Court File No. CV-18-00611219-00CL

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, LP, EDWARD S. LAMPERT, WILLIAM R. HARKER and WILLIAM C. CROWLEY

Defendants

Court File No. CV-18-00611214-00CL

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 LP, EDWARD LAMPERT, EPHRAIM J. BIRD, DOUGLAS CAMPBELL, WILLIAM CROWLEY, WILLIAM HARKER, R. RAJA KHANNA, JAMES MCBURNEY, DEBORAH ROSATI and DONALD ROSS

Defendants

JOINT FACTUM OF THE MONITOR AND THE LITIGATION TRUSTEE
(MOTION FOR PRE-PLEADING PRODUCTIONS AND PARTICULARS)
(RETURNABLE MARCH 20, 2019)

March 15, 2019

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TO: **LITIGATION SERVICE LIST**

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PART I - INTRODUCTION

1. In these motions, the ESL Parties and the Former Directors (as defined below) seek extraordinary relief in the form of full documentary discovery before they deliver their respective statements of defence. In addition, the ESL Parties seek further particulars, despite failing to adduce any evidence to support this relief.

2. In both motions, the moving parties have not met the high standard of proving that the documents and particulars they seek are essential for them to plead. They have provided no evidence from any of the defendants in support of their motions. Instead, current counsel to the Former Directors has filed an affidavit (not based on personal knowledge or even hearsay from the actual defendants) setting out his views and arguments.

3. The moving parties, like the parties in every other civil proceeding, will be entitled to full production of relevant documents in accordance with the *Rules* and normal procedure. The circumstances that gave rise to the commencement of these proceedings do not in any way support the relief sought, and they do not justify a departure from the *Rules*.

4. The moving parties argue, without evidence, that an order for pre-pleading production would result in savings of time and expense. In fact, requiring production *before* the issues have been crystallized by the pleadings would most likely have the opposite effect, since: (i) it would require the production of documents in circumstances where the scope of relevance is not yet defined, and (ii) it would likely necessitate a second round of productions by the plaintiffs once the issues have been defined in the pleadings.

5. Further, the Former Directors' position that they are entitled to documents based on indemnification agreement between them and Sears is plainly wrong, and is based on an obvious misreading of those agreements.

6. An order for pre-pleading discovery and further particulars is neither necessary nor appropriate, and should be denied.

PART II - SUMMARY OF FACTS

A. CCAA Application and Appointment of the Monitor and Litigation Investigator

7. On June 22, 2017, Sears Canada Inc. ("**Sears**") and a number of its affiliates (the "**Applicants**") made an application under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "**CCAA**"). The application was granted in an order of the Honourable Justice Hainey the same day (as amended July 13, 2017, the "**Initial Order**").[1]

8. The Initial Order, among other things, appointed FTI Consulting Canada Inc. (the "**Monitor**") as monitor of the Applicants in the CCAA proceeding.[2] The Initial Order granted the Monitor "full and complete" access to all of the Applicants' property, including their "books, records, data, including data in electronic form, and other financial documents".[3]

9. Following its appointment, the Monitor conducted an investigation into certain "transactions, payments and dividends entered into, made or declared" by the Applicants before the commencement of the CCAA application. The Monitor's investigation concerned the possibility that these transactions, payments and dividends were preferential transactions and/or

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[1] Twenty-Seventh Report of FTI Consulting Canada Inc., as Monitor ("**27th Report**"), para. 1, Motion Record of the Former Directors ("**FD MR**"), tab 2I, p. 178. Initial Order, FD MR, tab 2A, p. 22.
[2] 27th Report, para. 2, FD MR, tab 2I, p. 179.
[3] Initial Order, para. 30(h), FD MR, tab 2A, p. 35.

transfers at undervalue under sections 95 and 96 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "**BIA**"), as incorporated by section 36.1 of the CCAA.[4]

10. As part of its investigation, the Monitor received over 100,000 documents and files from Sears and the other Applicants from the time periods relevant to these transactions and undertook a targeted review of them.[5] Following its review, the Monitor identified three "Transactions of Interest", including a dividend in the amount of $509 million authorized by Sears' board in November 2013 and paid by the company to its shareholders on December 6, 2013 (the "**2013 Dividend**").[6]

11. On March 2, 2018, on an unopposed motion by the representative counsel to the court-appointed representative of certain Sears employees and retirees, the Court made an order (as amended April 26, 2018, the "**LI Order**") appointing Lax O'Sullivan Lisus Gottlieb LLP as litigation investigator (the "**Litigation Investigator**") in the CCAA proceeding.[7]

12. The LI Order directed the Litigation Investigator to investigate, consider, and report to a committee of Sears' creditors (the "**Creditors' Committee**") regarding claims that the Applicants and/or their creditors could have against any other parties (the "**Mandate**").[8]

13. The LI Order required the Monitor to provide a confidential briefing and additional related documents and information regarding the Transactions of Interest to the Litigation Investigator for

[4] 27th Report, para. 20, FD MR, tab 2I, p. 183.
[5] 27th Report, para. 22, FD MR, tab 2I, p. 183.
[6] 27th Report, para. 21, FD MR, tab 2I, p. 183.
[7] LI Order, para. 2, Joint Responding Motion Record of the Monitor and the Litigation Trustee ("**RMR**"), tab 2, p. 1713.
[8] *Ibid.*

the purpose of completing the Mandate. The Court ordered that the material provided to the Litigation Investigator was "subject to common interest privilege and strict confidentiality".[9]

14. Following its appointment, the Litigation Investigator conducted an investigation into potential claims that the Applicants and/or their creditors could bring in connection with Sears' insolvency. As part of the Mandate, the Litigation Investigator met with the Monitor, the Creditors' Committee, and the Applicants, and reviewed documents provided by the Applicants.[10]

15. The Litigation Investigator completed its investigation and presented a report to the Creditors' Committee in September 2018, which the Committee unanimously accepted. The Litigation Investigator filed a report (the "**LI Report**") with the Court in the CCAA proceeding on November 5, 2018.[11]

16. In the LI Report, the Litigation Investigator recommended, among other things, that J. Douglas Cunningham, Q.C., be appointed as litigation trustee (the "**Litigation Trustee**") to pursue claims on behalf of the Applicants with respect to the 2013 Dividend. The LI Report recommended that these claims should include claims for oppression, breach of fiduciary duty and standard of care, and conspiracy claims against certain former directors of Sears,[12] and claims for conspiracy, unjust enrichment, knowing assistance, and knowing receipt claims against certain of Sears' large shareholders and their affiliates (the "**Litigation Trustee Claims**").[13]

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[9] LI Order, para. 7, RMR, tab 2, p. 1728.
[10] First Report of LOLG in its Capacity as Litigation Investigator ("**LI Report**"), para. 11, FDMR, tab 2K, p. 325.
[11] LI Report, paras. 12-13, FD MR, tab 2K, p. 327.
[12] William Harker, William Crowley, Donald Ross, Ephraim J. Bird, James McBurney, Douglas Campbell (for the purposes of this motion, collectively the "**Former Directors**"), Deborah Rosati, and R. Raja Khanna.
[13] ESL Investments Inc., ESL Partners LP, SPE I Partners LP, SPE Master I LP, ESL Institutional Partners LP, and Edward Lampert (collectively, the "**ESL Parties**"). LI Report, paras. 19-23, FD MR, tab 2K, pp. 327-28.

17. The LI Report also recommended that the Monitor commence a claim for transfer at undervalue under section 36.1 of the CCAA and section 96 of the BIA against the ESL Parties and two of the Former Directors, William Harker and William Crowley (the "**Monitor Claims**", and, collectively with the Litigation Trustee Claims, the "**Claims**").[14]

B. The Litigation Trustee and Monitor Claims

18. On December 3, 2018, the Court made an order, on the motion of the Litigation Investigator, appointing the Litigation Trustee, empowering him to bring the Litigation Trustee Claims on behalf of Sears, and lifting the stay of proceedings as against the defendants, including the Former Directors (the "**Litigation Trustee Order**").[15]

19. On the same day, the Court made an order, on the motion of the Monitor, authorizing the Monitor to pursue the Monitor Claims and lifting the staying of proceeding as against Crowley and Harker.

20. The December 3 orders contemplate that any recoveries on the Claims will accrue to Sears' estate, and will ultimately be distributed to the Applicants' creditors.

21. On December 19, 2018, each of the Litigation Trustee and the Monitor issued and served a statement of claim commencing the Claims (the "**Litigation Trustee Action**" and the "**Monitor Action**"; collectively, the "**Actions**").[16]

22. The defendants to the Actions have not yet filed statements of defence.

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[14] LI Report, para. 26, FD MR, tab 2K, p. 328-29. The LI Report also recommended that two additional claims be brought or continued. Those claims are not the subject of this motion.
[15] Order of the Honourable Justice Hainey dated December 3, 2018, paras. 5-8, RMR, tab 4, pp. 1738-39.
[16] Statement of Claim, Court File No. CV-18-00611214-00CL, FD MR, tab 2G, p. 130; Statement of Claim, Court File No. CV-18-00611219-00CL, FD MR, tab 2F, p. 103.

23. On January 18, 2019, the ESL Parties delivered demands for particulars (the "**Demands for Particulars**") to the Litigation Trustee and the Monitor.[17] Among other things, the Demands for Particulars sought details about the identity of Sears' creditors and stakeholders and the nature of their claims against Sears.[18]

24. The Litigation Trustee and the Monitor both provided their responses to the Demands for Particulars on January 31, 2019.[19] The responses clarified that the creditors and stakeholders referred to in the Litigation Trustee's and Monitor's statements of claim are all of the creditors and stakeholders of Sears and the other Applicants. The responses do not provide further details of the identity of Sears' creditors or their claims, on the basis that further details are not necessary for the defendants to plead.

25. The next day, the Former Directors delivered requests to inspect documents (the "**Requests to Inspect**") to the Litigation Trustee and the Monitor.[20] The Former Directors requested the production of various Sears contracts, board materials, financial records, presentations, reports, correspondence, and other internal documents referred to in the statements of claim.

26. The Litigation Trustee provided his response on February 7, and the Monitor provided its response on February 8.[21] The responses provided every document asked for in the Requests to Inspect. In total, the responses provided 31 documents, totaling approximately 1300 pages. The

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[17] Demand for Particulars dated January 18, 2019 (Litigation Trustee), Motion Record of the ESL Parties ("**ESL MR**"), tab 3, p. 39; Demand for Particulars dated January 18, 2019 (Monitor), ESL MR, tab 5, p. 57.
[18] *Ibid.* Factum of the ESL Parties (Motion to Compel Particulars), para. 6.
[19] Response to Demand for Particulars dated January 31, 2019 (Litigation Trustee), ESL MR, tab 4, p. 47; Response to Demand for Particulars dated January 31, 2019 (Monitor), ESL MR, tab 7, p. 93.
[20] Request to Inspect Documents dated February 1, 2019 (Monitor), RMR, tab 1B, p. 9; Request to Inspect Documents dated February 1, 2019 (Litigation Trustee), RMR, tab 1C, p. 14.
[21] Response to Request to Inspect Documents (Litigation Trustee), RMR, tab 1G, p. 203; Response to Request to Inspect Documents (Monitor), RMR, tab 1F, p. 26.

documents provided in the responses included Sears board presentations, minutes, and other board materials (including those from the meeting at which the 2013 Dividend was approved), email correspondence, and corporate planning documents. These documents are listed in the attached Schedule "C".

27. On February 7, the ESL Parties and the Former Directors (the "**Moving Parties**") brought the instant motions (the "**Motions**"), seeking further particulars and pre-pleading documentary production.[22]

28. On February 20, counsel for the Monitor voluntarily delivered a brief of 45 additional documents, comprising approximately 1200 pages of text (the "**Additional Document Brief**") to the Former Directors and the ESL Parties.[23] These documents are highly relevant to the issues in dispute in the Actions. The contents of the Additional Document Brief are also listed in the attached Schedule "C".[24]

29. The Moving Parties are seeking extremely broad documentary production. The Former Directors' motions, for example, seek orders compelling the Litigation Trustee and the Monitor to "produce forthwith for inspection all documents that are in [their] possession, control, or power which are relevant to this action".[25]

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[22] The Motions consist of: motions for particulars brought by the ESL Parties in the Monitor Action and the Litigation Trustee Action, a motion for pre-pleading production brought by the ESL Parties in the Monitor Action and the Litigation Trustee Action, and motions for pre-pleading production brought by the Former Directors in the Monitor Action and the Litigation Trustee Action.
[23] Letter from Robert Frank to Wendy Berman dated February 20, 2019, RMR, tab 1I, p. 534; Brief of Documents, RMR, tab 1J, p. 538.
[24] After removing duplicates, the total length of the documents listed in Schedule "C" is approximately 1700 pages.
[25] Notice of Motion, para. (a), FD MR, tab 1, p. 1.

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

A. Issues Raised

30. The Motions raise two issues, namely:

(a) Whether the Court should order the Monitor and the Litigation Trustee to provide pre-pleading discovery beyond the responses to the Requests to Inspect and the Additional Document Brief already delivered; and

(b) Whether the Court should order the Monitor and the Litigation Trustee to provide further particulars regarding the identities of Sears' creditors and stakeholders referred to in the statements of claim.

B. No Basis for an Order for Further Pre-Pleading Discovery

31. Under the *Rules of Civil Procedure*, pleadings and discovery play a complementary role in an action. Pleadings define the issues in dispute between the parties and set the scope for documentary and oral discovery. Discovery follows the pleadings and provides the parties with an opportunity to test or discover the evidence necessary to prove or respond to the allegations in the pleadings.[26]

32. The courts have cautioned that parties should avoid confusing pleadings and discovery. In *Sears Canada Inc. v. Pi Media Ltd.*, Master Short noted that "the sufficiency of a pleading must be read in light of the discovery process in an action proceeding under the Rules."[27] In *Brigaitis v.*

[26] *Janza v. Nicholson*, 2014 ONSC 5588 ["*Janza*"], para. 51, Joint Book of Authorities of the Monitor and Litigation Trustee ("**JBOA**"), tab 1.
[27] *Sears Canada Inc. v. Pi Media Ltd.*, 2011 ONSC 2625 (Ont. Master), para. 49, JBOA, tab 2.

IQT, Ltd., Justice Perell held that "As evidence is not to be pleaded; it is not to be ordered by way of particulars" before examinations for discovery.[28]

33. Until the pleadings have closed, the facts and legal issues in dispute have not yet all been alleged, and the issues have not been concretized, so the necessary scope of disclosure remains indeterminate.[29] For this reason, the court's power to order production prior to the close of pleadings under rule 30.04(5) should only be exercised in "exceptional circumstances".[30] More particularly, production will not be required before the close of pleadings unless it is "essential" for pleading.[31]

34. The ESL Parties, citing the Court of Appeal in *Meuwissen*, suggest that pre-pleading production is "not confined" to situations in which it is necessary to allow a party to plead.[32] Their argument mischaracterizes that decision. In *Meuwissen*, the Court of Appeal determined that, because pre-action discovery was not "*required* to enable the respondents to plead", they were not entitled to it.[33] The decision was entirely consistent with the long-held principle that pre-pleading discovery will generally only be ordered where it is essential for pleading.[34]

35. There is a very narrow exception to the rule that pre-pleading discovery will only be granted where it is essential to plead, based on the presence of "extraordinary circumstances"

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[28] *Brigaitis v. IQT, Ltd.*, 2012 ONSC 6584 ["*Brigaitis*"], para. 38, JBOA, tab 3.
[29] *Janza*, para. 50, JBOA, tab 1.
[30] *Meuwissen (Litigation Guardian of) v. Strathroy Middlesex General Hospital*, 2006 CarswellOnt 8092 (C.A.) ["*Meuwissen*"], para. 6, ESL Parties' Book of Authorities ("**ESL Parties' BOA**"), tab 5 and Former Directors' Book of Authorities, tab 6.
[31] *Hong Kong (Official Receiver) v. Wing* (1986), 57 O.R. (2d) 216 (H.C.J.) ["*Wing*"], para. 9, ESL Parties' BOA, tab 4; *Janza*, para. 52, JBOA, tab 1.
[32] Factum of the ESL Parties (Re Productions Motion), para. 21.
[33] *Meuwissen*, para. 7 (emphasis added), ESL Parties' BOA, tab 5 and Former Directors' Book of Authorities, tab 6.
[34] *Martin v. The City of Mississauga*, 2018 ONSC 3990 (Ont. Master), para. 32, JBOA, tab 4.

justifying production.[35] In *Durling v. Sunrise Propane Energy Group Inc.*, Master Dash reaffirmed the general rule regarding pre-pleading productions, but found that "extraordinary circumstances" made it appropriate to order discovery nonetheless.[36] The "exceptional facts" in that case involved the risk that critical physical evidence would be "lost" or "removed".[37] In the circumstances, the court ordered productions that were "as narrow as possible " and "restricted to those required … to prevent prejudice".[38] There has been no suggestion that any such facts are present here.

(i) The Moving Parties Have Not Demonstrated that Pre-Pleading Discovery is Essential

36. The party seeking pre-pleading production bears the onus of demonstrating that it is necessary for their pleading.[39] The Moving Parties have not done so.

37. In order to meet their onus, parties seeking disclosure are required to provide affidavit evidence "supporting the essential nature of the disclosure".[40] It is established law that the "extraordinary" relief of pre-pleading production will not be granted absent evidence specifically showing that the facts necessary to plead a defence are not known by the party seeking production and that these facts cannot be uncovered without further production.[41]

38. When determining whether material facts are necessary for a pleading, the relevant question is whether *the party* who will have to plead is aware of all of the essential facts.[42] The

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[35] *Durling v. Sunrise Propane Energy Group Inc.*, 2008 CarswellOnt 7495 (Ont. Master) ["*Durling*"], para. 29, Book of Authorities of Khanna and Rosati, tab 2.
[36] *Ibid.* That case involved a motion for discovery from a third party under rule 30.10, but the court applied the same standards as would otherwise be applicable under rule 30.04(5).
[37] *Id.*, para. 28.
[38] *Id.*, para. 29.
[39] *Janza*, para. 54, JBOA, tab 1.
[40] *Ibid*.
[41] *Durish v. Bent*, 1985 CarswellOnt 508 (Ont. Master) ["*Durish*"], para. 9, JBOA, tab 5. See also *Wing*, para. 10, ESL Parties' BOA, tab 4; *HSBC Securities v. Davies*, 2001 CarswellOnt 2813 (Ont. Master), para. 9, JBOA, tab 6; *Janza*, paras. 54-55, JBOA, tab 1.
[42] *Durish*, para. 9, JBOA, tab 5.

evidence adduced to support a motion for pre-pleading discovery must therefore establish the knowledge (or lack thereof) of the party itself.[43] The affidavit of a solicitor who was not involved in the events giving rise to the claim, and would therefore not be expected to have first-hand knowledge of the underlying facts, is "worthless" for this purpose,[44] and will be given little or no weight.[45]

(a) The ESL Parties

39. The ESL Parties argue in their factum that they were "not privy" to the 2013 Dividend, had no formal connection to Sears' board of directors at the time, and have no knowledge of the surrounding circumstances.[46]

40. However, they provide no factual basis at all for this allegation, as the ESL Parties have not filed any affidavit evidence on this motion. Their motion record consists only of a notice of motion, and copies of the statements of claim and certain court orders. It cannot simply be assumed that the ESL Parties had no involvement with the 2013 Dividend, especially since both the Litigation Trustee and the Monitor have alleged that the defendant Edward Lampert influenced Sears' board of directors to authorize the payment of the 2013 Dividend for the benefit of the other ESL Parties.[47]

41. Even if, or to the extent that, the ESL Parties are ignorant of the internal deliberations at Sears surrounding the 2013 Dividend, that ignorance does not prevent them from pleading. They

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[43] *1731431 Ontario Ltd. v. Crestwood Apartments (Thunder Bay) Ltd.*, 2010 ONSC 5040 ["*Crestwood Apartments*"], para. 7, JBOA, tab 7.
[44] *Dudziak v. Boots Drug Stores (Canada) Ltd.*, 1983 CarswellOnt 547 (Ont. Master), para. 4, JBOA, tab 8.
[45] *Id.*, para. 5.
[46] Factum of the ESL Parties (Re Productions Motion), paras. 28-31.
[47] See, e.g., Statement of Claim (Monitor Action), paras. 17, 29, 48-49, 59-60, 66-67, FD MR, tab 2F, pp. 108, 115, 119, 120, 124, 127; Statement of Claim (Litigation Trustee Action), para. 11, FD MR, tab 2G, p. 137.

are of course aware of their own conduct in connection with the allegations made in the Actions, and can plead accordingly.

42. Moreover, there is no need for the ESL Parties to defend the conduct of the Former Directors. The Former Directors are parties to the Actions and will plead in defence of their own conduct. It would make little sense for the ESL Parties to plead a defence of conduct which they profess to have had no knowledge of or involvement in.

(b) The Former Directors

43. The Former Directors similarly have not adduced any evidence from a party to demonstrate a need for further productions.

44. The only evidence that they have put forth in support of their motion is an affidavit from one of their current lawyers, John Birch.[48] This affidavit gives Mr. Birch's personal view on the motion and makes argument about it. Mr. Birch does not attest to any information from any of the Former Directors that they do not have sufficient knowledge of the allegations in the Actions to plead a defence. His affidavit says: "*I* believe that the documents sought on this motion are … essential and necessary for the purpose of allowing the Former Directors to adequately and properly plead".[49]

45. The Former Directors' factum repeatedly argues that the events at issue in the Actions took place "many years ago".[50] This allegation is overstated: the conduct giving rise to the Actions took place in late 2013. It is also irrelevant. Without any evidence as to what the Former Directors recall or do not recall about their own deliberations in connection with the 2013 Dividend, their counsel

[48] Affidavit of John N. Birch sworn February 7, 2019 ["**Birch Affidavit**"], FD MR, tab 2, p. 9.
[49] Birch Affidavit, para. 23, FD MR, tab 2, p. 15 (emphasis added).
[50] See, e.g., Factum of the Former Directors, paras. 27, 29, 62.

may not assume that the Former Directors are unaware of the relevant facts, nor should this Court accept it as fact that the Former Directors are unable to defend the allegations against them due to the passage of time.

46. Neither the ESL Parties nor the Former Directors have provided any evidence to support the position that the additional pre-pleading discovery they are seeking is essential to allow them to plead. For this reason alone, their production motions should fail.

(ii) No Other Basis for Further Pre-Production Discovery

47. Although jurisprudence makes it clear that pre-pleading discovery will, in the overwhelming majority of cases, be ordered only when it is essential for pleading, the Moving Parties have nonetheless proposed several other arguments which, they submit, entitle them to further pre-pleading discovery. None of these arguments have any merit.

(a) Documents Sought by the Moving Parties are not "Third Party" Documents

48. Documents obtained by the Litigation Trustee and the Monitor from Sears cannot properly be classified as "third party productions",[51] because both the Litigation Trustee and the Monitor are acting on behalf of Sears in the Actions, and the Monitor is empowered by statute to commence the Monitor Action.

49. The Initial Order directed the Monitor to have "full and complete access" to the documents of Sears in order to allow it to carry out its duties under the CCAA, including the investigation of a potential claim for transfer at undervalue.[52] In a subsequent order, the court authorized the Monitor – to the exclusion of any other party, including Sears' remaining directors – to cause Sears

[51] See Factum of the ESL Parties (Re Productions Motion), paras. 26-27.
[52] Initial Order, para. 30(h), FD MR, tab 2A, p. 35.

to do anything the Monitor considers necessary to deal with any "remaining matters", including the prosecution of the Monitor Action.[53]

50. Similarly, the Litigation Trustee Order authorizes the Litigation Trustee to prosecute the Litigation Trustee Action on behalf of Sears.[54]

51. The fact that the Litigation Trustee and the Monitor have access to Sears' documents is a result of their pursuit of litigation on Sears' behalf pursuant to court order. It is not unusual for a plaintiff to be in possession of documents that a defendant does not have. This is why the *Rules* provide for an exchange of relevant documents – after the pleadings close. These plaintiffs' access to Sears' documents does not give the Moving Parties, who are opposed in interest to Sears in the Actions, any entitlement to obtain the documents before delivering their statements of defence.

52. Even if the Sears documents were third-party productions to the Monitor and Litigation Trustee, the Moving Parties would still have no right to obtain productions at this point in the Actions.

53. The ESL Parties' reliance on an analogy to rule 30.10 is misguided. Except in cases of "extraordinary circumstances", that rule authorizes only discovery following the close of pleadings and before trial.[55] It is undisputed that parties have an ongoing obligation to disclose documents *after* the close of pleadings under rule 30.07, but there is no analogous requirement *before* the

[53] Governance Protocol and Stay Extension Order dated December 3, 2018, FD MR, tab 2C, pp. 72-73.
[54] Litigation Trustee Order, para. 7, FD MR, tab 2D, p.79.
[55] *Hedley v. Air Canada*, 1994 CarswellOnt 491 (Gen. Div.), para. 52, JBOA, tab 9. *Durling*, para. 29, Book of Authorities of Khanna and Rosati, tab 2.

close of pleadings. As a result, a request for production of third party documents under rule 30.10 is subject to the same requirement of necessity as other pre-pleading discovery.[56]

54. Furthermore, the Litigation Investigator, the Litigation Trustee and the Monitor are all officers of the court. To the extent that the ESL Parties are seeking production of documents from the Litigation Investigator or on the basis of work undertaken by the Litigation Investigator,[57] they are prohibited from doing so by the well-established principle that court officers will not be ordered to produce documents for the purpose of collateral proceedings.[58] There is also no need for them to do so: the Moving Parties will receive all relevant documents from the plaintiffs in the Actions in the normal course of discovery following the close of pleadings.

(b) The Former Directors Do Not Have a Contractual Right to Receive Documents from Sears

55. The Former Directors purport to have a "contractual right" to receive the documents they seek on this motion, which, they argue, arises from a series of indemnification agreements between each of the Former Directors in their individual capacities and Sears (the "**Indemnification Agreements**").[59] This contention is plainly wrong, and is based on a selective (mis)reading of the relevant section of the Indemnification Agreement.

56. Read as a whole, as the court is obliged to do when construing a contract, the Indemnification Agreements make it clear that the Former Directors have no contractual right to the production of documents from Sears.[60]

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[56] *Durling*, para. 24, Book of Authorities of Khanna and Rosati, tab 2.
[57] See Factum of the ESL Parties (Re Productions Motion), paras. 9-12.
[58] *SA Capital Growth Corp. v. Mander Estate*, 2012 ONCA 681, paras. 8-10, JBOA, tab 10.
[59] Factum of the Former Directors, paras. 55-56; Indemnification Agreements, FD MR, tabs 2L-2Q, pp. 334-377.
[60] *Salah v. Timothy's Coffees of the World Inc.*, 2010 ONCA 673, para. 16, JBOA, tab 11.

57. The section of the Indemnification Agreements relied on by the Former Directors deals with litigation commenced against directors where Sears elects to assume the defence for those directors. In particular, it provides that:

> The Corporation [*i.e.*, Sears] shall be entitled to participate, at its own expense, in the defence of the Indemnified Party in any proceeding. If the Corporation so elects after receipt of notice of a proceeding, or the Indemnified Party in that notice so directs, the Corporation shall assume control of the negotiation, settlement or defence of the proceeding, in which case the defence shall be conducted by counsel chosen by the Corporation and reasonably satisfactory to the Indemnified Party. If the Corporation elects to assume control of the defence, the Indemnified Party shall have the right to participate in the negotiation, settlement or defence of the proceeding and to retain counsel to act on the Indemnified Party's behalf, in which case the Corporation shall reimburse the Indemnified Party for any fees and disbursements of that counsel if a conflict of interests has arisen between the Corporation and the Indemnified Party. Notwithstanding anything contained herein, the Corporation shall not be responsible for fees and expenses of more than one counsel separate from counsel for the Corporation for all Directors and Officers in connection with any action or separate but similar or related actions arising out of the same general allegations or circumstances. The Indemnified Party and the Corporation shall cooperate fully with each other and their respective counsel in the investigation related to, and defence of, any proceeding and shall make available to each other all relevant books, records, documents and files and shall otherwise use their best efforts to assist each other's counsel to conduct a proper and adequate defence.[61]

58. In context, it is apparent that this section of the Indemnification Agreements addresses only cases in which Sears has opted to participate in and/or to assume control of the defence of proceedings commenced against one of its directors or officers. It is for this reason that this section

[61] See, e.g., Indemnification Agreement Between Sears and James McBurney, s. 9, FD MR, tab 2P, p. 368 (note: the relevant language appears in the same form in the same section of each of the Indemnification Agreements).

of the Indemnification Agreements refers to cooperation in the "defence of" a proceeding. This provision does not apply in the current situation.

59. Sears' refusal to cooperate with the Former Directors in this case does not breach the Indemnification Agreements, and the existence of the Indemnification Agreements does not support the Former Directors' claim to further pre-pleading production of documents from Sears.

(c) Pre-Production Production would not be Cheaper, Faster, or more Fair than Proceeding in the Ordinary Course

60. There is no evidentiary basis for the Moving Parties' suggestion that pre-pleading discovery should be ordered because it would be more fair to the defendants, or because it would allow the Actions to be conducted more efficiently.

61. The Moving Parties argue that pre-pleading discovery would allow them to file more detailed statements of defence and would allow them to begin reviewing documents earlier than they otherwise would.[62] However, this position is contrary to the procedure set out in the *Rules of Civil Procedure*, which are applicable to all civil actions in Ontario, including those involving large amounts in dispute or accusations of serious wrongdoing. There is no reason why the Actions, alone among all civil proceedings, should be subject to their own special set of rules.

62. The *Rules of Civil Procedure* balance the parties' respective interests in disclosure over the course of a litigation. As explained above, the rule in all but an extremely limited set of "exceptional" situations is that pleadings precede discovery. Although the Actions have been brought by the Litigation Trustee and the Monitor on behalf of Sears rather than by the company

[62] Factum of the ESL Parties (Re Productions Motion), paras. 33-34; Factum of the Former Directors, para. 52.

directly, they are actions like any other, and there is no basis for an order deviating from the ordinary sequence of pleading and production as set out in the *Rules*.

63. Further, an order for pre-pleading discovery would most likely not lead to any savings of time or costs in this case. The Moving Parties seek to have the Litigation Trustee and the Monitor produce "all relevant non-privileged documents".[63] Because the defendants have not yet pleaded, the issues in dispute have not been established, and the undefined "scope" of relevance is larger than it will be after the close of pleadings. As a result, production at this time would be unfocused and inefficient.[64] A second round of production after the close of pleadings would also likely be necessary in any event.

64. It would not be unfair to require the Moving Parties to plead before receiving discovery. This is a standard feature of all actions under the *Rules*. The Moving Parties are free to defend the Actions on the basis of their involvement (or lack thereof) in the underlying transaction. In the absence of any credible evidence that documentary discovery is necessary for a pleading, the ordinary requirement to plead before discovery is not an injustice.

65. Nor is the imposition of extraordinary disclosure requirements justified under the general authority provision in section 11 of the CCAA. The Supreme Court has held that an order will be appropriate under section 11 when it "will usefully further efforts to achieve the remedial purpose of the *CCAA* — avoiding the social and economic losses resulting from liquidation of an insolvent company."[65] The Moving Parties have not provided any explanation as to how an order for pre-

[63] Factum of the ESL Parties (Re Productions Motion), paras. 35-36; Factum of the Former Directors, para. 63.
[64] *Janza*, para. 50, JBOA, tab 1.
[65] *Ted Leroy Trucking [Century Services] Ltd., Re.*, 2010 SCC 60, para. 70, ESL Parties' BOA, tab 6.

pleading production would help to achieve this remedial purpose. Accordingly, section 11 of the CCAA does not provide a basis for an order for pre-pleading production.

C. No Basis for an Order Requiring Further Particulars

66. The ESL Parties have brought a separate motion for further particulars, in addition to the responses to their Demands for Particulars already provided by the Litigation Trustee and the Monitor. For many of the same reasons as the motions for pre-pleading discovery, this motion should fail.

67. An order for particulars is discretionary, and particulars will be ordered only when they are both outside the knowledge of the requesting party and necessary to enable that party to plead.[66]

68. The party requesting particulars bears the onus of demonstrating that particulars are necessary. The requesting party must provide evidence that it does not know the information sought and of its necessity for pleading. Failure to deliver such evidence is generally fatal to a motion for particulars.[67] There is a limited exception to this requirement where the pleading is "so general" that particulars are "manifestly necessary".[68]

69. Despite the fact that the Litigation Trustee and Monitor have already responded to the Demands for Particulars, the ESL Parties now seek further particulars before filing their statement of defence (the "**Further Particulars**").

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[66] *Brigaitis*, para. 37, JBOA, tab 3.
[67] *Obonsawin v. Canada*, 2001 CarswellOnt 306 (S.C.J.), paras. 36-37, JBOA, tab 12.
[68] *Crestwood Apartments*, para. 8, JBOA, tab 7.

70. The ESL Parties have not adduced any evidence to prove that the Further Particulars are outside their knowledge or that the Further Particulars are necessary for them to plead their defence.

(i) The Further Particulars Being Sought

71. The ESL Parties served the Demands for Particulars on the Monitor and the Litigation Trustee on January 18, 2019.[69]

72. The ESL Parties' demand for particulars in the Litigation Trustee Action sought, among other things, additional details regarding the identities of the Sears creditors and stakeholders on whose behalf that Claim was brought.

73. The ESL Parties' demand for particulars in the Monitor Action sought, among other things, additional details regarding the identities of Sears' creditors at the time of the 2013 Dividend and whether their debts remain outstanding.

74. The Monitor and the Litigation Trustee responded to the Demands for Particulars on January 31, 2019.[70] Their responses explained that the creditors and stakeholders referred to in the statements of claim were all of Sears' creditors and stakeholders. The Monitor and the Litigation Trustee declined to provide further particulars of when the creditors' and stakeholders' claims arose and/or were discharged, because these particulars are not necessary for the ESL Parties to plead.

[69] Demand for Particulars dated January 18, 2019 (Litigation Trustee), ESL MR, tab 3, p. 39; Demand for Particulars dated January 18, 2019 (Monitor), ESL MR, tab 5, p. 57.
[70] Response to Demand for Particulars dated January 31, 2019 (Litigation Trustee), ESL MR, tab 4, p. 47; Response to Demand for Particulars dated January 31, 2019 (Monitor), ESL MR, tab 7, p. 93.

(ii) ESL Parties Have Provided no Evidence to Show that Particulars are Needed

75. The ESL Parties have failed to adduce any evidence concerning their knowledge of the particulars that they seek. As a result, the ESL Parties have not established that they are unaware of this information, or that they need it to plead their case.

(iii) The Further Particulars are Unnecessary

(a) Litigation Trustee Claim

76. The ESL Parties argue that they require further particulars of the identity and expectations of Sears' creditors and stakeholders so that they can "assess and plead to their unique reasonable expectations" in the Litigation Trustee Action.[71]

77. That argument is incorrect. The only plaintiff in the Litigation Trustee Action is Sears, as represented by the Litigation Trustee. Sears' oppression claim has been brought in a representative capacity on behalf of the general body of its stakeholders.[72] It is the reasonable expectations of Sears and its stakeholders as a whole that are relevant, rather than those of any individual stakeholder. The Litigation Trustee has provided particulars of the expectations of Sears' stakeholders as a group.[73]

78. The ESL Parties complain that the Litigation Trustee "asserted the broadest possible definition of 'stakeholder'" in its response to the demand for particulars.[74] This complaint is misplaced. The response could hardly be otherwise, since the "rationale for permitting a corporation to bring an oppression action [is] because it [is] in substance a representative action

[71] Factum of the ESL Parties (Motion to Compel Particulars), para. 14.
[72] *Arend v. Boehm*, 2017 ONSC 3582, paras. 52-53 ["*Arend*"], JBOA, tab 13.
[73] Response to Demand for Particulars (Litigation Trustee), para. 3.1(a), ESL MR, tab 4, pp. 47-48.
[74] Factum of the ESL Parties (Motion to Compel Particulars), para. 7.

on behalf of *all* shareholders (except the defendants) or [all] creditors in the case of a bankruptcy".[75]

79. A similar situation arose in *Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp.*[76] There, the defendants, who were affiliates of the bankrupt corporation, had orchestrated a transaction under which assets were transferred from the corporation before its bankruptcy for less than fair market value. Justice Farley found that the corporation, through its bankruptcy trustee, was a "proper person" to bring an oppression claim on behalf of all of its creditors. Justice Farley found that the trustee could recover because the defendants had disregarded the interests of the creditors as a whole, without considering each creditor's "unique" expectations.[77]

80. In this case, Sears itself will receive any funds recovered under the Litigation Trustee Action. Those funds will then be distributed to the company's creditors. The expectations of the ultimate recipients of any recovery are irrelevant and immaterial to the matters in dispute in the Litigation Trustee Action.

(b) Monitor Claim

81. The ESL Parties also argue that they require further particulars of the identities of Sears' creditors and the nature of those creditors' claims, because Sears could not have defrauded, defeated, or delayed creditors whose debts were later discharged.[78]

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[75] *Arend*, para. 52 (emphasis added), JBOA, tab 13.
[76] *Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp.*, 2001 CarswellOnt 2954 (S.C.J. [Commercial List]) (aff'd, 2003 CarswellOnt 5210 (C.A.)), JBOA, tab 14.
[77] *Id.*, paras. 29-32.
[78] Factum of the ESL Parties (Motion to Compel Particulars), para. 25.

82. This contention is also incorrect. Section 96(1)(b)(ii)(B) of the BIA requires the Monitor to show that the debtor "*intended* to defraud, defeat or delay a creditor", not that it actually did so with respect to any specific creditor.[79] Additional particulars regarding the identities of Sears' creditors at the time of the 2013 Dividend, and whether their debts remain outstanding, are not necessary for pleading a defence with respect to this intent.

83. The intent to defeat creditors may be inferred from the surrounding circumstances.[80] The Monitor has pleaded suspicious circumstances surrounding the 2013 Dividend from which intent can be inferred with respect to all of Sears' creditors. These circumstances include the fact that the Dividend was a non-arm's-length transaction for no consideration made outside the usual course of business, the haste of the Sears board's decision to declare and pay it, the deficient board process, the ESL Parties' urgent need for funds, the clear conflicts of interest within Sears' board and management, and the 2013 divestiture of Sears' most valuable assets despite the easily foreseeable impact on its business.[81]

84. The ESL Parties do not require further particulars in order to plead to and (if appropriate) deny these allegations.

85. Other relevant facts are not in dispute. It is not contested that Sears had creditors at the time of the 2013 Dividend. It also is not contested that Sears is now insolvent and unable to pay all its creditors in full.

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[79] Emphasis added.
[80] *Indcondo Building Corp. v. Sloan*, 2014 ONSC 4018, paras. 51-53 (aff'd, 2015 ONCA 752), JBOA, tab 15.
[81] See, e.g., Statement of Claim (Monitor Action), para. 62, FD MR, tab 2G, p. 130.

86. The Monitor Claim is not a claim for liability and payment of damages, the quantum of which depends on the specific nature and outcome of each creditor's claim. Nor is it a fraudulent conveyance case advanced by a single creditor or small group of creditors with provable claims being made in its or their interests. It is a claim advanced by the Monitor, under its statutory authority, to void a transaction and recover the proceeds, thereby protecting the interests of the general body of Sears' creditors.

87. Additional particulars regarding the identities of Sears' creditors at the time of the 2013 Dividend, and whether their debts remain outstanding, are not necessary for pleading a defence regarding Sears' intent under section 96.

88. In summary, the ESL Parties' motion for further particulars should fail, for much the same reason as the ESL Parties' and the Former Directors' motions for pre-pleading discovery: they have not met the high threshold of demonstrating that they require the Further Particulars in order to file their defences in the Actions.

D. Conclusion

89. The Moving Parties seek the extraordinary relief of discovery before the close of pleadings. They have provided no credible evidence to demonstrate that such discovery is necessary for them to plead, or that they will suffer any prejudice if they have to wait until production is made in the ordinary course. The same can be said for their request for further particulars.

90. There is no reason to depart, in this case, from the litigation process established by the *Rules of Civil Procedure*. The Motions should be denied.

PART IV - ORDER REQUESTED

91. The Litigation Trustee and the Monitor respectfully request that the Court dismiss the Motions of the ESL Parties and Former Directors, with costs payable forthwith.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of March, 2019.

for: Orestes Pasparakis/Robert Frank/Evan Cobb

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SCHEDULE "A"

LIST OF AUTHORITIES

1. *Janza v. Nicholson*, 2014 ONSC 5588
2. *Sears Canada Inc. v. Pi Media Ltd.*, 2011 ONSC 2625 (Ont. Master)
3. *Brigaitis v. IQT, Ltd.*, 2012 ONSC 6584
4. *Meuwissen (Litigation Guardian of) v. Strathroy Middlesex General Hospital*, 2006 CarswellOnt 8092 (C.A.)
5. *Hong Kong (Official Receiver) v. Wing* (1986), 57 O.R. (2d) 216 (H.C.J.)
6. *Martin v. The City of Mississauga*, 2018 ONSC 3990 (Ont. Master)
7. *Durling v. Sunrise Propane Energy Group Inc.*, 2008 CarswellOnt 7495 (Ont. Master)
8. *Durish v. Bent*, 1985 CarswellOnt 508 (Ont. Master)
9. *HSBC Securities v. Davies*, 2001 CarswellOnt 2813 (Ont. Master)
10. *1731431 Ontario Ltd. v. Crestwood Apartments (Thunder Bay) Ltd.*, 2010 ONSC 5040
11. *Dudziak v. Boots Drug Stores (Canada) Ltd.*, 1993 CarswellOnt 547 (Ont. Master)
12. *Hedley v. Air Canada*, 1994 CarswellOnt 491 (Gen. Div.)
13. *SA Capital Growth Corp. v. Mander Estate*, 2012 ONCA 681
14. *Salah v. Timothy's Coffees of the World Inc.*, 2010 ONCA 673
15. *Ted Leroy Trucking [Century Services] Ltd., Re.*, 2010 SCC 60
16. *Obonsawin v. Canada*, 2001 CarswellOnt 306 (S.C.J.)
17. *Arend v. Boehm*, 2017 ONSC 3582
18. *Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp.*, 2001 CarswellOnt 2954 (S.C.J. [Commercial List]) (aff'd, 2003 CarswellOnt 5210 (C.A.))
19. *Indcondo Building Corp. v. Sloan*, 2014 ONSC 4018 (aff'd, 2015 ONCA 752)

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

1. RULES OF CIVIL PROCEDURE, R.R.O. 1990, REG. 194

RULE 30 DISCOVERY OF DOCUMENTS

INTERPRETATION

30.01 (1) In rules 30.02 to 30.11,

(a) "document" includes a sound recording, videotape, film, photograph, chart, graph, map, plan, survey, book of account, and data and information in electronic form; and

(b) a document shall be deemed to be in a party's power if that party is entitled to obtain the original document or a copy of it and the party seeking it is not so entitled.

(2) In subrule 30.02 (4),

(a) a corporation is a subsidiary of another corporation where it is controlled directly or indirectly by the other corporation; and

(b) a corporation is affiliated with another corporation where,

(i) one corporation is the subsidiary of the other,

(ii) both corporations are subsidiaries of the same corporation, or

(iii) both corporations are controlled directly or indirectly by the same person or persons.

SCOPE OF DOCUMENTARY DISCOVERY

Disclosure

30.02 (1) Every document relevant to any matter in issue in an action that is or has been in the possession, control or power of a party to the action shall be disclosed as provided in rules 30.03 to 30.10, whether or not privilege is claimed in respect of the document.

Production for Inspection

(2) Every document relevant to any matter in issue in an action that is in the possession, control or power of a party to the action shall be produced for inspection if requested, as provided in rules 30.03 to 30.10, unless privilege is claimed in respect of the document.

Insurance Policy

(3) A party shall disclose and, if requested, produce for inspection any insurance policy under which an insurer may be liable,

(a) to satisfy all or part of a judgment in the action; or

(b) to indemnify or reimburse a party for money paid in satisfaction of all or part of the judgment,

but no information concerning the insurance policy is admissible in evidence unless it is relevant to an issue in the action.

Subsidiary and Affiliated Corporations and Corporations Controlled by Party

(4) The court may order a party to disclose all relevant documents in the possession, control or power of the party's subsidiary or affiliated corporation or of a corporation controlled directly or indirectly by the party and to produce for inspection all such documents that are not privileged.

AFFIDAVIT OF DOCUMENTS

Party to Serve Affidavit

30.03 (1) A party to an action shall serve on every other party an affidavit of documents (Form 30A or 30B) disclosing to the full extent of the party's knowledge, information and belief all documents relevant to any matter in issue in the action that are or have been in the party's possession, control or power.

Contents

(2) The affidavit shall list and describe, in separate schedules, all documents relevant to any matter in issue in the action,

(a) that are in the party's possession, control or power and that the party does not object to producing;

(b) that are or were in the party's possession, control or power and for which the party claims privilege, and the grounds for the claim; and

(c) that were formerly in the party's possession, control or power, but are no longer in the party's possession, control or power, whether or not privilege is claimed for them, together with a statement of when and how the party lost possession or control of or power over them and their present location.

(3) The affidavit shall also contain a statement that the party has never had in the party's possession, control or power any document relevant to any matter in issue in the action other than those listed in the affidavit.

Lawyer's Certificate

(4) Where the party is represented by a lawyer, the lawyer shall certify on the affidavit that he or she has explained to the deponent,

(a) the necessity of making full disclosure of all documents relevant to any matter in issue in the action; and

(b) what kinds of documents are likely to be relevant to the allegations made in the pleadings.

Affidavit not to be Filed

(5) An affidavit of documents shall not be filed unless it is relevant to an issue on a pending motion or at trial.

INSPECTION OF DOCUMENTS

Request to Inspect

30.04 (1) A party who serves on another party a request to inspect documents (Form 30C) is entitled to inspect any document that is not privileged and that is referred to in the other party's affidavit of documents as being in that party's possession, control or power.

(2) A request to inspect documents may also be used to obtain the inspection of any document in another party's possession, control or power that is referred to in the originating process, pleadings or an affidavit served by the other party.

(3) A party on whom a request to inspect documents is served shall forthwith inform the party making the request of a date within five days after the service of the request to inspect documents and of a time between 9:30 a.m. and 4:30 p.m. when the documents may be inspected at the office of the lawyer of the party served, or at some other convenient place, and shall at the time and place named make the documents available for inspection.

Documents to be Taken to Examination and Trial

(4) Unless the parties agree otherwise, all documents listed in a party's affidavit of documents that are not privileged and all documents previously produced for inspection by the party shall, without notice, summons or order, be taken to and produced at,

(a) the examination for discovery of the party or of a person on behalf or in place of or in addition to the party; and

(b) the trial of the action.

Court may Order Production

(5) The court may at any time order production for inspection of documents that are not privileged and that are in the possession, control or power of a party.

Court may Inspect to Determine Claim of Privilege

(6) Where privilege is claimed for a document, the court may inspect the document to determine the validity of the claim.

Copying of Documents

(7) Where a document is produced for inspection, the party inspecting the document is entitled to make a copy of it at the party's own expense, if it can be reproduced, unless the person having possession or control of or power over the document agrees to make a copy, in which case the person shall be reimbursed for the cost of making the copy.

Divided Disclosure or Production

(8) Where a document may become relevant only after the determination of an issue in the action and disclosure or production for inspection of the document before the issue is determined would seriously prejudice a party, the court on the party's motion may grant leave to withhold disclosure or production until after the issue has been determined.

DISCLOSURE OR PRODUCTION NOT ADMISSION OF RELEVANCE

30.05 The disclosure or production of a document for inspection shall not be taken as an admission of its relevance or admissibility.

WHERE AFFIDAVIT INCOMPLETE OR PRIVILEGE IMPROPERLY CLAIMED

30.06 Where the court is satisfied by any evidence that a relevant document in a party's possession, control or power may have been omitted from the party's affidavit of documents, or that a claim of privilege may have been improperly made, the court may,

(a) order cross-examination on the affidavit of documents;

(b) order service of a further and better affidavit of documents;

(c) order the disclosure or production for inspection of the document, or a part of the document, if it is not privileged; and

(d) inspect the document for the purpose of determining its relevance or the validity of a claim of privilege.

DOCUMENTS OR ERRORS SUBSEQUENTLY DISCOVERED

30.07 Where a party, after serving an affidavit of documents,

(a) comes into possession or control of or obtains power over a document that relates to a matter in issue in the action and that is not privileged; or

(b) discovers that the affidavit is inaccurate or incomplete,

the party shall forthwith serve a supplementary affidavit specifying the extent to which the affidavit of documents requires modification and disclosing any additional documents.

EFFECT OF FAILURE TO DISCLOSE OR PRODUCE FOR INSPECTION

Failure to Disclose or Produce Document

30.08 (1) Where a party fails to disclose a document in an affidavit of documents or a supplementary affidavit, or fails to produce a document for inspection in compliance with these rules, an order of the court or an undertaking,

(a) if the document is favourable to the party's case, the party may not use the document at the trial, except with leave of the trial judge; or

(b) if the document is not favourable to the party's case, the court may make such order as is just.

Failure to Serve Affidavit or Produce Document

(2) Where a party fails to serve an affidavit of documents or produce a document for inspection in compliance with these rules or fails to comply with an order of the court under rules 30.02 to 30.11, the court may,

(a) revoke or suspend the party's right, if any, to initiate or continue an examination for discovery;

(b) dismiss the action, if the party is a plaintiff, or strike out the statement of defence, if the party is a defendant; and

(c) make such other order as is just.

PRIVILEGED DOCUMENT NOT TO BE USED WITHOUT LEAVE

30.09 Where a party has claimed privilege in respect of a document and does not abandon the claim by giving notice in writing and providing a copy of the document or producing it for inspection at least 90 days before the commencement of the trial, the party may not use the document at the trial, except to impeach the testimony of a witness or with leave of the trial judge.

PRODUCTION FROM NON-PARTIES WITH LEAVE

Order for Inspection

30.10 (1) The court may, on motion by a party, order production for inspection of a document that is in the possession, control or power of a person not a party and is not privileged where the court is satisfied that,

(a) the document is relevant to a material issue in the action; and

(b) it would be unfair to require the moving party to proceed to trial without having discovery of the document.

Notice of Motion

(2) A motion for an order under subrule (1) shall be made on notice,

(a) to every other party; and

(b) to the person not a party, served personally or by an alternative to personal service under rule 16.03.

Court may Inspect Document

(3) Where privilege is claimed for a document referred to in subrule (1), or where the court is uncertain of the relevance of or necessity for discovery of the document, the court may inspect the document to determine the issue.

Preparation of Certified Copy

(4) The court may give directions respecting the preparation of a certified copy of a document referred to in subrule (1) and the certified copy may be used for all purposes in place of the original.

Cost of Producing Document

(5) The moving party is responsible for the reasonable cost incurred or to be incurred by the person not a party to produce a document referred to in subrule (1), unless the court orders otherwise.

DOCUMENT DEPOSITED FOR SAFE KEEPING

30.11 The court may order that a relevant document be deposited for safe keeping with the registrar and thereafter the document shall not be inspected by any person except with leave of the court.

2. **BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, C. B-3**

PART IV - PROPERTY OF THE BANKRUPT

PREFERENCES AND TRANSFERS AT UNDERVALUE

Preferences

95 (1) A transfer of property made, a provision of services made, a charge on property made, a payment made, an obligation incurred or a judicial proceeding taken or suffered by an insolvent person

(a) in favour of a creditor who is dealing at arm's length with the insolvent person, or a person in trust for that creditor, with a view to giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy; and

(b) in favour of a creditor who is not dealing at arm's length with the insolvent person, or a person in trust for that creditor, that has the effect of giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is 12 months before the date of the initial bankruptcy event and ending on the date of the bankruptcy.

Preference presumed

(2) If the transfer, charge, payment, obligation or judicial proceeding referred to in paragraph (1)(a) has the effect of giving the creditor a preference, it is, in the absence of evidence to the contrary, presumed to have been made, incurred, taken or suffered with a view to giving the creditor the preference — even if it was made, incurred, taken or suffered, as the case may be, under pressure — and evidence of pressure is not admissible to support the transaction.

Exception

(2.1) Subsection (2) does not apply, and the parties are deemed to be dealing with each other at arm's length, in respect of the following:

(a) a margin deposit made by a clearing member with a clearing house; or

(b) a transfer, charge or payment made in connection with financial collateral and in accordance with the provisions of an eligible financial contract.

Definitions

(3) In this section,

clearing house means a body that acts as an intermediary for its clearing members in effecting securities transactions; (*chambre de compensation*)

clearing member means a person engaged in the business of effecting securities transactions who uses a clearing house as intermediary; (*membre*)

creditor includes a surety or guarantor for the debt due to the creditor; (*créancier*)

margin deposit means a payment, deposit or transfer to a clearing house under the rules of the clearing house to assure the performance of the obligations of a clearing member in connection with security transactions, including, without limiting the generality of the foregoing, transactions respecting futures, options or other derivatives or to fulfil any of those obligations. (*dépôt de couverture*)

Transfer at undervalue

96 (1) On application by the trustee, a court may declare that a transfer at undervalue is void as against, or, in Quebec, may not be set up against, the trustee — or order that a party to the transfer or any other person who is privy to the transfer, or all of those persons, pay to the estate the

difference between the value of the consideration received by the debtor and the value of the consideration given by the debtor — if

(a) the party was dealing at arm's length with the debtor and

(i) the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and that ends on the date of the bankruptcy,

(ii) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, and

(iii) the debtor intended to defraud, defeat or delay a creditor; or

(b) the party was not dealing at arm's length with the debtor and

(i) the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and ends on the date of the bankruptcy, or

(ii) the transfer occurred during the period that begins on the day that is five years before the date of the initial bankruptcy event and ends on the day before the day on which the period referred to in subparagraph (i) begins and

(A) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, or

(B) the debtor intended to defraud, defeat or delay a creditor.

Establishing values

(2) In making the application referred to in this section, the trustee shall state what, in the trustee's opinion, was the fair market value of the property or services and what, in the trustee's opinion, was the value of the actual consideration given or received by the debtor, and the values on which the court makes any finding under this section are, in the absence of evidence to the contrary, the values stated by the trustee.

Meaning of person who is privy

(3) In this section, a ***person who is privy*** means a person who is not dealing at arm's length with a party to a transfer and, by reason of the transfer, directly or indirectly, receives a benefit or causes a benefit to be received by another person.

3. **COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, C. C-36**

PART II - JURISDICTION OF COURTS

General power of court

11 Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

SCHEDULE "C"

DOCUMENTS PREVIOUSLY PROVIDED TO THE MOVING PARTIES

Litigation Trustee's Response to Request to Inspect Documents, dated February 7, 2019

1. 2011-2014 Strategic Plan
2. March 2012 Presentation to the Board
3. Marina Strauss, "Who killed Sears Canada?", *The Globe and Mail*, October 20, 2017
4. Minutes of the meeting of the Board of Directors on September 23, 2013
5. August 2013 Presentation
6. Agenda for the Board of Directors meeting on November 18-19, 2013
7. Minutes of the meeting of the Board of Directors on November 18-19, 2013
8. April 23, 2010 Presentation
9. Minutes of the meeting of the Board of Directors on April 23, 2010

Monitor's Response to Request to Inspect Documents, dated February 8, 2019

1. 2011 Strategic Plan
2. Draft press release
3. September 23, 2013 Management Presentations
4. Resolution in Lieu of Meeting of the Board of Directors, dated November 8, 2013
5. Agenda for the Board of Directors meeting on November 18-19, 2013
6. October 2013 Financial Update
7. Agenda for the telephone meeting of the Investment Committee on November 14, 2013
8. December 12, 2013 email from Donald C Ross to the independent members of the board
9. April 23, 2010 and May 7, 2010 Management Presentations
10. August 3, 2010 Management Presentations
11. December 12, 2012 Report entitled "*Dividend Discussion*"
12. Draft Officer's Certificate
13. April 6, 2014 email from Bill Crowley, cc to Bill Harker

Monitor's Brief of Documents, dated February 20, 2019

1. 2009-2011 Strategic Plan Presentation
2. Capital Structure Presentation, dated April 23, 2010
3. Minutes of the Board, dated April 23, 2010
4. Dividend / Capital Structure Presentation, dated May 7, 2010 (partially redacted)
5. Minutes of the Board, dated May 7, 2010 (partially redacted)
6. Minutes of the Board, dated May 12, 2010
7. Minutes of the Board, dated May 18, 2010
8. Capital Structure Presentation, dated August 3, 2010
9. Minutes of the Board, August 3, 2010
10. Capital Structure Update, dated September 9, 2010
11. Minutes of the Board, dated September 9-10, 2010
12. 2011-2014 Strategic Plan
13. Board Update, dated March 1, 2012
14. Minutes of the Board, dated March 1, 2012
15. Real Estate Update, dated March 15, 2012
16. Appendix: Project Matrix, dated March 15, 2012
17. Full Line Store Refresh Update, dated July 9, 2012
18. Full Line Store Refresh Update, dated July 20, 2012
19. Minutes of the Board, dated July 20, 2012
20. Selected Board Materials from Board Meeting dated November 12, 2012
21. Minutes of the Board, dated November 12, 2012
22. Minutes of the Board, dated November 26, 2012
23. Notice of Special Board Meeting dated December 12, 2012
24. December 12, 2012 Report entitled "*Dividend Discussion*"
25. Officer's Certificate, dated December 12, 2012
26. Minutes of the Board, dated December 12, 2012
27. Real Estate Update, dated June 13, 2013 (with Real Estate Update, dated April 29, 2013)
28. Minutes of the Board, dated June 13, 2013
29. Strategic Session, dated September 4-5, 2013
30. Board Presentation - Next Steps, dated September 23, 2013
31. Board Minutes, dated September 23, 2013

32. Email from F. Perugini to the Board, dated September 25, 2013
33. Excel Spreadsheet, dated September 25, 2013
34. Real Estate Update, dated October 24, 2013
35. Minutes of the Board, dated October 28, 2013
36. Board Presentation re: Westcliffe Joint Venture
37. Email from W. Crowley to the Board, dated November 8, 2013
38. Board Materials, dated November 18 and 19, 2013
39. Officer's Certificate, dated November 18, 2013
40. Minutes of the Board, dated November 18 and 19, 2013
41. Executive Summary, dated December 13, 2013
42. Removed due to Privilege
43. Email from R. Khanna to F. Perugini, dated December 15, 2013
44. Email from EJ Bird to the SCI Board, dated March 13, 2014 (with attachments)
45. Minutes of the Board, dated March 13, 2014

FTI CONSULTING CANADA INC. Plaintiff	-and-	ESL INVESTMENTS INC. et al Defendants Court File No. CV-18-00611219-00CL
SEARS CANADA INC., by its Court-appointed Litigation Trustee, J. DOUGLAS CUNNINGHAM, Q.C. Plaintiff	-and-	ESL INVESTMENTS INC. et al. Defendants Court File No. CV-18-00611214-00CL

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SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT
TORONTO

JOINT FACTUM OF THE MONITOR AND THE LITIGATION TRUSTEE
(MOTION FOR PRE-PLEADING PRODUCTIONS AND PARTICULARS)
(Returnable March 20, 2019)

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