

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
**(IN BANKRUPTCY AND INSOLVENCY)**

IN THE MATTER OF THE BANKRUPTCY OF I. WAXMAN & SONS LIMITED,  
a corporation incorporated under the laws of the Province of Ontario,  
carrying on business in the City of Hamilton, in the Province of Ontario

**ENDORSEMENT OF MADAM JUSTICE PEPALL**

**DATED APRIL 22, 2008**  
**(Unofficial Transcription)**

Counsel      Messrs. Swan & Forrest for Morris  
                 Mr. Morris for UTC  
                 Mr. Merskey for Trustee

On March 6, 2008, I determined that Morris Waxman's claim should be characterized as a debt claim that is properly provable in bankruptcy and should not be subordinated to the claims of UTC.

There are two issues before me today:

1. The costs of the motion for advice and directions; and
2. Should Lerner's LLP be appointed as representative counsel for all unsecured creditors (except Morris and SWR) or for all trade creditors (except SWR) for the motion and any appeals. On the motion, Lerner's represented 13 unsecured trade creditors ("UTC").

Following the bankruptcy of IWS, the UTC raised the issue of subordination with the Receiver. The Trustee commissioned a legal opinion that concluded that the better view was that subordination was not applicable to Morris' claim. The Trustee provided a copy of the legal opinion to Morris and UTC (although until now, not to the court). Consistent with the UTC's request that the issue be considered "in the most cost effective manner possible", the Trustee then brought a motion for advice and directions.

At the conclusion of the argument of the motion, the Trustee advised the court that it would not seek costs of the motion against any party, regardless of the outcome. Morris now opposes that position. The Trustee had spent approximately \$115,000 in fees on the motion. Morris has approved the Trustee's accounts to Nov 30 but has reserved his rights to make whatever argument he deems appropriate with respect to costs of the motion.

Morris' costs of the motion amounted to \$88,843.15 of which he is claiming \$43,820.80 on a partial indemnity scale from the UTC. He maintains that the UTC had the Trustee's detailed legal opinion prepared after exhaustive research, and that he put the inspectors, two of whom are from UTC, and the UTC's counsel on notice that he would seek full indemnity for the costs of the motion. He also won the motion.

Morris also seeks recovery of the Trustee's costs of the motion from the UTC on a partial indemnity basis. If the estate is required to bear the Trustee's costs, in effect, Morris will bear the bulk of the costs given the size of the claim.

The UTC also seek payment of their costs out of the estate. No bill of costs was submitted but counsel states that on a full indemnity basis counsel and fees amount to approximately \$90,000 to the end of December 2007. In the Factum filed by the UTC, counsel submits that costs fall on the law firm to the extent the clients are unable to bear them. He submits that the issue was novel, unsettled and meritorious.

Section 197(1) of the BIA provides the court with wide discretion to deal with costs. I may award costs payable out of the estate of the bankrupt even where an argument advanced has been unsuccessful.

While the Trustee concluded that the better view was that Morris' judgment should not be subordinated, in the circumstances, it was reasonable for it to seek the advice and directions of the court. I am not persuaded that its costs on a partial indemnity scale should be paid by the UTC. I consider the Trustee's position of not seeking costs to be responsible and appropriate. It properly acted within its mandate and provided a forum for the issues to be determined.

As to Morris' request that the UTC pay his costs and the UTC's request that the estate pay their costs, I am of the view that the parties should bear their own costs. Although Morris put UTC's counsel on notice of his intended claim of costs, although he considered the UTC claim to be untenable and to use his counsel's language "an unnecessary safari into US case law" and although he was successful, the UTC case was at least arguable. Both Morris and the UTC represented disparate points of view and given that the context was a request for advice and directions, I am satisfied that this Order is both fair and reasonable for all concerned. I recognize that this is a departure from the principle that costs normally follow the event but I view it as a just result.

The second issue to consider is whether I should appoint Lerner's LLP as representative counsel for all unsecured creditors (except Morris and SWR) or for all trade creditors (except SWR) *nunc pro tunc* for the motion and for any appeals. A request for UTC costs to be paid out of the estate had been set forth in the UTC Factum filed on the original motion and in UTC's counsel's letter of Nov 7/07 to the Trustee, he indicated that he would be seeking reimbursement of his client's costs out of the estate. No suggestion was made for any representative counsel Order. The Trustee never took the position that Lerner's was precluded from acting for creditors.

The onus is on the moving party to establish that a representative counsel Order is fair and just: Westar Mining Ltd. (1999) 13 C.B.R. (4<sup>th</sup>) 289 at para. 33. In my view, the onus has not been met.

The Trustee represents all unsecured creditors – Morris, the UTC and those who did not participate in the UTC motion. This includes Canada Revenue Agency who is owed several million dollars. Acting for all, it considered that Morris' claim was a debt claim that was properly provable and should not be subordinated. It was correct. It does not support the request for a representative counsel Order.

The UTC decided in their own self interest that they wished to litigate this issue. A representative counsel Order would have a disproportionate effect on Morris.

The UTC only sought a representative counsel Order after they were unsuccessful on the motion. Indeed, correspondence sent by Lerner served as recognition that such an Order would be inappropriate. In that letter dated May 8, 2007, counsel writes that "if we are successful, we would anticipate some costs recovery..."

The UTC had a forum to voice their position and they are entitled to appeal the decision. That said, in my view, it is unreasonable to expect that the funding of their quest should be secured by the estate. Dismissing the motion is just and fair and I so order.

In summary, the motions are all dismissed. There is no Order of costs in favour of the Trustee, Morris or the UTC with respect to the subordination motion.

Following argument of the issues before me today, counsel agreed that the Trustee's costs of today should be fixed on a partial indemnity scale in the amount of \$7,500 and that payment would be made out of the respective parties' distribution allocation. I so order. Counsel did not agree on the breakdown allocated to the UTC motion and to Morris' motion. In my view, \$5,500 should be allocated to the UTC motion and \$2,000 to Morris' motion. These sums are inclusive of fees, disbursements and GST.

"S.E. Pepall, J"

Superior Court of Justice  
Commercial List

FILE/DIRECTION/ORDER

In the Matter of the Bankruptcy of  
1 Waxman + Sons Limited Plaintiff(s)  
AND

Defendant(s)

Case Management  Yes  No by Judge: Pepall

Counsel	Telephone No.:	Facsimile No.:
Messrs Swan + Fenwick for Morris		
Mr Morris for VFC		
Mr Murphy for Trustee		

- Order  Direction for Registrar (No formal order need be taken out)
- Above action transferred to the Commercial List at Toronto (No formal order need be taken out)
- Adjourned to: \_\_\_\_\_
- Time Table approved (as follows): \_\_\_\_\_

On March 6, 2008, I determined that Morris Waxman's claim should be characterized as a debt claim that is properly provable in bankruptcy + should not be subordinated to the claims of the UTC.

There are two issues before me today:

1. the costs of the motion for advice + directions +
2. should Kemers LLP be appointed as representative counsel for all unsecured creditors (except Morris + SWR) or for all trade creditors (except SWR) for the motion + any appeals. On the motion Kemers represented 13 unsecured trade creditors ("UTC").

Following the bankruptcy of WWS, the UTC raised the issue of subordination with the ~~Trustee~~ Trustee. The Trustee commissioned a legal opinion that concluded that

April 22, 08  
Date

[Signature]  
Judge's Signature

Additional Pages 5

Superior Court of Justice  
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsement Continued

the better view was that subordination was not applicable to Morris' claim. The Trustee provided a copy of the legal opinion to Morris + JTC (at the time on the law, not to the court). consistent with the UTC's request that the issue be considered "in the most cost effective manner possible", the Trustee then brought a motion for advice + directions

At the conclusion of the argument of the motion, the Trustee advised the court that it would not seek costs of the motion against any party, regardless of the outcome. Morris now opposes that position. The Trustee had spent approximately \$115,000 in fees on the motion. Morris has approved the Trustee's accounts but has reserved his right to make whatever argument he deems appropriate with respect to costs of the motion.

Morris' costs of the motion amounted to \$88,843.15 of which he is claiming \$43,800.50 on a partial indemnity scale from the UTC. He maintains that the UTC had the Trustee's detailed legal opinion prepared after exhaustive research + that he put the inspectors, two of whom are from UTC, + the UTC's counsel, on notice that he would seek full indemnity for the costs of the motion. He also won the motion.

Morris also seeks recovery of the Trustee's costs of the motion from the UTC on a partial indemnity basis. If the Estate is required to bear the Trustee's costs, in effect,

Superior Court of Justice  
Commercial List

## FILE/DIRECTION/ORDER

## Judges Endorsement Continued

Morris will bear the bulk of the cost given the size of the claim. The UFC also been payment of their costs out of the estate, not all of costs was submitted but counsel states that on a full indemnity basis, counsel's fees amount to approximately \$90,000 to the end of November, 2007. In the factum filed by the UFC, counsel submits that costs fall on the law firm to the extent the clients are unable to bear them. He submits that the issue was novel, unsettled & contentious.

Section 19(1) of the BIA provides the court with wide discretion to deal with costs. I may award costs payable out of the estate of the bankrupt even where an argument advanced has been unsuccessful while the trustee concluded that the better view was that Morris' judgment should not be subordinated. In the circumstances, it was reasonable for it to seek the advice & directions of the court. I am not persuaded that its costs on a partial indemnity scale should be paid by the UFC. I consider the trustee's position of not seeking costs to be reasonable & appropriate. It properly acted within its mandate & provided a forum for the issues to be determined.

As to Morris' request that the UFC pay his costs & the UFC's request

Superior Court of Justice  
Commercial List

## FILE/DIRECTION/ORDER

## Judges Endorsement Continued

that the estate pay their costs, I am of the view that the parties should bear their own costs. Although Memoirs put UFC's counsel on notice of his intended claim of costs, although he considered the UFC claim to be untenable + to use his counsel's language, "an unnecessary safari into US case law", + although he was successful, the UFC case was at least arguable. Both Memoirs + the UFC represented disparate points of view + given that the context was a request for advice + directions, I am satisfied that this order is both fair + reasonable for all concerned. I recognize that this is a departure from the principle that costs normally follow the event but I view it as a just result.

The second issue to consider is whether I should appoint Hennes as representative counsel for all unsecured creditors (except Memoirs + OR) or for all trade creditors (except Hennes + OR) for the motions + for any appeals. A request for costs to be paid out of the estate had been set forth in the UFC factum filed on the original motion + in UFC's counsel's letter of Nov 7, 07 to the Trustee, he indicated that he would be seeking reimbursement of his clients' costs out of the estate. No suggestion was made for any representative counsel order. The Trustee never took the position that Hennes was precluded from acting for

Superior Court of Justice  
Commercial List

## FILE/DIRECTION/ORDER

## Judges Endorsement Continued

creditors.

The onus is on the Mummy party to establish that a representative counsel order is fair + just: Westar Mummy Ltd (1999) 13 CBR (4th) 289 at para 33. In my view, the onus has not been met.

The Trustee represents all unsecured creditors - Memis, the UTC + those who did not participate in the UTC motion. This includes Canada Revenue Agency who is owed several million dollars. Acting for all, it is considered that Memis' claim was a debt claim that was properly provable + should not be subordinated. It was correct it does not support the request for a representative counsel order.

The UTC decided in their own self interest that they wished to litigate this issue. A representative counsel order would have a disproportionate effect on Memis.

The UTC only sought a representative counsel order after they were unsuccessful on the motion. Indeed, correspondence sent by heretofore served as recipients that such an order would be inappropriate. In that letter dated May 8, 2007, counsel writes that "if we are successful, we would anticipate some costs recovery."

The UTC had a forum to voice their position + they are entitled to appeal the decision. That said, in my view it is unreasonable to expect that the funding of their quest should be secured by the estate. Dismissively

Superior Court of Justice  
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsement Continued

The motion is just + fair + in order.  
In summary, the motions are all dismissed. There is no order of costs in favour of the Trustee, Mams or the UIC with respect to the subordination motion.

Following argument of the issues before me today, counsel agreed that the Trustee's costs of today should be fixed on a partial indemnity scale in the amount of \$700 + that payment would be made out of the respective parties' distribution allocation in order. Counsel did not agree on the formal order allocated to the UIC motion + to Mams' motion. In my view \$5500 should be allocated to the UIC motion + \$2000 to Mams motion. These ~~are~~ sums are inclusive of fees, disbursements + GST.

*[Signature]*