IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Lamb v. Sun Life Assurance Company of Canada,* 2024 BCSC 243

Date: 20240214
Docket: S233711
Registry: Vancouver

Between:

Dale Keith Lamb and DKL Financial Services Inc.

Plaintiffs

And

Sun Life Assurance Company of Canada, and in French, Sun Life Du Canada, Compagnie D'Assurance-Vie, Sunlife Financial Distributors (Canada) Inc., and in French, Distribution Financiere Sun Life (Canada) Inc., and Sun Life Financial Investment Services (Canada) Inc., and in French, Placements Financiere Sun Life (Canada) Inc.

Defendants/Plaintiffs by Counterclaim

And

Dale Keith Lamb, DKL Financial Services Inc., and Assante Financial Management Ltd., and in French, Gestion Financiere Assante Ltee.

Defendants by way of Counterclaim

Before: The Honourable Justice A. Ross

Reasons for Judgment

Counsel for the Plaintiffs and Defendants by way of Counterclaim, Dale Lamb and DKL Financial Services Inc.: L.S. Smith

Counsel for the Defendants and Plaintiffs by way of Counterclaim, Sun Life Assurance Company of Canada, Sun Life Financial Distributors (Canada) Inc. and Sun Life Financial Investment Services (Canada) Inc.:	R.J. Kaardal, K.C. P.D. Heisler C.W. Ehman
Counsel for Defendants by way of Counterclaim, Assante Financial Management Ltd., and in French, Gestion Financiere Assante Ltee.:	A.H. Sabur L.M.A. Kotler
Place and Date of Trial/Hearing:	Vancouver, B.C. November 29–30, 2023
Place and Date of Judgment:	Vancouver, B.C. February 14, 2024

Table of Contents

Introduction

[1] Assante Financial Management Ltd. (“Assante”) is a defendant by counterclaim in this proceeding. Assante seeks an order either striking or dismissing the counterclaim brought by Sun Life Assurance Company of Canada (“Sun Life”).

[2] The underlying action is brought by the plaintiffs, Mr. Dale Lamb and a company he controls, DKL Financial Services Inc. (“DKL”). Mr. Lamb is a life insurance agent and financial advisor. Until July 2020, he worked with Sun Life. He then moved his book of business to Assante. That move is the origin of the litigation. The plaintiffs sued Sun Life for terminating their commissions.

[3] Sun Life defends the plaintiffs’ claim. That defence is not relevant to this application. The relevant part is Sun Life’s counterclaim (the “Amended Counterclaim”) against the plaintiffs and Assante. At its core, Sun Life claims against:

a) Mr. Lamb and DKL for breaching contracts and fiduciary obligations to Sun Life; and

b) Assante for inducing Mr. Lamb to breach of contract and knowingly assisting Mr. Lamb to breach his fiduciary duty.

[4] Assante defends the Amended Counterclaim and denies any wrongdoing. It brings this application under R. 9-5 and R. 9-6 of the *Supreme Court Civil Rules*, seeking to have the claims against it either struck or dismissed. In broad overview, Assante says that, based upon the Amended Counterclaim:

a) under Rule 9-5, the “inducing breach of contract” claim is bound to fail and should be struck;

b) under Rule 9-6, Sun Life has failed to establish the elements of its claim for “inducing breach of contract” and the counterclaim should be dismissed;

c) under Rule 9-5, on the pleadings, the claim that Mr. Lamb and DKL owed fiduciary obligations to Sun Life is bound to fail. Hence, the claim in knowing assistance should be struck; and

d) under Rule 9-6, on the evidence, there is no triable case on the issue of whether Mr. Lamb and DKL owed fiduciary obligations to Sun Life. Hence, the claim in knowing assistance should be dismissed.

[5] Mr. Lamb and DKL made no submissions on this application, apart from adopting the submissions of Assante. As I discuss below, that raises concerns regarding “litigating in slices”.

[6] In defence of the application, Sun Life says:

a) its pleadings are sufficient;

b) Assante’s application mischaracterizes Sun Life’s claims; and

c) there is no basis to strike or dismiss the Amended Counterclaim against Assante.

[7] One major point of contention on this application is that when Sun Life amended its counterclaim, it eliminated its claim for damages. The Amended Counterclaim seeks disgorgement of profits from Mr. Lamb, DKL, and Assante. I expand on the parties’ positions below.

[8] This application came on for a two-day hearing (November 29–30, 2023). At the close of submissions, counsel advised me that the trial of the action was scheduled to proceed on February 12, 2024, for 20 days. That timing caused concern for me, because one party was seeking to be removed from the action and I was reserving my judgment. However, on December 12, 2023, counsel advised me that the trial had been adjourned at a trial management conference.

Issues

[9] I address the following issues below:

a) Under Rule 9-5, is it “plain and obvious” that Sun Life’s claim for inducing breach of contract is certain to fail?

b) Under Rule 9-6, on the relevant facts and law, is there a genuine issue to be tried in relation to the “inducing breach” claim?

c) Under Rule 9-5, is it plain and obvious that Sun Life’s “knowing assistance” claims are bound to fail?

d) Under Rule 9-6, on the relevant facts and law, is there a genuine issue to be tried in relation to the “knowing assistance” claim?

Background Facts

[10] The plaintiff Mr. Lamb is a Kelowna-based life insurance agent and investment advisor. He operates his business through DKL.

[11] Until July 2020, the plaintiffs, through DKL, sold life insurance and financial products exclusively on behalf of Sun Life. The relationship between Sun Life and the plaintiffs was governed by two advisor agreements. The first agreement applied to insurance products, and the second agreement applied to mutual fund products (together, the “Advisor Agreements”).

[12] Each of the Advisor Agreements included terms to the following effect:

a) Sun Life and the plaintiffs were in a principal/agent relationship.

b) Mr. Lamb and DKL were authorized to act as agents of Sun Life for the purpose of:

i. marketing investment funds and insurance products to the public;

ii. soliciting and obtaining applications for insurance products from potential clients; and

iii. soliciting clients to open mutual fund accounts.

c) All of the clients would be the exclusive clients of Sun Life (not the plaintiffs).

d) Mr. Lamb and DKL were authorized on behalf of Sun Life to provide "services", including providing advice, to clients in respect of insurance products and mutual funds.

e) All information with respect to clients would be confidential and would be the exclusive property of Sun Life.

f) Mr. Lamb and DKL were prohibited from disclosing or using any confidential information or data relating to any clients other than on behalf of Sun Life.

g) Mr. Lamb and DKL would act in the best interests of Sun Life and its clients.

h) Upon termination of the Advisor Agreements, Mr. Lamb and DKL were required to cease providing any "services" to the clients of Sun Life.

i) Mr. Lamb and DKL agreed that, for a period of two years following termination of the Advisor Agreements, they:

    i. would not solicit business from any of the clients of Sun Life; or

    ii. provide "services" in competition with Sun Life.

[13] The Advisor Agreements also provided for the quantum of commissions that would be paid if the Advisor Agreements were terminated. In particular, there was an incentive program contained in a provision called "commissions on release" or "CORe". Pursuant to the provisions of CORe in the Advisor Agreements, upon termination:

a) all of the clients "serviced" by the advisor would be released by the departing advisor and assigned to a new Sun Life advisor;

b) the eligible departing advisor would receive a monthly commission payment for a period of 10 years. Those continuing payments are conditional upon compliance with certain conditions;

c) of primary importance for this action, the Advisor Agreements state that the continuation of CORe payments is conditional upon the departing adviser forsaking work for competitors of Sun Life.

[14] On June 2, 2020, Mr. Lamb and DKL provided notice of their termination of the two Advisor Agreements to Sun Life. That notice became effective July 16, 2020.

[15] Sun Life says that in September 2020, it became aware that Mr. Lamb and DKL had breached the compliance requirements of the Advisor Agreements by providing “services” on behalf of Assante. Sun Life terminated the CORe payments to the plaintiffs.

The Proceedings

[16] For the context of the discussion below, it is important to understand that Assante argues that Sun Life’s current pleadings are the product of a series of deliberate litigation decisions. On that basis, Assante submits that Sun Life should be held to its current pleadings (i.e., not be allowed to amend). For its part, Sun Life stands by its pleadings and submits that Assante’s application should be dismissed. For that reason, I set out the chronology of the pleadings.

[17] Mr. Lamb and DKL commenced this action on October 13, 2020. They seek damages for the termination of the CORe commissions.

[18] On November 6, 2020, Sun Life filed its response to civil claim and counterclaim. The counterclaim named the plaintiffs as well as Assante. In sum, the original counterclaim alleged that:

a) based upon the Advisor Agreements, Mr. Lamb and DKL owed various obligations and duties to Sun Life including fiduciary, contractual, confidentiality, and exclusivity duties;

b) both before and after departing from Sun Life, Mr. Lamb and DKL breached their various duties and obligations;

c) Assante induced Mr. Lamb and DKL to breach those duties and obligations;

d) Assante knowingly participated, and assisted, in the plaintiffs' breaches of fiduciary duties.

[19] In the original counterclaim, Sun Life sought various forms of relief, including the following (summarized to avoid the natural duplication of pleadings):

a) As against Mr. Lamb and DKL:

   i. A declaration that Mr. Lamb and DKL breached the Advisor Agreements.

   ii. A permanent injunction preventing Mr. Lamb, DKL, and Assante from breaching the Advisor Agreements or using any confidential information.

   iii. The return of all confidential information.

   iv. Disgorgement of profits from the breach of the Advisor Agreements.

   v. Damages (Damages were claimed under various heads, including breach of contract and breach of fiduciary duty).

b) As against Assante:

   i. Damages for inducing breach of contract.

   ii. Damages for knowing participation or assistance in breaches of fiduciary duty.

   iii. An accounting of all proceeds from the knowing assistance in breach of fiduciary duty.

[20] On November 13, 2020, Mr. Lamb and DKL delivered a demand for further and better particulars. Sun Life responded on December 4, 2020.

[21] On December 18, 2020, Mr. Lamb and DKL filed two pleadings: a reply to Sun Life's response to civil claim, and a response to counterclaim.

[22] Assante filed its response to counterclaim on February 17, 2021.

[23] By letter dated April 22, 2022, Assante sought disclosure of Sun Life's documents relating to Sun Life's claim for, and calculations of, damages. Sun Life did not respond to that demand until March 2023.

[24] Crucially for this application, Sun Life filed its Amended Counterclaim on March 9, 2023. In that Amended Counterclaim, Sun Life:

a) continued to seek:

    i. a declaration that Mr. Lamb and DKL breached the Advisor Agreements; and

    ii. a permanent order requiring the opposing parties to deliver all confidential information to Sun Life.

b) removed all claims for damages; and

c) added the following claims for relief (again, paraphrased):

    i. A declaration that Assante induced Mr. Lamb and DKL to breach the Advisor Agreements.

    ii. Disgorgement of profits from Mr. Lamb and DKL resulting from the breaches of the Advisor Agreements.

    iii. An accounting of all proceeds received by, and disgorgement of any profits made by, Assante in respect of both the "inducing breach" and the "knowing assistance" in the breaches by Mr. Lamb and DKL of their various duties and obligations (conflict of interest, exclusivity, and fiduciary obligations).

[25] For the purpose of this application, the important point is that, in the Amended Counterclaim, Sun Life no longer seeks damages from Assante. It seeks disgorgement of Assante's profits.

[26] On March 10, 2023, in answer to Assante's letter dated April 22, 2022, Sun Life advised Assante that it would not be providing further documents relating to its damages claim because Sun Life was no longer claiming any pecuniary damages.

[27] As noted, the action was scheduled to proceed to trial in February 2024. Examinations for discovery have been conducted. There is at least one remaining issue on production of documents which is the subject of another application. However, the parties are near the end, not the beginning, of the litigation.

Rule 9-5 and Rule 9-6

[28] Assante's arguments on this application relate to the allegations contained within the Amended Counterclaim and the evidence filed in support of this application.

[29] As noted, Assante proceeds under both Rule 9-5 and Rule 9-6. I have been careful to distinguish those arguments below. Those distinctions were recently discussed by Justice Brongers in *Manns v. Vancouver Island Health Authority*, 2021 BCSC 2418:

> [18] The principles that apply to adjudicating Rule 9-5 applications to strike and Rule 9-6 applications for summary judgment are well established and are not in dispute. They are as follows.
>
> [19] On an application to strike, the question is whether it is "plain and obvious" that the claim is certain to fail even if the notice of civil claim is read as generously as possible and it is assumed that the facts set out in the pleading are true. When the application is based on an assertion that the claim discloses no reasonable cause of action, as in the present case, no evidence can be considered and the determination is made solely by reference to what is alleged in the notice of civil claim. The burden to show such an absence of a reasonable cause of action lies on the applicant, and it is a high one (*Goy v. District of Sechelt,* 2020 BCSC 1242 at paras. 55 and 56; *Lam v. Ark Platforms Inc.,* 2021 BCSC 647 at para. 4).
>
> [20] On an application for summary judgment, the question is whether on the relevant facts and law there is a genuine issue to be tried. Not only is it permissible to lead evidence in respect of such applications, but the parties

> are expected to do so in order to put their "best foot forward" with respect to the existence or non-existence of material issues that will require a trial. Furthermore, where there is a straightforward answer to the issues that will allow the court to dispose of a claim based on clear law, the court may act under this rule (*Litynsky v. Litynsky,* 2012 BCSC 1160 at paras. 43 to 46; *4 Corners Properties Ltd. v. Boffo Developments (Smithe) Ltd.,* 2013 BCSC 1926 at paras. 20-24)

[30] In my discussion below, I have applied these principles.

Assante's Arguments on Rule 9-5

[31] Assante submits that the Amended Counterclaim should be considered the "final form" of the pleading. Counsel notes Assante's April 2022 demand for particulars of the damage suffered by Sun Life. Sun Life failed to respond to that demand until March, 2023. Instead, Sun Life amended the counterclaim to remove all claims for damages and replaced them with claims for disgorgement.

[32] Assante notes that, when all of the duplication is cleared away, there are two claims against it:

a) inducing breach of contract (a tort claim); and

b) knowing assistance and knowing participation in a breach of fiduciary duty (an equitable claim).

[33] Assante argues that the first claim should be dismissed under Rules 9-5 and 9-6. It argues makes similar arguments on the second claim.

[34] I address each argument below.

Declaratory Relief – Improperly Sought

[35] Assante's first submission is that the Amended Counterclaim improperly seeks declaratory relief against Mr. Lamb, DKL, and Assante. The Amended Counterclaim seeks declarations:

a) that Mr. Lamb and DKL breached the Advisor Agreements; and

b) that Assante induced Lamb and DKL to breach the Advisor Agreements.

[36] Assante submits this is an improper claim for relief. A plaintiff is only entitled to seek a binding declaration of a legal right. In other words, a party is not entitled to a declaration that a certain thing has happened. For example, a plaintiff injured in a car accident is not entitled to sue for a declaration that the other driver was negligent. A claim in tort sounds in finding of liability. There is no claim for a declaration of negligence, nor of any other tort.

[37] Assante points to the decision of the Ontario Superior Court of Justice in *Hydroslotter Corporation v. Nikouline*, 2020 ONSC 1478:

> [60] A second difficulty with the Hydroslotter Application is that it purports to seek a "declaration" that the respondents "have committed the tort of defamation". A declaratory judgment is a judicial statement confirming or denying a legal right of the applicant under statute, administrative order, contract, collective agreement, trust, will, deed or other instrument: see the thorough discussion of declarations by Granger J. in *Nickerson v. Nickerson* (Gen. Div.), 1991 CanLII 7127 (ON SC). See also: *Yasin v. Ontario*, 2018 ONCA 417, at para. 8. In the present application, there is no right upon which a declaratory order or judgment could be founded. While a court may – following a trial[1] or summary procedure if a trial is not necessary – make a finding that a defendant has committed the tort of defamation, that is not the kind of finding for which declaratory relief is available.

[38] I will address this part of Assante's submission at this point.

[39] I accept, without deciding the issue, that this submission has some merit. However, Assante's full argument on this point is that, if the remainder of Sun Life's claims are struck (or dismissed), then the Amended Counterclaim cannot survive if the only remaining claim is for a "declaration" that certain things happened.

[40] As I set out below, I find that Sun Life's claims for disgorgement survive this application and should proceed to trial. Hence, the claim for a declaration is not the only claim propounded by Sun Life. In other words, I do not have to address the hypothetical situation wherein the only remedy Sun Life is seeking is declaratory relief. I find that Sun Life's pleading is saved by another part of the Amended Counterclaim.

Application under Rule 9-5: Inducing Breach of Contract

[41] I turn now to the main force of Assante's Rule 9-5 argument which relates to Sun Life's decision to remove the claim for damages and seek disgorgement of profits.

[42] Assante argues that the "inducing breach" claim should be struck under Rule 9-5. Assante submits:

a) "Inducing breach of contract" is a claim in tort.

b) An essential element of the tort of "inducing breach" is that the plaintiff has suffered damages.

c) Sun Life's Amended Counterclaim does not plead that Sun Life suffered damages, neither does it claim damages.

d) As a result, Sun Life's pleading is deficient. It does not plead an essential element of the tort.

e) Hence, it is plain and obvious that Sun Life's claim for inducing breach of contract is bound to fail.

f) Sun Life's pleadings do not arise from a slip or error. The removal of the damages claim was deliberate and strategic. Sun Life should not be given leave to amend.

[43] Assante says that a key element of its defence to Sun Life's original counterclaim was that Sun Life could not establish that it had suffered any pecuniary damages. Assante put significant effort toward disproving that aspect of the claim. By amending its counterclaim, Sun Life has deliberately side-stepped that issue.

[44] Assante submits that, by removing its claim for damages and seeking disgorgement, Sun Life is attempting to proceed on the basis of a "waiver of tort". In other words, Sun Life is abandoning the establishment of the essential elements of the tort of inducing breach of contract, and simply seeking disgorgement of profits.

[45] Assante points to the decision of the Supreme Court of Canada in *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 [*Atlantic Lottery*]. Assante relies on that decision for the proposition that there can be no stand-alone claim for disgorgement. In that decision, Justice Brown noted that "the term 'waiver of tort' is confusing, and should be abandoned" (at para. 23). Regarding "disgorgement" as a remedy for the tort of negligence, Justice Brown wrote:

> [37] Causation of damage is a required element of the tort of negligence. As I have explained, the conduct of a defendant in negligence is wrongful only to the extent that it *causes* damage (*Clements*, at para. 16). …
>
> [38] It follows that I respectfully disagree with Court of Appeal's conclusion that the plaintiffs would not be "precluded from leading evidence that the breach of duty (assuming it can be proven) led to some form of injury" (para. 186). Again, causation of damage is a required element of the cause of action of negligence, and it must be pleaded. Here, not only have the plaintiffs *not* pleaded causation, their pleadings expressly disclaim any intention of doing so. The absence of a pleading of causation, they acknowledge, arises from an intentional litigation strategy to increase the likelihood of obtaining certification of their action as a class action by avoiding having to prove individual damage. This particular claim also has no reasonable chance of success.

[46] Assante submits that the Amended Counterclaim fails to plead, or claim, damages for the tort of "inducing breach". As a result, Sun Life's claim against Assante is bound to fail.

[47] In response, Sun Life submits that Assante's argument is simply wrong. Sun Life says two things:

a) The Amended Counterclaim does contain an allegation that Sun Life suffered damage.

b) It is entitled to claim for disgorgement of profits in tort.

[48] On the first point, Sun Life is correct. Paragraph 37(g) of the Amended Counterclaim states:

> 37. Assante induced [Mr. Lamb and DKL] to breach their contract with Sun Life:
>
> …

(g) Sun Life suffered damages as a result.

[49] Sun Life concedes that this paragraph sits within the “Legal Basis” section of the Amended Counterclaim. However, the allegation is in the pleading, and the claim is not bound to fail on the pleading itself. Sun Life submits that an application under Rule 9-5 must be governed by the pleadings.

[50] I accept that submission. Sun Life’s Amended Counterclaim alleges that Sun Life suffered damages as a result of Assante’s tortious actions.

[51] The bigger issue is whether Sun Life is entitled to forego claiming, and proving, “damages” and, instead, claim “disgorgement”.

[52] On this issue, I start the discussion with a change of position taken by Sun Life. In a prior written communication to opposing counsel, counsel for Sun Life indicated that the claim for disgorgement would apply only to the fiduciary claims (i.e., not the tort or contract claims). Thereafter, Assante brought this application believing that to be the state of play. However, at the hearing of the application, counsel for Sun Life indicated that he was resiling from that prior position. Sun Life’s new position is that it is pursuing disgorgement as a remedy for all of the claims (tort, contract, and fiduciary duty). Counsel for Assante continued with their argument and made the points set out above.

[53] I note that Sun Life’s first position (i.e., only seeking disgorgement in respect of the fiduciary claims) was not set out in a pleading. Nor was there an undertaking by counsel on the issue. Hence, in my opinion, Sun Life is not bound to the position that it took in correspondence to counsel for Assante. However, the change in positions did put Assante at a disadvantage on this application.

[54] Sun Life’s primary answer to Assante’s submission is that it is not seeking to pursue a “waiver of tort” claim against Assante. To the contrary, it intends to establish the elements of the tort of “inducing breach”, and, instead of pursuing damages, it will seek disgorgement as a remedy. Sun Life points to the guidance provided by Brown J. in *Atlantic Lottery*:

> [25] Here, the plaintiffs seek *disgorgement*, not restitution: they say that they are entitled to a remedy quantified solely on the basis of ALC's gain, without reference to damage that any of them may have suffered. There are two schools of thought on where disgorgement fits in the overall legal structure of private obligations. The prevailing view is consistent with that which I have just stated. Disgorgement, as a gain-based remedy, is precisely that: a *remedy*, awarded in certain circumstances upon the plaintiff satisfying all the constituent elements of one or more of various causes of action (specifically, breach of a duty in tort, contract, or equity).
>
> …
>
> [36] The Court of Appeal majority concluded that, even if disgorgement for wrongdoing is not an independent cause of action, the plaintiffs have adequately pleaded the elements of the tort of negligence, and may therefore seek disgorgement for tortious wrongdoing on that basis. While disgorgement for tortious wrongdoing was initially applied only in the context of proprietary torts, including conversion, deceit, and trespass, it found broader application in the late 20th century (Martin, at pp. 505-6). It has even been suggested that disgorgement may be available for negligence in certain circumstances, and the issue remains unsettled (Edelman, at pp. 129-30; C.-M. O'Hagan, "Remedies", in L. N. Klar et al., eds., *Remedies in Tort* (loose-leaf), vol. 4, at §200). While that may have to be decided in an appropriate case, as I will explain the plaintiffs have not adequately pleaded a claim in negligence, and it is unnecessary to resolve the question here.
>
> [Emphasis added.]

[55] And further, Sun Life points to the following paragraphs of *Atlantic Lottery*:

> [51] More recently, courts have accepted that disgorgement may be available for breach of contract in certain exceptional circumstances (*Attorney General v. Blake*, [2001] 1 A.C. 268 (H.L.); *Bank of America*, at paras. 25 and 30-31). In *Blake*, the defendant was a former member of the British secret intelligence service who had defected to become an agent for the Soviet Union. He was discovered and sentenced to 42 years' imprisonment, but escaped prison and fled the country. Blake later entered into a contract to publish his memoirs, in contravention of the confidentiality undertaking in his employment agreement with the intelligence service. The information in his memoirs was, however, "no longer confidential, nor was its disclosure damaging to the public interest" (p. 275). Further, Blake's fiduciary obligations ceased to exist when he was dismissed from his post. The sole question was, therefore, whether the Crown could pursue disgorgement for his breach of contract.
>
> [52] Lord Nicholls, for a majority of the House, held that disgorgement for breach of contract may be appropriate in exceptional circumstances, but only where, at a minimum, the remedies of damages, specific performance, and injunction are inadequate (*Blake*, at p. 285; *One Step (Support) Ltd. v. Morris-Garner*, [2018] UKSC 20, [2018] 3 All E.R. 659, at para. 64; see also Watterson, at p. 55). As to the types of circumstances that should be considered exceptional, Lord Nicholls concluded:

> No fixed rules can be prescribed. The court will have regard to all the circumstances, including the subject matter of the contract, the purpose of the contractual provision which has been breached, the circumstances in which the breach occurred, the consequences of the breach and the circumstances in which relief is being sought. A useful general guide, although not exhaustive, is whether the plaintiff had a legitimate interest in preventing the defendant's profit-making activity and, hence, in depriving him of his profit. [Emphasis added in *Atlantic Lottery*; p. 285.]
>
> [53] Nothing in the law of Canada contradicts the "exceptional" standard articulated by Lord Nicholls in *Blake*. Indeed, this Court's statement in *Bank of America*, at para. 31 — that "[c]ourts generally avoid [the restitution] measure of damages" — affirms this Court's view, like that expressed by the House of Lords in *Blake*, that disgorgement awards are not generally available. In particular, and again as was held in *Blake*, disgorgement for breach of contract is available only where other remedies are inadequate and only where the circumstances warrant such an award. As to those circumstances, courts should in particular consider whether the plaintiff had a legitimate interest in preventing the defendant's profit-making activity.

[56] Sun Life submits that it has a legitimate interest in preventing Assante, a competitor, from reaping the financial benefit of inducing Sun Life's advisors away. On that basis, Sun Life will argue at trial that this is one of the exceptional cases discussed in *Atlantic Lottery*. On that basis, the claim is not bound to fail.

[57] Sun Life's alternative position is that if I should find the Amended Counterclaim to be deficient, they seek leave to further amend it.

Decision on Rule 9-5

[58] Put simply, in my opinion, Sun Life's claim against Assante for inducing a breach of contract is not bound to fail. On that basis, I dismiss this aspect of Assante's application.

[59] In coming to this decision, I am mindful that, at some point, a trial judge will be called upon to make a final determination on that issue. For that reason, I will be careful here. I do not wish to make any suggestion about the strength of the claim.

[60] However, I find that based on the pleading:

a) Sun Life has properly set out the necessary elements of the tort; and

b) the pleading is not deficient.

[61] I interpret Assante's arguments as being to the effect that Sun Life's claim for disgorgement is bound to fail because the law does not support a claim for disgorgement in tort. I am satisfied that, although somewhat novel, Sun Life's claim for disgorgement as against Assante is not precluded by law. Hence, it is not bound to fail.

[62] I now move to the application under Rule 9-6.

Application under Rule 9-6: Inducing Breach

[63] In the alternative, Assante submits that the tort claim for "inducing breach" should be dismissed under Rule 9-6. Assante submits that, unlike a claim for breach of contract, damage is a mandatory element of proving the tort of inducing breach of contract. Assante submits that failure to prove damage amounts to a failure to establish the requisite elements of the cause of action.

[64] As authority for this proposition, Assante relies on the decision of Justice Ballance in *Sateri (Shanghai) Management Limited v. Vinall*, 2017 BCSC 491 [*Sateri*]:

> [622] The tort of inducing breach of contract can be broken down into five constituent elements. Each must be proved to establish liability:
>
> a) the existence of a contract between the plaintiffs and a third party (i.e. Mr. Vinall) and a breach of it by the third party;
>
> b) the defendant had knowledge of the existence of the contract;
>
> c) the defendant's conduct was intended to cause the third party to breach the contract;
>
> d) the defendant's conduct caused the third party to breach the contract; and
>
> e) the plaintiff suffered damage as a result of the breach.

[65] Justice Ballance continued in *Sateri*:

> [625] Unlike a claim for breach of contract, damage is a mandatory element of proving the tort. Failure to prove damage in consequence of Fortress's conduct amounts to a failure to prove the cause of action.

> [626] Only where the cause of action has been proven, do damages as a remedy become available. In this context, damages are said to be "at large", meaning they are "not limited to specific or special damage" and may include exemplary or punitive damages and elements for injured feelings, loss of reputation, and the bad or good conduct of either party, where no precise limit can be set: *Drouillard v. Cogeco Cable Inc.*, 2007 ONCA 322 at paras. 42-43 (add'l reasons at 2007 ONCA 485).

[66] Assante submits that Sun Life has failed to provide any evidence of either pecuniary loss, or any other sort of damage (e.g., loss of reputation).

[67] On that basis, Assante submits that there is no evidence of a constituent element of the tort. The claim must be dismissed. Referring back to the *Manns* decision (*supra*), Assante submits that Sun Life is expected to put their "best foot forward" with respect to this application. On that basis, Assante says there is no issue to be tried.

[68] In answer to this submission, Sun Life argues that Assante confuses the concepts of "damage" and "damages". Sun Life submits that it no longer seeks pecuniary "damages" against Assante, but it continues to plead that it suffered "injury" or "damage" by Assante's actions.

[69] In that respect, Sun Life notes that damages for "inducing breach" are at large, and may include, for example, loss of reputation. Hence, the assessment of such damages is for the trial judge. Sun Life relies upon the guidance provided in *Burns v. Sharan Sohi et al*., 2012 ONSC 2414:

> [313] Damages for inducing breach of contract are discretionary. They may be assessed at large. In doing so, the trial judge may assess both pecuniary and non-pecuniary damages such as injured feelings, loss of reputation, the nature of the parties' conduct, and punishment. Consequently, no precise limit may be set on these damages: see *Drouillard* at para. 42.
>
> [314] In *Waxman v. Waxman,* 2002 CarswellOnt 2308, at para. 1804, the court commented on the assessment of damages at large for inducing breach of contract. It observed that these damages are "a matter of impression, not addition, and can be inferred from the circumstances." It is within the court's discretion to award damages at the date of the breach or in the years following the breach. The plaintiff is entitled to recover overlapping damages from the offender for actual breach of contract as well as from the tortfeasor for inducing the breach of contract; the heads of damage are distinct.

[70] Further, Sun Life notes, in accordance with the discussion above, that it is entitled to seek disgorgement from Assante (again, relying upon *Atlantic Lottery*). A plaintiff who elects to pursue disgorgement is precluded from pursuing a claim for damages (*Sateri* at para. 674). Hence, the law would preclude Sun Life from adducing evidence of pecuniary damages.

Decision on Rule 9-6: Inducing Breach

[71] On this issue, I accept the submission of Sun Life for reasons aligned with my reasons set out above on the Rule 9-5 application. In short:

a) Sun Life claims against Assante for the tort of inducing breach of contract.

b) Sun Life seeks disgorgement of profits, as opposed to an award of damages.

c) *Atlantic Lottery* provides that a plaintiff can pursue disgorgement in tort in certain circumstances.

d) The issue of whether Sun Life is entitled to disgorgement will be a question for the trial judge.

e) The election to pursue disgorgement disentitles Sun Life from an award of damages. Hence, the absence of evidence of specific damages is not fatal on this application.

[72] Hence, on the relevant facts and law, there is a genuine issue to be tried. For that reason, Assante's application to dismiss the "inducing breach" claim under Rule 9-6 is dismissed.

The "Knowing Assistance" Claim: Rule 9-5 and Rule 9-6

[73] Assante seeks to strike or dismiss the "knowing assistance" claim pursuant to both Rule 9-5 and Rule 9-6. Assante submits that the claim is bound to fail and that there is no genuine issue to be tried.

[74] Assante correctly notes that the "knowing assistance" claim is inexorably tied to Sun Life's claim that Mr. Lamb owed fiduciary obligations to Sun Life. Assante argues that there is no genuine issue to be tried on that claim. Hence, any claim hitched to that wagon should also fail.

[75] To set the parameters of this dispute, Sun Life agrees that the "knowing assistance" claim is predicated on the breach of fiduciary duty claim. Sun Life says that it will be able to establish that claim and there is evidence to support it.

[76] I note that Assante's notice of application argues that the fiduciary claim must be "struck and/or dismissed". I infer from that manner of pleading that Assante relies on both Rule 9-5 and Rule 9-6 in respect of this argument. Sun Life notes that Assante's written submissions conflate the two distinct tests under the two rules.

[77] Regarding the sufficiency of the pleading, Assante submits that Sun Life has changed its position (from the pleading to the written argument). Assante notes that:

a) The Amended Counterclaim pleads an *ad hoc* fiduciary duty, arising from:

    i. the nature of the relationship;

    ii. Mr. Lamb and DKL exercising significant influence and control over Sun Life's relationships with clients;

    iii. Sun Life's vulnerability;

    Hence, Mr. Lamb and DKL stood in a fiduciary position with Sun Life.

b) Sun Life's application response (and written argument) rely on the factual basis that the Advisor Agreements describe the relationship as a "principal/agent" relationship. Hence, it is a *per se* fiduciary relationship.

[78] Assante submits that Sun Life's position has changed from the existence of an *ad hoc* fiduciary relationship to a *per se* fiduciary relationship.

[79] Dealing first with the *per se* relationship, Assante submits that the use of the term “principal/agent” in the Advisor Agreements is not determinative of anything. Assante submits that I can infer there was a reason that Sun Life chose to call the document an “Advisor Agreement” and not “Agency Agreement”. Sun Life was protecting itself. Assante notes that the term “agent” is used only sparingly in the Advisor Agreements.

[80] Assante argues that, in the Advisor Agreements, DKL did not undertake to act solely in the best interests of Sun Life. By definition, DKL owed a duty of care to its clients. Hence, Assante argues, DKL could not serve (or owe fiduciary duties to) two masters. Hence, it could not owe the highest (fiduciary) duty to Sun Life.

[81] Assante further argues that Sun Life cannot establish the existence of an *ad hoc* fiduciary duty:

a) DKL did not assert control or influence over Sun Life; and

b) Sun Life was not vulnerable. Sun Life has failed to tender any evidence of vulnerability.

[82] Assante relies on several decisions that describe the relationship between similar advisors and investment companies as something less than a fiduciary relationship. There are many such decisions.

[83] Finally, Assante argues that the “knowing assistance” claim is a further step removed from the fiduciary duty claim. Assante submits that the “knowing assistance” claim must be dismissed because the constituent elements are not established. In particular, those elements are that:

a) DKL owed a fiduciary duty to Sun Life;

b) DKL breached that duty in a fraudulent or dishonest manner;

c) Assante had actual knowledge of both a) and b); and

d) Assante participated in, or assisted DKL with, the alleged fraudulent or dishonest conduct.

[84] In respect of points c) and d), Assante submits that the law is clear that DKL did not owe a fiduciary obligation to Sun Life. Hence, it would have been impossible for Assante to have known that the alleged fiduciary obligations existed.

[85] In support of this position, Assante points to the decision in *Sun Life Financial Distributors (Canada) Inc. et al. v. Sanche et al*., 2008 MBQB 99 [*Sanche*]. That decision arose from an application by Sun Life for an injunction against an advisor who was alleged to be in breach of a similar "Advisor Agreement". Mr. Sanche left Sun Life for a competitor, Raymond James Ltd.

[86] The legal test for an injunction, of course, required Sun Life to establish that there was a "serious question to be tried" on the issue of the existence of a fiduciary duty. Mr. Sanche and Raymond James argued (at para. 50) that:

> … there is no basis for finding Sanche to be a fiduciary and to do so would "extend the concept beyond all recognition". In other words, concerning that issue, Sun Life's case is frivolous and is thus not a serious question to be tried.

[87] In addressing the issue of whether the Sun Life advisor was a fiduciary, Justice Joyal (as he then was) wrote:

> [62] On the issue of the fiduciary status of Sanche and the alleged breach of that duty, I have concluded that on the evidence before me, there is insufficient proof to establish that Sanche was part of Sun Life's upper management, possessing the kind of senior responsibilities necessary to find that he occupied a fiduciary position. Indeed, when Mr. Pomeroy was cross-examined about Sanche's role with Sun Life, he responded as follows:
>
> 278 Q He didn't have a management role with Sun Life?
>
> A No, he did not.
>
> 279 Q In fact he wasn't even an employee of Sun Life?
>
> A No, he was not.
>
> 280 Q I would be correct, I would assume, that Sun Life never discussed or disclosed to Mr. Sanche any of its contemplated plans or strategies for the future? Mr. Sanche was definitely not part of the management team of Sun Life?

> A So there may be opportunities where an advisor would have that knowledge and they'd be bound by confidentiality agreements, and I'm unaware if Shea has entered into those at any time.
>
> 281 Q But that would generally be when you're about to roll out or discuss a project or product with the entire advisor group, wouldn't it?
>
> A Not fair to make that general statement. That forum can take many shapes and sizes.
>
> 282 Q But you have no knowledge of Sun Life ever disclosing to Mr. Sanche contemplated strategies that it wouldn't have disclosed to other advisors?
>
> A No, I don't have that knowledge.
>
> [63] Accordingly, on the issue of Sanche as a fiduciary, there is no serious question to be tried.

[88] In the present case, Assante points to examination for discovery evidence from a representative of Sun Life that mirrors the evidence adduced in *Sanche*.

[89] Hence, Assante submits:

a) Based upon the pleadings, the claim of breach of fiduciary duty against Mr. Lamb and DKL is bound to fail, and the knowing assistance claim fails for the same reason.

b) On the facts and law, there is no real issue to be tried.

[90] As noted, Assante's submissions blurred between the two concepts of striking and dismissing Sun Life's claims. However, the main focus was on Rule 9-6 and dismissal.

[91] In response to Assante's arguments, Sun Life submits:

a) The Amended Counterclaim asserts a *per se* fiduciary relationship.

b) That relationship derives from the description of the parties' relationship as that of "principal/agent".

[92] Sun Life submits that the principal/agent relationship is presumptively fiduciary in nature. In addition to the *per se* relationship, Mr. Lamb and DKL exercised discretion and influence over the clients and Sun Life was inherently vulnerable. Hence, there were *ad hoc* fiduciary obligations.

[93] In support of the presumption of a fiduciary relationship in principal/agent contracts, Sun Life relies on the statements of Justice Maisonville in *Shen v. West Continent Development Inc. (BC0844848),* 2020 BCSC 5:

> [87] Certain categories of relationships are presumptively fiduciary in nature because they have as their essence discretion, influence over interests, and an inherent vulnerability. In these types of relationships, there is a rebuttable presumption, arising out of the inherent purpose of the relationship, that one party has a duty to act in the best interests of the other: *Hodgkinson v. Simms*, 1994 CanLII 70 (SCC), [1994] 3 S.C.R. 377 at 409 [*Hodgkinson*]. These categories of relationships are called presumptive or *per se* fiduciary relationships: *Galambos v. Perez*, 2009 SCC 48 at para. 36 [*Galambos*]. The relationship between a principal and agent is one such relationship; see for example: *Lac Minerals Ltd. v. International Corona Resources Ltd.*, 1989 CanLII 34 (SCC), [1989] 2 S.C.R. 574 at 597 [*Lac Minerals*]; *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, 2011 SCC 23 at paras. 138–140. Where an agency relationship is established, a fiduciary duty will only be negated where it is shown that the agent did not have the powers of a true agent in the transaction at issue: *Imperial Oil v. H.H.L. Fuels Ltd.*, 2006 NBCA 1 at paras. 44–46; *Indutech Canada Ltd. v. Gibbs Pipe Distributors Ltd.*, 2013 ABCA 111 at para. 20 [*Indutech*].
>
> [Emphasis added.]

[94] Sun Life says that the reasoning in this paragraph establishes (or demonstrates) that there is a genuine issue to be tried.

[95] Sun Life further submits that Assante's argument of a "divided" fiduciary duty has no basis in law. In the private law context, a fiduciary can owe multiple obligations to multiple beneficiaries. Sun Life points to the decision *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6 [*Indalex*] which addressed a plan administrator with divided obligations:

> [193] Another important aspect of the legal context for Indalex's fiduciary duties as a plan administrator is that it was acting in the dual role of an employer-administrator. This dual role is expressly permitted under s. 8(1)(a) of the *PBA*, but this provision creates a situation where a single entity

> potentially owes two sets of fiduciary duties (one to the corporation and the other to the plan members).
>
> [194] This was the case for Indalex. As an employer-administrator, Indalex acted through its board of directors and so it was that body which owed fiduciary duties to the plan members. The board of directors also owed a fiduciary duty to the company to act in its best interests: *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 122(1)(*a*); *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, [2008] 3 S.C.R. 560, at para. 36. In deciding what is in the best interests of the corporation, a board may look to the interests of shareholders, employees, creditors and others. But where those interests are not aligned or may conflict, it is for the directors, acting lawfully and through the exercise of business judgment, to decide what is in the overall best interests of the corporation. Thus, the board of Indalex, as an employer-administrator, could not always act exclusively in the interests of the plan beneficiaries; it also owed duties to Indalex as a corporation.

[96] Sun Life further points to the "incontrovertible" propositions discussed in *Pirani v. Pirani*, 2022 BCCA 65, regarding the ability of the trust instrument to adjust apparently conflicting duties:

> [94] The parties agree on a number of incontrovertible general principles. First, trustees are fiduciaries and owe duties to the beneficiaries of the trust. Second, as a general matter, trustees should not act in the face of a disabling conflict of interest or duty. Third, conflicts may exist between duties owed as trustees, and duties owed in other capacities; or conflicts may exist between duty and interest. Fourth, where a trustee acts in the face of a disabling conflict, the trustee will bear the onus of demonstrating that decisions were taken in good faith within the scope of the trustee's powers. Depending on the circumstances, the trustee may also have to demonstrate they did not profit from acting as a trustee. Fifth, a *prima facie* conflict may arise where there is a substantial risk the conflict could sway the decision making.
>
> [95] The parties also agree these general propositions are context specific, and not necessarily of universal application. Their applicability turns, at least in part, on the extent to which the trust instrument, interpreted in its appropriate factual matrix, informs, alters, modifies, or displaces the scope and content of fiduciary duties. The parties agree the trust instrument may authorize a trustee to act in the face of what may otherwise be a disabling conflict; displace the operation of the "no profit" rule; and in other ways modify the content of the fiduciary duty, for example, displacing an obligation to act only in the best interests of all beneficiaries with a more limited duty.

[97] On the basis of the reasoning in *Indalex* and *Pirani*, Sun Life submits there is no merit to Assante's "divided loyalties" argument.

[98] For the basic proposition that a fiduciary relationship exists, Sun Life points to the decision of Justice Provenzano in *Planvest Financial Corp. v. Cramer* (1990), 30

C.P.R. (3d) 399, 1990 CanLII 406 (B.C.S.C.), where the plaintiff sought an injunction restraining five financial advisors from commencing a competing business. On the specific issue of whether a fiduciary relationship existed between the advisors and Planvest, Provenzano J. wrote:

> I conclude therefore that the Defendants were agents of the Plaintiffs in these matters and the fact that they were independent contractors is of no consequence. This result is similar to that reached in the **Versatile** case, supra. As an agent, the Defendants had a fiduciary duty towards the Plaintiff who was their principal. It has been suggested that if the Defendants owed a fiduciary duty, it was to the clients and not to the Plaintiff. Whether or not there was a fiduciary duty to the clients is not relevant on this application, in my opinion. But nevertheless if one does exist that does not prevent the existence of a duty to the Plaintiff.
>
> [Emphasis in original.]

[99] On this basis, Sun Life submits that there is a genuine issue to be tried and Assante's application should be dismissed.

Decision on Striking or Dismissing the Knowing Assistance Claim

[100] Before addressing the substantive elements of Assante's application, I pause to note that this portion of the application constitutes a worrisome "litigation in slices". By that, I mean that Assante argues that Sun Life's "fiduciary duty" claim against Mr. Lamb and DKL is bound to fail and has no chance of success. Hence, it should be struck or dismissed. Assante seeks such an order on the basis of the pleadings and the evidence adduced on this application. Mr. Lamb and DKL did not bring the same application, although they adopted Assante's submissions.

[101] It follows that Assante is asking me to rule that the fiduciary duty claim against Mr. Lamb and DKL is either bound to fail or constitutes no real issue to be tried. However, because this is Assante's application, I am only asked to dismiss the "knowing assistance" claim. If I rule in favour of Assante, Sun Life's Amended Counterclaim against Mr. Lamb and DKL will still exist. The fiduciary duty claim will still exist as between the remaining parties. When the matter advances to trial, the trial judge will be saddled with my findings, which were made on the basis of the application record tendered on this application, as opposed to the full trial.

[102] As a result, I approach this part of Assante's application with caution.

[103] Further, and again to avoid fettering the ambit of the trial judge's decision-making, I address the issues below on a binary basis. I provide no opinion on the chance of success of either side. I paint no shades of grey in discussing those issues. Instead, I provide a simple answer to the question: Has Assante met the necessary test for either striking or dismissing the "knowing assistance" claim?

[104] First, in respect of Assante's Rule 9-5 application to strike the "knowing assistance" claim, I agree with Sun Life that the Amended Counterclaim makes the necessary allegations of the existence of a fiduciary duty and then, at paras. 27–29, pleads the necessary elements of the claim:

a) Assante was aware of the obligations owed by Mr. Lamb and DKL;

b) The conduct of Mr. Lamb and DKL was carried out in a dishonest manner; and

c) Assante assisted in those breaches in a dishonest manner and profited from doing so.

[105] On that basis, I find that, on the pleadings, the "knowing assistance" claim is not bound to fail. It is not deficient. Assante's application under Rule 9-5 is dismissed as it relates to the knowing assistance claim.

[106] Moving to the Rule 9-6 application, I again agree with Sun Life's submission that:

a) there is an evidentiary basis for the allegation of the existence of a fiduciary duty;

b) there is caselaw that supports the position that there was a fiduciary relationship; and

c) the decision of whether Sun Life can establish the state of knowledge of Assante will be one for the trial judge.

[107] On that basis, I dismiss Assante's application to either strike or dismiss the "knowing assistance" claim. I find that there is a case to be tried.

Summary and Costs

[108] It follows from my discussion above that Assante's application is dismissed in its entirety.

[109] In the ordinary course, the successful party on the application would be entitled to its costs. Sun Life has been fully successful. However, as noted above, during the course of this hearing, Sun Life changed its position regarding its claim for disgorgement in relation to the tort and contract claims. I am unable to determine whether a prior, and proper, disclosure of that position would have obviated the need for this application. However, in my opinion, by changing its position, Sun Life created significant confusion.

[110] In my opinion, the fairest result on this application is that the costs of this application should be costs in the cause.

"A. Ross J."