CITATION: Steven Campbell v. Clairvest Group Inc., 2020 ONSC 4778

COURT FILE NO.: CV-18-609914-00CL
DATE: 20200813

ONTARIO

SUPERIOR COURT OF JUSTICE

(Commercial List)

BETWEEN:	)	
STEPHEN CAMPBELL Plaintiff	)	*Michael Robb, and Serge Kalloghlian* for the Plaintiff
– and –	)	
CLAIRVEST GROUP INC., DISCOVERY AIR INC., TOP ACES INC., TOP ACES HOLDINGS INC., KENNETH ROTMAN, ADRIAN PASRICHA, ROD PHILLIPS, MICHAEL M. GRASTY, G. JOHN KREDIET, MICHAEL MULLEN, ALAIN BENEDETTI, THOMAS HICKEY, PAUL BERNARDS, ALAN TORRIE, and JACOB SHAVIT Defendants	)	*Peter Wardle and Evan Rankin* for the Defendants Kenneth Rotman, Adrian Pasricha, Rod Phillips, G. John Krediet, Michael Mullen, Alain Benedetti, Paul Bernards, and Alan Torrie *Elizabeth Bowker* for the Defendants Discovery Air Inc., Top Aces Inc. and Top Aces Holdings Inc. *Alistair Crawley and Michael Byers* for the Defendant Clairvest Group Inc. *Mike Weinczok* for the Computershare Trust Company of Canada,
	)	**HEARD:** May 26, 2020

KOEHNEN J.

[1] The plaintiff, Steven Campbell, was a debentureholder in Discovery Air Inc. He seeks to bring a class action for oppression against certain shareholders, directors and officers of Discovery.

[2] The action arises out of a series of related party transactions that Mr. Campbell alleges led to the loss of the debentureholders' entire $34.5 million investment in Discovery. He further alleges that the transactions enriched the defendant Clairvest Group Inc. at the expense of Discovery and its creditors and resulted in Discovery's carefully planned and structured insolvency.

[3] In July 2018, Hainey J. granted leave to commence this action, despite the stay in place under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36. On September 4, 2018, Discovery was declared bankrupt.

[4] The defendants submit that the plaintiff has no status to bring this action and that the only party capable of bringing it is the trustee under the trust indenture governing the debenture.

[5] The plaintiff submits that the debenture does not preclude this particular action and that, in the alternative, the plaintiff has met the preconditions under the trust indenture which entitle him to bring this claim.

[6] The positions of the parties require me to resolve two fundamental issues:

I. Does the trust indenture preclude the plaintiff from bringing this action without authority from the trustee?

II. If so, has the plaintiff met the preconditions in article 8.5 of the indenture that would compel the trustee to commence an action or permit a debentureholder to proceed in the absence of the trustee?

[7] I allow the plaintiff's motion. On my reading, the trust indenture does not preclude the action the plaintiff has commenced and does not require the plaintiff to meet the preconditions set out in article 8.5. In the alternative, if I am incorrect in this assessment, I find that the plaintiff has met the preconditions in article 8.5 and it authorized to proceed in its own name without the further participation of the trustee.

I. Can Plaintiff Commence the Action Without Trustee Approval?

[8] The defendants submit that this action is precluded by article 8.5 of the trust indenture. That article provides that a debentureholder cannot commence an action unless:

(a) He or she has notified the trustee of an event of default under the debenture;

(b) Debentureholders representing 25% of the principal amount of the debentures have asked the trustee to commence the action and the trustee has declined to do so within a reasonable period of time;

(c) The debentureholders have given the trustee adequate security and indemnity; and

(d) The trustee has failed to commence the action within a reasonable period of time.

[9] Each of these preconditions will be examined later. At the moment, I am concerned with the opening language of article 8.5 which determines whether it even applies to the present situation. The plaintiff says the opening language of article 8.5 does not preclude the action; the defendants say it does. The article provides as follows:

> 8.5 No Suits by Debentureholders
>
> No holder of any Debenture shall have any right to institute any action, suit or proceeding at law or in equity for the purpose of enforcing payment of the principal of or interest on the Debentures or for the execution of any trust or power hereunder or for the appointment of a liquidator or receiver or for a receiving order under the Bankruptcy and Insolvency Act (Canada) or to have the Corporation wound up or to file or prove a claim in any liquidation or bankruptcy proceeding or for any other remedy hereunder, unless:

There then follow the four preconditions summarized in paragraph eight above.

[10] Provisions like these are known as no-action clauses. They were devised to prevent an action being brought by one debentureholder (or a small minority of debentureholders) without broader support.

[11] A no-action clause limits actions by debentureholders only to the extent expressly provided for in the indenture. The scope of the clause depends on the specific wording in the indenture: *Catalyst Capital Group Inc. v. Data & Audio-Visual Enterprises Wireless Inc*. 2013 ONSC 2170 at para. 22.

[12] Courts should interpret no-action clauses "harmoniously in the context of other provisions of the contract, and in light of the factual matrix as a whole": *Computershare Trust Co of Canada v Crystallex International Corp*, [2009] OJ No 5435 (ONSC) at para. 22; *Casurina Ltd Partnership*

v Rio Algom Ltd., [2002] OJ No 3229 (ONSC) at para 239; aff'd at [2004] OJ No 177 (ONCA) at para. 36; leave to appeal to the Supreme Court of Canada dismissed, [2004] SCCA No 105 (SCC).

[13] The starting point of my analysis is that any party, including a debentureholder, has a right of action against any party it wishes to sue, unless that right of action has been removed or limited by contract or some rule of law. The question here is whether the debenture, read as a whole, has limited or removed the debentureholders' right of action. I find that it has not.

[14] In considering that question I will proceed through the clauses that were cited to me in argument in the order in which they appear in the debenture.

[15] Article 1.12 of the debenture provides:

> **Nothing in this Indenture** or in the Debentures, express or implied, **shall give to any Person, other than the parties hereto** and their successors hereunder, any paying agent, the holders of Debentures, the Senior Creditors (to the extent provided in Article 5 only), and (to the extent provided in Article 8.11) the holders of Common Shares, **any benefit or any legal or equitable right**, remedy or claim under this Indenture. (Emphasis added)

[16] The action at issue is one by the debentureholders against certain former shareholders, officers and directors of Discovery Air. Article 1.12 basically means that the indenture does not give those defendants "any benefit or any legal or equitable right" because they are not parties to it. This would suggest that the debentureholders continue to have a direct right of action against those shareholders, officers and directors.

[17] Article 8.4(a) provides that if the Corporation fails to pay amounts owing under the indenture, the trustee may enforce payment "by such proceedings authorized by this Indenture or by law or equity…". This gives the trustee the power to enforce payment of the debentures.

[18] The plaintiff says this provision is irrelevant to his claim because he is not enforcing payment under the indenture but is claiming against those parties who rendered Discovery Air incapable of paying under the indenture. I tend to agree with the plaintiff that this clause has no bearing on his right to bring a claim. The clause is limited to enforcement of payment under the indenture. To interpret it more broadly than that would give rights to individuals who are not parties to the indenture which would contravene the language of article 1.12.

[19] Moreover, to this point in the analysis, article 8.4 (a) is an enabling provision, not a disabling provision. It enables the trustee to bring a claim for payment under the indenture. It does not disable debentureholders from bringing any claim.

[20] Article 8.4 (b) is to similar effect although slightly broader. It provides:

> The Trustee shall be entitled and empowered… to file such proof of debt, amendment of proof of debt, claim, petition or other document… to have the claims of the Trustee and of the holders of the Debentures allowed in any insolvency, bankruptcy, liquidation or other judicial proceedings relative to the Corporation… The Trustee is hereby irrevocably appointed… the attorney in fact of the respective holders of the Debentures with authority to make and file in the respective names of the holders of the Debentures or on behalf of the holders of the Debentures as a class,… any proof of debt, amendment of proof of debt, claim, petition or other document in any such proceedings… and to do and perform any and all such acts and things for and on behalf of such holders of the Debentures, as may be necessary or advisable in the opinion of the Trustee in order to have the respective claims of the Trustee and of the holders of the Debentures against the Corporation or its property allowed in any such proceeding…

[21] Like article 8.4(a), article 8.4 (b) is aimed at claims against the corporation or its property and does not apply to a claim against former shareholders and directors. As with 8.4 (a), even if the article did apply to the proceeding at issue here, the article enables the trustee to bring a claim but does not disable the debentureholders from doing so.

[22] Article 8.4(c) is broader still. It provides:

> The Trustee shall have the power at any time and from time to time to institute and maintain such suits and proceedings as it may be advised shall be necessary or advisable to preserve and protect its interests and the interests of the Debentureholders.

This provision is significantly broader than the previous provisions. It allows the trustee to take steps generally to preserve the interests of the debentureholders and is not limited to claims against the corporation and its property. This would appear to enable the trustee to bring the action at issue here. To this point, however, the provision remains one that enables the trustee to bring a claim but does not disable the debentureholders from doing so.

[23] This brings us to article 8.5 which is a disabling provision. I repeat it here for convenience:

> No holder of any Debenture shall have any right to institute any action, suit or proceeding at law or in equity for the purpose of enforcing payment of the principal of or interest on the Debentures or for the execution of any trust or power hereunder or for the appointment of a liquidator or receiver or for a receiving order under the Bankruptcy and Insolvency Act (Canada) or to have the Corporation wound up or to file or prove a claim in any liquidation

> or bankruptcy proceeding or for any other remedy hereunder, unless:
> [four conditions are met].

[24] Article 8.5 precludes a debentureholder from starting six enumerated types of actions, namely, claims: (i) to enforce payment of principal or interest; (ii) for the execution of any trust or power under the indenture; (iii) to appoint a liquidator or receiver; (iv) to have the corporation wound up; (v) to file a proof of claim in any liquidation or bankruptcy; or (vi) for any other remedy under the Indenture.

[25] In *Millgate Financial Corporation v BF Realty Holdings Ltd*, [1994] OJ No 1968 (ONCJ) at para. 18, Farley J. interpreted this language as preventing a debentureholder from commencing one of the enumerated claims against the corporation but leaving them free to commence other claims.

[26] In *Casurina,* Spence J. came to the opposite conclusion based on the language in a trust indenture issued by Rio Algom. In *Casurina*, the trust indenture contained additional language that prohibited debentureholders from taking any action without satisfying the four conditions. That additional language was found at the end of article 7.6 of the Rio Algom indenture (the equivalent of our 8.5), and provided:

> In such event but not otherwise, any Debentureholder acting on behalf of himself and all other Debentureholders, shall be entitled to take proceedings in any court of competent jurisdiction such as the Trustee might have taken under article 7.5, but **in no event shall any Debentureholder** or combination of Debentureholders **have any right to take any other remedy**[1] or proceedings out of court; it being understood and intended that no one or more of the Debentureholders shall have any right in any manner whatsoever to enforce any right hereunder or under any Debenture except subject to the conditions and in the manner herein provided, and that all powers and trusts hereunder shall be exercised and **all proceedings at law shall be instituted, had and maintained by the Trustee,**

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[1] Some might be tempted to argue that I have ended the bolding here too soon because the provision prevents the debentureholders from taking "any other remedy or proceedings out of court". However, Spence J. interpreted "remedy" and "proceeding out of court" as separate concepts and held that the words "out-of-court" referred only to "proceedings" and not to the word "remedy": see para. 135. In other words, the prohibition on the debentureholders from taking any other remedy, prevented them from bringing an action.

> **except only as herein provided,** and in any event for the equal benefit of all Holders of outstanding Debentures. (Emphasis added)

[27] The effect of this language in *Casurina* was to say that if a debentureholder satisfied the four preconditions, then he/she could start any action that the Trustee could have started, including any action generally to protect the interests of debentureholders (our article 8.4(c)). In the absence of having satisfied the four preconditions, however, the bolded language in article 7.6 of the indenture in *Casurina* prevented debentureholders from bringing any claims.

[28] The Discovery Air indenture does not contain the additional language at issue in *Casurina*. In that light, article 8.5 of the Discovery Air indenture remains an enabling provision, not a disabling one.

[29] The defendants try to overcome this by pointing out that article 8.5 precludes the debentureholders from taking any action "for the execution of any trust or power" under the indenture. The defendants submit that one of the trusts or powers is the power of the trustee under article 8.4(b) to bring any suit to protect the interests of the debentureholders. The defendants submit that the plaintiff's action is a trust or power under the indenture and should therefore be prohibited. I disagree.

[30] The words "any trust or power hereunder" refer to a trust or power given to someone under the indenture. In the context at hand, they refer to the power of the Trustee to commence an action on behalf of the debentureholders.

[31] What article 8.5 means when it precludes a debentureholder from taking any action "for the execution of any trust or power" is that a debentureholder cannot bring a proceeding to force the trustee to commence an action on behalf of debentureholders without having satisfied the four preconditions contained at the end of article 8.5. It does not take away the debentureholders' common law right of action unless some other provision of the indenture does so expressly.

[32] My reading of article 8.5 is supported by other articles of the indenture. For example, article 8.9 provides:

> 8.9 Remedies Cumulative
>
> No remedy herein conferred upon or reserved to the Trustee, or upon or to the holders of Debentures is intended to be exclusive of any other remedy, but each and every such remedy shall be cumulative and shall be in addition to every other remedy given hereunder or now existing or hereafter to exist by law or by statute.

[33] In other words, the fact that the trustee has been given the power to bring an action on behalf of debentureholders does not mean that the debentureholders are precluded from bringing

an action. The Trustee's power to bring an action is in addition to the debentureholders' common law right to do so. To remove a common law right as fundamental as access to the courts requires a specific contractual provision. Unlike the indenture at issue in *Casurina*, the Discovery Air indenture contains no such provision.

[34] Article 8.11 is also potentially relevant. It reads:

> 8.11 Immunity of Directors, Officers and Others
>
> The Debentureholders and the Trustee hereby waive and release any right, cause of action or remedy now or hereafter existing in any jurisdiction against any past, present or future officer, director or employee of the Corporation or holder of Common Shares of the Corporation or of any successor for the payment of the principal of or premium or interest on any of the Debentures or on any covenant, agreement, representation or warranty by the Corporation contained herein or in the Debentures.

[35] Although article 8.11 is a disabling provision, it is narrow in scope. It prevents debentureholders from bringing an action against directors and officers for payment of the debentures or for breach of any covenant or representation in the indenture. It does not, however, prevent oppression or other claims against directors and officers. It is clear from the language in 8.11 that the drafter knew how to craft a disabling provision when he/she chose to. The choice made was narrow. It limited but did not eliminate a debentureholder's right of action. Given the fundamental importance of access to courts, restrictions on access should be confined to the language chosen and should not be enlarged beyond that.

[36] The defendants point to the general policy behind no-action clauses as supporting their argument. They cite Justice Ground's explanation of the policy in para. 5 of *Amaranth LLC v Counsel Corp.,* [2003] 40 BLR (3d) 212 (ONSC):

> In my view it makes eminent good commercial sense that a legal proceeding which will affect the rights and remedies of the holders of a class of securities should be brought by a trustee on behalf of all the holders of such securities and avoid a multiplicity of proceedings and the possibility of conflicting results if individual proceedings by different security holders were permitted.

[37] The defendants argue further that these considerations apply equally when debentureholders seek to advance claims against officers and directors. They note that the Courts in both *Casurina* and *Amaranth* cited with approval the reasoning of the Delaware Court of Chancery in *Feldbaum v. McRory Corp*., 1992 Del.Ch. LEXIS 113 (June 1, 1992) to the effect that:

> Courts have implicitly concluded that this waiver by a bondholder applies equally to claims against non-issuer defendants as to claims against issuers. […]
>
> The policy favoring the channeling of bondholder suits through trustees mandates the dismissal of individual bondholder actions no matter whom the bondholders sue. So long as the suits to be dismissed seek to enforce rights shared ratably by all bondholders, they should be prosecuted by the trustee. Moreover, like other no-action clauses, the clauses at issue here explicitly make their scope depend on the nature of the claims brought, not on the identity of the defendant. [citations omitted]

[38] There are three reasons not to apply these principles to the facts of this case. First, a general policy that may justify contractual restrictions on the right to bring an action should not restrict the right to sue in the absence of contractual language to that effect. Second, the Discovery Air indenture allows debentureholders to bring a claim with the support of debentureholders representing only 25% of the debentures. This by nature makes a “multiplicity of proceedings” possible if different groups of debentureholders seek to pursue different or conflicting objectives. Third, the plaintiff represented 80% of Discovery Air’s debentureholders by the time of the hearing. Thus, any policy concerns about vexatious litigation or multiplicity of litigation are unfounded.

[39] As a result of the foregoing, I find that the debentureholders do have a right to pursue the action without satisfying the preconditions in article 8.5 of the Indenture.

II. Has the Plaintiff Met the Conditions of Article 8.5?

[40] Quite apart from the foregoing analysis, a debentureholder has the right to bring an action if he has met the four preconditions set out in article 8.5 of the indenture. The plaintiff submits he has met those preconditions.

[41] In the event my earlier analysis in these reasons is incorrect, I assess below whether the plaintiff has met the four preconditions of article 8.5.

[42] The preconditions as set out in the indenture are as follows:

> No holder of any Debenture shall have any right to institute any action, suit or proceeding at law or in equity … unless:
>
> (a) such holder shall previously have given to the Trustee written notice of the happening of an Event of Default hereunder;

> (b) the Debentureholders by Extraordinary Resolution or by written instrument signed by the holders of at least 25% in principal amount of the Debentures then outstanding shall have made a request to the Trustee and the Trustee shall have been afforded reasonable opportunity either itself to proceed to exercise the powers hereinbefore granted or to institute an action, suit or proceeding in its name for such purpose;
>
> (c) the Debentureholders or any of them shall have furnished to the Trustee, when so requested by the Trustee, sufficient funds and security and indemnity satisfactory to it against the costs, expenses and liabilities to be incurred therein or thereby; and
>
> (d) the Trustee shall have failed to act within a reasonable time after such notification, request and offer of indemnity and such notification, request and offer of indemnity are hereby declared in every such case, at the option of the Trustee, to be conditions precedent to any such proceeding or for any other remedy hereunder by or on behalf of the holder of any Debentures.

(a) Notice of Event of Default

[43] This condition is not seriously in issue. The trustee has been given notice of an event of default. Discovery Air has not repaid anything on the debentures and has been assigned into bankruptcy.

(b) Has the Plaintiff Complied with the 25% Requirement?

[44] Before the plaintiff commenced the action, his counsel approached the trustee, Computershare Trust Company of Canada, to ensure that he obtained consent of the debentureholders in a manner that was consistent with the Trustee's requirements.

[45] Computershare advised that it would not accept a written request under article 8.5(b) directly from the beneficial holders of 25% of the debentures. Instead, the request had to come from CDS Clearing and Depository Services Inc. in its capacity as the sole registered holder of the debentures.

[46] CDS in turn told plaintiff's counsel what it required to have CDS deliver a written request to Computershare under article 8.5(b). This involved a process whereby the beneficial holders had to instruct their brokers, in writing, to instruct CDS to deliver a written request to Computershare. As part of this process, the brokers would satisfy themselves that the instructions of their clients were valid and that they were in fact beneficial holders of the debentures.

[47] If the broker were so satisfied, it would sign the instruction and send it to CDS. Finally, CDS would verify that it had received instructions from holders of 25% of the face value of the debentures and provide the instruction to Computershare.

[48] Plaintiff's counsel followed these procedures. CDS confirmed to plaintiff's counsel in October 2018 that it had received appropriate instructions from brokers representing at least 25% of the face value of the debentures. Despite that advice, CDS never sent a request to Computershare.

[49] Neither CDS nor Computershare has provided any explanation for the failure to pass on these instructions. Neither has raised any complaint about the form of instructions that CDS received.

[50] On this motion, the defendants submit that the plaintiff and the debentureholders have not complied with the strict requirements of article 8.5(b) because Computershare has not received a written instruction from the CDS. That argument puts form over substance. It would mean that debentureholders could never commence an action if faced with a recalcitrant intermediary like CDS and would mean that the court was without power to compel CDS to comply with its duties.

[51] In addition, the defendants try to challenge the validity of the instructions the plaintiffs provided by suggesting that the beneficial debentureholders in respect of whom the brokers gave instructions to CDS may not in fact be the true beneficial debentureholders.

[52] Those arguments would have significantly more force if they came from the brokers, CDS or Computershare. They do not. On the contrary, CDS confirmed that it had received valid instructions. Moreover, by the time of the hearing, debentureholder support for the action had grown and debentureholders representing approximately 80% of the face value of the debentures had appointed the plaintiff as their proxy holder in this proceeding.

[53] While requirements for a threshold number of debentureholders may serve a valid policy purpose by ensuring that a vexatious debentureholder cannot compel the company into litigation against the wishes of other debentureholders, such requirements are not intended to create obstacles for debentureholders who have met them. On the evidence before me, the plaintiff has met the 25% threshold requirement.

[54] Indentures should be construed in a way that avoids a commercially unreasonable or absurd result: *Computershare Trust Co of Canada v Crystallex International Corp*., [2009] OJ No 5435 (ONSC) at para. 22: *Creston Moly Corp v Sattva Capital Corp*., 2014 SCC 53, [2014] 2 S.C.R. 633 at para. 47*; Ledcor Construction Ltd v Northbridge Indemnity Insurance Co.,* 2016 SCC 37, [2016] 2 S.C.R. 23 at paras. 63 and 65; *RBC Dominion Securities Inc. v. Crew Gold Corporation,* 2017 ONCA 648 at paras. 45 and 52-55.

[55] Courts may imply terms into a contract based on the presumed intention of the parties where the implied term is necessary "to give business efficacy to a contract or as otherwise meeting the 'officious bystander' test as a term which the parties would say, if questioned, that they had

obviously assumed": *MJB Enterprises Ltd v Defence Construction* (1951) Ltd., [1999] 1 S.C.R. 619 (SCC) at para. 27.

[56] It is not reasonable to interpret article 8.5 in a way that would preclude the plaintiff from bringing a claim when he has met the requirements for 25% approval but is prevented from moving forward because one actor in the chain refuses, for no articulated reason, to send the request to the trustee. If an officious bystander had been asked when the indenture was drafted, what should happen if the debentureholders met the 25% threshold, complied with the trustees requirements but an intermediary refused without reason to pass the request on to the trustee, I have no doubt that the officious bystander would say that the action should proceed. To hold otherwise puts form over substance to an absurd degree.

[57] Courts have not hesitated to relieve parties from strict compliance with contractual notice provisions where actual notice has been communicated by other means: *Limen Structures Ltd v Brookfield Multiplex Construction Canada Limited*, 2017 ONSC 5071 at paras. 53-54, 64-67; *Mar-King Construction Co v Peel (Regional Municipality)*, 2005 14 M.P.L.R. (4th) 151 (ONSC) at para. 23; *Citadel General Assurance Co v Johns-Manville Canada Inc*., [1983] 1 S.C.R. 513 (SCC), at paras 11 and 17. Computershare was served with the motion materials and appeared on the motion. They certainly had notice that the 25% threshold requirement by the time of the motion.

(c) Has the Plaintiff Complied with the Indemnity Requirement?

[58] Article 8.5 (c) of the indenture requires the debentureholders to provide Computershare with "sufficient funds and security and indemnity satisfactory to it against the costs, expenses and liabilities to be incurred" in or by the proposed litigation.

[59] Plaintiff's counsel offered to provide Computershare with a $4 million insurance policy to protect it against adverse costs incurred in connection with the litigation. Computershare responded by insisting on an insurance policy for $34.5 million, the full amount of the claim the plaintiff brings. Computershare took the position that the indemnity should not be limited to adverse costs awards in the proposed litigation, but should indemnify Computershare for all claims against it, even claims against Computershare for breach of its duties before the litigation commenced.

[60] The purpose of the indemnity is to protect Computershare against costs, expenses and liabilities it may incur as a result of litigation it is compelled to bring. It is not meant to indemnify Computershare for breaches of duty unrelated to the litigation, nor is it intended to permit Computershare to demand exorbitant indemnity to, in effect, create a further barrier to the debentureholders ever bringing suit.

[61] Given that the intention is to provide indemnity for "expenses and liabilities" incurred because of the litigation, the amount of the indemnity must be reasonably related to that object. The bondholders have explained how they arrived at the $4 million figure. They took the cost

award arising out of a recent, hard fought oppression suit in *Ernst & Young v Essar Global Fund Ltd. et al.*, 2017 ONSC 4017 and applied a generous premium to it.

[62] The respondents argue that the indenture does not require that the indemnity be reasonable but that it be satisfactory to the trustee. I do not accept that argument. Article 15.13(a) of the Indenture provides that the indemnity under article 8.5(c) be "reasonably satisfactory to the Trustee to protect and hold harmless the Trustee against the costs, charges and expenses and liabilities to be incurred thereby and any loss and damage it may suffer by reason thereof."

[63] Moreover, Computershare is a trustee. It owes fiduciary duties to the debentureholders. While Computershare may look out for its own interest to avoid financial exposure, it cannot simply pick any number it wants, no matter how unrelated to the potential liability at issue.

[64] The defendants also argue that there is insufficient evidence to conclude that the plaintiff's proposed indemnity was reasonable. They suggest that the indemnity is not limited to costs but covers all "loss or damage it may suffer" by reason of the litigation. While that is what the indenture says, no one was able to point to any loss or damage Computershare might suffer as a result of the litigation apart from costs of its own legal counsel or liability for defendants' costs and disbursements if the claim is unsuccessful. Given that the action is proceeding as a class-action, the plaintiff's counsel is not looking to the trustee for payment of its own legal fees. That leaves only the costs and disbursements of the potentially successful defendants as a source of liability.

[65] Counsel for Computershare made oral submissions on the motion. He did not explain the $34 million indemnity his client sought. He simply pointed out that trustees in this position must be indemnified because the company was bankrupt, Computershare was unfunded, and should not be put into the position of incurring even the cost of making submissions on a motion like this. While I sympathize with Computershare's position, the easy remedy is to absolve it of any further responsibility and allow the plaintiff to continue the suit as a representative action in his own name as he requests.

[66] The case law against commercially unreasonable results cited in paragraph 54 above is also relevant here. A trustee cannot simply be allowed to pick a number out of the air and insist that the indemnity be fixed at this figure without explanation or support.

[67] The trustee asserted that it could be liable for amounts greater than a cost award. To the extent that is correct, there would be no reason to limit the trustee's liability to the amount of the plaintiff's claim. A trustee could equally fear a liability of $100 million in response to a $34 million claim. The indemnity must be determined by some measure of reason. Subjective fear does not qualify as such a measure.

(d) Failure to Act in a Reasonable Time

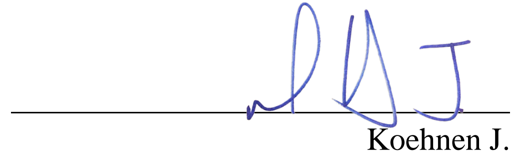
[68] The issue of timing was not contested on the motion before me. In my view the plaintiff has established this fourth condition. The trustee did not act within a reasonable time to bring the action. It knew that the plaintiff had the support of debentureholders representing at least 25% of the principal amount of the debentures and took no steps to commence the proceeding.

[69] Given the trustee's view on the amount of the indemnity and the relatively easy way of avoiding any risk to the trustee by allowing the plaintiff to proceed with his action, I would choose that route for practical reasons alone.

Disposition

[70] I grant the plaintiff's motion and declare that the plaintiff is not required to meet any preconditions to commence and proceed with his oppression action. If I am wrong in this, I declare in the alternative that the plaintiff met all preconditions to commencing and proceeding with the oppression action as of August 24, 2018.

[71] Any party seeking costs of this motion may send me submissions by email within 2 weeks, with responding submissions 1 week thereafter and reply submissions 3 days after that. If this proposed schedule causes difficulties for anyone, I will leave it to the parties to work out a schedule and advise me of it.



Koehnen J.

Released: August 13, 2020

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ONTARIO

SUPERIOR COURT OF JUSTICE

(Commercial List)

BETWEEN:

STEPHEN CAMPBELL
Plaintiff

– and –

CLAIRVEST GROUP INC., DISCOVERY AIR INC., TOP ACES INC., TOP ACES HOLDINGS INC., KENNETH ROTMAN, ADRIAN PASRICHA, ROD PHILLIPS, MICHAEL M. GRASTY, G. JOHN KREDIET, MICHAEL MULLEN, ALAIN BENEDETTI, THOMAS HICKEY, PAUL BERNARDS, ALAN TORRIE, and JACOB SHAVIT
Defendants

REASONS FOR JUDGMENT

Koehnen J.

Released: August 13, 2020