Case Name:

Catalyst Capital Group Inc. v. Data & Audio-Visual Enterprises Wireless Inc.

IN THE MATTER OF a Note Purchase, Guarantee and Backstop Agreement dated February 6, 2013 made by Data & Audio-Visual Enterprises Wireless Inc., Equity Financial Trust Company, and certain purchasers of notes thereunder whose identity is unknown (referred to in the title of Proceedings herein as "the Unknown Purchasers")
RE: The Catalyst Capital Group Inc., Applicant, and Data & Audio-Visual Enterprises Wireless Inc., Data & Audio-Visual Enterprises Holdings Inc., Data & Audio-Visual Enterprises Leasing Inc., Equity Financial Trust Company, and The Unknown Purchasers, Respondents

[2013] O.J. No. 1634

2013 ONSC 2170

Court File No. CV-13-10016-00CL

Ontario Superior Court of Justice
Commercial List

R.E. Mesbur J.

Heard: March 26, 2013.
Judgment: April 11, 2013.

(45 paras.)

Corporations, partnerships and associations law -- Corporations -- Oppression remedy -- Standing -- Complainant -- Grounds -- Conduct that unfairly disregards the interest of any security holder, creditor, director or officer -- Motion by debtor and guarantors to stay creditor's application for relief from oppression dismissed -- Debtor issued $195 million debt structured under creditor documents and there was indenture between debtor, guarantors and trustee -- Applicant claimed oppression on basis secondary financing with notes subordinate to applicant's improperly preferred

interests of unknown purchasers -- While indenture contained "no action" clause, trustee's powers were limited to enforcing payment defaults -- As terms were not broad and trustee was not authorized to initiate suit for oppression and applicant's claim was not based on default, it could proceed.

Contracts -- Interpretation -- General principles -- Consider the entire contract -- Motion by debtor and guarantors to stay creditor's application for relief from oppression dismissed -- Debtor issued $195 million debt structured under creditor documents and there was indenture between debtor, guarantors and trustee -- Applicant claimed oppression on basis secondary financing with notes subordinate to applicant's improperly preferred interests of unknown purchasers -- While indenture contained "no action" clause, trustee's powers were limited to enforcing payment defaults -- As terms were not broad and trustee was not authorized to initiate suit for oppression and applicant's claim was not based on default, it could proceed.

Creditors and debtors law -- Fraudulent preferences -- Preferences that are void -- Intent to give preference to creditor -- Motion by debtor and guarantors to stay creditor's application for relief from oppression dismissed -- Debtor issued $195 million debt structured under creditor documents and there was indenture between debtor, guarantors and trustee -- Applicant claimed oppression on basis secondary financing with notes subordinate to applicant's improperly preferred interests of unknown purchasers -- While indenture contained "no action" clause, trustee's powers were limited to enforcing payment defaults -- As terms were not broad and trustee was not authorized to initiate suit for oppression and applicant's claim was not based on default, it could proceed.

Motion by the debtor and guarantors to stay the creditor's application for relief from oppression. The debtor issued $195 million debt, structured under credit documents and guaranteed. There was an indenture agreement between the debtor, guarantors and trustee, which was secured by agreement and could only be enforced in the event of default. The applicant held more than 25 per cent of aggregate principal amount of notes. The applicant's claim arose from the defendant entering a secondary financing agreement with notes subordinate to those held by the applicant. The applicant argued the debtor improperly preferred the interests of unknown purchasers and thwarted the debtor's reasonable expectations. The applicant sought disclosure of all terms of new financing and wanted the financing set aside. The debtor and guarantors argued that s. 6.06 of the indenture was a "no action" clause. The applicant argued the no action clause was limited to claims arising from default under the indenture. The unknown purchasers supported the moving parties' position and asserted the applicant was bitter because its offer for secondary financing was declined.

HELD: Motion dismissed. The no action clause said that no note holder could pursue any remedy with respect to the note or indenture unless it complied with items one through six. There was no dispute the applicant was a note holder and had not complied with these items. The trustee's powers under the indenture were limited to enforcing payment defaults. The terms were not broad and the trustee was not authorized to initiate suit from oppression. The applicant's complaint was not based

on any event of default. The no action clause did not prevent the application from proceeding.

Counsel:

Marc Kestenberg and Evan Cobb, for Data & Audio-Visual Enterprises Wireless Inc., Data & Audio-Visual Enterprises Holdings Inc., Data & Audio-Visual Enterprises Leasing Inc., Respondents, moving parties.

Fred Myers, for the Ad Hoc Committee of Noteholders.

Janice Wright and Greg Temelini, for Equity Financial Trust Company, Trustee.

David Moore, Diana Soos and Murray Braithwaite, for the Applicant, responding party on the motion.

ENDORSEMENT

R.E. MESBUR J.:--

The motion:

1 The applicant, The Catalyst Capital Group Inc., (Catalyst) is a significant creditor of the respondent, Data & Audio-Visual Enterprises Wireless Inc., ("Wireless"). In April of 2011 Wireless issued debt of $195 million, structured under a number of credit documents. First Lien Senior Secured Notes, (the Notes) evidence the debt. The respondents Data & Audio-Visual Enterprises Holdings Inc. and Data & Audio-Visual Enterprises Leasing Inc. (the Guarantors) have guaranteed the Notes.

2 There is an Indenture among Wireless, the Guarantors and Equity Financial Trust Company as trustee whose terms govern the Notes. Wireless' obligations under the Indenture are also secured by security interests granted in favour of Equity, as collateral agent. The security interests are created by a Security Agreement. The security interests can only be enforced if there is an Event of Default under the Indenture. "Event of Default" is a defined term under the Indenture.

3 The Indenture is the primary, governing document. The credit documents say that if there is a conflict among the terms of the Indenture, the Security Agreement or the Notes, the Indenture's terms prevail.

4 Catalyst holds more than 25% of the aggregate principal amount of the Notes. Catalyst has started this application to seek relief from oppression. The basis of Catalyst's claim arises out of

Wireless' entering into a secondary financing with notes subordinate to the Notes Catalyst holds.

5 Simply put, Catalyst says that when Wireless obtained new financing through "unknown purchasers" of these secondary notes, Wireless preferred the interests of the unknown purchasers and thwarted Catalyst's reasonable expectations. Catalyst makes broad and sweeping allegations of oppression against Wireless.

6 Catalyst seeks disclosure of all the terms of the new financing and related broad disclosure. At the end of the day, Catalyst wants the court to set aside the new financing and the new note securing it.

7 Wireless and the Guarantors move to stay the application on the basis that Section 6.06 of the Indenture is a "no action" clause that prohibits Catalyst from commencing this proceeding.

8 Section 6.06 reads as follows:

> Except to enforce the right to receive payment of principal, premium, if any, or interest when due, no Holder of a Note may pursue any remedy with respect to the Indenture or the Notes unless:
>
> 1) Such Holder gives to the Trustee prior written notice than an Event of Default is continuing;
> 2) Holders of at least 25% in aggregate principal amount of the then outstanding Notes make a written request to the Trustee to pursue the remedy;
> 3) Such Holders have offered to the Trustee security or indemnity reasonably satisfactory to the Trustee against any loss, liability or expense;
> 4) The Trustee has not complied with the request within 60 days after receipt of the request and the offer of security or indemnity; and
> 5) During such 60-day period, Holders of a majority in aggregate principal amount of the then outstanding Notes have not given the Trustee a direction inconsistent with such request.
>
> A Holder of a Note may not use this Indenture to prejudice the rights of another Holder of a Note or to obtain a preference or priority over another Holder of a Note.

9 The issue is whether the provisions of 6.06 are wide enough to encompass Catalyst's claim. If they are, the application must be stayed so that Catalyst can comply with its provisions. If they are not so broad, then Catalyst's application may continue.

The parties, the facts and the parties' positions:

10 Catalyst holds over 25% of the aggregate principal of the outstanding Notes. Wireless needs additional financing, and has arranged it pursuant to secondary notes with some of the other Note holders (excluding Catalyst) under the Indenture. Catalyst does not know who these secondary noteholders are. Catalyst refers to them in the title of proceedings as the "Unknown Purchasers".

11 Equity Financial Trust Company is a trust company. Equity is the trustee under the Indenture as well as the collateral agent. The "Unknown Purchasers" are those who have provided secondary financing to Catalyst under another instrument. Equity is the collateral agent in that secondary financing.

12 When Wireless began to look for additional secondary financing Catalyst made a proposal to Wireless to provide a comprehensive refinancing package that would consolidate the existing debt with the additional debt, all in favour of Catalyst. Wireless declined, and opted instead to obtain secondary financing through a second debenture in favour of a number of the parties who also hold some of the first Notes. Because of the terms of the secondary financing, the names of those who have advanced the financing are confidential. Catalyst refers to them as "the Unknown Purchasers". Their counsel, Mr. Myers, calls them the "Ad Hoc Committee of Noteholders".

13 Catalyst takes the position the secondary financing is oppressive to it. It has launched this application, seeking relief from what it characterizes as oppressive conduct. Catalyst formulates its claim as arising from Wireless' conduct in entering into the new financing, and the oppressive result of that new financing. The majority of the Note holders under the Indenture approved the new financing. Catalyst complains that it was not consulted about it and did not provide its consent.

14 Catalyst goes on to say that the new financing contains "several unusual and prejudicial features" including the financial terms, maturity date, interest rate and fees, insufficient subordination of the Notes, and so on. Catalyst also alleges that as collateral agent under the second financing, Equity has placed itself in a position of conflict.

15 Catalyst sets out its reasonable expectations as including, among other things:[1]

a) That any new financing would be on terms consistent with usual commercial terms and practices;
b) Subordinate security holders would not be placed in a position of *de facto* economic/commercial control over Wireless' affairs;
c) That if any amendments were made to the Indenture, the Noteholders would immediately be provided with enough information and documentation to understand and analyze the effects and implications of them, in relation to both their legal rights and their economic interests;
d) That if any amendments were made to the Indenture, their effects would not adversely affect the economic or legal interests of the Noteholders;

e) That neither Wireless nor the Trustee would tolerate a situation where some of the Noteholders had "informational advantages" over other Noteholders in relation to the new financing; and f) The Trustee would not be placed in any conflict or potential conflict of interest.

16 Catalyst takes the position that the secondary financing has essentially violated these reasonable expectations, resulting in Catalyst's being oppressed.

17 Catalyst's biggest concern is that money will be advanced in late May under the second financing, with the attendant payment of significant fees. Catalyst says that if it cannot proceed with this application then its complaint will have become moot.

18 Catalyst suggests the no action clause is limited to claims arising because of Default under the Indenture. It says it is not complaining about any "default" under the Indenture. Thus it reasons this kind of application for relief from oppression lies far outside the scope of the no action clause and the clause therefore does not apply to this application.

19 Wireless takes the position that Catalyst's application comes squarely within the types of actions contemplated by the clause and is therefore barred until such time as Catalyst has complied with the notice to the Trustee and other provisions of the clause. That is the basis for its motion to stay the application.

20 The Unknown Purchasers support Wireless' position. They go further, and characterize Catalyst as nothing more than a "bitter bidder", who wants to stop the current financing because its own refinancing proposal was rejected.

21 Equity takes no position on the motion.

<u>The law:</u>

22 "No action" clauses are a common feature of Indentures such as this one. Oppression claims have been considered in a number of Canadian cases in the context of no action clauses. In some cases, courts have found the claims barred by the no action clause. In others, they have not. What emerges from the cases is that the result in any case will depend entirely on the actual wording of the indenture in question.

23 Canadian courts had not adjudicated issues surrounding no action clauses until Farley J. did so in *Millgate Financial Corp. v. BF Realty Holdings Ltd.* [2] He looked at jurisprudence from both American and English courts, and described the rationale for no-action clauses by quoting from *Feldbaum v. McCrory Corp.*[3]:

> ... in consenting to no-action clauses by purchasing bonds, plaintiffs waive their rights to bring claims that are common to all bondholders, and thus can be

> prosecuted by the trustee, unless they first comply with the procedures set forth in the clause or their claims are for the payment of past-due amounts ...
>
> The policy favouring the channelling of bondholder suits through trustees mandates the dismissal of individual bondholder actions no matter whom the bondholders sue. So long as the suits to be dismissed seek to enforce rights shared ratably by all bondholders, they should be prosecuted by the trustee. Moreover, like other no-action clauses, the clauses at issue here explicitly make their scope depend on the nature of the claims brought, not on the identity of the defendant. For example, the E-II clauses quoted earlier begin: "A Securityholder may not pursue any remedy with respect to this Indenture of the Securities unless ..."

24 The Ontario Court of Appeal has also specifically addressed the issue of no action clauses. In this regard, their analysis in *Casurina Limited Partnership v. Rio Algom Ltd.*[4] is helpful. The court agreed with the reasoning of the decision below, saying:

> Spence J. agreed with the rationale for giving a facially unlimited no-action clause a broad interpretation. However ... he conducted a further analysis of the no-action clause read together with the broad powers of the trustee contained in s. 12.11 of the indenture before concluding, based on the wording of the indenture read as a whole, that the clause prevents individual bondholders from bringing an oppression action against the issuer or any other party.

25 From these decisions I infer claims barred by no action clauses must first, be common to all bondholders, and second, be claims that can be prosecuted by the Trustee. While no action clauses will be interpreted broadly, they must still be considered in the context of the wording of the indenture read as a whole. Here, the question is whether the applicant's oppression claim falls into these categories.

<u>Discussion:</u>

26 The no action clause (section 6.06 of the Indenture) says, "No holder of a note may pursue any remedy with respect to the Notes or Indenture" unless it complies with items 1-6 set out in the section. There is no question Catalyst has not complied with any of them, other than being the holder of at least 25%of the aggregate principal amount of the Notes.

27 Catalyst concedes it is a holder of a Note. The question is whether "any remedy with respect to the Notes or Indenture" is broad enough to capture this application. Is the application seeking a remedy "with respect to the Notes or Indenture"?

28 Catalyst says there are three main reasons why 6.06 does not apply to its application:

a) The clause does not apply to oppression claims;
b) There has been no Event of Default, and therefore the claim is not one the Trustee can bring; and c) Even if the clause applies, there are exceptions that would apply to permit Catalyst's application to go ahead.

29 To support its position, Catalyst points to subparagraph (1) which requires a Noteholder to give notice to the Trustee that "an Event of Default" is continuing. It suggests that this means the no action provision only applies to situations where the proposed action is in relation to an Event of Default. Catalyst reasons that since it has not suggested there is an Event of Default as defined under the Indenture, the clause cannot apply.

30 Catalyst relies on *Millgate* [5] in which Farley J took a narrow view of a no action clause's ambit. There, the clause in question said:

> No holder of any [Debenture] or coupon shall have any right to institute any action, suit or proceeding at law or in equity for the purposes of enforcing payment of the principal or any premium or interest on any [Debenture] or coupon, or for the execution of any trust or power hereunder or ... for any other remedy hereunder ... unless ... [the Trust Indenture then sets out the preconditions such as notice, indemnity, etc.]

31 There, the court limited the clause's reach to those circumstances in which the plaintiff was alleging that BF was in breach of its contractual obligations pursuant to the payment of principal and interest under the Debentures being in default. Since that was not the essence of the claim, it was permitted to proceed.

32 Wireless says that Catalyst's application is grounded in the Indenture itself, and even though Catalyst has dressed the application in oppression's clothes, the application really seeks a remedy with respect to the Indenture or the Notes and thus must be stayed. It says that Catalyst's "reasonable expectations" are based on the debt instrument itself. Since "reasonable expectations" are the foundation of oppression relief,[6] Wireless reasons Catalyst's claim must arise out of the Indenture, and be "with respect to the Indenture or the Notes". It says if there is no default under the Indenture, then there is no way Catalyst's reasonable expectations have been defeated. Put another way, if Catalyst's reasonable expectations have been defeated, that defeat must arise only out of the terms of the Notes or Indenture which create the framework for those reasonable expectations.

33 Wireless relies on the reasoning in *Casurina*[7] and *Amarynth L.L.C. v. Counsel Corp.*[8] which held that the phrase "in respect of" is very broad, and should be given broad application. If the analysis required the court to look only at the wording of the preamble to 6.06 then Wireless would be correct. Courts have interpreted clauses broadly. That, however, is not the end of analysis.

34 In looking at the parties' positions in the context of the overarching rationale set out in *Feldbaum*, I must consider not only whether the proposed application seeks a remedy common to

all bondholders, but also whether the Indenture gives the Trustee the power to pursue that kind of suit. For example, in *Amarynth* Ground J. noted that in the trust indenture in that case, the trustee had the specific power to "institute proceedings necessary or advisable to protect the interests of the debentureholders." In *Casurina* the debenture provided that "all proceedings at law shall be instituted, had and maintained, by the Trustee, except only as herein provided."

35 As I see it, the difficulty with Wireless' position is that in this Indenture, the Trustee's powers are contractually limited. Article 7 deals specifically with the Trustee and its duties and powers. First, Article 7.01 of the Indenture sets out the Trustee's duties. Section 7.01(a) says "If an Event of Default has occurred and is continuing, the Trustee will exercise such of the rights and powers vested in it by this Indenture ..."

36 Section 7.01(b) goes on to say that except during the "continuance of an Event of Default, (1) the duties of the Trustee will be determined solely by the express provision of this Indenture and the Trustee need perform only those duties that are specifically set forth in this Indenture and no others, and no implied covenants or obligations shall be read into this Indenture against the Trustee ..."

37 So, what then are the Trustee's duties specifically set forth in the Indenture? Section 6.03 says "If an Event of Default occurs and is continuing the Trustee may pursue any available remedy to collect the payment of principal, premium and interest ... or to enforce the performance of any provision of the Notes or this Indenture ..."

38 Section 6.08 refers to collection suits by the Trustee. The section authorizes the Trustee to recover judgment in its own name and as Trustee "If an Event of Default specified in Section 6.01(1) or (2) hereof occurs and is continuing."

39 The specific Event of Default enumerated under section 6.01(1) is "default for 30 days in the payment when due of interest on the Notes". The Event of Default under 6.01(2) is "default in the payment when due (at maturity, upon redemption, upon repurchase as required by this Indenture or otherwise) of the principal of or premium, if any, on the Notes."

40 It seems to me that the no action clause must first be limited to those actions the Trustee is specifically authorized to take under the terms of the Indenture. As I read this Indenture, the Trustee's powers, duties and obligations as far as initiating action is concerned are limited to enforcing payment defaults. I do not see this Indenture as being nearly as broad as in *Amarynth*, or *Casurina.* As a result I do not see the Trustee under this Indenture as being authorized to initiate suit for oppression.

41 But, Wireless argues, what is really at the heart of Catalyst's claim? It suggests it is grounded in "default" under the Indenture and as such falls within the powers of the Trustee to prosecute. The difficulty with this position is that the Trustee's powers are limited to acting against Events of Default (as that term is defined under the Indenture), and in particular only those Events of Default specified in Sections 6.01(1) and (2) of the Indenture. Neither of these Events of Default has

occurred. Catalyst's complaint is based on neither of these specific Events of Default.

42 In coming to this conclusion, I recognize that other cases have determined that default is not necessary to invoke the no action clause, and that no action clauses can be broad enough to encompass oppression applications. Here, however, the clause is sufficiently restrictive, when read in conjunction with the rest of the Indenture and particularly the Trustee's powers, to lead me to conclude it does not prohibit Catalyst from pursuing its application for relief from oppression.

43 Since I have determined that the application is not barred by the no action clause in the Indenture, I need not deal with Catalyst's alternative argument that even if 6.06 applies, there are exceptions that would apply to permit Catalyst's application to go ahead in any case.

The decision:

44 The motion is therefore dismissed. Counsel for Catalyst and Wireless agreed that as between them a reasonable costs award for the loser to pay on this motion would be in the range of $7,500 to $12,500. Wireless will therefore pay costs to Catalyst fixed at $8,500, all inclusive. The parties agreed that neither the Ad Hoc Committee nor the Trustee would have any entitlement to costs, or any obligation to pay costs.

45 Since the application will proceed, it should proceed quickly to resolution. To that end, the parties are directed to schedule and attend a 9:30 appointment within one week of the release of these reasons to fix a speedy timetable for all steps necessary in the application, including the date of hearing.

R.E. MESBUR J.

cp/e/qlcct/qlrdp

1 Schedule A to Catalyst's Notice of Application.

2 [1994] O.J. No. 1968 (Gen. Div.).

3 1992 Del.Ch. LEXIS 113 (June 1, 1992).

4 [2004] O.J. No. 177, 181 O.A.C. 19, affirming [2002] O.J. No. 3229 (S.C.J.).

5 Note 2, above.

6 See *BCE Inc. v. 1976 Debentureholders* [2008] 3 S.C.R. 560. Oppression is fact specific. What is just and equitable is judged by the reasonable expectations of the stakeholders in the context of and in regard to the relationships at play. The court must look at both the reasonable expectations of the complainant, as well as whether those reasonable expectations have been violated by conduct that could be termed "oppressive" or with "unfair disregard" of a relevant interest.

7 Note 4, above.

8 [2003] O.J. No. 4674 (S.C.J.).

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