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 Proceedings Act, 1992*

REPLY FACTUM OF THE PLAINTIFF
(Motion for Certification Returnable April 17, 2019)

April 15, 2019

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PART I - INTRODUCTION

1. This Factum replies to four issues raised in the respective Factums of ESL and the Directors:[1] (i) that common issue d(i) is bound to fail and should not be certified; (ii) the Claim Agreement requires court approval; (iii) that it is necessary to certify the Franchise Action common issues in this action; and (iv) that class counsel conceded on cross-examination that it may seek to prove the merits of the Franchise Action.

(1) COMMON ISSUE (D)(I) IS NOT BOUND TO FAIL

2. Proposed common issue d(i) will determine the effect of the Claim Agreement in determining damages for the proposed class members. Contrary to the submissions of ESL at paragraphs 2-13 of its Factum, it is not plain and obvious that that common issue has no chance of succeeding and is bound to fail.

3. The Claim Agreement provides a workable basis for determining damages on behalf of the class as a whole. The Claim Agreement is incorporated into the Plan of Compromise and Arrangement (the "**Plan**") and will be subject to a vote at the meeting of the creditors. Provided the Plan receives the requisite majority of votes in terms of number and value, this Honourable Court will consider whether it is appropriate to approve the Plan, including whether the Plan is fair and reasonable. If the Plan is approved by the Court, the Claim Agreement and the Franchise Action Class' proven affected unsecured claim against Sears in the amount of $80 million will also be Court approved.

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[1] Capitalized terms herein are as defined in the Factum of the Plaintiff dated April 5, 2019.

4. The Claim Agreement was entered into by a court-appointed Monitor with a court-appointed representative of the Franchise Action Class as represented by counsel acting under a Representation Order by the judge presiding over the Sears CCAA. The Defendants are all creditors of Sears and, as such, will have the opportunity to vote on the Plan and to challenge it before the Court when it is presented for approval.

5. If the Plan is approved, it is open for 129 to argue that the issue of damages as against Sears in the Franchise Acton is *res judicata*. The appropriateness of the $80 million valuation will have already been addressed at the Plan sanction hearing. The Defendants will have an opportunity to make arguments in respect of the claim amount at that time. If the Plan is approved by the Court, the defendants' assertion that the Claim Agreement cannot be considered in this action may amount to a collateral attack on the Order approving the Plan.[2]

6. 129's arguments in respect of the Claim Agreement (namely, *res judicata* and collateral attack) are certainly not bound to fail. In any event, the certification motion is not the place to determine the merits of this issue. Common issue (d)(i) provides a means for determining damages in this action in a simplified and efficient manner, thereby advancing the litigation on a class-wide basis.

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[2] *Strum v. Sprott Resource Lending Corp.*, 2014 BCSC 190 at para. 66. 68-70, 103-104; *Samos Investments Inc. v. Pattison*, 2000 BCCA 412 at para. 69-71, 92-94.

(2) THE CLAIM AGREEMENT WILL BE APPROVED AS PART OF THE PLAN

7. The Defendants argue that the Claim Agreement has not received court-approval pursuant to the CPA and is therefore not binding.[3]

8. As stated above, the Claim Agreement is to be approved as part of the Plan. The Claim Agreement expressly states that the proven affected unsecured claim of the Franchise Action Class is subject to Plan approval.

9. If necessary, 129 will bring a motion, either prior to or contemporaneously with Plan approval to seek approval of the Claim Agreement as binding on the Franchise Action Class pursuant to the CPA. As class representative in the Franchise Action, 129 had the authority to enter into the Claim Agreement and settle the claims of the Franchise Action.

10. Contrary to the submissions at paragraph 15 of ESL's Factum, a settlement agreement in a class action does not have to speak to how any proceeds would be distributed to the class or how class counsel would be compensated. Distribution and class counsel fees are often dealt with as separate motions from settlement approval. A plan of distribution or fee approval are not conditions precedent to approving a class action settlement.

(3) IT IS NEITHER NECESSARY NOR DESIRABLE TO CERTIFY THE FRANCHISE ACTION COMMON ISSUES

11. It is not necessary to certify the Franchise Action common issues in order to answer the proposed common issues in this action, nor to establish entitlement to compensation in this action.

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[3] Factum of ESL at para. 14-15; Factum of the Directors at para. 51.

12. In their respective Factums, the Defendants repeatedly interchange *entitlement* to compensation with *quantification* of compensation. As addressed at paragraphs 57-62 and 87 of 129's Factum, the merits of the Franchise Class Action do not need to be proved in order to establish entitlement. Rather, the court will look at the conduct of the Defendants at the relevant time to determine whether it was oppressive to the Franchise Action Class, thereby establishing entitlement to compensation.

13. Quantification, on the other hand, will occur in one of two ways: if common issue d(i) is answered favourably to the class; or (ii) at a phase-two trial following the joint trial.

14. The Defendants' attempts to drag the merits of the Franchise Action into this action, before the Court has had a chance to determine whether the Claim Agreement is a complete or partial answer to the question of compensation, is a transparent attempt to derail the joint trial. It is an attempt by the Defendants to burden the Plaintiff in massive discovery, delay and costs and prevent timely adjudication of the oppression action.

(4) CLASS COUNSEL DID NOT CONCEDE THAT IT WAS POSSIBLE THEY MAY LEAD EVIDENCE ON THE MERITS OF THE FRANCHISE ACTION

15. Contrary to the submissions at paragraph 29 of the ESL Factum, class counsel did not concede on cross-examination that it was possible they may lead evidence on the Franchise Action. Rather, on cross-examination, ESL asked various hypotheticals premised on how they may choose to defend the action, all without having served a Statement of Defence. Class counsel simply

refused to answer the hypotheticals put forward in light of ESL's failure to serve a Statement of Defence.[4] The refusal was not a concession.

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

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[4] Transcript of the Cross-Examination of Andy Seretis held March 29, 2018, Compendium of Cross-Examination Transcripts, Tab B, p. 33-34, Q. 91-93.

SCHEDULE "A" - LIST OF AUTHORITIES

1 *Strum v. Sprott Resource Lending Corp.*, 2014 BCSC 190

2 *Samos Investments Inc. v. Pattison*, 2000 BCCA 412

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