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although they were all given notice of this motion. However, three class members did file written objections

[2] This class proceeding involves a claim for losses sustained by the class members arising out of certain investments that they made in Nelbar Financial Corporation and/or Essex Capital Management Ltd. In addition to the class proceeding, there were other actions that resulted from these failed investments. A Receiver was appointed over the assets of Nelbar Financial Corporation and Essex Capital Management Ltd. That receivership is virtually complete. Further, there were claims made on behalf of the class members against the Canadian Investment Protection Fund. Finally, there were both criminal and/or regulatory proceedings taken involving Nelbar Financial Corporation and other companies and individuals associated with it. While class counsel obviously did not control those proceedings, they were nonetheless involved in them to a greater or lesser degree as they impacted directly on the interests of the class members.

[3] Before turning to the fees themselves, a preliminary matter needs to be addressed. The fees that are sought, as I have already mentioned, cover work done not only on the class proceeding but on these related matters. Class counsel fairly points out that there may be an issue whether work done on these related matters is appropriately considered as either included in, or a justification for, the fees sought.

[4] I believe that such work is properly considered as part of the work related to the class proceeding and for which counsel can seek approval from the court as part of their overall fees. I agree with the submission of plaintiff's counsel that class counsel have a responsibility to protect the interests of the class members and that that responsibility may properly extend beyond the four corners of the class proceeding itself. For example, as in this case, receivership or bankruptcy proceedings may occur that are directly related to the interests of the class members and I accept that class counsel may properly spend time related to those proceedings in order to protect the class members even though those proceedings are outside the class proceeding itself. Similarly, and again as happened in this case, there may well be criminal, regulatory, legislative or other proceedings that directly or indirectly impact on the interests of the class members and,

again, class counsel may properly spend time related to those proceedings if it is necessary to protect the interests of the class members.

[5] This is not to say that class counsel have a carte blanche to undertake work of any description under the guise of protecting the interests of the class members. The court must ultimately determine whether any work, that is beyond the scope of the class proceeding, was properly undertaken in furtherance of the interests of the class members. However, that does not involve the court in any different responsibility than the responsibility that the court normally has to determine whether the work undertaken by class counsel within the class proceeding was properly spent, before approving the fees sought.

[6] I would also note that the retainer agreements signed by the class members contemplated fees being charged for work beyond the class proceeding itself. I would also note that the court's responsibility to approve the fees and disbursements of class counsel under section 32 of the *Class Proceedings Act, 1992* is not expressly stated to be restricted to fees and disbursements related only to the class proceeding. I consider, therefore, that where class counsel legitimately undertakes work that is beyond the four corners of the class proceeding, but which is designed to advance or protect the interests of the class members, class counsel is entitled to include that work in the "amount owing to the solicitor in respect of fees and disbursements" for which class counsel seeks approval from the court under section 32(4).

[7] Before turning to the fees themselves, I wish to deal with the objections filed. I earlier mentioned that three objections were filed. One of those objections was subsequently withdrawn. Of the two remaining objections, I can find little merit in either one. In both cases, the objectors signed retainer agreements with class counsel and the fees sought are well within the parameters of those agreements. In both cases, the objectors initially dealt with CIPF on their own and their claims were denied. Both objectors then expressly requested the assistance of class counsel regarding their claims. After class counsel became involved, they asked CIPF to re-consider its decisions. Class counsel provided additional information and documentation to CIPF and also made various submissions to it on behalf of these objectors. In both cases, CIPF subsequently reversed its original decisions and paid compensation to these objectors. It is therefore clear that both objectors benefited directly from the involvement of class counsel.

[8] Turning then to the fees sought, the factors to be taken into account in considering the reasonableness of fees charged by a solicitor to a client are well-established. They are set out in the Court of Appeal's decision in *Cohen v Kealey & Blaney* (1985), 26 C.P.C (2d) 211 (Ont C A) as follows.

- (a) the time expended by the solicitor,
- (b) the legal complexity of the matters to be dealt with,
- (c) the degree of responsibility assumed by the solicitor,
- (d) the monetary value of the matters in issue,
- (e) the importance of the matter to the client,
- (f) the degree of skill and competence demonstrated by the solicitor,
- (g) the results achieved,
- (h) the ability of the client to pay and
- (i) the client's expectation as to the amount of the fee

These factors are equally applicable in the class proceedings context – see *Windisman v. Toronto College Park Ltd* (1996), 3 C.P.C. (4th) 369 (Ont Gen Div.). I will deal with each of those factors

(i) Time expended

[9] This matter has been ongoing for five years. The dollar value of the work performed by the three firms that constitute class counsel totals \$789,519.25 This amount does not include time that will be incurred by class counsel on steps necessary to conclude the class proceeding but counsel advised me at the hearing that they will not seek any further fees for those steps. At the same time, insofar as fresh proceedings might be instituted based on matters determined out of the Receivership, for example, it should be made clear that those would be new and separate matters and are not intended to be covered by any fees approved here.

(ii) Complexity

[10] I accept that the proceedings were complicated insofar as they involved not only the class proceeding but also a receivership, criminal and regulatory proceedings and dealings with the CIPF.

(iii) Responsibility

[11] Class counsel undertook not only the institution of the class proceeding but they also caused the Receivership to be put in place. Further, and as it turned out perhaps most importantly, class counsel discovered the possibility of restitution from the CIPF and then pursued claims against the CIPF on behalf of the class members. They had to do so in relatively short order given the impending limitation period for claims to be advanced.

(iv) Monetary value in issue

[12] There is a significant monetary value to the claims in that the losses of the class members totalled something in the order of \$10 million

(v) Importance to the client

[13] Given that the vast majority of the class members were individuals who had invested considerable sums with Nelbar, the recovery of some or all of those lost amounts was of considerable importance to each class member

(vi) Degree of skill of counsel

[14] There is no question as to the skill and competence of class counsel. Both the firms involved and the particular counsel are extremely capable and experienced in the area of class proceedings.

(vii) Results achieved

[15] Had the matter been restricted to the class proceeding itself, it would be difficult to point to much in the way of results achieved. The action itself has yet to lead to any recovery. The Receivership lead to some recovery but that recovery was essentially consumed by the costs of the Receivership. However, considerable information was obtained from the Receivership and some of that information may yet lead to other avenues of recovery for the members of the class.

[16] What is of significance for the class members are the claims that were pursued against the CIPF. They lead to the recovery of approximately \$6 million. That represents an average recovery of \$44,000 for each class member. Also, unlike many class actions, in this case it is

known that all of the class members have directly benefited from the work undertaken by class counsel given that they have received direct payments from the CIPF.

(viii) Ability of the client to pay

[17] The ability of the class members to pay is directly related to their recovery from the CIPF. The fees sought represent 15% of the total amount recovered from the CIPF and no class member is to pay more than their individual 15%. Further, on December 18, 2001, Mr. Justice Cumming directed that 15% of all compensation awards made by the CIPF were to be withheld and paid into trust to await approval of the fees and disbursements of class counsel. Almost \$600,000 is currently being held in trust in accordance with that order. Therefore, the class members are only being asked to pay fees from monies actually recovered for them through the efforts of class counsel.

(ix) Client's expectation of the fee

[18] Insofar as the retainer agreements demonstrate the expectation of the members of the class regarding the fees to be paid to class counsel, the fees sought are well within the terms of those agreements. Those agreements provided for class members to pay the time expended by counsel increased by a multiplier of three. The amounts now sought represent only the time spent with no multiplier applied.

(x) Other considerations

[19] There are other factors against which the reasonableness of the fees sought may be tested. In *Gagne v. Silcorp Ltd* (1998), 41 O.R. (3d) 417 (C.A.), Mr. Justice Goudge identified three such factors:

- (a) the percentage that the fees sought are of the gross recovery. As noted above, in this case that is 15%,
- (b) whether the resulting multiplier is appropriately placed within the acceptable range which Goudge J.A. identified as being between one at the low end and three to four at the high end. As noted above, in this case there is no multiplier applied in this case, and,

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- (c) whether the compensation sought is viewed by the court as sufficient to provide a real economic incentive to solicitors to take on such cases. I find that the fees sought here clearly satisfy that objective

I might add to those considerations a fourth one, namely, how the fees sought relate to the fees that would be payable under any retainer agreement that has been entered into. In this case, as already noted, the fees are well within the parameters of those agreements.

[20] There is another approach one could take to the evaluation of the fees in this case. Counsel advised me that 38% of the time spent by counsel related directly to the claims against the CIPF. The value of that time alone would amount to approximately \$300,000. The fees sought exclusive of disbursements and GST amount to approximately \$800,000. If one restricted the approval analysis just to the time spent on the CIPF work, on the basis that it was the "only" work that led to a recovery for the class members, approving the fees sought would be equivalent to a multiplier of 2.67. That is towards the high end of the range of multipliers found acceptable in *Gagne v Silcorp Ltd*, *supra*, but it is still an acceptable one and one that is less than the class members agreed to in their retainer agreements. However, I repeat that I do not consider that approach to be fair since I do not consider it fair to restrict the activities of counsel (with the benefit of hindsight, I might add) only to those matters that result in a recovery. At the risk of repeating myself, if the court is satisfied that the other work was undertaken with a view to advancing the interests of the class members, then that work should fairly factor into the analysis of the overall reasonableness of the fees.

[21] As a result, having considered all of the above, I have concluded that the fees should be approved as requested. An order will therefore issue approving class counsel fees and disbursements in the amount of \$900,000 including disbursements and GST.

[22] In addition, an order will also issue directing Heenan Blaikie to pay to class counsel, forthwith, the sum of \$596,257.81, currently held in trust pursuant to the order of Mr. Justice Cumming, together with any further accrued interest.

[23] Finally, class counsel may forward to me the form of order that follows from this approval for my consideration. The order shall include a provision for judgment against those

class members who received payments from CIPF but who did not pay their proportionate share of class counsel fees.



NORDHEIMER J.

Released: December 22, 2004

Court File No. 31902/99 (London)
Toronto Court File No.: 99-CT-031902CP

SUPERIOR COURT OF JUSTICE

BETWEEN:

PERCY LEVY

Plaintiff

- and -

NELBAR FINANCIAL CORPORATION
and others

Defendants

REASONS FOR DECISION

NORDHEIMER J

RELEASED; DEC 22 2004