

**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

**FACTUM OF THE DEFENDANTS
WILLIAM HARKER, WILLIAM CROWLEY, DONALD ROSS,
EPHRAIM J. BIRD, JAMES MCBURNEY, AND DOUGLAS CAMPBELL**

**MOTION TO STRIKE
RETURNABLE APRIL 17, 2019**

March 29, 2019

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PART I - OVERVIEW

1. The Plaintiff alleges, generally, that the Defendants engaged in a conspiracy to generate funds for, and authorize, the payment of a dividend. However, the statement of claim does not allege the elements or material facts required to make out a claim of conspiracy.
2. In particular, the statement of claim does not allege an agreement as between the Defendants or specify the particulars of any such agreement. Nor does the statement of claim particularize the overt acts done by the Defendants, or each of them individually, in furtherance of the alleged conspiracy.

3. These specific allegations of material fact, which are lacking in the statement of claim, are required at law to be pleaded to support a claim of conspiracy. If they are not, the claim must fail.

4. Additionally, the statement of claim impermissibly lumps all of the Defendants together in connection with the bald allegations of conspiracy, but does not allege material facts sufficient to support the claim of conspiracy, making it impossible for each Defendant to know the precise conspiracy in which they are alleged to have been involved.

5. Accordingly, it is plain and obvious that the statement of claim does not disclose a cause of action in conspiracy. Additionally, the allegations of conspiracy do not satisfy the purpose of pleadings because they do not give fair notice to the Defendants as to the precise case to be met.

6. As such, the claim of conspiracy as presently pleaded cannot succeed. It should therefore be struck from the statement of claim.

PART II - THE FACTS

7. With respect to the claim of conspiracy, the Plaintiff alleges generally that:

- (a) “all of the Defendants acted together to generate the funds for and authorize the Dividend to the benefit of the Significant Shareholders”;
- (b) “this was unlawfully carried out through the Former Directors’ and Bird’s breaches of the duty of care, fiduciary duties, and oppressive conduct, as planned and directed by the ESL Parties”; and
- (c) “the Defendants knew, or ought to have known, that damage to Sears Canada would result,” and damages did result.¹

¹ Motion Record of the Defendants William Harker, William Crowley, Donald Ross, Ephraim J. Bird, James McBurney, and Douglas Campbell (“Motion Record”), Tab 2, Statement of Claim, paras. 97-99, p. 32.

PART III - ISSUE & THE LAW

8. The only issue on this motion is whether the allegations relating to conspiracy contained in the statement of claim should be struck.

(A) The Test on a Motion to Strike

9. The power to strike out claims is a valuable housekeeping measure “essential to effective and fair litigation”. It promotes efficiency, reducing time and cost, by allowing the parties to “focus on serious claims, without devoting days and sometimes weeks of evidence and argument to claims that are in any event hopeless.”²

10. Indeed, the “more the evidence and arguments are trained on the real issues, the more likely it is that the trial process will successfully come to grips with the parties’ respective positions on those issues and the merits of the case.”³

11. The test on a motion to strike under rule 21.01(1)(b) is whether it is plain and obvious that a claim discloses no reasonable cause of action. The plaintiff must plead all the facts needed to establish a cause of action. When a claim does not disclose a reasonable cause of action, the proper remedy is to strike the claim.⁴

12. The test on a motion to strike under rule 25.11 is whether all or part of a pleading is scandalous, frivolous or vexatious, or an abuse of process. Where a minimum level of material fact disclosure is not reached – or in the case of a conspiracy claim, full particulars – the claim should be struck.⁵

² *Knight v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, paras. 19-20, Book of Authorities of the Defendants William Harker, William Crowley, Donald Ross, Ephraim J. Bird, James McBurney, and Douglas Campbell (“Former Directors’ Book of Authorities”), Tab 1.

³ *Knight v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, para. 20. Former Directors’ Book of Authorities, Tab 1.

⁴ R.R.O. 1990, Reg. 194, r. 21.01(1)(b); *Research Capital Corp. v. Skyservice Airlines Inc.* (2008), 170 A.C.W.S. (3d) 47 (Sup. Ct.), para. 8, Former Directors’ Book of Authorities, Tab 2.

⁵ R.R.O. 1990, Reg. 194, r. 25.11; *Balanyk v. University of Toronto* (1999), 88 A.C.W.S. (3d) 1157 (Sup. Ct.), paras. 27-29, Former Directors’ Book of Authorities, Tab 3.

(B) No Cause of Action in Conspiracy Pleaded

13. “An allegation of conspiracy will be defective and should be struck unless the specific elements are pleaded in the statement of claim.”⁶

14. The elements that must be pleaded and supported by material facts for an “unlawful conspiracy” claim are:

- (a) an agreement by the defendants to conspire;
- (b) overt action by each of the defendants that is unlawful and in furtherance of the conspiracy;
- (c) action directed toward the plaintiff;
- (d) knowledge that, in the circumstances, injury to the plaintiff would likely result; and
- (e) actual injury to the plaintiff resulting from each of the defendants’ conduct.⁷

15. In this case, the conspiracy claims should be struck from the statement of claim because the Plaintiff has failed to plead with precision, or at all, the following elements of conspiracy:

- (a) an agreement between the Defendants to conspire; and
- (b) the overt acts alleged to have been done by **each** of the Defendants in furtherance of the conspiracy.

16. Generally, a plaintiff must ensure that the facts upon which it relies in making its claim are clearly pleaded and that the pleadings satisfy the rules.⁸

⁶ *Best v. Lancaster*, 2015 ONSC 6269, para. 108, Former Directors’ Book of Authorities, Tab 4.

⁷ *Ontario Consumers Home Services v. Enercare Inc.*, 2014 ONSC 4154, paras. 21, 25, Former Directors’ Book of Authorities, Tab 5.

⁸ *Knight v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, paras. 22-23, Former Directors’ Book of Authorities, Tab 1.

17. In particular:

The plaintiff must plead all the material facts on which it relies and all of the facts which it must prove to establish a cause of action which is legally complete. **If any fact material to the establishment of a cause of action is omitted, the statement of claim is bad** [...].⁹ [emphasis added]

18. A higher standard is required where conspiracy is alleged because it “is an intentional tort and a serious allegation, as such the material facts must be pleaded with heightened particularity.”¹⁰ When conspiracy is alleged, among other things, the statement of claim:

must state with precision and clarity material facts as to: [...]

b) the agreement between or amongst the defendants to conspire, **including particulars as to the time, place and mode of agreement;**

[and]

d) the overt acts alleged to have been done by each of the alleged conspirators in pursuance and furtherance of the conspiracy, **including the time, and place and nature of the acts.**¹¹ [emphasis added]

19. It is not appropriate for the Plaintiff to claim that particulars of the conspiracy are within the Defendants’ knowledge and then to await discovery to assemble the facts for a proper pleading.¹²

20. Rather, “if the plaintiff lacks knowledge of the facts at the time of pleading, it is inappropriate to make the allegation in the statement of claim.”¹³

⁹ *Balanyk v. University of Toronto* (1999), 88 A.C.W.S. (3d) 1157 (Sup. Ct.), para. 29, Former Directors’ Book of Authorities, Tab 3.

¹⁰ R.R.O. 1990, Reg. 194, r. 25.06(8); *Ontario Consumers Home Services v. Enercare Inc.*, 2014 ONSC 4154, para. 25, Former Directors’ Book of Authorities, Tab 5.

¹¹ *Ontario Consumers Home Services v. Enercare Inc.*, 2014 ONSC 4154, para. 24, Former Directors’ Book of Authorities, Tab 5.

¹² *Hostmann-Steinberg Ltd. v. 2049669 Ontario Inc.*, 2010 ONSC 2441, para. 20, Former Directors’ Book of Authorities, Tab 6.

¹³ *Research Capital Corp. v. Skyservice Airlines Inc.* (2008), 170 A.C.W.S. (3d) 47 (Sup. Ct.), para. 8, Former Directors’ Book of Authorities, Tab 2; *Balanyk v. University of Toronto* (1999), 88 A.C.W.S. (3d) 1157 (Sup. Ct.), para. 29, Former Directors’ Book of Authorities, Tab 3.

21. Where an allegation of conspiracy does not include material facts as to the agreement or the overt acts alleged to have been done by each of the alleged co-conspirators in pursuance and in furtherance of the conspiracy, the claim “fails to meet the requirements for the cause of action and must be struck.”¹⁴

(i) Failure to Plead an Agreement

22. The Plaintiff’s failure to plead material facts to support the allegation of an agreement – which is an essential element of a conspiracy – is fatal to its conspiracy claim. As such, the cause of action in conspiracy, as pleaded, is not legally complete and cannot succeed. As a result, the conspiracy claim must be struck.

23. The Plaintiff does not allege that each of the alleged co-conspirators were party to an agreement (or acted in concert or acted with a common design).

24. Rather, the Plaintiff claims:

- (a) that the “plan” which allegedly resulted in damages to Sears Canada was devised by only one of the alleged co-conspirators;¹⁵
- (b) that the culmination of that plan was “finalized” by only three of the alleged co-conspirators, without any allegation as to the participation or knowledge of the other alleged co-conspirators regarding finalization of the plan;¹⁶
- (c) that most of the Defendants were not even knowledgeable with respect to the alleged “plan” and in fact conducted themselves in “the absence of information”;¹⁷

¹⁴ *Ontario Consumers Home Services v. Enercare Inc.*, 2014 ONSC 4154, para. 32, Former Directors’ Book of Authorities, Tab 5.

¹⁵ Motion Record, Tab 2, Statement of Claim, para. 47, p. 21.

¹⁶ Motion Record, Tab 2, Statement of Claim, para. 54, p. 23.

¹⁷ Motion Record, Tab 2, Statement of Claim, paras. 58-63, 80, pp. 23-24, 27.

- (d) that most of the alleged co-conspirators failed to do what they were required to do, but not that such alleged failures were intentional;¹⁸ and
- (e) that **all** of the Defendants “acted together” without explaining when, where, or how all of the Defendants, or each of them, allegedly acted together.¹⁹

25. These allegations are not nearly sufficient to meet the requirement to plead an agreement between or amongst the Defendants to conspire, with particulars as to the time, place and mode of agreement, or at all.

26. Indeed, there are no material facts pleaded whatsoever to support the allegation that the majority of the former directors agreed to conspire, and there are insufficient material facts to support the allegation of an agreement as it relates to the other Defendants.

(ii) Failure to Plead Overt Acts by Each Defendant

27. The Plaintiff’s failure to plead material facts to support the allegation of conduct in furtherance of the conspiracy – which is an essential element of a conspiracy – is fatal to its conspiracy claim. As such, the cause of action in conspiracy, as pleaded, is not legally complete and cannot succeed. As a result, the conspiracy claim must be struck.

28. It is insufficient to simply “lump some or all of the defendants together into a general allegation that they conspired.”²⁰ “The courts are concerned that each person alleged to be part of a conspiracy know the particular of acts they are alleged to have conspired with others to do.”²¹

¹⁸ Motion Record, Tab 2, Statement of Claim, paras. 82-89, pp. 29-30.

¹⁹ Motion Record, Tab 2, Statement of Claim, para. 97, p. 32.

²⁰ *Ontario Consumers Home Services v. Enercare Inc.*, 2014 ONSC 4154, para. 25, Former Directors’ Book of Authorities, Tab 5.

²¹ *Research Capital Corp. v. SkyService Airlines Inc.* (2008), 170 A.C.W.S. (3d) 47 (Sup. Ct.), para. 17, Former Directors’ Book of Authorities, Tab 2.

29. Where the overt acts are not attributed to any particular defendant it is:

not possible for a specific defendant to know from the statement of claim what it is alleged to have been done as part of the conspiracy. Rather, all of the defendants are simply lumped into the general allegation that they committed the list of overt acts in furtherance of the conspiracy. This “group” approach does not satisfy the degree of specificity that is required for a conspiracy claim.²²

30. Each of the Defendants is entitled to know the particulars of the overt acts that each of them is alleged to have done in furtherance of the alleged conspiracy. In this case, like in previous cases in which conspiracy claims have been struck:

While there are a number of overt acts alleged, they are not specifically identified to any particular defendant, that is, no specific defendant could know from the statement of claim what it is that the plaintiffs say that that particular defendant did as part of the conspiracy.

[...]

While it is true that such a requirement may place a heavy burden on the plaintiff, that is the consequence of seeking to plead such a serious cause of action as that of conspiracy.²³

31. The Plaintiff does not allege that the conspiracy was carried out through overt acts or unlawful conduct by **each** of the alleged co-conspirators individually, but instead lumps them together into a general allegation that they all conspired without any specificity.²⁴

32. In fact, no specific allegations whatsoever are made against most of the former directors of Sears Canada and only sparse allegations are made against the other Defendants. The Defendants cannot know from the statement of claim what it is that the Plaintiff claims that each

²² *Martin v. Astrazeneca Pharmaceuticals PLC*, 2012 ONSC 2744, para. 176, Former Directors’ Book of Authorities, Tab 7.

²³ *J.G. Young & Sons Ltd. v. Tec Park Ltd.* (1999), 92 A.C.W.S. (3d) 198 (Sup. Ct.), paras. 6, 9, Former Directors’ Book of Authorities, Tab 8.

²⁴ Motion Record, Tab 2, Statement of Claim, para. 97, p. 32.

particular alleged co-conspirator did as part of the conspiracy. On that basis, the claim of conspiracy fails to meet the requirements of the cause of action and must fail.

33. Additionally, the Plaintiff fails to particularize the overt acts alleged to have been done by the Defendants, or each of them, in furtherance of the conspiracy.

34. A claim of conspiracy must:

state with precision and clarity material facts as to, among other things, [...] the overt acts alleged to have been done by each of the alleged conspirators in pursuance and furtherance of the conspiracy, **including the time, and place and nature of the acts**.²⁵ [emphasis added]

35. Rather than plead these required material facts, the Plaintiff alleges generally that the Defendants, or some of them, breached their common law and statutory duties of care, breached their fiduciary duties, and oppressed Sears Canada. This is hardly sufficient to meet the high standard of pleading required when making the serious accusation of conspiracy.

36. In failing to particularize the overt acts alleged to have been done by the Defendants in furtherance of the alleged conspiracy, the claim of conspiracy fails to meet the requirements of the cause of action and must fail.

(C) Failure to Satisfy Basic Pleadings Requirements

37. The Plaintiff's failure to plead material facts to enable the Defendants to know the case that each of them must meet with respect to the conspiracy claim is fatal to that claim. Since the allegations relating to conspiracy, as pleaded, do not meet the minimum standard required for claims of this nature they must be struck.

²⁵ *Ontario Consumers Home Services v. Enercare Inc.*, 2014 ONSC 4154, para. 25, Former Directors' Book of Authorities, Tab 5.

38. In assessing the adequacy of pleadings, the court must bear in mind the purposes of pleadings, which are:

- (a) to define clearly and precisely the questions in controversy between the litigants;
- (b) to give fair notice of the precise case which is required to be met and the precise remedies sought; and
- (c) to assist the court in its investigations of the truth of the allegations made.²⁶

39. Further to those purposes, rule 25.06(1) mandates a minimum level of material fact disclosure. If this level is not reached, the remedy is a motion to strike the pleading. When intent is alleged, such as in the case of a conspiracy claim, a higher level of material fact disclosure – full particulars – is required by rule 25.06(8). These full particulars:

must set out precisely what each allegation of such wrongful act is, and the when, what, by whom and to whom [...].²⁷

40. The requirement for such a “high degree of specificity” is the “consequence of alleging such a serious cause of action.”²⁸ “Conspiracy is a serious claim. A recitation of a series of events coupled with an assertion that they were intended to injure the plaintiff is insufficient”.²⁹

41. At best, the Plaintiff’s allegations of conspiracy, described above, do not satisfy the purposes of pleadings because they do not give fair notice to the Defendants as to the precise case to be met and because are not supported by a high degree of specificity.

²⁶ *Balanyk v. University of Toronto* (1999), 88 A.C.W.S. (3d) 1157 (Sup. Ct.), para. 27, Former Directors’ Book of Authorities, Tab 3.

²⁷ *Balanyk v. University of Toronto* (1999), 88 A.C.W.S. (3d) 1157 (Sup. Ct.), para. 28, Former Directors’ Book of Authorities, Tab 3.

²⁸ *Martin v. Astrazeneca Pharmaceuticals PLC*, 2012 ONSC 2744, para. 177, Former Directors’ Book of Authorities, Tab 7.

²⁹ *Martin v. Astrazeneca Pharmaceuticals PLC*, 2012 ONSC 2744, para. 168, Former Directors’ Book of Authorities, Tab 7.

42. At worst, these allegations, as presently pleaded, are simply inflammatory claims which impugn the integrity of the Defendants without basis.

43. Either way, the allegations relating to conspiracy, as presently pleaded, are scandalous or vexatious and must be struck.³⁰

PART IV - ORDER REQUESTED

44. The moving former directors request an order striking the word “conspiracy” wherever it appears in paragraph 1(a) and 1(b) of the statement of claim and striking paragraphs 97, 98, and 99 of the statement of claim, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 29th day of March, 2019.



CASSELS BROCK & BLACKWELL LLP

³⁰ *Best v. Lancaster*, 2015 ONSC 6269, paras. 60-61, Former Directors’ Book of Authorities, Tab 4; *Rare Charitable Research Reserve v. Chaplin* (2009), 180 A.C.W.S. (3d) 411 (Sup. Ct.), para. 22, Former Directors’ Book of Authorities, Tab 2.

SCHEDULE “A”
LIST OF AUTHORITIES

1. *Knight v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42
2. *Research Capital Corp. v. Skyservice Airlines Inc.* (2008), 170 A.C.W.S. (3d) 47 (Sup. Ct.)
3. *Balanyk v. University of Toronto* (1999), 88 A.C.W.S. (3d) 1157 (Sup. Ct.)
4. *Best v. Lancaster*, 2015 ONSC 6269
5. *Ontario Consumers Home Services v. Enercare Inc.*, 2014 ONSC 4154
6. *Hostmann-Steinberg Ltd. v. 2049669 Ontario Inc.*, 2010 ONSC 2441
7. *Martin v. Astrazeneca Pharmaceuticals PLC*, 2012 ONSC 2744
8. *J.G. Young & Sons Ltd. v. Tec Park Ltd.* (1999), 92 A.C.W.S. (3d) 198 (Sup. Ct.)
9. *Rare Charitable Research Reserve v. Chaplin* (2009), 180 A.C.W.S. (3d) 411 (Sup. Ct.)

SCHEDULE “B”

TEXT OF STATUTES, REGULATIONS & BY-LAWS

WHERE AVAILABLE

To Any Party on a Question of Law

21.01 (1) A party may move before a judge,

(a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs; or

(b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,

and the judge may make an order or grant judgment accordingly.

RULES OF PLEADING — APPLICABLE TO ALL PLEADINGS

Material Facts

25.06 (1) Every pleading shall contain a concise statement of the material facts on which the party relies for the claim or defence, but not the evidence by which those facts are to be proved.

Nature of Act or Condition of Mind

25.06 (8) Where fraud, misrepresentation, breach of trust, malice or intent is alleged, the pleading shall contain full particulars, but knowledge may be alleged as a fact without pleading the circumstances from which it is to be inferred.

STRIKING OUT A PLEADING OR OTHER DOCUMENT

25.11 The court may strike out or expunge all or part of a pleading or other document, with or without leave to amend, on the ground that the pleading or other document,

(a) may prejudice or delay the fair trial of the action;

(b) is scandalous, frivolous or vexatious; or

(c) is an abuse of the process of the court.

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