CITATION: Stephen Campbell v. Clairvest Group Inc. et al.,
2021 ONSC 2943

COURT FILE NO.: CV-18-609914-00CL
DATE: 20210420

ONTARIO

SUPERIOR COURT OF JUSTICE

[Commercial List]

BETWEEN:	)	
	)	
STEPHEN CAMPBELL	)	
Plaintiff	)	*Michael G. Robb and Serge Kalloghlian* for the Plaintiff
	)	
	)	
– and –	)	*Alistair Crawley and Dena Givari* for the Defendant, Clairvest Group Inc.
	)	
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	)	*Elizabeth Bowker* for the Defendants, Top Aces Inc. and Top Aces Holdings Inc.
	)	*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
Defendants	)	
	)	
	)	**HEARD:** April 16, 2021

KOEHNEN J

[1] The applicant moves for certification of this proceeding as a class action.

[2] The respondent Clairvest Group Inc. does not consent certification as against itself but opposes the form of the plaintiff's proposed common issues and wishes to include certain additional provisions about documentary and oral discovery in the certification order.

[3] The remaining defendants resist certification. They submit that the second amended statement of claim does not disclose a cause of action against them.

[4] As a result, there are three issues on this motion:

I. Does the statement of claim disclose a cause of action against the individual defendants and against the two Top Aces defendants?

II. What is the appropriate definition of the common issues?

III. Should any direction with respect to documentary or oral discovery be given at this point?

[5] For the reasons set out below, I grant certification against all defendants, revise the set of common issues to take into account some but not all, of Clairvest's suggestions and provide direction with respect to documentary and oral discovery.

I. Does the Statement of Claim Disclose a Cause of Action?

[6] The plaintiff and other class members were debenture holders of Discovery Air Inc. The primary asset of Discovery was its shareholding in Top Aces Inc. The plaintiff alleges that, through a series of transactions, the defendants transferred the shares that Discovery held in Top Aces to Clairvest at a material discount leaving Discovery in a cash poor position. This rendered Discovery unable to pay its debts, including those to the debenture holders which, in turn, is alleged to have led to a carefully engineered insolvency process in which Clairvest acquired the remaining assets of Discovery.

[7] The plaintiff alleges that securities regulations would ordinarily have required a formal valuation of Top Aces before Clairvest could acquire it because Clairvest was a related party purchaser. Such transactions are governed by special protections for minority security holders embodied in Multilateral Instrument 61-101 - Protection of Minority Security Holders in Special Transactions and its Related Companion Policy 61-101CP Protection of Minority Security Holders in Special Transactions.

[8] The plaintiff alleges that the transactions at issue were deliberately structured so as to avoid regulatory scrutiny and the requirements of MI 61 – 101 which in turn allowed Clairvest to acquire the shares of Top Aces at a material discount. The plaintiff further alleges that, after Clairvest acquired Top Aces, it sold shares in Top Aces to J.P. Morgan at a much higher price than the one at which Clairvest acquired the shares from Discovery. Clairvest is also said to have paid itself $25,000,000 out of Discovery shortly before causing Discovery to enter insolvency proceedings which had the effect of denying class members any recovery on their Discovery debentures.

[9] The individual defendants and Top Aces submit that each defendant named in a Statement of Claim should be able to look at the pleading and find an answer to the question: What do you say I did that has caused you, the plaintiff, harm, and when did I do it?[1] They submit that the statement of claim as pleaded does not enable them to answer those questions.

[10] In addition, they submit that the plaintiff has not provided specifics of any acts or omissions of the Individual Defendants or Top Aces which would justify imposing personal liability on them for oppression.

[11] The individual defendants submit that they are the object of a generalized, collective allegation that they have breached their duties which does not allow them to determine what or when they allegedly did something to harm the plaintiffs.

[12] I do not agree with that reading of the statement of claim.

[13] When determining whether a statement of claim discloses a cause of action under s. 5(1)(a) of the *Class Proceedings Act, 1992*[2] (the "***CPA***") the court asks itself whether it is plain and obvious that the Plaintiff's claim cannot succeed. That question is to be addressed in light of the following principles:

(a) The pleading must be read generously to allow for drafting deficiencies and the plaintiff's lack of access to key documents and discovery.

(b) The court should err on the side of permitting an arguable claim to proceed to trial.

(c) The pleading will be struck only if it is plain and obvious that the plaintiff cannot succeed or if the claim has no reasonable prospect of success.[3]

a. The Claim Against the Individual Defendants

[14] Although counsel for the individual defendants argued that the claim should not be certified against any of the individual defendants, he pressed the point with particular vigour with respect to Messrs. Benedetti, Shavit and Torrie because they had left Discovery or Top Aces before all of the transactions were completed.

[15] On my reading, the statement of claim alleges specific conduct that those individuals engaged in before leaving Discovery or Top Aces.

[16] Mr. Benedetti is alleged to have:

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[1] *Burns v RBC Life Insurance Company*, 2020 ONCA 347, at para 16.
[2] *Class Proceedings Act, 1992*, S.O. 1992, c.6.
[3] *Wright v Horizons ETFS Management (Canada) Inc*, 2020 ONCA 337 at para 57.

(a) designed the December 2016 Credit Agreement;

(b) designed the December 2016 Credit Agreement to disguise the undervalue transfer of Top Aces' shares to Clairvest;

(c) caused Discovery to enter into a going private transaction in order to avoid the formal valuation requirements of MI 61-101;

[17] With respect to Mr. Shavit, the Statement of Claim alleges that he:

(a) designed the December 2016 Credit Agreement, the June 2017 Credit Agreement and the June 2017 Swap Agreement;

(b) designed the Conversion Agreements to disguise the undervalue transfer of Top Aces' shares to Clairvest;

(c) caused Discovery to enter into the going private transaction in order to avoid the formal valuation requirements of MI 61-101.

[18] With respect to Mr. Torrie, the Statement of Claim alleges that he:

(a) was Discovery's CEO since August 29, 2017, during which the conversion options were executed pursuant to the conversion agreements;

(b) caused Top Aces' shares to be sold to a third-party investor group at a higher price than the price Clairvest acquired those shares;

(c) caused Discovery to use $25 million of the funds from the transaction with the third-party investor group to pre-pay amounts owned to Clairvest; and

(d) caused Discovery to enter insolvency proceedings.

[19] Those allegations are sufficient to give each individual defendant notice of what he is said to have done and what he is being called upon to explain in this action.

[20] The specific allegations against each individual are summarized in Schedule C to the plaintiff's reply factum with references to the statement of claim. I will not go through the exercise of reproducing the allegations against the remaining individual defendants. They are similar in nature and level of detail to the allegations described in paragraphs 16-18 above.

[21] The individual defendants submit that the allegations against them are generic and substantially duplicative. They do not appear to draw a distinction between individual

defendants and do not state with particularity, the specific role that each individual defendant had in designing an agreement/transaction or in causing one of the corporate parties to enter into or close a particular transaction.

[22] There are two answers to that complaint. First, there is nothing necessarily improper in alleging that a number of people conducted the same act together. Second, one must bear in mind that the proceeding is at an early stage and that the plaintiff does not have access to the complete books and records of the defendants.[4] The absence of documentary production at this early stage will inevitably affect the level of detail that the plaintiff can be expected to plead. To hold otherwise would mean that a plaintiff would have no cause of action against a group of defendants, even if the conduct was clearly oppressive, unless the plaintiff were able to provide granularly particularized actions in respect of each individual. This would be particularly unfair given that, in most situations, it is the proposed defendants who have knowledge of the granularly particularized actions in which they engaged but have typically failed to share that information with the plaintiff before documentary production or discovery.

[23] In addition, the individual defendants and Top Aces submit that the statement of claim runs afoul of the Supreme Court of Canada's decision in *Wilson v Alharayeri*[5] where it explained that personal liability for oppression would only be imposed if:

(a) The oppressive conduct was "properly attributable to the director because he or she is implicated in the oppression." In other words, "the director must have exercised – or failed to have exercised – his or her powers so as to effect the oppressive conduct".

(b) The imposition of personal liability must be "fit in all the circumstances".

[24] The statement of claim meets these requirements. In *Wilson* the Court held that it may be appropriate to impose personal liability where one or more of the following five non-exhaustive factors is present:

(i) directors obtain a personal benefit from their conduct;

(ii) directors have increased their control of the corporation by the oppressive conduct;

(iii) directors have breached a personal duty they have as directors;

(iv) directors have misused a corporate power; and

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[4] *1440195 Ontario Inc v 1440194 Ontario Inc*., 2016 ONSC 2921 at para 12.
[5] *Wilson v Alharayeri*, 2017 SCC 39 at paras. 47-49.

(v) a remedy against the corporation would prejudice other security holders.[6]

[25] The statement of claim alleges against each individual defendant that he breached his fiduciary duty to Discovery and preferred his own and Clairvest's interests to those of Discovery when he engaged in the conduct alleged against him. Those allegations fall squarely within the third and fourth factors set out in the previous paragraph. Those allegations also make clear to each individual defendant, the legal standard he is alleged to have breached.

[26] The combination of the facts alleged and the legal standard breached enables each individual defendant to defend himself, to know what documents are relevant to produce and what topics to review when preparing for oral discovery.

b. The Claim against Top Aces

[27] Counsel for the Top Aces defendants submits that her clients are described as objects of the oppression, not as oppressive actors. As an object of oppression, Top Aces submits cannot be liable for the oppression.[7]

[28] The plaintiff submits that Top Aces is not merely an object but an active participant in the oppression. It submits that even Top Aces Holdings Inc. which was not incorporated until December 14, 2017, close to the end of the impugned activities, was nevertheless an actor in the oppression because it was the entity that issued treasury shares to J.P. Morgan for allegedly less than market value which was an integral part of the oppression. Top Aces Inc. entered into an agreement based on a flawed valuation of itself and permitted the flawed valuation to be prepared.

[29] It does appear to me from the strict wording of the proposed Second Fresh as Amended Statement of Claim that both Top Aces entities are described more as objects of the oppression then they are as actors in it. That strikes me more as a question of language than substance and could be remedied with the addition of a few sentences to the statement of claim.

[30] Moreover, even if the Top Aces entities were objects rather than actors in the oppression, it would still be appropriate to name them as defendants. Rule 5.03 (1) provides:

> Every person whose presence is necessary to enable the court to adjudicate effectively and completely on the issues in a proceeding shall be joined as a party to the proceeding.

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[6] *Wilson* at paras. 47-49.
[7] *Hovsepian v. Westfair Foods Ltd*., 2001 ABQB 700 at para.92.

[31] It is necessary to join the two Top Aces parties to enable the court to adjudicate effectively and completely because the allegations involve activities in which they engaged. Although there may be other actors who caused the Top Aces entity to engage in the conduct being challenged, it was nevertheless the Top Aces corporations that engaged in the conduct. A corporation can act oppressively just as an individual can. Moreover, the Top Aces entities will have to be bound by any judgment of the court. A party that will be bound by a judgment should, generally speaking, be before the court. It may also be that Top Aces assets are ultimately those against which the plaintiff can execute any judgment. Finally, Top Aces is likely to have documents in its possession power or control that are necessary to enable the court to adjudicate the matter effectively.

[32] As a result of all of the foregoing, both Top Aces entities are appropriate parties to the action and the statement of claim discloses causes of action sufficient to have the action certified against them.

II. Definition of the Common Issues

[33] Although Clairvest concedes that certification of the class action against itself is appropriate, it takes issue with the plaintiff's proposed definition of the common issues.

[34] The plaintiff proposes that the common issues be confined to four relatively general questions as follows:

(i) Did any act or omission of Discovery or any of its affiliates effect a result, or were the business or affairs of Discovery or any of its affiliates carried on or conducted in a manner, or were the powers of the directors Discovery or any of its affiliates exercised in a manner that was oppressive or unfairly prejudicial to or that unfairly disregarded the interests of the Class Members, within the meaning of section 241 of the Canada Business Corporations Act ("CBCA")?

(ii) If the answer to (i) is yes, should the Court make an order that the Defendants, or any one or more of them, compensate the Class Members pursuant to section 241 (3) of the CBCA?

(iii) If the answer to (ii) is yes, on what basis should the amount of compensation payable to the Class Members be determined?

(iv) If the answer to (ii) yes, are there other remedies that should be ordered by the Court pursuant to section 241 of the CBCA to rectify the harm caused by the Defendants, or any of them, to the Class Members as a result of the conduct of those Defendants, or any of them, which was oppressive or unfairly prejudicial to or that unfairly disregarded the interests of the Class Members?

[35] Clairvest proposes a more granular definition of common issues that would break the oppression issue down into seven particular factual questions and add eight additional common issues after that.

[36] I do not believe it would be appropriate to break the larger oppression question down into the seven sub-issues that Clairvest suggests.

[37] Numerous courts have held that it is preferable, at least initially, to define the common issues in general terms.[8] If necessary, those general terms can be refined at a later stage of the proceeding. Courts have tended to reject efforts to unnecessarily particularize common issues at the certification stage.[9] Further particularization is not needed at the certification stage because the common issues will be interpreted and applied based on the statement of claim and the statements of defence.[10]

[38] In some cases, particularization of the common issues is preferable; particularly cases where the common issue is easily confined to a narrow question or set of narrow questions. Oppression is, however, a broader, more amorphous issue for which the broader approach that the plaintiff suggests is preferable. To subdivide oppression into detailed sub-issues such as those that Clairvest proposes, would set up a competition between the issues as defined in the pleadings and the definition of the common issues. That can create unnecessary confusion and mischief if parties begin interpreting their production obligations or obligations to answer question on discovery in light of the common issues as opposed to the pleadings. Both plaintiff and defendant should be able to define their cases as they wish in their pleadings. They should not be hampered in doing so by an overly particularized set of common issues.

[39] Numerous courts have adopted the approach the plaintiff suggests in oppression cases and have avoided detailed particularization of fact issues at the certification stage.[11] That is not to say that the additional issues that Clairvest proposes are irrelevant. They may well arise from the pleadings and form appropriate areas of inquiry on discovery. It is more that discovery should not be constrained by an unduly specific definition of common issues.

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[8] *Cloud v Canada (Attorney General)*, 2004 CanLII 45444 (ONCA) at para. 72. See also*: Sauer v Canada (Agriculture),* 2009 CanLII 2924 (Div Ct) at para 37; *Kirk v Executive Flight Centre Fuel Services*, 2017 BCSC 726 at para 105; *Miller v. Merck Frosst Canada Ltd*., 2013 BCSC 544 at para 143.

[9] See for example: *Taylor v Wright Medical Technology Canada Ltd*, 2014 NSSC 89 at para 48, aff'd 2015 NSCA 68; *Microcell Communications Inc v Frey*, 2011 SKCA 136; *Logan v Dermatech, Intradermal Distribution Inc*, 2011 BCSC 1097.

[10] *Logan v Dermatech, Intradermal Distribution Inc*., 2011 BCSC 1097 at para. 36.

[11] *Noble v. North Halton Golf and Country Club Ltd*., 2016 ONSC 2962; *Rooney v. ArcelorMittal*, 2018 ONSC 1878; *Barkley v. Tier 1 Capital Management Inc*., 2018 ONSC 1956; *Abdula v. Canadian Solar*, 2015 ONSC 53; *Brigaitis v. IQT, Ltd. c.o.b. as IQT Solutions*, 2014 ONSC 7; *Jellema v. American Bullion Minerals Ltd*., 2009 BCSC 1605 rev'd 2010 BCCA 495*; Lewis v. Cantertrot Investments Ltd*., 2005 CanLII 30321, 2006 CanLII 1192, 2006 CanLII 12717**.**

[40] Although the defendants have not yet filed statements of defence, one defence they have already flagged is that of causation. On the record before me, causation will be a critical issue going forward. At the time of the impugned transactions, the debentures were trading at approximately 30% of their face value. The defendants will argue that a company whose debt is trading at 30% of face value is clearly subject to significant solvency issues. They intend to defend by arguing, among other things, that any limitation on Discovery's ability to redeem the debentures arose out of financial difficulties the company encountered before the impugned transactions, not because of the impugned transactions.

[41] As a result, Clairvest proposes that the following common issues be added to the plaintiff's list:

(v) If the answer to (i) is yes, did any of the alleged oppressive acts cause Class Members to suffer damages?

(vi) What amounts, if any, would have been available to repay the Unsecured Debentures even if any alleged oppressive acts had not occurred?

[42] The plaintiff cannot point to any prejudice that would arise if these were added to the list of common issues. Indeed, his only basis for resisting their addition was to say that they are already inherent in the issues he has articulated. If that is the case, there is no harm in actually articulating them clearly at the outset. Doing so will help focus documentary production and oral discovery.

[43] In addition, Clairvest proposes to create several sub-classes among class members. Clairvest points out that the reasonable expectations of debenture holders may well vary depending on the time at which they purchased their debentures and the knowledge they could be expected to have at the time of purchase. By way of example, a debenture holder who purchased at face value might have different expectations than a debenture holder who purchased at $0.30 on the dollar after the impugned transactions had been announced. In the same vein, Clairvest points out that there was significant trading in the debentures when the transactions were announced. As a result, a material portion of class members may have purchased with knowledge of the transactions being attacked.

[44] The identity of the security holders, the time at which they purchased and the knowledge that can reasonably be imputed to them at the time of purchase are all relevant factors to consider in an oppression case.[12]

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[12] *Harbert Distressed Investment Master Fund Ltd. v. Calpine Canada Energy Finance ULC*, 2005 NSSC 211 at paras. 183, 186, 188, 189; *AMCU Credit Union Inc. v. Olympia & York Developments Ltd*. (1992), 7 B.L.R. (2d) 103 (Ont. Gen. Div-Commercial List) at para. 3.

[45] As a result, Clairvest would add following to the list of common issues:

(vii) Did different Class Members have different reasonable expectations based on the time at which they purchased or held investments in the Unsecured Debentures in Discovery Air?

(viii) Is there any methodology that can be employed to calculate a portion of individual Class Members' damages?

(ix) Should Class Members be grouped into sub-classes to assist in determining any of the above-noted issues?

[46] These are issues that will be important for the common issues judge to determine. They are integral to the oppression analysis and should be explored at an early stage in the proceeding. Without having these as part of the common issues list, it is difficult to see what purpose a common issues trial would serve. Liability would only be established in the most abstract and conditional of senses leaving the real meat of the analysis to be performed at a later stage. Stating these questions early on will help define production and discovery obligations and provide both sides with more information that will help in the ultimate resolution of the litigation either by adjudication or otherwise. I would therefore be inclined to add the three issues set out in paragraph 45 above to the common issues list.

[47] In its list of common issues, Clairvest proposes six particular categories of class members based on six different time periods during which class members purchased or held the debentures. The significance of Clairvest's proposed time periods was not apparent to me from the record and the parties did not have time to address the issue in oral argument. As a result, I am not prepared to define any subclasses at this point. This issue will, however, require further exploration in the very near future.

III. Additional Documentary or Oral Discovery

[48] Clairvest submits that the litigation plan should allow it to obtain additional information about the particulars of trading activity of class members, and in particular about the trading activities of Durig Capital Inc., a sophisticated distressed debt fund that Clairvest believes holds approximately 21% of the debentures and that Clairvest believes were purchased after the impugned transactions were announced. In addition, Clairvest submits that the litigation plan should:

(a) Require production of trading records from class members;

(b) permit discovery beyond the representative plaintiff;

(c) allow for the possibility of motions for summary judgment; and

(d) require the parties to meet and confer, and if necessary seek to have imposed by the court, a proportional and efficient process for the adjudication of the issues as they develop.

[49] The plaintiff does not agree with these requests. He notes first that pursuant to rule 30.10, production from non-parties is only available with leave and on notice to the non-party. The plaintiff notes that Clairvest's request in this regard was made without notice and has deprived the affected parties of the opportunity to file evidence on or argue the issue. There is force to that submission. I am not prepared to make a formal production order without notice to the affected parties.

[50] That said, the case law is relatively clear in stating that a party's knowledge at the time it purchased securities is relevant to its expectations and therefore relevant to a finding of oppression.

[51] Addressing the issue of class member trading records at an early stage is critical. If 95% of the current debenture holders purchased at a fraction of face value with full knowledge of the impugned transactions, that would put a very different complexion on the claim than if 95% of the debenture holders purchased at face value without knowledge of the transactions. Resolving the issue of trading records strikes me as being critical to the development of a cost-effective and efficient way of advancing the action.

[52] With respect to expanded oral discovery, section 15 (2) of the Class Proceedings Act, provides that a party may move for discovery against other class members after discovery of the representative plaintiff. As a result, I am not prepared to order oral discovery of other class members at this stage.

[53] With respect to the litigation plan generally, the proposed plan is being advanced at a very early stage of the proceeding without detailed argument about its contents. The plan will inevitably require refinement as things proceed. The fact that something is not contained in the litigation plan now will not necessarily preclude those steps from being added at a later stage. This is particularly germane to the issues of production from class members, discovery of class members and motions not contemplated in the litigation plan.

IV. Disposition and Costs

[54] For the reasons set out above, I order that:

(a) This action be certified as a class action with Stephen Campbell as the representative plaintiff.

(b) The litigation plan of the plaintiff attached as Schedule B to the plaintiff's notice of motion be adopted as the first draft of the litigation plan.

(c) The common issues will be those contained in paragraphs 34, 41 and 45 of these reasons.

[55] I will continue to case manage this action to ensure there is consistency in approach.

[56] The parties should begin to confer about the most effective way of addressing the issue of trading records from class members and any potential sub-divisions of class members. In directing parties to confer I am not making a ruling on those issues but indicating that they are live issues that need to be dealt with either by agreement or by way of court order. If the parties cannot resolve that, or any other issue going forward, any party can approach me directly for a case conference to address the most efficient way of addressing that issue at an early stage.

[57] Any party seeking costs as a result of that this motion may make written submissions within 14 days of receiving these reasons. Any responding party will have 10 days to respond with a further five days provided for reply.

Koehnen J.

Released: April 20, 2021

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STEPHEN CAMPBELL

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Defendants

REASONS FOR JUDGMENT

Koehnen J.

Released: April 20, 2021