IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Fairhurst v. De Beers Canada Inc.,*
2018 BCSC 59

Date: 20180118
Docket: S071269
Registry: Vancouver

Between:

Michelle Fairhurst and Marc Kazimirski

Plaintiffs

And

De Beers Canada Inc., DB Investments Inc.,
De Beers S.A., De Beers Consolidated Mines, Ltd.,
The Diamond Trading Company Limited,
CSO Valuations A.G., and De Beers Centenary A.G.

Defendants

Brought under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50

Before: The Honourable Madam Justice Warren

Reasons for Judgment

Counsel for the Plaintiffs:	Reidar Mogerman Naomi J. Novak Jennifer D. Winstanley
Counsel for the Defendants:	Katherine L. Kay
Place and Date of Hearing:	Vancouver, B.C. November 2, 2017
Place and Date of Judgment:	Vancouver, B.C. January 18, 2018

Introduction

[1] These reasons for judgment pertain to applications brought by the plaintiffs in this class proceeding for court approval of a settlement reached with the defendants; court approval of a distribution protocol; and court approval of the retainer agreements entered into by the plaintiffs and counsel, counsel's legal fees and disbursements.

[2] The settlement resolves this proceeding as well as parallel proceedings in Ontario and Québec. There is also an action in Saskatchewan. The plaintiffs in the Saskatchewan action are not parties to the settlement. However, the settlement resolves the claims of class members on a national basis, including Saskatchewan residents (such as the plaintiffs in the Saskatchewan action), and is conditional on the Saskatchewan court permanently staying or dismissing the action in that province.

[3] Parallel motions for approval of the settlement, the distribution protocol, and the legal fees were heard by Madam Justice Rady in the Ontario action in late October 2017. Her decision was under reserve at the time the motions were heard by me on November 2, 2017. At the conclusion of the hearing before me, the applications were adjourned pending Madam Justice Rady's decision on the Ontario applications to give the parties the opportunity to consider whether any additional submissions should be made, in light of Madam Justice Rady's decision, before I rendered a decision on the British Columbia applications.

[4] On December 18, 2017, Madam Justice Rady granted orders approving the settlement and the distribution protocol in the Ontario action. The following day she approved the legal fees and disbursements. She issued written endorsements setting out her reasons for approving the settlement (*Brant v. De Beers Canada Inc.*, 2017 ONSC 7269) and the fees and disbursements (*Brant v. De Beers Canada Inc.*, 2017 ONSC 7590).

[5] Counsel have advised that they have no additional submissions to make.

Background

[6] The plaintiffs in all the proceedings seek damages for an alleged conspiracy to raise, maintain, fix and stabilize the price of natural diamonds used as gemstones in jewelry or for investment.

[7] The first action was this one commenced in British Columbia on February 22, 2007. Parallel actions were then brought in Ontario, Québec and Saskatchewan. The plaintiffs in the British Columbia action, the Ontario action and the Québec action are represented by a consortium of counsel working cooperatively. The plaintiffs in the Saskatchewan action are represented by the Merchant Law Group. As mentioned, the plaintiffs in the Saskatchewan action are not parties to the settlement but they are members of the national class and the settlement is conditional on the Saskatchewan court permanently staying or dismissing the Saskatchewan action.

[8] The litigation has been aggressively prosecuted and defended. Among other hearings and applications, there was a jurisdictional challenge in this action (*Fairhurst v. Anglo American PLC*, 2011 BCSC 705), an unsuccessful appeal of that decision (*Fairhurst v. De Beers Canada Inc.*, 2012 BCCA 257), followed by an unsuccessful application for leave to appeal to the Supreme Court of Canada (*DeBeers Canada Inc. et al. v. Michelle Fairhurst*, 2013 SCC 1187). The plaintiffs then applied to have this action certified and, in December 2014, certification was granted following a contested hearing (*Fairhurst v. Anglo American PLC*, 2014 BCSC 2270). The defendants appealed the certification decision. In addition, there were numerous case planning conferences in this action, several other applications were argued, and there was a registrar's review of costs and disbursements awarded in relation to one or more of the interlocutory applications. An application to lift the implied undertaking was briefed but not ultimately argued.

[9] The Ontario action was scheduled to proceed to a contested certification hearing in February 2016. A certification record was prepared but that hearing was ultimately adjourned to permit settlement discussions.

[10] The Québec action has been less active than the British Columbia action and has not proceeded to a certification hearing.

[11] The settlement was reached and a settlement agreement executed on October 14, 2016 (the "Settlement Agreement"). Each of the British Columbia, Ontario and Québec actions was then certified for settlement purposes and notices of the settlement approval hearing and the plan of dissemination were also approved in each of those actions. A protocol for distributing the settlement funds was developed.

[12] In the meantime, several applications were heard in the Saskatchewan action. Specifically, the plaintiffs in that action applied to amend the pleadings and to certify the action on behalf of a national class, the plaintiffs and the defendants each applied to strike affidavits, and the plaintiffs in the British Columbia and Ontario actions applied to conditionally stay the Saskatchewan action. On February 17, 2016, Justice Currie of the Saskatchewan Court of Queen's Bench granted the Ontario plaintiffs' application for a conditional stay of the Saskatchewan action pending the outcome of the certification application in the Ontario action. Justice Currie declined to decide the other applications. On December 22, 2016 the Saskatchewan Court of Appeal dismissed an appeal of his decision.

[13] One of the representative plaintiffs in the Saskatchewan action, Scott Olson, filed an affidavit in the Saskatchewan Court of Appeal in which he raised concerns about the Settlement Agreement. The Court of Appeal did not consider the merits of the settlement agreement or Mr. Olson's concerns.

[14] Following the dismissal of the appeal of Justice Currie's February 17, 2016 decision, directions were sought from Justice Currie regarding the sequencing of the settlement approval hearings in British Columbia, Ontario and Québec, and an application for a permanent stay or dismissal of the Saskatchewan action. Mr. Olson filed a second affidavit, again raising concerns with the Settlement Agreement. In June 2017, Justice Currie directed that the application to permanently stay or dismiss the Saskatchewan action be brought after the application for approval of the

Settlement Agreement in Ontario had been determined. Mr. Justice Currie did not address Mr. Olson's concerns regarding the merits of the Settlement Agreement.

[15] As mentioned, motions for approval of the settlement, the distribution protocol, and legal fees and disbursements were heard by Madam Justice Rady in the Ontario action in late October 2017, with parallel applications being heard in this action on November 2, 2017, and in the Québec action on December 4, 2017.

The Settlement Agreement

Legal principles

[16] Section 35 of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50, requires court approval of any settlement of a class proceeding and provides that a class proceeding may be settled on the terms the court considers appropriate. It is well-established that in order to approve a settlement, the court must find that it is fair, reasonable, and in the best interests of the class: *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2012 BCSC 915 at para. 19; *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2013 BCSC 316 at para 12.

[17] In *Jeffrey v. Nortel Networks*, 2007 BCSC 69, Groberman J. (as he then was) reviewed the law regarding settlement approvals in class actions, synthesized the factors considered in approving a class proceeding settlement, and, at para. 28, distilled them into four broad questions:

- Has counsel of sufficient experience and ability undertaken sufficient investigations to satisfy the court that the settlement is based on a proper analysis of the claim?
- Is there any reason to believe that collusion or extraneous considerations have influenced negotiations such that an inappropriate settlement may have been reached?
- On a cost/benefit analysis, are the plaintiffs well-served by accepting the settlement rather than proceeding with the litigation? and
- Has sufficient information been provided to the members of the class represented by representative plaintiffs, and, if so, are they generally favourably disposed to the settlement?

Discussion

[18] Pursuant to the Settlement Agreement, the defendants agreed to pay $9.4 million in exchange for a release and the dismissal with prejudice of the British Columbia, Ontario and Québec actions, and the permanent stay or dismissal of the Saskatchewan action. There is also an opt-out threshold, which, if exceeded, permits the defendants to terminate the Settlement Agreement.

[19] The Settlement Agreement was reached following extensive negotiations, including a mediation held in London, England before an experienced mediator. Although the mediation did not result in settlement, discussions continued with the mediator's assistance and ultimately the Settlement Agreement was reached. As mentioned, the litigation has been hard-fought and protracted.

[20] Class counsel recommends approval of the Settlement Agreement and expresses the opinion that the settlement represents a good result for the class members, and is a fair and reasonable compromise of the litigation. Mr. Mogerman, counsel for the plaintiffs, has sworn an affidavit filed in support of the current applications. He deposes that in evaluating the merits of the settlement, class counsel considered information from a number of sources, including:

a) evidence filed by the defendants in this action, including direct and expert evidence, which is said to have showed that market power, the ability to overcharge, the size of any overcharge, the fact and amount of pass through and the variability of damages were all very much in issue;

b) documents produced by the defendants in this action that, among other things, confirmed the direct and expert evidence noted above and showed the manner in which De Beers had restructured its business in a way that reduced the plaintiffs' ability to prove their case;

c) information on the defendants' lack of relevant Canadian direct sales;

d) comparison to the settlement of a similar class action brought earlier in United States;

e) expert reports from Canada and the United States, which gave detailed descriptions of the relevant industry and economic factors;

f) the absence of evidence indicating that the Canadian Competition Bureau investigated the defendants for any potential competition law violations;

g) the publicly-available information relating to the investigations by the United States Department of Justice and European Commission, which showed that De Beers was not offside any regulator on the key issues in the case; and

h) the exchange of briefs and positions at the mediation held in London, which showed that all the key litigation issues were contested.

[21] Mr. Mogerman emphasized that the Canadian diamond market is small, relative to the United States. According to somewhat dated data, Canada had a 1.7% share of the global diamond market, measured by retail sales value, while the United States had a 55.8% share. The settlement amount in the US class action was US $295 million. Based on these relative market shares, the parallel Canadian settlement amount would be $9.52 million.

[22] Mr. Mogerman also outlined litigation risks that were extant at the time settlement was achieved:

a) the British Columbia Court of Appeal might overturn the certification decision in this action;

b) the Ontario Court might not certify the Ontario action or certification might be overturned on appeal;

c) the Courts could determine that an aggregate assessment of damages was not possible in light of the complex distribution chain;

d) the Courts could find that the defendants' conduct did not constitute a price-fixing conspiracy but, rather, was unilateral or monopolistic conduct that is not unlawful, *per se*, in Canada and does not give rise to a private claim for damages under the *Competition Act*, R.S.C. 1985, c. C-34;

e) even if a conspiracy was proven, the Courts could find that the agreement entered into by the defendants was ineffective, or that any illegal agreement had little or no effect on prices at the direct or indirect levels;

f) the Courts might not allow the "umbrella purchaser" claims made on behalf of class members who did not, directly or indirectly, purchase diamonds from the defendants but, rather, purchased diamonds mined by a non-conspirator entity;

g) there might be appeals on many substantive issues even if the plaintiffs were successful in all phases of the litigation;

h) the matter would be brought to trial in British Columbia against tenacious defendants with uncertain results; and

i) the Courts might find some, or all, of the class members' claims were time-barred.

[23] The deadline for opting out of the British Columbia, Ontario and Québec actions was October 27, 2017. A total of 73 opt outs were received (10 in British Columbia). The deadline for objecting to the Settlement Agreement was October 20, 2017. No objections were received.

[24] As mentioned, Mr. Olson filed affidavits in the Saskatchewan action raising concerns about the Settlement Agreement, although he did not oppose the relief sought by the plaintiffs on the current applications or the parallel applications heard by Justice Rady in Ontario. From the affidavits Mr. Olson filed in Saskatchewan, it is apparent he objects to the adequacy of the settlement and, in particular, he raises the concern that there will only be a nominal recovery by each class member. His assessment is based on:

a) the value of the settlement relative to the value of the settlement obtained in the US class action, which he also believes to be inadequate;

b) the absence, at the time he swore his affidavits, of a proposed distribution plan;

c) the return to potential class members based on his estimate of the number of diamonds sold in Canada using marriage statistics and his experience in the diamond and wedding industries;

d) his perspective that he will be beholden to an Ontario judge who would not have the benefit of the Saskatchewan record and evidence in assessing the settlement;

e) his estimate of the number of potential class members;

f) the fees and disbursements he anticipates will be paid to class counsel; and

g) his estimate of the costs of administering the settlement.

[25] It is apparent from Justice Rady's reasons approving the settlement in the Ontario action that the evidentiary record upon which her decision was based was substantially the same as that before me. Although she considered that it might not be necessary to consider Mr. Olson's concerns because he had opted out and had filed no material opposing court approval, she addressed his concerns "for the sake of completeness" and found that they are misplaced:

> [27] Mr. Olson compares the United States settlement of USD $295 million unfavourably to the proposed Canadian settlement. He estimates that Canada has approximately 10% of the population of the United States. Accordingly, a comparable Canadian settlement would be in the range of USD $29.5 million (or $39.6 in Canadian dollars). The proposed settlement is less than 25% of that figure.
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> [28] He also reviews Canadian marriage statistics that show that there were 145,000 new marriages each year between 2001 and 2008. Based on his experience of 25 years, he believes that over 50 percent of those persons purchased a gem grade diamond. He calculates that the indirect purchaser class could include more than one million people.
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> [29] After deducting class counsel's proposed fees and disbursements and distribution costs, he concludes that if there were 1,595,000 claims (50 percent of the number of marriages from 1994 to 2016) each claimant would recover a mere $3.63.
>
> [30] Class counsel submit and I accept that Mr. Olson's concerns are misplaced for a number of reasons, including:
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> a) the relative size of the United States and the Canadian population does not translate accurately into the relative size of the jewelry market. Available market data would suggest that Canada has a small share of the diamond jewelry market by retail sales value;
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> b) the United States settlement was negotiated after default judgements were signed against the defendants there;
>
> c) the United States claims were brought under the *Sherman Act* which, with the *Clayton Act*, create a private right of action for monopolization and the potential to recover treble damages;
>
> d) De Beers restructured its business, including its market power- after the United States class period but during the Canadian class period.

[26] After specifically considering Mr. Olson's concerns, Justice Rady concluded:

> [32] I am satisfied that the proposed settlement is fair, reasonable and in the best interests of the class. Success was far from a "sure thing" from the plaintiffs' perspective. If history is a good indicator, absent a settlement, the litigation would have continued and undoubtedly would have been protracted and expensive.
>
> [33] While it might be argued that the quantum is at the modest end of the range, it is nevertheless a good result produced by arms-length negotiations with the assistance of a neutral third-party. Counsel, who have long experience in class action litigation, recommend the settlement as a reasonable compromise based on their review of the evidence produced to date. I have considered Mr. Olson's objection and have concluded that it should not stand in the way of court approval. There are no other objections that I am aware of except from the Saskatchewan group.

[27] I agree with and adopt Justice Rady's reasoning and conclusions both generally and in relation to Mr. Olson's particular concerns. Specifically, with respect to the *Jeffrey* questions:

a) I am satisfied that counsel of sufficient experience and ability has undertaken sufficient investigations. The Settlement Agreement was reached by experienced counsel on both sides, including counsel who have been involved in many of the competition class actions litigated in Canada. Significant information was available to class counsel to evaluate the merits of the settlement, including that referred to in para. [20] above.

b) There is no suggestion that any collusion or extraneous considerations may have tainted the negotiations. The negotiations leading to the Settlement Agreement were hard-fought and the Settlement Agreement was negotiated by arms-length experienced counsel with the help of a neutral third party.

c) I am satisfied that the Settlement Agreement reflects an appropriate balancing of the costs and benefits. The risks identified by class counsel, as summarized in para. [22] above, are considerable. The plaintiffs in this action support approval and class counsel recommend approval. As held by Justice Butler in *Main v. Cadbury Schweppes plc*, 2010 BCSC 816 at para. 8, paraphrasing Justice Strathy in *Osmun v. Cadbury Adams Canada Inc.*, 2010 ONSC 2643, this is particularly important because class counsel has a duty to the class as a whole, as well as a duty to the court, and is uniquely situated to assess the risks of the litigation and the benefits of the settlement.

d) I am satisfied that the class members were adequately informed. No objections have been received. As mentioned, I agree with Justice Rady's conclusion that Mr. Olson's concerns do not support the view that the settlement is unfair, unreasonable or not in the best interests of the class.

[28] For the foregoing reasons, the Settlement Agreement is fair, reasonable and in the best interests of the class and it is approved.

The Distribution Protocol

Legal principles

[29] Access to justice requires access to a distribution process that has the potential to provide, in an economically feasible manner, just compensation for class members' individual claims: *Fischer v. IG Investment Management Ltd.*, 2013 SCC 69 at paras. 25 and 50. The court should examine whether a proposed distribution is reasonable, fair, economical and practical on the facts of each particular case.

Discussion

[30] Class counsel recommends approval of the proposed distribution protocol. Mr. Mogerman deposes that class counsel spent over nine months developing the protocol, emphasizing the importance of effectively delivering direct compensation to individual class members and fairly balancing the interests of class members at different levels of the distribution chain with regard to the amount of the overcharge absorbed at each level and the anticipated claims rates.

[31] The amount available for distribution will be the $9.4 million settlement amount and accrued interest after payment of class counsel fees and after deduction of administration expenses and taxes (including interest and penalties) accruable with respect to income earned by the Settlement Agreement (the "Net Settlement Amount"). The basic elements of the proposed distribution include:

a) 50.3% of the Net Settlement Amount is allocated to resellers and 49.7% of the Net Settlement Amount is allocated to consumers;

b) reseller claims will be subject to claims-weighting to calculate the claimant's gem grade diamond purchase amount, in a manner that will reflect the estimated pass-through rates at each level of the distribution chain;

c) consumer claims will be based on the retail purchase price of the diamond jewelry purchased by the settlement class member during the class period, with the exception of pavé and non-pavé diamond watches, which will be subject claims-weighting to reflect the value of their gem grade diamond content;

d) if a claimant's *pro rata* distribution is less than the minimum claim amount ($25), the claimant's distribution will be increased to the minimum amount and the *pro rata* distribution will be adjusted accordingly; and

e) consumers making a claim without documentary proof of purchase will receive the minimum claim amount.

[32] Mr. Mogerman deposes that in creating the distribution protocol, class counsel reviewed the expert evidence and the plan of allocation approved in the US class action; retained a senior economist, Dr. Gary French, to provide input on how to adapt and simplify the US plan to allow for a fair and cost-effective distribution in the Canadian context; and worked to ensure that the interests of consumer and reseller class members were represented. Mr. Mogerman explained that in the US action, comparable groups referred to as the Indirect Purchaser Reseller Subclass and the Indirect Purchaser Consumer Subclass retained separate experts to ensure that their interests were represented in the development of the US plan, and that a special master was then appointed to consider, among other things, the issue of the division as between those two groups. After engaging in a comprehensive analysis, the special master recommended an allocation of 50.3% to the resellers and 49.7% to the consumers. I was advised that Dr. French confirmed that this allocation was applicable to the Canadian context and, in the result, the distribution protocol proposed here contemplates the same allocation.

[33] The distribution protocol addresses the principles that will govern the claims administration process. The process will be bilingual and primarily online to provide for greater automation, although a hard copy claim form will be available for those

unable to file electronically. The process will provide for flexible proof of purchase, including an ability to extrapolate purchase data for years where no records or data are available and to file without proof of purchase. The process will include a deficiency process and an appeal process.

[34] Mr. Mogerman deposes that in developing the process, counsel sought to strike an appropriate balance of the following factors:

a) the need for a fixed-claims process, which provides certainty, and the need for flexibility, which permits the claims administrator to adjust during the claims process if the reality of the claims experience is different from expectations;

b) economic proportionality as between the size of claims and the cost of adjudicating the claims; and

c) the desire to provide a claimant-friendly claims process, while still collecting sufficient information to adjudicate claims in a fair and reasonable manner.

[35] It is proposed that class counsel submit a request for proposals to class action claims administrators and then apply for approval of the appointment of a claims administrator and a notice program to provide information about the claims process to class members and to encourage them to make claims.

[36] Notice of the hearing to approve the distribution protocol was published between August and October 2017. The deadline for objections was October 20, 2017. No objections have been received, although class counsel have been contacted by a few class members regarding how to make claims.

[37] I am satisfied that the proposed distribution protocol is reasonable, fair, economical and practical. The process that class counsel engaged in to develop the protocol was thorough. The proposed allocation of the Net Settlement Amount between resellers and consumers relied on an extensive analysis previously performed in the United States that was confirmed by an expert to be appropriate in the Canadian context. The proposed distribution protocol offers a meaningful opportunity for class members to receive direct compensation. It provides for

flexible proof requirements, including the ability to claim in respect of undocumented purchasers, and a minimum payment is available. Finally, no objections have been received in respect of the distribution protocol.

[38] For the foregoing reasons, the proposed distribution protocol is approved.

Class counsel fees and disbursements

Legal principles

[39] Section 38(2) of the *Class Proceedings Act* provides that fee agreements are not enforceable unless approved by the court. Pursuant to s. 38(1), a fee agreement must be in writing and must state the terms under which fees and disbursements are to be paid; give an estimate of the expected fee, whether the fee is contingent on success; and state the method by which payment of the fee is to be made, whether by lump-sum or otherwise.

[40] Fees charged to the class must be fair and reasonable. There should be recognition of the need to reward counsel for meritorious effort in achieving a positive result and also the need to encourage counsel to take on difficult and risky class action litigation: *Bodnar v. Cash Store Inc.*, 2010 BCSC 145 at paras. 23–25.

[41] The factors relevant to assessing the reasonableness of class counsel fees include the time expended by counsel; the legal complexity of the issues; the degree of responsibility assumed by counsel; the monetary value of the case; the importance of the matter to the client; the degree of skill and competence demonstrated by counsel; the results achieved; the ability of the client to pay; the client's expectations as to the amount of the fee; the risk undertaken by counsel, including the risk that the action might not be certified; and the position of any objectors: see for example, *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2012 BCSC 1136 at para. 20.

[42] Approved percentage contingency fees in British Columbia class actions have generally ranged from 15% to 33%: *Endean v. Canadian Red Cross Society;*

Mitchell v. C.R.C.S., 2000 BCSC 971 at paras. 77–79; *Bodnar* at para. 26, *Jellema v. American Bullion Minerals Ltd*., 2011 BCSC 925.

Discussion

[43] Class counsel seek orders approving the retainer agreement, approving legal fees in the amount of $2,350,000 plus applicable taxes (25% of the settlement amount) and approving disbursements of $527,940.06 including taxes. Orders are also sought to permit the fees, disbursements and taxes to be paid first from the recovered costs awards, with the remainder paid from the settlement amount in accordance with the Settlement Agreement and to dispense with the endorsement of the order by defence counsel. Finally, class counsel ask that all of these orders be contingent on parallel or equivalent orders being made in the Ontario and Québec actions.

[44] As mentioned, Justice Rady has approved the fees and disbursements in Ontario (2017 ONSC 7590). I agree with and adopt her analysis and conclusion.

[45] The fee agreement entered into with the representative plaintiffs in this action conforms with legislative requirements. It provides for a maximum legal fee of 30% of any settlement, plus disbursements and taxes.

[46] Counsel have docketed time of more than $1.6 million, which amount reflects the length and complexity of the proceeding. The have financed the litigation over almost a decade. As already outlined, the litigation was vigorously litigated. The case raised complex legal issues and gave rise to significant risks, as outlined above. Among other things, there was a real risk the plaintiffs would fail at the certification stage given that, at the time this action was commenced, no case had been certified on a contested basis on behalf of a class that included both direct and indirect purchasers. Certification was contested on all five criteria and subject to a pending appeal. Protracted settlement discussions involved a commitment of time and resources, without any guarantee that a settlement would be achieved or approved. The fee request reflects a 1.4 multiplier on the total docketed time which, in the circumstances, is reasonable.

[47] Class counsel demonstrated considerable skill and competence. Further, they pursued the litigation in three jurisdictions in a coordinated manner, which no doubt resulted in efficiencies.

[48] The plaintiffs support the fee requested and there are no objections. The amount, at 25%, is lower than that permitted by the retainer agreement and within the range awarded in other cases.

[49] For the foregoing reasons, the proposed fees are fair and reasonable. Legal fees of $2,350,000 (plus applicable taxes) and disbursements of $527,940.06 (including taxes) are approved. Specifically, the orders sought, as summarized in para. [43], above, are granted.

"WARREN J."