SUPERIOR COURT OF JUSTICE

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Date: April 20, 2015

RE: DBDC SPADINA LTD. ET AL. v. NORMA WALTON ET AL.
COURT FILE NO.: CV-13-10280-00CL

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Thank you.

CITATION: DBCD Spadina Ltd et al v. Norma Walton et al, 2015 ONSC 2550

COURT FILE NO.: CV-13-10280-00CL

DATE: 20150420

SUPERIOR COURT OF JUSTICE – ONTARIO
COMMERCIAL LIST

BETWEEN:

DBDC SPADINA LTD. and THOSE CORPORATIONS LISTED ON SCHEDULE A HERETO,

Applicants

AND:

NORMA WALTON, RONAULD WALTON, THE ROSE & THISTLE GROUP LTD. and EGLINTON CASTLE INC,

Respondents

AND

THOSE CORPORATIONS LISTED ON SCHEDULE B HERETO, TO BE BOUND BY THE RESULT

BEFORE: Newbould J.

COUNSEL: *Shara Roy*, for the Applicants

Mark Dunn and Michel Schneer, for the Manager

Lisa S. Corne, for Florence Leaseholds Limited, Beatrice Leaseholds Limited and Ada Leaseholds Limited (the Dupont mortgagees)

Jack Copelovici and Bram M. Zinman, for Fox Contracting Limited, Laser Heating and Air Conditioning Inc. and Gemtec Wall & Ceiling Sytems Ltd. (the Cityview lien claimants)

Lawrence F. Wallach, for E. Manson Investments Limited, B & M Handleman Investments Limited, 1363557 Ontario Limited and Martha Sorger

HEARD: April 16, 2015

ENDORSEMENT

[1] Schonfeld Inc., the Manager of the Schedule B Companies and some of the Schedule C Companies, moves for approval of its fees and disbursements, and those of its counsel, and for approval of a methodology for the allocation of the Manager's fees and those of its counsel among the various Schedule B Companies and Schedule C Properties (the "Fee Allocation Methodology").

[2] What led to the appointment of the Manager is well described in several decisions in this matter. Suffice it to say, the 31 Schedule B companies in which Dr. Bernstein through his applicant corporations invested were terribly mismanaged by the Waltons, particularly Ms. Walton, with funds being improperly used for other purposes than contracted for, including the funnelling of money for the Walton's own personal use, and the funds being improperly co-mingled in a Rose & Thistle account. The books and records were at least two years behind when the Manager was appointed and Ms. Walton took steps to do her best to create after the fact accounting records to support her case. Unscrambling the eggs has been far from easy and it has been very expensive.

[3] The properties were in various stages of development. The Manager conducted a claims process and has sold 21 of the Schedule B properties for some $165 million, paying off mortgages of some $159 million. The Manager managed the properties, primarily through a property management company which it supervised. Because many of the properties did not have sufficient cash flow to fund their operations, the Manager was required to negotiate a borrowing arrangement with the applicants.

[4] The Manager's fees for the period from November 5, 2013 to December 31, 2013 were approved by order of Justice Wilton-Siegal dated April 25, 2014. The Manager's fees for the period from January 1, 2014 to May 31, 2014, and the fees of the Manager's counsel, Goodmans LLP, for the period from December 9, 2013 to May 27, 2014, were approved by order of Justice Brown dated June 18, 2014. The motion now is to approve fees of the Manager from June 1,

2014 to November 30, 2014 and of its counsel from May 28, 2014 to November 30, 2014, totalling approximately $1.71 million.

[5] The Waltons were ordered on several occasions to pay the Manager's fees and expenses. They failed to do so. As authorized by the order appointing the Manager, the Manager has been paid its fees and expenses, and those of Goodmans LLP, on a monthly basis prior to Court approval. These payments were funded by:

(a) a loan from the applicants (which was secured by the Manager's charge), which has since been re-paid; and

(b) the proceeds generated by the sale of certain Schedule B Properties.

[6] Pursuant to the order appointing the Manager, the Manager was granted a super-priority charge to secure its costs and fees. However, after the order was granted, a number of mortgagees objected to the priority of the Manager's charge. Following negotiations between these mortgagees, the applicants and the Manager, consent orders dated December 24, 2013, January 6, 2014 and January 20, 2014 were made which, among other things, provided that the Manager's charge would be subordinate to prior ranking security on the properties involved.

[7] The Manager's position is that given the number of companies subject to these proceedings and the interconnectedness of the Schedule B and C Companies and their respective properties, it would have been impractical and very expensive to track fees separately for each of the properties. To allocate the fees to each individual company, the Manager has proposed that the fees paid and those to be paid in these proceedings be allocated to the Schedule B Companies, the Schedule C Properties and the Front Street Property based on the Fee Allocation Methodology. The Fee Allocation Methodology calculates a weighting for each Company, based upon a series of categories that, taken together, constitute a proxy for the effort and involvement of the Manager and its counsel with the various Properties.

2. The Fee Allocation Methodology includes the following six separate categories:

(a) Active Property Management (40%) – relates to the initial engagement of the Manager, accounting and analysis, operational management, financing,

development of a marketing plan, and all other aspects of managing the property (other than the sales process);

(b) Negotiated Agreements of Purchase and Sale (10%) – relates to the negotiation of agreements of purchase and sale that advance to the due diligence stage, whether or not they are completed;

(c) Legal Complexity (25%) – relates to the level of legal work involved, including the complexity of real estate transactions, sale approval motions and other litigation;

(d) Claims Process (10%) – relates to the level of effort involved with respect to conducting a claims process for a particular property, where applicable;

(e) Manager Interaction with Stakeholders (10%) – relates to properties carved out where key stakeholders, including mortgagees, tenants and/or shareholders, of such Properties required regular reporting; and

(f) Property Value (5%) – relates to an adjustment reflecting the relative property value of a particular Property.

[8] The Fee Allocation Methodology assigns a value to each of the above categories on a scale of 1 to 3 (with 1 being little, 2 being moderate, and 3 being complex or high) for each property to reflect the amount of time and effort the Manager and/or its counsel expended for the applicable Property in respect of each such category, other than the "Property Value" category which would be assigned a value on a scale of 1 to 3 based on the value of the applicable property (with 1 applying to property values less than $5 million, 2 applying for property values between $5 million and $10 million, and 3 applying for property values greater than $10 million).

[9] The other factor affecting the total amount of an allocation to a property is the period of time that is applied to it.

[10] The applicants support the requests of the Manager. Mr. Wallach, who acts for mortgagees of ten properties, also supports these requests.

[11] The Dupont mortgagees oppose the approval of the Manager's fees and disbursements and also oppose the Fee Allocation Methodology. They say the accounts do not separate out the work done on each property, and therefore they are unable to know exactly what amount of time was spent by the Manager or its solicitors on the Dupont property. They also take the position that the Manager has overstated the extent of the work required and carried out on the Dupont property by the values of 2 or 3 ascribed to the various categories in the Fee Allocation Methodology. They also contend that even if the fees and the Fee Allocation Methodology are approved, the charges should be allocated in some marshalling fashion so that the properties without any encumbrances should bear the Manager's fees and disbursements.

[12] The Cityview lien claimants do not opposed the overall fees and disbursements of the Manager but say that the values used by the Manager for the various categories are too high in some cases and that there has been duplication in the way that work is referred to in more than one category. They also take the position that the Manager should not be able to charge any of its fees and disbursements to a trust fund created by court order that replaced the claims for liens on the Cityview properties.

Analysis

[13] Allocating expenses to separate properties involved in a financial meltdown is no easy matter. Recently, in *Royal Bank of Canada v. Atlas Block Co.*, 2014 ONSC 1531 at para. 43 (Comm. List), a case in which some of the costs of a receivership had to be shared between two mortgagees involving more than one property, Brown J. (as he then was) reviewed the authorities and summarized them. He stated:

> 34. As to the allocation of the fees, the general principles governing the allocation of receiver's costs can be briefly stated:
>
> (i) The allocation of such costs must be done on a case-by-case basis and involves an exercise of discretion by a receiver or trustee;

> (ii) Costs should be allocated in a fair and equitable manner, one which does not readjust the priorities between creditors, and one which does not ignore the benefit or detriment to any creditor;
>
> (iii) A strict accounting to allocate such costs is neither necessary nor desirable in all cases. To require a receiver to calculate and determine an absolutely fair value for its services for one group of assets vis-à-vis another likely would not be cost-effective and would drive up the overall cost of the receivership;
>
> (iv) A creditor need not benefit "directly" before the costs of an insolvency proceeding can be allocated against that creditor's recovery;
>
> (v) An allocation does not require a strict cost/benefit analysis or that the costs be borne equally or on a pro rata basis;
>
> (vi) Where an allocation appears prima facie as fair, the onus falls on an opposing creditor to satisfy the court that the proposed allocation is unfair or prejudicial.

[14] In *Hunjan International Inc., Re*, (2006), 21 C.B.R. (5th) 276, C.L. Campbell J. made an apt statement of how creditors will look at allocations from their own perspective. He stated:

> **71** I am mindful that each creditor from its own particular perspective will have a view of what is or is not fair in terms of allocation. There is unlikely to be one specific method that can objectively point to absolute fairness to all parties. The exercise is inevitably one of viewpoint for the creditor and exercise of discretion for the Court.

[15] Ms. Corne for the Dupont mortgagees relies on a statement in *Confectionately Yours Inc., Re* (2002), 36 C.B.R. (4th) 200 (Ont. C.A.) of Borins J.A., particularly the last part of his statement in discussing the accounts of a receiver:

> **37** As for the procedure that applies to the passing of the accounts, Bennett indicates at p. 460 that there is no prescribed process. Nonetheless, the case law provides some requirements for the substance or content of the accounts. The accounts must disclose in detail the name of each person who rendered services, the dates on which the services were rendered, the time expended each day, the rate charged and the total charges for each of the categories of services rendered. See, e.g., *Hermanns v. Ingle* (1988), 68 C.B.R. (N.S.) 15 (Ont. Ass. Off.); *Toronto*

> *Dominion Bank v. Park Foods Ltd.* (1986), 77 N.S.R. (2d) 202 (S.C.). The accounts should be in a form that can be easily understood by those affected by the receivership (or by the judicial officer required to assess the accounts) so that such person can determine the amount of time spent by the receiver's employees (and others that the receiver may have hired) in respect to the various discrete aspects of the receivership.

[16] I do not think this statement is very helpful to our situation. It was a general statement in a case in which the receiver was dealing with one business. The Manager in this case was dealing with approximately 40 companies and different properties and facing issues common to them all, such a co-mingling of funds and tracing funds through different accounts.

[17] I agree with the Manager that it would have been extremely costly and time consuming, and somewhat artificial, to keep dockets as suggested by Ms. Corne. As an example, spending time tracing money affected all of the properties, and it would not have been possible to apportion such time in any meaningful or accurate way. Docket entries refer to lawyers who have described in block form several different things done on any particular day, some of which refer to the Dupont property in some way. Only the total time spent by the lawyer for that day is contained in the docket entry. For all of the lawyers and professionals in the Manager's office to take the time each day to separate out the time for each task recorded, even if it could have been done, would have involved enormous time and expense.

[18] Ms. Corne for the Dupont mortgagees relies on the recent case of *Bank of Nova Scotia v. Diemer*, 2014 ONCA 851 involving the receiver of a cattle farm, in which Justice Pepall was critical of the amount of time spent by counsel for the receiver. Pepall J.A. made statements that spoke to the necessity of not being slavish to hourly rates and hours docketed. She stated:

> **45** In my view, it is not for the court to tell lawyers and law firms how to bill. That said, in proceedings supervised by the court and particularly where the court is asked to give its *imprimatur* to the legal fees requested for counsel by its court officer, the court must ensure that the compensation sought is indeed fair and reasonable. In making this assessment, all the *Belyea* factors, including time spent, should be considered. However, value provided should pre-dominate over the mathematical calculation reflected in the hours times hourly rate equation. Ideally, the two should be synonymous, but that should not be the starting

> assumption. Thus, the factors identified in Belyea require a consideration of the overall value contributed by the receiver's counsel. The focus of the fair and reasonable assessment should be on what was accomplished, not on how much time it took. Of course, the measurement of accomplishment may include consideration of complications and difficulties encountered in the receivership.

[19] Ms. Corne says that because of the way in which the Manager and its solicitors kept dockets, it is not possible to know exactly what time was spent on the Dupont properties and therefore not possible to know if the principles espoused by Pepall J.A. have been met. I disagree. It is possible to measure what has been accomplished and no one has suggested the Manager or its counsel spent too much time on all of the various things that have had to be done or that their rates are too high. What the Dupont mortgagees complain of is that the form of the accounts does not permit one to identify how much time was spent at any one time on the Dupont property and issues arising that affected the property. That is the situation that governs whenever an allocation of expenses needs to be made.

[20] I also agree with the Manager that it is too late for the Dupont mortgagees to now complain about the form of the dockets kept by the Manager and its counsel. The Dupont mortgagees were aware of these proceedings from the outset. They retained their counsel in April, 2014. Accounts of the Manager and its counsel in the same form as the accounts now before the court were approved by Wilton-Siegel J. on April 25, 2014 and by Brown J. on June 18, 2014. Counsel for the Dupont mortgagees did not object to these accounts. The first complaint by the Dupont mortgagees to the accounts came in a letter from Ms. Corne on December 9, 2014 when she asked for a breakdown from dockets that contained blocks of time for work done on a variety of properties or the time spent on the Dupont property. On December 14, 2014 Mr. Dunn replied that the Manager was of the view that a strict accounting to allocate time among the assets of the receivership would not be cost-effective and would drive up the overall cost of the proceeding, and that the proposed method of allocating the costs was fair.

[21] To recount here everything that the Manager and its counsel have done for the period for which approval of their accounts is sought would be time consuming indeed. I am quite satisfied that what is charged is fair and reasonable. It is one of those situations described by Pepall J.A.

in *Diemer* in which the docketed charges are synonymous with what is a fair and reasonable charge. The accounts are approved.

[22] The Dupont mortgagees are critical of the way that the Fee Allocation Methodology has been applied to the Dupont property. Reliance is placed on an affidavit of Mr. Jack Brudner. Millwood Management Limited administered the mortgages on the Dupont property on behalf of the Dupont mortgagees and Mr. Brudner is the manager of Millwood. He was a solicitor until his retirement in January 2010. His affidavit was filed to support an argument that the Manager was incompetent, did things that were not required and failed to do things that should have been done.

[23] I am afraid I place little reliance on Mr. Brudner's evidence. It is for the most part hearsay and involves assertions with little or no evidence to support the assertions. For example, Mr. Brudner asserted that there was no reason for the Manager to undertake most of the repairs to the property that were made, and he said that "To the best of my knowledge, without inquiry, all of the rented premises were code compliant." This is no cogent evidence. The Manager in his supplemental report made in response to Mr. Brudner's affidavit provided details of what was required and why. In that supplemental report, the Manager disputed substantially all of Mr. Brudner's allegations and provided details on many of them that indicated that Mr. Brudner's affidavit was unreliable. I accept the supplemental report of the Manager and do not accept Mr. Brudner's assertions.

[24] The Cityview lien claimants are also critical of the way that the Fee Allocation Methodology has been applied to the Cityview properties. There was one Cityview property in the process of being severed when the Manager was appointed and after the severance was completed, the two separate Cityview parcels were sold by the Manager.

[25] The first complaint of the Cityview lien claimants is that that there is "little or no evidence as to the actual time spent…on account of the Cityview Property." This is a reference to the fact that neither the Manager nor its counsel tracked its time separately for each property. This is the same complaint made by the Dupont mortgagees, which I have previously discussed and not accepted. Further, the Manager's docketing practices have been consistent throughout

this mandate and have been approved several times. The Cityview lien claimants have not objected to any of the Manager's prior fee approval motions despite the fact that time was not broken out by property. As with the Dupont mortgagees, I think that the time to challenge the Manager's docketing practices has passed.

[26] In his factum, Mr. Copelovici contended that the Fee Allocation Methodology is arbitrary and not capable of being reviewed. However in argument, he said that his clients do not see any flaw in the Fee Allocation Methodology but their complaint is in the weighting given to the Cityview properties. In any event, I do not agree that the Fee Allocation Methodology is arbitrary or incapable of being reviewed. The various categories and the different levels of value that can be applied to each category are logical and appear to make sense having regard to the various tasks that the Manager has had to undertake. I agree that when one looks at the details of how the amounts are ascribed to each property, it is somewhat complicated, but it is comprehensible and understandable.

[27] Part of the argument of the Cityview lien claimants is that work ascribed to Active Property Management, being 40% of the weighting, is also ascribed to Negotiating Agreements of Purchase and Sale having a 10% weighting, and thus there is "overlap". I do not accept that. The example given of difficulties with a tenant involved property management issues to be sure, but it also complicated the sales process. The same can be said with respect to complaints about "overlapping" involving severance issues and legal complexity. Much of the complaints involve speculation, although counsel for the Cityview lien claimants cross-examined the Manager and undertook written interrogatories. I do not accept that any cogent argument supported by evidence has been made to criticize the way in which the Fee Allocation Methodology has been applied to the Cityview properties.

[28] Each case is different. This case involves unusual complexity involving the Manager's responsibility for 31 Schedule B properties and several Schedule C properties, all of which were improperly run by the Waltons before the Manager was appointed. The Manager's task was made no easier by challenges raised from the beginning to the end. I accept that the Fee Allocation Methodology in this case allocates costs in a fair and equitable manner and that the discretion of the Manager has been exercised fairly. The fact that one or more interested parties

is unhappy with the allocation is perhaps understandable but no basis in this case to change what the Manager has proposed to allocate the costs.

[29] The Dupont mortgagees have argued that if the Fee Allocation Methodology is upheld, the costs should be allocated in accordance with principles of marshalling. Ms. Corne asserts that as the Manager has a charge against all properties and her clients have a charge against only the Dupont property, the Manager should allocate the costs and recover from those properties for which there are no other encumbrances after paying out the prior mortgagees. I do not accept this argument.

[30] Ms. Corne relies on the doctrine of marshalling as discussed in *Snell's Equity*, 32nd ed. which states that where there are two creditors of the same debtor, one creditor having a right to resort to two funds of the debtor for payment of his debt and the other creditor having a right to resort to one fund only, the court will "marshal", that is to say arrange the funds so that both creditors are paid as far as possible. However, I do not think it can be said that the Manager is a creditor of the Dupont property owner. The Manager is a court appointed officer with a charge for its fees, which are to be approved by the Court. Even if the Manager could be considered a creditor, it would not be a creditor in the sense involved in the doctrine of marshalling, which involves a pre-existing secured creditor of a debtor against whom there are other pre-existing secured creditors. As pointed out in *Snell's Equity,* the doctrine cannot be applied against a purchaser of one of the properties, which is a recognition that the doctrine applies only to two secured creditors existing at the time of the insolvency.

[31] Moreover, the doctrine of marshalling applies to security granted by one debtor to two creditors, one of whom has been granted more than one parcel by that debtor as security. Here the effect of what the Dupont mortgagees seek would be to cause the pooling of funds of other debtors, not the Dupont property owner. That would not be marshalling. Moreover, it would be unfair to the equity holder of those properties in which there has ended up being equity, being Dr. Bernstein. It would not be a fair and reasonable allocation of costs, as properties in which there is no equity, such as the Dupont property, would bear none of the costs of the Manager, even though these properties with no equity have required the intervention of the Manager and its counsel.

[32] The Cityview lien claimants claim that the Manager has no right to the funds that remain after the two Cityview properties were sold, the effect of which would be to provide them with priority over the Manager's charge. I do not accept this contention of the Cityview lien claimants.

[33] The November 5, 2013 order appointing the Manager provided for two super-priority charges to secure the Manager's fees and disbursements, the fees and disbursements of the Manager's counsel and amounts borrowed to fund the operation of the Schedule "B" Companies. The Cityview lien claimants contend that there was no authority for the Court to make such an order in light of provisions of 77 of the *Construction Lien Act* which provides that liens "have priority over all judgments, executions, assignments, attachments, garnishments and receiving orders except those executed or recovered upon before the time when the first lien arose". In this case the liens arose before the appointment of the Manager. Reliance is placed on *Baxter Student Housing Ltd. v. College Housing Cooperative Ltd.* (1976) 2 S.C.R. 475 which held that an order appointing a receiver and providing priority to money paid to the receiver over "any and all other charges or encumbrances... affecting the lands" was invalidly made as it conflicted with rights of lien holders under the Manitoba *Construction Lien Act.*

[34] The Manager's charge was granted in the order of November 5, 2013 appointing the Manager. It provided that the Manager's fees and disbursements and those of its counsel "shall form a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise". The Cityview lien claimants were notified of the Manager's appointment by letter dated November 28, 2013, which also specifically stated that the November 5 order provided for "charges that rank ahead of pre-existing security interests in the [Schedule "B" Companies] property." The Cityview lien claimants took no steps to vary or set aside the November 5, 2013 order, or challenge the Court's jurisdiction to grant priority to the Manager's charges at any time. Their argument was first made in their factum dated April 8, 2015.

[35] Rule 37.14(1) provides that a party affected by an order obtained on motion without notice may move to set it aside or vary it by a motion "that is served forthwith after the order

comes to the person's attention and names the first available hearing date that is at least three days after the service of the notice of motion". As the November 5, 2013 order was received by the Cityview lien claimants by early December, 2013, any motion to vary it was required to be served "forthwith" thereafter. I dealt with this earlier in a similar motion by the Dupont mortgagees and my comments there are equally applicable to the Cityview lien claimants. See *DBDC Spadina Ltd. v. Walton*, 2015 ONSC 870 in which I stated:

> **15** In *Muscletech Research and Development Inc. (Re)* (2006), 19 C.B.R. (5th) 54 in discussing a comeback motion relating to a CCAA Initial Order, Farley J. stated "Comeback relief, however, cannot prejudicially affect the position of parties who have relied *bona fide* on the previous order in question." I agree entirely with that statement and in my view it is equally applicable to a motion to vary a receivership order, which is essentially what the November 5, 2013 order was, the word Manager instead of Receiver being used in an attempt to put a better face on the order to the marketplace.
>
> **16** The same reasoning underlies the dictates of rule 37.14 that requires a motion to vary to be brought "forthwith" after the affected party learns of the rule. A court can vary the strict provisions of the rule in appropriate circumstances, but should be loath to do so if in the interval persons relying on the order would be materially prejudiced.

[36] In this case, the Cityview lien claimants knew that the Manager's charge ranked ahead of their liens. They knew that the Manager and its counsel were working to maximize the value of the Cityview property. The Manager also borrowed funds that were required to complete the severance of the Cityview property, which added value for the benefit of all stakeholders, including the Cityview lien claimants. Knowing all of this, the Cityview lien claimants did nothing to challenge the Manager's fees until the Manager's mandate with respect to the Cityview Property was essentially complete. It would not be equitable for the Cityview lien claimants to now challenge the Manager's charges at this late date.

[37] Moreover, when 9-11 Cityview was sold, it was approved by two orders of Justice Spence dated February 21, 2014. The Cityview lien claimants consented to the February 21 orders on the condition that amounts sufficient to satisfy the Cityview liens were held back from the sale proceeds pending further order of the Court. A total of $969,583.99 was ordered to be held in trust. There is now some $805,000 left.

[38] The orders of Justice Spence provided that all encumbrances against the lands to be sold were to be lifted and that the net proceeds of the sale were to be held in trust by the Manager pending further order of the Court and that all encumbrances, which included the Manager's charges, would attach to the net proceeds from the sale "with the same priority as they had with respect to the [lands sold] immediately prior to the sale…". Thus the orders consented to by the Cityview lien claimants provided for the same priorities as prior to the sale. Those priorities included the Manager's charges under the November 5, 2013 order appointing the Manager.

[39] The Cityview lien claimants also argue that if their position opposing the Fee Allocation Methodology is not accepted, an order should be made that the Manager's fees with respect to the Cityview property should be paid on a proportionate basis by all creditors regardless of priority. If that argument were accepted, it would mean that the bulk of the costs would come out of the pocket of the mortgagee of the Cityview property, being a Dr. Bernstein company. I do not accept this contention.

[40] Dr. Bernstein's corporation had two mortgages on the Cityview property. There was a dispute between the Cityview lien claimants and the mortgagee as to the priorities for payment from the trust funds held following the sale of the Cityview property. In a settlement agreement of October 15, 2014, between the mortgagee and the Cityview lien claimants, the parties agreed on the priorities of the Bernstein first and second mortgages and the lien claims. The minutes of settlement resolved the priorities as follows:

(a) The parties agreed that the first mortgage had priority in its entirety over any interests that the Cityview lien claimants may assert in the surplus sale proceeds;

(b) The parties agreed that the second mortgage, less $20,000, had priority over any interests that the Cityview lien claimants may assert in the surplus sale proceeds. It was also agreed that the Cityview lien claimants' claims would have priority over the final $20,000 of the second mortgage.

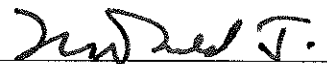
[41] The settlement agreement resolved issues between the Bernstein mortgagees and the Cityview lien claimants as to the right to the funds held in trust. What the Cityview lien

claimants now seek in requesting the Manager's fees be split in a proportionate basis would be contrary to the settlement agreement.

Conclusion

[42] The fees and disbursements of the Manager and its counsel for the period sought are approved.

[43] The Fee Allocation Methodology is also approved.



Newbould J.

Date: April 20, 2015