

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

BETWEEN:

MICHAEL J. QUILLING, in his capacity as court appointed
receiver for COURTNEY WALLIS SIMPSON

Applicant

- and -

NICHOLAS SMITH ATTORNEY IN FACT IN
CANADA FOR LLOYD'S UNDERWRITERS

Respondent

**MOTION RECORD
(9:30 am Motion Returnable January 31, 2008)**

BENNETT JONES LLP
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Suite 3400, P.O. Box 130
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M5X 1A4

M. Joanne MacMillan
LSUC No. 43529J
Tel: 416.777.4629
Fax: 416.863.1716

Solicitors for the applicant

TO: MILLER THOMSON LLP

Barristers and Solicitors
Scotia Plaza
40 King Street West
Toronto, Ontario M5H 3S1

Robert L. Falby, Q.C.
Tel: 416-595-8173
Fax: 416-595-8695

Solicitors for the respondent

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1. Notice of Motion
- A. Schedule "A" – Notice of Application
- B. Schedule "B" – Endorsement of Madam Justice Pepall dated November 28, 2007

TAB 1

**ONTARIO
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Respondent

**NOTICE OF MOTION
(9:30 am Motion Returnable January 31, 2008)**

The applicant will, with the consent of the respondent, make a motion on January 31, 2008 at 9:30 a.m. to a judge presiding over the Commercial List at 330 University Avenue in Toronto or as soon after that time as a motion can be heard.

PROPOSED METHOD OF HEARING: The motion is to be heard orally.

THE MOTION IS FOR:

1. An order appointing a Commercial List Court judge as mediator in this matter; and
2. Such further and other Order as this Honourable Court may deem just.

THE GROUNDS FOR THE MOTION ARE:

1. The parties have agreed, as recommended by Madam Justice Pepall, to mediate this insurance dispute.
2. In an effort to reduce costs to the receivership estate the parties are requesting a judge from the Commercial List be appointed to act as the mediator.
3. Rule 1.04(1) and 2.03 of the *Rules of Civil Procedure*.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

1. Schedules "A" and "B" hereto; and
2. Such other material as counsel may advise and this Honourable Court may permit.

DATE: January 30, 2008

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Solicitors for the applicant

**Michael J. Quilling, in his capacity as court appointed
receiver for Courtney Wallis Simpson
Plaintiff**

v.

**Nicholas Smith Attorney in Fact in
Canada for Lloyd's Underwriters
Defendants**

Court File No.: 07-CL-7122

**ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)**

Proceeding commenced at Toronto

**NOTICE OF MOTION
(9:30 am Motion Returnable
January 31, 2008)**

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One First Canadian Place
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M5X 1A4

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LSUC Reg. No. 43529J

Solicitors for the applicant

TAB A

Court File No.: 07-CU-7122

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

BETWEEN:

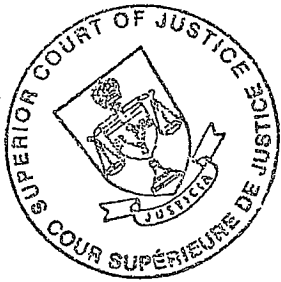
MICHAEL J. QUILLING, in his capacity as court appointed
receiver for COURTNEY WALLIS SIMPSON

Applicant

- and -

NICHOLAS SMITH ATTORNEY IN FACT IN
CANADA FOR LLOYD'S UNDERWRITERS

Respondent



NOTICE OF APPLICATION

TO THE RESPONDENT

A LEGAL PROCEEDING HAS BEEN COMMENCED by the applicant. The claim made by the applicants appears on the following page.


THIS APPLICATION will come on for a hearing on _____, 2007 and thereafter as the judge may direct at 10:00 a.m., at 330 University Avenue, Toronto, Ontario.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the *Rules of Civil Procedure*, serve it on the applicants' lawyer or, where the applicants do not have a lawyer, serve it on the applicants, and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the applicants' lawyer or, where the applicants do not have a lawyer, serve it on the applicants, and file it, with proof of service, in the court office where the application is to be heard as soon as possible, but at least two days before the hearing...

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO OPPOSE THIS APPLICATION BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date: August 01, 2007

Issued by: 

Address of court office:

330 University Avenue
Toronto, Ontario
M5G 2T6 1R7-a

TO: NICHOLAS SMITH ATTORNEY IN FACT IN
CANADA FOR LLOYD'S UNDERWRITERS
1155 rue Metcalfe
Suite 1540
Montreal, Quebec
H3B 2V6

APPLICATION

THE APPLICANT, Michael J. Quilling, in his capacity as court appointed receiver for Courtney Wallis Simpson (the "Receiver") makes an application for:

- (a) an order declaring that the Receiver is a "Claimant" as that term is defined in the Consumer Deposit Insurance Extension under Professional Liability Insurance policy number QK0502105 (the "Insurance Policy");
- (b) an order declaring that the Receiver is a Claimant on behalf of each and every consumer who sustained a loss in a trade in real estate arising from the theft, fraud, misappropriation or wrongful conversion directly or indirectly by Courtney Wallis Simpson ("Simpson") and/or York Region Realty Inc. ("York Realty") (collectively the "Registrants") of moneys or other property entrusted to or received by Simpson and/or York Realty in her or their professional capacity;
- (c) an order declaring that each loss suffered by each consumer in a trade in real estate arising from the theft, fraud, misappropriation or wrongful conversion directly or indirectly by the Registrants of moneys or other property entrusted to or received by Simpson and/or York Realty in her or their professional capacity is an "Occurrence" under the Insurance Policy;
- (d) an order declaring that the limits of each claim are \$100,000;
- (e) an order requiring Nicholas Smith Attorney In Fact in Canada for Lloyd's Underwriters ("Lloyd's") to pay to the Receiver the total amount of \$3,660,000.00 on behalf of all of the claimants who sustained losses in a

trade in real estate arising from the theft, fraud, misappropriation or wrongful conversion directly or indirectly by Courtney Wallis Simpson ("Simpson") and/or York Region Realty Inc. ("York Realty") (collectively the "Registrants") of moneys or other property entrusted to or received by Simpson and/or York Realty in her or their professional capacity;

- (f) his costs of this application; and
- (g) such further and other relief as to this Honourable Court appears just.

THE GROUNDS FOR THE APPLICATION are:

2. By Order of the Honourable Mr. Justice Ground dated November 17, 2005 (the "Receivership Order"), the Receiver was appointed pursuant to section 101 of the Courts of Justice Act, R.S.O. 1990, c. C.43 and rule 41.02 of the *Rules of Civil Procedure* over the assets of Simpson and her related companies in class action proceeding court file no. 05-CL-6159 (the "Deposit Scheme Action"). Simpson and York Realty are defendants in the Deposit Scheme Action.

3. The Real Estate Council of Ontario ("RECO") is a corporation incorporated pursuant to the laws of Canada. RECO administers the *Real Estate and Business Brokers Act, 2002*, S.O. 2002, c.30 and associated regulations on behalf of the Ontario Ministry of Government Services. RECO's mandate is to regulate the activity of trade in real estate in the public interest pursuant to its designation under the *Safety and Consumer Statutes Administration Act, 1996*, S.O. 1996, c.19.

4. RECO maintains an insurance program and a claims process specifically for misappropriated deposit funds (the "Insurance Policy"). The Insurance Policy is designed to protect the consumer from losses due to the theft, fraud, misappropriation, wrongful conversion directly or indirectly of moneys or property held on deposit for the consumer by the salesperson or broker.

5. Simpson is a named insured under the Insurance Policy.

6. The respondent, Lloyd's, is the insurer of the Insurance Policy.

7. In September 2005 Simpson, acting as a real estate broker induced approximately 26 people and/or corporations (collectively the "Claimants") to each enter into agreements of purchase and sale (the "Agreements") with respect to commercial properties in Stouffville, Ontario. It was a term of the Agreements that the Claimants provide deposit funds in the total amount of \$50,000 to \$200,000 to York Realty. Each Claimant provided the deposit funds in trust to York Realty as required under the Agreements. These deposit funds were to be held by York Realty in trust pending completion or termination of each of the Agreements.

8. The receipt of deposit funds referenced at paragraph 7 above was made in furtherance of a fraudulent scheme perpetrated by Simpson and York Realty. The purported vendors who are the actual commercial property owners have denied signing the purported agreements of purchase and sale. Many of the agreements of purchase and sale purported to sell the same property. Simpson collected the deposits associated with the agreements of purchase and sale from more than one Claimant with respect to the sale

of the same property. The agreements of purchase and sale entered into by the Claimants at the inducement of Simpson were fraudulent.

9. In particular Simpson represented to the Claimants:

- (a) She was the broker or agent with the authority to negotiate the purchase and sale of various commercial properties;
- (b) Their deposit funds would be held in trust by York Realty pending completion or termination of the Agreements of Purchase and Sale;
- (c) She acted on the authority of the various vendors involved in the Agreements of Purchase and Sale;
- (d) She was in the process of obtaining the documents necessary to complete the commercial real estate transactions; and
- (e) She could return their deposit funds or had already sent them a cheque in the amount of their deposit funds.

10. Each of the Claimants relied upon the representations set out in paragraph 9 above.

11. All of the representations set out in paragraph 9 above were untrue. There were no valid agreements of purchase and sale with respect to the various commercial properties.

12. The Insurance Policy names Lloyd's as the insurer and RECO and Simpson as "Named Insureds". The Consumer Deposit Insurance program, which includes the

Insurance Policy, is in place to protect the consumer for loss of deposits caused by real estate broker fraud, misappropriation of funds or insolvency.

13. Claimants under the Consumer Deposit Insurance program, pursuant to the process set out on RECO's website, must submit a Notice of Claim form to RECO's insurance department. The claim form authorizes RECO and Lloyd's to investigate the claim. RECO conducts a preliminary investigation before forwarding the claim to RECO.

14. The applicant and Claimant have submitted claim forms to RECO.

15. The deposits claimed to date total \$3,660,00.00.

16. Lloyd's has refused to pay the claims in the amount of \$3,660,00.00.

17. The policy was entered into by RECO on behalf of and for the benefit of people who give deposits to registrants, including the claimants. The applicant and these claimants are legitimate third party beneficiaries of the policy and are thereby entitled to step into the shoes of RECO and/or Simpson and assert their claim as against Lloyd's.

18. The policy's limits are \$100,000 for each claim and \$500,000 for each occurrence.

19. Lloyd's has advised the Claimants that it intends to pay valid claims up to the aggregate coverage limit of \$500,000 per occurrence on a *pro rata* basis. Lloyd's deems Simpson as an occurrence.

20. "Occurrence" is defined in the Insurance Policy as follows:

"Occurrence" means the insolvency of a Registrant or the theft, fraud, misappropriation or wrongful conversion directly or indirectly by a Registrant or present or former employee, by the Registrant in the Registrant's Professional Capacity.

21. Each claim is based upon a different agreement of purchase and sale and involves different purchasers or Claimants. Each misappropriated deposit is a theft, fraud, misappropriation or wrongful conversion directly or indirectly by a Registrant which is a separate occurrence or event, therefore, each claimant is entitled to a maximum of \$100,000 or the claimant's deposit amount if less than \$100,000 from Lloyd's for each misappropriated deposit.

22. More than twenty six claims have been made to RECO to date. Based on the amounts claimed by each claimant, the total amount owing by Lloyd's pursuant to the Insurance Policy is approximately \$3,660,00.00.

23. Rules 14.05(3)(d) and (h), 17.02(f)(i) and (o) of the *Rules of Civil Procedure*.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the application:

- (a) the affidavit of Michael J. Quilling, receiver for Courtney Wallis Simpson, to be sworn and the exhibits thereto; and
- (b) such further and other affidavits and materials as counsel may advise and this Honourable Court may permit.

Date of Issue: , 2007

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LSUC Nos. 37030L / 43529J

Solicitors for the applicant

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Applicant

v.

Nicholas Smith Attorney in Fact in
Canada for Lloyd's Underwriters
Respondents

Court File No. 07-0-7122

**ONTARIO
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(Commercial List)**

Proceeding commenced at Toronto

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Solicitors for the applicant

TAB B

Nov 26/07

I'd like to go as asked. I consider the budget to be reasonable & counsel for the receiver is at liberty to matter before me. The event that there are unanticipated costs. In addition, I would urge both counsel to consider mediation asap.

Peppall, J.

Udayan Pandya
Plaintiff

v.

Courtney Wallis Simpson et al.
Defendants

Court File No.: 05-CL-6159

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

In the matter of the *Class Proceedings Act, 1992*

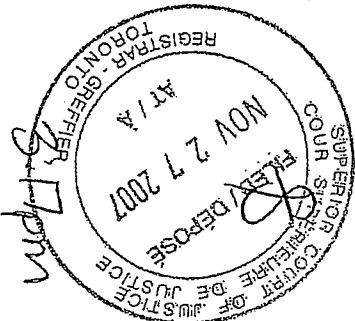
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MOTION RECORD
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Solicitors for the receiver



Nov 28/07

**Michael J. Quilling, in his capacity as court appointed
receiver for Courtney Wallis Simpson
Plaintiff**

v.

**Nicholas Smith Attorney in Fact in
Canada for Lloyd's Underwriters
Defendants**

Court File No.: 07-CL-7122

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