



SUPERIOR COURT OF JUSTICE

Judges' Administration
Court House

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FAX COVER SHEET

Date: February 4, 2010

TO:	FAX NO.	Total Number of Pages Including Cover Page
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And by ordinary mail to: J. Robert (Bob) Verdun 153-B Wilfred Avenue Kitchener, Ontario N2A 1X2		5

FROM:	
The Honourable Madam Justice:	
The Honourable Mr. Justice:	Newbould
Secretary's Name:	Yvonne C. Pawaroo

Re: Court File No.:	07-CL-6913 and 07-CL-6979
Matter:	Ed Mirvish Enterprises Limited et al v. Stinson Hospitality Inc. et al

Justice Newbould's Judgment/ Endorsement is attached for your perusal.

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CITATION: ED MIRVISH ENTERPRISES LIMITED et al. v.
STINSON HOSPITALITY INC. et al., 2010 ONSC 847
COURT FILE NO.: 07-CL6913 and 08-CL-7368
DATE: 20100204

**SUPERIOR COURT OF JUSTICE – ONTARIO
COMMERCIAL LIST**

RE: ED MIRVISH ENTERPRISES LIMITED and 1 KING WEST INC.

-and-

STINSON HOSPITALITY INC. and DOMINION CLUB OF CANADA
CORPORATION and HARRY STINSON

BEFORE: Justice Newbould

COUNSEL: J. Robert Verdun - Self-represented

Jessica Kimmel and Lauren Butti, for the Ira Smith Trustee and Receiver Inc.,
and Goodmans LLP

ENDORSEMENT

[1] On December 22, 2009 I released my decision dismissing the motion by Mr. Verdun for leave to commence an action against Ira Smith Trustee and Receiver Inc. and its counsel Goodmans LLP. I ordered that in light of the allegations made against the Receiver and Goodmans in their professional capacity, including allegations of fraud, they were entitled to their costs of the motion on a substantial indemnity basis.

[2] I have now received cost submissions on behalf of the Receiver and Goodmans in which substantial indemnity costs of \$76,787.03, inclusive of disbursements and GST, are sought. Mr. Verdun has delivered lengthy submissions, much of which consists of arguing the merits of his case, but which disputes the amount of time spent by Goodmans on the motion. He has submitted that there should be no costs ordered or in the alternative, if there are to be costs, they should be set at a counsel fee for one lawyer plus 4 hours of preparation time with no allowance for disbursements.

[3] I do not accept Mr. Verdun's contention that there should be no order as to costs. Mr. Verdun failed on his motion and made unfounded allegations of professional misconduct and fraud. In his written submissions on costs he continued to make allegations impugning the integrity of the respondents, including allegations that they provided false and misleading information to the court. In the circumstances, there is no basis to depart from the norm that an unsuccessful party should be required to pay costs, and there is good reason for my order that costs be paid on a substantial indemnity basis.

[4] Regarding the number of hours charged in the bill of costs submitted for approval, it must be recognized that the allegations made by Mr. Verdun on his motion for leave to commence an action spanned the entirety of the receivership as well as pre-receivership matters. The material filed by Mr. Verdun was poorly organized and difficult to follow. It was necessary for the responding parties to prepare extensive material to answer the various complaints made by Mr. Verdun and to put them in context in an understandable manner. It is all too easy after the fact to be critical of time spent by successful parties. In *Risorto v. State Farm Mutual Automobile Insurance Company* (2003), 64 O.R. (3d) 135 Winkler J., as he then was, stated:

Further, courts have repeatedly stated that the role of the court on a costs disposition is not to second-guess successful counsel on the amount of time spent on the case or the allocation of counsel to the tasks at hand. (See *Tri-S Investments Ltd. v. Vong*, [1991] O.J. No. 2292 (Quicklaw) (Gen. Div.); *Lawyers' Professional Indemnity Co. v. Geto Investments Ltd.*, [2002] O.J. No. 921 (Quicklaw), 17 C.P.C. (5th) 334 (S.C.J.)) This was a hard fought motion which, if the defendant were successful would have terminated the proceeding short of a trial. Its importance cannot be discounted after the fact.

[5] I am not in a position to second-guess the number of hours claimed in the bill of costs and on their face they do not jump out as being unreasonable.

[6] So far as the billing rates are concerned, the hourly amount claimed for the various persons involved appears reasonable. These rates are obviously based on an increase of 50% over the standard hourly rates awarded on a partial indemnity basis in accordance with the

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definition of substantial indemnity costs contained in rule 1.03 (1). Substantial indemnity rates of \$525 for Mr. Myers called in 1986, \$450 for Ms. Kimmcl and Mr. Latham called in 1991, \$375 for Ms. Creery called in 1995, \$225 for Ms. Butti called in 2002 and \$165 for Mr. Arthurs called in 2008 are reasonable.

[7] Rule 57.01(1) provides factors that a court may consider in exercising its discretion under section 131 of the *Courts of Justice Act* and rule 57.01 (4) provides that nothing in the rule affects the authority of a court to award costs on a substantial indemnity basis. Assuming that the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the matter is a factor that should be considered in setting the quantum of costs on a substantial indemnity basis, Mr. Verdun should have expected that in light of the serious nature of the allegations he was making against professional persons, those persons would not take the matter lightly and would vigorously defend the motion. Not only was the amount sought by Mr. Verdun in the millions of dollars, but had the motion for leave to commence the action been successful, the respondents would have been mired in lengthy litigation which would of necessity have involved professional people spending a great deal of time over a number of years, all of which would have been of considerable expense far greater than the expense of defending the motion for leave to commence the action against them. In my view the costs sought are of an amount that Mr. Verdun could reasonably expect to pay.

[8] I do not accept Mr. Verdun's contention that there should be no amount ordered for disbursements. The respondents produced a volume of the prior Receiver's reports and prior orders and endorsements, as well as responding motion material. These were of great assistance to the court. Mr. Verdun complains that there was no need to go to the expense of producing copies for him. I do not fault the respondents for serving Mr. Verdun with copies of the material that were filed with the court. That is the proper procedure and had copies not been served on Mr. Verdun, it may have been that he would have complained that he should have received copies. There is no basis to deny the disbursements for the material filed with the court and served on Mr. Verdun and I accept that these disbursements were reasonably occurred.

[9] Mr. Verdun contends that two counsel should not have appeared on the motion. Ms. Kimmel was senior counsel and Ms. Butti appeared as junior counsel. In a matter such as this

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with extensive documentation, it was reasonable for Ms. Butti to appear on the motion, particularly as it was she who spent the most number of hours preparing the material that was filed with the court. It would have been inefficient for Ms. Kimmel to have had to spend the extra time that would have been required if Ms. Butti had not attended on the motion.

[10] In the circumstances I fix the costs on a substantial indemnity basis, inclusive of disbursements and GST, at \$76,787.03 to be paid by Mr. Verdun to the Receiver and Goodmans within 30 days.

[11] At the time of the discharge of the Receiver, Pepall J. ordered that there be a reserve of \$100,000 to be held back from the distribution in the receivership to cover fees and costs that the Receiver might incur in connection with any motion seeking leave to commence an action against the Receiver or its counsel. The amount held back would have otherwise been paid to Segura Investments Ltd, a secured creditor with proven losses in the estate. If Mr. Verdun fails to pay the costs of \$76,787.03 now ordered to be paid by him, that amount will be paid from the \$100,000 reserve, to the detriment of Segura Investments Ltd. The Receiver asks that in those circumstances, Segura Investments Ltd. be entitled to an indemnity from Mr. Verdun for any amounts he fails to pay that is paid out of the \$100,000 reserve.

[12] This request by the Receiver is appropriate. Otherwise the cost order could be ignored by Mr. Verdun with impunity. The Receiver is discharged and it would be inappropriate to require it to chase Mr. Verdun for the costs. That was the whole purpose of the reserve being set up, to protect the Receiver and its counsel for costs incurred in any motion such as the one brought by Mr. Verdun. I therefore order as part of this cost order, that in the event any of the costs ordered to be paid by Mr. Verdun are not paid by him but are paid from the \$100,000 reserve, Segura Investments Ltd is entitled to be indemnified by Mr. Verdun for any such amount.


Newbould J.

DATE: February 4, 2010