

**CITATION:** TDCI Bracebridge Inc. v. Sheppard, 2025 ONSC 2944  
**COURT FILE NO.:** CV-17-00011833-00CL  
**DATE:** 20250516

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** TDCI Bracebridge Inc., Beaver Valley Holdings Limited, and Premiere Self Storage Inc., Plaintiffs

**AND:**

Thomas Sheppard and Heel Strike Corporation, Defendants

**BEFORE:** Cavanagh J.

**COUNSEL:** *K. Fisher and K. Mooibroek*, for the Plaintiffs

*Michael Kestenberg*, for the Defendants

**HEARD:** January 9, 2025

**ENDORSEMENT**

**Introduction**

[1] The plaintiffs are TDCI Bracebridge Inc. ("TDCI"), Beaver Valley Holdings Limited ("BVHL") and Premiere Self Storage Inc. ("Premiere"). BVHL's sole officer and director is Grace Adshade ("Adshade"). Premiere is wholly owned by BVHL and its sole officer and director is Adshade. Adshade is the sole shareholder, officer and director of TDCI.

[2] The defendant Thomas Sheppard ("Sheppard") is a lawyer who was legal counsel for TDCI in respect of seven mortgage loan transactions for mortgages registered against title to a development property owned by TDCI in Bracebridge, Ontario (the "Property"). Sheppard is the principal of the defendant Heel Strike Corporation ("Heel Strike").

[3] The plaintiffs plead that when the property was acquired by TDCI in 2009, Adshade, through BVHL, was a 50% owner of the shares of TDHI and Clive Figueira ("Figueira") was the owner of the other 50% interest.

[4] The plaintiffs plead that Figueira engaged in wrongful conduct in relation to them including by (i) failing to arrange for BVHL's 50% shares of TDCI to be reissued to it following a mortgage refinancing transaction, (ii) diverting to himself and others at his direction money that belonged to TDCI, (iii) failing to ensure that a mortgage on the Property was assigned to BVHL and allowing other mortgages to have priority over this mortgage, and (iv) wrongfully causing TDCI to take out additional mortgages against the Property.

[5] The plaintiffs plead that Sheppard breached his duties to them by knowingly participating with Figueira in his wrongful conduct and allowing himself to be a dupe for Figueira.

[6] In this action, the plaintiffs claim damages against Sheppard for negligence, breaches of duties of good faith, breaches of fiduciary duties, acting in conflict of interest, self-dealing, acting without proper instructions or authority, deceit and bad faith.

[7] The plaintiffs also claim against Heel Strike Corporation ("Heel Strike"). They allege that Heel Strike received approximately \$160,000 from mortgage advances made to TDCI from Sheppard's trust account and that Heel Strike has been unjustly enriched by receipt of these funds.

[8] Premiere was a tenant at the Property. Premiere claims damages in negligence related to the loss of its business interests and assets when the Property was sold after TDCI was placed in receivership.

[9] The defendants move for summary judgment dismissing the plaintiffs' claims against Sheppard on the ground that there is no genuine issue requiring a trial in relation to their defence that the claims are statute barred.

[10] The defendants also move for summary judgment dismissing the plaintiffs' claims (i) in relation to amounts received by Heel Strike, and (ii) in relation to the negligence claim by Premiere. The defendants separately move in respect of these claims on the ground that there is no genuine issue requiring a trial on the factual and legal merits of these claims.

[11] For the following reasons:

- (a) The defendants' motion for summary judgment dismissing the plaintiffs' claims against Sheppard on the ground that there is no genuine issue requiring a trial in relation to the defendants' defence that such claims are statute barred is dismissed.
- (b) The defendants' motion for summary judgment dismissing the plaintiffs' claim in respect of payments made to Heel Strike is granted.
- (c) The defendants' motion for summary judgment dismissing the claim by Premiere for damages in negligence related to the loss of its business interests and assets is granted.

### **Background Facts**

[12] In or about 2009, TDCI acquired the Property from Dura Automotive Systems (Canada) Ltd. ("Dura"). Mortgage financing was provided by a private lender and a vendor takeback mortgage from Dura.

[13] In 2009, BVHL was a 50% shareholder of TDCI along with Figueira. Adshade was an officer and director of TDCI, along with Figueira. By July 2011, Adshade was not an officer or director of TDCI.

[14] By July 2011, the initial mortgage financing used to acquire the Property was due and payable and refinancing was required.

[15] By October 2011, BVHL's shares in TDCI were transferred to Carol Tarback ("Tarback") (who was Figueira's wife). This was done so that Adshade could avoid providing a guarantee for third-party financing.

[16] In December 2011, Figueira contacted Sheppard to discuss mortgage refinancing for the Property. TDCI retained Sheppard in or about December 2011.

[17] Sheppard acted for TDCI in respect of seven loans involving TDCI and the Property from January 2012 to and including April 2014. Sheppard took instructions from Figueira.

[18] TDCI required financing to re-finance the existing first mortgage. The VTB mortgage was settled with the mortgagee who agreed to accept payment of \$350,000. TDCI had obtained legal advice that if the Dura Mortgage was discharge in consideration of the payment of \$350,000, the difference between the face value of the mortgage (approximately \$1.7 million) and the amount paid (\$350,000) would be treated as income for tax purposes. Accordingly, TDCI had been advised that for tax reasons it was preferable to arrange for the assignment of the Dura mortgage, rather than its discharge.

[19] In December 2011, Sheppard arranged to introduce Figueira to Mel Eisen ("Eisen") who was an individual who Sheppard knew arranged private mortgages.

[20] After Sheppard had arranged the introduction between Figueira and Eisen, TDCI and Eisen reached an agreement on terms by which Eisen would arrange to provide TDCI with \$3.5 million to be secured by a mortgage for a two-year term.

[21] The January 2012 Eisen mortgage financing was completed on or about January 25, 2012, and a first mortgage in the principal amount of \$3.5 million was registered against the Property in favour of Eisen in trust as mortgagee, among other security. As part of this transaction, Adshade agreed to cancel her shares in TDCI because she was told by Figueira that if the mortgage lender became aware of her involvement, he would require a personal guarantee from her. Her evidence is that the shares were to be re-issued after closing of the re-financing transaction. Adshade's evidence is that Figueira told her that he would transfer the Dura mortgage to BVHL as partial security for the amounts that BVHL had advanced to TDCI.

[22] Adshade, BVHL and Premiere commenced an application for remedies for oppression against TDCI, Figueira and Tarback in 2014. A receiver was appointed on February 27, 2015. The Property was sold on July 30, 2015.

[23] This action was commenced by a statement of claim that was issued on June 13, 2017.

## Analysis

[24] Rule 20.01(3) of the *Rules of Civil Procedure* provides that a defendant may, after delivering a statement of defence, move with supporting affidavit material or other evidence for summary judgment dismissing all or part of the claim in the statement of claim.

[25] Rule 20.04(2)(a) of the *Rules* provides that the court shall grant summary judgment if the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence.

[26] In *Hryniak v. Mauldin*, 2014 SCC 7, the Supreme Court of Canada, at paras. 49 and 66, addressed (i) when there will be no genuine issue requiring a trial, and (ii) the proper approach to be taken on a motion for summary judgment:

[49] There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

...

[66] On a motion for summary judgment under Rule 20.04, the judge should first determine if there is a genuine issue requiring trial based only on the evidence before her, *without* using the new fact-finding powers. There will be no genuine issue requiring a trial if the summary judgment process provides her with the evidence required to fairly and justly adjudicate the dispute and is a timely, affordable and proportionate procedure, under Rule 20.04(2)(a). If there appears to be a genuine issue requiring a trial, she should then determine if the need for a trial can be avoided by using the new powers under Rules 20.04(2.1) and (2.2). She may, at her discretion, use those powers, provided that their use is not against the interest of justice. Their use will not be against the interest of justice if they will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole.

[27] I first address the plaintiffs' claims against Sheppard which the defendants submit are statute barred because the plaintiffs discovered their claims against him more than two years before the action was commenced. They submit that there is no genuine issue requiring a trial in relation to their limitation period defences.

[28] In support of their submission that the plaintiffs' claims are statute barred, the defendants rely on evidence of the knowledge of Adshade, the principal of BVHL and Premiere and who, indirectly, claimed a 50% beneficial interest in TDCI through shares that, the plaintiffs claim, were to have been reissued to BVHL.

[29] In the *Limitations Act*, 2002, a "claim" means a claim to remedy an injury, loss or damage that occurred as a result of an act or omission.

[30] Section 4 of the *Limitations Act*, 2002 provides:

Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.

[31] The *Limitations Act*, 2002 provides:

5(1) A claim is discovered on the earlier of,

(a) the day on which the person with the claim first knew,

(i) that the injury, loss or damage had occurred,

(ii) that the injury, loss or damage was caused by or contributed to by an act or omission,

(iii) that the act or omission was that of the person against whom the claim is made, and

(iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and

(b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).

(2) A person with a claim shall be presumed to have known of the matters referred to in clause (1) (a) on the day the act or omission on which the claim is based took place, unless the contrary is proved.

[32] In *Grant Thornton LLP v. New Brunswick*, 2021 SCC 3, the Supreme Court of Canada addressed the degree of knowledge required under s. 5(2) of the *Limitations Act*, 2002 to discover a claim and trigger the limitation period in s. 5(1)(a) of that statute. The Court, at para. 42, held that "a claim is discovered when a plaintiff has knowledge, actual or constructive, of the material facts upon which a plausible inference of liability on the defendant's part can be drawn". The Court held, at para. 43, that pursuant to s. 5(2), a claim is discovered when the plaintiff has actual or constructive knowledge that (a) the injury, loss or damage occurred, (b) the injury, loss or damage was caused or contributed to by an act or omission, and (c) the act or omission was that of the defendant. The list is cumulative, not disjunctive.

[33] The Court held, at para. 44, that a plaintiff will have constructive knowledge when the evidence shows that the plaintiff ought to have discovered the material facts by exercising reasonable diligence. Suspicion may trigger that exercise. The Court held, at para. 45, that a plausible inference is one which gives rise to a "permissible fact inference".

[34] In *Grant Thornton*, the Supreme Court of Canada held, at para. 46, that the plausible inference of liability requirement ensures that the degree of knowledge needed to discover a claim is more than mere suspicion or speculation. This, the Court held, accords with the principles underlying the discoverability rule, which recognize that it is unfair to deprive a plaintiff from bringing a claim before it can reasonably be expected to know the claim exists. The Court noted that it is well established that the plaintiff does not need to know the exact extent or type of harm suffered, or the precise cause of its injury, in order for a limitation period to run.

[35] The defendants submit that Adshade had significant knowledge by no later than August 2014 of material facts upon which a plausible inference of liability on the part of Sheppard with respect to the plaintiffs' claims may be drawn.

[36] In the statement of claim, the plaintiffs make four claims against Sheppard which arise from his involvement as legal counsel to TDCI. I address the defendants' submission that there is no genuine issue requiring a trial in respect of their defence that each of these claims is statute barred.

***Claim #1: Sheppard breached duties owed by him by failing to ensure that shares of TDCI held by BVHL that were cancelled were reissued to BVHL.***

[37] The plaintiffs plead that Sheppard represented TDCI when it cancelled 50% of the shares in TDCI that were held by BVHL, as part of a mortgage refinancing transaction, for the purpose of avoiding a demand by the lender for Adshade to guarantee the mortgage loan. The plaintiffs allege that these shares were to be reissued to BVHL when the refinancing transaction closed. The plaintiffs plead that Sheppard failed to ensure that TDCI's share registry was rectified after the refinancing transaction closed to reflect the reissuance of shares to BVHL or to properly advise Adshade or BVHL. The plaintiffs claim that Sheppard breached his duties to them in this regard and is liable accordingly.

[38] The evidence shows that Adshade was aware that BVHL had not re-acquired its shares in TDCI following completion of the January 2012 Eisen mortgage transaction.

[39] The question that arises in relation to this claim is whether the evidence shows that Adshade had actual or constructive knowledge prior to June 13, 2015 (two years before the statement of claim was issued) of facts upon which a plausible inference may be drawn that Sheppard, as legal counsel for TDHI, had acted or failed to act in relation to the required reissuance of the shares to BVHL.

[40] Adshade swore an affidavit dated January 31, 2023 in response to this motion. In this affidavit, she gives evidence concerning Sheppard's involvement in cancelling BVHL shares. In paragraph 35 of her affidavit, she deposes that "[b]ased on the documents that have been provided" Sheppard was involved in the transfer of BVHL's shares in or about October 2011. In paragraph 44 of this affidavit, Adshade deposes that Sheppard's involvement with the cancellation of BVHL's shares and his failure to take steps to rectify the share register or properly advise the parties only became known to her after the appointment of the Receiver and the requirement for information and documents to be provided further to the Order of Pattillo J. dated July 10, 2015.

[41] The defendants submit that other paragraphs of Adshade's January 31, 2023 affidavit show that she knew by no later than 2011 of Sheppard's involvement in the share cancellation and that, based on her knowledge as stated in these paragraphs, her assertion that she only discovered his involvement after the receivership and the July 10, 2015 Order is plainly untrue.

[42] The paragraphs upon which the defendants rely for this submission read:

42. It is my belief that Sheppard's allegation that he did not know about the agreement between myself and Figueira respecting the re-transfer of TDCI's shares to BVHL until the application made by BVHL in 2014 is false. Sheppard knew or should have known, that both Tarback and Figueira publically (sic) stated in early 2012 that Tarback held 50% of her shares in trust for me and that I had financed all of the expenses through BVHL to TDCI (to which TDCI was indebted).

43. It is my knowledge and belief that Sheppard was also specifically aware of these facts as TDCI, Figueira and Tarback were defendants in a legal action commenced in November 2011 as court file No. CV-11-9494-00CL, in which these facts were specifically set out as part of their defence in relation to the claims raised in that action. It is my belief that Sheppard was specifically made aware of the legal action and was in direct communication with counsel acting on behalf of TDCI. I have also been advised that the court issued an order in that action which directly related to Sheppard and for disclosure of his file. I have also been advised that Figueira consented to judgment equal to approximately \$400,000 which was supported by a mortgage that was registered on title to the TDCI property. It is my understanding and belief that Sheppard was involved in that as well. I was not made aware of these facts at the time, I was not consulted, nor did I provide consent.

[43] These paragraphs state Adshade's knowledge and belief at the time she swore her January 31, 2023 affidavit concerning Sheppard's knowledge in relation to the circumstances of the cancellation of BVHL's shares in TDCI. Adshade does not state in these paragraphs that she knew in 2011, or at any time prior her receipt of documents following the Order dated July 10, 2015 made in the receivership proceeding, of Sheppard's involvement with the cancellation of BVHL's shares. If Adshade did not know of Sheppard's involvement with the share cancellation until she received documents following the July 10, 2015 Order, she did not have knowledge of an act or omission by Sheppard which caused or contributed to BVHL's loss.

[44] On the evidence before me on this motion, the defendants have not shown that there is no genuine issue requiring a trial in relation to their defence that the plaintiffs' claim in respect of Sheppard's failure to rectify TDCI's share register to reflect reissuance of shares to BVHL is statute barred.

***Claim #2: Sheppard wrongfully participated in diversion to Figueira of funds that belonged to TDCI, through use of Sheppard's trust account.***

[45] The plaintiffs plead that Figueira diverted mortgage proceeds advanced to TDCI through the assistance of Sheppard and with the use of Sheppard's trust account. The plaintiffs plead that

Sheppard knew or ought to have known that Figueira was using Sheppard's trust account to wrongfully divert funds belonging to TDCI to himself, and Sheppard breached his fiduciary duties and other obligations to the plaintiffs by allowing himself to be used as a dupe for Figueira.

[46] The defendants rely on evidence given by Adshade in an affidavit sworn August 28, 2014 in support of an oppression application by her, BVHL, and Premiere against TDCI, Figueira and Tarback. In that affidavit, Adshade deposed that she has learned through documents filed in other litigation, which included a number of records from Sheppard's file for TDCI, that monies paid to TDCI were not accounted for, that money was paid out of Sheppard's trust account based on directions from Figueira over the course of several months, and that it appears that in addition to other amounts wrongfully taken by Figueira, at least \$200,000 was paid directly to Figueira. Adshade deposes that it appears that Figueira took other money from TDCI. She attached as an exhibit to her affidavit a copy of a brief of documents filed in another court proceeding "related to documents from Mr. Sheppard's file for TDCI". Adshade deposes that this brief contains the documents she refers to in earlier paragraphs of her affidavit as to the \$3.5 million financing to TDCI as well as a number of other documents related to the transaction, including the transfer of the Dura mortgage.

[47] In this affidavit, Adshade also made the following statement:

65. ... I now know that Clive was diverting money whenever and wherever he could. It is also now clear to me that he used the tactic of having funds held and disbursed through Mr. Sheppard's trust account as a means to get around the controls I was trying to put in place to track company finances ...

[48] The defendants submit that these statements in Adshade's August 28, 2014 affidavit show that she knew when she swore her affidavit that Figueira was wrongfully diverting money from TDCI and using Sheppard's trust account to do so. The defendants submit that a plausible inference of liability on the part of Sheppard in relation to this claim can be drawn from these facts.

[49] The plaintiffs submit that until they received access to Sheppard's files following the Order of Pattillo J. dated July 10, 2015 in the receivership proceeding, they did not have actual or constructive knowledge that Sheppard, as opposed to Figueira, had committed an act or made an omission so as to give rise to a plausible claim against him for losses resulting from diversion of funds to Figueira from mortgage proceeds advanced to TDCI.

[50] The statements made in Adshade's August 28, 2014 affidavit show that when it was sworn, Adshade had knowledge of facts which give rise to a plausible claim against Figueira. But her knowledge of these facts must not be conflated with knowledge of facts which give rise to a plausible claim against Sheppard.

[51] Sheppard gives evidence in his affidavit sworn in support of this motion that when he agreed to act on TDCI's behalf, he took instructions from Figueira, including in respect of disbursement of mortgage proceeds from his trust account. The fact that Sheppard disbursed funds from his trust account on the instructions of Figueira does not, without more, allow a plausible inference to be drawn that Sheppard knew that Figueira was wrongfully diverting funds from TDCI

or that Sheppard allowed himself to be used as a dupe for Figueira, as pleaded. The defendants have not shown that Adshade had knowledge of facts when her August 2014 affidavit was sworn upon which a plausible inference of liability against Sheppard in respect of this claim can be drawn.

[52] The defendants have not shown that there is no genuine issue requiring a trial in relation to their defence that the plaintiffs' claim against Sheppard in respect of diversion of funds to Figueira using Sheppard's trust account is statute barred.

***Claim #3 - Sheppard failed to ensure that the Dura mortgage was transferred to BVHL and he allowed the postponement of the Dura mortgage to other Eisen mortgages.***

[53] The plaintiffs plead that a second mortgage registered on title to the Property in the principal amount of \$1,700,000 (the "Dura mortgage") was assigned by the mortgagee, Dura, to Sheppard, in trust for Tarback, and then to Tarback, in exchange for payment of \$350,000 of TDCI's funds. They allege that this was done with Sheppard's assistance by way of a trust agreement prepared by Sheppard. The plaintiffs allege that the Dura mortgage was to have been transferred to BVHL in January 2012 as security for indebtedness owed to it, and that the Dura mortgage was improperly postponed to four additional mortgages in favour of Eisen, with the result that by the time that the Dura mortgage was transferred to BVHL, the Property had insufficient value to support payment of the indebtedness secured by the Dura mortgage. The plaintiffs plead that Sheppard completed the transactions to postpone the Dura mortgage and registered the additional Eisen mortgages. The plaintiffs hold Sheppard liable for his failure to transfer the Dura mortgage to BVHL in January 2012 and the losses sustained by BVHL as a result.

[54] In support of their submission that this claim is statute barred, the defendants rely on statements made by Adshade in her August 28, 2014 affidavit of her knowledge, learned from documents in the brief of documents from Sheppard's file that were filed in other court proceedings, that while the Dura mortgage had been registered in the name of Sheppard, Sheppard had entered into a trust agreement with Tarback whereby he was holding that mortgage on her behalf. She states in this affidavit that neither Tarback nor Figueira had put any money into TDCI; all the funding had come from her through BVHL and the mortgages on the Property. Adshade states that the Dura mortgage should have been held in trust for BVHL or TDCI so that it could pay the debt owed to BVHL.

[55] The defendants submit that Adshade's statements in this affidavit show that she had knowledge of facts in August 2014 that give rise to a plausible claim against Sheppard for acts or omissions in relation to his failure to ensure that the Dura mortgage was transferred to BVHL and for allowing the Dura mortgage to lose priority by subordinating it to other Eisen mortgages.

[56] The plaintiffs acknowledge that Adshade knew that the Dura mortgage was not assigned to BVHL. They submit that Adshade did not, however, have knowledge of facts showing Sheppard's full involvement and knowledge as to the assignment of the Dura mortgage upon which a plausible inference of liability on Sheppard's part could be drawn until his file was obtained in July 2015.

[57] Adshade's knowledge that Sheppard held the Dura mortgage in trust for Tarback and that he did not transfer this mortgage to BVHL do not, without more, give rise to a plausible inference that Sheppard is liable to BVHL for his acts or omissions in this respect. A claim against Sheppard based on these facts alone would not be more than one based on suspicion or speculation.

[58] The defendants also rely on email correspondence between BVHL's lawyer and Sheppard in November 2012. On November 13, 2012, Sheppard received an email from Thomas Baulke ("Baulke") who advised that he acted for BVHL. Baulke informed Sheppard that BVHL would be loaning money to TDCI to enable it to make future mortgage payments due under mortgages registered against the Property. At the time, there were two mortgages registered against the Property, both of which were in favour of Eisen.

[59] By November 2012, the Dura Mortgage had been assigned to Tarback and postponed to two Eisen mortgages.

[60] In January 2013, Adshade and Figueira exchanged emails (copied to both Sheppard and Baulke) respecting the assignment of the Dura mortgage to Tarback.

[61] In her January 5, 2013 email, Adshade wrote:

Everyone: I do not know what information Clive is talking about as we have never discussed this. If it why Carol Tarback has a \$1.7M mortgage on the land when she has put no money into the company, I have asked my lawyer to look in to this matter. My company has invested 2.5m in TDCI and should be entitled to some form of security ...

[62] In his responding email dated January 5, 2013, Figueira wrote:

Grace, There are no secrets here. We have discussed this several times and you are more than aware what has transpired so if Tom (your lawyer) needs any information you can provide to him you have it all. I am not spending any of Tom's [Sheppard's] time (costs) to do this. It's a waste of money, something you know we have everything. Clive

[63] Adshade responded by email dated January 15, 2013:

Clive: My lawyer suggests that you assign the \$1.7M mortgage to Beaver Valley Holdings as collateral for the \$2.5M owed. Don't want to stir things up with Mel Eisen but I must protect my investment and can see no other way of handling this. It would also put Carol in a better position with the Lisa situation, as if the lawyer found out that Carol was possibly getting this money they would have a better case and it could drag on for years. Grace.

[64] This email correspondence shows that by January 2013, Adshade knew that the Dura mortgage had been assigned to Tarback. The correspondence does not show that Adshade knew

facts about Sheppard's knowledge of or involvement with the Dura mortgage upon which a plausible inference of liability on the part of Sheppard in relation to this claim can be drawn.

[65] In Adshade's responding affidavit sworn January 31, 2023, she deposes that it was only determined that the amounts owing under the prior mortgages to the Dura mortgage far exceeded the value of the Property when it was sold through the Receiver. The plaintiffs rely on this evidence and submit that Adshade did not have actual or constructive knowledge that the plaintiffs suffered a loss as a result of the postponement of the Dura mortgage until the Property was sold and a vesting order was made on July 30, 2015.

[66] If I had held that the plaintiffs had actual or constructive knowledge, more than two years before the action was commenced, of material facts upon which a plausible inference that Sheppard committed an act or made an omission that caused or contributed to injury, loss or damage loss by the plaintiffs in respect of the Dura mortgage, I would not conclude that the plaintiffs only discovered that injury, loss or damage occurred when the Property was sold. As noted in *Grant Thornton*, at para. 46, a plaintiff does not need to know the exact extent or type of harm suffered in order for a limitation period to run. The plaintiffs knew before the sale that the subordination of the Dura mortgage to several Eisen mortgages altered its priority position as a second mortgage which resulted in the occurrence of a loss, the extent of which may not have been known until later.

[67] The defendants have not shown that there is no genuine issue requiring a trial in relation to the defendants' defence that the plaintiffs' claim in respect of the Dura mortgage is statute barred.

***Claim # 4 - Sheppard negligently allowed TDCI to obtain mortgages.***

[68] The plaintiffs plead that Sheppard acted without proper instructions and authority and was negligent in relation to each mortgage after the Eisen first mortgage, whereby further mortgage advances were made by Eisen. The plaintiffs allege that Sheppard knew or ought to have known that he was acting without proper authority and that he is liable accordingly in relation to all losses sustained as a result of these further mortgage advances. The plaintiffs plead that Sheppard breached his fiduciary and other duties to the plaintiffs by allowing these mortgage transactions to proceed.

[69] The defendants submit that more than two years before the action was commenced, the plaintiffs knew of Sheppard's involvement on behalf of TDCI in respect of these additional mortgages that were registered against title to the Property. They submit that the plaintiffs thereby had knowledge of the material facts upon which a plausible inference of liability on Sheppard's part can be drawn in relation to his acts or omissions in respect of these mortgage transactions.

[70] The plaintiffs submit that the extent of Sheppard's involvement in TDCI was not known to them until Sheppard's full file was provided to them in July 2015 and that they did not discover this claim until then.

[71] The fact that Sheppard acted for TDCI in relation to the additional Eisen mortgages, which the plaintiffs now allege were unauthorized, is not a fact that, without more, gives rise to a plausible

inference of liability on Sheppard's part in relation to his acts or omissions in respect of these mortgages. On the evidence before me of Adshade's knowledge of facts in respect of the additional Eisen mortgages, I am unable to conclude that Adshade's degree of knowledge of facts in respect of a claim against Sheppard rises to a level that is more than mere suspicion or speculation.

[72] The defendants have failed to show that there is no genuine issue requiring a trial in relation to the defendants' defence that the plaintiffs' claim against Sheppard in respect of the additional Eisen mortgages is statute barred.

***Claim in respect of payments by TDCI to Heel Strike Corporation***

[73] I now turn to the defendants' motion for summary judgment dismissing the plaintiffs' claim against Heel Strike.

[74] The plaintiffs plead that Sheppard breached duties to the plaintiffs by lending money to Figueira through Heel Strike, a company owned and controlled by Sheppard, and by directing payment to Heel Strike of approximately \$160,000 from mortgage advances to TDCI from Sheppard's trust account. The plaintiffs plead that Heel Strike has been unjustly enriched by receipt of this payment as directed by Sheppard and that Sheppard is also liable to the plaintiffs for the full amount he directed be paid to Heel Strike.

[75] The defendants submit that the payments to Heel Strike were for repayment of loans made by Heel Strike to TDCI. The defendants submit that there is no genuine issue requiring a trial in relation to this claim.

[76] In support of this motion, the defendants rely on the affidavit of Sheppard. In this affidavit, Sheppard deposes:

103. Throughout the time that I acted as TDCI's solicitor, Figueira often told me about TDCI'S financial issues.

104. To assist TDCI with some of its short-term cash flow issues, Heel Strike loaned money to TDCI, or for the benefit of TDCI, on an interest free and unsecured basis.

105. Because I am a principal of Heel Strike and because I had acted as TDCI's lawyer, before any loans were made by Heel Strike to TDCI I advised Figueira, who was TDCI's president, that he should seek independent legal advice ("ILA") in relation to the loans.

106. Figueira declined my recommendation for TDCI to obtain ILA respecting loans by Heel Strike to TDCI or on behalf of TDCI. Accordingly, TDCI executed an Acknowledgement and Waiver of ILA respecting loans made by Heel Strike, Attached and marked as Exhibit "T" are copies of the ILA Waivers, along with loan statements and copies of cheques. The Directions to pay as applicable are included

in the Exhibits respecting payments made by me from net proceeds of the various mortgage loans described above.

107. The Plaintiffs allege (at paragraph 53 of the Statement of Claim) that I paid \$160,000 to Heel Strike from net proceeds of various mortgages provided to TDCI that I had deposited into my trust account. I deny this allegation.

108. As reflected in Exhibit "T", I paid a total of \$122,250 from my trust account to Heel Strike further to directions received from TDCI. ... [table showing five payments totalling \$122,250]

109. These amounts do not reflect all interest free loans made to TDCI or monies paid by Heel Strike on behalf of TDCI. In addition to the sums identified in paragraph 108, I directly, or through Heel Strike, loaned a further \$57,750 to TDCI on an interest free and unsecured basis. TDCI directly repaid \$31,500; however, \$26,250 (representing a mortgage interest payment made by Heel Strike to Eisen to replace a bounced TDCI cheque) was never repaid. Attached and marked as Exhibit "U" are copies of the ILA Waivers, loan statements or evidence of advance and copies of the two (2) cheques evidencing repayment of \$31,500.

[77] In Adshade's affidavit in response to this motion, she states that, based on information obtained by the Receiver, Sheppard directed Heel Strike Corporation to be paid approximately \$160,000 from the mortgage advances to TDCI from Sheppard's trust account. Adshade does not address the evidence given by Sheppard in his affidavit that loans were made by Heel Strike to TDCI and that TDCI used funds received from mortgage advances to repay the loans, in part.

[78] The defendants submit that Sheppard's evidence is supported by documents, including waivers of independent legal advice which reference loans and loan statements from Heel Strike. The defendants submit that Sheppard's evidence has not been contradicted or undermined on cross-examination and that the evidence from Adshade does not raise a genuine issue requiring a trial.

[79] The plaintiffs submit that no monies were actually advanced by Sheppard to TDCI, and the repayment of alleged "loans" to Heel Strike were all part of the diversion of funds out of TDCI to the benefit of Figueira and Tarback, with the assistance of Sheppard. The plaintiffs do not accept that Heel Strike made the additional \$30,000 loan and they submit that Sheppard has failed to provide documents to substantiate that payments to Heel Strike were for repayment of loans. The plaintiffs submit that the issues surrounding the Heel Strike loans are genuine issues requiring a trial.

[80] On a motion for summary judgment, the responding party must put their best foot forward. The plaintiffs have provided no evidence that shows that there is a genuine issue requiring a trial in relation to the claim for damages in respect of the payment of \$160,000 to Heel Strike. The evidence before me on this motion shows that Heel Strike made loans to TDCI and that payments were made to Heel Strike in repayment of such loans.

[81] In *Butera v. Chown, Cairns LLP*. [2017] O.J. No. 5267 (C.A.), the Court of Appeal cautioned against motions for partial summary judgment. The defendants' motion is not for partial summary judgment. In *Butera*, the Court of Appeal noted, at para. 35, that where a motion for summary judgment is brought, "to the extent the motion judge considers it advisable, if the motion for summary judgment is not granted but is successful in part, partial summary judgment may be ordered in that context".

[82] In my view, granting summary judgment in respect of the plaintiffs' claim in relation to payments to Heel Strike will not give rise to the risk of inconsistent decisions, where other claims will proceed to trial. The claim in respect of amounts paid to Heel Strike is discrete.

[83] The defendants' motion for summary judgment in respect of this claim should be allowed.

***Claim against Sheppard by Premiere Self-Storage Inc.***

[84] In the statement of claim, the plaintiffs claim damages in negligence in the amount of \$1,000,000 to Premiere related to negligent loss of its business interests and assets. The plaintiffs plead that Sheppard was counsel to and a solicitor acting on matters for TDCI and, at times for Premiere.

[85] In addition to their motion to dismiss Premiere's claim based on expiry of the limitation period, the defendants move to dismiss Premiere's claim on the basis that there is no genuine issue requiring a trial in relation to this claim because it is founded in negligence and there is no basis in the evidence for a finding that Premiere was Sheppard's client or that he owed a duty of care to Premiere.

[86] The plaintiffs plead that Premiere is wholly owned by BVHL and Adshade is its sole officer and director. Premiere was a tenant at the Property.

[87] The plaintiffs plead that Sheppard owed a duty not only to his client, TDCI, but to Premiere and BVHL. The plaintiffs plead that Sheppard was aware or should have been aware of actions taken by Figueira to the detriment of Premiere for which Sheppard provided his assistance in breach of his obligations to Premiere.

[88] The defendants submit that there is no evidentiary basis for a finding that Sheppard was a lawyer representing Premiere or for the imposition on Sheppard of a duty of care to Premiere, a non-client. As a result, the defendants submit that there is no genuine issue requiring a trial in relation to Premiere's claim for negligent loss of its business.

[89] Although the plaintiffs' pleaded that Sheppard, at times, was a lawyer for Premiere, they did not make this submission at the hearing of this motion. They submit that Premiere, a tenant in the Property, lost its business when the Property was sold and that Sheppard should be held liable for damages for such loss.

[90] On the evidence before me, there is no basis for the imposition on Sheppard of a duty of care owed to a non-client, Premiere. I conclude that the defendants have shown that there is no genuine issue requiring a trial in relation to the claim in negligence by Premiere against Sheppard.

[91] I also consider it to be appropriate to grant summary judgment in respect of the claim by Premiere in negligence, which is discrete from the other claims which will proceed to trial.

***Disposition***

[92] For these reasons:

- (a) The defendants' motion for summary judgment dismissing the plaintiffs' action is dismissed, with the exception of the defendants' motion for summary judgment dismissing the plaintiffs' claims in respect of (i) payments to Heel Strike, and (ii) damages in negligence suffered by Premiere related to the loss of its business interests and assets.
- (b) The defendants' motion for summary judgment dismissing the plaintiffs' claim in respect of payments made to Heel Strike is granted.
- (c) The defendants' motion for summary judgment dismissing the claim by Premiere for damages in negligence related to the loss of its business interests and assets is granted.

[93] If the parties are unable to resolve costs, they may make written submissions in accordance with a timetable to be agreed upon by counsel (with reasonable page limits) to be approved by me.

---

Cavanagh J.

**Date:** May 16, 2025