

CITATION: PACE SECURITIES CORP. et al v. FIRST HAMILTON HOLDINGS INC. et al.,
2021 ONSC 6956

COURT FILE NO.: CV-20-00641059-00CL and CV-20-00641372-00CL

DATE: 2021-10-19

SUPERIOR COURT OF JUSTICE – ONTARIO (COMMERCIAL LIST)

RE: IN THE MATTER OF THE BUSINESS CORPORATIONS ACT, R.S.O. 1990,
C. B.16, AS AMENDED

AND:

IN THE MATTER OF THE CANADA BUSINESS CORPORATIONS ACT,
R.S.C., 1985, C. C-44, AS AMENDED

AND:

IN THE MATTER OF A WINDING UP OF PACE SECURITIES CORP., PACE
FINANCIAL LIMITED, PACE INSURANCE BROKERS LIMITED AND
PACE GENERAL PARTNER LIMITED

BEFORE: Penny J.

COUNSEL: Massimo Starnino and Jesse Wright for Representative Counsel for the Investor
Claimants

Wayne Gould on his own behalf

David Miller on his own behalf

Barry Papazian for Mr. Ariel Simms (PSC investment advisor)

HEARD: October 18, 2021

ENDORSEMENT

- [1] Representative Counsel was appointed to represent certain investors in preference shares of the respondents by the August 6, 2020 order of The Honourable Justice Hailey. The shares turned out to be worthless. Representative Counsel was able to negotiate a settlement with potential defendants in what otherwise would have been an investor-based claim for losses arising out of the failed investment. The settlement, of some \$40 million, was approved by the March 2, 2021 order of Justice Koehn. Representative Counsel now seeks payment of its professional costs and approval of its proposed scheme of distribution to the investors.

- [2] Specifically, this motion is for an order approving Representative Counsel's Third Report, approving payment of Representative Counsel's professional costs out of the settlement fund, directing the transfer of the balance of the settlement fund to Industrial Alliance, Insurance and Financial Services Inc. as distribution agent, to be distributed in accordance with the requested pro rata scheme of distribution and discharging and releasing Representative Counsel from its appointment.
- [3] Notices of objection to the professional costs and proposed scheme of distribution were filed by two investors: Mr. Miller and Mr. Gould.
- [4] There are only two points of contention.
- [5] First, both objectors oppose the proposed manner of allocating the professional costs among the 610 investors. Representative Counsel proposes that the professional costs be paid off the top, followed by the pro rata distribution of the remaining settlement fund. Both objectors argue for some form of flat fee allocation of professional costs to avoid, or reduce, what they alleged would be "cross-subsidization" of the smaller investors by the larger investors under Representative Counsel's proposal.
- [6] Second, Mr. Gould opposes the proposed fee of \$6 million requested by Representative Counsel. He maintains the fee should be capped at \$5 million.
- [7] For the reasons that follow, Representative Counsel's motion is granted in full. The requested order shall issue.

The Allocation of Professional Costs

- [8] Mr. Miller argues that each and every claimant "household" (of which he says there are 503) contributed to incurring the professional costs in equal portions. There was and is no difference among claimant households in this regard. Each claimant household contributed equally to incurring the cost, thus it is reasonable that each claimant household should pay an equal share of the costs. Thus, Mr. Miller argues for a flat or equal fee allocation of professional costs based on a mathematical formula in which the total amount permitted for professional costs is divided by total number of investor households.
- [9] From this perspective, the deduction of professional costs "off the top" and pro rata distribution thereafter results in an alleged "cross-subsidization" of small investors by large investors, which, he says, is "unfair". The result is illustrated, at least directionally, in Figure 4 to Mr. Miller's submission. Under proportional allocation, a \$5,000 investor household pays \$640 toward the professional costs (for a net recovery of \$3,628); a \$750,000 investor household pays \$96,038 (for a net recovery of \$544,213). Under Mr. Miller's flat fee allocation approach, each investor household pays \$11,928 (for a net recovery of \$0 for the \$5,000 investor household and \$628,323 for the \$750,000 investor household). A by-product of this approach is that investor households of \$15,000 or less would get nothing, or next to nothing, from the settlement fund.
- [10] Mr. Gould proposes a hybrid approach, in which 70% of the professional costs are allocated pro rata and 30% are allocated on a flat fee basis. Mr. Gould's flat fee allocation is by

individual investor, however, not by household. Under his proposal, a \$5,000 investor would pay a combined proportional/flat fee allocation of \$2,834 (for a recovery of \$1,431), and a \$750,000 investor would pay \$58,709 (for a recovery of \$581,041). Although there is some dispute about this, Mr. Gould maintains that under his “hybrid” approach, every investor gets at least some recovery.

- [11] Neither Mr. Miller nor Mr. Gould were able to offer any precedent for either of these approaches.
- [12] Settled authority establishes that when allocating a limited fund, courts will apply the approach which is the most just, convenient and equitable in the circumstances: *Nortel Networks Corp., Re*, 2015 ONSC 2987 (Commercial List), leave to appeal denied 2016 ONCA 332. Similarly, in the class actions context, courts will approve a plan to allocate funds where it falls within a zone of reasonableness and is fair and in the best interests of the class: *Mancinelli v. Royal Bank of Canada*, 2018 ONSC 4192 (Sup. Ct.) at para. 496.
- [13] In the absence of a reliable juridical basis to differentiate between claimants, the jurisprudence calls for a ratable distribution of the fund. For example, in the *Nortel* proceedings, where Newbould J. was required to determine the basis for allocating \$7.3 billion among the various Nortel debtor estates, having found that the Nortel group had not contractually stipulated a method to allocate the funds, the court defaulted to a pro rata allocation, having regard to the “fundamental tenet of insolvency law that all debts shall be paid *pari passu* and all unsecured creditors shall receive equal treatment.
- [14] In this case, there is a limited fund, the claimants seeking payment from that fund cannot be made whole, there is no agreement, and there is no ready and/or reliable way to differentiate between investor claimants’ entitlement to the settlement fund. These considerations strongly support a pro rata allocation of the settlement fund on the basis of what each claimant invested. In addition, a pro rata allocation is consistent with the two principles underpinning Representative Counsel’s approach to advocating for the investors, that:
 - (1) each investor has a valid claim because the preference shares were not an appropriate investment for any investor and, accordingly, any proposal to segregate or “bucket” the investors should be rejected; and
 - (2) timeliness is of critical importance to the investor claimants and that efficient and expedited procedures were required to achieve a timely resolution of outstanding issues.
- [15] A pro rata allocation of professional costs accords with these principles by ensuring that each claim results in a common, proportionate recovery and by avoiding any delays and additional costs that would arise if an attempt were made to more critically examine and differentiate the claims of each investor.
- [16] A pro rata allocation also falls within a zone of reasonableness. The proposed allocation of the settlement fund will result in each investor receiving in excess of 70 cents on the dollar based on their original investment. Even if one were to make the inquiries necessary to

distinguish or “bucket” investors into different groups, the quantification of the premium or discount to be applied to particular cohorts of investors would necessarily be arbitrary.

- [17] Where professionals such as lawyers or accountants have contributed to the creation of a fund, the associated professional costs typically constitute a charge against the fund and are paid “off the top” prior to any distribution of net proceeds. Where costs are paid in priority this way, the effect is that the cost burden is borne by each claimant rateably with their entitlement to the fund. This approach to professional fee payment has been adopted in dozens of group investor claims.
- [18] The mandate of Representative Counsel was to represent all investors with claims. Representative Counsel sought recovery for the benefit of all investors. Small investors’ claims formed a material part of the demand that was advanced in these proceedings. Indeed, “smaller” investors made up the bulk of the investors advancing claims. It is highly doubtful that the settlement would have been achieved without them, or if a settlement was possible, that it would have been anywhere near as beneficial to the investors as a whole.
- [19] I agree with Representative Counsel that in order to depart from the pro rata allocation approach to professional costs, the objectors must identify a persuasive juridical basis to distinguish between different investor claims. The distinction that the objectors offer is the amount invested. They distinguish between larger investors (who they suggest saved for years and invested their retirement savings) and smaller investors (who they suggest can afford their losses and fall back on other investments).
- [20] I cannot accept that the size of an investment is juridically relevant to the manner in which professional costs should be allocated between members of the investor as a group. Larger investors have more to lose, and therefore more to gain by incurring the cost of pursuing their claims. The so-called “reliance” factor between large and small investors is entirely speculative, being unproved, and would require enquiries into the investing circumstances of each claimant, an enquiry that the settlement was, in part, designed to avoid and which would be costly and time-consuming.
- [21] I find the objectors’ proposed use of flat fee allocations of the professional cost of achieving the settlement, in any form, to be arbitrary and unfair.
- [22] I therefore approve the approach to the treatment of professional costs advanced by Representative Counsel, as being not only in keeping with well-established precedent, but as being fair and reasonable in the circumstances.

Representative Counsel’s Fees

- [23] The August 6, 2020 order of Hainey J. provided for the payment of professional costs in para. 9:

THIS COURT ORDERS that the fees and expenses of Representative Counsel shall be paid out of the funds recovered for the Investor Claimants (if any) pursuant to or by virtue of this appointment, in accordance with terms to be agreed with the members of the Representative Committee and approved by this Court in the ordinary course, or, in the

absence of an agreement, as directed by further order of this Court, having regard to the resources invested, risk assumed and results achieved by Representative Counsel, together with such other considerations as this Court determines to be relevant.

- [24] Representative Counsel asks for a fee of \$6 million.
- [25] Mr. Gould submits that Representative Counsel's fees and expenses, including HST, be limited to a maximum of \$5,000,000. According to Mr. Gould, during the mediation process, the Representative Committee (of which he was a member) was provided with a dollar value from Representative Counsel of the amount of fees/expenses/HST to be included in the settlement calculations for negotiation purposes. That number, he says, was \$5 million. From his perspective, this figure "served as the key component of the mediation position that determined the settlement expectations for investor claimants".
- [26] The test for approval of professional fees in similar contexts is whether they are fair and reasonable in all the circumstances.
- [27] In the class action context, the court may consider a number of factors when determining whether counsel's fees are fair and reasonable, including:
- (a) the factual and legal complexities of the matters;
 - (b) the risks assumed in pursuing the litigation, including the risk of nonpayment and the risk of loss at trial;
 - (c) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement;
 - (d) the amount in issue;
 - (e) the result achieved;
 - (f) the importance of the matter to the class members and to the public;
 - (g) the degree of responsibility assumed and the skill and competence demonstrated by class counsel;
 - (h) the ability of the class to pay;
 - (i) the expectations of the representative plaintiffs, the class and class counsel as to the basis for calculating fees and the amount of fees; and
 - (j) whether the fee maintains the integrity of the profession.
- [28] In some Ontario class proceedings, judges have gone so far as to apply a presumption that the percentage contingency fee (up to one third) provided in class counsel's retainer agreement with the representative plaintiff will be approved. There is no agreement on a percentage fee in this case, although the evidence is that when Representative Counsel was

first approached to take on this case, a 30% contingency fee was the initial basis upon which it was to be compensated. Our courts have also applied a multiplier approach to test the reasonableness of a proposed fee: a multiplier of 2.5 times docketed time is well within the range accepted in the case law and may well be considered “low” in some circumstances. A multiplier of up to 4 times docketed time was recently described as “presumptively fair” and courts have accepted multipliers in excess of 7 times docketed time. Regardless of whether a fee is calculated as a percentage of recovery or as a multiplier of a base fee, the premium must result in fair and reasonable compensation.

- [29] Here, the “premium” requested by Representative Counsel represents a 1.62 multiplier over docketed time at its regular hourly rates.

Resources Invested

- [30] Due to the breadth of the case and the need to move it forward quickly, a significant team of professionals was required to work on the matter over the course of Representative Counsel’s engagement. In order to achieve a resolution of the investor claims in a very short time frame, the file demanded serious front-end loading of legal work and became very time and resource intensive.
- [31] In total, as of October 4, 2021, Representative Counsel’s billing professionals had spent approximately 5,240 hours in respect of the Representative Counsel engagement. This time has a total value, at Representative Counsel’s usual hourly rates, of approximately \$2.95 million.
- [32] Awarding professional costs of \$6 million (inclusive of disbursements and taxes) gives rise to a multiple of approximately 1.6 times the standard Paliare Roland hourly rates. Expressed as a percentage of total recovery, the proposed professional costs, inclusive of disbursements and taxes, represent only 15% of the settlement fund.
- [33] Whether calculated as a percentage or by using a multiplier, the professional costs requested are well within the range accepted in the case law and are fair and reasonable having regard to the risks assumed and the results achieved by Representative Counsel.

Risks Assumed

- [34] The risks of an action are to be assessed at the time the action was commenced and are not to be discounted merely because the parties chose to proceed down the path of a negotiated settlement. This was a legally and factually complex case in which Representative Counsel took on significant risk. The case involved claims grounded in negligence, group enterprise liability and oppression—heads of liability that, as applied to investor loss cases, are factually driven and which often present difficult issues of proof. This case also raised significant procedural challenges because, while the investors had a number of common issues, they also had very different circumstances that would present difficulties at trial.
- [35] Had representative Counsel not negotiated a favourable settlement, it would have been required to prosecute an expedited but long and difficult trial. It would have had no

guarantee of material success. If the claims were dismissed, Representative Counsel would have got nothing for its investment of time, professional skill and judgment.

- [36] In addition to the risk associated with proving the investors' claims, Representative Counsel also took on the risk of being unable to enforce any judgment awarded. There was limited insurance available to pay the investors' claims and the Credit Union itself was subject to regulatory proceedings of uncertain duration and outcome.
- [37] Finally, this case demanded material front end loading of legal work. The fact that these costs had to be incurred over the period of less than a year reflects a material redirection of resources from ordinary fee-for-service files and an enhanced risk on the part of the firm relative to contingent fee cases where the work can be spread out over a longer period of time. Representative Counsel proceeded along a dual path – litigation and negotiation. This was a necessary and reasonable approach, given that the willingness of a defendant to settle very much depends on a credible litigation threat.
- [38] Representative Counsel faced, in short, very serious risks relative the usual “time and disbursements” approach to billing.

Results Achieved

- [39] The results achieved by Representative Counsel for the investors can only be described as excellent. The settlement was achieved within approximately one year of Representative Counsel being contacted and less than one year after its appointment. Further, before costs, the settlement amount is in excess of 80% of the principal amount invested in the preference shares by the investors. If the amount and allocation of professional costs proposed by Representative Counsel are approved, the investors will still recover more than 70% of the amount invested by them in respect of their preference shares. I tend to agree that, in liquidation proceedings, it is somewhat rare for investor claims to be resolved so quickly and for investors to achieve a 70% net recovery.

Communications with the Representative Committee

- [40] I have reviewed Mr. Gould's allegations regarding the estimation of costs during the lead up to the mediation. I have also reviewed Mr. Rosenberg's response to these allegations. Without getting into the details of the Representative Committee's expectations (of which there is no evidence but Mr. Gould's own), I am satisfied that the estimates Mr. Gould relies on, taken in proper context, are not reasonably capable of supporting a promise that Representative Counsel's fees would, in no circumstances, exceed \$5 million.
- [41] For all these reasons, I approve Representative Counsel's requested professional fee of \$6 million as fair and reasonable in all the circumstances.

The Terms of the Order Sought

- [39] I am satisfied that the other terms of the order sought on this motion are appropriate and warranted. That order shall issue.

Scheduling

- [42] At the end of the hearing, I confirmed an appointment for counsel involved in an issue relating to the form of the release for settling defendants, if they need it, for 30 minutes on October 25, 2021 at 9:30. Counsel shall arrange the Zoom co-ordinates for this attendance and, in co-ordination with the Commercial List office, send the necessary invitation to the presiding judge.

A handwritten signature in black ink, appearing to read 'Penny J.', with a large loop at the start and a period at the end.

Penny J.

Date: October 19, 2021