CITATION: The Catalyst Capital Group Inc. v. Veritas Investment Research Corporation, 2016 ONSC 23
COURT FILE NO.: CV-15-530726
DATE: 20160105

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
	)	
THE CATALYST CAPITAL GROUP INC. and CALLIDUS CAPITAL CORPORATION	)	*Rocco DiPucchio and Andrew Winton*, for the Plaintiffs
	)	
Plaintiffs	)	
– and –	)	
	)	*Matthew Milne-Smith and Andrew Carlson*, for the Defendant West Face Capital Inc.
VERITAS INVESTMENT RESEARCH CORPORATION and WEST FACE CAPITAL INC.	)	
	)	*Brendan Morrison and Julian Porter, QC*, for the Defendant Veritas
Defendants	)	
	)	
	)	
	)	**HEARD:** November 9, 2015

S.A.Q. AKHTAR J.

I. BACKGROUND AND OVERVIEW

The Factual Backdrop

[1] The defendants bring a motion to strike out the plaintiffs' claim as disclosing no reasonable cause of action.

[2] All parties to this motion are companies involved in the investment industry. The Catalyst Capital Group ("Catalyst") and West Face Capital Inc. ("West Face") compete for control and influence in the "special situations for control investment industry": a field of investments in distressed and undervalued Canadian companies. Veritas, on the other hand, is an equity research company located in Toronto which prepares and publishes investment research reports distributed to subscribers. Callidus Capital Corporation ("Callidus") is a publicly traded asset-based lender providing finance to companies unable to access more traditional methods of

money lending. Prior to April 2014, it was wholly owned by Catalyst but was the subject of an initial public offering that made forty percent of its shares available to the public.

[3] The litigation and bad blood between the West Face and Catalyst began in June 2014, when West Face hired a Catalyst employee, Brandon Moyes, to work at its company. Catalyst subsequently commenced litigation alleging the misuse of confidential information communicated by Moyes to West Face and were successful in seeking injunctive relief against West Face, which resulted in Moyes' employment with West Face being suspended pending the outcome of its legal action. The same court authorised an Independent Supervising Solicitor to review forensic images kept on Moyes' electronic devices. A series of other injunctive remedies sought by Catalyst were denied.

[4] These proceedings appeared to light the touch paper for the action that forms the subject matter of this motion. Catalyst's alleges that West Face commenced a "short-selling strategy" against Callidus. The process of "short-selling" involves the sale of stock of a particular company in the hope that its price depreciates. That same stock is subsequently repurchased at the lower price resulting in a net profit. One of the potential pitfalls of this scheme occurs when the stock price appreciates as repurchasing the stock in those circumstances leads to the seller buying back at a loss.

The Catalyst Allegations

[5] Catalyst alleges West Face began its short-selling strategy without conducting the proper research to guard against the loss-creating scenario. Instead, on or about 17 December 2014, at a meeting between West Face and Veritas representatives, Greg Boland, West Face's CEO, disclosed details of an unfavourable report that West Face had prepared regarding Callidus ("the West Face Report"). Revealing West Face's short-selling strategy, Boland "arranged" for the report to be shared with Veritas so that Veritas would produce a second report equally unfavourable to Callidus ("the Veritas Report"). The ultimate goal was that publication of the Veritas Report would cause a massive sale of Callidus shares, driving down their price so that West Face could buy back the stock at a reduced price.

[6] Catalyst submits that the adverse nature of the Veritas Report was based on falsehoods and that West Face and Veritas acted in a conspiratorial fashion to deceive Callidus's shareholders. According to Catalyst, the Veritas Report was distributed to its existing subscribers whereas West Face Report ended up in the hands of unknown third parties.

[7] Catalyst's action against the defendants rests on three foundations:

(1) West Face and Veritas made false and defamatory statements about Callidus in the West Face and Veritas Reports, the totality of which was designed to cause shareholders to sell Callidus stock;

(2) West Face and Veritas committed the tort of intentional interference with economic relations in publishing the report; and

(3) West Face and Veritas conspired to publish defamatory statements about Callidus.

The Position of the Parties

[8] West Face and Veritas move to strike out the pleadings in Catalyst's Statement of Claim. West Face seeks to do so in its entirety whilst Veritas brings its motion only in respect of the actions relating to intentional interference with economic interest ("the intentional interference claim") and conspiracy to defame.

[9] West Face argues that there is no reasonable cause of action in any of the three claims made by Catalyst. With respect to the allegations of defamation, West Face submits there is insufficient detail of the publication of the West Face Report to found an action for defamation and therefore those pleadings must be struck. Whilst Veritas accepts, at this stage, that the defamation claim with respect to the Veritas Report is properly pleaded, it joins West Face in its position that the remaining claims are simply "dressed up" versions of the same defamation claim. Both defendants argue that there is no basis for the intentional interference claim and the duplicative effect of the conspiracy claim falls foul of the common law "merger" doctrine. That being the case, neither can survive the test for striking out.

[10] Catalyst argues the claim is properly pleaded. It points to sections of the pleadings which clearly demonstrate that the West Face Report was published both to Veritas and third parties by West Face. Catalyst also claims that the intentional interference claim satisfies the test laid out in recent case law and that the doctrine of merger does not apply at the pleadings stage.

The Test for Striking Out Pleadings

[11] Rule 21.01(1)(b) of the *Rules of Civil Procedure*, O. Reg. 193/15, provides as follows:

> (1) A party may move before a judge,
>
> (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.

[12] No evidence is admissible on this type of motion and, for the purposes of the hearing, the motions judge is to assume all of the facts contained within the Statement of Claim are true. The test, agreed upon by both parties in these proceedings, is whether it is plain and obvious that the Statement of Claim discloses no reasonable cause of action: see *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263.

[13] On a motion to strike out a pleading, the court must read the impugned pleading in a generous manner so as not to unfairly deny a plaintiff the benefit of a pleading in an action. The test for striking out pleadings was summarized by McLachlin C.J. in *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45. A pleading will only be struck out if it has no reasonable chance of success. However, care must be taken when using the striking-out power. A court must respect the fact that a claim may involve new or novel issues. As the court in *Imperial Tobacco* observed, the legal landscape is constantly changing and a claim that might have had little hope of success in years past may triumph today. It should also be noted that a

motion to strike should not become the battleground for novel and complex issues to be decided prematurely: see *PDC 3 Limited Partnership v. Bregman + Hamann Architects* (2001), 52 O.R. (3d) 533 (C.A.).

II. SHOULD THE DEFAMATION PLEADINGS BE STRUCK OUT?

The Requirement for Specificity in Defamation Proceedings

[14] There is no doubt that in the context of pleadings, defamation occupies a somewhat unique position: the law stipulates a degree of specificity in any allegation of defamatory statements.

[15] This principle was re-stated by the Court of Appeal for Ontario in *Lysko v. Braley* (2006), 79 O.R. (3d) 721 (C.A.), where Rosenberg J.A. explained, at para. 91:

> Both courts and leading authors on the law of defamation repeatedly state that pleadings in defamation cases are more important than in any other class of actions. The statement of claim must contain a concise statement of the material facts. A summary of the necessary material facts to allege a complete cause of action for defamation is found in Patrick Milmo and W.V.H. Rogers, ed., Gatley on Libel and Slander, 10th ed. (London: Sweet & Maxwell, 2003) at p. 806:
>
> > These facts are the publication by the defendant, the words published, that they were published of the claimant, (where necessary) the facts relied on as causing them to be understood as defamatory or as referring to the claimant and knowledge of these facts by those to whom the words were published, and, where the words are slander not actionable per se, any additional facts making them actionable, such as that they were calculated to disparage the plaintiff in an office held by him or that they have caused special damage.

[16] The most obvious concern in vague pleadings regarding defamation is the inability of a defendant to properly respond to the allegation: see for example *Metz v. Tremblay Hall*, 2006 CanLII 34443 (ON SC).

[17] The courts have, however, shown some flexibility in permitting defamation actions to proceed despite an absence of specificity. In *Magnotta Winery Ltd. v. Ziraldo* (1995), 25 O.R. (3d) 575 (Gen. Div.), Lane J. accepted that a party may be unaware of the precise words published to another but is able to provide details of the date and time of the publication in addition to the identity of the recipients. In coming to this conclusion, Lane J. set out four criteria to be met:

(1) The plaintiffs have pleaded all of the particulars available with the exercise of reasonable diligence;

(2) The proceeding is being undertaken in good faith and is not a "fishing expedition" i.e. something that would mandate the pleading of a "coherent body of fact" such as time, place, speaker and audience;

(3) The "coherent body of fact" demonstrates not only a defamatory utterance but one that contains material which defines the character of and concerns the plaintiff; and

(4) The exact words are not within the plaintiff's knowledge but are known to the defendant and will become available to be pleaded by discovery of the defendant or production of a document or by other defined means.

[18] An example of the *Magnotta Winery* approach is to be found in *Disruptive Strategies Inc. v. WorkOnce Wireless Corp,* 2007 CanLII 13704 (ON SC), where Patillo J. found that the pleadings did not contain a coherent body of fact because the time frame alleged in that case was too broad and there was insufficient detail in relation to the identity of the speaker of the words or to whom they were spoken.

Does the Statement of Claim Contain a "Coherent Body of Fact"?

[19] West Face takes aim at the pleadings, contained in paras. 21-25 of Catalyst's Statement of Claim, submitting that they are deficient in (a) identifying the parties to whom the defamatory statements were made, and (b) whether the alleged defamatory statements were ever published. West Face reserves particular ire for the allegation contained in para. 25 of the Statement of Claim which alleges that the West Face Report was distributed to unnamed third parties. West Face claims that Catalyst is simply conducting a fishing expedition to attempt to gain access to its reports through the mechanism of a defamation action.

[20] I reject West Face's argument that Catalyst's Statement of Claim does not disclose a coherent body of fact to establish a claim for defamation. Paragraphs 21-24 outline Catalyst's allegations that on 17 December 2014, members of West Face's management met with Veritas and "arranged for West Face to share its report" with Veritas to facilitate production of the Veritas Report. The disclosure of the West Fact Report to Veritas thus identifies both the recipients and the publication of the alleged defamation. Paragraph 27 sets out West Face's allegations of the defamatory content of the report. Reading these paragraphs together, I conclude that Catalyst has satisfied the *Magnotta Winery* criteria of detailing a coherent body of fact with respect to paras. 21-24 of their Statement of Claim.

The Allegations of Third Party Publication

[21] Paragraph 25 of the Statement of Claim, however, requires a different analysis. It reads as follows:

> Beginning in November 2014, and continuing to March 2015, on specific dates known only to West Face, West Face distributed a report impugning Callidus and Catalyst to market participants (the "West Face Report"). The West Face Report was distributed to third parties, the identities of which are known to West Face.

[22] In para. 43 of their factum on this motion, Catalyst concede that their claim contains all of the particulars known to them. The difficulty, of course, is that there are no details of when and to whom the alleged defamation was published. Catalyst relies upon a different principle to justify para. 25: that unnamed third parties can be treated as an extension to a named party. Support for this argument can be found in Raymond E. Brown, *The Law of Defamation in Canada,* 2nd ed., Vol. 3 (Scarborough: Carswell, loose leaf), at para. 7.4, which reads:

> The defamatory material may be published indirectly through the action of some intermediary for whose publication a defendant may be held to share responsibility. This may be because the defendant authorized, incited or encouraged another to publish it, or because he or she had authority to forbid it but permitted it, or had authority to remove an offending publication but allowed it to remain. For example, a defendant may be liable for the publication of a defamatory statement by another where he has some control over the machinery that produces it, or the place where it originated, or some responsibility for the persons publishing it.

[23] Catalyst argues that the case at bar is on all fours with *Geurgis v. Novak*, 2013 ONCA 449, 116 O.R. (3d) 280, where the court found that once the plaintiff had established a *prima facie* case against a named person, there was a right to plead defamation allegations against unnamed third persons. See also: *Gaur v. Datta*, 2015 ONCA 151, and *Dionisio v. El Popular*, [2007] O.J. No. 4792 (S.C.), as cases that recite the principle. Thus, argues Catalyst, once it establishes a *prima facie* case that West Face published defamatory statements to Veritas, it is entitled to plead West Face's liability in publishing to unnamed third parties.

[24] The concern arising out of the vagueness of the defamation pleadings in the case at bar is not simply that West Face does not know the case that it has to meet. There is the additional potential that a procedural quagmire might follow at the discovery stage where the plaintiff will question witnesses on an unacceptably broad basis, riding on the horse that it requires information to support those vague pleadings. In *William E. Robb Enterprises Inc. v. ATI Technologies Inc.,* 2006 CanLII 39466 (ON SC), Wilton-Siegel J. dealt with a case of defamation by employees of ATI, who was alleged to be vicariously liable. The pleadings contained no dates or names of persons to whom the alleged defamation was communicated as the plaintiffs did not have that information, having obtained news of the defamation from third parties. Wilton-Siegel J. found the Statement of Claim to be fatally deficient and explained at, para. 18, the reasons for his findings:

> It is necessary to identify the third parties and the other ATI representatives to whom it is alleged that the statements were made. In the absence of such pleadings, the respondents have failed to set out a pleading that addresses the essential elements of defamation and therefore have failed to set out a reasonable cause of action. They have instead set out a pleading that will inevitably lead to a "fishing expedition" to determine if there is any valid claim that may be asserted.

[25] Whilst it is accepted that the old rule of specifically pleading the defamatory words has been relaxed, it is not open to a party to make allegations of defamation based on rumour,

hearsay or information from third parties which cannot be confirmed in an evidentiary manner. Put simply, if a party, at the pleading stage, does not possess the knowledge to clearly articulate an allegation of defamation, it should not make it: see *Metz*, at para. 10. It is impermissible for a plaintiff to use their pleadings to search for the source of their cause of action at the discovery stage: see *Dionisio*, at para. 5.

[26] I find that Catalyst to be in that very position. By its own admission, it has no knowledge of the identities of the third parties that were the recipients of the West Face Report. As para. 25 of its Statement of Claim declares: the identities of the third parties are known only to West Face. Catalyst cannot provide the "who, what and when" details of the alleged defamation and, as a result, fails to satisfy the necessity of pleading a coherent body of fact.

[27] I would also add that *Guergis* does not assist Catalyst in its argument. There the court, emphasised, at para. 52, that:

> The right to plead that a defamatory statement was made to certain unnamed persons is restricted to the case where a plaintiff has made out a prima facie case that the statement was made to a named person and has produced uncontradicted evidence of publication to other persons. [Emphasis added, citation omitted].

[28] Since Catalyst is unaware of the details of publication to any of the unnamed third parties, it is unable to produce any, let alone uncontradicted, evidence of publication, as stipulated in *Guergis*. Absent that evidence, Catalyst cannot group defendants together without clarifying what they actually said and did or hope that some liability might end up attaching to one or more of them: see *Hyprescon Inc. v. Ipex Inc.*, 2007 CanLII 11316 (ON SC).

[29] For the above reasons I find that para. 25 of Catalyst's Statement of Claim fails to disclose a reasonable cause of action and must be struck out. Further, I decline to grant leave to amend the pleadings as Catalyst themselves concede that they have no knowledge of any further particulars that could be provided to form the foundation for a proper claim.

III. SHOULD THE PLEADING OF INTENTIONAL INTERFERENCE WITH ECONOMIC RELATIONS BE STRUCK?

The Test for Intentional Interference with Economic Relations

[30] The tort of intentional interference with economic relations is not commonly pleaded in the civil courts. In *A.I. Enterprises v. Bram Enterprises Ltd.*, 2014 SCC 12, [2014] 1 S.C.R. 177, Cromwell J. described it as a long standing tort surrounded by uncertainty and requiring clarification. A claim of intentional interference is founded on the following principles:

(1) The situational background involves three party situations;

(2) The defendant commits an unlawful act against a third party, i.e. an act that would be actionable by a third party or would be actionable if they had suffered loss as a result of it; and

(3) The act committed intentionally causes harm to the plaintiff.

The Competing Arguments

[31] Veritas and West Face contest the pleadings with respect to this allegation on the basis that it is simply a derivative of the defamation claim pleaded on the same facts. They allege that Catalyst is "dressing up" its defamation allegations to gain a tactical advantage by eliminating potential defences available in a defamation action.

[32] Catalyst insists that although there is a factual overlap between the allegations of defamation and intentional interference with economic relations, the two claims are founded on separate and independent wrongdoings. The defamation claim targets the defendants' actions in deprecating their reputation in the eyes of a reasonable person, whereas the intentional interference action is directed towards a different wrong: the publication of misleading facts to induce investors in Callidus to sell their shares.

The "Directly Actionable" Test

[33] There is no bar preventing a claimant from claiming defamation alongside additional torts: see *Young v. Bella*, 2006 SCC 3, [2006] 1 S.C.R. 108. The defendants, however, place great emphasis on the Court of Appeal decision in *Alleslev-Krofchak v. Valcom Ltd.*, 2010 ONCA 557, 322 D.L.R. (4th) 193, which decided that, for intentional interference with economic relations to be properly pleaded, "the unlawful act" could not be actionable directly by the plaintiff. *Alleslev-Krofchak* also involved pleaded allegations of defamation, the substance of which formed the basis for the claim of intentional interference with economic relations. The court found that since all of the defamation claims were directly actionable by the plaintiff under the tort of defamation, she was prohibited from pursuing the tort of intentional interference with economic relations. The defendants submit that Catalyst is in exactly the same position.

[34] The *Alleslev-Krofchak* principle was followed in cases such as *Avalon Rare Metals Inc. v. Hykawy*, 2011 ONSC 5569, where the court struck out pleadings alleging intentional interference with economic relations because those pleadings' factual foundation was the same as the plaintiff's pleaded claim for defamation. Roberts J. held, at para. 36, that, "As those acts are directly actionable by the plaintiff and indeed form part of the plaintiff's Amended Statement of Claim as its defamation claim, all of the elements of the tort of intentional interference with economic relations cannot be satisfied." Similarly, in *Carbone et al. v. Michael DeGroote et. al.*, 2014 ONSC 6146, Firestone J., following *Alleslev-Krofchak* and *Avalon Rare Materials*, found that defamatory statements could not form the basis of an intentional interference with economic relations action.

[35] The defendant's submissions therefore carry some considerable force. However, in *AI Enterprises*, Cromwell J., writing for a unanimous court, took a different view. Reviewing *Alleslev-Krofchak* and other similarly decided cases, Cromwell J. concluded that the "unlawful means tort" was not limited to situations where a defendant's action is not otherwise actionable by the plaintiff. At paras. 77 and 78, he set out the law in the following way:

> The appellants urge us to hold that the unlawful means tort, because it has a gap-filling function, should only be available where the defendant's conduct does not provide the plaintiff with any other cause of action against the defendant. This was the view of the Court of Appeal in this case and this view has also been adopted by the Ontario Court of Appeal and followed by other Canadian courts. For example, in Correia, the unlawful means alleged by the plaintiff were directly actionable in negligence against one of the defendants and in *Alleslev-Krofchak*, the unlawful means were directly actionable in defamation and for this reason, the plaintiffs' claims for causing loss by unlawful means failed. [Citations omitted.]
>
> On this view, the tort exists "to fill a gap where no action could otherwise be brought for intentional conduct that caused harm through the instrumentality of a third party": *Correia*, at para. 107. The question is whether we should accept this limitation on the scope of the unlawful means tort. My view is that, for several reasons, we should not.
>
> This limitation seems to me to be wrong in principle. The gist of the tort is the targeting of the plaintiff by the defendant through the instrumentality of unlawful acts against a third party. It is that conduct by the defendant which gives rise to liability quite apart from conduct that may be otherwise actionable by the plaintiff. Moreover, general principles of tort liability accept concurrent liability and overlapping causes of action for distinct wrongs suffered by the plaintiff in respect of the same incident: see, e.g., *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147. Finally, and as I explained earlier, this limitation is premised on an unduly narrow understanding of the "gap-filling" function of the tort. A gap need not be a void.

[36] In light of these comments, I can only conclude that the "directly actionable" principle approved of in *Alleslev-Krofchak* has been overruled. As a consequence, the plaintiffs are not precluded from advancing both the defamation and the intentional interference claims.

Is Intentional Interference Properly Pleaded?

[37] The defendants' alternative argument is that the Statement of Claim does not disclose a reasonable cause of action because it fails to provide any allegations of conduct which give rise to a cause of action by the third party or would give rise to a cause of action if the third party has suffered a loss because of its conduct. The entire claim, argues the defendants, is simply a re-pleading of the defamation allegations and should be struck.

[38] I disagree. Whilst defamation forms a substantial part of the intentional interference action, it is not the entire basis for the claim. The allegations of defamation concern conduct that directly targets the plaintiff by diminishing its reputation. The intentional interference claim, by contrast, focusses on third parties, i.e. the shareholders who, it is alleged, were deliberately misled by the defendants' publications and, as a result, were induced into selling their shares as a result of the deception. Ultimately, the defendants' conduct as pleaded is an actionable wrong committed against the shareholders.

[39] The essential elements contained in *AI Enterprises* are satisfied in the pleadings: there are three parties involved, the unlawful act was committed against the shareholders who could potentially sue if they suffered loss as a result, and that act was committed with the intention of lowering Callidus's share price thereby causing harm to the plaintiff.

[40] Accordingly, the defendants' motion to strike out the intentional interference claim is dismissed.

IV. SHOULD THE CONSPIRACY CLAIM BE STRUCK OUT?

The Merger Doctrine

[41] The defendants argue that the pleading of conspiracy be struck out on the basis that it breaches the doctrine of merger as explained by Lord Denning in *Ward v. Lewis*, [1955] 1 W.L.R. 9 (C.A.), at p. 11:

> It is important to remember (and we had a case only last week on this point) that when a tort has been committed by two or more persons an allegation of a prior conspiracy to commit the tort adds nothing. The prior agreement merges in the tort. A party is not allowed to gain an added advantage by charging conspiracy when the agreement has become merged in the tort.... When the court sees attempts of that kind being made, it will discourage them by striking out the allegation of conspiracy, on the simple ground that the conspiracy adds nothing when the tort has in fact been committed.

[42] The operation of the merger doctrine can be seen in cases such as *Waters v. Michie*, 2011 BCCA 364, 309 B.C.A.C. 305; *Perth Insurance Company v. Osler Rehabilitation Centre Inc. et. al.*, 2013 ONSC 7033; and *Allstate Insurance Company v. Fairview Assessment Centre,* 2013 ONSC 5446. Striking out conspiracy pleadings on the basis that they add nothing when the substance of the tort is alleged to have been committed is well-rooted in the Canadian jurisprudence.

[43] In recent years, however, the doctrine has been the subject of some criticism. That criticism is borne out of the comments of Wilson J. in *Hunt v. Carey Canada Inc.,* [1990] 2 S.C.R. 959, on the difficulty in determining whether an allegation of conspiracy "merged" with other tortious acts alleged at the pleadings stage. Wilson J. observed that it was premature, in a motion to strike, to decide that a nominate tort would be successful, thereby rendering the additional tort of conspiracy as redundant. Her solution, set out at p. 991-2, was to leave matters in the hands of the trial judge:

> It seems to me totally inappropriate on a motion to strike out a statement of claim to get into the question whether the plaintiff's allegations concerning other nominate torts will be successful. This a matter that should be considered at trial where evidence with respect to the other torts can be led and where a fully informed decision about the applicability of the tort of conspiracy can be made in light of that evidence and the submissions of counsel. If the plaintiff is successful

> with respect to the other nominate torts, then the trial judge can consider the defendants' arguments about the unavailability of the tort of conspiracy. If the plaintiff is unsuccessful with respect to the other nominate torts, then the trial judge can consider whether he might still succeed in conspiracy. Regardless of the outcome, it seems to me inappropriate at this stage in the proceedings to reach a conclusion about the validity of the defendants' claims about merger. I believe that this matter is also properly left for the consideration of the trial judge.

[44] These remarks formed the basis of Perrell J.'s conclusion in *Jevco Insurance Co. v. Pacific Assessment Centre Inc.,* 2014 ONSC 2244, 120 O.R. (3d) 43, that the merger doctrine no longer has any value when deciding the propriety of pleadings. After deciding that it was time to "jettison the merger principle" in the law of pleading, Perrell J. added, at paras. 80-83:

> The above is enough to decide that the principle of merger does not apply to the case at bar. However, I will go further and say that it is time to eulogize the passing of the merger principle as a basis to challenge a pleading.
>
> I would argue that *Hunt v. Carey Canada Inc.* did put an end to the merger principle at the pleadings stage of an action leaving intact the need to plead special damages to determine the scope of the tort of conspiracy.
>
> The merger principle can still apply at trial. That use of the merger principle would make sense and would occur naturally at trial. Lord Denning did not explain how redundancy by itself would justify striking out a cause of action without adjudication on its merits, and it is odd that he would think so, given that he was one of the champions of concurrent liability in tort and in contract.
>
> There is something to the idea that a cause of action merges into a judgment, which, of course, can only occur when there is a judgment, but it is odd to apply merger before judgment, which I think is a point that Justice Wilson was making in *Hunt v. Carey Canada Inc., supra.*

[45] There is much force in Perrell J.'s observations about the use and efficacy of the merger doctrine in a motion to strike pleadings. The abolition of the rule at this stage would not, as was observed in both *Hunt and Jevco*, prevent a party from arguing the merger doctrine at trial. At that point in the proceedings, a judge would be in full possession of the factual background, evidence and argument and, accordingly, would be far better situated to determine whether the conspiracy claim was redundant in the context of the entire action. I agree with Perrell J. that *Hunt v. Carey* signalled the end of the merger doctrine at the pleadings enquiry.

[46] In the circumstances of this case, no judicial economy is achieved by striking this part of the claim. The evidence relating to both the conspiracy and the other nominate torts may well be the same, in which case the presiding judge may well take the view that the conspiracy claim is redundant. On the other hand, if the conspiracy charge requires additional evidence causing further time to be consumed, that might be an indication that the claim is not subsumed into the

nominate torts. Dismissing the defendants' motion to strike the conspiracy pleading in this motion leaves the same avenue open to them at trial.[1]

V. CONCLUSION AND COSTS

[47] For the above reasons, the following order is made:

1. The motion to strike out para. 25 of Catalyst's Statement of Claim is granted as it discloses no reasonable cause of action;

2. The motion to strike out the remainder of Catalyst's Statement of Claim is dismissed.

[48] With respect to costs, this is an unusual case. There were several legitimate arguments that required resolution and, in the result, there was a division of success between the parties. As a result, I find that this is one of the rare cases in which a costs order would not be appropriate. Accordingly, no order for costs is made.

S.A.Q. Akhtar J.

Released:

5 January 2016

[1] Following the release of these reasons to counsel, I was made aware of the fact that Perrell J.'s decision in *Jevco* had been upheld by the Superior Court of Justice (Divisional Court): see *Jevco Insurance Company v. Pacific Investment Centre Inc.*, 2015 ONSC 7751.

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Plaintiffs

– and –

VERITAS INVESTMENT RESEARCH CORPORATION and WEST FACE CAPITAL INC.

Defendants

REASONS FOR JUDGMENT

S.A.Q. Akhtar J.