

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Sherwood Real Estate Corporation v.
Kingsnorth,*
2026 BCCA 80

Date: 20260227
Docket: CA50780

Between:

Sherwood Real Estate Corporation

Appellant
(Plaintiff)

And

**Steven James Kingsnorth and
Civil-X Contractors Inc.**

Respondents
(Defendants)

Before: The Honourable Mr. Justice Harris
The Honourable Justice Warren
The Honourable Justice Francis

On appeal from: An order of the Supreme Court of British Columbia, dated
May 27, 2025 (*Sherwood Real Estate Corporation v. Kingsnorth,*
2025 BCSC 961, Vancouver Docket S230349).

Counsel for the Appellant:

C.E. Hunter, K.C.
D. Eeg

Counsel for the Respondents:

J.W.T. Robinson

Place and Date of Hearing:

Vancouver, British Columbia
January 30, 2026

Place and Date of Judgment:

Vancouver, British Columbia
February 27, 2026

Written Reasons by:

The Honourable Justice Warren

Concurred in by:

The Honourable Mr. Justice Harris
The Honourable Justice Francis

Summary:

The appellant appeals the summary dismissal of its claim for negligent misrepresentation. It contends the chambers judge erred in: (1) determining there was no genuine issue of the existence of a duty of care by reducing the test for proximity to a question of the expertise of one of the respondents; and (2) misconstruing the representation as pertaining to a non-actionable future occurrence rather than current fact.

Held: Appeal dismissed. The trial judge erred in his duty of care analysis by failing to consider other indicia of proximity that emerge from the record. However, the error was not material because the purpose of the alleged negligent misrepresentation and the purpose of the appellant’s alleged reliance do not align, the alleged reliance falls outside the scope of any proximate relationship, and, therefore, there is no genuine issue as to the existence of a duty of care. In the circumstances, it is not necessary to address the second alleged error.

Reasons for Judgment of the Honourable Justice Warren:

Introduction

[1] Sherwood Real Estate Corporation (“Sherwood”), the plaintiff in the Court below, appeals from an order granting summary judgment against it and dismissing its action in its entirety.

[2] In the action, the appellant sought damages and related relief for negligent misrepresentation and breach of contract. The respondents, Steven James Kingsnorth and Civil-X Contractors Inc. (“Civil-X”), applied for summary judgment pursuant to R. 9-6 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*Rules*], and alternatively, an order striking the claim in its entirety pursuant to R. 9-5. The chambers judge granted summary judgment, finding there to be no genuine issue for trial in relation to either the negligent misrepresentation claim or the breach of contract claim.

[3] The appeal is brought in relation to the negligent misrepresentation claim only.

Background

[4] Sherwood and Civil-X are the shareholders of Civil-X Aggregate Productions Ltd. (“CAP”). Mr. Kingsnorth is the principal of Civil-X and the nephew of Sherwood’s principal, Osvaldo Iadarola.

[5] The genesis of the dispute is a failed joint venture between CAP and OKIB Operations GP Ltd. (the Okanagan Indian Band’s economic development entity) for the extraction and sale of gravel aggregate from a quarry located on Okanagan Indian Band Reserve No. 1 (the “Quarry”).

[6] In early 2021, Sherwood acquired its shares in CAP pursuant to a share purchase agreement (the “Share Purchase Agreement”), and then Sherwood, Civil-X, CAP, Mr. Iadarola, and Mr. Kingsnorth entered into a shareholders operating agreement (the “SHO Agreement”), in anticipation of CAP’s participation in the joint venture.

[7] In June 2020, several months before Sherwood entered into the Share Purchase Agreement and the SHO Agreement, Mr. Kingsnorth and Mr. Iadarola exchanged correspondence about the joint venture opportunity. The negligent misrepresentation claim arose out of this correspondence.

[8] By June 2020, Mr. Kingsnorth had worked in civil construction for about 14 years (since 2006). The joint venture was his first experience working in the gravel industry, but he had previously used aggregates in his civil construction work. He had experience sourcing aggregates for construction projects and in relation to a trucking business he started in 2018.

[9] In early June 2020, Mr. Kingsnorth engaged a materials testing company to visit the Quarry, collect samples, and report on the results. He received the test results on June 23, 2020.

[10] On June 25, 2020, Mr. Kingsnorth sent an email to Mr. Iadarola. At the time, Mr. Kingsnorth owned 51 percent of the shares of CAP, and it appears he controlled the other 49 percent. In the email, Mr. Kingsnorth provided information about the joint venture opportunity to Mr. Iadarola, proposed that Mr. Iadarola buy out CAP's then-49 percent owner for \$2,750,000, and advised, among other things, that:

- (a) He had received a materials report from the Okanagan Indian Band stating that there was “by survey 321,367,568 cubic feet of materials remaining in the pit which is 9,100,116 m³”, not including “already produced products on the ground ready for sales”.
- (b) He had hired a survey drone to fly the site and confirm the volume.
- (c) Using the “low end conversion of m³ into tonnes [of] 1.6 tonnes per m³ ... that would give us [approximately] 14,560,186 tonnes of materials”.
- (d) He was putting a price list together.
- (e) One product, fill sand, sells for about \$3.50 per tonne. This product “is kind of garbage sand materials that are dirty and do not meet any specifications”, but the Quarry does not produce much of this.
- (f) The highest priced product “is going to be [approximately] \$25-28 with a couple products reaching \$35-45 per tonne”.
- (g) The remaining products range from \$8-22 per tonne. Using the \$8 per tonne figure, and accounting for a 10% Government royalty, the 14,560,186 tonnes of material still in the Quarry “= \$104,833,339”, not including production costs.
- (h) “[B]y using the same calculations there is \$9-14M of already produced product on the ground ready for sales, which when using the lower [figure] is \$9,000,000 – Government royalty of 10% = \$8,100,000”. Using the 50/50 joint venture split, this “is \$4,050,000 on the ground with no production costs !!!”.

- (i) He had consulted a third party who “is heavily involved with financing construction/aggregate companies, equipment, set ups, buy/sells etc etc in the gravel and civil industry” to assess the value of the opportunity.
- (j) The third party had advised that “it is very hard to put a number on this as a share sale as things are not finalized”, there had been no “physical monetary sales to date”, and there were no “history books on CAP ... but there is a huge amount of value ...”.
- (k) The third party suggested a sale price of \$3,820,000 for half of CAP, which was also referred to as a “‘sale evaluation’ starting point”. This value reflected CAP’s 50 percent share of the already produced product on the ground (\$4,050,000) plus other value components.
- (l) Despite this evaluation, Mr. Kingsnorth’s asking price for 49 percent of the shares in CAP was \$2,750,000.

[11] The same day, June 25, 2020, Mr. Iadarola replied with a counterproposal. Among other things, he wrote that:

- (a) “Evaluations vary widely from one method to another, especially for a new company ...”.
- (b) He did not “question [the] tonnage valuation” but said the expenses and taxes may be underestimated.
- (c) He valued CAP at “\$2.5M with a minimum of \$500K working capital” and therefore he would pay “\$1.250M including ½ the working capital” for a 49 percent or 50 percent interest in CAP.

[12] Negotiations between the parties continued. Ultimately, Sherwood entered into the Share Purchase Agreement and paid \$1.25 million to acquire 50 percent of the shares in CAP. Sherwood contributed a further \$375,000 over the following months.

[13] The SHO Agreement was made as of January 29, 2021. The recitals to the SHO Agreement provide that Sherwood and Civil-X each held 100 shares of CAP, and that Sherwood, Civil-X, and CAP “desire to enter into [the SHO Agreement] in order to record their respective rights and obligations regarding certain aspects of [CAP’s] management and regarding certain arrangements for the purchase and sale of their respective interests in [CAP]”.

[14] On January 13, 2023, Sherwood filed a notice of civil claim against Mr. Kingsnorth and Civil-X seeking damages for negligent misrepresentation and alleging that it “entered into the SHO Agreement in CAP based on representations made by [Mr. Kingsnorth and Civil-X] that induced [it] to invest and purchase shares in CAP”. It also alleged breach of the SHO Agreement.

[15] The order under appeal was the result of the respondents’ third application to dismiss the claim. The first was an application to strike the claim pursuant to R. 9-5(1), which was heard by Associate Judge Robinson on March 13, 2024: reasons indexed as 2024 BCSC 591 (unreported). Associate Judge Robinson found significant deficiencies in the notice of civil claim in respect of both the negligent misrepresentation and breach of contract claims but granted Sherwood leave to amend.

[16] Sherwood filed an amended notice of civil claim on April 15, 2024. It is a peculiar feature of this case that in this version of its pleading, Sherwood deleted the allegation that the alleged misrepresentation induced it to “invest and purchase shares in CAP”, such that the only allegation of reliance is that the alleged misrepresentation induced it to enter into the SHO Agreement. This is a feature to which I will return.

[17] The respondents’ second application to strike pursuant to R. 9-5(1) was heard by Justice Chan on November 4, 2024, which was to have been the first day of the trial: reasons indexed as *Sherwood Real Estate Corporation v. Civil-X Contractors Inc.* (8 November 2024), Vancouver Docket S230349 (B.C.S.C.). Justice Chan adjourned the trial. She identified continuing deficiencies in the appellant’s pleading

in relation to the negligent misrepresentation claim. Specifically, she observed that the amended notice of civil claim did not set out the material facts supporting a duty of care, it was not clear what the relationship of proximity was alleged to be between the parties, there was no explicit pleading that the representations were false, and there was no specificity as to how the representations were alleged to be false. She advised that it appeared to her that Sherwood intended to claim that Mr. Kingsnorth and Civil-X were industry experts and Sherwood was an investor without industry experience, and she noted that the details of such a relationship ought to be pleaded.

[18] Sherwood filed a second amended notice of civil claim on December 9, 2024 (the “SANOCC”). As discussed in more detail later, the SANOCC remains deficient. In particular, there is no express allegation to the effect that the respondents or one of them undertook to represent a state of affairs with the intention of inducing the appellant to enter into the SHO Agreement (or for any other purpose). The central allegations, for the purpose of this appeal, are the following:

- Mr. Kingsnorth has over 18 years’ experience in the civil construction and gravel industry and is Mr. Iadarola’s nephew: at para. 7.
- Sherwood entered into the SHO Agreement “based on” a representation made by the respondents, which Sherwood “relied upon [and] which induced [Sherwood] to enter into the ... SHO Agreement to its detriment”: at paras. 5, 13, 13(a), 13(e), and 16.
- The representation (referenced twice in the pleading) was made in the June 25, 2020 email: at paras. 13(a) and 13(e).
- The representation was that there was \$9 million to \$14 million of already produced “product on the ground ready for sales, which when using the lower \$9 million – Government royalty of 10% = \$8,100,000 and using the JV [joint venture] split of 50/50 is \$4,050,000 of already produced product on the ground with no production costs”: at paras. 13(a) and 13(e).

- The representation was false “as there never was \$9 to \$14 million of product on the ground ready for sales and furthermore when using the \$9 million amount and considering the JV [joint venture] split of 50/50 ... there never was ... \$4,050,000 of already produced product on the ground with no production costs”: at para. 19.
- The respondents “ought to have reasonably foreseen that [Sherwood], would rely on the [representation] because the [respondents] had experience in the civil construction and aggregate industry, furthermore [Mr. Kingsnorth] is [Mr. Iadarola’s] nephew which constitute[s] a special relationship in the circumstances ...”: at para. 19A.
- Sherwood’s reliance on the representation “would be reasonable in the circumstances, as the [respondents] had the Gravel industry experience”: at para. 19B.
- A reasonable party in Sherwood’s position “would have been led or induced by the [representation] to believe that it had the assurance of the [respondents] taking reasonable care, equivalent in weight to the [representation]”: at para. 19C.

[19] I emphasize that the SANOCC continues to claim that Sherwood was induced by the alleged misrepresentation to enter into the SHO Agreement and there continues to be no allegation to the effect that the alleged misrepresentation induced Sherwood to invest in the joint venture by purchasing shares in CAP.

[20] The respondents’ third application was heard on April 24, 2025. As noted, the chambers judge granted summary judgment and dismissed Sherwood’s action under R. 9-6, finding there to be no genuine issue for trial in relation to either the negligent misrepresentation claim or the breach of contract claim.

[21] Sherwood appeals that order in relation to the negligent misrepresentation claim alone, arguing that the judge erred in two ways: (1) by reducing the analysis of proximity for the purpose of establishing a duty of care to a question of Mr. Kingsnorth’s expertise in valuing gravel; and (2) by misreading the alleged misrepresentation as pertaining to future events and not present facts.

Decision of the Chambers Judge

[22] The reasons for judgment of the chambers judge are indexed at 2025 BCSC 961 (“RFJ”). As the appeal is confined to the dismissal of the negligent misrepresentation claim, I will review only the portions of the RFJ pertaining to that claim.

[23] The judge summarized the events giving rise to the litigation, and at para. 7 of the RFJ, set out the alleged misrepresentation, quoting from the June 25, 2020, email:

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 [joint venture] split 50/50 is \$4,050,000 on the ground with no production costs ...

[24] The judge reviewed the procedural history of the litigation, including the deficiencies in the appellant’s pleading in respect of the negligent misrepresentation claim that had been identified by Justice Chan, her observation that Sherwood appeared to be alleging that the respondents were industry experts and Sherwood was an unknowledgeable investor, and her observation that the details of the relationship supporting a duty of care ought to be pleaded.

[25] The judge identified the test for summary dismissal under R. 9-6 and the legal principles applicable to the application of that test. He identified the constituent elements of the tort of negligent misrepresentation as set out in *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 at 110, 1993 CanLII 146 [*Cognos*]. He noted that the Supreme Court of Canada revisited the first element (a duty of care) in *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63 [*Livent*] and that the Court

subsequently summarized the analytical shift in *1688782 Ontario Inc. v. Maple Leaf Foods Inc.*, 2020 SCC 35 [*Maple Leaf*]. He quoted paras. 29–33 of *Maple Leaf*, which contains much of that summary.

[26] No issue is taken with the judge’s analysis to this point.

[27] At para. 21 of the RFJ, the judge articulated his task this way:

...I will first consider whether there is a “genuine issue” as to the parties being in a proximate relationship, recognising that I am looking for the “close and direct” relationship that is the “hallmark” of a duty of care, having regard to the “determinative” factors of the defendants’ undertaking and the plaintiff’s reliance: *Livent* at paras. 23, 29-30.

[28] The judge then observed that in response to Justice Chan’s ruling, the appellant had amended its pleading in two respects: first, to allege Mr. Kingsnorth’s experience in the civil construction and gravel industry, and second, to allege that he is Mr. Iadarola’s nephew. The judge referred to the pleading as “seem[ing] to be leading in the direction of the ‘industry expert-unknowledgeable investor’ theory of proximity raised by Justice Chan”: RFJ at para. 24. He found that Mr. Kingsnorth’s evidence undermined the foundation for such a theory, and the evidence relied on by Sherwood was limited to establishing, at best, that Mr. Kingsnorth had gravel operations experience. He observed there was no evidence, or pleading, that Mr. Kingsnorth had particular skill or knowledge in the valuation of gravel. He concluded that “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”: RFJ at para. 26.

[29] The judge found that the nephew-uncle relationship “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”: RFJ at para. 27.

[30] The judge “accordingly conclude[d] 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”: RFJ at para. 28.

[31] While acknowledging it was not strictly necessary to do so, the judge went on to find what he characterized as “at least one other fatal flaw in the ... negligent misrepresentation claim”: RFJ at para. 29.

[32] In this regard, the judge cited *PD Management Ltd. v. Chemposite Inc.*, 2006 BCCA 489 at para. 14 for the proposition that an alleged misrepresentation must pertain to a matter of fact and not to a future occurrence or conduct. He observed that “[o]n its face, [the representation] certainly could be construed as a representation of existing fact” but “when placed in the context of the rest of Mr. Kingsnorth’s email, a different picture emerges”: RFJ at para. 30. He then excerpted the part of the June 25, 2020 email directed to calculations about the aggregate at the Quarry and concluded that “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 ...”: RFJ at para. 31.

[33] As, in the judge’s view, “the representations are best understood as a forecast of future profitability of the venture”, he concluded that the representation pleaded was not an actionable representation that could ground a claim in negligent misrepresentation, and this was “another basis on which the claim in negligent misrepresentation must be dismissed under Rule 9-6”: RFJ at para. 32.

Grounds of Appeal

[34] The appellant submits the chambers judge erred:

- (a) in law, by reducing the test for proximity to a question of whether Mr. Kingsnorth had expertise in valuing gravel; and
- (b) in law, or alternatively in fact, by misreading the representation as pertaining to a future occurrence rather than current fact.

Standard of Review

[35] On a summary judgment application, a judge’s decision of whether there is a genuine issue for trial is a matter of mixed fact and law. Unless the appellant establishes an extricable question of law (assessed for correctness), the standard of review is palpable and overriding error: *Wilkinson v. Chartier*, 2025 BCCA 53 at para. 36; *Lyons v. Canadian Imperial Bank of Commerce*, 2025 BCCA 22 at para. 12.

Discussion

[36] The appellant must prevail in relation to both alleged errors to succeed on the appeal.

[37] In my view, the judge’s proximity analysis reflects an error attracting the palpable and overriding standard of review. As elaborated on below, the judge overlooked the contextual circumstances in which the June 25, 2020 email was sent. While not specifically pleaded (as they should have been), those contextual circumstances emerge from the email itself, which was in the application record. The judge was required to consider those contextual circumstances in assessing proximity. However, this error was not material because the judge’s conclusion that there is no genuine issue as to the existence of a duty of care was correct, albeit for a reason he did not identify. In the circumstances, it is not necessary to consider the second ground of appeal. I would dismiss the appeal.

[38] There is no dispute between the parties about the constituent elements of the tort of negligent misrepresentation or the law applicable to determining whether the duty of care element has been established.

[39] As the chambers judge observed, the elements of the tort were set out by Justice Iacobucci in *Cognos* at 110:

- 1) There must be a duty of care based on a “special relationship” between the representor and the representee.

- 2) The representation must be untrue, inaccurate, or misleading.
- 3) The representor must have acted negligently in making the representation.
- 4) The representee must have reasonably relied on the representation.
- 5) The reliance must have been detrimental to the representee.

[40] As the judge noted, the Supreme Court of Canada revisited the first element (a duty of care) in *Livent* and subsequently summarized the analytical shift in *Maple Leaf*. The principles that emerge from those cases that are relevant in this case may be summarized as follows:

- The analytical framework governing cases of negligent misrepresentation or performance of a service has been brought into accord with the two-stage *Anns/Cooper* framework laid out in *Cooper v. Hobart*, 2001 SCC 79: (1) whether the relationship between the parties gives rise to a *prima facie* duty of care; and (2) whether policy concerns negate the duty of care.
- Under the *Anns/Cooper* framework, a *prima facie* duty of care is established by “the conjunction of proximity of relationship and foreseeability of injury”. Foreseeability alone is insufficient; a duty arises only where there is a relationship of proximity: *Maple Leaf* at para. 30.
- In cases of negligent misrepresentation or performance of a service, proximity is more usefully considered before foreseeability because what a defendant reasonably foresees as flowing from their negligence depends on the characteristics of their relationship with the plaintiff, and specifically, the purpose of the defendant’s undertaking of responsibility: *Livent* at para. 24.

- A party may seek to base a finding of proximity upon a previously established or analogous category but where no such category is identified, “courts must undertake a full proximity analysis to determine whether the *close and direct* relationship — which [the Supreme Court of Canada] has repeatedly affirmed to be the hallmark of the common law duty of care — exists in the circumstances of the case ...”: *Maple Leaf* at para. 31 (italics in original).
- The full proximity analysis requires courts to examine all relevant factors arising from the relationship between the parties. These factors are diverse and depend on the circumstances of each case: *Livent* at para. 29.
- In cases of pure economic loss arising from negligent misrepresentation or performance of a service, two factors are determinative in the proximity analysis: the defendant’s undertaking and the plaintiff’s reliance. Where 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: *Livent* at para. 30; *Maple Leaf* at para. 32.
- It is the intended effect of the defendant’s undertaking upon the plaintiff’s autonomy that brings the defendant into a relationship of proximity with the plaintiff and gives rise to the plaintiff’s right to rely on the defendant’s undertaking, but “only so far as the undertaking goes”: *Maple Leaf* at paras. 34–35. Reliance falling outside the purpose for which a representation was made or service undertaken falls outside the scope of the proximate relationship and the duty of care: *Livent* at para. 31.
- Put another way, reasonableness and foreseeability are informed by the proximate relationship in the sense that the purpose underlying the undertaking and the corresponding reliance limit the type of injury which

could be reasonably foreseen (*Livent* at paras. 34–35). Reliance that exceeds the purpose of the defendant’s undertaking is not reasonable and therefore not foreseeable: *Maple Leaf* at para. 35.

- In other words, “an undertaking of responsibility, where it induces foreseeable and reasonable reliance, is formative of a *relationship* of proximity between two parties”: *Maple Leaf* at para. 38 (italics in original). Determining whether the reliance is reasonable and foreseeable requires consideration of the purpose of the undertaking. Reliance that falls outside the purpose of the undertaking is neither foreseeable nor reasonable and “therefore does not connote a proximate relationship” (*ibid*).

[41] In summary, a *prima facie* duty of care is established by the “conjunction of proximity of relationship and foreseeability of injury”. This occurs where an undertaking of responsibility induces foreseeable and reasonable reliance. Reliance falling outside the scope and purpose of that representation is neither reasonable nor foreseeable and therefore does not connote a proximate relationship.

[42] The judge’s conclusion that there was no genuine issue as to the existence of a duty of care flowed from his determination that neither Mr. Kingsnorth’s experience in gravel operations nor the nephew/uncle relationship amounted to the kind of undertaking of responsibility that characterizes a proximate relationship. In my view, no error of law emerges from his analysis. He cited the relevant jurisprudence and articulated his task with reference to the correct legal test: that is, whether there is a genuine issue as to the existence of “the ‘close and direct’ relationship that is the ‘hallmark’ of a duty of care, having regard to the ‘determinative’ factors of the defendants’ undertaking and the plaintiff’s reliance”: RFJ at para. 21. The judge cited *Livent* at paras. 23, 29–30, as supportive of this articulation of his task. As noted, in para. 29 of *Livent*, the Court instructed that where an established or analogous proximate relationship does not exist, courts must examine all relevant, case-specific factors in determining whether that “close and direct relationship” exists. Thus, I

disagree with the appellant's submission that the judge erred *in law* by reducing the test for proximity to a question of Mr. Kingsnorth's expertise.

[43] The difficulty with the judge's proximity analysis is that in applying that test he overlooked some relevant factors; namely, the contextual circumstances that emerge from Mr. Kingsnorth's June 25, 2020 email to Mr. Iadarola.

[44] The judge's task was complicated by the way the SAN OCC is drafted. In particular, it fails to comply with R. 3-7(2) and R. 3-7(18) of the *Rules*. Rule 3-7(2) provides, in part, that the effect of a document referred to in a pleading, if material, must be stated briefly. Rule 3-7(18) provides that if a party relies on misrepresentation, among other things, "full particulars ... must be stated in the pleading". The appellant's position on the proximity issue hinges on the June 25, 2020 email having a certain effect, but this effect was not expressly stated in the SAN OCC. The appellant asks the Court to draw from that email material facts and particulars that ought to have been specifically pleaded.

[45] It appears that these deficiencies in the SAN OCC led the judge to focus only on the circumstances that were expressly pleaded as supporting a finding of the requisite "close and direct" relationship; specifically, Mr. Kingsnorth's experience and the familial relationship. However, the existence of the email, as the means by which the representation was made, was pleaded and the email itself was in the record.

[46] It is well-established that the bar on an application for summary judgment pursuant to R. 9-6 is high: to grant summary judgment, a judge must be satisfied "beyond a reasonable doubt" that there is "no genuine issue" for trial: *Beach Estate v. Beach*, 2019 BCCA 277 at para. 65.

[47] Given that high bar, the judge ought to have considered the context of the email in determining whether there was a genuine issue as to the existence of a duty of care, as he did when considering whether the alleged misrepresentation pertained to a matter of current fact or to a future occurrence. He erred in limiting his consideration to Mr. Kingsnorth's experience and the familial relationship and

not considering other indicia of proximity that, although not expressly pleaded, emerge from the text of the email. These include (quoted phrases were drawn from the appellant's factum):

- Mr. Kingsnorth was providing information to Mr. Iadarola about the nature of the joint venture opportunity.
- Mr. Kingsnorth was seeking to “induce Mr. Iadarola’s investment”.
- The investment was to take the form of a purchase of half the shares in CAP.
- Mr. Kingsnorth had a financial interest in the matter about which the representation was made.
- Mr. Kingsnorth made the representation in the course of business, deliberately, and not on a social occasion.
- Mr. Kingsnorth portrayed himself as having at least some special knowledge about the nature and scope of the investment opportunity, and he had done or was doing research about the opportunity.
- The email referenced earlier discussions between the parties suggesting that the representation may have been made in response to a specific enquiry.
- Mr. Kingsnorth “pitched CAP” as a long-term opportunity.
- Mr. Kingsnorth highlighted his own reputation.

[48] These contextual circumstances, considered together with the expressly pleaded details concerning Mr. Kingsnorth’s experience and the familial relationship, could imply that, in sending the email, Mr. Kingsnorth undertook to represent a state of affairs with the intention of inducing Mr. Iadarola/Sherwood to invest in the joint venture by purchasing shares of CAP. There was at least a reasonable doubt about

that: see *Hayes v. Schimpf*, 2005 BCCA 568, where very similar circumstances resulted in a finding of proximity.

[49] The difficulty for the appellant is that a consideration of the contextual circumstances that emerge from the email reveals that there is no correspondence between the pleaded purpose of the appellant’s reliance and the apparent purpose of Mr. Kingsnorth’s representation.

[50] In its factum, the appellant addressed reliance in these terms:

If proximity is established, the next question is reasonable foreseeability. Here *losing an investment* was clearly a foreseeable consequence of relying on negligent statements in a communication made to the plaintiff to *induce their investment*. And the contrary was never pleaded or argued by the defendants.

[Emphasis added, internal footnote omitted.]

[51] In their factum, the respondents observed that, while the appellant’s factum argues Mr. Kingsnorth sought to induce Mr. Iadarola’s investment, the only pleaded act of reliance is entry into the SHO Agreement. The respondents argued that the absence of correspondence between the purpose of the undertaking and the purpose of the reliance “reinforces the judge’s conclusion that there was no genuine issue for trial on the issue of duty of care”.

[52] I agree with the respondents that the requisite correspondence between the purpose of the undertaking and the scope of the alleged reliance necessary to establish a *prima facie* duty of care is missing. In the absence of a pleading alleging this conjunction of circumstances there is no genuine issue as to the existence of a duty of care.

[53] As noted in *Canada (Attorney General) v. Lameman*, 2008 SCC 14 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”: see also *Sakwi Creek Hydro Limited Partnership v. Dickin*, 2023 BCCA 188 at para. 25.

[54] The June 25, 2020 email makes clear, beyond doubt, that the “investment” Mr. Kingsnorth was promoting to Mr. Iadarola was the purchase of shares in CAP. The purpose of his undertaking to represent a state of affairs concerning the Quarry was to induce Mr. Iadarola to purchase 49 percent of the shares in CAP. There is nothing in the SANOCC or in any of the other material in the record that suggests or even hints that Mr. Kingsnorth’s purpose in making the alleged misrepresentation was to induce Sherwood to enter into the SHO Agreement.

[55] Despite its deficiencies, the SANOCC makes clear, beyond doubt, that the detrimental reliance alleged by Sherwood is not the purchase of the shares in CAP but rather the entering into of the SHO Agreement. Not only does the SANOCC expressly and repeatedly state that the appellant relied on the representation to its detriment in entering into the SHO Agreement, an allegation in a previous iteration that the representation induced the appellant to “invest and purchase shares in CAP” was deleted. This reflects a considered decision to restrict the detrimental reliance allegation to a claim that the alleged misrepresentation induced the appellant to enter into the SHO Agreement.

[56] The detrimental reliance alleged in the SANOCC (entering into the SHO Agreement) falls outside the scope of the undertaking implicitly alleged in the SANOCC (to induce Mr. Iadarola/Sherwood to purchase shares in CAP). In the result, despite the error in the judge’s proximity analysis, there is no genuine issue as to the existence of a duty of care that could ground liability for the alleged detrimental reliance. Put another way, there is no genuine issue for trial about whether Mr. Kingsnorth undertook to represent a state of affairs with the intention of inducing Mr. Iadarola to enter into the SHO Agreement. Were the negligent misrepresentation claim allowed to proceed to trial, it would surely fail on this ground.

[57] For these reasons, I would dismiss the appeal.

Disposition

[58] The appeal is dismissed.

“The Honourable Justice Warren”

I AGREE:

“The Honourable Mr. Justice Harris”

I AGREE:

“The Honourable Justice Francis”