COURT OF APPEAL FOR ONTARIO

CITATION: Ottawa Community Housing Corporation v. Sloan Valve Company, 2025 ONCA 586
DATE: 20250811
DOCKET: COA-24-CV-0366

Gillese, Roberts and Coroza JJ.A.

BETWEEN

Ottawa Community Housing Corporation

Plaintiff/Responding Party
(Appellant)

and

Sloan Valve Company and Wolseley Canada Inc. o/a
Wolseley Mechanical Group

Defendants/Moving Parties
(Respondents)

Joseph Y. Obagi and Elizabeth A. Quigley, for the appellant

Jim Holloway, for the respondents

Heard: January 23, 2025

On appeal from the order of Justice Sylvia Corthorn of the Superior Court of Justice, dated March 12, 2024, with reasons reported at 2024 ONSC 1493, 171 O.R. (3d) 298.

Coroza J.A.:

I. OVERVIEW

[1] The appellant, Ottawa Community Housing Corporation ("OCHC"), is a housing corporation that provides affordable housing accommodations in the City

of Ottawa. In 2012, OCHC underwent an energy retrofit to make its buildings more sustainable and cost-effective. To achieve this goal, OCHC retrofitted residential unit toilets with a new flushing system manufactured by the respondent Sloan Valve Company ("Sloan"). In 2018, OCHC noticed a rise in water consumption at several of its properties. It discovered that the flushing system had failed, the system leaked water, and water usage had increased leading to increased water costs.

[2] OCHC sued Sloan and the seller of the system, the respondent Wolseley Canada Inc. ("Wolseley"), for damages of $7,670,000 and an unspecified amount of special damages. In its statement of claim, OCHC advances several causes of action: breaches of warranty, negligence, and negligent misrepresentation. OCHC seeks recovery for the "excess water costs" arising from the failure of the system and the repair costs.

[3] Sloan and Wolseley brought a motion under r. 21 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, to strike part of OCHC's claim against them. First, relying on r. 21.01(1)(b), Sloan sought to strike the claim against it for breach of implied warranty under the *Sale of Goods Act*, R.S.O. 1990, c. S.1 (the "SGA"), and both Sloan and Wolseley sought to strike OCHC's claim against them in

negligence.[1] Sloan argued that it was not a "seller" for the purposes of the SGA, and both Sloan and Wolseley argued the claim in negligence to recover damages for pure economic loss could not succeed. Second, in the alternative, relying on r. 21.01(1)(a), Sloan and Wolseley asked the motion judge to determine the following questions of law:

- Can the purchaser of a product in Ontario assert implied warranty claims under the SGA against the manufacturer of the product, where the manufacturer is not the seller of the product? ("Question 1")
- Does the manufacturer or seller of a product, which is not alleged to be dangerous, and which presents no risk of harm, owe the purchaser/user of that product a duty of care, such that the purchaser/user has a claim in negligence to recover damages for a pure economic loss? ("Question 2")

[4] The motion judge agreed with Sloan and Wolseley. She struck the claim against Sloan under the SGA without leave to amend and struck OCHC's claim in negligence against both respondents with leave to amend to incorporate certain allegations into the negligent misrepresentation claim. The motion judge also answered both questions of law in the negative.

[5] OCHC appeals.

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[1] In their motion, Sloan and Wolseley did not seek to strike the SGA claim made against Wolseley, the express warranty claim made against Sloan based on an alleged collateral contract, or the negligent misrepresentation claim.

[6] I would dismiss the appeal. As I will explain, the motion judge correctly held that she was bound by this court's decision in *Arora v. Whirlpool Canada LP*, 2013 ONCA 657, 118 O.R. (3d) 113, leave to appeal refused, [2013] S.C.C.A. No. 498. The court in *Arora* confirmed that the remedy of an implied warranty under the SGA is restricted to claims against sellers who directly sell to purchasers. There is no claim for implied warranty under the SGA against manufacturers who are not sellers. Nor did the motion judge err in holding that OCHC's negligence claim was one of pure economic loss that was not recoverable in tort. Accordingly, the motion judge correctly determined that it is plain and obvious that OCHC's statement of claim discloses no reasonable cause of action or has no reasonable prospect of success under the SGA against Sloan or in negligence against Sloan and Wolseley. She also correctly answered the questions of law in the negative.

II. FACTUAL BACKGROUND[2]

OCHC's Retrofit of Toilets

[7] OCHC provides affordable housing in the City of Ottawa and maintains approximately 15,000 residential units for low-income residents. In 2012, OCHC underwent an energy retrofit to make its buildings more sustainable and cost-effective. To achieve this goal, OCHC was in contact with Sloan about its

[2] This factual background is based on the factual allegations in OCHC's statement of claim which, for purposes of a motion under r. 21.01(1), are assumed to be true unless they are patently ridiculous or incapable of proof: *McCreight v. Canada (Attorney General)*, 2013 ONCA 483, 116 O.R. (3d) 429, at para. 29; *Wyatt v. Mirabelli*, 2025 ONCA 178, at para. 20.

Flushmate System (the “System”), a pressure-assisted flushing system for toilets. OCHC claims that it received assurances from Sloan that the System would help combat high water costs because the normal failure mode was to leak air, not water, and to eventually cease flushing.

[8] OCHC decided to purchase the System for use in its units and sought bids for the sale and supply of the product. OCHC ultimately accepted Wolseley’s bid and entered into a contract with Wolseley for the sale and supply of the System. The System was installed between 2012 and 2013, and as a result, OCHC enjoyed reduced water costs for several years.

The Failure of the System

[9] In 2018, OCHC noticed a rise in water costs for the 2017 year and determined that a part in the System (the cartridge) had failed en masse and leaked water. In 2019, Sloan provided OCHC with 16,000 replacement cartridges which were modified slightly from the original cartridges. OCHC hired contractors to replace all existing cartridges in the toilets with the new ones provided by Sloan.

OCHC’s Action Against Sloan

[10] OCHC started an action in 2022 against both Sloan and Wolseley. In its statement of claim, OCHC advances three causes of action against the respondents: breach of express and implied warranties, including under contract and the SGA; negligence; and negligent misrepresentation. OCHC alleges that

Sloan was negligent in the “design, development, manufacture and/or testing” of the System, whereas Wolseley was negligent in the “distribution, marketing and/or sale” of the System.

[11] The damages claimed by OCHC include: (a) excess water costs arising from the failure of the System; (b) internal labour costs; and (c) expenses incurred for external vendors to investigate the cause of and to remediate the increased water consumption.

III. ISSUES

[12] OCHC raises three issues on appeal:

- First, OCHC argues that the motion judge erred in striking out its claim under the SGA against Sloan because there is binding judicial precedent from this court that supports its argument that Sloan was a “seller” under the SGA and its claim is not doomed to fail.
- Second, OCHC submits that the motion judge erred in striking out its claim in negligence because the claim is for the loss of water which was its property and not a claim for pure economic loss.

- Finally, OCHC contends that even if its pleadings are deficient, the motion judge erred in refusing leave to amend so that it could properly reframe the SGA and negligence claims.[3]

IV. ANALYSIS

Tests and Standard of Review

[13] There is no dispute about the applicable tests that the motion judge had to apply. OCHC does not allege that the motion judge erred in her description of the tests. On a motion to strike under r. 21.01(1)(b), a pleading will be struck if it is "plain and obvious" that the claim discloses no reasonable cause of action or has no reasonable prospect of success: *Jayco Inc. v. Canada (Revenue Agency)*, 2022 ONCA 277, 468 D.L.R. (4th) 676, at para. 4, leave to appeal refused, [2022] S.C.C.A. No. 184. The same "plain and obvious" test applies to motions brought under r. 21.01(1)(a): *Beaudoin Estate v. Campbellford Memorial Hospital*, 2021 ONCA 57, 154 O.R. (3d) 587, at para. 14. In applying that test, the court must take the facts pleaded in the statement of claim as true, unless they are patently ridiculous or manifestly incapable of being proven: *Paton Estate v. Ontario Lottery and Gaming Corp.*, 2016 ONCA 458, 131 O.R. (3d) 273, at para. 12. Claims that

[3] I note that in both the factum and oral argument on appeal, counsel for OCHC focused their submissions on the motion judge's decision to strike the claim under r. 21.01(1)(b), rather than on the motion judge's alternative conclusions regarding the legal questions raised under r. 21.01(1)(a). This is because the arguments are inextricably linked. Accordingly, these reasons address the specific arguments advanced by counsel.

have some chance of success should be permitted to proceed: *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, at para. 19.

[14] Leave to amend the pleadings should only be denied in the clearest of cases: *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at p. 980; *Burns v. RBC Life Insurance Company*, 2020 ONCA 347, 151 O.R. (3d) 209, at para. 22. In exercising its discretion to grant or deny leave, the court may consider whether the party seeking leave has provided specifics to address the deficiencies in the existing pleadings, including a draft amended pleading: e.g., *Ontario v. Madan*, 2023 ONCA 18, 165 O.R. (3d) 510, at para. 68; *Heydary Hamilton Professional Corporation v. Hanuka*, 2010 ONCA 881, 272 O.A.C. 271, at para. 16, leave to appeal refused, [2011] S.C.C.A. No. 100. The court may deny leave if it is plain and obvious that there is no tenable cause of action, the proposed pleading is scandalous, frivolous or vexatious, or there is non-compensable prejudice to the defendants: *McHale v. Lewis*, 2018 ONCA 1048, 144 O.R. (3d) 279, at para. 6; *Fernandez Leon v. Bayer Inc.*, 2023 ONCA 629, at para. 5.

[15] The governing standard of review applicable to the motion judge's determinations is also well settled. A motion judge's determination under r. 21.01(1)(b) that a claim discloses no reasonable cause of action or has no reasonable prospect of success is a determination of law reviewable on a standard of correctness: *Darmar Farms Inc. v. Syngenta Canada Inc.*, 2019 ONCA 789, 148 O.R. (3d) 115, at para. 30, leave to appeal refused, [2019] S.C.C.A. No. 409. So

too is a motion judge's determination of a question of law under r. 21.01(1)(a): *Das v. George Weston Ltd.*, 2018 ONCA 1053, 43 E.T.R. (4th) 173, at para. 65, leave to appeal refused, [2019] S.C.C.A. No. 69. Therefore, no deference is owed to the motion judge. However, a decision denying leave to amend is a discretionary decision and is entitled to deference on appeal: *Darmar Farms Inc.*, at para. 30. This court should only interfere if the motion judge erred in principle or acted unreasonably in the exercise of their discretion: *Grigonis v. Toronto Boardsailing Club*, 2010 ONCA 651, at para. 5.

Issue 1: Did the Motion Judge Err in Striking Out the Statutory Implied Warranty Claim Against Sloan?

[16] OCHC alleges that Sloan breached a statutory implied warranty under the SGA as to the fitness of the System. OCHC relies on s. 15 of the SGA which states in part:

> Subject to this Act and any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:
>
> 1. Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description that it is in the course of the seller's business to supply (whether the seller is the manufacturer or not), there is an implied condition that the goods will be reasonably fit for such purpose, but in the case of a contract for the sale of a specified article under its patent or other trade name there is no implied condition as to its fitness for any particular purpose. [Emphasis added.]

[17] Plainly, s. 15 applies to the seller of goods. The term “seller” is defined in s. 1(1) of the SGA as follows:

> “seller” means a person who sells or agrees to sell goods.

[18] The motion judge struck the claim against Sloan for breach of an implied warranty under s. 15 of the SGA. In her view, it was plain and obvious, assuming the facts pleaded are true, that the pleadings disclosed no reasonable cause of action. Nor did the pleadings have any reasonable prospect of success. The motion judge noted that OCHC could still pursue its claim against Sloan based on the express warranty arising from the alleged collateral contract between the two parties. Flowing from this analysis, the motion judge answered Question 1 in the negative.

[19] I see no error in the motion judge’s reasoning and I agree with her conclusion. In my view, it is plain and obvious that the statutory claim against Sloan is doomed to fail. The answer to Question 1 is also inextricably tied to this conclusion and the motion judge correctly answered that question of law.

[20] OCHC argues that it had direct communication with Sloan before it purchased the System and the existence of these communications is an important element to establish whether or not a manufacturer can, in certain circumstances, be deemed to be a seller for the purposes of enforcing implied warranties under the SGA. In support of its position, OCHC relies on a brief endorsement of this

court in *CIT Financial Ltd. v. Sellter Industries Inc.*, 2005 CanLII 8191 (Ont. C.A.), at para. 1 ("*CIT*") and contends that the motion judge erred in refusing to follow this endorsement.

[21] In *CIT*, the appellant's claim under the SGA against a manufacturer was permitted to proceed in a case where the manufacturer provided assurances to the appellant that a certain product would "do the job". This court allowed the appeal and in a very brief endorsement stated, at paras. 1-2:

> While the [pleading] is not a model pleading there is in our view nevertheless, enough to enable us to discern possible causes of action – that the warranty here is unconscionable, breach of the *Sale of Goods Act* (cases have held that where a purchaser makes known the purpose of the sale to a manufacturer, and is assured that a certain product would do the job, the manufacturer can be considered a seller for the purposes of the *Sale of Goods Act* – see *Great West Van Conversions Inc. v. Langeuin*, [2000] B.C.J. No. 2547) [*sic*] and negligent misrepresentation.
>
> While the pleading in its present form does not clearly set out these causes of action and the material facts relied on in support of them, we are of the view that [the appellant] should have the further opportunity to properly articulate its causes of action before the door is forever shut. [Emphasis added.]

[22] Relying on *CIT*, OCHC argues that the pre-sale communications and the receipt of assurances from Sloan arguably make Sloan a seller under the SGA. OCHC contends that it is not "plain and obvious" that the SGA claim against Sloan is doomed to fail.

[23] I do not accept OCHC's submissions.

[24] First, OCHC does not claim in its pleadings that Sloan was a seller of the System. Nor does OCHC claim in its pleadings that Sloan was a party to a contract for the sale of goods. Instead, the pleadings describe Sloan as having "represented to the public and to OCHC that [the System was] a highly effective solution to reduce water consumption" and having "provided literature and marketing materials to its distributors, including Wolseley [the seller of the System], knowing and expecting that they … would be relied upon by purchasers, including OCHC." Nothing in the pleadings alleges that Sloan directly sold the System to OCHC or provided a direct, implied warranty to OCHC under a contract for the sale of goods. Rather, the pleadings allege that a collateral contract was formed between OCHC and Sloan. Since the SGA only applies to contracts for the sale of goods, it does not apply to the alleged collateral contract. In any event, Sloan did not move to strike OCHC's allegations regarding the formation of a collateral contract. The existence of a collateral contract with Sloan and the warranties under such contract remain live issues. Given, however, that Sloan is not a party to a contract for the sale of goods, the SGA cannot apply and Sloan's liability, if any, rests on its alleged warranties made under the collateral contract.

[25] Second, the motion judge correctly relied on this court's decision in *Arora*, a more recent case than *CIT*, to strike the claim. *Arora* reinforces the motion judge's conclusion that a claim against Sloan in breach of implied warranty under the SGA

cannot succeed. In *Arora*, the appellants sought to certify a class action against Whirlpool Canada LP and Whirlpool Corporation, a manufacturer of washing machines. The appellants claimed that Whirlpool's front-loading washing machines were poorly designed and prone to developing an unpleasant smell. They sought damages, asserting several claims including a breach of implied warranty under s. 15 of the SGA. The motion to certify was dismissed on the ground that none of the claims disclosed a cause of action. This court upheld the motion judge's refusal to certify the breach of implied warranty claim and dismissed the appeal.

[26] Despite *Arora* occurring in the context of a motion to certify, the test on a motion to certify shares certain similarities with a motion to strike. Namely, determining whether a class proceeding discloses a cause of action under s. 5(1)(a) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, requires the plaintiff to establish that it is not "plain and obvious" that their claim cannot succeed: *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, [2013] 3 S.C.R. 477, at para. 63.

[27] Notably, in *Arora*, Hoy A.C.J.O. writing for the court held that the "fact that Whirlpool did not sell the machines directly to consumers is critical to the viability of the appellants' implied warranty claim": at para. 31 (emphasis added). She found that Whirlpool was the manufacturer, not the seller, and the remedy in s. 15 of the SGA is restricted to claims against the seller. The appellants had either purchased

the washing machines from a retailer or had acquired the washing machines from their original owners when purchasing a new house. In either case, there was no privity of contract between the appellants and Whirlpool. On this basis, it was plain and obvious that the SGA claim against Whirlpool had no reasonable prospect of success, and the claims were properly struck.

[28] OCHC argues that the facts of *Arora* are distinguishable because there were no pre-sale communications between the purchaser and the manufacturer in that case. Although the motion judge in this case agreed with this submission, she nevertheless followed the reasoning in *Arora* to hold that Sloan was not a seller under the SGA because it did not sell directly to OCHC and the lack of contract privity defeated the implied warranty claim. She was not persuaded, based on her consideration of the applicable authorities, that "a single paragraph in a four-paragraph endorsement from *CIT Financial*, based on a British Columbia Supreme Court decision on an appeal from a Small Claims Court decision, carries the day."

[29] I agree with the motion judge. *Arora* is a judgment of this court that comprehensively dealt with the issue of whether a manufacturer, who was not a party to the contract for the sale of goods, could be considered a seller under the SGA. Sloan, like Whirlpool, did not sell the System directly to OCHC. And Sloan, like Whirlpool, was not a party to the contract for the sale of goods. *Arora* was therefore the controlling authority that the motion judge was required to follow and she was correct to hold that *CIT* does not "carr[y] the day".

[30] *CIT* is a very brief endorsement released by this court and it did not decide whether the SGA claim made in that case would succeed. Rather, the court in *CIT* concluded that the claim advanced was not doomed to fail, leaving open for determination on a full record or in a future case whether a manufacturer that does not sell a product directly to a consumer can be a seller for the purpose of the SGA. The court in *CIT* did not avert to the statutory definition of "seller" in the SGA nor engage in the comprehensive interpretive analysis conducted by Hoy A.C.J.O. in *Arora*. Had the court in *CIT* intended to set out a broad principle about the applicability of the SGA, one would have expected more comprehensive reasons, like in *Arora*.

[31] *CIT* also relies on a single decision from the British Columbia Supreme Court (sitting on appeal from a small claims court judgment) in support of the proposition that a manufacturer can be considered a seller for purposes of the SGA if the "purchaser makes known the purpose of the sale to [the] manufacturer, and is assured that a certain product would do the job": at para. 1. Despite stating that "cases" have so held, *CIT* cites only one: *Great West Van Conversions Inc. v. Langevin*, 2000 BCSC 1830. The court in *CIT* did not analyze the reasoning in *Great West Van Conversions Inc.* or explain why it had persuasive weight in this province.

[32] In contrast, when the issue was squarely before this court again in *Arora*, Hoy A.C.J.O. provided a detailed and substantial analysis of the issue. The two

decisions can be reconciled because *Arora* represents a subsequent development in the law. While *CIT* left open the possibility that a claim could be brought against a manufacturer under the SGA, *Arora* is clear that a claim under s. 15 of the SGA against a manufacturer will fail where the manufacturer did not directly sell the product and was not a party to the contract for the sale of goods.[4]

[33] *CIT* has not been cited by this court or any other court for the proposition that a manufacturer, who is not a party to the contract for the sale of goods, can be a seller under the SGA if it is made aware by the purchaser of the purpose of the sale and assures the purchaser the product will do the job. Instead, subsequent cases in this province have followed *Arora* and consistently held that privity is an essential element of an implied warranty claim under the SGA: *Haliburton Forest & Wildlife Reserve Ltd. v. Toromont Industries Ltd. et. al.*, 2016 ONSC 3767, at paras. 99-103; *Marcinkiewicz v. General Motors of Canada Co.*, 2022 ONSC 2180, 81 C.P.C. (8th) 95, at para. 151. Therefore, I reject OCHC's submission that the motion judge failed to follow binding authority from this court.

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[4] *Great West Van Conversions Inc.* purported to rely on *Traders Finance Corporation Ltd. v. Haley* (1966), 57 D.L.R. (2d) 15 (Alta. S.C. App. Div.), aff'd [1967] S.C.R. 437, to apply British Columbia's *Sale of Goods Act*, R.S.B.C. 1996, c. 410. However, in *Traders Finance Corporation Ltd.*, Johnson J.A. awarded damages for breach of an express warranty made by the manufacturer directly to the buyer, not for breach of a statutorily implied warranty under Alberta's *Sale of Goods Act*, R.S.A., 1955, c. 295. Johnson J.A.'s observation that, "if it [were] necessary to decide it", he would have concluded that the manufacturer was a seller under Alberta's *Sale of Goods Act*, was *obiter*: *Traders Finance Corporation Ltd.*, at p. 18 (emphasis added).

[34] Finally, the requirement of privity is reinforced by the language of the SGA. The SGA applies where there is a “contract of sale of goods”. Section 4 provides that such a contract may be written, oral, or implied from the conduct of the parties. As noted above, while OCHC asserts the existence of a collateral contract for warranties with Sloan, it does not allege that Sloan is a party to the contract for the sale of goods. This omission is fatal to its claim under s. 15 of the SGA. There must be a contract for the sale of goods, whether actual or implied, to invoke the protections of the SGA. Nothing in *Arora* suggests otherwise.

[35] In sum, the motion judge did not err by relying on *Arora*. It is the controlling authority, the motion judge was bound to follow it, and she correctly held that it is plain and obvious that OCHC’s claim for breach of implied warranty under the SGA against Sloan discloses no reasonable cause of action and has no reasonable prospect of success. The motion judge correctly struck this claim from the pleadings and answered Question 1 in the negative.

Issue 2: Did the Motion Judge Err in Striking Out the Claim for Negligence?

[36] In its statement of claim, OCHC alleges that it suffered damages as a result of the respondents’ negligence. Before the motion judge, the respondents argued that OCHC’s claim in negligence was from the sale of allegedly shoddy, non-dangerous goods and OCHC did not plead that the respondents’ negligence caused a real and substantial danger to persons or property. Therefore, the

respondents contended, it did not fall into any of the categorical exceptions that allows for recovery in tort for pure economic loss.

[37] For its part, OCHC argued that it incurred damages caused by the System and that these damages were recoverable in negligence. OCHC argued that the loss of water constituted loss of property and its damages (increased water costs) were not pure economic loss.

[38] The motion judge rejected OCHC's submission that the water flowing through the units was OCHC's property. The motion judge observed that OCHC did not plead that the water which flows through the units is "property" and that, even on the most generous reading of the pleadings, such a claim was entirely unsupported. She reviewed and distinguished the facts from two cases relied on by OCHC in support of their position that the water was its property. The first was a decision of the Exchequer Court: *The Nicholls Chemical Co. of Canada v. The King* (1905), 9 Ex. C.R. 272. In that case, the plaintiff paid for its sulphuric acid to be shipped by a tanker. The sulphuric acid leaked due to the negligence of the defendant and the plaintiff recovered its losses. The second was a sentencing decision from the Ontario Superior Court where the sentencing judge referred to the "theft of water" in relation to the accused's conviction for theft under the *Criminal Code*, R.S.C., 1985, c. C-46: *R. v. Su*, 2016 ONSC 195. The motion judge distinguished both of the cases and found that they were not capable of supporting OCHC's assertion that the water was its own property.

[39] Since the motion judge found that there was no property damage or loss of property, she held that it is plain and obvious that OCHC's claim in negligence discloses no reasonable cause of action and cannot succeed because the claim is for pure economic loss. Based on the caselaw that there is no cause of action in negligence regarding shoddy, non-dangerous goods (*1688782 Ontario Inc. v. Maple Leaf Foods Inc.*, 2020 SCC 35, [2020] 3 S.C.R. 504 ("*Maple Leaf*")), the motion judge also answered Question 2 in the negative.

[40] Accordingly, the motion judge struck specific paragraphs of OCHC's statement of claim advancing a negligence claim. However, at OCHC's request, she granted OCHC leave to amend the pleadings to incorporate certain allegations made against Sloan to advance the negligent misrepresentation claim.

[41] On appeal, OCHC renews its submission that its claim of negligence is not a claim for pure economic loss because the water that flowed through the affected units was OCHC's property, such that the damage OCHC suffered was properly characterized as property loss. OCHC argues that, on a generous reading of the pleadings, the inclusion of damages for "excess water costs" was properly grounded in negligence because the water was property that it owned.

[42] I do not accept OCHC's submission.

[43] Fairburn A.C.J.O.'s decision in *North v. Bayerische Motoren Werke AG*, 2025 ONCA 340, provides a useful framework for distinguishing between standard

negligence and pure economic loss in defective product cases. She explains that the common law draws a key distinction between (1) damage caused to a product by an external force or incident, which supports a standard negligence claim, and (2) inherent defects in a product, which raise more complex issues of pure economic loss: *North*, at para. 25.

[44] She went on to explain that in *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co.*, [1995] 1 S.C.R. 85, the Supreme Court held that the cost of repairing a defective building component – absent personal injury or damage to other property – constitutes pure economic loss. The Supreme Court emphasized that the claim was not for damage to "other property" or for personal injury, but solely for the cost of restoring the building to a safe condition.

[45] This principle was reaffirmed in *Maple Leaf*, where the court clarified that pure economic loss is not generally recoverable in tort, except in limited categories such as the negligent supply of shoddy goods or structures: at para. 21. Even within these categories, recovery is not automatic; the plaintiff must still establish all elements of negligence, including actual damage.

[46] In the present case, OCHC attempts to characterize its loss as arising from an external incident, namely property loss of water caused by the failure of the System, thus invoking the standard negligence framework. However, this framing is unpersuasive. OCHC did not plead that the water which flows through its units

is property. Rather, OCHC pleads that it suffered damages from “excess water costs arising from the failure of the [System]”.

[47] The real claim that is being advanced is thus not for property loss, but for increased water bills resulting from an inherently defective product that did not pose a safety risk to persons or other property. Accordingly, the claim falls within the category of pure economic loss, specifically the negligent supply of a defective product. But as *Maple Leaf* confirms, such claims are exceptional and do not permit recovery in this case because the design defect did not pose a real and substantial danger and OCHC did not incur costs in preventing injury or averting danger: at paras. 47-49, 57.

[48] Respectfully, the core of OCHC’s claim is financial loss that is quintessential pure economic loss, being “economic loss that is unconnected to a physical or mental injury to the plaintiff’s person, or to physical damage to property”: *Maple Leaf*, at para. 17. OCHC’s costs “were solely financial in nature” and “not causally connected to physical injury to [its] person[] or physical damage to [its] property”: *Design Services Ltd. v. Canada*, 2008 SCC 22, [2008] 1 S.C.R. 737, at para. 30.

[49] I agree with the motion judge that OCHC’s claim that the water was its property is not supported by the pleadings. Reading the pleadings as urged by OCHC to call the lost water in this case “property” would do an end run around the

restrictive limits placed on recovery for pure economic loss. I adopt the following words of the motion judge:

> The level of generosity that would have to be applied to give the Pleading the reading suggested by OCHC – with the lost water constituting the loss of property – goes beyond the level of generosity required at this stage of the proceeding.

[50] In sum, OCHC's claim against Sloan is a "shoddy good" claim. And while pure economic loss may be recoverable in certain circumstances, there is no general right in tort protecting against the negligent infliction of pure economic loss. In my view, OCHC's claim is a matter that should customarily be dealt with by contract and not tort: *Arora*, at para. 104.

[51] It follows that the motion judge was correct to conclude that it is plain and obvious that the claim in negligence discloses no reasonable cause of action and has no reasonable prospect of success. These paragraphs of the pleadings were properly struck and the motion judge correctly answered Question 2 in the negative.

Issue 3: Did the Motion Judge Err in Refusing Leave to Amend?

[52] As noted above, the claim against Sloan based on s. 15 of the SGA was struck without leave to amend. The claim in negligence against both respondents was struck with leave to amend for the sole purpose of incorporating certain

allegations into the claim for negligent misrepresentation (para. 33(v) of the statement of claim).

[53] OCHC argues that the motion judge erred in failing to determine whether amending the pleadings would rectify any perceived deficiencies. It argues that there is no reason to believe that amendments could not remedy the drafting inadequacies raised by the pleadings.

[54] I would reject that argument. There is no basis for intervening in the motion judge's discretionary decision refusing leave. The defects that justify striking out the SGA and negligence claims cannot be cured by amendment.

[55] The motion judge was required to deal with the pleadings before her and not any speculative amendments not put before her. For the SGA claim, OCHC did not allege that Sloan was a seller or a party to the contract for the sale of goods. As explained above, this is fatal to its claim under s. 15 of the SGA and cannot be cured by amendment.

[56] For the negligence claim, the type of damage alleged here can only be characterized as pure economic loss. I agree with the motion judge that *The Nicholls Chemical Co. of Canada* and *Su* are distinguishable from the factual circumstances as alleged. Importantly, OCHC has also not alleged any further facts which would allow for the characterization of its economic loss claim as a

property claim to support a viable negligence claim as in those cases. No use would come from granting OCHC leave to amend the pleadings.

[57] In sum, the deficiencies in the pleadings cannot be cured by amendment and the motion judge did not err in denying leave to amend the claim.

V. DISPOSITION

[58] For these reasons, I would dismiss the appeal. I would order OCHC to pay the respondents the costs of this appeal in the total amount of $28,565.34, all-inclusive.

Released: August 11, 2025 “E.E.G.”

“S. Coroza J.A.”
“I agree. E.E. Gillese J.A.”
“I agree. Roberts J.A.”