Court File No. CV-17-11712-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

BETWEEN:

CALLIDUS CAPITAL CORPORATION

Plaintiff/Defendant by Counterclaim

and

OPES RESOURCES INC., RICHARD GEORGE MOLYNEUX
and DARRYL LEVITT

Defendants/Plaintiffs by Counterclaim

AND BETWEEN:

RICHARD GEORGE MOLYNEUX

Plaintiff by Counterclaim

and

J. CLAIRE EDWARDS, not individually, but as Chapter 7 Trustee of FORTRESS RESOURCES, LLC d/b/a MCCOY ELKHORN COAL COMPANY, CALLIDUS CAPITAL CORPORATION, OPES RESOURCES INC. and DARRYL LEVITT

Defendant to the Counterclaim

FACTUM OF THE DEFENDANT (PLAINTIFF BY COUNTERCLAIM), RICHARD GEORGE MOLYNEUX

October 30, 2018

SOLMON ROTHBART GOODMAN LLP
Barristers
375 University Avenue
Suite 701
Toronto, Ontario
M5G 2J5

Melvyn L. Solmon (LSUC# 16156J)
msolmon@srglegal.com
Tel: 416-947-1093 (Ext. 333)
Fax: 416-947-0079

Lawyers for the defendant/plaintiff by counterclaim
Richard George Molyneux

TO: **DANSON & ZUCKER**
Barristers and Solicitors
375 University Avenue
Suite 701
Toronto, Ontario
M5G 2J5

Symon Zucker
Tel: 416-863-9955
Fax: 855-696-5441

Lawyers for the defendants, Opes Resources Inc. and Darryl Levitt

AND TO: **DICKINSON WRIGHT LLP**
Barristers and Solicitors
199 Bay Street
Suite 2200
Commerce Court
Toronto, Ontario
M5L 1G4

John D. Leslie (LSUC# 29956P)
Tel: 416-646-4603
Fax: 416-865-1398
jleslie@dickinsonwright.com
Michael J. Brzezinski (LSUC# 63573R)
Tel: 416-777-2394
Fax: 416-865-1398
mbrzezinski@dickinsonwright.com

Lawyers for the plaintiff/defendant to the counterclaim,
Callidus Capital Corporation

AND TO: **BINGHAM GREENEBAUM DOLL LLP**
3500 PNC Tower
101 South Fifth Street
Louisville, Kentucky
40202

Christopher B. Madden
cmadden@bgdlegal.com
Tel: 502-587-3770
Fax: 502-540-2270

Lawyers for the defendant to the counterclaim, J. Claire Edwards

Court File No. CV-17-11712-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

CALLIDUS CAPITAL CORPORATION

Plaintiff/Defendant by Counterclaim

and

OPES RESOURCES INC., RICHARD GEORGE MOLYNEUX
and DARRYL LEVITT

Defendants/Plaintiffs by Counterclaim

A N D B E T W E E N:

RICHARD GEORGE MOLYNEUX

Plaintiff by Counterclaim

and

J. CLAIRE EDWARDS, not individually, but as Chapter 7 Trustee of FORTRESS RESOURCES, LLC d/b/a MCCOY ELKHORN COAL COMPANY, CALLIDUS CAPITAL CORPORATION, OPES RESOURCES INC. and DARRYL LEVITT

Defendant to the Counterclaim

FACTUM OF THE DEFENDANT (PLAINTIFF BY COUNTERCLAIM), RICHARD GEORGE MOLYNEUX

PART I - OVERVIEW

1. This Factum is in response to the motion brought by the plaintiff, Callidus Capital Corporation ("Callidus"), as against Richard George Molyneux ("Molyneux"), with respect to certain categories of questions refused on his cross examination of May 24, 2018, continued on October 2, 2018, with respect to an affidavit he swore in opposition to a motion for summary judgment brought by Callidus on March 27, 2018.

2. This action arises out of a guarantee that Mr. Molyneux provided to Callidus to support a loan pursuant to an Overall Loan Agreement received by Fortress Resources LLC, a company in which Mr. Molyneux had an indirect interest.

3. Callidus brings a motion for summary judgment returnable November 13th and 14th to enforce the guarantee of Mr. Molyneux.

4. In the action, Mr. Molyneux takes the position that Callidus is a predatory lender that lends money with the objective to obtain ownership or control of the assets of a borrower. In this case, Callidus loaned money pursuant to an Overall Loan Agreement to Fortress Resources LLC, a corporation that operated a mining enterprise in Kentucky. Fortress Resources LLC borrowed those funds from Callidus based upon misrepresentations made by Callidus as to its business practices and assurances given by Callidus and Mr. Molyneux takes the position that his guarantee was induced and provided as a result of fraudulent misrepresentations.

5. Mr. Molyneux further takes the position that Callidus breached the Overall Loan Agreement by, *inter alia*,:

(a) failing to provide all of the funds Callidus agreed to lend, under a Revolver loan facility and failing to act and provide those funds in a timely manner, knowing the drastic effect this would have on the ability of Fortress to carry on business and avoid either receivership or bankruptcy;

(b) failing to act in a timely manner in good faith and honestly with regard to Callidus' obligations under the Overall Loan Agreement; and,

(c) failing to release the guarantee initially provided (subject to the satisfaction of the conditions precedent) as agreed to by Callidus.

6. There was a material change to Mr. Molyneux's risk under his guarantee based on the Overall Loan Agreement agreed to by the parties on September 4, 2015 and the conduct and representations of Callidus thereafter. As a result of Callidus' wrongful conduct, and lack of evidence as key witnesses are no longer with Callidus and they did not provide evidence on the motion for summary judgment, Mr. Molyneux takes the position that Callidus is not entitled to summary judgment (or to any judgment) as against Mr. Molyneux.

7. After this action was commenced, Callidus together with an affiliated corporation, The Catalyst Capital Group Inc. ("Catalyst"), commenced another action against West Face Capital Inc., among others, including, two of the defendants to this action, Richard Molyneux and Darryl Levitt (the "Wolfpack Action"). In the Wolfpack Action, Catalyst and Callidus allege that Molyneux was part of a conspiracy to short sell publicly traded stock of Callidus.

8. Molyneux stated in his affidavit evidence that Callidus has no evidence whatsoever to support the allegation that he was involved in any such conspiracy and that he was not. This new claim he alleges is an abuse of process by Callidus.

9. Part of the defence on the motion for summary judgment is that there is a triable issue as to whether Callidus abuses the court process to carry out its business plan to place companies into financial distress, so they are forced to eventually agree to any terms required by Callidus, that leads to the businesses and the cash flow being controlled by Callidus so that Callidus can financially strangle the company. Then a court process is used by Callidus to allow Callidus to force a sale of the assets. Callidus then attempts to purchase the assets in that court process using

a credit bid and attempts to obtain the assets cheaply. Callidus then inflates the value of the assets when placed on the balance sheet of its public company to artificially inflate the price of Callidus' stock offered to the public.

10. There has been absolutely no evidence provided by Callidus that evidence that Mr. Molyneux was involved in any conspiracy or, in any event, that he had any involvement in the publically traded stock of Callidus or any alleged short selling. To provide the context for Mr. Molyneux's position on the summary judgment motion, the evidence included the pleadings available in the action at that time – the claim and the defence of West Face.

11. The Wolfpack Action is a separate proceeding from this action and, it is Mr. Molyneux's position that the Wolfpack Action was commenced as against Mr. Molyneux in order to intimidate him and to cause him additional expense, and for that reason as well, is an abuse of process.

12. The Wolfpack Action involves multiple parties and clearly, by its very nature, will be required to be defended by Mr. Molyneux at great expense.[1]

13. As a result of Callidus' practices, it being a publically traded entity, complaints have been made to the Ontario Securities Commission by "whistleblowers".

14. These whistleblowers are protected by statutory legislation and common law that protect their identity and any information they have provided. The policy reasons are sound and invoke established principles of absolute privilege and qualified privilege.

15. Mr. Molyneux is likewise protected.

---

[1] A motion to strike the West Face Action was argued before Justice Wilson-Siegel on October 29, 2018. The decision was reserved.

16. Furthermore, he signed a confidentiality agreement with the Whistleblower and information related to the complaint.

17. On this motion, Callidus seeks to obtain answers to three categories of questions which have been refused by Mr. Molyneux.

18. These categories and questions can be summarized as follows:

(a) Questions were asked about the Wolfpack Action, as it is referred to in Mr. Molyneux's Fresh as Amended Statement of Defence and Counterclaim and attached to Mr. Molyneux's affidavit. They were refused. The fact that a document is attached to an affidavit does not mean all questions related to that document are relevant. One must examine the context. In the context, based on the allegation against Mr. Molyneux, there is no basis for any of these questions. Callidus has not provided one iota of evidence to suggest Mr. Molyneux was involved in any conspiracy that resulted in profitable short-selling or any short-selling whatsoever. There is no relevance to those questions in this Action or on this motion for summary judgment ("MFSJ"). Those questions should only be asked, if proper, on discovery in the Wolfpack Action, after pleadings are closed[2], production is complete and all other alleged co-conspirators are present. No evidence has been filed on the MFSJ by Callidus to provide any evidence to support the pleading of conspiracy ("Wolfpack Questions");

(b) Questions were asked, and refused, with respect to the identity of a Whistleblower and with respect to any confidential information allegedly provided by a

[2] As stated above, the West Face Action Statement of Claim has been challenged.

Whistleblower to Mr. Molyneux. That information remains confidential and those questions were properly refused ("Whistleblower Questions");

(c) Questions were asked, and refused, with respect to the confidentiality agreement entered into with one or more of the Whistleblowers. That information should be protected and not ordered to be provided on the basis of public policy; the confidentiality should be maintained ("Confidentiality Questions").

19. It is the position of Mr. Molyneux that all of these questions were properly refused and should not be ordered to be answered.

PART II - STATEMENT OF ISSUES, LAW & AUTHORITIES

Issue One: None of the Questions are Relevant and the Refusal to Answer Should Stand

20. It is trite law that a proper question is one that may be relevant (not might be) to the issues in the Action. This is an action on a personal guarantee. The issue on the MFSJ is whether the guarantee is enforceable.

21. Callidus choose to commence a separate action, the Wolfpack Action, against a number of parties alleging a non-particularized conspiracy. Having chosen to commence the Wolfpack Action, Callidus must ask any of these questions in that action, with all of the proper production completed and all of the other parties, who are entitled to receive that evidence, present. Callidus cannot indirectly obtain discovery of Mr. Molyneux about the allegations in the Wolfpack Action, through this MFSJ.

22. The Wolfpack Questions are focused on the Wolfpack Action, and have no semblance of relevancy to whether the guarantee is enforceable, the Overall Loan Agreement, how the

transaction between Callidus and Fortress transpired or whether Callidus was engaged in "loan to own" conduct (the "Defence and Counterclaim").

23. The fact that Mr. Molyneux referred to the Wolfpack Action in the MFSJ, goes solely to the issue of whether it is an abuse of process. The merits of the Wolfpack Action are not relevant, especially given that Callidus did not respond in Reply to Mr. Molyneux's affidavit that there was absolutely no facts to support the allegation of conspiracy. As such, questions about that conspiracy and Mr. Molyneux's alleged role, are not relevant on this MFSJ.

24. Likewise, the Whistleblower Questions and the Confidentiality Questions have no semblance of relevancy to this action.

25. The identity of the Whistleblower and any information that that person provided, cannot assist this Court in determining whether the guarantee should be enforced and the Defence and Counterclaim. The existence and terms of a Confidentiality Agreement should be adhered to and, again, cannot be relevant to the guarantee and the Defence and Counterclaim.

26. Callidus has provided no evidence that the Wolfpack Questions, the Whistleblower Questions or the Confidentiality Questions are required for it to enforce the guarantee, address the Defence and Counterclaim or to proceed with the MFSJ.

Issue Two: The Whistleblower Questions and the Confidentiality Questions Were Properly Refused

27. In July, 2016, the Ontario Securities Commission ("OSC") implemented a Whistleblower Program. The express purpose of that program is:

> "The whistleblower program is designed to encourage individuals to report and submit to the OSC information on serious securities-related misconduct (excluding tips related to criminal and quasi-criminal matters)."[3]

28. The OSC also makes all reasonable efforts to keep the identity of a whistleblower confidential. The program also specifically prohibits any reprisals against a whistleblower.[4]

29. The public policy reasons for maintaining the confidentiality of a whistleblower and their information is sound. A person is going to be much less willing to come forward to report, if they are not protected from fear of disclosure, reprisals and repercussions.[5]

30. In *Fraleigh v. RBC Dominion Securities Inc. et al.*, the Honourable Justice Newbould held that there are circumstances in which a complaint made to a quasi-judicial body such as the OSC, was held to be protected by absolute privilege.[6] Quoting from the Honourable Justice Levine in *Hung v. Gardiner* at paragraphs 31 and 37:

> "There are important public policy reasons for this finding. Absolute privilege allows a member of the public to raise a concern about the conduct of a [page300] professional person, without fear of reprisal. In this way, the immunity afforded by absolute privilege protects both professionals and the public."[7]

31. In *Caron v. A (Litigation guardian of)*, the British Columbia Court of Appeal stated the rational to absolute privilege as follows:

> "Absolute privilege, on the other hand, provides a complete defence in cases of alleged defamatory publications, even if the defendant published the statement with actual malice. Traditionally, absolute privilege was granted to any "communications which take place during, incidental to, and the processing and furtherance of, judicial or quasi-judicial proceedings": *Elliott v. Insurance Crime Prevention Bureau*, 2005 NSCA 115 (N.S. C.A.) at para. 112, citing Raymond E. Brown, *The Law of Defamation in Canada*, (Toronto: Carswell, 1999) at para. 12.4(1)."[8]

32. In *Sussman v. Eales*, the Court of Appeal stated that:

---

[3] Practical Law Canada Corporate & Securities: OSC Implements a Whistleblower Program
[4] *Supra.*
[5] *Supra.*
[6] *Fraleigh v. RBC Dominion Securities Inc. et al.* 99 O.R. (3d) 290, para.31 to 34
[7] *Supra, Fraleigh*, para.34
[8] *Caron v. A. (Litigation guardian of)*, 2015 BCCA 47, para. 16

> "In our view, the doctrine of immunity by reason of absolute privilege with respect to statements made in the course of proceedings before a statutory body, exercising disciplinary powers over a member with respect to unprofessional conduct, applies to statements made in a letter of complaint addressed to the Registrar of the Royal College of Dental Surgeons. It is a document incidental to the initiation of quasi-judicial proceedings, and it matters not that the Complaints Committee has investigatory powers which may or may not lead to a direction that the matter be referred to the Discipline Committee. A complainant in the respondent Eales' position should not be deferred by the fear of proceedings and "the vexation of defending actions". (Lincoln v. Daniels, [1961] 3 All E.R. 740 at 748.)"[9]

33. As stated in *Duncan v. Lessing*, the British Columbia Court of Appeal noted that:

> "It is not the nature of the conduct which gives rise to the immunity, but the occasion on which the conduct is performed."[10]

34. It is the occasion of reporting to the OSC that affords the application of the absolute privilege; it matters not the nature of the conduct. There is further no question that complaints to a regulatory authority are subject to absolute privilege.[11]

35. Information provided under absolute privilege is not actionable, and as such, also should not be subject to disclosure.

36. Quoting from *Caron* again, qualified privilege is described as follows:

> "Qualified privilege applies when there is a "duty, legal, social or moral, to publish the matter complained of to persons with a corresponding duty or interest to receive it": *Pressler v. Lethbridge* (200), 86 B.C.L.R. (3d) 257 (B.C. C.A.), at 296. The legal effect of the defence of qualified privilege is to rebut the inference, which normally arises from the publication of defamatory words, that they are spoken with malice. ...However, the privilege is not absolute and can be defeated if the dominant motive for publishing the statement is actual or express malice": *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 (S.C.C.) at para. 144. In short, where there is a public or shared interest in support of the statement both being made and received, a defendant cannot be held to have defamed a plaintiff unless the plaintiff can show that the defendant made the alleged publication for a malicious purpose."[12]

37. Qualified privilege has been held to apply to any report to the Toronto Police.[13]

38. Good faith in the whistleblowing program is assumed[14]; absent evidence of malice, qualified privilege applies. Malice is irrelevant if absolute privilege applies.[15]

---

[9] *Sussman v. Eales (Ont. C.A.)*, [1986] O.J. No. 317
[10] *Duncan v. Lessing*, [2018] B.C.J. No. 17, para. 53
[11] Libel, Third Addition, Peter A. Downard, Chapter 7, Absolute Privilege, 7.03(6), ¶ 7.30
[12] *Caron*, supra, para. 15
[13] *Cadillac Fairview Corp. v. Standard Parking of Canada*, 2004 CarswellOnt 63, para. 13 to 19

39. Further, even with qualified privilege, a finding of malice would be required for the privilege to be lost.

40. As a result, based upon the policy and purpose of the Whistleblower program, along with absolute and qualified privilege, the Whistleblower Questions and the Confidentiality Questions are not proper and do not need to be answered.

41. Further, and in any event, even if the identity of the Whistleblower was relevant, which is denied, the Court has an overriding discretion to refuse disclosure of a witness' name, taking into account the consequences that may follow from the disclosure.[16]

42. In any event, even was this case law not to apply, which it does, the four Wigmore criteria used to establish whether privilege can be extended to any communication. This would apply to the Whistleblower Questions and the Confidentiality Questions. The determination is to be made on a case-by-case basis.

43. The four criteria have been stated as follows by the Supreme Court of Canada in *M.(A.) v. Ryan*, as quoted by Master Dash in *Cadillac Fairview Corp. v. Standard Parking Canada Ltd.* :

> "First, the communication must originate in a confidence. Second, the confidence must be essential to the relationship in which the communication arises. Third, the relationship must be one which should be "sedulously fostered" in the public good. Finally, if all these requirements are met, the court must consider whether the interests served by protecting the communications from disclosure outweigh the interest in getting at the truth and disposing correctly of the litigation." [17]

---

[14] *Caron*, supra, para. 41
[15] *Caron*, supra, para. 15 and 16
[16] Rule 31.06(2) of the *Rules of Civil Procedure*; *Dudulski v. Kingston General Hospital* (1987) 59 O.R. (2d) 520
[17] *Supra, Cadillac Fairview Corp.*, para. 21

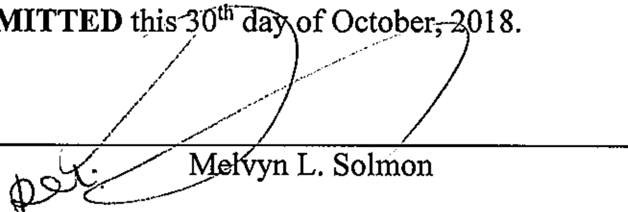
44. Mr. Molyneux has, it is submitted, adduced sufficient evidence to support that the privilege should apply to the Whistleblower Questions and the Confidentiality Questions.[18]

45. Courts have routinely upheld confidentiality agreements. Often in employment cases, former employees, subject to confidentiality agreements are sought to be examined. In those circumstances, a court order is used to protect all interests. Notice of the person who benefits from the confidentiality agreement can also be necessary.[19]

PART III - ORDER REQUESTED

46. The Defendant, Mr. Molyneux, respectfully requests that this motion be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 30th day of October, 2018.



Melvyn L. Solmon

SOLMON ROTHBART GOODMAN LLP
Barristers
375 University Avenue
Suite 701
Toronto, Ontario
M5G 2J5

Melvyn L. Solmon (LSUC# 16156J)
msolmon@srglegal.com
Tel: 416-947-1093 (Ext. 333)
Fax: 416-947-0079

Lawyers for the defendant/plaintiff by counterclaim
Richard George Molyneux

[18] *Talsiman Energy Inc. v. Flo-Dynamics Systems Inc.*, 21015 ABQB 561, para. 31 and 31.
[19] "Prospective witness, confidentiality agreements of the advocate", Evan Thomas, The Advocates Quarterly, Fall 2018.

SCHEDULE "A"

LIST OF AUTHORITIES

1. Practical Law Canada Corporate & Securities: OSC Implements a Whistleblower Program

2. *Fraleigh v. RBC Dominion Securities Inc. et al.* 99 O.R. (3d) 290

3. *Caron v. A. (Litigation guardian of)*, 2015 BCCA 47

4. *Sussman v. Eales (Ont. C.A.)*, [1986] O.J. No. 317

5. *Duncan v. Lessing*, [2018] B.C.J. No. 17

6. Libel, Third Edition, Peter A. Downard, Chapter 7, Absolute Privilege, 7.03(6)

7. *Cadillac Fairview Corp. v. Standard Parking of Canada,* 2004 CarswellOnt 63

8. *Dudulski v. Kingston General Hospital* (1987) 59 O.R. (2d) 520

9. *Talsiman Energy Inc. v. Flo-Dynamics Systems Inc.*, 2015 ABQB 561

10. "Prospective witness, confidentiality agreements of the advocate", Evan Thomas, The Advocates Quarterly, Fall 2018

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

31.06

Identity of Persons Having Knowledge

(2) A party may on an examination for discovery obtain disclosure of the names and addresses of persons who might reasonably be expected to have knowledge of transactions or occurrences in issue in the action, unless the court orders otherwise. R.R.O. 1990, Reg. 194, r. 31.06 (2).

CALLIDUS CAPITAL CORPORATION Plaintiff	-and-	DARRYL LEVITT et al. Defendants
RICHARD GEORGE MOLYNEUX Plaintiff by Counterclaim	-and-	CALLIDUS CAPITAL CORPORATION et al. Defendants to the Counterclaim

Court File No. CV-17-11712-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT
TORONTO

FACTUM OF THE DEFENDANT (PLAINTIFF BY COUNTERCLAIM)

SOLMON ROTHBART GOODMAN LLP
Barristers
375 University Avenue
Suite 701
Toronto, Ontario
M5G 2J5

Melvyn L. Solmon (LSUC# 16156J)
msolmon@srglegal.com
Tel: 416-947-1093 (Ext. 333)
Fax: 416-947-0079

Lawyers for the defendant/plaintiff by counterclaim
Richard George Molyneux

File Number: 17683

RCP-E 4C (May 1, 2016)