IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Sherwood Real Estate Corporation v. Kingsnorth,* 2025 BCSC 961

Date: 20250527
Docket: S230349
Registry: Vancouver

Between:

Sherwood Real Estate Corporation

Plaintiff

And

Steven James Kingsnorth and Civil-X Contractors Inc.

Defendants

Before: The Honourable Justice Underhill

Reasons for Judgment

Counsel for the Plaintiff:	G. Douvelos
Counsel for the Defendants:	J.W. Robinson
Place and Date of Hearing:	Vancouver, B.C. April 24, 2025
Place and Date of Judgment:	Vancouver, B.C. May 27, 2025

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Introduction

[1] This is an application brought by the defendants to have the plaintiff's action dismissed pursuant to Rule 9-6 of the *Supreme Court Civil Rules*, or alternatively, struck out in its entirety without leave to amend, pursuant to Rule 9-5. The claim arises out of a failed joint venture for the extraction and sale of gravel aggregate from a quarry located on Okanagan Indian Band ("OKIB") Reserve No. 1, and is grounded in the tort of negligent misrepresentation as well as breach of contract.

[2] This is the third application to dismiss or strike brought before this Court by the defendants. Both of the previous applications resulted in the plaintiff being granted leave to amend its claim, and the defendants being granted leave to bring a further application to strike.

[3] For the reasons that follow, I have determined that the claim should be dismissed pursuant to Rule 9-6.

Background

[4] Given the limited record before me on this application, the following background is largely taken from the pleadings, and I do not understand it to be in controversy.

[5] The plaintiff, Sherwood Real Estate Corporation, is a company incorporated under the laws of British Columbia and its principal is Osvaldo Iadarola. The defendant Civil-X Contractors Inc. (Civil-X) is also a BC company, and the defendant Steven James Kingsnorth is its principal. Mr. Kingsnorth is Mr. Iadarola's nephew.

[6] On January 29, 2021, the plaintiff entered into a written Shareholders Operating Agreement ("SHO") with the defendants for the purpose of purchasing shares in a joint venture between OKIB Operations CP Ltd. (the OKIB's economic development entity) and Civil-X Aggregate Productions Ltd. ("CAP"; a company incorporated by Mr. Kingsnorth for the purpose of pursuing the joint venture). The primary purpose of the joint venture was the extraction and sale of gravel from the quarry on OKIB Reserve No. 1. The plaintiff and Civil-X each acquired 100 Class A

voting shares in CAP, and Mr. Iadarola and Mr. Kingsnorth were both appointed directors of CAP.

[7] The Second Amended Notice of Civil Claim includes a claim in negligent misrepresentation that has now been narrowed to allege what I understand to be one misrepresentation (although referenced twice in the pleadings) contained in a January 25, 2020 email from Mr. Kingsnorth to Mr. Iadarola. The plaintiff says it relied upon the following portions of the email to enter into the SHO:

> The beautiful thing is that by using the same calculations there is $9-14M of already produced product on the ground ready for sales…
>
> Using the JV split 50/50 is $4,050,000 on the ground with no production costs…

[8] From the materials before me, it is clear that the parties frequently used “JV” to refer to the joint venture between CAP and OKIB Operations CP Ltd.

[9] The original claim for breach of contract is somewhat difficult to understand, particularly with the new amendments referenced below, but it appears to be grounded in an allegation that the provision of funds by the plaintiff, including its initial investment in CAP, constituted a breach of the following provisions of the SHO, in which “the Corporation” refers to CAP and “the Shareholders” refers to Mr. Iadarola and Mr. Kingsnorth:

> 3.01 The financial contribution of the Shareholders to the Corporation shall be kept at as low a level of possible.
>
> 3.02 Funds required from time to time by the Corporation shall be obtained, to the greatest extent possible, by borrowing from an institutional lender.

[10] In addition, two new breach of contract claims were added to the Second Amended Statement of Claim:

> 19D. In the alternative, it was an implied term of the SHO Agreement between the Plaintiff and the Defendants that the Defendants would exercise reasonable care, skill and diligence in their dealings with the Plaintiff. The negligent representations constitute a breach of contract between the Plaintiff and the Defendants.
>
> […]

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> 21. It was an implied term of the SHO Agreement that the Defendants were to act in good faith in relation to the financial contribution and by having the Plaintiff make a further contribution of approximately $375,000 instead of CAP borrowing from an institutional lender, which the Plaintiff expected pursuant to the SHO Agreement. The Defendants did not act in an honest, candid, forthright or reasonable manner in relation to those aspects of the contractual performance.

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Procedural History

[11] This claim was originally filed on January 13, 2023, and a response to civil claim was filed on July 27, 2023. A five-day trial was set down to commence on November 4, 2024.

[12] As noted earlier, this is the third application brought by the defendants. The first was an application to strike under Rule 9-5(1), which was heard by Associate Justice Robinson on March 13, 2024. In an oral judgment rendered March 26, 2024, Robinson A.J. found significant deficiencies in both the negligent misrepresentation and breach of contract claims. In the result, Robinson A.J. granted leave to the plaintiff to amend its claim and the defendants were granted leave to renew an application to strike:

> [36] The fairest result is to grant leave to the Plaintiff to amend its Notice of Civil Claim and to grant the Defendants leave to reapply, at their discretion, if the Notice of Civil Claim is not amended or, if following an amendment, the Defendants are of the view that it remains deficient.
>
> [37] In reaching that determination, I am compelled to state that, in my view, without amendment, for the reasons outlined, paras. 9, 13, 14, 15, 16 and 20 of part 1 of the Notice of Civil Claim are not compliant with the [Supreme Court Civil] Rules as they pertain to pleadings. Without amendment, they are subject to being struck. If the Plaintiff wishes to avail itself of the right to file an Amended Notice of Civil Claim, it must do so by April 15, 2024, subject to an agreement with the Defendants on a later date.

[13] An amended civil claim was filed on April 15, 2024, and an amended response to civil claim was filed on July 11, 2024. The second application to strike was heard on November 4, 2024, the first day of trial. Justice Chan adjourned the trial at the conclusion of the oral hearing, and subsequently delivered oral reasons for judgment on the defendants' application on November 8, 2024. Justice Chan identified continuing deficiencies in the pleading of negligent misrepresentation, but

found the "bare essentials" of a breach of contract claim had been plead. Under the heading "Remedy", Justice Chan said this:

> [21] The defendants urge this Court to strike out the claims of negligent misrepresentation and breach of contract. This is the second time the defendants have brought an application to strike. The plaintiff had the comments of Associate Judge Robinson in March 2024 as to the defects in the pleadings, and still has not filed proper pleadings.
>
> [22] The Court has found the breach of contract has been properly pleaded, so that claim will not be struck. As for the tort of negligent misrepresentation, the Court is reluctant to strike this claim as there appears to be material facts which may support a duty of care. It appears the plaintiff claims the defendants are the industry experts in extraction and sale of gravel, and that the plaintiff was the investor without the industry knowledge. The details of this relationship ought to be pleaded, as it may set out a duty of care.
>
> [23] The plaintiff did make some amendments to the paragraphs that Robinson AJ had set out as problematic. However, the amendments did not cure the pleadings of all its shortcomings. The case law recognizes that striking a claim is a draconian remedy, as it leaves the plaintiff unable to have its claim adjudicated on the merits. In my view, considering the amount of the alleged loss, and that the plaintiff did try to amend the pleadings in accordance with the Court's earlier directions, it is in the interests of justice to provide the plaintiff a second opportunity to amend the pleadings to see if it can properly plead negligent misrepresentation.

[14] The Second Amended Notice of Civil Claim, which was before me on the hearing of this application, was filed December 9, 2024. The Response to the Second Amended Notice of Civil Claim was filed December 20, 2024.

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Analysis

The Test under Rule 9-6

[15] While the defendants provided comprehensive oral and written submissions on both Rule 9-5 and Rule 9-6, the primary order sought in the Notice of Application was a dismissal of the claim under Rule 9-6, also known as the summary judgment rule. In *Canada (Attorney General) v. Lameman*, 2008 SCC 14, the Supreme Court of Canada described the importance of summary judgment rules in these terms:

> [10] This appeal is from an application for summary judgment. The summary judgment rule serves an important purpose in the civil litigation system. It prevents claims or defences that have no chance of success from proceeding to trial. Trying unmeritorious claims imposes a heavy price in terms of time

> and cost on the parties to the litigation and on the justice system. It is essential to the proper operation of the justice system and beneficial to the parties that claims that have no chance of success be weeded out at an early stage. Conversely, it is essential to justice that claims disclosing real issues that may be successful proceed to trial.

[16] Rule 9-6 provides in part:

> **Application by answering party**
>
> (4) In an action, an answering party may, after serving a responding pleading on a claiming party, apply under this rule for judgment dismissing all or part of a claim in the claiming party's originating pleading.
>
> **Power of court**
>
> (5) On hearing an application under subrule (2) or (4) the court,
>
> (a) if satisfied that there is no genuine issue for trial with respect to a claim or defence, must pronounce judgment or dismiss the claim accordingly...

[17] As the Rule provides, the central focus in the analysis is ascertaining whether there is a "genuine issue" that should go forward to trial, considering the pleadings and the evidence before the court. Where, as here, a defendant is applying for summary judgment, they must demonstrate that the plaintiff's case is unsound or adduce evidence that provides a complete answer to the case. Importantly, though, a summary judgment is not a summary trial, such that there should be no weighing of the evidence. These principles were discussed in *Sakwi Creek Hydro Limited Partnership v. Dicken*, 2023 BCCA 188:

> [25] As noted in *Lameman* at para. 19. "[a] motion for summary judgment must be judged on the basis of the pleadings and materials actually before the judge, not on suppositions about what might be pleaded or proved in the future". A defendant applying for summary judgment may succeed either by demonstrating that the plaintiff's case is unsound or by adducing evidence that provides a complete answer to the plaintiff's case: *Beach Estate v. Beach*, 2019 BCCA 277 at para. 48 [*Beach*]. While an application under Rule 9-6 invokes the court's consideration of evidence, it is not a summary trial. The judge is not permitted to weigh evidence on a Rule 9-6 application beyond determining whether it is "incontrovertible". If the court is satisfied that it is manifestly clear (or beyond doubt) that the plaintiff is bound to lose, the defendant must succeed on the Rule 9-6 application: *Lameman* at paras. 10–11; *Beach* at paras. 48–49. Conversely, if the plaintiff submits evidence

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> contradicting the defendant's evidence in some material respect, the application must be dismissed: *Beach* at para. 48.

[18] Thus, I will consider below whether the plaintiff is advancing unsound claims in negligent misrepresentation and breach of contract, or whether the evidence adduced by the defendants provides a complete answer to those claims.

The Claim in Negligent Misrepresentation

[19] The constituent elements of the tort of negligent misrepresentation were set out by Justice Iacobucci in *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 at 110:

> (1) there must be a duty of care based on a "special relationship" between the representor and the representee;
>
> (2) the representation in question must be untrue, inaccurate or misleading;
>
> (3) the representor must have acted negligently in making said misrepresentation;
>
> (4) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and
>
> (5) the reliance must have been detrimental to the representee in the sense that damages resulted.

[20] The Supreme Court of Canada revisited the first requirement in *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63 [*Livent*] in order to bring the analysis in line with its decision in *Cooper v. Hobart*, 2001 SCC 79. The Court subsequently summarized this analytical shift in *1688782 Ontario Inc. v. Maple Leaf Foods Inc.*, 2020 SCC 35:

> [29] In *Livent*, this Court restated the analytical framework governing cases of negligent misrepresentation or performance of a service. In doing so, it brought the analytical approach in such cases into accord with the refined *Anns/Cooper* framework laid out in *Cooper*. Previously, the duty analysis had been stated in *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, which grounded a *prima facie* duty of care on mere foreseeability of injury. *Cooper*, however, "signalled a shift from th[at] test" (*Livent*, at para. 22; see also para. 23).
>
> [30] Under the *Anns/Cooper* framework, a *prima facie* duty of care is established by the conjunction of proximity of relationship and foreseeability of injury. As this Court affirmed, "foreseeability alone" is insufficient to ground the existence of a duty of care. Rather, a duty arises only where a relationship of "proximity" obtains (*Cooper*, at paras. 22 and 30-32; see

> also *Livent*, at para. 23). Whether a proximate relationship exists between two parties at large, or inheres only for particular purposes or in relation to particular actions, will depend on the nature of the relationships at issue (*Livent*, at para. 27). It may also depend on the nature of the particular kind of pure economic loss alleged.
>
> [31] A party may seek "to base a finding of proximity upon a previously established or analogous category" (*Livent*, at para. 28). But where no established proximate relationship can be identified, courts must undertake a full proximity analysis in order to determine whether the *close and direct* relationship ☐ which this Court has repeatedly affirmed to be the hallmark of the common law duty of care ☐ exists in the circumstances of the case (*ibid.*, at para. 29; *Saadati*, at para. 24; *Cooper*, at para. 32).
>
> [32] n cases of negligent misrepresentation or performance of a service, two factors are *determinative* of whether proximity is established: the defendant's undertaking, and the plaintiff's reliance (*Livent*, at para. 30). Specifically, "[w]here the defendant undertakes to provide a representation or service in circumstances that invite the plaintiff's reasonable reliance, the defendant becomes obligated to take reasonable care", and "the plaintiff has a right to rely on the defendant's undertaking to do so" (*ibid.*). "These corollary rights and obligations", the Court added, "create a relationship of proximity" (*ibid.*). In other words, the proximate relationship is formed when the defendant undertakes responsibility which invites reasonable and detrimental reliance by the plaintiff upon the defendant for that purpose (P. Benson, "Should *White v Jones* Represent Canadian Law: A Return to First Principles", in J. W. Neyers, E. Chamberlain and S. G. A. Pitel, eds., *Emerging Issues in Tort Law* (2007), 141, at p. 166).
>
> [33] Taking *Cooper* and *Livent* together, then, this Court has emphasized the requirement of proximity within the duty analysis, and has tied that requirement in cases of negligent misrepresentation or performance of a service to the defendant's undertaking of responsibility and its inducement of reasonable and detrimental reliance in the plaintiff. Framing the analysis in this manner also illuminates the legal interest being protected and, therefore, the right sought to be vindicated by such claims. When a defendant undertakes to represent a state of affairs or to otherwise do something, it assumes the task of doing so reasonably, thereby manifesting an intention to induce the plaintiff's reliance upon the defendant's exercise of reasonable care in carrying out the task. And where the inducement has that intended effect ☐ that is, where the plaintiff reasonably relies, it alters its position, possibly foregoing alternative and more beneficial courses of action that were available at the time of the inducement. That is, the plaintiff may show that the defendant's inducement caused the plaintiff to relinquish its pre-reliance position and suffer economic detriment as a consequence.
>
> [Emphasis in original.]

[21] Accordingly, I will first consider whether there is a "genuine issue" as to the parties being in a proximate relationship, recognizing that I am looking for the "close and direct" relationship that is the "hallmark" of a duty of care, having regard to the

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"determinative" factors of the defendants' undertaking and the plaintiff's reliance: *Livent* at paras. 23, 29-30.

[22] In her oral reasons on the previous application, Justice Chan observed that it was not clear on the pleadings what the relationship of proximity was between the parties that would give rise to a duty of care. She suggested at para. 22 that the plaintiff was potentially alleging that the defendants were industry experts in the extraction and sale of gravel and the plaintiff was an unknowledgeable investor.

[23] The amendments contained in paras. 7 and 19A of the Second Amended Notice of Civil Claim appear to raise two potential relationships. First is that Mr. Kingsnorth has over 18 years' experience in the civil construction and gravel industry in the Okanagan Area of British Columbia. Second is that Mr. Kingsnorth is Mr. Iadarola's nephew.

[24] The pleading of Mr. Kingsnorth's experience in the gravel industry seems to be leading in the direction of the "industry expert-unknowledgeable investor" theory of proximity raised by Justice Chan. As a starting point, however, Mr. Kingsnorth's evidence undermines the foundation for such a theory:

> 3. It is true that I have worked in civil construction for over 18 years, though not all of this experience was in the Okanagan region. I had never worked in the gravel industry until Civil-X Aggregates Productions Ltd. ("CAP") began operating a gravel pit located on the OKIB Indian Reserve No. 1 (the "Gravel Pit", as defined in the Second Amended Notice of Civil Claim) in the spring of 2021.
>
> 4. So there is no misunderstanding about my evidence on this point, I wish to be clear that:
>
>> (a) Until CAP began operating the Gravel Pit, I had never had a job working in a gravel pit.
>>
>> (b) My work in civil construction involved using aggregates, typically for use in providing structural bases or foundations for civil works, such as roads and pipelines.
>>
>> (c) I had been a superintendent in a large civil construction company, Copcan Civil, and in that role, I had overseen the sourcing of aggregate supplies for large civil construction projects. For many projects, these aggregate supplies were from established aggregate resources. In other projects, particularly projects in remote areas, Copcan Civil would identify onsite aggregate resources and hire a

> contract aggregate producer to produce aggregates from that resource.
>
> (d) In 2018, I began running my own trucking company that hauled aggregates, and my company sourced the aggregates it supplied from aggregates resources operated by others.

[25] Mr. Iadarola was silent on the issue of Mr. Kingsnorth's industry experience in his affidavit of January 20, 2025. The only potential challenge to Mr. Kingsnorth's evidence is a passing hearsay statement in Affidavit #1 of Timothy Omilon, the former gravel pit manger for CAP, who stated that Mr. Kingsnorth advised him during his job interview that Mr. Kingsnorth "had gravel operations experience".

[26] In my view, this evidence does not raise a "genuine issue" that Mr. Kingsnorth owed a duty of care to Mr. Iadarola. Even if I take Mr. Omilon's evidence at its highest, it at best establishes that Mr. Kingsnorth has some operational experience in the gravel industry. There is no evidence or pleading that Mr. Kingsnorth has particular skill or knowledge in the valuation of gravel or other aggregate resources. More importantly, Mr. Kingsnorth being experienced in gravel operations does not amount to the kind of undertaking of responsibility towards Mr. Iadarola that characterizes a proximate relationship and thereby a duty of care. On a potential industry expert-unknowledgeable investor theory of a duty of care, the parties would have a proximate relationship because the industry expert undertakes a responsibility to provide expertise (in this case in gravel valuation) upon which the unknowledgeable investor can reasonably rely. The same cannot be said about a relationship between a businessperson with operational experience and an investor without that same experience.

[27] In oral submissions, the plaintiff put greater emphasis on the fact that Mr. Kingsnorth is Mr. Iadarola's nephew, arguing that the potential for this to be a novel category of proximal relationship is a genuine issue to be tried. I do not agree. While "nephew-uncle" may well be an important familial relationship, it suffers from the complete absence of an undertaking of responsibility that characterizes those relationships which the courts have found give rise to a duty of care, such as lawyer-client or trustee-beneficiary.

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[28] I accordingly conclude that there is no “genuine issue” of the existence of a duty of care in this case, such that the claim in negligent misrepresentation must be dismissed.

[29] While not strictly necessary to consider, I also find there is at least one other fatal flaw in the plaintiff’s negligent misrepresentation claim. In *PD Management Ltd. v. Chemposite Inc.*, 2006 BCCA 489 at para. 14, Justice Kirkpatrick held that “[i]t is settled law that an alleged misrepresentation must pertain to a matter of fact” and not to a future occurrence or conduct.

[30] I note, however, that courts have observed that distinguishing between representations about future events and present facts can be “elusive” (see *Smith v. Union of Icelandic Fish Producers Ltd.,* 2005 NSCA 145 at para. 76, per Cromwell J.A., as he then was). At first glance, that is arguably the case here with the representation regarding “$9—14M of already produced product on the ground ready for sales”. On its face, it certainly could be construed as a representation of existing fact. However, when placed in the context of the rest of Mr. Kingsnorth’s email, a different picture emerges:

> […]
>
> I’m putting a price list together, there is 1 product that we call **fill sand** which is kind of garbage sand materials that are direty [*sic*] and do not meet any specifications that sells for about $3.50 per tonne, this pit does not produce much of this materials [*sic*] as the pit is what we call really “clean” to the point that it tests out almost as a washed product.
>
> The highest priced product is going to be - $25-28 with a couple products reaching $35-45 per tonne (I’m trying to find out what the “prefered [*sic*] pricing” is on these items from our competitors which I think is $24 per tonne and $42 per tonne respectively – so whole sale would be down about $5 per tonne)
>
> The remaining products range from $8-22 so use a low number of $8 per tonne (I felt using a true average will give us false projections as we do have that one low priced product and one high price product -I’d rather have higher actual results then lower) for calculations.
>
> Using these numbers of 14,560,186 tonnes x $8 =$116,481,488 – 10% Government royalty of $11,648,149=$104,833,339.

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> (If we used the actual average of $15 per tonne and still using the low conversion rate m3 to tonnes we would see 14,560,186 tonnes x $15= $218,402,790 – 10% government royalty of $21,840,279= $196,562,511)
>
> If we use the JV 50/50 split with the OKIB that would be $52,416,670 each to CAP and OKIB – less expenses projected at 20% including equipment costs – when I was at Copcan we used this quick production break down for our "plugged numbers" when applying for our bonding = Gov royalty 10%, Gravel source supplier 20%, Production 20%, financial gain 50% (we usually used the gravels for further profits) **again this is erroring to the lower end** of profitability (as we saw on several occasions a 70% gain).
>
> The beautiful thing is that by using the same calculations there is $9-14M of already produced product on the ground ready for sales, which when using the lower is $9,000,000 – Government royalty of 10% = $8,100,00.
>
> Using the JV split 50/50 is $4,050,000 on the ground with no production costs!!!
>
> [Bolded emphasis in the original.]

[31] In my view, when the representation is placed within this context, it becomes clear that the "$9—14 million" value estimate is based on a forecast of future events, including both on the revenue side (Mr. Kingsnorth's "feeling" that $8/ton was the right number to use) and on the expense side (said to be "projected at 20%..."). This is reinforced by Mr. Iadarola's response later that day, where he says, among other things, the following:

> Evaluations vary widely from one method to another, especially for a new company with little assets, cashflow, w/c or revenues, but has JV agreement that provides future instrinsic [*sic*] value.
>
> I really don't question your tonnage valuation; this is good instrinsic [*sic*] value over time. However, CAP's operating expenses, administrations costs may be under estimated. Furthermore, corporate taxes will be a minimum 37% (higher once the Fed's look for more money to pay Canada [sic] growing deficit).
>
> […]
>
> I value <u>CAP at $2.5M</u> with a minimum of $500K working capital.
>
> [Underlined emphasis in the original.]

[32] Put another way, the representations are best understood as a forecast of future profitability of the venture, expressed in terms of present value. I therefore conclude that the impugned representations in the Second Amended Notice of Civil Claim are not "actionable representations" that can ground a negligent

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misrepresentation claim (*PD Management* at para. 13), as they are in substance a future forecast based on a number of variables which were not ascertainable by the defendants as of January 25, 2020. This is another basis on which the claim in negligent misrepresentation must be dismissed under Rule 9-6.

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The Breach of Contract Claims

[33] The original breach of contract claim, for which Justice Chan found the “bare essentials” had been plead, is grounded in an alleged breach of these two terms of the SHO:

> 3.01 The financial contribution of the Shareholders to the Corporation shall be kept at as low a level of possible.
>
> 3.02 Funds required from time to time by the Corporation shall be obtained, to the greatest extent possible, by borrowing from an institutional lender.

[34] As I noted earlier, the amendments to the claim are somewhat difficult to understand in that it appears the plaintiff is now saying that all of his investments, including the initial $1.25 million to purchase shares in CAP, together with additional contributions of $250,000 and $375,000, constituted breaches of these provisions by the defendants.

[35] First, on their face, these provisions appear to be, as the defendants submitted, preconditions for the company to make requests for loans from shareholders. I have difficulty understanding how the defendants could be capable of breaching these terms, and the plaintiff did not adduce any evidence before me to suggest how they may have done so.

[36] Indeed, to the contrary, the defendants led uncontradicted evidence to this effect:

a) CAP required advances from its shareholders in order to continue operations;

b) Mr. Iadarola was well aware that CAP was never in a position to borrow money from an institutional lender; and

c) Mr. Iadarola consensually advanced additional funds to CAP and no request was ever made under the SHO Agreement (which in any event required unanimous board approval);

[37] Mr. Iadarola did not challenge any of this evidence in his responding affidavit. In the face of this, I cannot find that there is a genuine issue on the original breach of contract claim requiring the time and expense of a trial.

[38] This brings me to the new breach of contract claims added to the Second Amended Notice of Civil Claim, which are intertwined with the existing claim in a somewhat confusing fashion.

[39] The first claim is found in para. 19D (where the financial contributions referenced above are also pleaded), and alleges that the negligent misrepresentations constitute a breach of an implied term of the SHO that the defendants would exercise reasonable care, skill and diligence in their dealings with the plaintiff.

[40] I agree with the defendants that this pleading is fundamentally inconsistent with the pleading of negligent misrepresentation, and in particular the pleading in para. 13 of the Second Amended Notice of Civil Claim that the misrepresentations induced the plaintiff to enter into the SHO. The representations cannot at the same time be the inducement that caused the plaintiff to sign the SHO, and also constitute a breach of that same contract. This claim is unsound and there is no genuine issue that should go forward to trial.

[41] As I understand it, the essence of the second new claim, found in para. 21 of the Second Amended Notice of Civil Claim, is that the defendants breached an implied term of the SHO by not acting in an honest, candid, forthright or honest manner in relation to the plaintiff's further contribution of $375,000 to CAP.

[42] I have carefully reviewed the plaintiff's evidence, and find no foundation for this claim. As noted earlier, the uncontradicted evidence before me is that Mr. Iadarola consented to that additional contribution to allow CAP to continue

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operating. In light of that evidence, there is no real or genuine issue requiring a trial of this claim.

[43] I therefore find that all of the breach of contract claims should be dismissed.

[44] Finally, taking a step back, and reviewing the entirety of the plaintiff's submissions and affidavit evidence, it is my view, that the difficulties with the breach of contract claims – new and old – flow in large part from the fact that the plaintiff is in substance saying that the alleged misrepresentations caused him to make the additional contributions (and perhaps the initial investment in CAP as well). For example, para. 8 of Mr. Iadarola's first affidavit provides:

> I would never have had to make any further financial contribution of working capital in CAP after my initial purchase of shares in CAP if the Defendant did not make false statements of the value of the products that were ready for sales, of product of a value that never existed at the Gravel Pit.

[45] If this is in fact the substance of the plaintiff's claim, it fails to raise a genuine issue for the reasons explained above – there is no proximity between the plaintiff and defendants, and the representations are not "actionable" in that they constitute a forecast of future profitability, albeit expressed in present value terms.

Conclusion

[46] Having found there is no genuine issue underlying the plaintiff's claims in negligent misrepresentation and breach of contract, I grant summary judgment in favour of the defendants and dismiss the action in its entirety. Unless there is something of which I am not aware, the defendants are entitled to their costs of the action on Scale B. If there is a need for submissions on costs, the initial submission should be made within 14 days, and any response should follow within a further 14 days.

"Underhill, J."

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