adequate time receive information and discuss, with counsel and with Greg Fenske, how NEL and NPL should proceed.

17. Mr. Nygard has several limitations in this regard. He finds it more difficult to receive information and discuss that information over the phone. It is easier and quicker

for him to understand documents when he reads them. It is easier for him to ask questions once he has read documents. Mr. Nygard reads the documents on the JVN, asks questions about the documents, so he can discuss with Greg Fenske what he thinks is the best course for NEL and NPL.

18. Mr. Nygard is 81 years old; his vision is deteriorating, he has difficulty seeing which makes it more difficult for him to read, and this also slows his reading.

19. As also set out in Exhibit “K” LTGLC are only able to book appointments on the timetable given to us by TSDC.

20. As set out in Exhibit “K” there are numerous complications in that regard.

21. The January 2022 bill (December 21-January 27) covers part of the time dealing with the December contested motion including one day of the hearing, the Receiver filing a brief on December 31 and the respondents filing a brief on January 6, 2022. This represents approximately 30% of the account. After January 6 most of the time was spent dealing with TSDC.

22. The February 2022 bill (January 27-February 27) covers a period of time when we were working with TSDC and preparing for the anticipated appeal (either defending or appealing the decision) . A potential consolidation order could also trigger a dispute over ownership of assets (NPL vs other Respondents or Respondents v others). One example is the building in China. Was it owned by NPL or not. Research was started accumulating evidence as to the ownership of assets and intercompany debts.

23. The March 2022 bill (February 25-March 29) covers the time dealing with the appeal from the March 10 judgement. After the Decision on March 10, 2022, an Appeal was filed on March 22, 2022, which said Appeal was held in abeyance while a Motion for an extension of time to file the Notice of Appeal was filed, which was contested and argued. The Motion was filed on March 25, 2022 along with an affidavit in support and a brief.

24. The April 2022 bill (March 29-April 25) covers the time of filing a supplemental brief of the Respondents and dealing with TSDC and preparing for the leave hearing which took place on May 5, 2022. The Receiver filed their brief on April 28, 2022.

25. The May 2022 bill (April 26-May 29) covers the time dealing with the motion heard on May 5, 2022. On May 2 ,3 and 4, 2022 correspondence was exchanged with the Court and a hearing was held on May 5, 2022. The Court granted an extension of time to file the Notice of Appeal which had been held in abeyance. The Notice of Appeal was deemed to be filed on May 5, 2922.

26. Correspondence was exchanged between counsel regarding an amended Notice of Appeal in May, 2022. The receiver agreed to some amendments and not others. A motion requesting leave to amend the Notice of Appeal was filed on June 6, 2022 with an Affidavit in support and a Motions brief.

27. The June 2022 bill (May 30-June 29) covers the time dealing with two motions. On June 6, 2022 a Notice of Motion was filed requesting permission to amend the Notice of Appeal which motion was contested. After correspondence on June 10 and 13, 2022, a further motion and Motions brief were filed requesting a longer

factum (44 pages) and the ability to file the Appeal book digitally. Both requests were opposed. The third Motion and brief were filed on June 22, 2022 and the Receiver's brief was filed on June 23, 2022. We determined we needed to file a draft Factum to support the motions. The motions were to be heard on June 30, 2022 but were adjourned to August 10, 2022 because it was determined, in consultation with the Court, they were unlikely to be heard on June 30.

28. The July 2022 bill (June 29-July27) covers a period of time when the majority of work done was dealing with TSDC.

29. The August 2022 bill (July 28-August 29) covers the period of time when the second and third Notices of Motion were heard. The decision, given orally on August 11, 2022, granted most of the amendments and approved the filing of a digital Appeal Book. Some of the requested amendments were not approved and permission was not granted to file a longer factum. The Respondents Factum and Appeal book were filed on August 17, 2022, and the Book of Authorities was filed on August 24, 2022.

30. The Receiver's factum and Appeal book was filed on Sept 19 and the book of authorities was filed on Sept 26. Find attached the Receiver's Factum, Appeal Book Index and book auth index.

PART V; ARGUMENT

31. The law as it relates to what factors to consider is uncontroversial.

32. There are many cases in Manitoba that relate to what *Reasonable legal fees* are in situations where individuals have challenged their lawyers bill in the court. In

those cases the test is whether the fee is “fair and reasonable” and the factors that are considered are listed below in Friesen v Bennell, 1999 CanLii 14202 (MBQB)

(a) the time and effort required and spent;

(b) the difficulty and importance of the matter;

(c) whether special skill or services has been required and provided;

(d) the customary charges of other lawyers of equal standing in the locality in like maters and circumstances;

(e) in civil cases the amount involved, or the value of the subject matter;

(f) in criminal cases the exposure and risk to the client;

(g) the results obtained;

(h) tariffs or scales authorized by local law;

(i) such special circumstances as loss of other employment, urgency and uncertainty of reward;

(j) any relevant agreement between the lawyer and the client.”

33. The Code of Ethics in Manitoba states at 3.6-1 “What is a fair and reasonable fee will depend upon such factors as: (a) the time and effort required and spent; (b) the difficulty of the matter and the importance of the matter to the client; (c) whether special skill or service has been required and provided; (d) the results obtained; (e) fees authorized by statute or regulation; (f) special circumstances, such as the postponement of payment, uncertainty of reward, or urgency; (g) the likelihood, if made known to the client, that acceptance of the retainer will result

in the lawyer's inability to accept other employment; (h) any relevant agreement between the lawyer and the client; (i) the experience and ability of the lawyer; (j) any estimate or range of fees given by the lawyer; and (k) the client's prior consent to the fee."

34. *The court may, if it thinks it appropriate, authorize an advance by an interim receiver out of the debtor's estate to pay the legal costs of defending the application: Re C.J. Wilkinson Ford Mercury Sales Ltd. (1986), 60 C.B.R. (N.S.) 289 (Ont. S.C.).*

    This finding relates to when the receivership is paying an advance before the legal action is complete, not after the fact as is the case here. The court can and did order reasonable fees and disbursements be paid.

35. In *Re King Petroleum Ltd. (1973), 18 C.B.R. (N.S.) 270 (Ont. S.C.),* the court stated: "The amount of the advance will be whatever the court considers reasonable, balancing the interests of the debtor in defending the application the and interests of creditors in preserving the assts for their benefit."

36. Unlike most assessments of accounts the party asking for an assessment is not the client.

37. This is an important difference because when the client is the person asking for the account to be assessed there are no issues with respect to solicitor and client privilege. The client can waive the privilege. Our client has not waived its solicitor and client privilege.

38. In an analogous situation in dealing with the claims of solicitor client privilege, the Court of Appeal stated:

    "As I would order an assessment, I must address the solicitor-client privilege claim made by National. National contends that many of the entries in the bills provided by Kelly Affleck are protected by solicitor-client privilege. National cannot, of course, have the final say on this issue. The unedited accounts should be produced to the assessment officer who may examine them and determine what part, if any, should be protected by the solicitor-client privilege. The assessment officer may also have to consider whether the terms of the 1997 agreement constitute a waiver of any solicitor- client privilege claim in so far as it relates to Plazavest's obligation to pay National's legal bills. Any bill or part of a bill which is not protected by the privilege should be turned over to Plazavest. The assessment officer may, if he or she can do so without compromising the privilege, also provide Plazavest with a summary of any of the information which has been determined to be protected by the solicitor- client privilege." *Plazavest Financial Corporation v National Bank of Canada*, 2000 CanLII 5704 (ON CA)

39. In our circumstances, if necessary, privileged information could be given to an assessment officer. The accounts are as they have been sent to the client less the redacted information.

40. Most of the communication as set out in the accounts is with the client and shareholder and the shareholder of the client.

41. The position of the Receiver has been:

i. They don’t have enough information in order to approve the accounts;

ii. The accounts are too much.

42. To address these issues LTGLC broke the bills down into 10 categories as set out above in Paragraph 6 and more fully explained in Exhibit “K”.

43. The receiver has complete knowledge with respect to the communications between LTGLC and the Receiver and the court (1)

44. The Receiver has complete knowledge as to the issues litigated in the December hearing, the three contested Court of Appeal motions and the Notice of Appeal , Appeal Book and Book of Authorities.(2, 7 and 10) .

45. The Receiver would have had to consider, and did consider, intercompany debt issues and tax issues so should have an understanding as to their complexity and difficulty in finding supporting documentation (5,6).

46. The consolidation motion required an analysis of what could happen and what assets may be involved. This required a analysis of who owned what asset. (9)

47. One example of attempting to determine the ownership and value of an asset is a building in Shanghai. We have shared the process of trying to sell this building with the Receiver. (4)

48. Directors fee correspondence is reflected in (8)

49. Communicating with Mr. Nygard since his arrest has been challenging as set out in Exhibit “K”. It has taken a significant amount of effort and time as set out in the

accounts. Mr. Nygard has wanted to be engaged in all aspects of the litigation from the beginning until now as is his right. (3) Mr. Nygard is interested in the litigation because of the significant impact it has on his financial circumstances. Millions of dollars are involved.

50. The Receiver has taken the position that too much time has been spent between January 9th and March 10th. They have taken the position there were no specific court hearings planned and the time spent and billed was not appropriately expended on Receivership issues.

51. The breakdown of the accounts into "areas" helps explain what was undertaken by LTGLC. The dominant issue was communicating with TSDC. This is directly related to the Receivership issues as we were communicating with them to make appointments and attempt to expand the time available and to make up time when it was missed.

52. A summary of the fees and disbursements is as follows:

	Fees	Tax	Disbursements	Total
Dec	$29,982.50	$3,602.17	$182.25	$33,769.92
Jan	$51,033.00	$6,179.72	$1,115.23	$58,327.95
Feb	$24,384.00	$2,930.64	$91.25	$27,405.89
Mar	$46,465.50	$5,605.48	$882.15	$52,953.13
April	$44,795.00	$5,404.33	$578.50	$50,777.83
May	$63,638.00	$7,670.90	$725.26	$72,034.16
June	$57,896.00	$6,979.67	$793.00	$65,668.77
July	$26,657.00	$3,203.43	$91.50	$29,951.92
August	$47,052.00	$5,730.03	$1675.75	$54,457.78
Total	$391,903.00	$47,306.36	$6137.84	445,347.35

Conclusion

53. As it relates to the relevant factors:

i. The time was spent and it is related to the receivership;

ii. This was a difficult and important matter. The issues were complex;

iii. Special litigation and insolvency services were required and provided;

iv. The fees were standard in the locality. Less than those charged by the Receiver's Manitoba counsel;

v. Millions of dollars were involved;

vi. The Court will be the judge of the materials filed and arguments made before it. The results in the Court of Appeal were mixed. Some successes and some losses;

vii. The client approved the fees.

54. It is submitted the accounts attached to the Affidavit of Wayne Onchulenko should be paid.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3rd day of October, 2022.

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1973 CarswellOnt 87
Ontario Supreme Court, In Bankruptcy

King Petroleum Ltd., Re (No. 2)

1973 CarswellOnt 87, [1973] O.J. No. 1324, 18 C.B.R. (N.S.) 270

Re King Petroleum Limited

J. M. Ferron, Q.C., Registrar

Judgment: September 27, 1973

Counsel: *C. H. Morawetz, Q.C.*, for King Petroleum Limited.
J. C. Osborne, for interim receiver and creditor.

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
IV Receivers
IV.3 Powers, duties and liabilities
Headnote
Bankruptcy --- Interim receiver — Powers, duties and liabilities
Interim receiver — Controlling disbursements — Retainer to solicitors defending petition for receiving order.
The interim receiver has fixed and special duties to perform under the direction of the court, and he is responsible to the court and not the petitioning creditor. As an officer of the court, it is essential that where required, the interim receiver should retain independent counsel so there can be no question of his independence with respect to the petitioning creditor. Under an interim receiving order the interim receiver is directed to control disbursements. However, by reason of the control of the disbursements the debtor should not be put in an embarrassing position by reason of the lack of funds where those funds are required for a legitimate purpose. The question of what is a legitimate purpose must be decided in every case on the particular facts before the court. Where it appeared that several issues had to be tried of some complexity, *held*, under the circumstances, the interim receiver should make funds available to the solicitor for the debtor, so that the debtor could put forth its defence as may be advised. An order was made authorizing the interim receiver to put the solicitors for the debtor in funds to the extent of $10,000 as a retainer to be accounted for by the said solicitors and subject to any further order made by the court on the final determination of the issue.
Annotation

In this case, the interim receiver and the Court were faced with a difficult problem. The debtor should be entitled to defend the petition and be allowed sufficient funds to provide for this. However, if the debtor is insolvent and a receiving order is made, the funds used to defend the petition would have been available for distribution among the creditors. This is a situation which could lead to very serious abuse and must be scrutinized by the court very carefully. The court must be very alert to prevent funds available to creditors being dissipated by frivolous and vexatious proceedings. The Registrar acknowledged that each case must be determined on its own facts. In this particular case, the Registrar found that the amount involved, the acts of bankruptcies set out in the petition and the nature of the dispute filed justified the payment of the retainer.

***Ferron*, Registrar:**

1 A petition for a receiving order was issued on 17th July 1973, by Imperial Oil Limited against King Petroleum Limited alleging an indebtedness of $705,293.91 for goods sold and delivered. On that same day, I made an order appointing The Clarkson Company Limited as interim receiver and directed the interim receiver to take immediate possession of the property of King Petroleum Limited and to control the receipts and disbursements of that company.

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2 A dispute to the petition was filed on behalf of King Petroleum on 5th September 1973. The matter came up before Houlden J. on 6th September 1973, at which time an order was made permitting counsel for King Petroleum Limited to cross-examine on the affidavit of verification filed by the petitioning creditor.

3 It appears from the affidavit of Ronald A. McKinlay, vice-president of the interim receiver that at the request of counsel acting for King Petroleum Limited, a cheque in the amount of $10,000 was issued by the interim receiver to be a retainer for the solicitors for King Petroleum Limited who were acting for King Petroleum Limited in disputing the petition. Mr. McKinlay states in para. 4 of his affidavit, "subsequent to the arrangement being made, but before the ten thousand dollar cheque cleared the King Petroleum Limited bank account, the Interim Receiver was advised by its counsel, Messrs. MacMillan, Binch that the arrangement was improper and accordingly payment of the ten thousand dollar cheque was stopped by the Interim Receiver".

4 This application accordingly is for an order authorizing the interim receiver to issue a cheque to counsel for King Petroleum as a retainer in connection with the defence of the petition. It is clear that unless funds are made available to King Petroleum the defence of the petition will be prejudiced.

5 It is argued by counsel for the interim receiver who is also counsel for the petitioning creditor that the dispute filed by King Petroleum Limited is frivolous and that the retainer requested is excessive. The merits of the dispute filed, obviously cannot be dealt with at this time and even if the dispute were on its face manifestly without merit there will be no jurisdiction in the Registrar to deal with that situation. Accordingly, that argument cannot be taken into consideration on this application.

6 King Petroleum Limited, having filed a dispute has the right to put forth its defence but this would be a hollow right if funds were not forthcoming to permit the respondent to engage counsel to advance its position.

7 It would seem that the interim receiver appreciated this position, since arrangements were made to put the debtor in funds to enable it to engage legal counsel. The cheque for the retainer was, as I have mentioned above, issued but payment of the cheque was stopped on the advice of the interim receiver's solicitors. I have no doubt that this advice was motivated on proper considerations, but one can see the dangers of possible bias where the interim receiver and petitioning creditor are represented by the same counsel. The interim receiver has fixed and special duties to perform under the direction of the court, and he is responsible to the court and not the petitioning creditor. As an officer of the court, it is essential that where required, the interim receiver should retain independent counsel so there can be no question of his independence with respect to the petitioning creditor.

8 Under the interim receiving order made on 17th July 1973, the interim receiver was directed to control disbursements. It is quite clear that by reason of the control of the disbursements the debtor should not be put in an embarrassing position by reason of the lack of funds where those funds are required for a legitimate purpose. The question of what is a legitimate purpose must be decided in every case on the particular facts before the court. In this particular instance it appears from the amount involved, the acts of bankruptcy set out in the petition and a general perusal of the dispute that there are several issues to be tried of some complexity. As mentioned above, the matter came before Houlden J. on 6th September and the order was made as I have mentioned above and trial fixed for 12th and 13th November next. I am of the opinion that, under the circumstances, the interim receiver should make funds available to counsel for the debtor, so that the debtor can put forth its defence as may be advised.

9 On the application there was no material filed to indicate in what manner the figure of $10,000 as a retainer was determined. It appears however, from the interim receiver's affidavit and indeed from his action that he must have been convinced that the amount was reasonable. It would seem to me that on these applications some material should be filed to indicate the funds expected reasonably to be expended, so that there may be some basis by which to determine the quantum of retainer to be ordered.

10 In conclusion, an order will go authorizing the interim receiver to put the solicitors for King Petroleum Limited in funds to the extent of $10,000 as a retainer to be accounted for by the said solicitors and subject to any further order made by the court on the final determination of this issue. I think the costs should be reserved to be dealt with likewise on the final termination of this matter.

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Most Negative Treatment: Distinguished
Most Recent Distinguished: Residential Warranty Co. of Canada Inc., Re | 2006 ABCA 293, 2006 CarswellAlta 1354, 417 A.R. 153, 410 W.A.C. 153, [2006] 12 W.W.R. 213, [2006] A.W.L.D. 3143, 65 Alta. L.R. (4th) 32, 25 C.B.R. (5th) 38, 275 D.L.R. (4th) 498, [2006] I.L.R. I-4552 | (Alta. C.A., Oct 10, 2006)

1986 CarswellOnt 211
Ontario Supreme Court, In Bankruptcy

C.J. Wilkinson Ford Mercury Sales Ltd., Re

1986 CarswellOnt 211, 60 C.B.R. (N.S.) 289

Re C.J. WILKINSON FORD MERCURY SALES LIMITED

Campbell J.

Judgment: September 8, 1986

Counsel: *W.J. Burden*, for petitioning creditor.
F. Bennett, for debtor.
H. Fogul, for interim receiver.

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
III Bankruptcy petitions for receiving orders
III.6 Practice and procedure on petition
III.6.h Miscellaneous
Headnote
Bankruptcy --- Bankruptcy petitions for receiving orders — Practice and procedure on petition — Miscellaneous practice issues
Petitions for receiving orders — Defences — Costs of defence — Registrar authorizing payment by interim receiver to solicitors for debtor to defend petition — Debtor entitled to day in court but not entitled to pay solicitors from trust funds belonging to taxing authorities or employees — Registrar properly balancing interests — Order affirmed.
The registrar authorized a payment by the interim receiver of the debtor of the sum of $3,000 to the solicitors for the debtor to furnish his defence in defending a bankruptcy petition. The vast majority of the funds in the hands of the interim receiver were impressed with statutory trusts in favour of employees or tax authorities. The petitioning creditor appealed the order and the debtor cross-appealed the amount.
Held:
Order of registrar affirmed.
The registrar balanced the interests of the debtor against the principle that trust funds belonging to employees or taxing authorities should not be paid to someone else who does not own them. The debtor was entitled to have his day in court but he was not entitled to pay his solicitor from trust funds belonging to employees or taxing authorities.
On motions of this sort, the debtor must be afforded the means to defend itself in a situation where its funds have been commandeered by an interim receiver. On the other hand, creditors have an interest in the funds in the hands of the interim receiver and there is always pressure to retain those funds for the protection of creditors.

Appeal and Cross-Appeal of registrar's authorization of interim receiver to make payment to debtor's solicitor.

***Campbell J.* (orally):**

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1 This is an appeal and cross-appeal of a contested bankruptcy petition from the order of Master Ferron sitting as a registrar authorizing the payment by the interim receiver of the debtor of the sum of $3,000 to the solicitors for the debtor to further his defence in these proceedings. The debtor argues that the sum of $3,000 is not adequate for the defence of these proceedings and argues most strenuously that equity requires the payment of $20,000 in legal fees so the debtor can effectively have his day in court.

2 The petitioning creditor cross-appeals the order saying that there was no basis for it in the evidence and there were no funds properly available to support the order. The petitioning creditor also says that the registrar should not have admitted the second affidavit of Mr. Dowdall.

3 Taking the last point first, the learned registrar considered carefully whether or not the affidavit should be received and I cannot say he was wrong in giving leave to receive it or to use it in the manner he did, having regard to the observations he made about its weight and lack of specificity. There was clear jurisdiction to make the order sought below and made below. This appears from *Re King Petroleum Ltd.* (1973), 18 C.B.R. (N.S.) 270 (Ont.)

4 The registrar summed up the matter very clearly when he put his dilemma and the dilemma of this court as follows:

> The questions on these motions are difficult. On the one hand the company must be afforded the means to defend itself in a situation where its funds have been commandeered by the interim receiver. On the other hand, creditors have an interest in the funds in the hands of the interim receiver and there is always pressure to retain those funds for the protection of creditors.

I agree essentially with his approach to the legal and equitable principles involved in this matter and I therefore dismiss the cross-appeal. I would, however, add to what he said that although the respondent has his right to his day in court, he does not have the right to have his legal expenses paid from money he does not own.

5 The vast majority of the funds in the hands of the interim receiver are impressed with statutory trusts in favour of employees or tax authorities. This is clear from the material before the registrar, from the affidavit material filed today by the interim receiver and also clear from the endorsement made in another motion on 15th July to pay out money in the hands of the interim receiver to meet a payroll. The moving party there was the debtor and the endorsement reads as follows:

> Counsel for the moving party concedes that the funds in the hands of the interim receiver are impressed with a trust. Accordingly, there are no funds to meet the payroll and an order which would in effect require the interim receiver to breach the trust cannot be made.

6 Under all the circumstances I see no error in the decision of the registrar. He balanced the interests of the debtor against the principle that trust funds belonging to employees or taxing authorities should not be paid to someone else who does not own them for the benefit of the debtor who similarly does not own them.

7 While there are some differences in the language creating the various statutory trusts, the effect of all the provisions is that they are simply not available to meet anything other than the fulfillment of the trust obligations with which they are impressed. Even if there is now $4,000 available as "surplus" over and above the trusts, rather than $3,000, the simple issue is that there is just not enough money in the hands of the interim receiver which is not impressed with the trust to make an order for payment to solicitors in any amount significantly different from that ordered by the learned registrar. The respondent is entitled to have his day in court. He is not entitled to pay his solicitor from trust funds belonging to employees or taxing authorities.

8 The appeal is dismissed.

Appeals dismissed.

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Date: 19990628
Docket: CI 97-01-03744
(Winnipeg Centre)

1999 CanLII 14202 (MB QB)

COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

OLGA MULLER FRIESEN, applicant,	The applicant appeared in person
- and -	
RANDOLPH A. BENNELL, respondent.	The respondent appeared in person
	Report delivered: **June 28, 1999**

MASTER SHARP

MASTER'S REPORT ON ASSESSMENTOF LAWYER'S BILL

[1] This is my Report on the lawyer's fee assessment conducted pursuant to Rule 71 and a reference order originally signed August 19, 1997.

[2] This proceeding has been hotly contested. Although the parties originally favoured resolution of the issues without the necessity of a formal hearing, it became apparent that a formal hearing was necessary. The formal hearing had then to be adjourned on two separate occasions due to lack of time. The energy with which this proceeding was pursued resulted, in my view, in the unnecessary prolongation of the proceedings.

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The Bill

[3] The applicant brought into question the bill of the respondent dated February 19, 1997, in the total amount of $3,122.27. The portion of this bill relating to fees only was $2,600.00 (not including applicable gst). The bill was for work performed for the applicant respecting the sale of a commercial property.

The Issues

[4] The applicant's complaints against the respondent were substantial. They included the following:

(1) The respondent exaggerated the time spent.
(2) Much of the time spent could have been avoided as it was unnecessary, either because the work had been done by others, or because the time was being wasted in unnecessary meetings or other unnecessary activities.
(3) The respondent increased the bill unnecessarily by taking a vacation during a critical period of the work.
(4) The respondent double-billed.
(5) The respondent was slow and thereby allowed unnecessary interest to accrue at the expense of the applicant.
(6) The respondent intruded into private family matters against instructions, and the time thus spent should not be included in the billing.

[5] In making these complaints, both in her written communications and at the formal hearing, the applicant used colorful language which in my view bordered on the defamatory. The underlying issue of the applicant's complaints was that, apart from being too high for the reasons given above, it was far in excess of the original quotation given by the respondent of $250.00.

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The Evidence

[6] During the course of these proceedings the respondent provided a detailed itemized account, and also his complete file, for review.

[7] At the formal hearing, neither side was represented by counsel. Evidence was heard from both the applicant and the respondent. Peter Warkentin, a barrister and solicitor with approximately 17 years experience, testified as an expert on behalf of the respondent. Randy Kendall, a friend of the applicant's who had attended some of the meetings with the respondent and the applicant, testified on the applicant's behalf.

Conclusions

[8] The lawyer's fee assessment procedure is not intended to provide relief against any perceived negligence, deceit, fraud or lack of moral integrity, or to recompense for alleged emotional or financial abuse. These are all issues which must be addressed in other arenas. The focus is the fee charged and account billed the client.

[9] The test to be applied on a lawyer's fee assessment is well established as being that set out in Rule 155 of the *Law Society of Manitoba Rules,* which stipulates that:

> "155 A member shall not
> (a) stipulate, charge or accept a fee that is not <u>fully disclosed, fair and reasonable;</u> or
> (b) charge or accept an amount as a disbursement that is not <u>fully disclosed, fair and reasonable</u>.

The question in this proceeding is, therefore, whether the account in issue was fully disclosed, fair and reasonable.

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[10] The meaning of the words "fair" and "reasonable" is further elaborated upon in the *Commentary to the Code of Professional Conduct:*

> "Factors to be Considered
>
> 1. A fair and reasonable fee will depend on and reflect such factors as:
>
> (a) the time and effort required and spent;
> (b) the difficulty and importance of the matter;
> (c) whether special skill or service has been required and provided;
> (d) the customary charges of other lawyers of equal standing in the locality in like matters and circumstances;
> (e) in civil cases the amount involved, or the value of the subject matter;
> (f) in criminal cases the exposure and risk to the client;
> (g) the results obtained;
> (h) tariffs or scales authorized by local law;
> (i) such special circumstances as loss of other employment, urgency and uncertainty of reward;
> (j) any relevant agreement between the lawyer and the client."

(1)" Fully disclosed"

The seeds of the difficulties between these parties were sown at the very outset of their association. The applicant claimed she was quoted an initial fee of $250.00. This was not denied by the respondent. However, according to the respondent's evidence the quote was based upon representations by the applicant that the property to be sold was a "house", as

well as other fundamental misrepresentations of the factual situation in respect of which the applicant required legal representation.

The evidence disclosed that the applicant in or about May or June, 1996, telephoned a number of law firms, requesting a quotation for fees for the sale of a “house” of the approximate value of the subject proper, “with clear title and no anticipated problems”. The applicant chose the respondent based on his quotation of $250.00. This was, as the evidence also disclosed, based on a fundamental misrepresentation on the part of the applicant. Far from being a “house”, the property in question was in fact a commercial tenancy with a restaurant owned by a corporation, the registration for which had lapsed. There was a mortgage on the property. The terms of the offer to purchase were not finalized. These, as well as other factors which developed over time, served to distinguish the work to be – and actually – done by the respondent from a normal $250.00 house deal.

While it should have become apparent to all concerned that the original quotation given by the respondent was wholly unrealistic in light of the actual circumstances, the applicant chose, for whatever reason, to believe that the original quotation was an appropriate fee and that, in any event, and despite the fact it was not in writing, the respondent was obligated to stick to it. In a note she wrote to the respondent complaining of the fees he was ultimately to charge, the applicant stated:

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> "I made it clear that a firm quote was of utmost importance to me. Some lawyers I consulted gave written quotes. I have previously been taken advantage of by lawyers, who, once they received trust money became greedy and added generous time, "forgetting" about quotes previously given."

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These sentiments appear to explain the applicant's attitude and the basis for her unhappiness with the respondent's account here. The applicant's concern to keep costs down ultimately contributed, in my view, to the costs increasing even more than they might have.

The evidence adduced by the applicant herself, proves that the $250.00 fee quoted by the respondent was a wholly inappropriate fee for dealing with the issues in this situation, and must therefore have been founded on wrong or limited information. In contemplation of these proceedings the applicant obtained a written quotation from another law firm in February, 1998, which she tendered as an exhibit (Exhibit 8). The fee quoted there was approximately $900.00 to $1,000.00 plus gst and disbursements, based on:

- sale of commercial building valued at $150,000.00 with one tenant
- no encumbrances, mortgage to be transferred to purchaser
- revival of dissolved corporation, to include filing annual returns and preparing Articles of Revival, bring minute book up to date and preparing resignations for existing directors and transfer of shares without need to negotiate terms
- added charge of $50 to $75 to review the Offer to Purchase.

It is also to be noted that this particular quotation itself was provided without the benefit of a review of the respondent's file and thus a full picture of what had in fact transpired.

The respondent did subsequently provide the applicant with a revised quotation. On September 17, 1996, the respondent wrote to the applicant providing an interim report and confirming that "this file is becoming substantially more involved than was initially contemplated" and that costs would be in the range of $2,500,00 by the time the matter was finished. This quotation was provided without the benefit of knowing the further difficulties which lay ahead. The applicant registered her concerns with the respondent at that time, but continued to utilize the respondent's services.

I conclude, therefore, that the fees were not fully disclosed at the outset. This state of affairs could not, however, be attributed to the respondent. The applicant's failure to reveal fundamental facts necessary to providing a fair and proper quotation made it impossible for the respondent to provide an appropriate quotation. For the respondent to be expected to adhere to the original quotation would, in my view, have been grossly unfair.

(2) "Fair and reasonable"

As there was clearly no agreement as to fees, the question is, what would be fair and reasonable in the circumstances.

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The factors noted above at p.4 are now considered against the background of the facts of this case.

(a) Time and effort required and spent

During the course of these proceedings the respondent provided an itemized account of the time he spent. This showed that a total of 50.10 hours was spent by the respondent. Charged out at the respondent's current billing rate of $150.00 per hour, this would have resulted in a fee of $7,515.00, excluding gst and disbursements. Even allowing for the deduction of time spent by the respondent addressing the applicant's complaints (October 17, 1996, and January 13, 1997 for a total of 2 hours; the respondent had already discounted time he spent dealing with the Law Society as a result of the respondent's complaints), leaving a total of 48.10 hours, and applying a lower hourly rate at $125.00, this would still have resulted in a fee of over $6,000.00.

The applicant claimed that the respondent spent more time than was necessary, as some of the work was done by others. For example, the applicant herself contacted the tax department to ascertain the calculation of taxes and penalties to possession date. She also arranged for the mortgage assumption statement and paid off utilities herself. Unfortunately, there were problems with the possession date originally contemplated by the parties, and it was changed. Even so, it is questionable whether any conscientious and responsible lawyer would feel confident to rely on information thus provided by

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a client. It is the lawyer upon whom trust conditions are imposed. It is not surprising that, in the circumstances of this case, the respondent felt obliged to obtain the required information from source.

As noted above, the applicant criticized the respondent's itemized account on other grounds as well. The specific criticisms leveled by the applicant at the numerous time entries on the account are too extensive to allow for individual comment here, and some examples only are dealt with.

The time the respondent spent per the first page of the account, a period of time from June 19, 1996, (when the original letter and offer to purchase was received from counsel for the potential purchaser), to July 31, 1996, (by which time the terms of the offer to purchase had been amended and were now acceptable), totalled approximately 5½ hours. The applicant dismissed this time spent claiming the sale was firm and had already been negotiated for 2½ years. According to the applicant, it only needed "a firm push on June 19", thus eliminating almost all telephone calls and meetings. From a review of the respondent's file alone, I am unable to agree with the applicant's interpretation of the facts and events. The offer to purchase that was actually signed on July 11, 1996 is not the same offer which was presented with counsel's letter of June 19, 1996, referred to above. There was even a danger the deal would be aborted altogether.

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From my review of the time spent, I am unable to concur with the criticisms the applicant has leveled. The itemized account and time shown are in fact only a guide. The respondent's bill was not based strictly and only on the time he spent. This is only one of the factors to be considered in the overall picture of the account rendered.

(b) the difficulty and importance of the matter

The sale of the property in question was very important to the applicant. The evidence established the applicant had other issues at stake and risked losing the building altogether if it was not sold.

As indicated above, this should not have been a difficult transaction. It was made so, partly by the applicant's own actions, and partly by the actions of the purchaser. Some of these included, for example, the initial problems with the offer to purchase, the failure of the applicant to secure a deposit, a dispute between vendor and purchaser respecting the possession date (which then affected the adjustments), a dispute between vendor and purchaser respecting fixtures and chattels, the difficulties with the dissolved company, and delays in registration.

In her original letter of complaint to the respondent, the applicant stated:

> "This was not only the smallest of commercial sales, but also much below market value, less than an average home. It is not a big legal deal – in fact much simpler than any other, requiring only …. paper work and no disbursements."

It is clear from this statement that the applicant misconstrued the entire situation and the complications which arose.

(c) whether special skill or service has been required and provided

To the extent that the respondent was able to identify each of the difficulties as they arose in this situation and deal with them, a degree of legal skill or special service was required and provided.

(d) customary charges of other lawyers of equal standing in the locality in like matters and circumstances

The evidence of Peter Warkentin provided on behalf of the respondent suggested that, on the basis of a review of this file, a fee of $3,000.00 to $3,500.00 plus disbursements would have been fair and reasonable. Mr. Warkentin, a contemporary of the respondent, testified he would have charged more. It took him two and a half hours to review the file.

The quotation obtained by the applicant (Exhibit 8) was referred to earlier in this report (at p. 6) and provides some further guidance. As noted above, however, it was prepared without a full and accurate picture of all the complications which arose in this case. Furthermore, I note that its author is a lawyer with half the experience of Mr. Warkentin. These factors reduce the weight to be attributed to Exhibit 8.

It is noted that the applicant also filed as an exhibit in her case (Exhibit 10) a statement of account dated January 24, 1992 respecting the refinancing

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of the same property, for work which included “initial steps regarding potential sale and renewal of existing mortgage, preparation, attendance upon execution and registration of commercial mortgage and residential mortgage in support with instructions; to all services rendered incidentally hereto.”

The fee charged there was $1,500.00 and the total bill, including disbursements, was $2,476.52. The applicant filed this account as she believed that transaction was more complicated. On the basis of the evidence, I do not agree with the applicant’s conclusion. This again exemplifies the applicant’s lack of understanding.

Factors (d) and (e) are not applicable and are therefore not considered.

(g) the results obtained

I am satisfied that the transaction was, eventually, satisfactorily concluded.

(h) tariffs or scales authorized by local law

The last available tariff was that prepared by The Manitoba Bar Association: “Guideline to Solicitor’s Fees”. As this was prepared in July, 1974 I decline to rely on it.

(i) special circumstances

In my view there were no special circumstances as contemplated herein, other than as already discussed, and the underlying difficulties of dealing with a client who believed she was being taken advantage of.

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(j) any relevant agreement between the lawyer and the client

This has already been discussed under the heading “Fully disclosed”, *supra*. There was no agreement between the parties.

Decision

[11] In the peculiar circumstances of this case, I conclude that a fee of $2,600.00 was fair and reasonable. The applicant attempted to keep her costs to a minimum by obtaining a firm quotation which she expected to remain unchanged, and by attending to aspects of the transaction herself.

[12] The practice of obtaining quotations from lawyers is a common one in this day and age. The practice is certainly to be encouraged, however, if all the material circumstances are not set out at the outset, or have not been adequately explained, difficulties may well be encountered down the road, notably when the bill is presented. Ideally, quotations should be in writing, with all the material circumstances outlined as part of the quotation. Counsel for their part should avoid giving quotations without obtaining a proper factual background.

[13] Similarly, the applicant’s desire to attend to some aspects of the transaction herself was unwise. The applicant claimed to have some twenty years experience with lawyers; however, she did not, for example, know that a mortgage constitutes “an encumbrance”.

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[14] I agree with the submission of the respondent that the applicant did not understand what was done on her behalf; after three days of testimony the applicant appeared still not to understand the subtleties of the transaction. In her submission, the applicant made a number of statements which were, in my view, unfortunate and untenable. For example, she suggested the respondent charged her half an hour for “thinking on the beach” and that she was “being used to support lawyers“.

[15] If the respondent is to be faulted at all, it is with respect to the manner of his communication with the applicant. The applicant testified that her former lawyer, the author of Exhibit 10, “did a better job of selling himself”. There was evidence that the respondent “lost it” on occasion in meetings with the applicant, for example, by raising his voice. A major issue for the applicant was the fact that, and the manner in which, the respondent contacted her children, who were involved in the dissolved corporation that required revival. Under the circumstances I do not fault the respondent for contacting the applicant’s children. The problem lies with the respondent’s handling of the situation which ideally should have been done in a way which would have caused the applicant less grief and anger.

[16] More significant is the failure of the respondent to discuss with the applicant the issue of the fees, with no substantial position being provided to the applicant, until his letter in September, 1996. While this factor in of itself is

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not sufficient, in my view, to justify a reduction in the fee charged, I take that factor into consideration in assessing the issue of costs of this proceeding. Normally, with three days of hearing, that would be a situation where the awarding of costs to the successful party would follow. Under the circumstances, there will be no costs awarded to the respondent.

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C. W. Sharp
Master

NOTICE

A REPORT HAS NO EFFECT UNTIL IT IS CONFIRMED.
A COPY OF QUEEN'S BENCH RULE 54.07 TO 54.10 DEALING WITH CONFIRMATION OF MASTERS' REPORTS FORMS THE LAST PAGE OF THIS REPORT.
PLEASE REVIEW CAREFULLY.

Plazavest Financial Corporation et al. v. National Bank of Canada et al.

[Indexed as: Plazavest Financial Corp. v. National Bank of Canada]

47 O.R. (3d) 641
[2000] O.J. No. 1102
No. C30641

Court of Appeal for Ontario
Doherty, Laskin and Moldaver JJ.A.
April 5, 2000

Professions -- Barristers and solicitors -- Fees -- Assessment -- As term of loan agreement borrower agreeing to pay lender's actual legal fees relating to loan transaction -- Borrower refusing to pay solicitors' bills -- Lender paying bills from funds held in borrower's account -- Borrower bringing application for order directing that bill be referred for assessment pursuant to Solicitors Act -- Section 11 of Act applying as bills had been paid prior to application for assessment -- Borrower required to demonstrate that special circumstances of case appeared to require assessment -- Language of agreement between borrower and lender not determinative of whether special circumstances existed -- Public interest requiring that court maintain supervisory role over disputes relating to payment of lawyers' fees -- Borrower having been provided with almost no information concerning work done by solicitors when it brought application -- Borrower demonstrating special circumstances -- Borrower entitled to order directing assessment -- Solicitors Act, R.S.O. 1990, c. S.15, s. 11.

The appellant borrowed money from the respondent in 1997. As a term of the loan agreement, the appellant agreed to pay the

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respondent's legal fees relating to the loan transaction. Under a previous loan agreement, the appellant was required to pay the respondent's "reasonable" legal fees and expenses incurred in relation to the transactions described in that agreement. Under the 1997 agreement, the appellant was obligated to pay "the actual fees and expenses" of the respondent's solicitors. The agreement also provided that the respondent could pay those fees and expenses from funds held in the appellant's account with the respondent. The respondent's solicitors submitted five bills to the respondent. The respondent asked the appellant to pay the total amount owing and provided the appellant with a copy of the fifth account, which provided some details of the work done by the solicitors over a one-month period. The material provided to the appellant did not provide any details with respect to the four previo us accounts other than the amount owing on each account. When the appellant declined to pay the bills, the respondent paid them from funds held in the appellant's account. The appellant brought an application for an order directing that the respondent deliver copies of the solicitors' bills to the appellant and an order directing that the bills be referred for assessment pursuant to the Solicitors Act. The application judge held that the appellant had paid the bills prior to seeking an assessment and was required under s. 11 of the Act to demonstrate that the special circumstances of the case appeared to require the assessment. She examined the language of the agreement between the appellant and the respondent and concluded that as the appellant was required to pay "all legal expenses actually charged" to the respondent, it could not demonstrate special circumstances justifying an order directing an assessment. The appellant appealed.

Held, the appeal should be allowed.

The rendering of legal services and the determination of the appropriate compensation for those services is not solely a private matter to be left entirely to the parties. There is a public interest component relating to the performance of legal services and the compensation paid for them. That public interest component requires that the court maintain a supervisory role over disputes relating to the payment of

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lawyers' fees. Section 9(1) of the Act put the appellant in the same position as the respondent in so far as the assessment of the solicitors' bill was concerned. If an agreement between the solicitors and the respondent to pay the firm's actual fees could not pre-empt an application by the respondent to assess those fees, it followed that the same agreement between the respondent and the appellant to pay actual legal fees did not place those fees beyond the pale of the assessment process.

Where a payment is authorized by the payor, it is a payment for the purposes of s. 11 of the Act. In the circumstances of this case, the payment was authorized by the appellant under the terms of the 1997 agreement and was a payment for the purposes of s. 11. The appellant was, therefore, entitled to an assessment only if it could show that the special circumstances of the case appeared to require an assessment.

Three factors were particularly significant in determining whether special circumstances existed here. First, the payment to the solicitors was made on the appellant's behalf by the respondent over the express objection of the appellant. The appellant had made it clear that it did not agree with the amounts claimed in the bills provided to the respondent by the solicitors. In this circumstance, the normal inference concerning the propriety of the bills flowing from the payment of the bills could not be made. Second, when the appellant initiated the application, it had virtually no information concerning the work done by the solicitors. In effect, the respondent took the position that the appellant was obligated to pay the legal fees but was not entitled to any information concerning the work done to earn those fees. The respondent's refusal to give the bills to the appellant before paying the legal fees from the appellant's account, and its subsequent providing of only edited bills to the appellant, were im portant factors which told in favour of directing an assessment. A third party who has agreed to pay a client's legal bills is entitled, subject to any sustainable solicitor-client privilege claim, to information in the client's possession which is relevant to the determination of whether the legal bills are properly payable by the third party. The third factor was the wording of the terms of the agreement

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between the appellant and the respondent. The appellant agreed to pay actual legal fees and expenses incurred in relation to the transactions arising out of the loan agreement. Given the respondent's position, the appellant had no way, other than through the assessment process, of determining whether the amounts claimed in the bills met those two criteria. These factors combined to constitute special circumstances within the meaning of s. 11 of the Act.

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Borden & Elliot v. Barclays Bank of Canada (1993), 15 O.R. (3d) 352 (Gen. Div.); Randell and Robins and Robins (Re) (1979), 22 O.R. (2d) 642 (H.C.J.); Tory, Tory, DesLauriers and Binnington v. Concert Productions International Inc. (1985), 7 C.P.C. (2d) 54 (Ont. H.C.J.), consd

Other cases referred to

Enterprise Rent-a-Car Co. v. Shapiro, Cohen, Andrews, Finlayson (1998), 38 O.R. (3d) 257, 157 D.L.R. (4th) 322, 80 C.P.R. (3d) 214 (C.A.); Krigstin v. Samuel (1982), 31 C.P.C. 41 (Ont. H.C.J.); Minkarious v. Abraham, Duggan (1995), 27 O.R. (3d) 26, 129 D.L.R. (4th) 311, 44 C.P.C. (3d) 210 (Gen. Div.); Peel Terminal Warehouses Ltd. v. Wootten, Rinaldo & Rosenfeld (1978), 21 O.R. (2d) 857, 10 C.P.C. 160 (C.A.)

Statutes referred to

Solicitors Act, R.S.O. 1990, c. S.15, ss. 1-36

APPEAL from a judgment dismissing an application for an order for an assessment of solicitors' bills.

Bernard Burton, for appellants.
Anne C. Sonnen, for respondent, National Bank of Canada.
Kenneth A. Dekker, for respondent, Kelly Affleck Greene.

The judgment of the court was delivered by

DOHERTY J.A.: --

I.

[1] The appellant ("Plazavest") borrowed money from the respondent, the National Bank of Canada ("National"). As a term of that loan agreement, Plazavest agreed to pay National's legal fees relating to the loan transaction. National retained the respondent, Kelly Affleck Greene ("Kelly Affleck") who provided legal services and eventually submitted their bill to National. National requested that Plazavest pay the bill, and when Plazavest declined, National, pursuant to a term of the loan agreement with Plazavest, paid the bill from funds held in Plazavest's account. Plazavest then brought an application seeking an order directing that National deliver copies of Kelly Affleck's legal bills to Plazavest and an order directing that the bills be referred for assessment pursuant to the Solicitors Act, R.S.O. 1990, c. S.15 (the "Act").

[2] Sanderson J. held that Plazavest had paid the bills prior to seeking an assessment and was required under s. 11 of the Act to demonstrate that "the special circumstances of the case . . . appear to require the assessment". She examined the language of the agreement between Plazavest and National and concluded that as Plazavest was required to pay "all legal expenses actually charged" to National, it could not demonstrate "special circumstances" justifying an order directing an assessment. Having reached this conclusion, it was unnecessary for her to decide whether National should be required to give copies of the legal bills to Plazavest.

[3] Plazavest appeals.

[4] I agree with Sanderson J. that s. 11 of the Act applies and that Plazavest was required to show "special circumstances". With respect, however, I do not agree that the language of the agreement between Plazavest and National was determinative of whether "special circumstances" existed. I think that the entirety of the circumstances, including but not limited to the terms of the agreement, should have been

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considered in deciding whether Plazavest had established "special circumstances". On the view I take of the entirety of the circumstances, Plazavest demonstrated "special circumstances" and was entitled to an order directing an assessment.

II.

[5] Plazavest and National initially entered into a loan agreement in 1990. Under the terms of that agreement, Plazavest was required to pay National's "reasonable" legal fees and expenses incurred in relation to the transactions described in the agreement. In April and May of 1997, Plazavest and National entered into a new agreement restructuring Plazavest's loan arrangements with National (the "1997 agreement"). The 1997 agreement called for a loan in the amount of $2,235,000. Under the terms of the 1997 agreement, Plazavest was obligated to pay "the actual fees and expenses" of National's solicitors incurred in relation to the transactions described in the agreement. Under the terms of the 1997 agreement, not only was Plazavest liable to pay the actual legal fees and expenses incurred by National, but National could pay those fees and expenses from funds held in Plazavest's account with National.

[6] Kelly Affleck performed legal services in connection with the transactions described in the 1997 agreement between December 1996 and July 1997. It submitted five bills to National totalling $32,564.24. The fifth bill was sent to National in July 1997.

[7] On October 21, 1997, National wrote to Plazavest requesting that Plazavest pay the amount owing ($32,564.24) directly to Kelly Affleck at Plazavest's "earliest convenience". A copy of the fifth account (July 15, 1997) in the amount of $1,499.61 was enclosed in the October 21 letter. That account provided some details of the work done by Kelly Affleck between June 1, 1997 and June 30, 1997. That account also referred to the amounts owing on the four previous accounts that had been submitted to National. The material sent to Plazavest did not, however, provide any details with respect to the four previous accounts other than the amount owing on

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each account.

[8] At some unspecified date after Plazavest received the letter of October 21, 1997, Mr. Phillip Meretsky, the solicitor for Plazavest, asked National for copies of the first four accounts. National refused to provide the copies. Mr. Meretsky advised National that Plazavest could not agree with the quantum of the bills and would assess the accounts if no agreement could be reached.

[9] On December 19, 1997, National wrote to Plazavest stating:

> Please be advised that we have incurred legal fees in the total amount of $34,000 for the Borrowers' account in respect of this matter. Payment of this amount is requested prior to December 31, 1997, failing which we shall deduct same from the $154,616.10 payment made by the Borrowers in accordance with Article 7.4 of the Loan Agreement.

[10] The affidavit of Mr. Kennedy filed by National on the application contains the following assertion:

> The Moving Parties [Plazavest] did not pay the outstanding Kelly Affleck Greene accounts. Accordingly, on December 18, 1998, [See Note 1 at end of document] the Bank applied a portion of monies received by it on account of the Moving Parties' indebtedness, pursuant to the terms of the Loan Agreement, on account of the outstanding Kelly Affleck Greene accounts. The Bank remitted these monies to Kelly Affleck Greene in satisfaction of its accounts.

[11] In oral argument, counsel for National indicated that in fact the funds owed to Kelly Affleck had been segregated from the other funds held on behalf of Plazavest as of December 18, 1997, but were not paid to Kelly Affleck until some subsequent unspecified date. I do not read Mr. Kennedy's affidavit as drawing the distinction made by counsel. In my view, the affidavit must be read as indicating that National exercised its rights under the 1997 agreement to pay the amounts owed to Kelly Affleck on December 18, 1997, while at the same time

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indicating that payment would not be made until December 31. It does not appear, however, that National's precipitous action prejudiced Plazavest. There is no suggestion that Plazavest would have moved to assess the bill between December 19 and December 31. This application was not commenced until July 1998.

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[12] Prior to the return of the application, National did deliver copies of the first four accounts to Plazavest. These accounts provide details of the work done by Kelly Affleck. Several entries in each of the accounts were, however, "blacked-out" in the copies provided to Plazavest. National claimed client-solicitor privilege with respect to the edited entries.

III.

[13] Counsel for National submitted that the 1997 agreement constituted a waiver by Plazavest of any right it may have had to an assessment of the legal accounts. In advancing this position, she placed considerable reliance on Plazavest's agreement to pay all "actual" legal fees and expenses relating to the transaction. She contrasted this commitment with Plazavest's agreement in 1990 to pay "reasonable" legal fees and expenses. She argued that while a commitment to pay "reasonable" legal fees contemplated a review by a neutral arbiter of the fees claimed, a promise to pay "actual" legal fees did not envision any such review. It does not appear that this argument was made before Sanderson J.

[14] The rendering of legal services and the determination of appropriate compensation for those services is not solely a private matter to be left entirely to the parties. There is a public interest component relating to the performance of legal services and the compensation paid for them. That public interest component requires that the court maintain a supervisory role over disputes relating to the payment of lawyers' fees. I adopt the comments of Adams J. in Borden & Elliot v. Barclays Bank of Canada (1993), 15 O.R. (3d) 352 (Gen. Div.) at pp. 357-58, where he said:

The Solicitors Act begins with s. 1 reflecting the legal profession's monopoly status. This beneficial status or privilege of the profession is coupled with corresponding obligations set out in the Act and which make clear that the rendering of legal services is not simply a matter of contract. This is not to say a contract to pay a specific amount for legal fees cannot prevail. It may. But even that kind of agreement can be the subject of review for fairness: see s. 18 of the Solicitors Act.

[15] The observation of Adams J. that the rendering and payment of legal accounts is not "simply a matter of contract" finds support in a long established line of authority which recognizes, apart entirely from the Act, that a superior court has an inherent jurisdiction, as part of its disciplinary authority over lawyers, to direct the assessment of lawyers' fees: Peel Terminal Warehouses Ltd. v. Wootten, Rinaldo & Rosenfeld (1978), 21 O.R. (2d) 857 at p. 861, 10 C.P.C. 160 (C.A.); Minkarious v. Abraham, Duggan (1995), 27 O.R. (3d) 26 at pp. 55-56, 44 C.P.C. (3d) 210 at p. 242 (Gen. Div.).

[16] The provisions of the Solicitors Act also offer full support for the conclusion reached by Adams J. Sections 16 to 36 of the Act recognize that clients and solicitors may enter into written agreements concerning payments for legal services. These sections do not, however, suggest that those agreements oust the assessment process. To the contrary, they provide detailed provisions for the assessment of legal fees rendered pursuant to written agreements between lawyers and their clients.

[17] Although I would reject the contention that an agreement between a client and a lawyer may preclude the client from resorting to the Act or the inherent power of the court to seek an assessment of the lawyer's fees, I do not mean to suggest that the existence of such a contract and the terms of that contract are of no significance. As Adams J. said, the terms of the agreement may in the end prevail and dictate the fees to be paid. Furthermore, where the party seeking an assessment must show special circumstances, the terms of the agreement may figure prominently in the determination of whether those

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special circumstances exist: Borden & Elliot v. Barclays Bank of Canada, supra, at pp. 358-59.

[18] The agreement relied on in this case is not between the client (National) and the solicitor (Kelly Affleck), but rather, is between the client (National) and the borrower (Plazavest). Under the terms of that agreement, Plazavest is liable to pay National's actual legal fees and expenses. Section 9(1) of the Act is directly applicable to Plazavest. The relevant words provide:

> 9(1) Where a person, not being chargeable as the principal party, is liable to pay or has paid a bill . . . to the solicitor . . . the person so liable to pay or paying . . . may apply to the court for an order referring to assessment as the party chargeable therewith might have done, and the same proceedings shall be had thereupon as if the application had been made by the party so chargeable.

[19] Section 9(1) of the Act puts Plazavest in the same position as National in so far as the assessment of Kelly Affleck's bill is concerned. If an agreement between National and Kelly Affleck to pay the firm's actual fees could not pre-empt an application by National to assess those fees, it must follow that the same agreement between the client and a third party to pay actual legal fees does not place those fees beyond the pale of the assessment process should the third party seek to resort to that process.

[20] Apart entirely from the general question of whether those liable to pay legal fees can waive a right to assess a lawyer's bill, the actual terms of the agreement between Plazavest and National do not provide any evidence of a waiver. Plazavest agreed to pay National's actual fees and legal expenses relating to the transactions encompassed in the loan agreement. Certainly, there is no express agreement to waive any right to assess those costs. Nor can I accept that it was implicit in Plazavest's agreement to pay actual legal fees relating to the transactions that it would not challenge whether the fees were "actual" or whether the fees related to transactions encompassed by the loan agreement. An agreement to

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pay "actual" legal fees cannot be read as an agreement to pay all fees "actually charged". Actual fees refer to fees for work done within the scope of the retainer. For example, if Kelly Affleck's bill inadvertently included charges for work done on a file unrelated to the 1997 loan agreement, thos e charges would not be part of the "actual" legal fees referred to in the 1997 agreement even though they would be part of the fees "actually charged" by Kelly Affleck.

[21] In my view, the 1997 agreement between Plazavest and National described the scope of Plazavest's obligation to pay National's legal bills, but said nothing about Plazavest's entitlement to challenge the propriety of those bills. Even if Plazavest could waive its right to seek an assessment under the Act, it did not do so in the 1997 agreement.

[22] In an alternative but related submission, the respondent argued that Plazavest could not seek an assessment under the general provisions of the Act (ss. 1-14) as it did, but could only rely on the provisions governing assessment where there is an agreement as to the fee to be paid (ss. 15-33). The respondent contends that the 1997 agreement constitutes an agreement for the purposes of ss. 15 to 33 of the Act. This argument was also not advanced before Sanderson J.

[23] Sections 15 to 33 of the Act speak to situations in which there is a written agreement between the lawyer and a "client" respecting the manner and amount of payment of the lawyer's fees. While Plazavest is a "client" under the expanded definition of that word in s. 15 of the Act, there was no written agreement between Kelly Affleck and Plazavest. Nor, for that matter, was there any evidence of a written agreement between Kelly Affleck and National concerning Kelly Affleck's fees. I do not think that ss. 15 to 33 have any application, direct or by analogy, to written agreements to pay legal fees to which the lawyer claiming the fees is not a party. The sections are intended to reflect and manifest the court's supervisory power over agreements involving lawyers for the payments of lawyers' fees. The sections do not reach arrangements between clients and third parties referable to the payment of the client's legal fees. [See Note 2 at end of

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document]

IV.

[24] Having concluded that the 1997 agreement did not preclude Plazavest's resort to the Act, I must now determine which section of the Act applies. By operation of s. 9(1) of the Act, Plazavest's entitlement to an assessment is the same as that which would be available to the actual client (National) in the same circumstances.

[25] Counsel for Plazavest submitted that s. 3(a) or (b) of the Act applies and that since the application was brought within 12 months of the delivery of the bills, Plazavest is entitled to an assessment and need not demonstrate special circumstances. [See Note 3 at end of document]

[26] National and Kelly Affleck submit that the bill was paid prior to, but within 12 months of the application for an assessment, and that s. 11 of the Act applies. It provides:

> 11. The payment of a bill does not preclude the court from referring it for assessment, if the application is made within twelve months after payment, and if the special circumstances of the case, in the opinion of the court, appear to require the assessment.

[27] It is Plazavest's position that the phrase "the payment of a bill" in s. 11 refers to payments made voluntarily by the party responsible for the payment. It contends that the payment made from Plazavest's account to Kelly Affleck by National was not a voluntary payment, but was in fact made in the face of Plazavest's objection to payment of the bill.

[28] Plazavest relies on Re Randell and Robins and Robins (1979), 22 O.R. (2d) 642 (H.C.J.). In Re Randell, the solicitors obtained a judgment for their client. They deducted the amount owing on their fees and remitted the balance of the judgment to the client. After receipt of those funds, the client moved for an assessment of the bill. The law firm argued that the bill had been paid and, therefore, under s. 10 (now s.

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11) of the Act, the client was required to show "special circumstances" justifying an assessment. While it would appear there was no specific agreement between the client and the firm permitting the firm to deduct its fees from the judgment, Eberle J. made it clear that it was not suggested that the solicitors acted improperly in doing so.

[29] Eberle J. acknowledged that for many purposes, payment of the account had been made. He then said, at p. 643:

> However, when I consider the intention of s. 10 [now s. 11], it seems clear to me that the reason why a client who has paid an account is required to show special circumstances in order to have the account taxed, is because the payment of the account indicates that the client accepts the amount of the account as being proper. That is, that payment is an implied acceptance of the reasonableness of the account. Can one make that implication in the circumstances of this case -- circumstances of payment which are not uncommon? In my view "no"; one cannot make that implication, and I am, therefore, driven to the conclusion that although, for many purposes, the solicitors' account has been paid, for purposes of s. 10 a voluntary action on the part of the client on making the payment is required before one can infer an acceptance by the client of the propriety of the bill. Therefore, in my view, the special circumstances required by s. 10 of the Solicitors Act where there has been pay ment of a bill need not here be shown.

(Emphasis added)

[30] I agree with Eberle J.'s description of the purpose underlying s. 11 of the Act. Payment of the bill is generally seen as an implied acceptance by the payor of the propriety of the bill. Absent special circumstances, the payor should not be allowed to resile from its implied acceptance of the propriety of the bill. I think, however, that the purpose underlying s. 11 is not served by attempting to distinguish between voluntary and involuntary payments. The distinction is not an easy one to make. Plazavest argues that the payment of the bill was not voluntary because National made the payment from Plazavest's

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account over Plazavest's objection. National argues that Plazavest agreed, as part of the 1997 agreement, that National could unilaterally make the payment. National contends that a payment made pursuant to an agreement, the validity of which is not challenged, is a voluntary payment.

[31] I would avoid any attempt to characterize a payment as voluntary and involuntary, but instead distinguish between payments that are authorized by the payor and those that are not authorized. Where the payment is authorized by the payor, I would hold that it is a payment for the purposes of s. 11 of the Act. Plazavest agreed that it would pay National's actual legal fees and expenses. It also agreed that National could unilaterally pay those fees and expenses from Plazavest's account if Plazavest did not pay them. These were two terms of a complex bargain struck between National and Plazavest by which Plazavest gained access to financing in excess of $2 million. There is no suggestion that the agreement does not reflect the bargain made between National and Plazavest or that there is any reason why the court should not enforce that bargain. Indeed, I do not understand Plazavest to contend that National was not entitled to pay the bill.

[32] In my opinion, the payment was authorized by Plazavest under the terms of the 1997 agreement and is a payment of the bill for the purposes of s. 11 of the Act. Plazavest's objection to paying the bill could not make the payment unauthorized since Plazavest had agreed in advance that National could unilaterally make the payment. Plazavest was, therefore, entitled to an assessment only if it could show that the special circumstances of the case appeared to require an assessment.

V.

[33] Section 11 refers to "special circumstances", which "in the opinion of the court appear to require the assessment." This language clearly implies that assessment after payment will be the exception rather than the rule. It further contemplates that in determining whether to order an assessment, the court has a broad discretion to be exercised on

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a case-by-case basis and with an eye to all of the relevant circumstances. As was said in Minkarious v. Abraham, Duggan, supra, at p. 49 O.R., p. 236 C.P.C.:

> . . . exceptional circumstances of either a contractual or an equitable nature could lead a court to find that an assessment is necessary or essential on general principles or is called for as being appropriate or suitable in the particular case.

[34] In deciding whether special circumstances exist, the court may take into consideration the fact that payment was made by a third party and not by the client. Section 9(2) of the Act provides in part:

> 9(2) . . . the court may take into consideration any additional special circumstances applicable to the person making it [the payment], although such circumstances might not be applicable to the party chargeable with the bill [the client] if he, she or it was the party making the application.

[35] Section 9(2) of the Act reflects the reality that a third party required to pay a legal bill will often not be in as good a position as the client to determine the propriety of that bill. In Tory, Tory, DesLauriers and Binnington v. Concert Productions International Inc. (1985), 7 C.P.C. (2d) 54 (Ont. H.C.J.), Steele J. considered a case in which a borrower committed to pay the lender's legal fees as part of the financing arrangements. The borrower subsequently sought to assess those fees. Steele J. said, at p. 57:

> A third party under s. 8 [now s. 9] can be in no higher status than the party itself, and therefore, in my opinion, special circumstances are required to be shown by the applicant herein. However, s. 8(2) [s. 9(2)] allows the Court to consider any extra circumstances. A third party is not per se automatically entitled to be said to have special circumstances, although it should be given more favourable consideration than the party who paid the account. The facts in each case must be considered on their merits.

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[36] Bearing in mind the comments of Steele J. and the need to consider all of the circumstances of the case, three factors are particularly significant in determining whether special circumstances exist here. First, the payment to Kelly Affleck was made on Plazavest's behalf by National over the express objection of Plazavest. Plazavest had made it clear that it did not agree with the amounts claimed in the bills provided to National by Kelly Affleck. In this circumstance, the normal inference concerning the propriety of the bills flowing from the payment of the bills cannot be made. It cannot be said that Plazavest is seeking to challenge legal bills which, by its earlier conduct, it had accepted as appropriate. To the contrary, in bringing this application, Plazavest was maintaining the same position it had taken from the time it was first advised of the amount of the bill. Denying an assessment in these circumstances does not further the purpose underlying s. 11 of the Act: see Enterprise Rent-a-Car v. Shapiro, Cohen, Andrews, Finlayson, supra, at p. 265.

[37] Second, when Plazavest initiated this application, it had virtually no information concerning the work done by Kelly Affleck for which the law firm was claiming fees in excess of $32,000. Plazavest was not the client and could not have first hand knowledge of what work Kelly Affleck had done on the relevant transactions. Plazavest requested the bills when National demanded payment. National provided one bill referable to a very small part of the overall amount claimed by Kelly Affleck but refused to provide the remaining bills. In effect, National took the position that Plazavest was obligated to pay the legal fees but was not entitled to any information concerning the work done to earn those fees. National eventually modified its position somewhat and did provide Plazavest with the bills given to it by Kelly Affleck. The bills given to Plazavest were, however, edited on the basis of solicitor-client privilege and gave Plazavest only partial information as to the work done by Kelly Affleck. The edited bills were provided long after National had paid the bill from Plazavest's account.

[38] National's refusal to give the bills to Plazavest before

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paying the legal fees from Plazavest's account, and its subsequent providing of only edited bills to Plazavest are important factors which tells in favour of directing an assessment. A third party who has agreed to pay a client's legal bills is entitled, subject to any sustainable solicitor-client privilege claim, to information in the client's possession which is relevant to the determination of whether the legal bills are properly payable by the third party.

[39] I would think that in the normal course, a client in the position of National should provide copies of the legal bills to the third party who was responsible for paying those bills. If the client has legitimate concerns that the bills will reveal information protected by the solicitor-client privilege, the client should provide the third party with a description of the legal work done and the fees charged for that work which will protect the privilege but still allow the third party to make an informed decision as to its obligation to pay that bill.

[40] Had National been more forthcoming in providing details as to the services rendered by Kelly Affleck, it may well have avoided this application altogether. At a minimum, it would have been in a much better position to argue that Plazavest could not demonstrate "special circumstances".

[41] The third factor to be considered is the wording of the terms of the agreement between Plazavest and National. This was the factor which Sanderson J. regarded as determinative against Plazavest on the special circumstances inquiry.

[42] Plazavest argued that a term requiring that the legal fees be reasonable should be implied into the 1997 agreement. I cannot accept that submission. The 1990 agreement referred to "reasonable" legal fees and expenses. The parties chose to change that term in the 1997 agreement and Plazavest agreed to pay "actual" legal fees and expenses. I see no reason why the court should ignore the change in the language made by the parties.

[43] I do not, however, accept National's submission that the

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language of the agreement tells against an assessment. Plazavest agreed to pay actual legal fees and expenses incurred in relation to the transactions arising out of the loan agreement. Given National's position, Plazavest had no way, other than through the assessment process, of determining whether the amounts claimed in the bills met these two criteria. I see nothing in the language of the 1997 agreement which should foreclose Plazavest's resort to an independent arbiter to determine whether the fees claimed in fact came within the description of the fees which Plazavest had agreed to pay. The analysis of Adams J. in Re Borden & Elliot v. Barclays Bank of Canada, supra, at pp. 358-59, although directed to an agreement requiring that the third party pay "reasonable" fees, seems to me to have equal application to the 1997 agreement. Plazavest agreed to pay actual legal fees and expenses incurred in relation to the loan transaction. It did not agree to pay any and all fees claimed by Kelly Affleck. The terms of the 1997 loan agreement may well limit the arguments available to Plazavest on an assessment, but in my view they should not preclude that assessment.

[44] Plazavest was entitled to satisfy itself that the legal fees and expenses which were claimed met the criteria set out in the 1997 agreement. National chose to deny Plazavest the relevant information and to pay Kelly Affleck's fees from Plazavest's account over Plazavest's express objection. Absent an assessment by Plazavest, there will be no independent review of the fees and no way of knowing whether they are truly covered by the 1997 agreement. In my view, these factors combine to constitute special circumstances within the meaning of s. 11 of the Act. This is a case where an assessment should be ordered.

VI.

[45] As I would order an assessment, I must address the solicitor-client privilege claim made by National. National contends that many of the entries in the bills provided by Kelly Affleck are protected by solicitor-client privilege. National cannot, of course, have the final say on this issue. The unedited accounts should be produced to the assessment

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officer who may examine them and determine what part, if any, should be protected by the solicitor-client privilege. The assessment officer may also have to consider whether the terms of the 1997 agreement constitute a waiver of any solicitor-client privilege claim in so far as it relates to Plazavest's obligation to pay National's legal bills. Any bill or part of a bill which is not protected by the privilege should be turned over to Plazavest. The assessment officer may, if he or she can do so without compromising the privilege, also provide Plazavest with a summary of any of the information which has been determined to be protected by the solicitor-client privilege.

VII.

[46] I would allow the appeal, set aside the order below, and direct an assessment subject to the conditions set out above. Plazavest is entitled to its costs here and below.

Appeal allowed.

Notes

Note 1: The parties agree that this is a typographical error and should be December 18, 1997.

Note 2: Even if ss. 15 to 33 applied, s. 25 would appear to put Plazavest in virtually the same position it would be in if s. 11 applied. Section 25 would allow Plazavest to apply to "re-open" the agreement under which the legal fees were paid. If Plazavest could demonstrate "special circumstances" the court could order the agreement re-opened and the fees assessed.

Note 3: Given the conclusion I have reached, I need not decide whether Plazavest's application does fall within s. 3(a) or (b) of the Act. Arguably, it is an application brought more than one month after delivery of the bill and less than 12 months after delivery of the bill and therefore falls into the "gap" in the Act recognized by this court in Peel Terminal Warehouses Ltd. v. Wootten, Rinaldo & Rosenfeld, supra: see also Krigstin v. Samuel (1982), 31 C.P.C. 41 (Ont. H.C.J.); Enterprise Rent-a-Car

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Company v. Shapiro, Cohen, Andrews, Finlayson (1998), 38 O.R. (3d) 257 at p. 260, 157 D.L.R. (4th) 322 (C.A.).

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