

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

BETWEEN:

ONTARIO SECURITIES COMMISSION

Applicant

- and -

**STABLEVIEW ASSET MANAGEMENT INC., STABLEVIEW YIELD & GROWTH
FUND, STABLEVIEW PROGRESSIVE GROWTH FUND, STABLEVIEW INSIGHT
FUND LP and STABLEVIEW INSIGHT FUND GP INC.**

Respondents

**APPLICATION UNDER
Section 129 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended**

**APPELLANT'S FACTUM
(appeal from receiver's disallowance of appellant's claim)**

June 10, 2021

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I. PARTIES, MATTER APPEALED, OVERVIEW

1. Boyle & Co. LLP (the “**Appellant**”) is a law firm. Grant Thornton Ltd. is the court-appointed receiver of the Respondents under the *Securities Act* (in such capacity, the “**Receiver**”).¹
2. Stableview Asset Management Inc. (the “**Manager**”) and the “**Stableview Entities**” (as defined in the December 7, 2020 claims procedure order of McEwen J. (the “**Claims Procedure Order**”) to include all Respondents except the Manager) operate as a hedge-fund-style investment fund. Investors in the Stableview Entities have their funds deposited in the Stableview Entities, to be invested and managed by the Manager under the Management Structure (defined below).
3. The Appellant provided legal services to the Stableview Entities, some of which remain unpaid. As a result the Appellant holds a claim (the “**Claim**”) directly against the Stableview Entities and their assets, including their trust property, as provided in the Management Structure.
4. The Claim is also against the Manager – an entity with little to no assets – which should also result in payment under the Management Structure, such as through the Manager’s obligation to pay service providers from the assets of the Stableview Entities, including their trust property, and through the Manager’s rights of indemnity from the Stableview Entities for all claims against it, such as the Claim.

¹ The appointment order is available for consultation at [https://docs.grantthornton.ca/document-folder/viewer/docul8LWsxWho7J/701902315204221139?_ga=2.23593912.32022090.1622568740-1757796528.1616102233].

5. In accordance with the Claims Procedure Order, the Appellant filed with an 874-page proof of claim including two affidavits. The Receiver disallowed the Claim in a 5-page response.
6. The notice of disallowance is unsatisfactory and replete with reviewable errors. It erroneously disallows the Claim against the Stableview Entities. Furthermore, it *allows* part of the Claim against the Manager, but inexplicably, makes no mention of its satisfaction under the Management Structure, or of the Receiver's review or even knowledge of the Management Structure.
7. This is not an insolvency. The Receiver was appointed based on possible issues with the Respondent's affairs under the *Securities' Act*. The Stableview Entities' assets are largely sufficient to satisfy their liabilities, as indicated by the claims process and a subsequent \$10,000,000 distribution made, with court approval, to *equity holders* from one of the Stableview Entities. As such there should be no consideration in this file for compromising or not satisfying creditor claims.
8. Of note is that the Receiver's activities in respect of the Claim and its disallowance have been carved out of the latest approval order, set to be dealt with at a later date.
9. The Appellant appeals in accordance with the Claims Procedure Order, seeking an order quashing the Receiver's disallowance and ordering the Claim to be paid from the Stableview Entities' assets as an unsecured creditor claim, and costs of this appeal.

II. FACTS

A. The Management Structure

10. The Respondents together operate as hedge-fund-style investment funds. The Manager is the manager of Stableview Insight Fund GP Inc. (who is the general partner of Stableview Insight Fund LP (the "**Partnership**")) pursuant to a management agreement dated

June 13, 2014 (the “**Management Agreement**”).² The Manager is also the manager and trustee of the Stableview Progressive Growth Fund and the Stableview Yield and Growth Fund pursuant to a trust indenture dated July 8, 2016 (the “**Trust Indenture**” and, with the Management Agreement, the “**Management Structure**”).³

11. Under the Management Structure, the Manager is the controlling mind and the agent of the Stableview Entities, bears no personal liability for its *intra vires* acts, and benefits from broad rights of repayment and indemnity, which extend to third parties who provided services for the Manager or the Stableview Entities, directly from the Stableview Entities and their trust property.
12. Relevant sections of the Trust Indenture (wherein the Manager is both the “Manager” and the “Trustee”) include (all emphasis added):
 - a. *“All expenses of a Pooled Fund [which includes the Funds] shall be paid by that Pooled Fund out of its Trust Property and such expenses shall include, without limitation, legal and audit fees [and] the Manager’s fees... Each of the Trustee and the Manager shall be entitled to reimbursement from a Pooled Fund for any expenses payable by the Pooled Fund which either of them incurs from time to time on behalf of that Pooled Fund.”* (s. 2.7)
 - b. *“The Trustee, acting as bare trustee, subject only to the specific limitations and reservations contained in this Indenture, shall have full, absolute, and exclusive power, control and authority over the Trust Property of each Pooled Fund and over the business and affairs of each Pooled Fund to the same extent as if the Trustee*

² A copy of the Management Agreement is at **tab 6 of volume 2** of the Appellant’s appeal book (the “**AAB**”).

³ A copy of the Trust Indenture is at **tab 4 of volume 2** of the AAB.

were the sole owner thereof in its own right, and is hereby authorized to do all such acts and things as in its sole judgment and discretion are necessary or incidental to, or desirable for, carrying out the investment objectives of the Pooled Fund or otherwise conducting the business of the Pooled Fund.” (s. 7.3)

c. the Trustee is empowered to:

i. *“incur and pay out of the Trust Property any charges, expenses or disbursements which are, in the opinion of the Trustee, necessary or incidental to or desirable for carrying out the investment objective of each Pooled Fund or otherwise conducting the business of each Pooled Fund including, without limitation, the expenses of the Pooled Fund contemplated by Section 2.7” (s. 7.5(d))*

ii. *“employ and contract with, for and on behalf of a Pooled Fund... agents... counsel... and servants that the Trustee may reasonably require for the proper discharge of its duties hereunder and to pay out of the Trust Property their reasonable expenses and compensation” (s. 7.5(i), see also s. 7.5(c), (f), (g) and (j), and 7.11),*

d. the Manager may:

i. *“engage one or more advisers to provide investment, advisory and management services to each Pooled Fund” (s. 8.3(a))*

ii. *“co-ordinate the activities of the Trustee, the Custodian and other Persons engaged on behalf of the Pooled Fund” (s. 8.5(j))*

iii. *“pay the direct costs and expenses of the Pooled Fund described in Section 2.7 out of the Trust Property of the Pooled Fund” (s. 8.5(l))*

- e. *“In addition to and without limiting any other protection afforded the Trustee hereunder or otherwise by law, the Trustee... [and] its agents shall be indemnified and saved harmless **out of the Trust Property** from and against any and all liabilities, losses, claims... costs, expenses and disbursements, including any and all legal and adviser fees and disbursements of whatever kind or nature, which may at any time be suffered by, imposed on, incurred by or asserted against the Trustee... and/or agents, whether groundless or otherwise, howsoever arising from or out of any act, omission or error of the Trustee in connection with its acting as Trustee hereunder”* (s. 12.3). The same indemnification provision is present in respect of the Manager. (s. 12.5)
 - f. *“the Manager shall not be held to any personal liability, nor shall resort be had to the property or assets of the Manager for satisfaction of any obligation or claim arising out of or in connection with any contract or other obligation of a Pooled Fund but **the Trust Property only shall be liable and subject to levy or execution.**”* (s. 12.4)
 - g. *“The Manager may indemnify and save harmless any Person that has agreed to... provide services to a Pooled Fund **out of the assets of the Pooled Fund** from and against... all other costs, charges and expenses which it sustains or incurs in relation to the affairs of the Pooled Fund.”* (s. 12.6)
13. Relevant sections of the Management Agreement include:
- a. *“the Manager shall manage, supervise, and administer the day-to-day business, operations and affairs of the Partnership.”* (s. 4)

- b. the Manager may “*engage qualified persons to provide such services as the Manager believes to be necessary or appropriate to assist the Manager*”. (s. 4)
 - c. the Manager is entitled to repayment, from the Partnership, of “*any expenses of the Partnership and the General Partner which the Manager may have incurred and paid on behalf of the Partnership*”, which expressly includes “*legal costs*” (s. 6 and 7).
14. Another important aspect of the Management Structure is that the Manager’s compensation is not indexed to the performance of the funds. Thus, when the Manager retains service providers, the sole incentive is to create value for the Stableview Entities.
15. Emblematic of the Stableview Entities’ liability and position as the ultimate beneficiary as seen above is that in at least one case, the Appellant was paid directly from the Stableview Entities (not the Manager).⁴

B. The Claim

16. The Appellant provided legal services to the Stableview Entities since about December 2013. Around January 2018, the Stableview Entities had invested in Clarocity Corporation, a Canadian TSX Venture publicly traded corporation (“**Clarocity**”; formerly Zaio Corporation), and Clarocity was underperforming. The Stableview Entities therefore decided to divest from their investment in Clarocity (the “**Clarocity Divestment**”).⁵

⁴ See the Appellant’s trust client ledger at **tab 12 of volume 2** of the AAB.

⁵ Affidavit of James Patrick (Jim) Boyle sworn March 11, 2020 in support of a motion for summary judgment in the Action (defined in the text) (the “**Boyle March 2020 Affidavit**”), **tab 2 of volume 1** of the AAB, paras. 6 as well as 13 and following. **Note:** to shorten footnotes, references to exhibits in the Boyle March 2020 Affidavit are implied in the reference to the paragraph mentioning that exhibit.

17. The Stableview Entities, through the Manager, retained the Appellant in respect of the Clarocity Divestment. As more fully set out in the Boyle March 2020 Affidavit (defined below), the goal of the Clarocity Divestment was for the Stableview Entities' to obtain the most value from their stake in Clarocity. The Appellant provided critical decision-making advice and implementation work to devise the strategy and successfully execute it.⁶
18. The Appellant agreed to defer payment of its work until the conclusion of the Clarocity Divestment, which occurred on July 18, 2019 with the closing of a sale of the Respondents' interest in Clarocity to iLOOKABOUT Corporation (“**iLA**”).⁷
19. The Claim is for 6 unpaid invoices in connection with the Clarocity Divestment totalling approximately 494 hours worked for an amount of \$417,815.04 (the “**Invoices**”). The Invoices bear respective numbers 2066, 2067, 2088, 2090, 2098 and 2111.⁸
20. The Appellant made multiple demands on the Stableview Entities who, through the Manager's officer and director, and Respondents' directing mind, Colin Fisher (“**Mr. Fisher**”), acknowledged the Claim and provided reassurances on several occasions. There were also discussions on an offer to settle. Mr. Fisher was elusive about payment, made promises to attend at the Appellant's office with cheques and then failed to attend, and even resorted to physical threats to avoid payment. The Claim remains outstanding.⁹
21. On November 6, 2019, the Appellant commenced an action (the “**Action**”) against the Respondents in respect of the Claim. The Respondents' defence is dated January 10, 2020,

⁶ Boyle March 2020 Affidavit, **tab 2 of volume 1** of the AAB, paras. 13 and following.

⁷ Boyle March 2020 Affidavit, **tab 2 of volume 1** of the AAB, para. 44.

⁸ A copy of the Invoices are at **tabs 2F, 2G, 2H, 2I, 2J and 2K of volume 1** of the AAB.

⁹ Boyle March 2020 Affidavit, **tab 2 of volume 1** of the AAB, paras. 24, 25.

and the Appellant’s reply, January 20, 2020.¹⁰ Filed in the Action on behalf of the Appellant is an affidavit of James Patrick (Jim) Boyle (“**Mr. Boyle**”) sworn March 11, 2020 in support of a motion for summary judgment (the “**Boyle March 2020 Affidavit**”).¹¹ The Action is stayed by this receivership proceeding. Part of the Claim includes the Appellant’s costs incurred so far in the Action on a full indemnity basis. As such the Claim totals \$470,353.02.

22. The proof of claim package submitted by the Appellant in support of the Claim (the “**PoC**”) is dated January 4, 2021, and includes a copy of the following documents:
- a. completed proof of claim form in accordance with the Claims Procedure Order.¹²
 - b. affidavit of Mr. Boyle sworn January 4, 2021 affirming that the content of the PoC is true (the “**Boyle January 2021 Affidavit**”).¹³
 - c. pleadings in the Action.¹⁴
 - d. Boyle March 2020 Affidavit, with all exhibits.¹⁵
 - e. memorandum to Receiver re: additional and streamlined background on the Invoices (the “**Memorandum**”).¹⁶
 - f. email correspondence with Mr. Fisher re: offer to settle.¹⁷
 - g. affidavit of fees from the Appellant’s lawyers in the Action, with true copies of invoices.¹⁸

¹⁰ A copy of the pleadings is at **tab 2A of volume 1** of the AAB.

¹¹ Boyle March 2020 Affidavit, **tab 2 of volume 1** of the AAB.

¹² **Tab 1 of volume 1** of the AAB.

¹³ **Tab 2 of volume 1** of the AAB.

¹⁴ **Tab 2A of volume 1** of the AAB.

¹⁵ **Tab 2B of volume 1** of the AAB.

¹⁶ **Tab 2C of volume 1** of the AAB.

¹⁷ **Tab 2D of volume 1** of the AAB.

¹⁸ **Tab 3 of volume 1** of the AAB.

23. On January 20, 2021, the Receiver sent an email to the Appellant’s lawyers in the receivership, requesting certain clarifications. The Appellant provided such clarifications and attendant additional documentation through a letter dated January 25, 2021 (the “**January Response**”).¹⁹

C. The disallowance

24. The Receiver’s notice of disallowance of the Claim is dated March 18, 2021 (the “**Disallowance**”). It is 5 pages long. The Receiver disallowed the Claim against the Stableview Entities but allowed part of the Claim (\$225,357.25, which covers 4 of the Invoices) against the Manager only. This is a summary of the Disallowance:²⁰

- a. the Appellant provided legal services to the Manager pursuant to the 2013 retainer between the Appellant and the Manager. The Stableview Entities are not parties to the aforementioned retainer.
- b. the Appellant also provided legal services to Clarocity pursuant to a retainer effective September 1, 2018.
- c. the Invoices, totalling \$417,815.04, remain outstanding.
- d. as to Invoices number 2066, 2088, 2098 and 2111, totalling \$225,357.25:
 - i. *“the Receiver accepts that Boyle has a claim against Stableview Management for [those Invoices] in the total amount of \$225,357.25.”*
 - ii. *“The Receiver has not been provided with any evidence that Stableview Management entered into the Stableview Retainer on behalf of the Funds”.*

¹⁹ A copy of the January Response is at **tab 1 of volume 2** of the AAB.

²⁰ A copy of the Disallowance is at **tab 2 of volume 2** of the AAB.

- iii. *“The Receiver has not been provided with any evidence that supports a finding that Stableview Management represented to Boyle that it entered into the Stableview Retainer as agent of the Funds.”*
- iv. *“The Stableview Retainer between Stableview Management and Boyle constitutes a juristic reason for any alleged deprivation suffered by Boyle and any benefit allegedly derived by the Funds from the services provided by Boyle.”*
- e. as to Invoice number 2067²¹ in the amount of \$85,054.61, it was issued to the Manager and Clarocity, however the services charged were provided to Clarocity, not the Manager, and *“The Receiver has not been provided with a copy of any agreement pursuant to which Stableview Management is liable for payment for legal services provided to Clarocity.”*
- f. as to invoice number 2090 in the amount of \$78,865.76, it *“primarily relate[s] to services provided to Clarocity in connection with the ILA Transaction covered by the Clarocity Retainer. The Receiver has not been provided with any documents evidencing that the obligation to pay for Boyle’s services provided under the Clarocity Retainer rests with anyone other than Clarocity. To the extent any services were provided by Boyle to Stableview in connection with the ILA Transaction during the same time period, those services were reflected in Invoice Number 2088²² issued by Boyle to Stableview Management.”*

²¹ The notice of disallowance also speaks of invoice number 2078 but the Appellant made and makes no claim in respect of invoice number 2078.

²² This appears to be a typo for “2078”. As noted above, the Appellant made and makes no claim in respect of invoice number 2078.

g. as to the portion of the claim relating to the Appellant's costs in the Action, "*There is no requirement under the Stableview Retainer for Stableview to pay Boyle's legal costs on full indemnity basis or at all. The Receiver has not been provided with any cost order against Stableview or the Funds in favour of Boyle.*"

25. The Disallowance is, with respect, unsatisfactory and contains numerous mistakes as will be seen. Most notably, it contains no mention of the Management Structure, nor that the Receiver knows or has reviewed the same, notwithstanding that those documents were entirely within the Receiver's power to access. This is particularly striking considering that the Receiver is chiefly aware that the Manager has little to no assets, which should prompt a fairness analysis as to the flow of rights among the Manager and the Stableview Entities. Coincidentally, none of the Receiver's reports filed with the supervising court reports on or mentions the Receiver's review of the Management Structure, let alone in respect of the Claim, despite the Appellant raising that very matter through affidavits sworn November 13, 2020 (before the claims process) and March 26, 2021 filed in responding records to Receiver's motions. Also, the Disallowance simply ignores the fact that the Stableview Entities obtained value from the Appellant's work in the Clarocity Divestment.

III. ISSUES AND LAW

26. The issues are **(A)** the standard of review, **(B)** that the Claim ought to be allowed as an unsecured creditor claim against the Stableview Entities, and **(C)** costs on appeal.

A. Standards of review

27. The Claims Procedure Order provides that any appeal from a notice of disallowance is a true appeal and not a trial *de novo*. Accordingly, the standards of review applicable are the ordinary standards of review on appeal in civil matters, being **(i)** correctness for questions

of law, and (ii) reasonableness for questions of facts and questions of mixed fact and law. For questions of mixed fact and law, the amount of deference attracted lies on a spectrum dependent on the proportion of factual and legal assessments involved.²³

B. The Claim ought to be allowed as an unsecured creditor claim against the Stableview Entities

i. *Invoices*

28. **Question of law** – The Appellant submits that this is a question of law including because it is a determination of rights based on the interpretation of contractual provisions, and that the Receiver incorrectly decided that question of law such that this court may intervene. Alternatively, the Appellant submits that this is a question of mixed fact and law lying heavily on the law side of the spectrum, such that the deference that ought to be attracted is low, and the Receiver committed a reviewable error.

29. **The work was in respect of the Clarcity Divestment** – All the Invoices are for work performed and resultant amounts due in respect of the Clarcity Divestment, as more fully appears from the PoC²⁴ and the January Response,²⁵ including *inter alia*:

- a. the Invoices themselves, including time narratives,²⁶
- b. the Memorandum,²⁷ which summarizes the Invoices and is sworn true per the Boyle January 2021 Affidavit, and
- c. the Boyle March 2020 Affidavit.²⁸

²³ *Housen v Nikolaisen*, [2002 SCC 33](#).

²⁴ **Volume 1** of the AAB is a copy of the PoC.

²⁵ A copy of the January Response is at **tab 1 of volume 2** of the AAB.

²⁶ A copy of the Invoices is at **tabs 2F, 2G, 2H, 2I, 2J and 2K of volume 1** of the AAB.

²⁷ **Tab 2C of volume 1** of the AAB.

²⁸ A copy of the Boyle March 2020 Affidavit is at **tab 2 of volume 1** of the AAB.

30. For example:
- a. the time periods of work covered by the Invoices is from March 2018²⁹ to August 2019, which corresponds to the time when the decision to proceed with the Clarocity Divestment was made (around January 2018) and the closing of the iLA transaction (around July 2019), accounting for some follow-up work.
 - b. the issuance dates of the Invoices, being between January and September 2019, which again correspond with the Clarocity Divestment.
 - c. a common occurrence on all the Invoices is time corresponding with Mr. Fisher, notably for instructions. It is not in dispute that Mr. Fisher was the directing mind of the Respondents.
 - d. in correspondence, Mr. Fisher acknowledged that the Invoices were outstanding and provided reassurances to the Appellant on behalf of the Respondents. There were even settlement negotiations.³⁰
31. **The Clarocity joint retainer** – As more fully recounted and substantiated in the Boyle March 2020 Affidavit, at some point during the Clarocity Divestment, the Manager wished the Appellant to begin representing both the Manager and Clarocity in a joint retainer with respect to the iLA transaction. This was notably to save on legal fees considering the aligned incentives to maximize value in the context of an underperforming entity, and that

²⁹ There is also one leftover charge for a September 29, 2017 time entry representing approximately \$500.

³⁰ See the Boyle March 2020 Affidavit, **tab 2 of volume 1** of the AAB, paras. 24, 25, and the settlement discussions a copy of which is included at **tab 2D of volume 1** of the AAB.

the strategy involved the Stableview Entities' assignment of Clarocity in receivership. An acknowledgement regarding potential conflicts was signed by both parties.³¹

32. This joint retainer does not affect the Stableview Entities' liability for payment of the entirety of the work done, including for the following reasons, which are more fully set out in the Boyle March 2020 Affidavit³² and the January Response:³³

- a. the Clarocity joint retainer constituted one item of the strategy of overseeing the Clarocity Divestment, which is a mandate for and from the Stableview Entities.
- b. the nature and context of the joint retainer is such that the clients' obligations for fees were joint. Testament to this is the fact that the only Invoices issued to Clarocity (Invoices number 2067 and 2090) were issued to Clarocity *and* the Manager and, further:
 - i. Invoice 2067 states being "*for professional services rendered to **Clarocity and StableView Asset Management Inc.** in connection with the strategic transaction among Clarocity Corporation, iLOOKABOUT Corp. and Stableview Asset Management Inc.*" (emphasis added).
 - ii. Invoice 2090 states being "*for professional services rendered at the request of Stable View Asset Management Inc. to Clarocity Corporation*".
 - iii. both Invoices say, to the attention of both recipients equally, "*Please make payment on this account at your earliest convenience.*"

³¹ See the Boyle March 2020 Affidavit, **tab 2 of volume 1** of the AAB, paras. 28-31.

³² See the Boyle March 2020 Affidavit, **tab 2 of volume 1** of the AAB, paras. 28-31.

³³ A copy of the January response is at **tab 1 of volume 2** of the AAB.

- iv. nothing in the two Invoices suggests a repartition of the obligation to pay; many indicia establish the contrary.

33. **The Manager retained the Appellant for the Clarocity Divestment in its capacity as manager and trustee of the Stableview Entities under the Management Structure –**

The overwhelming evidence is that the Clarocity Divestment was directly in respect of the affairs of the Stableview Entities. The transactions devised and the work performed in the Clarocity Divestment were part of an overarching strategy towards one overall goal: the divestment of the Stableview Entities from Clarocity – which was actually effected in large part thanks to the Appellant’s work.

34. To suggest that the Manager did not deal with the Appellant *qua* manager and trustee of the Stableview Entities during the Clarocity Divestment, as the Receiver does in the Disallowance, is to suggest that the Manager did it in another capacity or in its personal capacity. However, as set out above, there would have been no economic benefit for the Manager to do so. Only the Stableview Entities had an economic benefit from salvaging their investment in the Clarocity Divestment. There is no evidence, nor an inkling of explanation in the record, as to why the Manager would act in respect of the Clarocity Divestment in any other capacity than as manager and trustee of the Stableview Entities.

35. There is no requirement – under the Management Structure or otherwise – that the Stableview Entities be parties to contracts made on their behalf by the Manager in order for the Stableview Entities to be bound by such contracts. This is especially true from the point of view of the Appellant, who – from past dealings – knew that the Manager was

simply the operating mind of the Stableview Entities in accordance with industry practice.³⁴ Furthermore, the Appellant had seen the public, audited financial statements of each of the funds which explicitly say that *“The Manager has the power to incur and make payment out of the Fund property any charges or expenses which, in the opinion of the Manager, are necessary or incidental to, or proper for, carrying out any of the purposes of the Trust Indenture, including without limitation all fees and expenses relating to the management and administration of the Fund.”*³⁵ The same is true with respect to the Manager’s audited financial statements, which provide: *“During the year, the [Manager] paid on behalf of the Funds a total of \$44,456 of operating expenses that were subsequently reimbursed to the Company. These transactions are in the normal course of operations”*.³⁶

36. **The Claim is against the Stableview Entities and their assets, including trust assets, directly** – This appears from the plain language of the provisions highlighted above, including sections 6 and 7 of the Management Agreement as well as sections 2.7 (*“All expenses of a Pooled Fund shall be paid by that Pooled Fund out of its Trust Property and such expenses shall include, without limitation, legal and audit fees”* (emphasis added)) and 12.4 of the Trust Indenture (*“the Manager shall not be held to any personal liability, nor shall resort be had to the property or assets of the Manager for satisfaction of any obligation or claim arising out of or in connection with any contract or other obligation of a Pooled Fund but the Trust Property only shall be liable and subject to levy or execution.”* (emphasis added)).

³⁴ See *C.M. Callow Inc. v Zollinger*, [2020 SCC 45](#).

³⁵ See the Boyle March 2020 Affidavit, **tab 2 of volume 1** of the AAB, para. 10. A copy of the audited financial statements for the year ending on December 31, 2017 is **exhibit “E” to the Boyle March 2020 Affidavit**.

³⁶ A copy of the Manager’s audited financial statements for the year ended July 31, 2018 is at **tab 10 of volume 2** of the AAB; see note to read number 9 of such financial statements.

37. **Alternatively, to any extent that the Claim is valid against the Manager only, the Receiver has the power and duty to trigger the waterfall of indemnities so as to satisfy the Claim** – Should the court find that any portion of the Claim is not against the Stableview Entities but rather against the Manager only – which the Appellant denies, then the Appellant submits the following with respect to such portion only.
38. Under the Management Structure, the Manager must pay any party who provides services to the Manager and/or the Stableview Entities out of the assets of the Stableview Entities, including their trust property. Moreover, the Manager is entitled to full indemnity from the Stableview Entities, including out of their trust property, from all claims asserted against the Manager (the Trust Indenture even provides “*whether groundless or otherwise*”) arising out of the Manager’s exercising its function as Manager – such as the Claim. Reference is made to sections 6 and 7 of the Management Agreement as well as sections 2.7, 7.5(d), 7.5(i), 8.5(l), 12.3, 12.5 and 12.6 of the Trust Indenture, all which provisions are reproduced above.
39. Further, under the Management Structure, including sections 7.2 and 8.2 of the Trust Indenture as well as s. 10 of the Management Agreement, the Manager has a duty to act with honesty and good faith.³⁷
40. In the Disallowance, the Receiver acknowledges on numerous occasions that the Claim is valid as against the Manager and, this being a true appeal and not a hearing *de novo*, this admission remains binding on the Receiver.

³⁷ See *Bhasin v Hrynew*, [2014 SCC 71](#).

41. The receivership appointment order, substantially in the form of the Commercial List model order, vests the Receiver with all the powers required to effect the Manager's powers and duties under the Management Structure. Further, the purpose of court-appointed receiverships is "to enhance and facilitate the preservation and realization of the assets for the benefit of creditors",³⁸ and it is trite that a court-appointed receiver acts in a fiduciary duty to all stakeholders.
42. The Receiver, as court-appointed receiver of the Manager, has the power and duty to effect the Manager's own responsibilities, as is fair, practical and within the reasonable expectations of the stakeholders and the court itself; doing otherwise would be, with respect, ineffective, lethargic, and artificially formulaic. The Receiver could not and should not be allowed to cause harm to a good faith creditor such as the Appellant by inertly allowing the Manager to abdicate its rights and duties under Management Structure. Further, doing so would yield no benefit to the Respondents, nor to other stakeholders, because this is not an insolvency: the Respondents' assets are largely sufficient to meet their creditor liabilities and any equity claim in the estate (such as those of investors in the Respondents) is subordinate to all valid creditor claims (such as the Appellant's).
43. **Conclusion** – For those reasons, the Receiver erred in not allowing the Claim in its entirety as against the Stableview Entities. Alternatively, the Receiver erred in (i) not effecting the Manager's powers and duties under the Management Structure so as to pay the Claim out of the assets of the Stableview Entities, and (ii) not causing the Stableview Entities to satisfy their indemnity obligations to the Manager triggered by the Claim, and then cause

³⁸ *Third Eye Capital Corporation v Ressources Dianor Inc./Dianor Resources Inc.*, [2019 ONCA 508](#), para. 73.

the Claim to be paid out of that. Those errors are reviewable by this court in accordance with the applicable standard of review.

ii. Costs in the Action

44. It is trite that within the court's discretion, the prevailing party in an action is in principle entitled to its costs.³⁹ For the reasons set out above the Action is well-founded in fact and in law and the Appellant would have prevailed, entitling it to costs. Any comment on this is entirely absent from the Receiver's Disallowance. The Appellant submits that this failure is an error of law which is reviewable by this court.
45. Alternatively, to the extent this portion of the Claim is contingent, then the Receiver must reasonably evaluate the contingency and deduct the same, while providing sufficient reasons to meet the requirements of procedural fairness and court oversight. This has not been done. The Appellant submits that this is a question of mixed fact and law and that the Receiver committing a reviewable error in this respect.

C. Costs on appeal

46. The Appellant submits that if it is successful on this appeal, it should be relieved of its costs on appeal on a substantial indemnity basis because had the Receiver made no reviewable mistake, then the Appellant would not have had to incur such costs.
47. The costs on appeal are in addition to the Claim and are claimed against the Respondents jointly and severally, not against Grant Thornton Ltd. personally.
48. Further submissions on costs will be made if necessary.

³⁹ *Courts of Justice Act*, [R.S.O. 1990, c. C.43](#), s. 131; rule 57 of the *Rules of Civil Procedure*, [R.R.O. 1990, Reg. 194](#).

IV. ORDER SOUGHT

49. The Appellant herein appeals in accordance with the Claims Procedure Order, seeking an order quashing the Receiver's disallowance and ordering the Claim to be paid from the Stableview Entities' assets as an unsecured creditor claim, and costs of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10th day of June, 2021.

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SCHEDULE A – LIST OF AUTHORITIES

1. *Housen v Nikolaisen*, [2002 SCC 33](#).
2. *C.M. Callow Inc. v Zollinger*, [2020 SCC 45](#).
3. *Bhasin v Hrynew*, [2014 SCC 71](#).
4. *Third Eye Capital Corporation v Ressources Dianor Inc./Dianor Resources Inc.*, [2019 ONCA 508](#).

SCHEDULE B – RELEVANT STATUTES

- *Courts of Justice Act*, [R.S.O. 1990, c. C.43](#)

Costs

131 (1) Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid. R.S.O. 1990, c. C.43, s. 131 (1).

Crown costs

(2) In a proceeding to which Her Majesty is a party, costs awarded to Her Majesty shall not be disallowed or reduced on assessment merely because they relate to a lawyer who is a salaried officer of the Crown, and costs recovered on behalf of Her Majesty shall be paid into the Consolidated Revenue Fund.

- *Rules of Civil Procedure*, [R.R.O. 1990, Reg. 194](#)

RULE 57 COSTS OF PROCEEDINGS

Factors in Discretion

57.01 (1) In exercising its discretion under section 131 of the *Courts of Justice Act* to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle or to contribute made in writing,

(0.a) the principle of indemnity, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer;

(0.b) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;

(a) the amount claimed and the amount recovered in the proceeding;

(b) the apportionment of liability;

(c) the complexity of the proceeding;

(d) the importance of the issues;

(e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;

(f) whether any step in the proceeding was,

(i) improper, vexatious or unnecessary, or

- (ii) taken through negligence, mistake or excessive caution;
- (g) a party's denial of or refusal to admit anything that should have been admitted;
- (h) whether it is appropriate to award any costs or more than one set of costs where a party,
 - (i) commenced separate proceedings for claims that should have been made in one proceeding, or
 - (ii) in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different lawyer;
- (h.1) whether a party unreasonably objected to proceeding by telephone conference or video conference under rule 1.08; and
- (i) any other matter relevant to the question of costs.

Costs Against Successful Party

(2) The fact that a party is successful in a proceeding or a step in a proceeding does not prevent the court from awarding costs against the party in a proper case.

Fixing Costs: Tariffs

(3) When the court awards costs, it shall fix them in accordance with subrule (1) and the Tariffs.

Assessment in Exceptional Cases

(3.1) Despite subrule (3), in an exceptional case the court may refer costs for assessment under Rule 58.

Authority of Court

- (4) Nothing in this rule or rules 57.02 to 57.07 affects the authority of the court under section 131 of the *Courts of Justice Act*,
- (a) to award or refuse costs in respect of a particular issue or part of a proceeding;
 - (b) to award a percentage of assessed costs or award assessed costs up to or from a particular stage of a proceeding;
 - (c) to award all or part of the costs on a substantial indemnity basis;
 - (d) to award costs in an amount that represents full indemnity; or
 - (e) to award costs to a party acting in person.

Bill of Costs

(5) After a trial, the hearing of a motion that disposes of a proceeding or the hearing of an application, a party who is awarded costs shall serve a bill of costs (Form 57A) on the other parties and shall file it, with proof of service.

Costs Outline

(6) Unless the parties have agreed on the costs that it would be appropriate to award for a step in a proceeding, every party who intends to seek costs for that step shall give to every other party involved in the same step, and bring to the hearing, a costs outline (Form 57B) not exceeding three pages in length.

Process for Fixing Costs

(7) The court shall devise and adopt the simplest, least expensive and most expeditious process for fixing costs and, without limiting the generality of the foregoing, costs may be fixed after receiving written submissions, without the attendance of the parties. O. Reg. 42/05, s. 4 (3).

ONTARIO SECURITIES COMMISSION, Applicant, and STABLEVIEW ASSET MANAGEMENT INC., STABLEVIEW YIELD & GROWTH FUND, STABLEVIEW PROGRESSIVE GROWTH FUND, STABLEVIEW INSIGHT FUND LP and STABLEVIEW INSIGHT FUND GP INC., Respondents

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

APPELLANT'S FACTUM
(appeal from receiver's disallowance of
appellant's claim)

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