

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N

BOB BRIGAITIS and CINDY RUPERT

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

Defendants

Proceeding under the *Class Proceedings Act, 1992*, S.O. 1992, c.6

FACTUM OF THE PLAINTIFFS/MOVING PARTY
Motion for Particulars and Production/Inspection of Documents
(Returnable November 16, 2012)

November 6, 2012

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Court File No.: CV-11-432919 00CP

**ONTARIO
SUPERIOR COURT OF JUSTICE**

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PART I – OVERVIEW

1. On this motion, the plaintiffs seek to have the defendants Alex Mortman, David Mortman, IQT, Inc., IQT Canada Inc., and JDA Partners LLC (the “IQT Defendants”) deliver to the plaintiffs particulars of questions relating to allegations in the statement of defence and crossclaim filed by the IQT Defendants; to produce for inspection documents referred to in the statement of defence and crossclaim; to produce for inspection documents relevant to this proposed class action; and to provide them with authorizations to access computers held by the Canada Revenue Agency (“CRA”).

2. The IQT Defendants have not filed any affidavit evidence on this motion. Therefore, there is no evidence proffered as to the prejudice the IQT Defendants would suffer should the relief sought be granted; there is no evidence that the IQT Defendants will have any difficulty in producing the documents sought to be produced in this motion; and the evidence in the affidavit of Andrew J. Eckart, filed in support of this motion, is true and uncontested.

PART II – THE FACTS

Background

3. On July 15, 2011, IQT, Ltd. ceased operations and all employees were terminated from their employment without any advance notice, without any compensation for outstanding wages or vacation pay and without any termination pay or severance pay (the “Debt”).¹

4. An action was commenced by notice of action on August 16, 2011, against the IQT Defendants for damages sought by all persons who were employees of IQT whose employment in Oshawa, Ontario was terminated on July 15, 2011, exclusive of its directors and officers (the “Class Members” or the “Class”). A statement of claim was filed with the court on September 15, 2011.²

5. The plaintiffs have pleaded, *inter alia*, that the IQT Defendants either individually or collectively stripped IQT, Ltd. of all or substantially all of its assets for an improper purpose – to avoid paying the Debt.³

6. The plaintiffs have pleaded that the IQT Defendants received financial benefits from diverting the IQT, Ltd. assets.⁴

¹ Statement of Claim, Tab 2 of the Plaintiffs’ Motion Record at paras. 18-23.

² Tab 2 of the Plaintiffs’ Motion Record.

³ Statement of Claim at paras. 54-55, 62-65, 70-71, 74-75.

⁴ Statement of Claim at para. 71.

7. The plaintiffs have pleaded that in the context of diverting the assets, the IQT Defendants knew that the contract between IQT, Ltd. and Bell Canada was about to be terminated which would have the result of depriving IQT, Ltd. of its sole source or main source of revenues.⁵

The Particulars

8. On May 16, 2012, plaintiffs' counsel was served with a statement of defence and cross claim of the IQT Defendants.⁶

9. Due to the vagueness of the allegations in the statement of defence and crossclaim, the plaintiffs served, by letter dated June 29, 2012, a demand for particulars from counsel for the IQT Defendants. This request for particulars directed counsel for the IQT Defendants to specific paragraphs in the statement of defence and asked for direct information concerning allegations raised therein.⁷

10. By letter dated August 28, 2012, the IQT Defendants refused to provide the requested particulars.⁸

Production of Documents

11. After the within claim was commenced, IQT, Ltd. was assigned into bankruptcy on December 20, 2011. Class counsel subsequently reviewed and copied documents held by the trustee in bankruptcy for IQT, Ltd (the "Trustee").⁹

12. Counsel reviewed and copied monthly bank account statements and cancelled cheques for two bank accounts held by IQT, Ltd. at a BMO branch in Oshawa Ontario. There was an account for US currency, and one for Canadian currency. Upon review of

⁵ Statement of Claim at paras. 63-64 and 71.

⁶ Tab 3 of the Plaintiffs' Motion Record.

⁷ Exhibit "A" and paras. 3-5 of the affidavit of Andrew J. Eckart, sworn September 21, 2012 (the "Eckart Affidavit").

⁸ Exhibit "B" and para. 3 of the Eckart Affidavit.

⁹ Exhibit "C" and paras. 9-10 of the Eckart Affidavit.

these documents, however, it became apparent to class counsel that the 2011 monthly bank account statements and cancelled cheques for those accounts were not available. The records that were available showed that substantial funds were being regularly transferred from IQT, Ltd. to the defendant IQT, Inc. in the United States. No bank account statements for IQT, Inc. were amongst the documents held by the Trustee.¹⁰

13. At the time of bankruptcy, IQT, Ltd. was in arrears with Revenue Quebec and the CRA in the amount of over \$1,000,000 for sales taxes alone. There was evidence found by class counsel that the defendant Alex Mortman was aware of being in arrears with Revenue Quebec as far back as November 19, 2010, and that he had made arrangements to pay the arrears but did not honour the agreement.¹¹

14. IQT, Ltd. also had ongoing debt obligations to Wells Fargo which stood at \$17,371,743.71 as of December 21, 2011.¹²

15. This evidence suggests that IQT, Ltd. was in an insolvent position (it was unable to pay the creditors Wells Fargo and Revenue Quebec as its debts were becoming due), yet was routinely transferring funds to a United States bank account for the benefit of some or all of the IQT Defendants.

16. The plaintiffs also seek production of correspondence between the IQT Defendants and Wells Fargo, and the IQT Defendants and Bell Canada as such correspondence will disclose the circumstances under which the termination occurred and will inform the IQT Defendants pleadings which are at the moment vague.¹³

17. Certification materials are due from the plaintiffs by February 15, 2013. In order for the plaintiffs to adequately prepare for certification and to assess whether the within action is worthwhile pursuing, the answers to the particulars requested, the

¹⁰ Exhibit "D" and paras. 10-12 of the Eckart Affidavit.

¹¹ Exhibits "E", "F", and "G" and paras. 15-16 of the Eckart Affidavit.

¹² Exhibit "H" and para. 17 of the Eckart Affidavit.

¹³ Notice of Motion at p. 7.

documents requested for inspection, and access to the computers held by the CRA are required.

PART III – LAW AND ARGUMENT

Issue (i) – The IQT Defendants must deliver particulars of allegations raised in their statement of defence and crossclaim.

18. Particulars for pleadings are normally ordered if:

- (1) They are not within the knowledge of the party demanding them;
and
- (2) They are necessary to enable the other party to plead his or her response.¹⁴

19. Particulars have been referred to as “additional bits of information, or data, or detail, that flesh out the material facts, but they are not so detailed as to amount to evidence”. Particulars are ordered to define the issues, prevent surprise at trial, enable adequate preparation for trial and to facilitate the hearing.¹⁵

20. None of the particulars sought in this motion are within the knowledge of the plaintiffs. The particulars relate exclusively to allegations raised in the statement of defence and crossclaim with respect to acts done by the IQT Defendants, or other defendants in this action, and none with respect to the plaintiffs’ acts or omissions, which would be within their knowledge.

21. Many of these allegations relate to the financial difficulties experienced by IQT, Ltd. (see the allegations at paras. 14, 17, 26(b), 41, and 42 of the statement of defence and crossclaim). The plaintiffs, as employees of IQT, Ltd., were not parties to any such detailed knowledge of the financial status of the IQT Defendants.

¹⁴ *Physicians Services Inc. v. Cass*, [1971] O.J. No. 1561, [1971] 2 O.R. 626 (C.A.),
Obonsawin v. Canada, [2001] O.J. No. 369 (S.C.J.) [*Obonsawin*] at para. 33.

¹⁵ *Obonsawin* at paras. 30 and 33.

22. The IQT Defendants have also raised several allegations with respect to actions taken by John Fellows and Brad Richards, defendants in this action, and which were discovered by one or more of the IQT Defendants (allegations at paras. 40, 43, 44, and 59 of the statement of defence and crossclaim). Again, such information is not within the knowledge of the plaintiffs but rather lies with the IQT Defendants.

23. There is sworn affidavit evidence which demonstrates that the plaintiffs require the particulars sought as the allegations in the statement of defence and crossclaim are so vague that they do not sufficiently inform the plaintiffs of the position taken by the IQT defendants. The allegations state simply, for example, that the IQT Defendants “made further and substantial efforts to avert this crisis and to make an agreement Wells Fargo that would continue the operation of IQT, Ltd.” This does not inform the plaintiffs of what further and substantial efforts were made and when they were made. The plaintiffs have no way of knowing whether these efforts were adequate and whether or not they should reply to that allegation in the form of a reply pleading.¹⁶

24. There are several advantages to having pleadings closed before a certification motion. Specifically, it may narrow the issues involving the s. 5(1)(a) criterion of the *Class Proceedings Act, 1992*, S.O. 1992, c. C.6 (“CPA”) at the certification motion and may even encourage it to be decided prior to the certification motion. The close of pleadings before certification may also provide useful information for analyzing the preferable procedure criterion and the plaintiffs’ litigation plan.¹⁷

25. In order to adequately respond to the statement of defence by way of reply and allow the pleadings to be closed prior to certification, the plaintiffs require the particulars sought. Once the plaintiffs have replied and the pleadings are closed, the issues to be dealt with at certification may be considerably narrowed. The close of

¹⁶ Para. 4 of the Eckart Affidavit and
Para. 17 of the Statement of Defence and Crossclaim.

¹⁷ *Pennyfeather v. Timminco Ltd.* (2011), 107 O.R. (3d) 201, 2011 ONSC 4257 at paras. 83-92.

pleadings in this case will prevent surprise at that stage of the proceedings and will facilitate the hearing of this proposed class action.

Issue (ii) – The plaintiffs are entitled to inspect documents that are referred to in the IQT Defendants’ statement of defence and crossclaim.

26. Pleadings are deemed to include documents incorporated in them by reference and which form an integral part of the pleadings.¹⁸

27. Documents that are referred to in a party’s pleadings may be inspected by a party pursuant to Rule 30.04(2). This inspection operates to enable parties to review documents referred to in another’s pleading to assist in preparing a responding pleading and to aid the requesting party in determining if the other’s pleading discloses a reasonable cause of action or defence.¹⁹

28. Compliance with a request under rule 30.04(2) is immediate and mandatory. This is emphasized by the obligation of a party to produce a document referred to in its pleading whether or not the document otherwise would be privileged. The intent of the rule is to provide the opposite party with the same advantage as if the other had reproduced the contents of the document in its pleading.²⁰

29. In the statement of defence and crossclaim, the IQT Defendants specifically refer to the following documents:

- (1) at paragraph 30 they refer to an order made by the Director under the *Employment Standards Act, 2000*;
- (2) at paragraph 41 they refer to IQT, Ltd.’s books and operating statements that the Board of Directors received;
- (3) at paragraph 42 they refer to e-mails requesting documents substantiating travel and entertainment expenses of Mr. Fellows; and

¹⁸ *Montreal Trust Co. of Canada v. Toronto-Dominion Bank* (1992) 40 C.P.C. (3d) 389 (Ont. Gen. Div.) at p. 4.

¹⁹ *Timminco Limited v. Asensio et al.* 95 O.R. (3d) 547 at para. 17 [*Timminco*].

²⁰ *Timminco* at paras. 19-20 and 25.

(4) at paragraph 54 the IQT Defendants refer to a declaration of default of Wells Fargo.

30. To date, the IQT Defendants have not produced for inspection these documents referred to in their statement of defence and crossclaim. Those documents are required for the plaintiffs to assess whether or not the IQT Defendants' pleadings disclose a justifiable defence and crossclaim. They will also be required for the certification motion and will likely be disclosed on cross-examination leading up to that motion in any event.

31. The plaintiffs therefore respectfully submit that documents referred to in the IQT Defendants' pleadings should be disclosed as sought.

Issue (iii) – The plaintiffs are entitled to inspect relevant documents that are within the possession of the IQT Defendants.

32. Although production and disclosure do not ordinarily take place in a civil action until after the pleadings are completed, there is nonetheless discretion under Rule 30.04(5) to order production between the parties at any time. This discretion is usually exercised in exceptional circumstances in order to enable a party to plead.²¹

33. In class actions, however, there may exist extraordinary circumstances due to the specific “class” nature of the proceedings which allow courts to depart from the Rules pursuant to section 12 of the *CPA*.²²

34. Specifically, notwithstanding that pre-discovery production is usually exercised in order to enable a party to plead, the court's discretion to order production at any time could be exercised on other compelling grounds.²³

²¹ *Hedley v. Air Canada*, [1994] O.J. No. 287 at para. 46.

²² *Stern v. Imasco*, 38 C.P.C. (4th) 347, [1999] O.J. No. 4235 (S.C.J.) at para. 28.

²³ *Durling v. Sunrise propane Energy Group*, [2008] O.J. No. 5031 (S.C.J.) at para. 25-29.

35. The facts that underlie the Debt and this proposed class action involve several companies, complex financial arrangements with Wells Fargo, the movement of assets between Canada and the US, and several directors who allege that other directors were responsible for misappropriating and defalcating assets. These facts are complex and a certification motion will require expert evidence from a forensic accountant. The accountant will require all relevant financial documents in order to complete an affidavit supporting the plaintiffs in their motion for certification.²⁴

36. Specifically, the bank account statements in the United States for IQT, Inc. are of particular importance because they will educate class counsel as to whom the assets being divested routinely from IQT, Ltd. accounts were being dispersed to. It may be that additional parties will be added to this lawsuit once this information comes to light. Adding parties at this stage, prior to the close of pleadings, would be much more cost effective and efficient.

37. If materials for certification are prepared by a forensic accountant without access to relevant evidence that is easily accessible to the IQT Defendants, the plaintiffs run the risk of presenting inaccurate arguments and evidence to the court. In the meantime, the banks and other 3rd parties from whom requests may have to be made, may lose the documents sought on this motion which are likely now easily accessible to the IQT Defendants.

38. Having the documents requested now will narrow the issues at certification; allow all parties to better prepare for certification; allow the plaintiffs to reply to the defence and crossclaim filed; inform class counsel whether additional parties need to be added to the action; inform class counsel whether a claim is worth pursuing against Mr. Richards; and/or inform class counsel whether this action is worthwhile pursuing at all, given the bankruptcy of IQT, Ltd. and the non-residential status of several of the defendants.

²⁴ Para. 14 of the Eckart Affidavit.

39. In the alternative, class counsel may wait for pleadings to close, have the IQT Defendants serve their affidavits of documents, and at that time seek disclosure of these relevant documents. The defendants have already served their statement of defence. Once pleadings are closed, the plaintiff will be entitled to their affidavit of documents and the documents therein.

The Nature of the Documents sought to be Produced

40. The plaintiffs seek production of a limited amount of documents which, it is submitted, are easily accessible to the IQT Defendants. For example, the plaintiffs seek only those monthly bank statements for 2 specific bank accounts in the name of IQT, Ltd. for the year 2011. Requests to the bank for these documents, with the authorization of the IQT Defendants, would not require any great effort on the part of the IQT Defendants.

41. The same is true for the bank statements for 2010 and 2011 for IQT, Inc. and the consent by the IQT Defendants to access the CRA records. These requests simply require the defendants to sign the proper authorizations and make the requests to the proper parties.

42. The documents exchanged between Bell Canada, Wells Fargo and the IQT Defendants may require additional requests by the IQT Defendants. Nonetheless, several of these documents are likely still in the possession of IQT Defendants and if not, requests, with authorizations, can be made to Wells Fargo and Bell Canada.

43. In the event that the documents from Wells Fargo and Bell Canada are not produced to the plaintiffs, representatives of these companies will be subpoenaed as witnesses on a pending motion for certification. It is respectfully submitted that it would

be much more cost effective and efficient for the IQT Defendants to produce those records at this time, rather than involving third parties in this action.²⁵

PART IV – RELIEF SOUGHT

44. The plaintiffs seek an order:

- (1) That the IQT Defendants to deliver the plaintiffs' particulars as referred to in paragraph 1 of the Notice of Motion;
- (2) That IQT, Inc. produce for inspection all monthly bank statements and cancelled cheques for all IQT, Inc. bank accounts for 2010 and 2011;
- (3) That all monthly bank statements and cancelled cheques for IQT, Ltd. for 2011, except for March of that year, in two bank accounts with the Bank of Montreal in Oshawa: Treasury Account # 0351 1057-571 and US\$ Business Current Account # 0351 4601-201 be produced for inspection;
- (4) That copies of all written communications between Bell Canada and IQT, Ltd. or any of the IQT Defendants concerning any disputes over amounts owing to IQT, Ltd. under the Master Service Agreements and concerning the termination of these agreements by Bell be produced for inspection;
- (5) That copies of all written communications between Wells Fargo and the defendants relating to the defendants ability to repay the loan, breaches of the Account Purchase Agreement, or the Defendants' insolvency be produced for inspection;
- (6) That the IQT Defendants provide their consent to the CRA granting the plaintiffs access to the hard drives of computers seized by the CRA for the purpose of inspecting the hard drives and duplicating information found on the hard drives;
- (7) That the IQT Defendants produce for inspection the following documents referred to in their statement of defence and crossclaim as follows:
 - a) The order of the Director under the *Employment Standards Act, 2000*, deeming the rest of the members of the proposed plaintiff class to have filed complaints;

²⁵ Para. 22 of the Eckart Affidavit.

- b) IQT, Ltd.'s books and operating statements delivered to the board of directors of IQT, Ltd.;
 - c) E-mails from Alex Mortman requesting John Fellows to document travel and entertainment expenses for the management team; and
 - d) Wells Fargo's declaration of default;
- (8) Costs of this motion on a partial indemnity basis; and
- (9) Such further and other relief and directions as counsel may request and this Honourable Court permit.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 6th DAY OF
NOVEMBER, 2012.

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Schedule “A”

Durling v. Sunrise propane Energy Group, [2008] O.J. No. 5031 (S.C.J.).

Hedley v. Air Canada (1994), 23 C.P.C. (3d) 352, [1994] O.J. No. 287 (Gen. Div.).

Montreal Trust Co. of Canada v. Toronto-Dominion Bank, (1992) 40 C.P.C. (3d) 389 (Ont. Gen. Div.).

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Physicians Services Inc. v. Cass, [1971] O.J. No. 1561, [1971] 2 O.R. 626 (C.A.).

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Timminco Limited v. Asensio et al. 95 O.R. (3d) 547 (S.C.J.).

Schedule “B”

Class Proceedings Act 1992, S.O. 1992, c. 6, Section 12:

Court may determine conduct of proceeding

12. The court, on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate. 1992, c. 6, s. 12.

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rules 25.10 and 30.04(1)-(4):

PARTICULARS

25.10 Where a party demands particulars of an allegation in the pleading of an opposite party, and the opposite party fails to supply them within seven days, the court may order particulars to be delivered within a specified time. R.R.O. 1990, Reg. 194, r. 25.10.

INSPECTION OF DOCUMENTS

Request to Inspect

30.04 (1) A party who serves on another party a request to inspect documents (Form 30C) is entitled to inspect any document that is not privileged and that is referred to in the other party's affidavit of documents as being in that party's possession, control or power. R.R.O. 1990, Reg. 194, r. 30.04 (1).

(2) A request to inspect documents may also be used to obtain the inspection of any document in another party's possession, control or power that is referred to in the originating process, pleadings or an affidavit served by the other party. R.R.O. 1990, Reg. 194, r. 30.04 (2).

(3) A party on whom a request to inspect documents is served shall forthwith inform the party making the request of a date within five days after the service of the request to inspect documents and of a time between 9:30 a.m. and 4:30 p.m. when the documents may be inspected at the office of the lawyer of the party served, or at some other convenient place, and shall at the time and place named make the documents available for inspection. R.R.O. 1990, Reg. 194, r. 30.04 (3); O. Reg. 575/07, s. 1.

Documents to be Taken to Examination and Trial

(4) Unless the parties agree otherwise, all documents listed in a party's affidavit of documents that are not privileged and all documents previously produced for inspection by the party shall, without notice, summons or order, be taken to and produced at,

(a) the examination for discovery of the party or of a person on behalf or in place of or in addition to the party; and

(b) the trial of the action. R.R.O. 1990, Reg. 194, r. 30.04 (4).

Court may Order Production

(5) The court may at any time order production for inspection of documents that are not privileged and that are in the possession, control or power of a party. R.R.O. 1990, Reg. 194, r. 30.04 (5).

BRIGAITIS, et al.
Plaintiffs

v.

IQT, et al.
Defendants

Court File No.: CV-11-43291900CP

Ontario
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

**FACTUM OF THE
PLAINTIFFS/MOVING PARTY
(Motion Returnable November 16, 2012)**

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