

**CITATION:** Mizrahi v. Rogers, 2025 ONSC 4439  
**COURT FILE NO.:** CV-24-00728675-00CL  
**DATE:** 20250731

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Sam Mizrahi, Mizrahi 128 Hazelton Retail Inc., Sam M (180 SAW) LP Ind., Sam M (180 SAW) Inc., and 1000041090 Ontario Inc., Plaintiffs

**AND:**

Edward S. Rogers III, Robert Hiscox, and Constantine Enterprises Inc., Defendants

**BEFORE:** Cavanagh J.

**COUNSEL:** *Jerome Morse and David Trafford*, for the Plaintiffs

*Eliot Kolers and Nicholas Avis*, for the Defendants

**HEARD:** April 17, 2025

**ENDORSEMENT**

**Introduction**

[1] The Defendants move for an order striking out the Plaintiffs' Amended Statement of Claim, without leave to amend, on the ground that it discloses no reasonable cause of action or on the ground that it is scandalous, frivolous, or vexatious, or an abuse of the court's process.

[2] For the following reasons, I grant the Defendants' motion to strike out the Amended Statement of Claim on the ground that it discloses no reasonable cause of action. I grant leave to the Plaintiffs to amend the Amended Statement of Claim within 45 days.

**Background Facts**

[3] The Plaintiffs filed an Amended Statement of Claim on April 8, 2024.

[4] The Plaintiffs are Sam Mizrahi ("Sam"), Mizrahi 128 Hazelton Retail Inc. ("Retail Inc."), Sam M (180 SAW) LP Inc. ("Sam M Inc."), Sam M (180 SAW) Inc. (Sam M 180 SAW Inc.), and 1000041090 Ontario Inc. ("Mizrahi SPV").

[5] The Defendants are Edward S. Rogers III ("Edward"), Robert Hiscox ("Robert"), and Constantine Enterprises Inc. ("CEI").

[6] I use these abbreviated names, including first names for the individual parties, for clarity, because they are used in the Amended Statement of Claim.

[7] In the Amended Statement of Claim, the Plaintiffs plead that Sam is the principal of Mizrahi Developments Inc. (“MDI”) and MDI is the 50% shareholder of Mizrahi (128 Hazelton) Inc. The Plaintiffs plead that Sam is the principal of Retail Inc., Sam M 180 SAW Inc., and Mizrahi SVP.

[8] In the Amended Statement of Claim, the Plaintiffs plead that Edward is the co-founder of CEI, owns 90% of its shares, and is its directing mind. They plead that Robert is co-founder and CEO of CEI and owns 10% of its shares.

[9] The Plaintiffs’ claim relates to two real estate developments in Toronto – one at 128 Hazelton Avenue and one at 180 Steeles Avenue West.

[10] In the Amended Statement of Claim, Sam claims:

- (a) general damages in the sum of \$50,000,000 for breach of contract, negligence, negligent misrepresentation, breach of fiduciary duty, breach of duty of good faith, unjust enrichment, tortious interference with economic interests and conspiracy to cause economic harm.
- (b) a declaration that (i) he is not indebted to the Defendants or others with respect to the 128 Hazelton project, (ii) he is not indebted to the Defendants or others with respect to the 180 SAW project, (iii) no funds are payable by him to the Defendants.
- (c) a declaration and order for contribution and indemnity in respect of all expenses, losses, damages and liabilities of whatsoever kind in his favour in respect of the 128 Hazelton project and the 180 SAW project.
- (d) Aggravated, exemplary or punitive damages.

[11] In the Amended Statement of Claim, Sam M Inc. and Sam M (180 SAW) Inc. each claim a declaration that it is not indebted to the Defendants or others with respect to the 180 SAW project. Mizrahi SPV claims a declaration that it is not indebted to the Defendants or others with respect to the 128 Hazelton project.

[12] In the Amended Statement of Claim, The Plaintiffs also claim special damages (estimated) in the sum of \$10,000,000.00.

[13] In paragraphs 16-21 of the Amended Statement of Claim, the Plaintiffs plead an Overview of their claims. I reproduce these paragraphs below:

16. This action arises from the Parties' agreement to develop two real estate projects. Sam utilized various corporate entities to undertake the development of the projects and borrow funds and partner with CEI and its related entities who provided capital to the projects. Edward and Robert utilized CEI to fund the projects and partner with SAM and the Sam entities.

17. Edward and Robert conspired to cause CEI and the 180 SAW GP to undertake the projects in a manner intended to harm the economic interests of Sam and the Sam entities and are therefore liable for conspiracy to cause economic harm and tortious interference with economic interests causing Sam and the Sam entities the losses pleaded herein. These losses were also sustained due to CEI's breach of contracts, negligence, breach of fiduciary duty, and breach of the duty of good faith causing Sam and the Sam entities the losses pleaded herein. Sam and the Sam entities were owed fiduciary and good faith duties by CEI and the 180 SAW GP and when breached, unjustly enriched CEI to the detriment of Sam and the Sam entities. These actionable wrongs entitle the Plaintiffs to the declaratory relief sought.

18. The Defendants knew CEI, not Sam, would incur losses on the 128 Hazelton project. The Defendants refused to realize the profit to be garnered on the 180 SAW project based upon offers Sam solicited, because Sam asserted his legal rights and could not be coerced to agree to indemnify CEI 50% of its losses on the 128 Hazelton project as a condition of accepting the offers on the 180 SAW project. These 180 SAW project offers would have retired all debt Sam owed CEI on the 180 SAW project and earned Sam a profit. The Defendants caused the 180 SAW GP to reject these offers on the 180 SAW project which would generate CEI (and the Sam entities) returns at no less than commercially reasonable rates of returns so that CEI could increase the interest owing on loans advanced to Sam and the Sam entities to be in a position to eliminate Sam M Inc.'s one-third interest and thereby take over 100% of the project, realize 100% of the profits to be garnered on the 180 SAW project, and pursue Sam and the Sam entities for their 180 SAW project debts. The Defendants therefore were in a position to proceed with a Receivership referable to Sam's one-third interest, and did so, and thereby harmed Sam's reputational interest.

19. The Defendants carried on the business of the 128 Hazelton project so Sam could not reduce the debt he had guaranteed on that project that ranked ahead of CEI's debt, refused to close the sale of the Retail Unit (defined below) to Retail Inc., who was entitled to acquire the Retail Unit at a profit, self-dealt when it acquired a number of units of the 128 Hazelton project at a gain to CEI and Robert and at a loss to the 128 Hazelton project, again putting Sam at risk for the indebtedness he guaranteed and refused to refinance to bring the project to an orderly conclusion and put the project into receivership which will incur costs that also increases the risk of Sam having to pay indebtedness he guaranteed. The Receivership harms Sam's reputational interests.

20. The Defendants' unlawful conduct aforesaid and pleaded herein was undertaken in a manner that was calculated to harm Sam's reputational interests, entitling Sam to an award of aggravated damages.

21. The Defendants' unlawful conduct aforesaid and pleaded herein was high-handed, outrageous, and a contumelious and callous disregard of the rights of Sam

and the Sam entities, for which punitive or exemplary damages should be awarded to sanction the Defendants' conduct and deter the like-minded.

### **Analysis**

[14] I first address the Defendants' motion that the Amended Statement of Claim should be struck out pursuant to rule 21.01(1)(b) on the ground that it discloses no reasonable cause of action.

### ***Legal Principles***

[15] Rule 21.01(1)(b) of the *Rules of Civil Procedure* provides that a party may move before a judge to strike out a pleading on the ground that it discloses no reasonable cause of action or defence. Under rule 21.01(2)(b), no evidence is admissible on such a motion.

[16] In *Deep v. M.D. Management*, 2007 CanLII 22655 (ON SC), affirmed 2008 ONCA 211, D. M. Brown J., as he then was, at para. 9, summarized the general principles applicable on a motion to strike out a statement of claim under rule 21.01(1)(b):

- (i) The power to strike out a claim must be used sparingly, and caution and prudence are to govern the court's exercise of its discretion; only in the clearest of cases should a party be deprived of the opportunity of persuading a trial judge that the evidence and the law entitle it to a remedy or a defence: *Atlantic Steel Industries Inc. v. CIGNA Insurance Co. of Canada* (1997), 1997 CanLII 12125 (ON SC), 33 O.R. (3d) 12 (Gen. Div.), at p. 18;
- (ii) the court must accept the facts alleged in the statement of claim as proven unless they are patently ridiculous or incapable of proof, and must read the statement of claim generously with allowance for inadequacies due to drafting deficiencies: *Nash v. Ontario* (1995), 1995 CanLII 2934 (ON CA), 27 O.R. (3d) 1 (C.A.), at page 6;
- (iii) when a defendant moves to strike a claim, it is contending that the claim fails to disclose a wrong that is recognized as a violation of the plaintiff's rights, with the result that a court would be unable to grant a remedy even if the plaintiff proved all the facts alleged. The only question on such a motion is the substantive adequacy of the plaintiff's claim: i.e. whether a plaintiff will have established a cause of action entitling it to some form of relief assuming it can prove the allegations pleaded in the claim or, put another way, whether the plaintiff has sought relief for acts proscribed at law: *Dawson v. Rexcraft Storage and Warehouse Inc.* (1998), 1998 CanLII 4831 (ON CA), 164 D.L.R. (4th) 257 (C.A.), at paras. 8 and 9;
- (iv) the court hearing the motion cannot consider any evidence: Rule 21.01(2)(b). Instead, the court must consider whether the material facts pleaded in accordance with Rule 25.06(1) disclose a claim in respect of which relief may be granted.

- (v) Where the level of material facts pleaded fails to meet the level required to disclose a cause of action – i.e. if any fact material to the establishment of a cause of action is omitted - the remedy is a motion to strike the pleading, not a motion for particulars: *Balanyk v. University of Toronto*, 1999 CanLII 14918 (ON SC), [1999] O.J. No. 2162 (S.C.J.), at para. 29; *Copland v. Commodore Business Machines Ltd.* (1985), 1985 CanLII 2190 (ON SC), 52 O.R. (2d) 586 (Master);
- (vi) the novelty of the cause of action or the novelty of the application of a recognized cause of action should not prevent a plaintiff from proceeding with its case. Whether there is good reason to extend a tort to a new context is the kind of question for a trial judge to consider in light of all the evidence. The fact that a pleading reveals an arguable, difficult or important point of law may well make it critical that the action be allowed to proceed: *Hunt v. Carey Canada Inc.*, 1990 CanLII 90 (SCC), [1990] 2 S.C.R. 959, at paras. 33, 34, 49 and 52; and,
- (vii) the court should not, at this stage of the proceedings, dispose of matters of law that are not fully settled in the jurisprudence: *R.D. Belanger & Associates Ltd. v. Stadium Corp. of Ontario Ltd.* (1991), 1991 CanLII 2731 (ON CA), 5 O.R. (3d) 778, at p. 782 (C.A.).

[17] In *Barbra Schlifer Commemorative Clinic v. HMQ Canada*, 2012 ONSC 5271, D.M. Brown J., as he then was, summarized the principles governing motions to strike out claims as disclosing no reasonable cause of action:

In sum, Rule 21.01(1)(b) operates to weed out the hopeless claims, based on a review of the pleadings, because they fail to state legally sufficient claims. If the pleading asserts a legally sufficient claim, Rule 21.01(1)(b) does not subject the claim to an analysis of the strength or weakness of the evidence advanced by the party in support of its claim. That is why under the Rule a court assumes the facts pleaded in the claim can be proved. Put another way, Rule 21.01(1)(b) does not provide a vehicle by which an opposing party can seek a final disposition of a claim on the evidence – that function falls to a motion for summary judgment or the trial. The purpose of Rule 21.01(1)(b) is more modest – to assess the tenability at law of a pleaded claim.

[18] Vague or conclusory allegations in a statement of claim are insufficient to avoid the pleading being struck out. See *Boudreau v. Bank of Montreal*, 2012 ONSC 3965, at para. 14; affirmed 2013 ONCA 211.

***Does the Amended Statement of Claim plead the existence of a partnership among Sam and the Defendants?***

[19] In the Amended Statement of Claim, Sam claims general damages for breach of contract and for several other causes of action, including breach of fiduciary duty and breach of duty of

good faith. In the Amended Statement of Claim, Sam does not claim general damages for breach of a partnership agreement with one or more of the Defendants.

[20] The Plaintiffs submit that the claims for damages for breach of fiduciary duty and breach of duty of good faith are claims that are founded on a partnership among Sam and “the Sam entities” and the Defendants (and 180 SAW GP, a non-party to this action). Throughout the Amended Statement of Claim, the Plaintiffs refer to “the Sam entities”. This term is not defined in the Amended Statement of Claim and it is not clear which entities are included when this term is used.

[21] The Plaintiffs submit that they properly plead in the Amended Statement of Claim that Sam entered into a partnership with Edward, Robert and CEI and that the Defendants breached their duties owed to Sam as partners, breached contractual duties, and committed torts against Sam with the intention of harming him.

[22] With respect to the alleged partnership, in the Amended Statement of Claim, at paragraphs 16 and 29, the Plaintiffs plead:

16. This action arises from the Parties' agreement to develop two real estate projects. Sam utilized various corporate entities to undertake the development of the projects and borrow funds and partner with CEI and its related entities who provided capital to the projects. Edward and Robert utilized CEI to fund the projects and partner with SAM and the Sam entities.

29. CEI pressed Sam to include as a term of the Retail loan a requirement that Sam indemnify CEI for 50% of the principal and interest owed to CEI including its existing loan with security for the indemnity in the form of a pledge of Sam's interest in the 180 SAW project. CEI knew and understood Sam had no personal liability for CEI's loans to Hazelton Inc., yet it conducted itself in a manner going forward to obtain such indemnity from Sam that amounts to a breach of the duty of good faith owed Sam and the Sam entities as partners of Robert, Edward, CEI and 180 SAW GP, in the development and construction of the 128 Hazelton project and the development and sale of the 180 SAW project.

[23] The Plaintiffs rely on these paragraphs in support of their submission that the existence of a partnership between Sam and the Defendants is properly pleaded.

[24] At paragraph 31 of the Amended Statement of Claim, the Plaintiffs plead:

On April 30, 2019, CEI and Sam M Inc ., as limited partners, and 180 SAW GP, as general partner, entered into a partnership agreement to create a limited partnership, Mizrahi Constantine (180 SAW) LP ("180 SAW LP"), to acquire and develop the 180 SAW project for sale. CEI had a two-thirds interest and Sam M Inc. a one-third interest in 180 SAW LP. Sam M 180 SAW Inc. guaranteed certain of the indebtedness of Sam and the Sam entities on the 180 SAW project.

[25] This is a pleading of a partnership agreement for the creation of a partnership to acquire and develop the 180 SAW project for sale. This pleading does not allege that Sam was a partner in 180 SAW LP.

[26] In the Amended Statement of Claim at paragraph 33, the Plaintiffs plead that on December 3, 2021, CEI, Sam M Inc., and 180 SAW GP entered into an Amended Partnership Agreement. In paragraph 55 of the Amended Statement of Claim, the Plaintiffs allege that Sam and the Sam entities were entitled to rely on CEI, Robert, and the 180 SAW GP meeting their duties with respect to the conduct of the partnership for the 180 SAW project. The Plaintiffs allege in paragraph 56 of the Amended Statement of Claim that Robert and Edward acted to coerce Sam to pay 50% of the losses on the 128 Hazelton project which was a breach of the Amended Partnership Agreement and a breach of their fiduciary and good faith duties.

[27] The Amended Statement of Claim does not include any pleaded factual allegation, beyond a conclusory allegation, that Sam, in his personal capacity, is a partner with the Defendants under the Amended Partnership Agreement. As noted, the Plaintiffs plead in paragraph 33 the parties to the Amended Partnership Agreement and the identified parties do not include Sam.

[28] In their factum in response to this motion, the Plaintiffs submit that the Amended Statement of Claim includes pleadings that Sam and his companies “partnered” with the Defendants Rogers and Hiscox and their company CEI on two real estate developments – one at 128 Hazelton and another at 180 Steeles Ave. West. They submit that the partnership between the parties was “amorphous” and subject to a number of “intertwined contracts”, some formal, and others informal, such as verbal agreements later confirmed in emails.

[29] In paragraph 16 of the Amended Statement of Claim, the Plaintiffs plead that Sam utilized various corporate entities to undertake the development of the projects “and partner with CEI and its related entities” and that Edward and Robert utilized corporate entities to “partner with Sam and the Sam entities”. There are many contracts pleaded in the Amended Statement of Claim made between various corporate entities where there is no pleading that Sam, himself, is a party.

[30] In *Backman v. Canada*, 2001 SCC 10, the Supreme Court of Canada held, at para. 17, that “[p]artnership is a legal term derived from common law and equity as codified in various provincial and territorial statutes”. The Court held, at para. 18, that the essential ingredients of a partnership relationship are (1) a business, (2) carried on in common, (3) with a view to profit. The Court noted, at para. 21, that in determining whether a business is carried on “in common”, “it should be kept in mind that partnerships arise out of contract”. The Court observed that “the common purpose required for establishing a partnership will usually exist where the parties entered into a valid partnership agreement setting out their respective rights and obligations as partners”.

[31] The Plaintiffs do not plead, with clarity, factual allegations showing when, how, or on what terms Sam, in his personal capacity, entered into a partnership agreement with the Defendants or when or how particular commercial contracts made between identified corporate entities established, by their terms, a legal partnership relationship between Sam and the Defendants, as opposed to being commercial agreements between corporate entities in connection with the development of the two projects.

[32] It is not sufficient for Sam to submit in response to this motion that the alleged partnership was “amorphous” and somehow emerges from or is subject to unspecified other “intertwined” contracts made between corporate entities. The pleadings in paragraphs 16 and 29 of the Amended Statement of Claim that Sam and the Defendants were “partners” consist of vague and conclusory allegations that do not disclose the existence of a legal partnership relationship among Sam (in his personal capacity) and the Defendants.

[33] I conclude that the Plaintiffs do not sufficiently plead in the Amended Statement of Claim the existence of a partnership among Sam and the Defendants as partners.

***Should Sam’s claim for damages for breach of contract be struck out?***

[34] In paragraph 1(i) of the Amended Statement of Claim, Sam claims general damages in the sum of \$50,000,000.00 for breach of contract.

[35] In *Cameron-Gardos v. Crawford and Company (Canada) Inc.*, 2024 ONSC 700, at para. 76, the Court held that the elements of a breach of contract claim, which is actionable without proof of damages, are: (a) the plaintiff and the defendant are parties to a validly formed contract; and, (b) the defendant fails to perform his or her obligations under the contract.

[36] In *Brown v. Belleville (City)*, 2013 ONCA 148, at para. 73, the Court of Appeal for Ontario confirmed that under the common law doctrine of privity of contract, an established principle is that “no one but the parties to a contract can be bound or entitled under it”.

[37] In the Amended Statement of Claim at para. 16, the Plaintiffs plead that “[t]his action arises from the Parties’ agreement to develop two real estate projects”.

[38] This pleading, without more, is insufficient to plead the existence of a contract between Sam and one or more of the Defendants. The Plaintiffs must plead the particulars of each contract they allege was made between Sam and one or more Defendants. They must do so with clarity and precision, identifying the particular entity or entities that are alleged to have entered into a given contract, when the contract was made, whether the contract was in writing or oral, and the material terms of the contract. The Plaintiffs must also plead how the contract is alleged to have been breached by each Defendant.

[39] In the Amended Statement of Claim, the Plaintiffs refer in various paragraphs to 27 contracts or agreements. In some, but not all, cases, the parties are identified. In some cases, the parties named in the pleading include entities which are not parties to this action. Of these 27 contracts, the Plaintiffs allege that the following 10 contracts were breached:

- (i) Amended Partnership Agreement for 180 SAW LP between Sam M Inc. and CEI (paras. 33, 55, 56);
- (ii) the “Waterfall Agreement” dated December 3, 2021 between Sam M Inc., 180 SAW LP by its general partner 180 SAW GP (not parties to this action), Mizrahi SVP and Hazelton Inc. (not a party) and CEI (paras. 37, 40, 55, 56,

- 71) establishing an agreed-upon “waterfall” or flow of amounts payable to Sam M Inc. by 180 SAW LP;
- (iii) the “Hazelton Deficiency Agreement” (paras. 37(viii), 39, 40, 55, 56, and 71) entered into by Sam M Inc. which specified Sam M Inc. would only absorb losses up to 50% of the 128 Hazelton project, payable from its share of the profits on the 180 SAW project;
  - (iv) Allegation that CEI acted in “breach of the agreements in place” (para. 41);
  - (v) Agreement reached by CEI with Sam that CEI would discharge the \$1,500,000 Mizrahi SPV loan upon closing of the sale of unit 601 that was allegedly breached by CEI (para. 44);
  - (vi) Allegation that CEI, by refusing to discharge the Mizrahi SPV loan upon closing of CEI’s other retail units, acted “in breach of agreements and fiduciary and good faith duties” (paras. 44, 96(iv));
  - (vii) “Contribution Agreement”. The Plaintiffs plead that “[t]he loan agreement in place, being the Contribution Agreement, was between MDI (Mizrahi Developments Inc., not a Plaintiff) and CEI with no back stop or guarantee by Sam. Plaintiffs allege that CEI breached loan agreements (para. 49);
  - (viii) “Term sheet of the Retail loan”. Plaintiffs plead that Hiscox was “clearly in breach of section 3(d) of the Term sheet of the Retail loan ...” (para. 52);
  - (ix) “[S]et off agreement in place”. Plaintiffs plead that the “Retail loan was to be extinguished upon Retail Inc. closing on the unit. This is a breach of the set-off agreement in place ...” (para. 52);
  - (x) December 22, 2023 agreement. Plaintiffs plead that there were outstanding issues between CEI and Sam and the “Sam entities” and that an email was sent by Rogers to Sam on December 21, 2023 of the terms that CEI would agree to so that the HAM [Hyundai Asset Management] revised offer could proceed and the sale of 180 SAW closed. Plaintiffs plead that on December 22, 2023, Edward Rogers and Sam met remotely and “Sam memorialized the agreement reached on each of the points set out in Edwards’s December 21, 2023 email. Plaintiffs plead that Sam sent Edward an email confirming the agreement reached at the December 22, 2023 meeting (defined as the “December 22 Agreement”). (paras. 88-93)

[40] The only Plaintiff who pleads a claim for damages for breach of contract is Sam. When I review the Amended Statement of Claim and take the factual allegations pleaded to be true, there is no pleading that Sam, acting in his personal capacity, is a party to any of the contracts that are alleged to have been breached, with the possible exception of the “December 22 Agreement”. Even in respect of this alleged contract, the Plaintiffs do not plead that Sam was acting in his personal capacity when it was made, as opposed to acting as a representative of a corporation.

[41] Sam's claim for damages for breach of contract is made against all of the Defendants. However, the Plaintiffs do not consistently plead in the Amended Statement of Claim who the parties to each contract are, when the contract was made, whether it was written or oral, what the material terms are, who breached the contract, or how the alleged breaches occurred. The Defendants are not able to determine from the pleading whether a claim is made against a particular Defendant for damages for breach of contract in relation to a particular contract.

[42] The Plaintiffs do not plead that Edward or Robert is a party in his personal capacity to the contracts that were allegedly breached, with the possible exception of the December 22 Agreement. Even in respect of this alleged contract, the Plaintiffs plead that Edward resiled from the December 22 Agreement and this failure "is a breach of CEI's contractual, fiduciary and good faith, duties". There is no pleading that Edward or Robert breached contractual obligations to which he was personally bound to fulfill.

[43] The pleaded factual allegations in support of Sam's claim for damages for breach of contract are vague and conclusory. Sam's claim in paragraph 1(i) of the Amended Statement of Claim for damages for breach of contract fails to plead material facts setting out with clarity and precision (a) the existence of one or more contracts between Sam (acting in his personal capacity) and one or more of the Defendants, (b) an alleged breach of a contract by one or more of the Defendants, including the particular acts or omissions that constitute such breach or breaches, or (c) that any privity of contract exception applies.

[44] Sam is required to properly plead the material facts in support of his claims for damages breach of contract. He has not done so.

[45] For these reasons, I conclude that the Amended Statement of Claim discloses no reasonable cause of action on the part of Sam for damages for breach of contract against the Defendants or any one or more of them.

***Should Sam's claim for damages for "tortious interference with economic interests" be struck out?***

[46] In the Amended Statement of Claim, Sam claims general damages against the Defendants for tortious interference with economic interests.

[47] In *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, 2014 SCC 12, the Supreme Court of Canada decided an appeal that addressed what the trial judge had referred to as the tort of unlawful interference with economic relations. Cromwell J., who delivered the judgment of the Court, observed that this tort is variously referred to by other names. Cromwell J. referred to the tort as the "unlawful means" tort.

[48] Cromwell J., at para. 26, addressed the scope of liability for the tort of causing loss by unlawful means. He held that the unlawful conduct must be an actionable civil wrong or conduct that would be actionable if it had caused loss to the person at whom it was directed. There is no requirement that the unlawful means be otherwise actionable by the plaintiff. The definition of unlawful means should not be subject to principled exceptions.

[49] Cromwell J., at para. 37, addressed the possible rationales for the unlawful means tort which, he noted, are mostly rationales on two themes. The first, the “intentional harm” rationale, focuses on the fact that harm has been intentionally inflicted. Cromwell J. noted that this rationale supports the creation of new tort liabilities in order to reach clearly excessive and unacceptable intentional conduct. The second rationale focuses on extending an existing right to sue from the immediate victim of the unlawful act to another party whom the defendant intended to target with the unlawful conduct. Cromwell J. called this the “liability stretching” rationale. Cromwell J., at para. 44, expressed his preference for the liability stretching rationale which, he held, supports a narrow definition of “unlawful means” by which the tort simply expands the range of persons who may sue for harm intentionally caused by existing actionable wrongs to a third party. Cromwell J., at para. 45, held that the two core components of the unlawful means tort are that the defendant must use unlawful means, in the narrow sense, and that the defendant must intend to harm the plaintiff through the use of unlawful means.

[50] The Defendants submit that factual allegations that satisfy the required elements for the unlawful means tort are absent from the Amended Statement of Claim. They submit that the Plaintiffs have failed to plead with clarity and particularity (a) conduct by the Defendants against a third party that rises to the level of being unlawful; (b) the identity of a third party; or (c) an intention on the Defendants’ behalf to cause economic injury to any of the Plaintiffs.

[51] The Plaintiffs submit that the tort named tortious interference with economic interests is recognized in Canadian common law and applies when a defendant intentionally and unlawfully interferes with the plaintiff’s economic interests. In support of this submission, the Plaintiffs cite *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2013 SCC 57 which sets out the elements for tortious interference with economic interests, which include that the defendant intended to injure the plaintiff and interfered with the economic interests of the plaintiff by unlawful or illegal means.

[52] I do not accept this submission by the Plaintiffs. It is not enough that a defendant intentionally and unlawfully interferes with a plaintiff’s economic interests. This formulation of the unlawful means tort focuses on a rationale that Cromwell J. rejected in *A.I. Enterprises*, that harm has been intentionally inflicted. The decision in *Pro-Sys* was released approximately one year before the decision in *A.I. Enterprises*, and the decision in *A.I. Enterprises* narrowed the scope of unlawful means as a core component of this tort.

[53] In the Amended Statement of Claim, the Plaintiffs plead the tort of tortious interference with economic interests at para. 17:

Edward and Robert conspired to cause CEI and the 180 SAW GP to undertake the projects in a manner intended to harm the economic interests of Sam and the Sam entities and are therefore liable for conspiracy to cause economic harm and tortious interference with economic interests causing Sam and the Sam entities the losses pleaded herein. These losses were also sustained due to CEI’s breach of contracts, negligence, breach of fiduciary duty, and breach of the duty of good faith causing Sam and the Sam entities the losses pleaded herein. Sam and the Sam entities were owed fiduciary and good faith duties by CEI and the 180 SAW GP and when

breached, unjustly enriched CEI to the detriment of Sam and the Sam entities. These actionable wrongs entitle the Plaintiffs to the declaratory relief sought.

[54] This pleading, although made by way of overview, does not sufficiently plead the required elements of the unlawful means tort because it does not plead with particularity the unlawful conduct by the Defendants against one or more identified third parties and the Defendants' intention to harm Sam through the use of unlawful means.

[55] The Plaintiffs refer to paragraph 40 of the Amended Statement of Claim which, they submit, is a pleading that the Defendants acted with an intention to injure the Plaintiffs' economic interests. This applicable part of this paragraph reads:

... Edward and Robert conspired to cause the 180 SAW GP to use its 50% voting right in the 180 SAW project and CEI's rights as a shareholder and lender in the 128 Hazelton project to harm Sam's interest in the Hazelton 128 project, so as to increase Sam M Inc.'s liability under the Hazelton Deficiency Agreement and the Waterfall Agreement and to expose Sam to liability on his personal guarantee to DUCA, Aviva and CEI on the Retail Inc. loan.

[56] This is a pleading that Edward and Robert acted with the intention of harming Sam's interests. This pleading focuses on the "intentional harm" rationale for the tort, one that was not accepted by Cromwell J. in *A.I. Enterprises*. It is not a pleading of an actionable civil wrong directed to an identified third party which was intended to harm Sam.

[57] The Plaintiffs also refer to paragraph 46 of the Amended Statement of Claim which, in relation to the 128 Hazelton Project, reads:

CEI, due to the conspiracy of Robert and Edward to harm Sam's economic interests, breached fiduciary and good faith duties when it refused to refinance to "take out " the expiring DUCA facility.

[58] This is a pleading that the Defendants acted with the intention of harming Sam's economic interests. It is not a pleading of an actionable civil wrong directed to a third party which was intended to harm Sam.

[59] The Plaintiffs refer to paragraphs 52 and 72 of the Amended Statement of Claim which read:

52. On February 5, 2024, Robert communicated that CEI would proceed with closing the Retail Unit provided that both the Retail loan was repaid to CEI and the full purchase price required under the APS paid to Hazelton Inc. This was clearly in breach of section 3(d) of the Term sheet of the Retail loan which requires CEI to sign any documentation required to permit the loan set-offs "free and clear of any security interests held by the Lender [CEI] in connection with any other loans made by it [CEI] to ProjectCo". The Retail loan was to be extinguished upon Retail Inc. closing on the unit. This is a breach of the set-off agreement in place and another instance of CEI's breach of contract, breach of fiduciary duty, and breach of the

duty of good faith, causing Sam's damages, all in furtherance of Robert and Edward's conspiracy to harm Sam's economic interests.

72. On July 14, 2023, Robert advised Sam that CEI would not proceed with the HAM transaction unless Sam entered into a binding agreement to pay 50% of the losses, estimated at that time at more than \$30,000,000. on the 128 Hazelton project. This requirement of CEI was the result of the conspiracy of Edward and Robert to harm the economic interests of Sam by causing the 180 SAW GP to refuse a purchase price on the 180 SAW project at no less than or at the market price, and in excess of CEI's target price, contrary to CEI's, Robert's and 180 SAW GP's fiduciary and good faith duties. Edward and Robert are therefore liable for tortious interference with the economic interests of Sam and the Sam entities in the 180 SAW project since there was no binding agreement for Sam to incur 50% of the losses on the 128 Hazelton project and therefore no justification to reject the HAM offer for that reason.

[60] Paragraph 52 of the Amended Statement of Claim makes a factual allegation that CEI communicated to Sam that it intended to proceed to close a transaction involving the Retail Unit on a basis that would be a breach of the term sheet of the Retail loan, and that this communication was made with the intention of harming Sam. The pleaded communication to Sam of the Defendants' expressed intention with respect to the Retail Inc. in relation to the term sheet is not a pleading of unlawful conduct against Retail Inc. that would be an actionable civil wrong.

[61] Paragraph 72 of the Amended Statement of Claim does not allege unlawful conduct by the Defendants against an identified third party that would be an actionable civil wrong by that third party. The pleaded alleged breaches of fiduciary and good faith duties by Rogers, Hiscox and 180 SAW GP are duties pleaded as owed to Sam.

[62] The Plaintiffs do not plead in the Amended Statement of Claim that the Defendants engaged in unlawful conduct directed against identified third parties that would be an actionable civil wrong by that third party, and that such unlawful conduct against such third parties was intended to harm Sam.

[63] I conclude that the Amended Statement of Claim discloses no reasonable cause of action by Sam for the unlawful means tort or, as named in the Amended Statement of Claim, for tortious interference with economic interests.

***Should the Plaintiffs' claim for damages for breach of a duty of good faith be struck out?***

[64] In paragraph 1(i) of the Amended Statement of Claim, Sam claims general damages for "breach of duty of good faith". This is pleaded as a separate cause of action from the causes of action pleaded for breach of fiduciary duty or breach of contract.

[65] In paragraph 17 of the Amended Statement of Claim (quoted above), the Plaintiffs allege that Edward and Robert conspired to cause CEI and 180 SAW GP to undertake the projects in a manner intended to harm the economic interests of Sam and the Sam entities, causing Sam and the

Sam entities the losses pleaded in the Amended Statement of Claim. The Plaintiffs plead that these losses were also sustained due to CEI's "breach of the duty of good faith" and breach of "good faith duties" owed by CEI and 180 SAW GP to Sam and the Sam entities.

[66] In paragraph 29 of the Amended Statement of Claim, the Plaintiffs plead that CEI's conduct in seeking to obtain an indemnity from Sam when it knew he had no personal liability for CEI's loans to Hazelton Inc. amounts to a breach of the duty of good faith owed Sam and the Sam entities as partners of Edward, Robert, CEI and 180 SAW GP in the development and construction of the 128 Hazelton project and the development and sale of the 180 SAW project.

[67] In the Amended Statement of Claim, the Plaintiffs refer to the duty of good faith eighteen more times. These references are conclusory allegations of breaches of fiduciary and good faith duties.

[68] In *Bhasin v. Hrynew*, 2014 SCC 71, the Supreme Court of Canada, at para. 63, enunciated a general organizing principle of good faith that parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily. Cromwell J. explained, at para. 64, that an organizing principle "is not a free-standing rule, but rather a standard that underpins and is manifested in more specific legal doctrines and may be given different weight in different situations: [citations omitted]. It is a standard that helps to understand and develop the law in a coherent and principled way".

[69] In *Bhasin*, Cromwell J., at para. 93, held that it is appropriate to recognize a new common law duty that applies to all contracts as a manifestation of the organizing principle of good faith: a duty of honest performance, which requires the parties to be honest with each other in relation to the performance of their contractual obligations.

[70] In *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7, the Supreme Court of Canada, at para. 111, held that where a party to a contract exercises its discretion unreasonably (in this context, in a manner not connected to the underlying purposes of the discretion granted by the contract), its conduct amounts to a breach of the duty to exercise contractual discretionary powers in good faith.

[71] The organizing principle of good faith as explained by Cromwell J. in *Bhasin* does not establish a standalone cause of action for breach of a duty of good faith. The Plaintiffs submit that their claim does not allege a standalone breach of a duty of good faith. Rather, the Amended Statement of Claim alleges a duty of good faith is owed because the Defendants were Sam's partners in the two projects. They submit that partners owe each other fiduciary duties and duties of good faith.

[72] The Plaintiffs point to paragraph 29 of the Amended Statement of Claim where it is pleaded that Sam and the Sam entities were partners of Robert, Edward, CEI and 180 SAW GP in the development and construction of the 128 Hazelton project and the development and sale of the 180 SAW project. I have held that this conclusory allegation is insufficient to properly plead the existence of a partnership relationship among Sam and the "Sam entities" and the Defendants. It

follows that the Plaintiffs have not pleaded facts to support the existence of duties arising from such a partnership.

[73] Even if the pleaded allegations are read as failures by the Defendants to comply with contractual duties of good faith, the Plaintiffs do not plead with clarity and precision factual allegations of conduct by the Defendants, or any of them, in relation to a particular contract, or particular contracts, to which Sam is pleaded to be a party, which, if taken to be true, would give rise to liability on the parts of Hiscox, Rogers, and CEI, as contracting parties, for breach of a duty of honest performance of a contractual obligation or breach of a duty to exercise a contractual discretionary power in good faith.

[74] I conclude that the Amended Statement of Claim discloses no reasonable cause of action for breach of duty of good faith.

***Should the Plaintiffs' claim for damages for breach of fiduciary duty be struck out?***

[75] In the Amended Statement of Claim, Sam claims general damages for breach of fiduciary duty.

[76] The elements of a claim for breach of fiduciary duty are: (1) a fiduciary relationship; (2) a fiduciary duty; and (3) breach of the fiduciary duty.

[77] In paragraph 17 of the Amended Statement of Claim, in the overview section, the Plaintiffs plead that Sam and the Sam entities sustained losses due to CEI's breach of fiduciary duty. They allege that Sam and the Sam entities were owed fiduciary duties by CEI and the 180 SAW GP (as noted, not a party to the action).

[78] In paragraph 40, the Plaintiffs plead that Sam M Inc. entered into the Hazelton Deficiency Agreement and the Waterfall Agreement with the expectation that CEI as a partner on the 180 SAW project would meet its fiduciary duties to ensure a reasonable return on the 180 SAW project in the time frame it would take to sell the property. In paragraph 41, the Plaintiffs plead that CEI and Robert, as a director of the 180 SAW GP, breached fiduciary duties owed to its partner and its borrower, being Sam and the Sam entities.

[79] In paragraphs 74 and 81, the Plaintiffs plead that the CEI's rejection of the offer by HAM to purchase the 180 SAW project was a breach of fiduciary duties.

[80] In several other paragraphs of the Amended Statement of Claim, the Plaintiffs allege that CEI breached fiduciary duties, sometimes pleading that such breach was in furtherance of Robert's and Edward's conspiracy to harm Sam's economic interests, and sometimes alleging such breaches with respect to "the conduct of the partnership agreed to for the 180 SAW project".

[81] As I have noted, although the Plaintiffs submit that the Amended Statement of Claim should be read as alleging that Sam entered into a partnership with Edward, Robert and CEI on two real estate developments, there is no allegation in the Amended Statement of Claim that Sam, in his personal capacity, made a partnership agreement with CEI or Edward or Robert.

[82] The Plaintiffs have not pleaded facts that establish the existence of a fiduciary relationship between the Defendants or any combination of them, on the one hand, and Sam, or any combination of the Plaintiffs, on the other hand. The Plaintiffs do not allege in the Amended Statement of Claim any *per se* category of fiduciary relationship which is applicable in the context of the relationships pleaded. The Plaintiffs do not make factual allegations that support the existence of an *ad hoc* fiduciary relationship giving rise to fiduciary duties owed to Sam.

[83] The pleaded allegations of breach of fiduciary duty are vague and conclusory allegations.

[84] I conclude that the Amended Statement of Claim fails to disclose a reasonable cause of action by Sam for breach of fiduciary duty.

***Should the Plaintiffs' claim for damages for unjust enrichment be struck out?***

[85] In the Amended Statement of Claim, Sam claims general damages for unjust enrichment.

[86] In *Kerr v. Baranow*, 2011 SCC 10, the Supreme Court of Canada, at para. 32, confirmed that where an unjust enrichment claim is made, Canadian law permits recovery whenever a plaintiff can establish three elements: an enrichment of or benefit to the defendant, a corresponding deprivation of the plaintiff, and the absence of a juristic reason for the enrichment. Cromwell J., writing for the Court, at para. 40, explained that the absence of a juristic reason for the enrichment means that there is no reason in law or justice for the defendant's retention of the benefit conferred by the plaintiffs, making its retention "unjust" in the circumstances of the case.

[87] In paragraph 17 of the Amended Statement of Claim, the Plaintiffs plead that Sam and the Sam entities were owed fiduciary and good faith duties by CEI and 180 SAW GP and when breached, unjustly enriched CEI to the detriment of Sam and the Sam entities. This is a conclusory pleading that, standing alone, discloses no reasonable cause of action.

[88] There are several other references in the Amended Statement of Claim to unjust enrichment.

[89] In paragraph 55, the Plaintiffs plead that the Defendants refused to sell the 180 SAW project at a profit and used such refusal as leverage to "(1) coerce Sam to agree to pay 50% of the losses on the 128 Hazelton project: (2) delay any exit on the 180 SAW project to increase Sam's interest liability to CEI, given his indebtedness was at an interest rate of 28% per annum: and (3) eliminate Sam M Inc.'s 1/3 interest in the project, amounting to an unjust enrichment of the Defendants and corresponding deprivation to Sam and the Sam entities".

[90] The alleged conduct by the Defendants of refusing to sell the 180 Saw Project is not an allegation that the Defendants, or any of them, were enriched or received a benefit from this conduct. The Plaintiffs do not plead factual allegations that, if taken to be true, show that the Defendants were enriched or received an unjust benefit from refusing to sell the 180 SAW Project, as alleged. It follows that there are no factual allegations, beyond bald assertions, that support the existence of a corresponding deprivation by Sam. Although Sam is the party claiming damages for unjust enrichment, the Plaintiffs do not plead factual allegations that show that Sam, as opposed to Sam M Inc., held an interest in the 180 SAW project.

[91] In paragraph 81 of the Amended Statement of Claim, the Plaintiffs plead that Hyundai Asset Management (“HAM”) made an offer for the purchase of the 180 SAW project that was at or no less than a market price and in excess of the CEI target price. The Plaintiffs plead that the failure to close this purchase was intended to cause economic harm to Sam and the Sam entities and caused Sam damages. The Plaintiffs plead in paragraph 82 that “[t]he actionable wrongs pleaded in paragraph 81 have unjustly enriched the Defendants, and the Defendants must disgorge their unjust enrichment to Sam and Sam M Inc.”.

[92] In these paragraphs, the Plaintiffs do not plead factual allegations that, if taken to be true, show that the Defendants were enriched by failing to complete a purchase by HAM of the SAW Project or that Sam suffered a corresponding deprivation. Through this pleading, the Plaintiffs make a conclusory allegation that the Defendants were unjustly enriched. This conclusory allegation discloses no reasonable cause of action.

[93] In paragraph 93 of the Amended Statement of Claim, the Plaintiffs plead that Rogers resiled from the December 22 Agreement and the failure to honour the “December 22 Agreement is a breach of CEI’s contractual, fiduciary, and good faith duties. In paragraph 94, the Plaintiffs plead that “[t]he actionable wrongs pleaded in paragraph 93 have unjustly enriched the Defendants, and the Defendants must disgorge such unjust enrichment to Sam and Sam M Inc.”.

[94] The Plaintiffs’ factual allegations as pleaded in these paragraphs do not show that the failure to honour the December 22 Agreement resulted in an enrichment of the Defendants. Absent such factual allegations, the assertion that the pleaded actionable wrongs “have unjustly enriched the Defendants” is a conclusory allegation which discloses no reasonable cause of action.

[95] I conclude that the Amended Statement of Claim discloses no reasonable cause of action for Sam’s claim for unjust enrichment.

***Should the Plaintiffs’ claim for damages for conspiracy be struck out?***

[96] In the Amended Statement of Claim, Sam claims general damages for conspiracy to cause economic harm.

[97] There are two forms of conspiracy recognized in Canadian common law:

- (a) the essence of unlawful act conspiracy is an agreement pursuant to which two or more defendants use unlawful conduct directed towards a plaintiff that the defendant ought to have known would likely, and does, result in injury to the plaintiff; and
- (b) the essence of predominant purpose conspiracy is an agreement pursuant to which two or more defendants use lawful or unlawful means for the predominant purpose of causing injury to the plaintiff, and injury to the plaintiff does result. See *Agribrands Purina Canada Inc. v. Kasamekas*, 2011 ONCA 460, at para. 24.

[98] A plaintiff asserting a cause of action for conspiracy must plead material facts in sufficient detail to support the claim and the relief sought. A plaintiff must plead with sufficient detail the constituent elements of each cause of action. The pleadings must tell a defendant who, when, where, how and what gave rise to its liability. Assumptions, speculation and facts that lack sufficient particularity are not enough to constitute material facts. See *Jensen v. Samsung Electronics Co. Ltd.*, 2021 FC 1185, at para. 75; aff'd *Jensen v. Samsung Electronics Co. Ltd.*, 2023 FCA 89, leave to appeal dismissed, 2024 CanLII 543.

[99] In paragraph 17 of the Amended Statement of Claim, as part of the overview, the Plaintiffs plead that Edward and Robert “conspired to cause CEI and the 180 SAW GP to undertake the projects in a manner intended to harm the economic interests of Sam and the Sam entities and are therefore liable for conspiracy to cause economic harm”.

[100] In paragraph 41 of the Amended Statement of Claim, the Plaintiffs plead:

CEI, due to the conspiracy of Robert and Edward to harm Sam and the Sam entities' economic interests, consistently took steps to prevent Sam and the Sam entities from repaying loans. It was in CEI's interest to accrue interest on Sam's and Sam-related entities' indebtedness to it, to the detriment of Sam and the Sam entities' interest in breach of the agreements in place. CEI and Robert, as a director of 180 SAW GP, breached both fiduciary duties and good faith duties owed to its partner and its borrower, being Sam and the Sam entities.

[101] In *Jensen*, at para. 125, the Court held that “[t]o properly plead a conspiracy, a plaintiff must specify the agreement to conspire between the defendants, and its purpose or object, as well as any specific conduct, described with clarity and precision, that is alleged to have been adopted by each of the conspirators in furtherance of the conspiracy”.

[102] The conclusory allegation that Edward and Robert “conspired” or that CEI acted “due to the conspiracy” of Edward and Robert is not a proper pleading of a cause of action against them for conspiracy. The Plaintiffs have failed to plead with clarity and precision the agreement to conspire between or among the Defendants or the time, place or nature of the specific conduct alleged to have been adopted by each of the conspirators in furtherance of the conspiracy.

[103] In addition, in paragraph 41 of the Amended Statement of Claim in which a conspiracy is alleged, the conduct complained of is the conduct of CEI. The pleaded allegation that a company acted through its directing minds in breach of an agreement does not make the company’s action to breach the agreement the result of a conspiracy recognized by law.

[104] I conclude that the Amended Statement of Claim discloses no reasonable cause of action for conspiracy.

***Does the Amended Statement of Claim disclose a reasonable cause of action for negligence?***

[105] In the Amended Statement of Claim, Sam claims general damages against the Defendants for negligence.

[106] In *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63, at para. 77, the Supreme Court of Canada held that in a successful negligence action, a plaintiff must demonstrate that (1) the defendant owed him or her a duty of care; (2) the defendant's behaviour breached the standard of care; (3) the plaintiff sustained damage; and (4) the damage was caused, in fact and in law, by the defendant's breach.

[107] The requirements for the finding of a duty of care are: (a) reasonable foreseeability of harm; (b) the sufficiently close and direct proximity between the parties such that the defendant is under an obligation to be mindful of the plaintiff's interests; and (c) the absence of overriding policy considerations which negate a *prima facie* duty of care established by foreseeability and proximity. See *Stewart v. The Corporation of the Township of Douro-Dummer*, 2018 ONSC 4009, at paras. 105-108, citing *Cooper v. Hobart*, [2001] 3 S.C.R. 537 and *Rankin (Rankin's Garage & Sales) v. J. (J.)*, 2018 SCC 19.

[108] At paragraphs 96 and 97, the Plaintiffs plead that CEI was negligent with respect to the 128 Hazelton project and the 180 SAW project, respectively, with particulars of the alleged negligence pleaded in these paragraphs. The Plaintiffs do not make allegations of negligence in these paragraphs against the individual Defendants that could support a claim against them that they failed to meet the required standard of care and breached a duty of care.

[109] At paragraph 104 of the Amended Statement of Claim, the Plaintiffs plead that "[t]he Defendants owed the Plaintiffs a duty of care". This is a conclusory allegation. There are no facts pleaded in this paragraph which, if taken to be true, establish that the requirements for a finding of a duty of care owed to Sam are satisfied in respect of CEI or the other Defendants. The Plaintiffs do not plead the standard of care that would apply if there were a duty of care owed by CEI or the other Defendants to Sam.

[110] The particulars of alleged negligence pleaded in relation to CEI in paragraphs 96 and 97 of the Amended Statement of Claim are not tied to a duty of care arising from pleaded factual allegations or to a standard of care that is pleaded as applying to actions or omissions of CEI in relation to Sam.

[111] I conclude that the Amended Statement of Claim discloses no reasonable cause of action in negligence.

***Does the Amended Statement of Claim disclose a reasonable cause of action for negligent misrepresentation?***

[112] In the Amended Statement of Claim, Sam claims general damages against the Defendants for negligent misrepresentation.

[113] In *Deep v. M.D. Management*, 2007 CanLII 22655, D.M. Brown J., as he then was, at paragraph 10, held that in order to establish a claim for negligent misrepresentation a plaintiff must specifically plead (i) the existence of a duty of care based on a special relationship between the representor and the representee; (ii) that the representation in question was untrue, inaccurate or misleading; (iii) the representor must have acted negligently in making the misrepresentation; (iv)

the representee must have relied, in a reasonable manner, on the negligent misrepresentation; and (v) the reliance must have been detrimental to the representee in the sense that damages resulted.

[114] The Plaintiffs' pleaded allegation in paragraph 104 of the Amended Statement of Claim that "[t]he Defendants owed the Plaintiffs a duty of care" is a conclusory allegation. The Plaintiffs fail to adequately plead facts that show that the requirements for a finding of duty of care owed to Sam, in his personal capacity, by each of the Defendants, are satisfied.

[115] In paragraphs 98-100 of the Amended Statement of Claim, the Plaintiffs' plead allegations of negligent misrepresentations by CEI. The Plaintiffs do not plead that these misrepresentations were made to Sam in his personal capacity or how, in this capacity, he relied on the alleged misrepresentations in such a way that he suffered damages as a result.

[116] I conclude that the Amended Statement of Claim discloses no reasonable cause of action for negligent misrepresentation.

***Adequacy of pleading as against Edward and Rogers***

[117] I have concluded that the Amended Statement of Claim discloses no reasonable cause of action against the Defendants.

[118] Sam's claims for general damages for all causes of action are made against all Defendants.

[119] In the Amended Statement of Claim, the Plaintiffs plead that CEI is a body corporate that is a private real estate fund and the 50% shareholder of Mizrahi (128 Hazelton) Inc.

[120] The Plaintiffs plead that Edward and Robert are co-founders of CEI, that Robert is the Chief Executive Officer of CEI and that Edward owns 90% of the shares of CEI. They plead that Edward is the controlling mind of both CEI and 50% of 180 SAW GP. The Plaintiffs plead that Robert owns 10% of the shares of CEI and is the director of 180 SAW GP and takes direction from Edward to enable Edward to control 50% of 180 SAW GP.

[121] In the Amended Statement of Claim, the Plaintiffs do not plead allegations of fact that Edward or Robert, on the one hand, have privity of contract with Sam, or any of the Plaintiffs, on the other hand. There is no tenable claim for breach of contract as against Edward or Robert.

[122] The claim that Edward and Rogers, by acting as the directing minds of CEI and 180 SAW GP, engaged in conduct that is a conspiracy as a matter of law does not adequately plead a cause of action for conspiracy.

[123] With respect to the other causes of action pleaded, the Plaintiffs do not plead factual allegations that Edward or Robert acted in any capacity other than as directors and corporate officers of CEI and 180 SAW GP.

[124] The Plaintiffs do not plead facts that justify the piercing of the corporate veil of CEI such that Edward or Robert are personally liable for claims made against CEI.

[125] Even if I had concluded that the Amended Statement of Claim discloses one or more reasonable causes of action against CEI, I would conclude that the claims pleaded against Edward and Robert disclose no reasonable cause of action against either of them.

***Should the Plaintiffs be given leave to amend the Amended Statement of Claim?***

[126] The Defendants submit that if their motion to strike out the Amended Statement of Claim as disclosing no reasonable cause of action is granted, the Plaintiffs should not be given leave to amend their pleading.

[127] The Defendants submit that the defects in the Amended Statement of Claim persist notwithstanding that the Plaintiffs have already amended their pleading on one occasion. The Defendants note that the Plaintiffs did not amend their Amended Statement of Claim to correct the defects even after service of the Defendants' notice of motion for this motion which sets out the Defendants' concerns with the Amended Statement of Claim.

[128] The Defendants submit that granting leave to amend would be significantly prejudicial to them because, they submit, this action at its core was an attempt to delay a receivership application. The Defendants submit that to allow the Plaintiffs to amend their pleading would indulge their efforts to delay and hinder the ongoing receivership proceedings.

[129] I do not accept that the fact that the Plaintiffs amended their pleading once is a reason to deny leave to amend. The first amendment was made on the next business day after the Statement of Claim was issued and the amendments were not substantive.

[130] In *South Holly Holdings Limited v. The Toronto-Dominion Bank*, 2007 ONCA 456, The Court of Appeal for Ontario held that a litigant's pleading should not lightly be struck out without leave to amend, and that leave to amend should only be denied in the clearest of cases.

[131] I am not satisfied that the Defendants will be prejudiced if leave to amend is granted. The receivership proceedings are subject to court supervision, and the court will be able to ensure that these proceedings are not hindered or unfairly delayed.

[132] I grant leave to the Plaintiffs to amend the Amended Statement of Claim within 45 days of the release of this endorsement.

[133] As a result of my decision that the Amended Statement of Claim should be struck out on the ground that it discloses no reasonable cause of action, it is not necessary for me to address the Defendants' motion to strike out the Amended Statement of Claim because it is scandalous, frivolous, or vexatious, or an abuse of the court's process.

**Disposition**

[134] For these reasons, the Defendants' motion to strike out the Amended Statement of Claim on the ground that it discloses no reasonable cause of action is granted. The Amended Statement of Claim is struck out.

[135] The Plaintiffs are granted leave to amend the Amended Statement of Claim within 45 days.

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

**Date:** July 31, 2025

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Cavanagh J.