Court File No. CV-19-617792-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

1291079 ONTARIO LIMITED

Plaintiff

and

SEARS CANADA INC., SEARS HOLDING CORPORATION, ESL INVESTMENTS INC., WILLIAM C. CROWLEY, WILLIAM R. HARKER, DONALD CAMPBELL ROSS, EPHRAIM J. BIRD, DEBORAH E. ROSATI, R. RAJA KHANNA, JAMES MCBURNEY and DOUGLAS CAMPBELL

Defendants

Proceeding under the *Class Proceeding Act, 1992*

RESPONDING FACTUM OF THE DEFENDANT ESL INVESTMENTS, INC.

(Motion for Certification Returnable April 17, 2019)

April 12, 2019

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TO: **THE LITIGATION SERVICE LIST**

Litigation Service List
Last Updated Mar. 8, 2019 at 11:27 AM

Court File No. CV-18-611219-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

FTI CONSULTING CANADA INC.,
in its capacity as Court-appointed monitor in proceedings
pursuant to the *Companies' Creditors Arrangement Act*, RSC 1985, c. c-36

Plaintiff

and

ESL INVESTMENTS INC., ESL PARTNERS, LP, SPE I PARTNERS, LP, SPE MASTER I, LP, ESL INSTITUTIONAL PARTNERS, L.P., EDWARD S. LAMPERT, WILLIAM HARKER and WILLIAM CROWLEY

Defendants

Court File No. CV-18-611214-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

SEARS CANADA INC., by its Court-appointed Litigation Trustee,
J. DOUGLAS CUNNINGHAM, Q.C.

Plaintiff

and

ESL INVESTMENTS INC., ESL PARTNERS LP, SPE I PARTNERS, LP,
SPE MASTER I, LP, ESL INSTITUTIONAL PARTNERS, L.P.,
EDWARD LAMPERT, EPHRAIM J. BIRD, DOUGLAS CAMPBELL, WILLIAM CROWLEY,
WILLIAM HARKER, R. RAJA KHANNA, JAMES MCBURNEY, DEBORAH ROSATI and
DONALD ROSS

Defendants

Litigation Service List
Last Updated Mar. 8, 2019 at 11:27 AM

Court File No. CV-18-611217-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

MORNEAU SHEPELL LTD., in its capacity as administrator of the Sears Canada Inc. Registered Pension Plan

Plaintiff

and

ESL INVESTMENTS INC., ESL PARTNERS, LP, SPE I PARTNERS, LP, SPE MASTER I, LP, ESL INSTITUTIONAL PARTNERS, LP, EDWARD S. LAMPERT, WILLIAM HARKER, WILLIAM CROWLEY, DONALD CAMPBELL ROSS, EPHRAIM J. BIRD, DEBORAH E. ROSATI, R. RAJA KHANNA, JAMES MCBURNEY and DOUGLAS CAMPBELL

Defendants

Court File No. 4114/15 (Milton)

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

1291079 ONTARIO LIMITED

Plaintiff

and

ESL INVESTMENTS INC., SEARS CANADA INC., WILLIAM C. CROWLEY, WILLIAM R. HAWKER, DONALD CAMPBELL ROSS, EPHRAIM J. BIRD, DEBORAH E. ROSATI, R. RAJA KHANNA, JAMES MCBURNEY and DOUGLAS CAMPBELL

Defendants

Proceeding under the Class Proceedings Act, 1992

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Court File No. CV-19-617792-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

1291079 ONTARIO LIMITED

Plaintiff

and

SEARS CANADA INC., SEARS HOLDING CORPORATION, ESL INVESTMENTS INC., WILLIAM C. CROWLEY, WILLIAM R. HARKER, DONALD CAMPBELL ROSS, EPHRAIM J. BIRD, DEBORAH E. ROSATI, R. RAJA KHANNA, JAMES MCBURNEY and DOUGLAS CAMPBELL

Defendants

Proceeding under the *Class Proceeding Act, 1992*

RESPONDING FACTUM OF THE DEFENDANT ESL INVESTMENTS INC.

(Motion for Certification Returnable April 17, 2019)

PART I - INTRODUCTION

1. The defendant ESL Investments, Inc. ("**ESL**") does not oppose certification of this proceeding under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the "**CPA**"), provided the proceeding is certified on appropriate terms. ESL takes issue with three aspects of the terms of certification. It is ESL's position that:

(a) the Court should not certify common issue (d)(i);

(b) the Court should certify, for the purposes of this proceeding, the questions certified in the underlying action bearing court file no. 3769/13 (the "**2013 *Wishart Act* Class Action**"); and

(c) the litigation plan proposed by the plaintiff must contemplate the inevitability of a hearing on the merits of the 2013 *Wishart Act* Class Action.

PART II - STATEMENT OF ISSUES, LAW AND AUTHORITIES

1. Common issue (d)(i) should not be certified

2. 1291079 Ontario Limited's ("**129**") theory in this proposed class action is that Sears Canada Inc.'s ("**Sears Canada**") payment of a dividend in 2013 unlawfully deprived the proposed class members of the damages they would have obtained against Sears Canada by proving the allegations in the 2013 *Wishart Act* Class Action. The proposed class' success therefore relies on proof of two things: 1) that the proposed class plaintiffs in this action would have obtained an award of damages against Sears Canada at a trial of the 2013 *Wishart Act* Class Action; and 2) that the acts of the defendants to this action unlawfully deprived the proposed class of this award. Neither question has been answered. Yet the proposed class now seeks to certify an obviously untenable question with the hope of relying on a deal it struck with the Monitor to avoid having to prove the merits of its 2013 *Wishart Act* Class Action:

> (d) In determining the compensation, (i) is the quantum of such compensation to be based on the plaintiff's proven unaffected unsecured claim against Sears Canada Inc. ("Sears") of $80,000,000 as agreed by the court-appointed monitor in the filing by Sears under the Companies' Creditors Arrangement Act ("CCAA") and as set out in the Plan of Arrangement filed by the monitor in the CCAA ("CCAA Claim Amount")?

3. Certifying a patently unreasonable question such as this is not only improper in law but would cause unnecessary uncertainty in the proposed litigation plan. Put in terms of ss. 5(1)(a) and 5(1)(c) of the CPA, the Court should refuse certification of this question as (a) it is plain and obvious that 129 has no chance of succeeding on this question, and (b) this question will not advance the proceeding as it will clearly be answered in the negative.

It is plain and obvious that common issue (d)(i) has no chance of success

4. Under s. 5(1)(a) of the CPA, a court must refuse to certify a common issue where it is plain and obvious that the allegation on which it is based has no chance of success.[1] Pleaded facts and allegations are assumed to be true unless "patently ridiculous" or "incapable of proof."[2]

5. As part of the CCAA proceedings, in or around December 14, 2018, 129 entered into an Amended and Restated Settlement Agreement with Sears Canada and the Monitor (the "**Compromise Agreement**"), "for the purposes of voting on, and receiving distributions pursuant to"[3] a Plan of Arrangement under the CCAA. 129 pleads that the Directors and ESL will be "bound to the Plan of Arrangement, including the Agreement" by virtue of the fact that these defendants have filed an indemnity claim in the CCAA proceedings as creditors and as such will be bound by that Plan.[4]

6. This is an absurd proposition. In essence, 129 is attempting to avoid its basic obligation to prove damages by relying on a side agreement with the Monitor, even though

- the $80 million figure "agreed" to by the Monitor, and the treatment of the Class Action Claims, is for the purpose of voting on, and receiving distributions pursuant to, a CCAA Plan (Compromise Agreement, p. 2, last recital);
- the $80 million figure does not appear to be supported by any assessment of Sears Canada's liability or the class' actual damages;
- the Compromise Agreement provides that nothing in it shall constitute an admission by Sears Canada or a finding by the Monitor concerning any alleged conduct of the defendants to the class actions (Compromise Agreement, para. 10);

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[1] *Williams v. Canon Canada Inc.*, 2011 ONSC 6571 at para. 176, aff'd 2012 ONSC 3692 (Div. Ct.), Plaintiff's Book of Authorities at Tab 1 [*Williams v. Canon*].
[2] *Williams v. Canon* at para. 176, Plaintiff's Book of Authorities at Tab 1.
[3] Compromise Agreement, Plaintiff's Supplementary Motion Record, Tab 2C, p. 25.
[4] Amended Statement of Claim, Plaintiff's Supplementary Motion Record, Tab 2D, p. 72, para. 110.

- the Compromise Agreement provides that it is only binding on class members, Sears Canada and the Monitor (Compromise Agreement, para. 13); and
- the defendants to this proceeding had no involvement in the making of the Compromise Agreement, and are not parties to the Compromise Agreement.

7. The allegation that the Directors and ESL will be bound by the Compromise Agreement by reason of its proposed incorporation into the Plan of Arrangement is bound to fail as a matter of law. It is plain and obvious that a Plan of Arrangement cannot bind creditors vis-à-vis each other, particularly in the context of ongoing litigation. The Monitor's assessment of the value of a claim for the purposes of a Plan of Arrangement is fundamentally different from a determination of the actual value of a claim, as a CCAA plan is, by its nature, an exercise in *compromise*. It is not intended to be perfect, and need only be fair, reasonable and equitable.[5] While a Plan of Arrangement binds creditors vis-à-vis the debtor with regard to their own claims,[6] it does not and cannot determine the value of a claim for all other purposes. 129 has pointed to no case law supporting its *prima facie* untenable position.

8. The consequence of 129's assertion would be that creditors who receive a lower amount than the value of their claim via an approved Plan of Arrangement would be bound by this quantum vis-à-vis other creditors and third parties. This simply cannot be the case. Turning approved CCAA plans into orders that are enforceable by and against third parties would have the effect of discouraging creditors from voting to approve plans. 129's proposition is also inconsistent with s. 20(2) of the CCAA, which permits a debtor to admit the amount of a claim *for the purposes of a Plan* while reserving the right to contest liability for other purposes.

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[5] *Canadian Red Cross Society, Re* (2000), 19 C.B.R. (4th) 158, at para. 22 (Ont. S.C.J.), Book of Authorities of ESL at Tab 2 [BOA].
[6] CCAA, s. 6(1).

9. The allegation is also bound to fail on the plain wording of the Compromise Agreement. The Court is entitled to consider the Compromise Agreement on this motion. In contemplating relief under s. 5(1)(a), the Court may consider documents referenced in the pleadings to determine whether what is pleaded or alleged is "patently ridiculous" or bound to fail.[7] The allegation that the Compromise Agreement is binding on the defendants in this proceeding meets this standard, as it contradicts the clear language of the Compromise Agreement, which, among other things, provides that it <u>will not be binding</u> on third parties.

10. It is clear that 129 is inappropriately using common issue (d)(i), and the allegation at paragraphs 109 and 110 of the amended statement of claim, as a means to "short-circuit" the requirement to prove its damages, and is bound to fail in its attempt to do so.

Proposed common issue (d)(i) will not move the proceeding forward

11. The Court should also refuse to certify proposed common issue (d)(i) under s. 5(1)(c) of the CPA, which requires that a common issue move the proceeding forward.[8] Courts have discretion to amend or refuse to certify common issues under this prong, and are particularly willing to do so when they relate to a measure of damages that is inappropriate or would serve "no purpose."[9]

12. Courts have also refused to certify common issues under s. 5(1)(c) where it is "self-evident" that the common issue would be answered against the plaintiff, and would therefore not advance the litigation. In *Kalra v. Mercedes Benz*, the Court found it was inappropriate to strike a portion of a claim that had a "slight pulse" under s. 5(1)(a), but relied on s. 5(1)(c) in refusing to certify that portion of the claim because the answer was "self-evident":

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[7] *Gaur v. Datta*, 2015 ONCA 151, at paras. 5 and 19, BOA at Tab 6.
[8] *Williams v. Mutual Life Assurance Co. of Canada* (2003), 226 D.L.R. (4th) 112, at paras. 44 and 47 (Ont. C.A.), leave to appeal to SCC denied, [2003] S.C.C.A. No. 283, BOA at Tab 14 [*Williams v. Mutual*].
[9] *Brigaitis v. IQT, Ltd.*, 2014 ONSC 7, at para. 151, BOA at Tab 1; *Pardhan v. Bank of Montreal*, 2012 ONSC 2229, at paras. 285-288, BOA at Tab 10.

> But there is a more pressing problem. When I dealt with the negligence claim as a cause of action under s. 5(1)(a), I found that it still had a (slight) pulse and should not be struck. But here, where the negligence claim is presented as a proposed common issue, I must pay greater heed to the fact that the plaintiff is claiming for economic loss only and not for any health-related injury and to the fact that today the overwhelming body of law would not impose a tort duty of care on the defendants for manufacturing and marketing a vehicle that on the facts as pleaded is a safe but shoddy product. In my view, it is beyond dispute — given that the claim herein is for economic loss only — that under the applicable law the answer to the duty of care question must be "no". Because this answer is self-evident and will not advance the litigation, [this proposed common issue] should not be certified.[10]

13. The Compromise Agreement – and any potential Plan of Arrangement – are plainly not capable of being conclusive on the issue of damages in this proceeding. In addition to the fact that this assertion is untenable at law and contradicts the plain wording of the Compromise Agreement, 129 refuses to disclose the materials it provided to the Monitor to prove and quantify its claim on the basis of "settlement privilege", and indicates that it has no plan to seek to waive that privilege.[11] The settlement reflects a valuation of 80% of the full amount pleaded in the 2013 *Wishart Act* Class Action. There is no evidence of any analysis by the Monitor of actual losses or of the likelihood of Sears Canada's liability for those alleged losses.

Even the claim that the 2013 proposed Class Action is "settled" is tenuous

14. 129 cannot use a Compromise Agreement from the CCAA that does not comply with CPA requirements to argue that the 2013 *Wishart Act* Class Action has effectively been "settled", let alone argue that the settlement is somehow binding on the defendants. The Compromise Agreement brazenly disregards the CPA requirement for court approval of all class action settlements and payments to class counsel to prevent abuse and conflicts of interest.[12]

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[10] *Kalra v. Mercedes Benz*, 2017 ONSC 3795, at para. 65, BOA at Tab 7.
[11] Transcript of the Cross-Examination of A. Seretis, p. 29, ll. 4-9.
[12] CPA, ss. 29(2) and 32.

Inexplicably, the parties have not sought the Court's approval of the purported "settlement". The analysis that a court must undertake in approving a class action settlement and class counsel fees is different from the analysis a court undertakes in approving a Plan of Arrangement, so it is not enough for the CPA to say that the Compromise Agreement will be approved by the Court in the insolvency context.[13]

15. 129 has even refused to *disclose the information that a court would require* prior to approving the settlement and counsel fees under the CPA. For instance, the Compromise Agreement says nothing about how the settlement funds will be distributed amongst class members or the portion of the $80 million that will be paid to class counsel. The Compromise Agreement references a mysterious "upfront payment" to be taken out of the Sears Canada Estate and delivered to class counsel, but does not indicate its ultimate recipient(s). On cross-examination, class counsel refused to reveal who will receive this "upfront payment" and why it was being paid, by improperly invoking settlement privilege.[14] An unapproved class action "settlement" that raises alarming concerns such as these could never be considered "binding" or "valid" as a matter of law.

16. The Court should decide this question now. The consequences of the Court certifying such a far-fetched and unreasonable question is that the parties will expend significant pre-trial resources fighting over issues that stem from this proposed question as a result of the plaintiff's refusal to provide pertinent information and inappropriate invocation of "settlement privilege". It

[13] The test for approving a class action settlement is whether the settlement is "fair, reasonable and in the best interest of those affected by it" (*Dabbs v. Sun Life Assurance Co. of Canada* (1998), 58 C.L.R. (3d) 233, at para. 9 (Ont. Gen. Div), BOA at Tab 4). The approval hearing typically includes an opportunity for objectors to be heard.
[14] Transcript of the Cross-Examination of A. Seretis, pp. 21-22, ll. 9-25, 1-10.

will also throw the litigation plan into doubt, since the Court would effectively be endorsing the possibility that no hearing as to the merits of the 2013 *Wishart Act* Class Action is necessary.

2. The Court should certify the questions certified in the underlying 2013 Wishart Act Class Action

17. If 129 wishes to have entitlement to compensation adjudicated as a common issue, the common issues in the 2013 *Wishart Act* Class Action must be certified for the purposes of this proceeding.

18. 129's claim rests entirely on the theory that the defendants' conduct precluded the class from recovering the damages it would have received in the 2013 *Wishart Act* Class Action. As a subset of the 2013 class, the proposed 2015 class members are entitled to damages no higher than the amount they would have received had they obtained a favourable judgment in the 2013 *Wishart Act* Class Action. The oppression remedy cannot put a party in a better place than it would be in had the oppressive conduct not occurred.[15] The Supreme Court of Canada has affirmed that "[t]he purpose of the oppression remedy is therefore corrective […] an order made under s. 241(3) should go no further than necessary to correct the injustice or unfairness between the parties."[16] 129 has not identified any cases in which a contingent judgment creditor recovered damages under the oppression remedy in the absence of that judgment having crystallized.

19. The only path to a favourable judgment in the 2013 *Wishart Act* Class Action was through a trial of the common issues certified in that action, as set out in the order of Gray J. dated September 8, 2014:

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[15] *Naneff v. Con-Crete Holdings Ltd*. (1995), 23 O.R. (3d) 481, at para. 40 (C.A.), BOA at Tab 9.
[16] *Wilson v. Alharayeri*, 2017 SCC 39, at para. 27, BOA at Tab 15.

(a) Has Sears Canada at any time since July 5, 2011 breached its obligations under the Dealer Agreements with each of the class members including the asserted obligation to exercise contractual discretion in good faith by:

(i) Failing to increase commission paid to class members;

(ii) Changing commissions paid to class members in August 2012;

(iii) Selling directly to consumers located within the class members' Market Areas (as defined in their respective Dealer Agreements), or, alternatively, by failing to pay commission to the class members for goods sold directly to consumers located within the class members' Market Areas through direct channels;

(iv) Changing local store advertising subsidies;

(v) Failing to provide a monthly accounting of how compensation was calculated; or

(vi) Imposing handling fees payable by customers on catalogue sales made by dealers?

(b) Has Sears Canada been unjustly enriched by any of the acts or omissions (a)(i) to (vi) above?

(c) If liability is established what is the appropriate measure of damages or compensation, if any, for the class?

(d) Is Sears Canada a "franchisor" within the meaning of the *Arthur Wishart Act (Franchise Disclosure)*, 2000, S.O. 2000, c. 3 (*Arthur Wishart Act)*? If so:

(i) Did Sears Canada breach the duty of fair dealing under s. 3 of the *Arthur Wishart Act* by any of the acts or omissions (a)(i) to (vi) above, and if so, what are the damages for the class?

(ii) Was Sears Canada required to deliver to each class member a disclosure document within the meaning of s. 5 of the *Arthur Wishart Act* at least fourteen days before the class member signed a Dealer Agreement or any material amendment thereof, and if so, were the provisions of s. 5(3) of the *Act* otherwise complied with? If s. 5 was not complied with, what are the damages for the class under s. 7?[17]

20. Courts have broad discretion to vary common issues.[18] There is no basis for the Court to certify a broad damages question, such as common issue (d)(ii), when the basis for an award of

[17] Certification Motion Record dated September 8, 2014, Plaintiff's Motion Record, Tab 2C, pp. 85-86.
[18] *Williams v. Mutual* at paras. 30-31, BOA at Tab 14.

such damages and the quantum of such damages can only follow from a judicial determination of questions that have already been certified in the 2013 *Wishart Act* Class Action.

21. The underlying common issues in the 2013 *Wishart Act* Class Action should be certified now, as this is the only contemplated certification hearing in this proceeding.

3. The proposed litigation plan is unworkable

22. Section 5(1)(e)(ii) of the CPA requires, as an explicit statutory condition for certification, that a proposed representative plaintiff produce a plan for the proceeding that sets out a "workable method of advancing the proceeding".[19] A workable plan "must be comprehensive and provide sufficient detail which corresponds to the complexity of the litigation proposed for certification."[20] It should "demonstrate that the representative plaintiff and class counsel have a clear grasp of the complexities involved in the case which are apparent at the time of certification and a plan to address them."[21]

23. The litigation plan in this proceeding must account for the reality that all of the proposed common issues will turn on proof of the 2013 *Wishart Act* Class Action. 129's litigation plan is deficient in that it entirely avoids the central question in its proposed class action.

The merits of the 2013 Wishart Act Class Action are relevant to whether the class was oppressed

24. ESL has advised class counsel that it intends to defend proposed common issue (b) on the basis that the defendant directors did not violate the reasonable expectations of the class through

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[19] CPA, s. 5(1)(e).
[20] *Dumoulin v. Ontario* (2005), 19 C.P.C. (6th) 234, at para. 44 (Ont. S.C.J.), BOA at Tab 5.
[21] *Rebuck v. Ford Motor Company*, 2018 ONSC 7405, at para. 67, BOA at Tab 11, citing *Fakhri v. Alfalfa's Canada Inc.*, 2003 BCSC 1717, at para. 77, aff'd, 2004 BCCA 549.

conduct that could be characterized as oppressive.[22] Specifically, ESL will rely on the class' status as a contingent judgment creditor with an unliquidated claim, and argue that the defendant directors reasonably relied on professional advice regarding the merits of that claim and treated it appropriately in light of that advice.

25. *Contingent* judgment creditors are differently positioned from a *creditor*, whose legal relationship is established by a proven debt owing by the company. Contingent judgment creditors can have no reasonable expectation that the corporation will preserve and protect its assets for the potential benefit of a contingent creditor.[23]

26. In *Levy-Russell Ltd.* Cumming J. described the reasonable expectations of contingent judgment creditors as follows:

> Until the judgment of Lane J. in the Tecmotiv action, the status of Levy was merely that of a contingent claimant, or potential judgment creditor, asserting an unliquidated demand against Shieldings, a potential judgment debtor who might have exigible assets.
>
> Levy had a reasonable expectation that the affairs of Levy's potential debtor, Shieldings, would be conducted honestly and in good faith, based on the reasonable business judgment of its directing mind, and in a manner that did not unfairly prejudice or affect Levy's interests. Levy did not have a reasonable expectation that Shieldings would be managed and operated in such a way as to ensure Levy was paid the debt of Shieldings if and when there was a judgment favourable to Levy following upon the trial in the Tecmotiv action.[24]

27. The Ontario Court of Appeal came to the same conclusion in *Stabile v. Milani Estate*:

> Once the default had been set aside, Mr. Stabile was not a judgment creditor. His status was that of a contingent claimant asserting a claim for a liquidated demand against MMHL and the Milani Estate. His position was not analogous to that of a minority shareholder, or of a major lender who might be said to have "some particular legitimate interest in the manner in which the affairs of the

[22] Letter from A. Faith dated February 28, 2019, Responding Motion Record of ESL, Tab 1B, p. 27; transcript of the Cross-Examination of A. Seretis, p. 33, ll. 3-7.
[23] *Levy-Russell Ltd. v. Shieldings Inc.* (2004), 48 B.L.R. (3d) 28, at paras. 136 and 161 (Ont. S.C.J. – Commercial List), BOA at Tab 8 [*Levy-Russell*].
[24] *Levy-Russell* at paras. 164-165, BOA at Tab 8,

> company are managed": see *Daon Development Corp., Re* (1984), 54 B.C.L.R. 235 (B.C. S.C.), at 243. His interest and concern were simply those of any remote potential judgment creditor whose potential debtor has exigible assets. He had a reasonable expectation that the affairs of the potential debtor corporation would be conducted honestly and in good faith, based on the reasonable business judgment of its directing minds, and in a manner that did not unfairly prejudice or affect his interests. He had no reasonable expectation that MMHL would be managed and operated in a way that would ensure he was paid for his debt (assuming it was established at trial) in priority to others, including the Crown for tax liabilities.[25]

28. Although ESL has no access to the underlying professional advice at this time, ESL understands Sears Canada and the board received information and advice regarding the unlikelihood of the class obtaining judgment in the 2013 *Wishart Act* Class Action. In the Officer's Certificate delivered to the Board of Directors on November 18, 2013, Ephraim J. Bird,[26] Sears Canada's Chief Financial Officer concluded that "it is unlikely that the Corporation will be required to make payment in respect of any contingent liability within a reasonably foreseeable period."[27] According to the certificate, Mr. Bird reached his conclusion based on his personal examinations and investigations as well as advice from Sears Canada's advisers.

29. ESL has indicated to class counsel that it intends to rely on the reasonableness of the directors' assessment and treatment of the claim, and asked class counsel to confirm: "Does 129 intend to challenge at the joint trial the advice and assumptions on which the directors relied in assessing the merits of the 2013 [*Wishart Act*] Class Action?" and "If so, will 129 seek to adduce evidence as to the merits of the 2013 Class Action to contradict the directors' assessment of the 2013 Class Action?"[28] Class counsel responded that 129 does not intend to litigate the merits of

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[25] *Stabile v. Milani Estate* (2004), 46 BLR (3d) 294, at para. 46 (Ont. C.A.), BOA at Tab 12.
[26] Mr. Bird is named as a defendant in this proceeding. The certificate is issued under the short form of his name, E.J. Bird.
[27] Officer's Certificate, Responding Motion Record of ESL, Tab 1D, p. 53, para. 5(a).
[28] Letter from A. Faith dated February 28, 2019, Responding Motion Record of ESL, Tab 1B, p. 27.

the 2013 action.[29] However, on cross-examination, class counsel was unable to commit to not leading evidence on the merits of the 2013 action, and conceded it was possible they may do so.[30]

The merits of the 2013 Wishart Act Class Action are relevant to whether 129 has standing as a complainant

30. Further, ESL will be defending proposed common issue (a) on the basis that the class lacks standing, as it has not yet obtained judgment.[31] 129 has not pointed to any cases where a contingent judgment creditor obtained relief under the oppression remedy without having first proven the underlying claim prior to the finding of oppressive conduct, and ESL is not aware of any such cases.

The merits of the 2013 Wishart Act Class Action will be essential to the question of damages

31. Common issues (c) and (d) address the class' entitlement to compensation and the quantum of such compensation, which can only be determined by proving entitlement to damages in the underlying 2013 *Wishart Act* Class Action (see paras. 19-21, above). The defendants require the discovery and document production processes to take into account the fact that a key element of their defence will be that the class would not have recovered anything in the 2013 *Wishart Act* Class Action.

32. The court should reject 129's proposal to put off its obligation to prove entitlement to and quantum of damages until after the joint trial. As mentioned above, evidence of the merits of the 2013 Class Action will have to be led at the joint trial. A plan that bifurcates liability from damages is therefore implausible.

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[29] Email from D Sterns dated March 8, 2019, Responding Motion Record of ESL, Tab 1C, p. 30.
[30] Transcript of the Cross-Examination of A. Seretis, pp. 33-34, ll. 13-25, 1-18.
[31] See, e.g., *Devry v. Atwood's Furniture Showrooms Ltd.* (2000), 11 B.L.R. (3d) 227, at paras. 26-27 (Ont. S.C.J.), BOA at Tab 4.

Conclusion

33. Class counsel's position that it does "not intend to litigate the underlying claim in the [2013 *Wishart Act*] class action in the Joint Trial, nor [does it] believe it necessary or appropriate for your clients to do so"[32] is fundamentally misguided. The refusal to acknowledge the relevance of the merits of the 2013 *Wishart Act* Class Action has led to a litigation plan that is unrealistic, does not "grasp the complexities of the issues at play" [33], and may prejudice the timeline set for the hearing of the joint trial of the Monitor, Pension and Litigation Trustee actions (the "**Related Actions**").

34. If this proceeding is heard as part of the proposed joint trial, it will not be possible to keep the joint trial confined to the live issues in the Related Actions. Although there is superficial overlap between this proceeding and the Related Actions to the extent they all challenge the 2013 dividend, the class members – as contingent judgment creditors – are in a fundamentally different position than other creditors, and the factual and legal issues in this proceeding will be distinct and more complex.

35. As such, it is ESL's position that this action should not proceed as part of the joint trial.[34] To the extent the Court is not willing to have this matter proceed separately, the Court should be prepared to set aside four weeks of additional trial time for a hearing on the merits of the 2013 *Wishart Act* Class Action, and help ensure that the defendants obtain timely document production regarding the 2013 *Wishart Act* Class Action and sufficient discovery time to pursue their defences.

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[32] Responding Motion Record of ESL, Tab 1C
[33] *Rebuck v. Ford Motor Company*, 2018 ONSC 7405, at para. 67, BOA at Tab 11 citing *Fakhri v. Alfalfa's Canada Inc.*, 2003 BCSC 1717, at para. 77, aff'd, 2004 BCCA 549.
[34] This position is shared by the other ESL Parties in the related proceedings.

36. This is not a "wait and see" issue. Trial preparation must proceed on the basis that the merits of the 2013 *Wishart Act* Class Action will be at issue, as the defendants will be relying on the weakness of the 2013 claim to defend itself. The defendants are entitled to explore and test 129's evidence on these issues, both during discovery and at trial.

PART III - ORDER REQUESTED

37. The defendant ESL requests that:

(a) the Court not certify the proposed common issue (d)(i) regarding the "Compromise Agreement" with the Monitor;

(b) the Court certify the questions certified in the 2013 *Wishart Act* Class Action for the purposes of this proceeding;

(c) the Court reject the class' proposed Litigation Plan; and

(d) the Court order 129 to provide a new litigation plan that accounts for the necessity of a hearing on the merits of the 2013 *Wishart Act* Class Action, or in the alternative that this proceeding not be heard with the Related Actions at the joint trial.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of April, 2019.

H. Underwood

Harry Underwood

Andrew Faith

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SCHEDULE "A"

LIST OF AUTHORITIES

1. *Brigaitis v. IQT, Ltd.*, 2014 ONSC 7
2. *Canadian Red Cross Society, Re* (2000), 19 C.B.R. (4th) 158 (Ont. S.C.J.)
3. *Dabbs v. Sun Life Assurance Co. of Canada* (1998), 58 C.L.R. (3d) 233 (Ont. Gen. Div)
4. *Devry v. Atwood's Furniture Showrooms Ltd.* (2000), 11 B.L.R. (3d) 227 (Ont. S.C.)
5. *Dumoulin v. Ontario* (2005), 19 C.P.C. (6th) 234 (Ont. S.C.J.)
6. *Gaur v. Datta*, 2015 ONCA 151
7. *Kalra v. Mercedes Benz*, 2017 ONSC 3795
8. *Levy-Russell Ltd. v. Shieldings Inc.* (2004), 48 B.L.R. (3d) 28 (Ont. S.C.J.)
9. *Naneff v. Con-Crete Holdings Ltd.* (1995), 23 O.R. (3d) 481 (C.A.)
10. *Pardhan v. Bank of Montreal*, 2012 ONSC 2229
11. *Rebuck v. Ford Motor Company*, 2018 ONSC 7405
12. *Stabile v. Milani Estate* (2004), 46 B.L.R. (3d) 294 (Ont. C.A.)
13. *Williams v. Canon Canada Inc.*, 2011 ONSC 6571
14. *Williams v. Mutual Life Assurance Co. of Canada* (2003), 226 D.L.R. (4th) 112, (Ont. C.A.)
15. *Wilson v. Alharayeri*, 2017 SCC 39

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY – LAWS

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Compromises to be sanctioned by court

6 (1) If a majority in number representing two thirds in value of the creditors, or the class of creditors, as the case may be — other than, unless the court orders otherwise, a class of creditors having equity claims, — present and voting either in person or by proxy at the meeting or meetings of creditors respectively held under sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court and, if so sanctioned, is binding

a. on all the creditors or the class of creditors, as the case may be, and on any trustee for that class of creditors, whether secured or unsecured, as the case may be, and on the company; and

b. in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act* or is in the course of being wound up under the *Winding-up and Restructuring Act*, on the trustee in bankruptcy or liquidator and contributories of the company.

Admissions of claim

20 (2) Despite subsection (1), the company may admit the amount of a claim for voting purposes under reserve of the right to contest liability on the claim for other purposes, and nothing in this Act, the Winding-up and Restructuring Act or the Bankruptcy and Insolvency Act prevents a secured creditor from voting at a meeting of secured creditors or any class of them in respect of the total amount of a claim as admitted.

Class Proceedings Act, 1992, S.O. 1992, c. 6

Certification
5 (1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,

a. the pleadings or the notice of application discloses a cause of action;

b. there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;

c. the claims or defences of the class members raise common issues;

d. a class proceeding would be the preferable procedure for the resolution of the common issues; and

e. there is a representative plaintiff or defendant who,

i. would fairly and adequately represent the interests of the class,

ii. has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

iii. does not have, on the common issues for the class, an interest in conflict with the interests of other class members. 1992, c. 6, s. 5 (1).

Settlement without court approval not binding

29(2) A settlement of a class proceeding is not binding unless approved by the court. 1992, c. 6, s. 29 (2).

Fees and disbursements

32 (1) An agreement respecting fees and disbursements between a solicitor and a representative party shall be in writing and shall,

a. state the terms under which fees and disbursements shall be paid;

b. give an estimate of the expected fee, whether contingent on success in the class proceeding or not; and

c. state the method by which payment is to be made, whether by lump sum, salary or otherwise. 1992, c. 6, s. 32 (1).

Court to approve agreements

(2) An agreement respecting fees and disbursements between a solicitor and a representative party is not enforceable unless approved by the court, on the motion of the solicitor. 1992, c. 6, s. 32 (2).

Priority of amounts owed under approved agreement

(3) Amounts owing under an enforceable agreement are a first charge on any settlement funds or monetary award. 1992, c. 6, s. 32 (3).

Determination of fees where agreement not approved

(4) If an agreement is not approved by the court, the court may,

a. determine the amount owing to the solicitor in respect of fees and disbursements;

b. direct a reference under the rules of court to determine the amount owing; or

c. direct that the amount owing be determined in any other manner. 1992, c. 6, s. 32 (4).

1291079 ONTARIO LIMITED
Plaintiff

-and-

SEARS CANADA INC. et al.
Defendants

Court File No. CV-19-617792-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT
MILTON

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