

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *10010524 Manitoba Inc. v. Rosso*,
2025 BCSC 2282

Date: 20251125
Docket: S250864
Registry: Vancouver

Between:

10010524 Manitoba Inc.

Plaintiff

And

Wesley Rosso, Rosso Enterprises Inc., 1172068 B.C. Ltd., Assured Credit Corporation, Homeline Financial Services Ltd. o/a Dominion Lending Centres Homeline Mortgages, Alan Fetterly, Alan Fetterly o/a Fetterly Financial and Verico Compass Mortgage Group Corporation

Defendants

Before: The Honourable Justice J. Hughes

Reasons for Judgment

Counsel for the Plaintiff:

K. Thompson

Counsel for the Defendants, Alan Fetterly,
Alan Fetterly o/a Fetterly Financial, and
Verico Compass Mortgage Group
Corporation:

C. Cheng
J.J. Mason

Place and Date of Hearing:

Vancouver, B.C.
November 6, 2025

Place and Date of Judgment:

Vancouver, B.C.
November 25, 2025

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[1] This is an application by the defendants, Alan Fetterly, Alan Fetterly O/A Fetterly Financial, and Verico Compass Mortgage Group Corporation (the “Fetterly Defendants”), seeking summary judgment dismissing the plaintiff’s claim against them under Rule 9-6 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*Rules*], or alternatively, to have the notice of civil claim struck as against them, pursuant to Rule 9-5(1).

Background

[2] The plaintiff, 10010524 Manitoba Inc., is a holding company owned and operated by Darren Garnham. Mr. Garnham is a self-employed business owner who installs sprinklers and lighting systems.

[3] The defendant Mr. Fetterly is a certified financial planner and mortgage broker, based in British Columbia. The defendant Fetterly Financial is the sole proprietorship through which Mr. Fetterly offers real estate, financial, and mortgage services, including private mortgage and investment services. Mr. Fetterly was also an independent contractor engaged by the defendant Verico Compass Mortgage Group Corporation (“Verico”) to provide financial advisory and mortgage broker services.

[4] From 2018 through 2023, Mr. Garnham, through the corporate plaintiff, made seven private mortgage investments with Mr. Fetterly. One of those investments was a multi-million-dollar syndicated mortgage and industrial subdivision project in Rosser, Manitoba (the “Saucier Project”). The plaintiff invested \$200,000 in the Saucier Project in 2019, and that investment remained extant as of 2023.

[5] In February or March 2023, Mr. Fetterly recommended that Mr. Garnham contact Wesley Rosso about an investment opportunity involving construction of a long-term care facility in Victoria, British Columbia (the “Martel Investment”). Mr. Rosso was also a mortgage broker and, at least in respect of one development, referred to as the Sturgeon Road mortgage, was Mr. Fetterly’s business partner.

[6] The plaintiff alleges that Mr. Garnham spoke with both Mr. Rosso and Mr. Fetterly about the Martel Investment. The plaintiff admits that it relied on Mr. Rosso to do the due diligence in respect of the Martel Investment, but also pleads that Mr. Fetterly provided his own comments, observations, and advice to Mr. Garnham about the Martel Investment and recommended that the plaintiff pursue it.

[7] The plaintiff alleges that after speaking with both Mr. Rosso and Mr. Fetterly about the Martel Investment, and in reliance on the information they provided, the plaintiff invested \$450,000 in the Martel Investment. The plaintiff pleads that both Mr. Rosso and Mr. Fetterly assured Mr. Garnham that the Martel Investment was safe, would receive a good return, had an attractive loan to value rate that was worth borrowing against, and would be secured against the long-term care facility property.

[8] Of the \$450,000 invested, \$250,000 consisted of funds the plaintiff had available, and the remaining \$200,000 was obtained through a line of credit. The plaintiff pleads that it obtained the line of credit to maximize the funds available to it for the Martel Investment on the advice and encouragement of Mr. Rosso and Mr. Fetterly.

[9] The plaintiff pleads that:

- a) Unbeknownst to Mr. Garnham, Mr. Rosso transferred the plaintiff's \$450,000 to his business partner, Greg Martel, through Mr. Martel's company, My Mortgage Auction Corp.;
- b) In May 2023, Mr. Rosso advised Mr. Garnham that the Martel Investment was in jeopardy;
- c) The plaintiff subsequently learned that its funds had not been invested in a long-term care facility being built in Victoria, but rather, transferred to My Mortgage Auction Corp.; and

- d) Mr. Martel has been publicly accused of running a Ponzi scheme and of owing millions of dollars to investors and a receiver has allegedly been appointed over My Mortgage Auction Corp.

[10] The plaintiff's claim against the Fetterly Defendants is predicated on Mr. Fetterly:

- a) referring Mr. Garnham to Mr. Rosso for the purpose of investing and vouching for Mr. Rosso;
- b) recommending that the plaintiff pursue the Martel Investment because it was safe, secure, and had a favourable loan to value rate; and
- c) encouraging the plaintiff to take out a \$200,000 line of credit to maximize its investment in the Martel Investment.

[11] The Fetterly Defendants deny all the above conduct, with the exception that Mr. Fetterly now admits that he did refer Mr. Garnham to Mr. Rosso. Mr. Fetterly maintains that he did not know that the referral was for the Martel Investment, that he knew nothing about the Martel Investment, and that he did not provide any advice or recommendation to the plaintiff about the Martel Investment, its loan to value rate, or its security.

[12] The Fetterly Defendants made a demand for further particulars of the plaintiff's claim against them. In response, the plaintiff provided particulars of, among other things, Mr. Fetterly's conduct and statements about the Martel Investment, the factual underpinnings of the duties it alleges the Fetterly Defendants allegedly owed, and the plaintiff's alleged vulnerability to the Fetterly Defendants.

[13] The Fetterly Defendants also delivered an extensive notice to admit. In response, the plaintiff made multiple admissions. The Fetterly Defendants rely heavily on those admissions in support of this application, including the plaintiff's admission that the Fetterly Defendants did not explicitly undertake to provide advice regarding the Martel Investment and that it relied on Mr. Rosso to conduct due

diligence for that investment. The Fetterly Defendants say that in light of these admissions, among others, it is plain and obvious that there is no triable issue in respect of any of the plaintiff's claims against them such that summary judgement ought to be granted in their favour.

Issue #1: Should summary judgment be granted under Rule 9-6?

[14] Rule 9-6(4) permits a defendant—an “answering party”—to apply for summary judgment on all or part of a claim. If the court is satisfied that there is no genuine issue for trial with respect to a claim or defence, then it must dismiss the claim: Rule 9-6(5)(a).

[15] The burden on the applicant under Rule 9-6 is high. The onus on the party seeking summary judgment requires that it be “plain and obvious”, “manifestly clear”, or “beyond a doubt” that there is no genuine issue of material fact requiring trial: *Beach Estate v. Beach*, 2019 BCCA 277 at paras. 48, 65, 67; *Canada (Attorney General) v. Lameman*, 2008 SCC 14 at para. 11. It is not enough to show that the claim or defence has little merit, nor is it appropriate to ask the court to weigh competing evidence. Rather, the applicant must show that the claim or defence presents no genuine issue for trial and is bound to fail: *Zheng v. Bank of China (Canada) Vancouver Richmond Branch*, 2023 BCCA 43 at para. 31; *Beach Estate* at paras. 49, 66–67.

[16] A defendant can succeed on a Rule 9-6 application by showing that the case pleaded by the plaintiff is unsound or by adducing sworn evidence that gives a complete answer to the plaintiff's case: *Zheng* at para. 32, citing *Vandev Consulting Limited v. Pacific Maple Manufacture Inc.*, 2022 BCCA 97 at para. 42. However, if the plaintiff submits evidence contradicting the defendant's evidence in some material respect, or if the defendant's evidence fails to meet all the causes of action raised by the plaintiff's pleadings, the application must be dismissed: *Zheng* at para. 33, citing *Vandev* at paras. 42–43; *Beach Estate* at para. 48; *Lameman* at para. 11.

[17] Although an application under Rule 9-6 invokes the court's consideration of evidence, it is not a summary trial. I am not permitted to weigh evidence, assess

credibility, or draw unfavourable inferences against the party defending the application: *Zheng* at para. 34, citing *Aubichon v. Grafton*, 2022 BCCA 77 at para. 27. Any weighing of evidence beyond determining whether it is incontrovertible may only be done in a trial: *Beach Estate* at para. 49; *Tran v. Le*, 2017 BCCA 222 at paras. 2 and 8. Accordingly, a matter is not appropriate for determination by way of summary judgment where determinations of fact are required: *Wang v. Niu*, 2022 BCSC 1027 at para. 51, aff'd 2023 BCCA 153, citing *Skybridge Investments Ltd. v. Metro Motors Ltd.*, 2006 BCCA 500 at para. 8.

[18] Finally, because an application under Rule 9-6 seeks a final order, the affidavit material filed by the applicant in support thereof may not contain statements of information and belief: *Wang v. Lu*, 2024 BCSC 126 [*Lu*] at para. 66. Conversely, a party responding to a summary judgment application is permitted to rely on hearsay evidence because it does not seek a final order; it seeks to dissuade the court from making a final order by way of dismissal of the summary judgment application: *Lu* at para. 67.

[19] The Fetterly Defendants accept that, generously framed, the causes of action advanced against them in the notice of civil claim sound in professional negligence, negligent misrepresentation, and breach of fiduciary duty. This summary judgment application rests on admissions that the plaintiff has made which, according to the Fetterly Defendants, make it plain and obvious that each of the above claims is bound to fail such that there is no triable issue.

[20] The plaintiff says that the admissions are not dispositive and that summary judgment should not be granted because there remain material facts in dispute which give rise to triable issues.

Professional negligence and negligent misrepresentation

[21] The plaintiff's claim in professional negligence and negligent misrepresentation is for economic loss. The plaintiff must therefore prove all the elements of negligence: (a) that the Fetterly Defendants owed it a duty of care; (b) that the Fetterly Defendants' conduct breached the standard of care; (c) that the

plaintiff sustained damage; and (d) that the damage was caused, in fact and in law, by the Fetterly Defendants' breach: *1688782 Ontario Inc. v. Maple Leaf Foods Inc.*, 2020 SCC 35 [*Maple Leaf*] at para. 18.

[22] The Fetterly Defendants concede that the plaintiff suffered loss as a result of its investment in the Martel Investment. However, the Fetterly Defendants say that the plaintiff's claim is bound to fail because they did not owe it a duty of care in respect of the Martel Investment; and in any event, the plaintiff cannot prove causation due to its admission that it relied on Mr. Rosso in making the Martel Investment. I am not persuaded that it is manifestly clear that the plaintiff's claim is bound to fail on either of these grounds.

[23] First, mortgage brokers owe a duty of care to their clients: *Hainan Dehong Real Estate Development Corporation v. 0952130 B.C. Ltd.*, 2024 BCSC 2362 [*Hainan*] at para. 83. 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 relationship in issue: *Maple Leaf* at para. 30; *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63 [*Livent*] at para. 27. The fact that someone is a mortgage broker—or in this case, also a financial advisor—does not necessarily suffice to meet the proximity requirement for a duty of care to be imposed.

[24] In 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: *Maple Leaf* at para. 32. The Fetterly Defendants say that the plaintiff's admissions in response to their notice to admit foreclose any undertaking being found to exist in respect of the Martel Investment. Accordingly, they say that the plaintiff's claim is bound to fail at the proximity stage of the analysis. The Fetterly Defendants do not take issue with the reliance aspect of the analysis; indeed, they acknowledged in oral submissions that there is sufficient evidence of reliance to give rise to a triable issue.

[25] In particular, the Fetterly Defendants say that the following admissions are dispositive of the issue of whether an undertaking was given that included the Martel Investment:

15. Fetterly never explicitly provided any undertaking to the plaintiff respecting the scope of services Fetterly would provide to the plaintiff respecting the long-term care facility investment.

16. Fetterly never explicitly provided any undertaking to the plaintiff respecting the nature of services Fetterly would provide to the plaintiff respecting the long-term care facility investment.

17. Fetterly never explicitly provided any undertaking to the plaintiff respecting any statements Fetterly would provide to the plaintiff respecting the long-term care facility investment.

18. Fetterly never particularized or detailed any undertaking to the plaintiff respecting any statements that Fetterly would provide to the plaintiff in respect of the long-term care facility investment.

[26] The plaintiff agrees that it made these admissions, but notes that they all pertain to whether there was an “explicit” or particularized agreement regarding the scope of services that Mr. Fetterly would provide in respect of the Martel Investment. The plaintiff’s case is not predicated on an “explicit” or particularized agreement. In its submission, there was no need for explicit or express discussions because Mr. Fetterly was already providing mortgage broker and financial advisory services to it in the context of the pre-existing and subsisting relationship between the plaintiff and Mr. Fetterly.

[27] It is undisputed that the plaintiff was a client of Mr. Fetterly’s and had invested in seven mortgages with him from 2018 through 2023. The plaintiff’s evidence is that the parties’ relationship was informal in nature, that they conducted their business primarily over the phone or by email, that they did not have a written agreement, and that the mortgage investments the plaintiff made through Mr. Fetterly were often done in circumstances where funds were advanced before all necessary documentation had been provided or executed. Mr. Fetterly disputes this and provides evidence of his “invariable” practice as a mortgage broker that contradicts Mr. Garnham’s evidence. The plaintiff also says that Mr. Garnham was actively dealing with Mr. Fetterly in respect of one of those mortgages—the Saucier Project

mortgage—during the time frame in which the plaintiff alleges Mr. Fetterly referred Mr. Garnham to Mr. Rosso and provided advice about the Martel Investment mortgage security and loan to value rate.

[28] The plaintiff submits that in these circumstances, there was no need for an “explicit” discussion about services that Mr. Fetterly had already undertaken, and continued, to perform. The plaintiff asserts that Mr. Fetterly’s undertaking is implicit in the parties’ prior and ongoing relationship as client and mortgage broker and Mr. Fetterly’s conduct in relation to the Martel Investment.

[29] I agree with the plaintiff. The Fetterly Defendants’ position is predicated on a requirement that is not found in the jurisprudence, namely that the undertaking must be “explicit” and cannot be inferred from the circumstances or the parties’ pre-existing or continuing relationship. None of the cases cited—namely *Maple Leaf*, *Livent*, or *Hainan*—state that for the purpose of the proximity analysis, the defendant’s undertaking must be “explicit” and cannot be implied.

[30] The Fetterly Defendants rely on *Hainan* at para. 139, which notes that courts must use caution in imposing duties by implication and also notes the instruction in *Maple Leaf* that undertakings are not to be treated as given at large. However, *Hainan* does not go as far as the Fetterly Defendants suggest; it does not say that an undertaking can never arise by implication from the circumstances of the parties’ relationship or their conduct. As the Supreme Court of Canada noted in *Maple Leaf* at para. 30: “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” (emphasis added).

[31] The Fetterly Defendants’ position relies on a narrow interpretation of *Maple Leaf* to the effect that a separate and explicit undertaking is required for each specific transaction in the context of a longstanding and ongoing relationship between a client and mortgage broker. Even if this were the case—and I am not satisfied that it is—Mr. Garnham’s evidence is that the plaintiff was Mr. Fetterly’s client at the material time, and that after Mr. Fetterly referred the plaintiff to Mr.

Rosso, Mr. Fetterly and Mr. Garnham had a specific discussion about the Martel Investment in which Mr. Fetterly provided advice about the security and loan to value ratio, and recommended that the plaintiff participate in the Martel Investment.

[32] Considering the notice of civil claim and particulars in light of Mr. Garnham's evidence, I am not persuaded that it is plain and obvious that the plaintiff's claim is bound to fail because the undertaking alleged is merely "at large", such that it cannot support a cause of action in professional negligence or negligent misrepresentation.

[33] In their oral submissions, the Fetterly Defendants drew the Court's attention to the plaintiff's admission that Mr. Garnham never asked Mr. Fetterly to conduct due diligence on the Martel Investment. I agree with the plaintiff that this is immaterial for present purposes. The plaintiff's claim does not rest on whether Mr. Garnham asked Mr. Fetterly to conduct due diligence on the Martel Investment or whether Mr. Fetterly did in fact do so. The plaintiff's claim is founded on Mr. Fetterly's conduct in referring Mr. Garnham to Mr. Rosso and subsequently providing advice on the security for, and loan to value of, the Martel Investment. In the plaintiff's submission, this type of advice is routinely given by mortgage brokers and is the type of advice that Mr. Fetterly had previously provided for other investments. Thus, this advice falls within the undertaking Mr. Fetterly provided to the plaintiff by acting as its mortgage broker on a continuous basis, thereby giving rise to a relationship of proximity. Whether or not the existence of an actual undertaking will be borne out on the law and evidence gives rise to triable issues.

[34] Moreover, I am not persuaded that the plaintiff's admission that he relied on Mr. Rosso to conduct due diligence on the Martel Investment renders it plain and obvious that the plaintiff's claim is bound to fail at the causation stage of the analysis. The plaintiff claims that Mr. Garnham relied on both Mr. Rosso and Mr. Fetterly in deciding to make the Martel Investment.

[35] Accordingly, I find that it is not manifestly clear that the lack of an "explicit" undertaking is dispositive of whether Mr. Fetterly undertook to provide advice to the plaintiff about the Martel Investment. The facts about whether an undertaking with

respect to the Martel Investment arose from the parties' existing relationship—put differently, whether the advice that the plaintiff alleges Mr. Fetterly gave regarding the Martel Investment fell within the scope of the services he undertook to provide to the plaintiff—are disputed. Nor is it manifestly clear that the plaintiff's admission that he relied on Mr. Rosso in addition to Mr. Fetterly negates any triable issue as to causation.

[36] Finally, the Fetterly Defendants say that the plaintiff's negligent misrepresentation claim is bound to fail because the alleged misrepresentations constitute statements of opinion about future events. Actionable misrepresentation must pertain to a matter of past or existing fact: *Hainan* at para. 326, citing *PD Management Ltd. v. Chemposite Inc.*, 2006 BCCA 489 at para. 14.

[37] I am not persuaded that it is plain and obvious that the plaintiff's claim in negligent misrepresentation is bound to fail because it is not predicated on a past or existing representation of fact. I agree with the plaintiff that the assertions that Mr. Fetterly told Mr. Garnham that Mr. Rosso was an "award winning mortgage broker", and that Mr. Fetterly told Mr. Garnham that the Martel Investment was "secure" and his comments on the loan to value ratio could be construed as statements of past or existing facts.

[38] Moreover, there are conflicts in the evidence of Mr. Garnham and Mr. Fetterly on matters central to the nature and scope of their relationship as client and mortgage broker/financial advisor. These conflicts cannot be resolved on a summary judgment application because doing so would require me to weigh the evidence and make credibility findings based on contested evidence. I agree with the plaintiff that in light of the contradictions in the evidence, the summary judgment application cannot succeed unless I were to impermissibly prefer Mr. Fetterly's evidence over Mr. Garnham's and the documentation adduced by the plaintiff. These factors also weigh heavily against summary dismissal of the plaintiff's claims.

[39] I therefore find that there are triable issues pertaining to the nature and scope of the undertaking Mr. Fetterly provided, if any, to the plaintiff in respect of the Martel

Investment. I am satisfied, based on the plaintiff's evidence, that there is a triable issue about whether there was sufficient proximity between the plaintiff and the Fetterly Defendants to give rise to a duty of care in the circumstances alleged in respect of the Martel Investment.

[40] As the responding party on the summary judgment application, the plaintiff, is not required to prove its claim against the Fetterly Defendants: *Northwest Organics, Limited Partnership v. Maguire*, 2015 BCSC 1918 [*Northwest Organics*] at para. 38, aff'd 2014 BCCA 454, leave to appeal to SCC ref'd, 36248 (25 June 2015). All that is required of the plaintiff is to demonstrate a triable issue, which I find it has done on the evidentiary record before me. It is not enough to show that the plaintiff's negligence claims have little merit: *Zheng* at para. 31. The Fetterly Defendants must show that the claim presents no genuine issue for trial and is bound to fail. The evidence before me falls short of meeting that high bar.

Breach of fiduciary duty

[41] For the purpose of this summary judgment application, the Fetterly Defendants accept that the facts set out in the notice of civil claim construed in conjunction with the particulars may support a breach of fiduciary duty claim even though that claim was not properly pleaded in the notice of civil claim.

[42] The Fetterly Defendants say that the fiduciary duty claim is bound to fail because "No evidence indicates that the plaintiff was vulnerable to Mr. Fetterly, that Mr. Fetterly exercised authority over the plaintiff, or that Mr. Fetterly acted in bad faith or in [his] own selfish interests". Accordingly, the Fetterly defendants say that: "The plaintiff has neither pleaded nor proven the essential elements to support the Fiduciary Duty claim, and it must be dismissed" (emphasis added).

[43] The Fetterly Defendants' submission misconstrues the burden on the plaintiff as the responding party to a summary judgment application. As noted above, the plaintiff is not obliged to prove its claim, since it is only required to provide sufficient evidence to establish that there is a genuine issue for trial: *Northwest Organics* at para. 38. Regardless, I find that Mr. Garnham's evidence about his lack of

sophistication as an investor, the nature and scope of the plaintiff's relationship with Mr. Fetterly as mortgage broker and financial advisor, and the plaintiff's reliance on Mr. Fetterly in those capacities is sufficient to give rise to a triable issue in respect of a claim for breach of fiduciary duty.

[44] Accordingly, it is not plain and obvious or manifestly clear that a breach of fiduciary duty claim is bound to fail. The defendant's application for summary judgment in respect of the breach of fiduciary duty claim is thus dismissed

Conclusion on summary judgment

[45] The Fetterly Defendants have failed to establish that it is manifestly clear that there is no genuine issue for trial in respect of the plaintiff's claims in professional negligence, negligent misrepresentation, or breach of fiduciary duty such that those claims are bound to fail. In the result, the Fetterly Defendants' application for summary judgment dismissing the plaintiff's claim is dismissed.

Issue #2 – Should the notice of civil claim be struck under Rule 9-5(1)(a)?

[46] Pursuant to Rule 3-1(2), a notice of civil claim must, among other things, set out: (a) a concise statement of the material facts giving rise to the claim; (b) the relief sought by the plaintiff against each named defendant; and (c) a concise summary of the legal basis for the relief sought.

[47] To properly serve their purpose of defining the issues of fact and law to be decided, pleadings must contain a concise statement of material facts giving rise to the claim or defence. The requirement that the statement of material facts be concise means that it must include everything that is necessary, but nothing more: *Lu v. Shen*, 2020 BCSC 490 at para. 46, aff'd 2021 BCCA 95. Pleadings are not designed to tell a story and should not include unnecessary narrative: *Mercantile Office Systems Private Limited v. Worldwide Warranty Life Services Inc.*, 2021 BCCA 362 at para. 44.

[48] These requirements promote sufficiency and fairness by enabling the defendant to know the case against it and are necessary to ensure that the notice of

civil claim serves the ultimate function of pleadings, namely, to clearly define the issues of fact and law to be determined by the court: *Sahyoun v. Ho*, 2013 BCSC 1143 at para. 18, aff'd 2017 BCCA 96, leave to appeal to SCC ref'd, 37581 (18 October 2018).

[49] A pleading may be struck under Rule 9-5(1), which provides as follows:

Scandalous, frivolous or vexatious matters

- (1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
 - (a) it discloses no reasonable claim or defence, as the case may be,
 - (b) it is unnecessary, scandalous, frivolous or vexatious,
 - (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
 - (d) it is otherwise an abuse of the process of the court,and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

[50] The Fetterly Defendants rely solely on Rule 9-5(1)(a). They abandoned their application under subrules (b) and (d) in oral submissions.

[51] Rule 9-5(1)(a) provides that a pleading, petition, or other document may be struck on the ground that it discloses no reasonable claim or defence. The purpose of Rule 9-5(1)(a) is to ensure that the parties and the court have a clear understanding of the nature of the claims advanced. A party pleading a particular claim must plead assertions of fact which would establish the essential elements of a successful claim if proven: *Tenshi Seafood Ltd. v. Ocean Run Seafood Canada Ltd.*, 2021 BCSC 2075 at para. 6.

[52] The test on a motion to strike for not disclosing a reasonable cause of action under Rule 9-5(1)(a) is whether it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action: *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 17; *FORCOMP Forestry Consulting Ltd. v. British Columbia*, 2021 BCCA 465 [FORCOMP] at para. 21, leave to appeal

to SCC ref'd, 40051 (30 June 2022). I am to read the amended notice of civil claim generously and accommodate inadequacies in form that are merely the result of drafting deficiencies: *FORCOMP* at para. 22.

[53] Response to particulars also forms part of pleadings: *Besler v. What The Fungus*, 2023 BCSC 2590 at para. 11. Accordingly, I must construe the notice of civil claim in conjunction with the plaintiff's response to particulars.

Does the notice of civil claim disclose a reasonable cause of action?

[54] The Fetterly Defendants assert that the plaintiff's claim ought to be struck as against them because it does not plead the material facts necessary to support any of the causes of action advanced. They assert that the notice of civil claim fails to plead the material facts:

- a) alleged to give rise to an undertaking from Mr. Fetterly for the purpose of establishing a proximate relationship as required for the plaintiff's professional negligence and negligent misrepresentation claim; and
- b) supporting the imposition of a fiduciary duty, namely subordination of the Fetterly Defendants' interests to those of the plaintiff and the balance of the factors required as set out in *Frame v. Smith*, [1987] 2 S.C.R. 99., 1987 CanLII 74 (S.C.C.).

[55] The plaintiff accepts that in its present form, the notice of civil claim is "not perfect" and that the breach of fiduciary duty claim is not properly pleaded, but submits that it nonetheless overcomes the plain and obvious test under Rule 9-5(1)(a), particularly when interpreted generously and in conjunction with the particulars.

[56] I agree. While not a model of proper pleading, I find that construed generously and in light of the particulars, it is not plain and obvious, assuming the facts pleaded to be true, that the pleading does not disclose a reasonable cause of action in professional negligence and misrepresentation.

[57] At paras. 10–12 of the notice of civil claim, the plaintiff pleads as follows:

10. The plaintiff has been a client of Alan Fetterly since 2018 and Verico since 2021. At all times, Mr. Fetterly was a licensed submortgage broker in good standing who was employed by Verico pursuant to the *Mortgage Brokers Act*, RSBC 1996, c313.

11. At all times, the plaintiff relied on Mr. Fetterly and Verico to provide him with financial guidance, advice and direction, including providing the plaintiff with mortgage investment opportunities. The plaintiff relied on Mr. Fetterly and Verico as fiduciaries that would protect his interests and relied on them to his detriment.

12. From 2018 to 2023, the plaintiff invested in eight (8) mortgage investments with the assistance and guidance of Alan Fetterly and Verico.

[58] The contents of these paragraphs are further detailed in the particulars where, in response to the Fetterly Defendants' demand for particulars of Mr. Fetterly's conduct that is alleged to provide the basis for the plaintiff's reliance on him to provide financial and mortgage brokerage advice, the plaintiff asserts that:

- a) From 2018 to 2023, Mr. Fetterly and Fetterly Financial acted as a financial planner to Mr. Garnham, and that Mr. Fetterly concurrently acted as a mortgage broker;
- b) Mr. Garnham and Mr. Fetterly were not friends; their relationship was professional and Mr. Garnham relied on Mr. Fetterly in his professional roles;
- c) While acting as a financial planner and mortgage broker, Mr. Fetterly:
 - i. made recommendations on eight private mortgages, including the Martel Investment; and
 - ii. opined on, *inter alia*, the safety and security of loans, and rates of return.

[59] I also reject the Fetterly Defendants' assertion that the claim fails to plead the undertaking necessary to establish the element of proximity for the plaintiff's claims in negligence. In addition to pleading the plaintiff's ongoing relationship with Mr.

Fetterly as its mortgage broker and financial advisor, the plaintiff pleads that Mr. Fetterly recommended that Mr. Garnham speak with Mr. Rosso about a potential investment (which ended up being the Martel Investment), described Mr. Rosso as an “award-winning mortgage broker and a trusted friend”, and was Mr. Rosso’s business partner in respect of the Surgeon Road mortgage .

[60] The plaintiff also asserts that in deciding to pursue the Martel Investment, it relied on Mr. Fetterly’s referral, the “comments, observations, and advice” he provided in relation to the Martel Investment, and his recommendation that the plaintiff pursue the investment. The plaintiff further pleads that “Both mortgage brokers assured the plaintiff that [the Martel Investment] was a safe investment that would receive a good return” and that they described it as having “an attractive loan to value rate that was worth borrowing against”. The particulars add the assertion that after recommending that the plaintiff invest with Mr. Rosso, Mr. Fetterly independently advised on the Martel Investment, and “recommended and encouraged a line of credit to maximize the investment potential”.

[61] In my view, these pleadings provide sufficient assertions of material fact to support an undertaking from Mr. Fetterly for the purpose of establishing a proximate relationship as is required for the plaintiff’s professional negligence and negligent misrepresentation claims.

[62] Second, I find that the plaintiff’s misrepresentation claim ought not to be struck for failure to plead a representation of past or existing fact. I agree with the plaintiff that at this stage of the proceedings and for the analysis under Rule 9-5(1)(a), the alleged representations that the Martel Investment had a loan to value rate that was worth borrowing against—namely the fact that the interest from the investment would cover the borrowing costs—and was secured against the long-term care facility property sufficiently plead assertions of past or existing fact.

[63] Third and with respect to the breach of fiduciary duty claim, the Fetterly Defendants say that the notice of civil claim does not plead material facts in support of the required elements as set out in *Frame*, namely: (a) scope for the exercise of

some discretion or power; (b) that power or discretion can be exercised unilaterally so as to effect the beneficiary's legal or practical interests; and (c) a peculiar vulnerability to the exercise of that discretion or power: *Hodgkinson v. Simms*, 1994 CanLII 70 (S.C.C.), [1994] 3 S.C.R. 377 at p. 408, citing *Frame* at p. 136. The Fetterly Defendants' submissions focussed in large part on the lack of material facts pleaded so as to prove the plaintiff's vulnerability.

[64] I disagree. The notice of civil claim pleads that: (a) the plaintiff "relied on Mr. Fetterly and Verico as fiduciaries that would protect his interests" and that he did so to his detriment; and (b) Mr. Fetterly and Verico were negligent in the performance of their duties to the plaintiff because among other things, they "failed to carry out fiduciary duties to the plaintiff". The plaintiff accordingly seeks "general damages of \$450,000 for ... negligence [and] breach of fiduciary duty", among other things.

[65] The elements required for a breach of fiduciary duty claim are further amplified in the particulars. The plaintiff asserts that the Fetterly Defendants: owed the plaintiff fiduciary duties which included duties to act in good faith, to make timely and relevant disclosures that might influence the client's decision-making obligations, and to avoid secret commissions or profits. The plaintiff also asserts that the Fetterly Defendants had an obligation to ensure that they were prioritizing their clients' best interests. Further, the particulars expressly plead material facts relevant to the issue of the plaintiff's vulnerability, namely that the plaintiff was not a sophisticated person or investor, and that it was "assumed that the Fetterly Defendants were acting in the plaintiff's best interest and not their own."

[66] With respect to how the Fetterly Defendants preferred their own interests to the plaintiff's, the plaintiff acknowledges that it does not know the full extent of how this occurred. However, the plaintiff nonetheless pleads that Mr. Fetterly's commission from the Saucier Project investment may have been influenced by his referral of the plaintiff to Mr. Rosso, though the plaintiff does not know the extent of any "profits or kickbacks received by the Fetterly Defendants".

[67] Construing the notice of civil claim generously as amplified by the particulars, I find that the plaintiff has pleaded sufficient material facts to support a claim for breach of fiduciary duty consistent with the factors set out in *Frame*, including an expectation that the Fetterly Defendants would subordinate their own interests to the plaintiffs'. It is not, therefore, plain and obvious, assuming the facts pleaded to be true, that the pleading does not disclose a reasonable cause of action for breach of fiduciary duty.

Should leave to amend be granted?

[68] I have concluded that when read in conjunction with the particulars, the notice of civil claim discloses viable causes of action in professional negligence, negligent misrepresentation, and breach of fiduciary duty. However, it does not do so in a manner that is compliant with the *Rules*. Further rigour and particularity must be brought to the plaintiff's pleading.

[69] The notice of civil claim requires amendment to bring it into compliance with the *Rules*. I therefore order that within 30 days, the plaintiff is to file an amended notice of civil claim that complies with Rule 3-1(2) and Rule 3-7, including without limitation, to include a concise summary of material facts in support of, and a proper articulation of the legal basis for, each of the causes of action being advanced.

[70] The plaintiff has not yet utilized the "free" amendment contemplated in Rule 6-1(1)(a) of the *Rules*. The plaintiff is thus able to amend as of right such that leave is not required.

Conclusion

[71] The Fetterly Defendants' application for summary judgment dismissing the claim as against them is dismissed.

[72] The Fetterly Defendants' application to strike the notice of civil claim as against them pursuant to Rule 9-5(1)(a) is also dismissed.

[73] The plaintiff must file an amended notice of civil claim within 30 days.

[74] In my view, the outcome of this application reflects divided success: the Fetterly Defendants' applications for summary judgement and to strike the plaintiff's claim as against them were dismissed. However, the plaintiff's pleadings were nonetheless found to be in need of amendment. Accordingly, costs of this application will be in the cause.

"Hughes J."