

CITATION: Municipal Electric Association Reciprocal Insurance Exchange v. The Dominion of Canada General Insurance Company, 2024 ONSC 59
COURT FILE NO.: CV-22-00678235-0000
DATE: 20240103

ONTARIO SUPERIOR COURT OF JUSTICE

RE: Municipal Electric Association Reciprocal Insurance Exchange, Plaintiff
-and-
The Dominion of Canada General Insurance Company and The Travelers Companies, Inc., Defendants

BEFORE: Robert Centa J.

COUNSEL: Alan Mark and Kirby Cohen, for the plaintiff
Mark Walli and Eric Turner, for the defendants

HEARD: December 22, 2023

ENDORSEMENT

- [1] The defendants, The Dominion of Canada General Insurance Company and The Travelers Companies Inc., move to strike out portions of the Municipal Electric Association Reciprocal Insurance Exchange’s statement of claim pursuant to rule 21.01(1)(b).¹ Dominion and Travelers challenge four specific claims advanced by MEARIE, namely that:
- a. Travelers induced Dominion to breach its contract with MEARIE;
 - b. Dominion breached a fiduciary duty owed to MEARIE;
 - c. Travelers knowingly assisted Dominion’s breach of a fiduciary duty owed to MEARIE; and
 - d. Travelers and Dominion conspired to cause harm to MEARIE.
- [2] On a rule 21.01(1)(b) motion, it is not sufficient for Dominion and Travelers to demonstrate that it is more probable than not that MEARIE’s statement of claim does not disclose a reasonable cause of action. They must meet the much higher standard of establishing that the claim as pleaded has no reasonable prospect of success. In my view, the defendants

¹ *Rules of Civil Procedure*, R.R.O. 1990, Reg 194.

have not met the stringent test to strike out portions of MEARIE's claim. The motion to strike is dismissed.

The parties and the statement of claim

- [3] The following facts are taken from the statement of claim.²
- [4] MEARIE is a reciprocal insurance exchange created in 1987 and licensed under the *Insurance Act*.³ It offers insurance products, including property and automobile insurance, to entities in Ontario's energy sector, with operations such as electrical distribution, small hydro and gas generation, telecommunications, fiber optics, and municipal water distribution.
- [5] As an insurance reciprocal with a limited membership, MEARIE's members have indemnity obligations to one another. As a requirement of its licence, MEARIE must have extended underwriting periods, typically for three years. During the underwriting period, MEARIE's members cannot withdraw from the program and rely on MEARIE as the sole source of their insurance.
- [6] MEARIE reinsures its property and automobile insurance risks. Since 2010, MEARIE has sought to obtain multi-year reinsurance agreements that would allow it to access reinsurance without having to go to market each year. MEARIE "seeks to have reasonable assurance that reinsurance matching the coverage MEARIE offers its members will be available to it at reasonable and stable rates throughout the underwriting period." Specifically, MEARIE sought assurances that it would have access to rates that would only vary during the multi-year term of the contract in accordance with loss experience or other justifiable actuarial or cost factors.
- [7] MEARIE also seeks a reinsurance provider that will act as the program provider to its members and handle all administrative and claims functions for MEARIE's members. The reinsurer, therefore, is expected to support MEARIE in establishing and maintaining goodwill with its members.
- [8] In 2010, MEARIE entered into an agreement with the defendant Dominion to reinsure its property policies. The defendant Travelers acquired Dominion in 2013 and now controls it.
- [9] By 2012, MEARIE and Dominion were negotiating agreements that essentially provided for a rolling three-year agreement with annual rate adjustments. In 2016, MEARIE and Dominion adopted a similar multi-year agreement structure for the automobile reinsurance

² MEARIE issued a statement of claim on March 11, 2022, which it amended on December 23, 2022. When I refer to the statement of claim, I am referring to the amended statement of claim unless I specify that I am referring to the original statement of claim.

³ R.S.O. 1990, c. 1.8.

products. The contracts were repeatedly renewed until 2020, which included MEARIE's right to renew for 2021 and 2022.

- [10] Pursuant to the 2019 agreement, Dominion was to deliver proposed terms for the 2021 renewal period by September 30, 2019. At Dominion's request, MEARIE agreed to extend the date for delivering the proposed rates several times. Dominion finally delivered its rate proposals on March 12, 2020. Dominion proposed to increase the property rates by 125% and automobile rates by 43%, which would have cost MEARIE \$4.5 million in additional premiums. Dominion also proposed other changes that MEARIE neither anticipated nor welcomed. MEARIE asserts that these proposed rates and changes were arbitrary, unjustified, and unfair.
- [11] MEARIE asserts that it had no option but to sign the agreement on terms that were slightly more favourable than those initially proposed by Dominion, and that it still suffered damages despite these efforts to mitigate its losses.
- [12] MEARIE asserts that by proposing these drastically different rates and terms, Dominion breached its contractual obligations, its common law duty of honesty, and a fiduciary duty owed to MEARIE.
- [13] MEARIE also asserts that Travelers instructed Dominion to breach the contract, induced that breach of contract, and knowingly assisted Dominion to breach its fiduciary duty to MEARIE. In doing so, MEARIE asserts that Travelers and Dominion committed the tort of civil conspiracy.

Legal principles

- [14] Dominion and Travelers have brought a motion under rule 21.01(1)(b), which allows a defendant to move before a judge to strike out a statement of claim on the ground that it discloses no reasonable cause of action.
- [15] The proper approach on a rule 21.01(1)(b) motion is well settled.⁴ I am to take the facts asserted in the statement of claim as true unless they are patently incapable of proof or are merely bald conclusory statements of fact, unsupported by material facts.⁵ This means that the defendants must take the plaintiff's claim at its provable highest.⁶ I am to read the statement of claim generously, making allowances for drafting deficiencies and erring on

⁴ *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, at para. 22; *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441, at p. 450; *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19, [2020] 2 S.C.R. 420, at para. 14; *FNF Enterprises Inc. v. Wag and Train Inc.*, 2023 ONCA 92, 165 O.R. (3d) 401, at para. 12; *Fernandez Leon v. Bayer Inc.*, 2023 ONCA 629, at para. 8; *Asghar v. Toronto Police Services Board*, 2019 ONCA 479; *MacKinnon v. Ontario Municipal Employees Retirement Board*, 2007 ONCA 874, 88 O.R. (3d) 269; *Tran v. University of Western Ontario*, 2015 ONCA 295.

⁵ *Trillium Power Wind Corp. v. Ontario (Ministry of Natural Resources)*, 2013 ONCA 683, 117 O.R. (3d) 721, at para. 31; *Balanyk v. University of Toronto*, 1999 CanLII 14918, at para. 29 (Ont. S.C.)

⁶ *The Catalyst Capital Group Inc. v. Dundee Kilmer Developments Limited Partnership*, 2020 ONCA 272, 150 O.R. (3d) 449, at para. 45; *Yan v. Daniel*, 2023 ONCA 863, at para. 14

the side of permitting an arguable claim to proceed to trial. The ultimate question is whether it is plain and obvious, assuming the facts pleaded to be true, that each of the pleaded claims discloses no reasonable cause of action. This is true where:

- a. the allegations do not give rise to a cause of action;
- b. the plaintiff fails to plead a necessary element of a cause of action; or
- c. the allegations in the pleading are conjecture, assumptions, or speculation unsupported by material facts.

[16] This is a stringent test, and the moving parties must meet a very high threshold.⁷ It is not sufficient for the defendants to demonstrate that it is more probable than not that the plaintiff's pleading does not disclose a reasonable cause of action. The defendant must meet the much higher standard of establishing that the claim as pleaded has no reasonable prospect of success.⁸

[17] MEARIE may not, however, simply plead bald conclusions. If MEARIE's claim has no reasonable prospect of success, or if it is plain and obvious that this action cannot succeed, it should not be allowed to proceed to trial.

[18] It is important to note the Court of Appeal's caution regarding Rule 21 motions and how they can cause unnecessary delay and expense at the cost of the timely adjudication of disputes on their merits:

Pleadings are very important. They frame the proceedings and the case that must be met. However, long gone are the days where proceedings could be terminated at the early pleadings stage on mere technicalities that can be cured by amendment unless it would result in non compensable prejudice to the opposing party or the administration of justice. Motions to strike can certainly serve a useful purpose at early stages of a proceeding to weed out clearly untenable causes of action that have no chance of success: *Imperial Tobacco*, at para. 19. But in circumstances where parties are quibbling over whether a known cause of action has been pleaded with sufficient particularity, injudicious use of motions to strike inevitably lead to proceedings becoming mired down, as here, in technical pleadings disagreements that cause unnecessary delay and expense, rather than the adjudication of the dispute on the merits.⁹

[19] Here, MEARIE has pleaded known causes of action. The issue is not whether these claims could withstand a motion for summary judgment or succeed a trial. The test is whether the

⁷ *PMC York Properties Inc. v. Siudak*, 2022 ONCA 635, at para. 30.

⁸ *Catalyst*, at para. 47.

⁹ *PMC*, at para. 34.

impugned aspects of the statement of claim are patently ridiculous and incapable of proof.¹⁰ In my view, they are not, and the defendants' motion does not succeed.

Inducing breach of contract

- [20] Travelers moves to strike out MEARIE's pleading that it induced Dominion to breach its contract with MEARIE on the basis that it is plain and obvious that the statement of claim does not plead this cause of action. I disagree.
- [21] MEARIE is required to plead four elements to plead a cause of action for inducing breach of contract:
- a. MEARIE had a valid and enforceable contract with Dominion;
 - b. Travelers was aware of the existence of this contract;
 - c. Travelers intended to and did procure Dominion to breach its contract with MEARIE; and
 - d. as a result of the breach, MEARIE suffered damages.¹¹
- [22] MEARIE has pleaded material facts underpinning each of these four elements in its statement of claim. MEARIE pleads that:
- a. it had a valid and enforceable contract with Dominion for the 2020 policy year, including MEARIE's right of renewal for the 2021 and 2022 years;¹²
 - b. Travelers was aware of the existence of the contract;¹³
 - c. Travelers intended to and did procure Dominion to breach the contract with MEARIE;¹⁴ and
 - d. it suffered damages as a result.¹⁵
- [23] Travelers submits that MEARIE has pleaded that Travelers intended to bring about an immediate termination of the contract with MEARIE, but that did not happen because MEARIE and Dominion ultimately did reach a renewal agreement. Travelers also submits that because the ultimate terms of the contract were different than Dominion's initial

¹⁰ *Catalyst*, at para. 49.

¹¹ *Drouillard v. Cogeco Cable Inc.*, 2007 ONCA 322, 86 O.R. (3d) 431, at para. 26; *Chaba v. Khan*, 2020 ONCA 643, at para. 17; *Correia v. Canac Kitchens*, 2008 ONCA 506, 91 O.R. (3d) 353, at para. 93.

¹² See paragraphs 16, and 27 to 34 of the statement of claim.

¹³ See paragraphs 40, 41, and 42 of the statement of claim.

¹⁴ See paragraphs 40, 41, 42, and 43 of the statement of claim.

¹⁵ See paragraphs 56 to 65 of the statement of claim.

proposal, the amended claim fails to plead that Travelers intended to and procured a breach of contract that caused MEARIE damages.

[24] In my view, Travelers' submissions do not undermine MEARIE's proper pleading that Travelers induced a breach of contract. MEARIE repeatedly pleads that Travelers caused, induced, or commanded Dominion to breach the contract.¹⁶ It will be for the trial judge to determine whether MEARIE's entering into the renewal contract mitigated its damages or meant that Dominion did not breach the contract. It is certainly not plain and obvious from the pleading itself that MEARIE will not be able to prove that it suffered significant damages as a result of Travelers inducing Dominion to breach its contract with MEARIE.

[25] I decline to strike out MEARIE's pleading that Travelers induced Dominion to breach its contract with MEARIE.

Breach of fiduciary duty

[26] Dominion moves to strike out MEARIE's claim that Dominion breached a fiduciary duty owed to MEARIE. The parties agree that the relationship between Dominion and MEARIE is not a fiduciary relationship, *per se*.¹⁷ For there to be a fiduciary relationship between an insurer and an insured, a plaintiff must plead the specific circumstances, unique to the relationship, that call for the imposition of fiduciary obligations.¹⁸ Dominion submits that MEARIE has not pleaded any facts that that could give rise to an *ad hoc* fiduciary relationship. I disagree.

[27] An *ad hoc* fiduciary duty arises where:

- a. an alleged fiduciary gives an undertaking to act in the best interests of the alleged beneficiary;
- b. a defined class of beneficiaries is vulnerable to the alleged fiduciary's control; and
- c. the beneficiaries have a legal or substantial practical interest that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.¹⁹

[28] A fiduciary duty only arises where the alleged fiduciary undertakes to act in the beneficiary's best interests and to forsake the interests of all others in favour of the interests of the beneficiary in relation to the specific legal interest at stake. This undertaking may be

¹⁶ See for example, paragraphs 42, 43, and 46 of the statement of claim.

¹⁷ *Plaza Fiberglass Manufacturing Ltd. v. Cardinal Insurance Co.* (1994), 18 O.R. (3d) 663 (C.A.), at pp. 669-670.

¹⁸ *Kang v. Sun Life Assurance Company of Canada*, 2011 ONSC 6335, at para. 133, rev'd on other grounds, 2013 ONCA 118, at para. 34.

¹⁹ *Chippewas of Nawash Unceded First Nation v. Canada (Attorney General)*, 2023 ONCA 565, at para. 185; *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623, at para. 50; *Restoule v. Canada (Attorney General)*, 2021 ONCA 779, 466 D.L.R. (4th) 1, at para. 586, leave to appeal granted, [2022] S.C.C.A. No. 5.

found, among other places, in the relationship between the parties, or in the express or implied terms of an agreement.²⁰

- [29] In my view, MEARIE has pleaded facts describing specific circumstances of a unique relationship between Dominion and MEARIE that could support a fiduciary duty. In its claim, MEARIE has pleaded that this insurance contract was far from typical and that the unique relationship between the parties may support duties beyond those typically owed by an insurer to an insured. I do not think MEARIE's claim is patently ridiculous and incapable of proof.²¹
- [30] MEARIE explicitly pleads that it was highly vulnerable to Dominion, which could exercise its discretion to harm MEARIE's interests, and that Dominion undertook to exercise that discretion in MEARIE's best interests.²²
- [31] In my view, this is not a bald or conclusory pleading. In paragraphs 5 to 9 of the statement of claim, MEARIE pleads that it was necessary, as a requirement of its license, to have extended three-year underwriting periods and that its members were obligated to continue with MEARIE for the entire three-year term of the contract. MEARIE pleads that it was, therefore, particularly vulnerable to rate increases during the underwriting period, and that Dominion was aware of MEARIE's needs within this idiosyncratic commercial context. MEARIE elaborates as follows:

19. Additionally, in light of the relationship between MEARIE and Dominion of reinsured and reinsurer, the knowledge and acceptance by Dominion of the need for the reinsurance program to provide stable, long term rates and coverages, Dominion's discretion in the agreements to quote renewal rates, and MEARIE's reliance upon Dominion to effectively be the insurance program provider to support MEARIE's property and automobile insurance programs, Dominion was a fiduciary of MEARIE and owed MEARIE a duty to act with honesty and in good faith. Dominion was MEARIE's partner in delivering effective and affordable insurance programs to MEARIE's members and had a duty to avoid undermining or damaging MEARIE's insurance program. Among the facts referred to above, MEARIE relies upon the following in establishing Dominion's fiduciary duty:

- (a) Dominion was not only the reinsurer, but processed claims, provided risk-management advice to MEARIE's insureds, provided underwriting assessments for new locations, and generally stood in the shoes of MEARIE as

²⁰ *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261, at paras. 31 to 32; *Galambos v. Perez*, 2009 SCC 48, [2009] 3 S.C.R. 247, at para. 77.

²¹ *Catalyst*, at para. 49.

²² Paragraph 21 of the statement of claim.

the provider of property and auto insurance to MEARIE's subscribers;

(b) Dominion was aware and accepted that its conduct had the ability to adversely impact MEARIE's goodwill with its members;

(c) MEARIE and Dominion also agreed to share profits from their partnership;

(d) Dominion was aware that MEARIE had a very limited market for its insurance products and that interference with MEARIE's property and auto programs and damage to MEARIE's goodwill with its subscribers would be an existential threat to MEARIE.

21. MEARIE was highly vulnerable to, and dependent on, Dominion. Dominion had the unilateral ability to exercise its discretion in a manner that would affect MEARIE's interests. It expressly or implicitly undertook to exercise its discretion in MEARIE's best interests when it entered into a relationship with MEARIE, knowing its unique requirements as set out in paras. 5-9, 12, 19-20 and this paragraph 21.

[32] Dominion submits that MEARIE has failed to plead factual allegations that Dominion gave an undertaking to act in MEARIE's best interest with respect to renewal terms. I disagree. In paragraph 21 of the statement of claim, MEARIE pleads that Dominion "expressly or implicitly undertook to exercise its discretion in MEARIE's best interests." That pleading, combined with the facts pleaded in paragraphs 5 to 9, 12, and 19 to 20, are more than sufficient to plead that Dominion gave an undertaking to act in MEARIE's best interests.

[33] Dominion also submits that such an undertaking is inconsistent with the terms of the contract between Dominion and MEARIE. I would not give effect to this argument on a motion under rule 21.01(1)(b). In order for the court to interpret the contract properly, the court must consider the factual matrix that gave rise to the contract, even if the contract clauses at issue appear not to be ambiguous.²³ Because MEARIE is not permitted to lead evidence of the factual matrix in a rule 21.01(1)(b) motion, I find that such a motion is ill-suited to strike out its pleading of a breach of fiduciary duty based on Dominion's preferred interpretation of the contract.²⁴ While Dominion may have a formidable case on a motion for summary judgment or at trial, I do not find that MEARIE's claim as pleaded has no reasonable prospect of success.

²³ *Dumbrell v. Regional Group of Companies Inc.*, 2007 ONCA 59, 85 O.R. (3d) 616, at para. 54.

²⁴ *Catalyst*, at paras. 37 to 47.

[34] I decline to strike MEARIE's pleading that Dominion breached a fiduciary duty owed to MEARIE.

Knowing assistance of breach of fiduciary duty

[35] Travelers moves to strike out the pleading that it knowingly assisted Dominion to breach its fiduciary duty owed to MEARIE.

[36] The constituent elements of the tort of knowing assistance are as follows:

- a. there must be a fiduciary duty;
- b. the fiduciary must have breached that duty fraudulently and dishonestly;
- c. the stranger to the fiduciary relationship must have had actual knowledge of both the fiduciary relationship and the fiduciary's fraudulent and dishonest conduct; and
- d. the stranger must have participated in or assisted the fiduciary's fraudulent and dishonest conduct.²⁵

[37] I find that MEARIE has adequately pleaded the requisite elements of the tort. MEARIE has pleaded that:

- a. Dominion owed it a fiduciary duty;
- b. Dominion delayed providing its quotes from September 30, 2019, to March 15, 2020, in order to cause the maximal harm to MEARIE and misrepresented its reasons for the delay in quoting.²⁶ In my view, MEARIE has pleaded material facts in support of its allegation that Dominion breached its fiduciary duty owed to MEARIE in a fraudulent and dishonest fashion.
- c. Travelers had actual knowledge of the fiduciary duty that Dominion owed to MEARIE, and that Travelers knew all about Dominion's fraudulent and dishonest conduct that breached that fiduciary duty.²⁷
- d. Travelers participated in Dominion's fraudulent activity by instructing Dominion to terminate the relationship with MEARIE, by imposing unreasonable rates and terms, by withholding presentation of the revised rates and terms until MEARIE had no practical option but to accept those terms, and by indemnifying Dominion for any costs associated with exiting the relationship with MEARIE.²⁸

²⁵ *Harris v. Leikin Group Inc.*, 2011 ONCA 790, at para 8.

²⁶ See paragraphs 37 to 39, 52, 53, and 55 of the statement of claim, among others.

²⁷ See paragraphs 40 to 42, and 52 of the statement of claim, among others.

²⁸ See paragraphs 40 to 42, and 51 to 55 of the statement of claim, among others.

- [38] As set out above, I disagree with Travelers' submission that MEARIE has not adequately pleaded an allegation that Dominion owed it fiduciary duties. I also disagree that MEARIE has not pleaded fraudulent and dishonest conduct on the part of Dominion. In my view, fraudulent and dishonest aptly describe the actions of Dominion that MEARIE sets out in the statement of claim. In particular, the allegations that Dominion deliberately delayed the delivery of its quote to cause the most harm possible to MEARIE easily meet the test of fraudulent and dishonest conduct.
- [39] I decline to strike MEARIE's pleading that Travelers committed the tort of knowingly assisting Dominion to breach its fiduciary duty to MEARIE.

Civil Conspiracy

- [40] MEARIE has pleaded that Dominion and Travelers are both liable for civil conspiracy. MEARIE asserts that the defendants committed both predominant purpose conspiracy and unlawful act conspiracy.
- [41] Given my findings above, I am reluctant to strike the claims of conspiracy. The alleged conspiracy may give rise to harm of a magnitude that is greater than the harm caused by either Dominion or Travelers acting independently.²⁹ Moreover, whether or not there is any redundancy among the conspiracy claims and the other tort claims should be left to the trial judge:

It seems to me totally inappropriate on a motion to strike out a statement of claim to get into the question whether the plaintiff's allegations concerning other nominate torts will be successful. This a matter that should be considered at trial where evidence with respect to the other torts can be led and where a fully informed decision about the applicability of the tort of conspiracy can be made in light of that evidence and the submissions of counsel. If the plaintiff is successful with respect to the other nominate torts, then the trial judge can consider the defendants' arguments about the unavailability of the tort of conspiracy. If the plaintiff is unsuccessful with respect to the other nominate torts, then the trial judge can consider whether he might still succeed in conspiracy. Regardless of the outcome, it seems to me inappropriate at this stage in the proceedings to reach a conclusion about the validity of the defendants' claims about merger. I believe that this matter is also properly left for the consideration of the trial judge.³⁰

- [42] Justice Molloy also observed that conspiracy pleadings should not be struck on the basis of the doctrine of merger. Instead, that issue should be left to the trial judge:

²⁹ *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at p. 989.

³⁰ *Hunt*, at pp. 991-992; *McHale v. Lewis*, 2018 ONCA 1048, 144 O.R. (3d) 279, at para. 20.

Accordingly, in my view, the law supports permitting the conspiracy claim to be pleaded along with other nominate torts and applying the doctrine of merger only at the end of the trial when it is known if the plaintiff has been fully successful on the nominate torts and whether there is anything added by the conspiracy claim. Further, in the interests of paring down out-of-control interlocutory proceedings and introducing consistency in the law, as a practical matter it is preferable not to resolve these types of claims at the pleadings stage.³¹

- [43] I do not think that striking the conspiracy pleadings would streamline documentary or oral discovery in any way, given the other torts that will go to trial.
- [44] There are two categories of conspiracy recognized by Canadian law. Justice Estey described the two categories this way:

Although the law concerning the scope of the tort of conspiracy is far from clear, I am of the opinion that whereas the law of tort does not permit an action against an individual defendant who has caused injury to the plaintiff, the law of torts does recognize a claim against them in combination as the tort of conspiracy if:

- (1) whether the means used by the defendants are lawful or unlawful, the predominant purpose of the defendants' conduct is to cause injury to the plaintiff; or,
- (2) where the conduct of the defendants is unlawful, the conduct is directed towards the plaintiff (alone or together with others), and the defendants should know in the circumstances that injury to the plaintiff is likely to and does result.³²

- [45] For either type of conspiracy, the statement of claim should plead, with clarity and precision, material facts to identify:
- a. the parties to the conspiracy, and their relationship to one another;
 - b. the agreement between the parties;
 - c. the purpose or objects of the conspiracy stated precisely;
 - d. the overt acts done in pursuance and furtherance of the conspiracy stated; and

³¹ *Jevco Insurance Co. v. Pacific Assessment Centre Inc.*, 2015 ONSC 7751, 128 O.R. (3d) 518, at para. 52 (Div. Ct.); *McHale*, at para. 21.

³² *Canada Cement Lafarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452, at pp. 471-72.

e. the injury and damages occasioned to the plaintiff.³³

[46] I do not accept the defendants' submission that that the statement of claim does not meet the requirement of pleading the conspiracy with full particularity. The defendants have not provided defences, much less production. As discussed below, MEARIE has pleaded facts related to the concerted actions of Travelers and Dominion. At this stage, MEARIE's pleading is adequate as it cannot provide particulars that are only within the defendants' knowledge.³⁴ I have no doubt that the defendants will be able to provide an adequate statement of defence and defend the conspiracy allegations.

[47] To plead the tort of predominant purpose conspiracy, the plaintiff must plead that:

- a. the defendants acted in combination;
- b. the defendants acted with the predominant purpose (the actual intent) of causing injury to the plaintiff; and
- c. as result of the defendants' actions, actual damage is suffered by the plaintiff.³⁵

[48] I am satisfied that MEARIE has adequately pleaded the tort of predominant purpose conspiracy. Dominion and Travelers correctly state that the essence of the tort 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.³⁶

[49] Travelers and Dominion submit that MEARIE has only pleaded that they intended to maximize their profits. In my view, MEARIE has pleaded that Travelers instructed Dominion to cause harm to MEARIE and that this was the predominant purpose of its actions. It will be for the trial judge, in light of all of the evidence presented, to determine what motivated Travelers and Dominion.³⁷ At the pleading stage, however, I am satisfied that MEARIE has pleaded adequately that the defendants' predominant purpose was to harm MEARIE, not to earn higher profits.

[50] Moreover, I agree with MEARIE that it has pleaded that Travelers took seven discrete actions together with Dominion in furtherance of its conspiracy. Paragraphs 41, 42, and 48 of the statement of claim are more than sufficient in this regard.

[51] In my view, MEARIE has adequately pleaded the tort of conspiracy, specifically the category of predominant purpose conspiracy. That is sufficient for the conspiracy pleading

³³ *Beaver Lumber Inc. v. Hamer*, 2004 CanLII 17180 (Ont. S.C.), at para. 31; *Bank of America v. Mutual Trust Co.*, [1992] O.J. No. 2662 (Ont. Gen. Div.).

³⁴ *Castrillo v. Workplace Safety and Insurance Board*, 2017 ONCA 121, 136 O.R. (3d) 654, at para. 43.

³⁵ *Canada Cement Lafarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452, at pp. 471-72.

³⁶ *Agribrands Purina Canada Inc. v. Kasamekas*, 2011 ONCA 460, 106 O.R. (3d) 427, at para. 24.

³⁷ *McHale*, at paras. 19 to 20.

to survive and there is no need to consider whether or not MEARIE has also pleaded the category of unlawful act conspiracy.

Leave to amend

[52] Although it is not necessary to decide this issue, if I had struck out any part of the claim, I would have granted leave to MEARIE to amend the claim. Leave to amend should only be denied in the clearest of cases and this is not one of them.³⁸ I do not think it is plain and obvious that no tenable cause of action is possible on the facts as alleged.³⁹

[53] I recognize that MEARIE has amended its claim once already. However, the claim was first issued in March 2022, and there has been no undue delay in the proceeding. I am satisfied that it would have been just and appropriate to give MEARIE a chance to amend its claim to cure any deficiencies.

Conclusion

[54] I encourage the parties to resolve the costs of this motion among them.

[55] If the parties are not able to resolve costs of this motion, MEARIE may email its costs submission of no more than three double-spaced pages to my judicial assistant on or before January 11, 2024. The defendants may deliver their responding submission of no more than three double-spaced pages on or before January 18, 2024. No reply submissions are to be delivered without leave.

Robert Centa J.

Date: January 03, 2024

³⁸ *Tran v. University of Western Ontario*, 2015 ONCA 295, at paras. 26-27.

³⁹ *Mitchell v. Lewis*, 2016 ONCA 903, 134 O.R. (3d) 524, at para. 21.