2014 ONSC 3619 (CanLII)

CITATION: Brigaitis v. IQT, Ltd. (IQT Solutions), 2014 ONSC 3619
COURT FILE NO.: 11-CV-432919CP
DATE: 20140613

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
BOB BRIGAITIS and CINDY RUPERT	)	*Theodore P. Charney*, for the Plaintiffs
Plaintiffs	)	
– and –	)	
IQT, LTD., c.o.b. as IQT SOLUTIONS, IQT SOLUTIONS, IQT CANADA, LTD., JDA PARTNERS LLC, IQT, INC., ALEX MORTMAN, DAVID MORTMAN, JOHN FELLOWS, RENAE MARSHALL, and BRAD RICHARDS	)	*Jodi Gallagher Healy*, for the Defendants IQT, Inc., IQT Canada, Ltd., JDA Partners LLC, David Mortman and Alex Mortman
Defendants	)	
Proceeding under the *Class Proceedings Act, 1992*	)	**HEARD**: June 10, 2014

PERELL, J.

REASONS FOR DECISION

[1] This is an action certified as a class proceeding under the *Class Proceedings Act, 1992*.[1] See *Brigaitis v. IQT, Ltd. c.o.b. as IQT Solutions*.[2] The Representative Plaintiffs, Bob Brigaitis and Cindy Rupert, claim damages on behalf of a class of employees of IQT, Ltd. who were terminated on mass on July 15, 2011. In their Amended Statement of Claim, the Plaintiffs plead claims for wrongful dismissal, conspiracy, inducing breach of contract, negligence and oppression under the Ontario *Business Corporations Act*.[3] The Plaintiffs claim aggravated and punitive damages. The Amended Statement of Claim claims damages in the amount of $20 million.

[2] There is a default judgment against the Defendant John Fellows.[4]

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[1] S.O. 1992, c. C.6.
[2] 2014 ONSC 7.
[3] R.S.O. 1990, c. B.16.
[4] See *Brigaitis v. IQT, Ltd.*, 2014 ONSC 2180.

[3] The Plaintiffs now bring a motion requiring the Defendants IQT, Inc., IQT Canada, Ltd., JDA Partners LLC, David Mortman and Alex Mortman to disclose full particulars of the insurance policies available to them.

[4] The Defendants disclosed and produced to the Plaintiffs a $5 million in the aggregate insurance policy (Executive Risk Indemnity Inc. Policy No. 8210-8407) that includes Directors and Officers Liability Coverage and Employment Practices Liability Coverage. The Defendants have also disclosed that there remains $436,979.45 USD for payment should the Plaintiffs succeed in their class action.

[5] However, despite being requested to do so, the Defendants have refused to explain how, when, to whom, and for what purposes the insurance proceeds/monies of approximately $4.5 million were paid. Hence, this motion.

[6] Relying on my judgment in *Sharma v. Timminco*,[5] the Plaintiffs submit that they are entitled to additional information about the insurance proceeds and that they need the information to make responsible decisions about whether to proceed with the action or whether to attempt to settle it. Further, they submit that if they did attempt to settle the action and then moved for court approval, they would have to satisfy the court that they had information about what had happened to the $4.5 million of insurance proceeds. Class Counsel submit that it would be irresponsible for them to provide advice or to make decisions based on the current state of information. Thus, the Plaintiffs submit that there is a genuine need to have the additional information about the insurance policy that might cover the circumstances of the case at bar.

[7] For their part, the Defendants submit that they have provided all the information required by the authority of *Sharma v. Timminco* or by the authority of the jurisprudence about rules 30.02 (3) and 31.06 (4), which rules address the disclosure of information about insurance policies as a part of the discovery process of an action under the *Rules of Civil Procedure*. They submit that no further information about insurance is necessary. Further still, the Defendants submit that the pursued information is not relevant to the issues in the lawsuit and that the Plaintiffs are just fishing for information potentially relevant to an action against their insurers but not pertinent to the action before the court.

[8] I agree with the arguments of the Defendants and, therefore, I dismiss the Plaintiffs' motion.

[9] In my opinion, the Plaintiffs have all the information they need to make responsible decisions about whether to pursue or attempt to settle this action. The issue of whether any particular settlement is approvable is not before the court.

[10] The Plaintiffs know at this juncture that if they pursue the litigation and are successful then: (a) in the worst case, there will be $0.5 million of insurance proceeds available to satisfy the judgment; and (b) in the best case, after a successful action or settlement with the insurer, there will be up to $5 million of insurance proceeds available.

[5] 2010 ONSC 790.

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[11] Knowing these parameters, the Plaintiffs can make a reasonable decision about whether to abandon, settle, or pursue the litigation. In any event, they can make a decision about whether to attempt to settle the litigation with the information they now have. At this juncture, the Plaintiffs do not need any more information about insurance than they have in order to decide whether to invite settlement negotiations, which invitation may or not be accepted by the Defendants.

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[12] If the Plaintiffs wish additional information about the insurance coverage for the settlement negotiations, then they can ask for it during the negotiations in the same way that they might ask for information about what other resources the Defendants have to pay a judgment.

[13] In circumstances where the parties have not entered into settlement negotiations, the Plaintiffs' request for more information about the insurance creates a conflict between the Defendants and their insurer (who is likely paying for their defence) and in my opinion it is an unfair, divisive, overreaching, and unnecessary request.

[14] If the parties do enter into settlement negotiations and reach a settlement, then both parties will be interested in showing that the settlement is in the best interests of the class, and at that time, the court can explore whether the proposed settlement was reasonable having regard to the available resources, including but not limited to insurance proceeds.

[15] The case law about the extent of disclosure about insurance proceeds supports the Defendants' position. See: *Sabatino v. Gunning*[6]; *Seaway Trust Co. v. Markle*[7]; and *Pye Bros. Fuels Ltd. v. Imperial Oil Ltd.*[8]

[16] In *Seaway Trust Co. v. Markle*, Justice Lane stated:

> In my view, the amendment was intended to enable an examining party to learn what amount is actually likely to be available under the policy and under what conditions. The word "conditions" is not, I think, used as narrowly as counsel contended. It is intended to refer to conditions which may have come into existence as the result of non-waiver agreements or other agreements or understandings between insurer and insured, notices given by either to the other or positions taken as to the liability of the insurer under the policy in the circumstances of the case. It is not the intent of the rule to open up the whole file between insurer and insured. It is significant that the rule as to the production of insurance policies was not amended to broaden the scope of production of insurance-related documents beyond the policy itself. In my view, the examiner is entitled to disclosure in full of the terms of any agreement, understanding, notice or position taken, written or oral, that may affect the availability of the insurance proceeds but no more than that. The details of the information made available to the insurer by the insured or obtained by the insurer through its own investigation are not subject to disclosure under this rule even though such information will usually provide the factual basis for the agreement, understanding, notice or position in question. If the Rules Committee had intended a broader disclosure of the insurer's file, the Rules would have explicitly provided for it.

[17] For the above reasons, I dismiss the Plaintiffs' motion.

[18] If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with the Defendants' submissions within 20 days of the release of these Reasons for Decision followed by the Plaintiffs' submissions within a further 20 days.

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[6] (1985), 50 O.R. (2d) 171 (C.A.).
[7] [1992] O.J. No. 1602 (S.C.J.).
[8] 2012 ONCA 153.

Perell, J.

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Defendants

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