CITATION: Pine Glen v. Rolling Meadows, 2024 ONSC 1464
COURT FILE NO.: CV-22-14203
DATE: 2024/03/11

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
Pine Glen Thorold Inc. Plaintiff/Responding Party	Mark Klaiman, Counsel for the Plaintiff/Responding Party
– and –	
Rolling Meadows Land Development Corporation and Glen Gordon Defendant/ Moving Parties	Aaron Blumenfild, Counsel for the Defendant/Moving Parties
	HEARD: August 28, 2023, and December 11, 2023

M.J. Valente J.

REASONS FOR DECISION ON MOTION

Nature of the Motion

[1] The Defendants, Rolling Meadow Land Development Corporation ('Rolling Meadows') and Glen Gordon ('Gordon') (sometimes referred to as the 'Defendants'), bring this motion for an order striking the Amended Statement of Claim of the Plaintiff, Pine Glen Thorold Inc. ('Pine Glen') pursuant to Rule 21.01(1)(b) of the *Rules of Civil Procedure,* R.R.O. 1990, Reg 194 (the '*Rules*') for failing to disclose any reasonable cause of action.

[2] In the alternative, the Defendants seek an order dismissing Pine Glen's action pursuant to Rule 21.01(3)(d) on grounds that the Pine Glen action is an abuse of process insofar as it pleads causes of action that were or ought to have been litigated in the application commenced by Pine Glen against Rolling Meadows on February 14, 2022, and subsequently determined by Edwards J.

[3] In the further alternative, the Defendants seek an order dismissing Pine Glen's action pursuant to Rule 21.01 (1)(a) because the Pine Glen Amended Statement of Claim pleads causes of action that were extinguished pursuant to the doctrine of merger upon the completion of the agreement of purchase and sale between Pine Glen and Rolling Meadows on October 12, 2022.

Factual Background

[4] Pine Glen is a home builder. Rolling Meadows is the owner and seller of development lands. Gordon is the principal of Rolling Meadows.

[5] By agreement of purchase and sale, dated June 2, 2020, Pine Glen, as purchaser, agreed to purchase from and Rolling Meadows, as vendor, certain lands in the city of Thorold for the purchase price of $4,466,00 (the 'Agreement of Purchase and Sale'). The Agreement of Purchase and Sale permitted Rolling Meadows, in its sole discretion, to increase or decrease the purchase price by $200.00 per front of footage. The Agreement of Purchase and Sale was also to be completed on June 15, 2023, but permitted Pine Glen to complete its purchase of the lands earlier on a lot-by-lot basis.

[6] Prior to the execution of the Agreement of Purchase and Sale, Pine Glen and Rolling Meadows had entered into other agreements for the purchase and sale of lands.

[7] As Pine Glen and Rolling Meadows had agreed in the past, so too did they agree pursuant to the terms of the Agreement of Purchase and Sale that Pine Glen would be permitted to enter upon the subject lands and build homes prior to the completion of the Agreement of Purchase and Sale.

[8] In the past, because Pine Glen required financing for its home construction but was not the owner of the lands at the commencement of the construction, it together with its lenders and Rolling Meadows entered into a Cooperation Agreement to facilitate the construction financing.

[9] In this instance, however, the Agreement of Purchase and Sale did not require Rolling Meadows to sign a Cooperation Agreement, or any other agreement, to assist Pine Glen in securing construction financing.

[10] On October 14, 2020, Pine Glen and Rolling Meadows agreed to amend the Agreement of Purchase and Sale by increasing the purchase price from $4,466,000 to $ 6,148,000 and removing the conditions to the completion of the transaction.

[11] On January 25, 2022, Pine Glen delivered to Rolling Meadows a Cooperation Agreement for its signature to facilitate Pine Glen's required construction financing. Rolling Meadows refused to sign the Cooperation Agreement on the basis that the parties' agreement imposed no obligation on it to do so. Additionally, Rolling Meadows took the position that the purchase price was not $6,148,000 but rather $7,863,822.

[12] At or about the same time, Pine Glen had entered into agreements of purchase and sale with its customers for the construction and sale of all 62 lots to be purchased pursuant to the Agreement of Purchase and Sale.

[13] On February 14, 2022, Pine Glen commenced an application against Rolling Meadows seeking, amongst other relief, a declaration that Rolling Meadows was obliged to complete the Agreement of Purchase and Sale at the $6,148,000 purchase price and that it was required to sign the Cooperation Agreement to assist Pine Glen in securing financing. Prior to the hearing of the application, Pine Glen abandoned its request for the latter mandatory order.

[14] On April 12, 2022, Rolling Meadows commenced its own application seeking a declaration that Pine Glen had breached of the Agreement of Purchase and Sale and/or a declaration that the Agreement of Purchase and Sale was unenforceable.

[15] On August 11, 2022, Edwards J. ruled the Agreement of Purchase and Sale was binding and enforceable. (see: *Rolling Meadows Land Development v. Pine Glen Thorold*, 2022 ONSC 4653 (‘*Rolling Meadows 2022’*), upheld on appeal, 2023 ONCA 489)

[16] On September 26, 2022, Pine Glen exercised its right to accelerate the completion date of the Agreement of Purchase and Sale and the Agreement of Purchase and Sale was completed on October 12, 2022, with the transfer of all 62 lots by Rolling Meadows to Pine Glen for the purchase price of $6,148,000.

[17] On December 7, 2022, Pine Glen commenced the within proceeding, pleading numerous causes of action and seeking damages of $5,000,000 in addition to aggravated, exemplary, and punitive damages.

[18] Following service of the Defendants’ motion to strike Pine Glen’s Statement of Claim and/or dismiss its action, Pine Glen delivered its Amended Statement of Claim.

Guiding Principles – The Test on a Motion to Strike

[19] Pursuant to Rule 21.01(1)(b), a party may move to strike a pleading on the ground that it discloses no reasonable cause of action. Evidence is not permitted on a Rule 21.01(1)(b) motion but a document that is referenced in a claim or that is integral to the plead allegations may be considered. (see: *Web Offset Publications Limited v. Vickery*, 1999 CanLII 4462 (ONCA)).

[20] The legal test applicable to Rule 21.01(1)(b) motions to strike was established by the Supreme Court of Canada in *Hunt v. Carey Canada Ltd*., [1990] S.C.R. 959 (‘*Hunt’*). On a motion to strike a pleading for disclosing no reasonable cause of action, the Supreme Court in *Hunt* set out the following principles:

> (a) the material facts pleaded are taken to be true unless they are patently ridiculous or incapable of proof;
>
> (b) a pleading is to read generously, with fair allowance for drafting deficiencies;
>
> (c) pleadings will only be struck where it is "plain and obvious" that the pleadings disclose no reasonable cause of action, or put another way, the plaintiff cannot succeed if all alleged material facts are proved to be true; and
>
> (d) neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for a strong defence should prevent a party from proceeding with its case (at para. 36; see also: *Trillium Power Wind Corp. v. Ontario (Ministry of Natural Resources)*, 2013 ONCA 683, at paras. 30-31).

[21] It is plain and obvious that a claim does not disclose a reasonable cause of action where the pleading fails to plead the material facts required to support the claim. Rules 25.06 (1) and 25.06 (2) also require a pleading to contain a concise statement of the material facts upon which the party relies for its claim. It therefore follows that where the necessary material facts are not plead, the appropriate remedy is to strike the claim (see: *Aristocrat Restaurant Ltd. V. Ontario*, [2003] OJ No 5331 (OSC), at para. 78).

[22] In matters that involve multiple plaintiffs, defendants and causes of action, each plaintiff must identify the causes of action, the material facts and relief being sought against each of the defendants (see: *Martin v. AstraZeneca Pharmaceuticals PLC*, 2012 ONSC 2744, at paras. 132-133). In these types of cases with multiple causes of action, it is also important that each of the claims be plead separately along with each element of the subject cause of action (see: *Shafique v. University of Waterloo*, 2019 ONSC 2418, at para. 40).

The Claims Advanced by Pine Glen

[23] Pine Glen has advanced nine separate causes of action against the Defendants. I will address each of the causes of action separately.

(i) Breach of Contract; Attempted Breach of Contract

[24] Pine Glen claims damages against the Defendants for breach of contract and for attempting to breach the Agreement of Purchase and Sale.

[25] Pine Glen made no submissions in support of this alleged cause of action. For its part, the Defendants submit that Pine Glen cannot have a claim against Gordon for breach of contract because he was never a party to the Agreement of Purchase of Sale. Furthermore, while Rolling Meadows was a contracting party, it fulfilled its obligations under its agreement with Pine Glen.

[26] A proper pleading for breach of contract must provide sufficient particulars to identify:

(a) the nature of the contract;

(b) the facts supporting privity of contract between the parties to the agreement;

(c) the terms of the contract that were breached;

(d) the conduct giving rise to the breach; and

(e) the damages that flow from the breach. (see: *Nanra v. NRI Legal Services*, 2017 ONSC 4503, at para. 19).

[27] I find that Pine Glen has failed to plead the second element of the cause of action (in so far as Gordon is concerned) along with the third and fourth elements of a claim for breach of contract. I can only conclude that these relevant particulars have not been plead by Pine Glen because there is no factual basis upon which to advance a claim in breach of contract.

[28] I agree with the Defendants' position that as a non party to the Agreement of Purchase and Sale, Gordon cannot be responsible for its breach. I also agree that as vendor, Rolling Meadows, satisfied its obligations under the contract with Pine Glen once Edwards J. ruled that the Agreement of Purchase and Sale was binding and enforceable. Pine Glen admits as much in paragraph 27 of its Amended Statement of Claim. In that paragraph, Pine Glen pleads that on October 12, 2022 Rolling Meadows completed the Agreement of Purchase and Sale by transferring title of the 62 lots to it for the originally agreed purchase price of $6,148,000.

[29] Furthermore, by no liberal interpretation can it be successfully argued that the Defendants breached their agreement with Pine Glen to sign the proposed Cooperation Agreement in circumstances where there was no contractual obligation in the Agreement of Purchases and Sale or otherwise requiring the Defendants to assist Pine Glen in securing construction financing. In any event, Pine Glen ultimately abandoned its request for a mandatory order that the Cooperation Agreement be signed.

[30] Finally, I am not aware of any cause of action arising from a contracting party attempting, albeit unsuccessfully, to breach the terms of an agreement to which it is bound. For its part, the Plaintiff has provided me with no guidance in this respect. I conclude that Pine Glen has not offered the Court any assistance because it is plain and obvious that there is no claim at law for attempted breach of contract.

[31] In summary, it is my opinion that the Amended Statement of Claim is wholly deficient to the extent that it fails to plead the essential elements of breach of contract. I am also of the view that the claim for attempted breach of contract must fail because it is not a cause of action recognizable at law. Both claims are therefore struck.

(ii) Inducement of Breach of Contract by Gordon

[32] Pine Glen alleges that Gordon was both aware that the Agreement of Purchase and Sale was enforceable and engaged in conduct to cause Rolling Meadows to intentionally breach its contract by refusing to acknowledge the binding nature of the contract and attempting to terminate it. As a result, Pine Glen alleges it suffered damages and claims them personally from Gordon.

[33] Pine Glen relies on the decision of the Ontario Court of Appeal in *ADGA Systems International Ltd v. Valcom Ltd* (1999), 1999 CanLII 1527 (ONCA) (‘*ADGA Systems’)* in support of its position that directors and officers of a corporation are responsible for their tortious conduct even though their conduct may have been directed in a *bona fide* manner to the best interests of the corporation.

[34] The Defendants submit that no liability is to be attributed to Gordon for this tort because it is premised on a non-existent breach of contract, and in any event, the rule in *Said v. Butt* [1920] 3.K.B. 497 (H.L.) (‘*Said v. Butt’*) shields Gordon from personal liability for any breach of the Agreement of Purchase and Sale. The Defendants further submit that a director or officer will not be held liable for actions of the corporation, including breach of contract, unless he or she is engaged in independently tortious conduct.

[35] In *Correia v Canac Kitchens*, 2008 ONCA 506, the Ontario Court of Appeal held that a sufficient pleading alleging the tort of inducing breach of contract is to include the following four elements:

> (a) the defendant had knowledge of the contract between the plaintiff and the third party;
>
> (b) the defendant’s conduct was intended to cause the third party to breach the contract;
>
> (c) the defendant’s conduct caused the third party to breach the contract; and
>
> (d) the plaintiff suffered damages as a result of the breach (at para. 99).

[36] Were one to adopt the most generous reading of the Amended Statement of Claim, with a liberal allowance for drafting deficiencies, the second and third elements of the tort for inducing breach of contract have not been plead. For this reason alone, I conclude that the pleading fails to disclose any reasonable cause of action for the alleged tort.

(iii) Intentional Interference with Contractual Relations by Gordon

[37] Pine Glen alleges that it suffered damages because Gordon, in his personal capacity, intentionally interfered with the contractual relations between it and Rolling Meadows.

[38] In support of their respective positions regarding the tort of intentional interference with contractual relations, the Plaintiff and the Defendants each rely upon their same submission respecting the tort of inducing breach of contract.

[39] The Ontario Court of Appeal in *Unisys Canada Inc v. York Three Associates Inc*., 2001 CanLII 7276 (ONCA), stipulated the essential elements of the tort of intentional interference with contractual relations to include:

(a) an enforceable contract;

(b) knowledge of the plaintiff's contract by the defendant;

(c) an intentional act on the part of the defendant to cause a breach of contract;

d) resulting damages to one of the parties to the contract (at para. 13),

all of which must be alleged in the claim to sufficiently plead the tort.

[40] While I reject the Defendants' submission that an essential element of the tort includes a breach of contract and appreciate that a defendant's alleged wrongful interference is not restricted to acts prohibited by law or statute but also extends to an act that the defendant "is not at liberty to commit", or in other words, an act without legal justification (see: *Reach MD Inc. v. Pharmaceutical Manufacturers Association of Canada*, 65 O.R. (3d) 30 (ONCA) ('*Reach MD'*) at para. 44), I find that on a most liberal reading of the Amended Statement of Claim, the third element of the tort has not been plead.

[41] Had Gordon's alleged intention to injure Pine Glen been plead, just as had there been a breach of the Agreement of Purchase and Sale and all the essential elements of the tort of inducing breach of contract been alleged, I would have nonetheless struck the two alleged causes of action from the pleading.

[42] In my opinion, the Plaintiff's interpretation of the Court of Appeal's decision in *ADGA Systems* is but a partial statement of the legal principles respecting the personal liability of directors and officers of a corporation. Personal liability will be attributed to directors and officers provided firstly, that the evidence justifies an allegation of a personal tort, or in other words, the actions of the directing minds of the corporation exhibit a separate identity or interest from that of the corporation and secondly, that any personal liability of directors and officers is always subject to the *Said v. Butt* exception.

[43] In *Said v. Butt*, the House of Lords held that a servant of a corporation, acting *bona fide* and within the scope of his authority, who procures a breach of contract between his employer and a third party, is not liable to the third party (see: *Rofe v. Kay Avaiation b.v.*, 2001 PESCAD 7 (‘*Rofe’*) at para. 16).

[44] Carthy J.A. of the Ontario Court of Appeal in *ADGA Systems* explained the rational for the exception from personal liability for offices or employees of corporations who terminate contracts on behalf of the corporate entity in this way, at para. 15:

> … [The] exception to the general rule that persons are responsible for their own conduct … assures that persons who deal with a limited company and accept the imposition of limited liability will not have available to them both a claim for a breach of contract against a company and a claim for tortious conduct against the director with damages assessed on a different basis. The exception also assures that officers and directors, in the process of carrying on business, are capable of directing that a contract of employment be terminated or that a business contract not be performed on the assumed basis that the company’s best interest is to pay the damages for failure to perform. By carving out the exception for these policy reasons, the Court has emphasized and left intact the general liability of any individual for personal conduct.

[45] In reliance upon the rule in *Said v. Butt*, as adopted and explained by the Ontario Court of Appeal in *ADGA Systems* as well as in its decision in *Normart Management Ltd. V. West Hill Redevelopment (1998)*, 1998 CanLII 2447 (ONCA) (‘*Normart’*) and *Scotia Macleod Inc. et al v. People’s Jewellers Ltd. et all (1995),* 1995 CanLII 1301 (ONCA), the Prince Edward Island Court of Appeal in *Rofe*, determined, and I agree, that:

> …persons who deal with a corporate entity, knowing the extent to which liability is limited, do not have a cause of action against both the company for breach of contract and an action against the officer or director for inducing breach of contract” … or… “for interfering unlawfully in the economic interests” of the corporation (at paras. 19 and 23),

both of which torts provide for a scope of damages much broader than those flowing from a breach of contract. On this basis, the Prince Edward Island Court of Appeal struck, as do I strike in the matter before me, both alleged torts for failure to disclose any reasonable cause of action.

(iv) Breach of Contractual Duty of Good Faith

[46] The Plaintiff pleads that the Defendants acted dishonestly and in bad faith in the performance of the contract between it and Rolling Meadows.

[47] The Plaintiff submits that it has sufficiently plead the Defendants' breach of their common law duty of contract to act honestly and in good faith by alleging that the Defendants have put forth a false facade that an additional $1,715,822 was due and owing under the Agreement of Purchase and Sale from that which was originally agreed.

[48] The Defendants argue that the pleading is wholly inadequate and is nothing more that a bald allegation of bad faith and dishonesty.

[49] In *Bhasin v. Hrynew*, 2014 SCC 71 ('*Bhasin*'), the Supreme Court of Canada established a common law duty to act honestly in matters with a nexus to the performance of direct contractual obligations. A party to a contract cannot lie or otherwise knowingly mislead another contracting party with respect to matters pertaining directly to the performance of the contract. This does not mean, however, that in the event of a dispute, the contract is subject to being judicially rewritten or amended (see: *Royal Bank of Canada v. 4445211 Manitoba Ltd.*, 2015 SKQB 26 ('*RBC v. 444'*) at para. 29).

[50] As described by the Court in *Bhasin*, the principle is not without limits:

> … there is a general duty of honesty in contractual performance. This means simply that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract. This does not impose a duty of loyalty or of disclosure or require a party to forgo advantage flowing from the contract; it is a simple requirement not to lie or mislead the other party about one's contractual performance. Recognizing a duty of honest performance flowing directly from the common law organizing principle of good faith is a modest, incremental step (at para. 73).

[51] No where in the Amended Statement of Claim does Pine Glen allege that the Defendants, or either of them, deceitfully claimed an increase in the contract price or otherwise lied or

knowingly mislead it about matters linked to the performance of the Agreement of Purchase and Sale. Lying or intentionally misleading the party opposite in a contract is at the core of the duty to act honestly and in good faith in the performance of a contract. Without an express pleading that a representative of Rolling Meadows intentionally lied to Pine Glen together with sufficient facts to ground an allegation of breach of this duty, as the Saskatchewan Court of Queen's Bench points out in *RBC v. 444*, the pleading is insufficient and fails to disclose a viable cause of action (at para. 40).

[52] Even assuming everything the Plaintiff has plead in its Amended Statement of Claim is true, as I am generally required to do on this motion, a *Bhasin* breach does not arise and cannot be shown. It is Pine Glen's obligation to plead sufficient material facts, and in my view, it has failed to do so. Accordingly, the claim that the Defendants breached their duty to act honestly and in good faith in the performance of the contract with the Plaintiff is struck.

(v) Breach of Gordon's duty pursuant to the *Ontario Business Corporation Act* to Act in Good Faith, Honestly and in the Best Interests of Rolling Meadows

[53] The Amended Statement of claim alleges that Gordon failed to act in good faith and honestly, and was therefore, in breach of his obligations as an officer and director pursuant to s. 134 of the Ontario *Business Corporation Act* R.S.O. 1990, Cb16 (the '*OBCA*'). As a consequence of this breach, the allegation is that Pine Glen suffered damages.

[54] Section 134 of the *OBCA* provides, in part, that every officer and director of a corporation, in exercising his or her powers and discharging his or her duties to the corporation, shall act honestly and in good faith with a view of the best interests of the corporation.

[55] The Plaintiff offered no submissions in response to the Defendant's position that its claim fails to disclose any reasonable cause of action based on an alleged breach of s. 134 of the *OBCA*.

[56] Pine Glen's allegation that Gordon breached his duty to Rolling Meadows is plead without any specific factual basis. The absence of a specified factual foundation to support a cause of action is in and of itself potentially fatal to any defence to a motion to strike pursuant to Rule 21.01(1)(b).

Nonetheless, were I to read generously the factual allegations set out in paragraphs 28 and 29 of the amended pleading and find, assuming them to be true, that they support the alleged breach of s. 134, I am aware of no authority that suggests such a breach of the *OBCA* gives rise to a remedy in favour of any person other than the corporation to which its officers and directors owe the duty to act in good faith, honestly and in the corporation's best interests. In short, unlike Rolling Meadows, the Plaintiff is owed no duty by Gordon pursuant to s. 134 of the *OBCA* and has no remedy against Gordon based on this alleged cause of action. For this reason, I find that it is both plain and obvious that the Amended Statement of Claim fails to disclose any reasonable cause of action against Gordon for the alleged breach of his s. 134 obligations to Rolling Meadows. The cause of action is therefore struck.

(vi) Oppression

[57] The Plaintiff alleges that the Defendants engaged in oppressive conduct and unfairly disregarded its interests contrary to s. 248 of the *OBCA*.

[58] Pine Glen submits that it falls within the s. 245 definition of "complainant" under Part XVII of the *OBCA*, and therefore, may seek relief for the Defendants' oppressive conduct as well as their conduct that unfairly disregarded its interests.

[59] For their part, the Defendants submit that the Plaintiff's amended claim fails to disclose any reasonable cause of action under the oppression remedy provision of the *OBCA* because Pine Glen is not alleged to be a security holder, creditor, or director or officer of Rolling Meadows as stipulated by s. 248(2).

[60] In considering Pine Glen's oppression remedy claim, I am guided by four fundamental considerations. Firstly, the Supreme Court of Canada in *Wilson v. Alharayeri*, 2017 SCC 39 ('*Wilson*') made very clear that the oppression remedy:

> creates an equitable remedy that "seeks to ensure fairness – what is just and equitable" (*BCE*, at para. 58). It gives "a Court broad, equitable jurisdiction to enforce not just what is fair" (*ibid*). Courts considering claims for oppression are

> therefore instructed to engage in fact-specific, contextual inquiries looking at "business realities, not merely narrow legalities" (*ibid*) (at para. 23)

[61] Secondly, I am guided by the finding of the Ontario Court of Appeal in *Budd v. Gentra Inc*. (1998), 1998 CanLII 5811 (ONCA) ('*Budd*'), as approved by the Supreme Court in *Wilson*, that the common law principle as to when directors will bear personal liability do not apply equally in an oppression case. In particular, a director's conduct need not reveal "a separate identity or interest from that of the corporation by falling outside the normal scope of his or her duties in order to attract personal liability" (see: *Wilson* at para. 30). Rather in oppression cases, for personal liability to befall a director, the oppressive conduct must be attributable to the director because of his or her action or inaction and the order attributing personal liability must be appropriate in all of the circumstances. (see: *Budd* at para. 46). The Ontario Court of Appeal suggests in *Budd* one instance in which a director may be held liable is where the director has virtually total control over the corporation, as in the case of Gordon with respect to Rolling Meadows (see: *Budd* at para. 44).

[62] Thirdly, I note that s. 245 of the *OBCA* defines "complainant" under the oppression remedy provisions of Part XVII of the statute as "a registered holder or beneficial owner, or former registered holder or beneficial owner of a security; a director or officer or former director or officer; or any other person, who in the discretion of the Court, is a proper person to make an application under this Part." This Court in its recent decision in *Foglia v. Grid Link*, 2021 ONSC 703, confirmed that the Court has a broad discretion in determining who is a complainant under the third branch of the definition.

[63] While I appreciate the oppression remedy requires me to consider business realities and adopt a more liberal approach in considering the potential personal liability of Gordon as a director of Rolling Meadows as well as qualifying Pine Glen as a complainant pursuant to s. 245 of the *OBCA*, I am equally guided by s. 248(2) of the relevant legislation that provides a complainant may seek relief to rectify conduct "that is oppressive or unfairly prejudicial to or that unfairly disregards the "interest of any security holder, creditor, director or officer of the corporation".

[64] In its Amended Statement of Claim, Pine Glen not only fails to plead that it is a complainant within the meaning of s. 245 but it also does not plead any conduct that unfairly disregards the

interests of the stipulated categories of persons in s. 248(2) that the oppression remedy is designed to protect.

[65] Furthermore, Perell J. of this Court in *CBS Outdoor Canada v. Clarity Outdoor Media Inc*., 2012 ONSC 2547, at para 61, held that:

> In assessing a claim for oppression, a Court must answer two questions: (1) Does the evidence support the reasonable expectation the claimant asserts? (2) Does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest?

[66] No where in its amended pleading does Pine Glen allege any reasonable expectation(s), how its reasonable expectation(s) was/were violated or provide any factual foundation for its allegations.

[67] Given all of the identified deficiencies in Pine Glen's oppression remedy claim, I find that the Amended Statement of Claim fails to disclose any reasonable basis for this cause of action and the claim to be struck.

(vii) Tort of Intimidation

[68] Pine Glen's Amended Statement of Claim pleads that Gordon engaged in the tort of intimidation by, in part, attempting to terminate the Agreement of Purchase and Sale.

[69] The Plaintiff submits that although to date, the tort of intimidation is defined by an express threat, no decision has prohibited the tort from including an implied threat. Pine Glen submits that Gordon impliedly threatened to cause Rolling Meadows to initiate proceedings to have the Agreement of Purchase and Sale declared void in the face of the Plaintiff having committed to sell the 62 lots that were the subject of the Agreement unless the Plaintiff acceded to Gordon's demand to increase the Agreement's purchase price by $1,715,822.

[70] On the other hand, it is the position of the Defendants that the essential elements of the tort of intimidation have not been plead by Pine Glen. The Defendants also submit that advancing a position that is disadvantageous to one's opposing party in an effort to maximize one's own financial benefit does not amount to an attempt to intimidate (see: *Sprung Instant Structure Ltd. v. Royal Bank of Canada*, 2008 ABQB 30, at para. 33).

[71] Perell J. in *Mizzi v. Cavanagh*, 2021 ONSC 1594 ('*Mizzi*') at para. 86 held that the tort of intimidation:

> …is committed when the defendant threatens to commit an unlawful act and in so doing causes loss to the person threatened…

[72] In the same decision, Perell J. defines the essential elements of the tort of intimidation to include the following elements:

> (a) the defendant coerces the plaintiff or others to the injury of the plaintiff to act or to refrain from doing an act;
>
> (b) the defendant uses a threat as a means of compulsion;
>
> (c) the defendant intends to injure the plaintiff;
>
> (d) the threat involves the use of unlawful means;
>
> (e) the plaintiff complies with the defendant's demand; and
>
> (f) the plaintiff suffers damage. (see: *Mizzi*, at para. 85).

[73] It is well established that the novelty of a claim will not militate against a plaintiff on a Rule 21 motion to strike (see: *Trustee of Millright Regional Counsel v. Celestica*, 2012 ONSC, 6083, at para. 55). With this principle in mind, and for purposes of this motion, I accept the Plaintiff's submission that the threat need not be expressly stated but may be implied and I further accept that the threat need not necessarily be of a criminal nature.

[74] Notwithstanding these concessions, it is nonetheless plain and obvious to me that the Amended Statement of Claim does not disclose a reasonable cause of action for the tort of intimidation. I have reached this conclusion because the amended pleading fails to allege:

(a) any implied threat;

(b) Gordon's intention to injure Pine Glen;

(c) the nature of the unlawful means used by Gordon to threaten Pine Glen; and

(d) Pine Glen's compliance with Gordon's threatened demand.

[75] Based on the facts as plead, instead of complying with Gordon's alleged threat, Pine Glen initiated its own legal proceedings for a declaration that the purchase price under the Agreement of Purchase and Sale was fixed at $6,148,000 and that the parties were bound to complete the transaction pursuant to the Agreement's terms. I therefore find that the Plaintiff's claim for the tort of intimidation is to be struck.

(viii) Tort of Concerted Design

[76] The Plaintiff pleads that the Defendants acted in concerted design to cause it injury.

[77] The Plaintiff submits that it has sufficiently plead the critical elements of the tort of concerted design as articulated by the Supreme Court of Canada in *Botiuk v. Toronto Free Press Publications Ltd*., 1995 CanLII 60 ('*Botiuk*'). Specifically, it has alleged that the Defendants acted in furtherance of a common design to commit a wrong.

[78] The Defendants argue that the cause of action must fail because a corporation and its directing mind cannot be co-conspirators, and in any event, the predominant purpose of the Defendants' impugned conduct was not to cause injury to the Plaintiff but rather to find a means to terminate the Agreement of Purchase and Sale.

[79] The Ontario Court of Appeal in *Rutman v. Rabinowitz*, 2018 ONCA 80, described the tort of concerted design or action as generally involving a common design or conspiracy and quotes the Supreme Court of Canada's adoption of the following formulation of the tort from its decision in *Botiuk*, as set out by John G. Fleming in *The Law of Torts,* 8th ed. (Sydney: Law Book Co., 1992) at p. 255:

> The critical element of [concerted action liability] is that those participating in the commission of the tort must have acted in furtherance of a common design…Broadly speaking, this means a conspiracy with all participants acting in furtherance of the wrong, though it is probably not necessary that they should realize they are committing a tort (at para. 33).

[80] In its 2020 decision in *Mughal v. Bama Inc*., 2020 ONCA 704, the Ontario Court of Appeal also held that where the alleged means used by the defendant to injure is lawful, the predominant purpose of the defendants' conduct must be to cause injury to the plaintiff (at para. 21).

[81] I find the facts alleged in support of the tort of concerted design to injure the Plaintiff are lawful. Given this finding, coupled with the finding of Edwards J. in his decision of August 11, 2022 that it was clear to him that Gordon had "seller's remorse" and was "searching for any reason to terminate the transaction" (see: *Rolling Meadows 2022*, at para 105), I fail to see how it may be open to Pine Glen to argue that the predominant purpose of the Defendants' conduct was to cause injury to the Plaintiff.

[82] Furthermore, although Plaintiff's counsel submits in argument that the common design of the Defendants was to cause the Plaintiff to resile from the Agreement of Purchase and Sale and thereby suffer economic harm due to its commitment to some 62 end purchasers, the Amended Statement of Claim fails to plead this wrong, or any wrong, as the alleged focus of the Defendants' conspiracy to injure. In my view, it is not sufficient for the Plaintiff to plead that the Defendants acted in concerted design to injure it in some unspecified way. Rather, the Defendants are entitled to know the nature of the alleged wrong so that they may also know the case they are to meet.

[83] Lastly, and perhaps most significantly, based on the allegations as plead, I am of the opinion that Rolling Meadows and Gordon cannot act in common to further an alleged wrong. I have reached this conclusion because Gordon is the directing mind of the corporate defendant. In reaching this conclusion, I rely on the Ontario Court of Appeal's decision in *Normart* where the Court held that unless there is some activity on the part of directors that takes them out of the role of the directing mind of the corporation, it follows that the "directing mind of a corporation cannot, by causing the corporation to act in a certain way, be said to have made an agreement with that corporation". In other words, unless the directing mind of a corporation was acting outside the scope of their authority or not acting in the best interests of the corporation, directors cannot act in concert with the corporation.

[84] The Plaintiff submits that *Normart* is distinguishable on its facts because it was decided within the context of the tort of conspiracy. I reject this proposition, however, because at its core, the tort of concerted design involves a conspiracy, and apart from that, *Normart* stands for the principle in general terms that unless there are exceptional circumstances a director cannot enter into an agreement with the corporation he or she controls.

[85] In this case, because the Amended Statement of Claim does not plead that Gordon was acting outside the scope of his authority or was not acting in the best interests of Rolling Meadows, I find that it is plain and obvious that the Amended Statement of Claim fails to disclose a reasonable cause of action for the tort of concerted design, and therefore, the cause of action is struck.

(ix) Tort of Abuse of Process

[86] Finally, the Plaintiff alleges in its pleading that the Defendants engaged in the tort of abuse of process by attempting to use or abuse the legal process to resile from or terminate the Agreement of Purchase and Sale and/or delay the hearing of the applications before Edwards J. in an attempt to cause economic harm to the Plaintiff.

[87] The Plaintiff submits that the Defendants opposed its application for a declaration that they were obliged to complete the purchase and sale transaction and advanced their own application for a declaration that the Agreement of Purchase and Sale was unenforceable for the collateral purpose

of exerting pressure on the Plaintiff to cause it to agree to the Defendants' demand for an increase in the purchase price so as to avoid defaulting on its agreements with its 62 end purchasers. It also submits that each of the four elements of the tort as stipulated by this Court in *Harris v. Glaxo Smith Kline Inc*., 2010 ONSC 2326 ('*Harris*'), and affirmed by the Court of Appeal in 2010 ONCA 872, are satisfied in its amended pleading.

[88] The Defendants submit, however, that the alleged tort has no chance of success because Rolling Meadows was not motivated to defend the Plaintiff's application and prosecute its own application with the ulterior motive of inflicting economic harm on Pine Glen. On the contrary, it was motivated by "seller's remorse" as found by Edwards J. in his binding determination and as admitted by the Plaintiff in its amended pleading.

[89] The Defendants further submit to the extent that the Plaintiff suffered economic loss, such loss was an unavoidable corollary of Rolling Meadows' legitimate interest in having its claims adjudicated.

[90] The parties agree that Perell J.'s decision in *Harris* particularizes the four elements of the tort of abuse of process, all of which must be plead to validly constitute this cause of action. The four elements are:

(a) The plaintiff is a party to a legal process initiated by the defendant;

(b) the legal process was initiated for the predominant purpose of furthering some indirect, collateral and improper objective;

(c) the defendant took or made a definite act or threat in furtherance of the improper purpose; and

(d) some measure of special damages has resulted (see: *Harris* at para. 48)

[91] The Plaintiff has plead the first element of the tort. Based on a generous and liberal reading of the Amended Statement of Claim, I am also prepared to find that the fourth element has been satisfactorily plead. The second and third elements of the tort as stipulated in *Harris*, however, require further comment.

[92] In *Tsiopoulos v. Commercial Union Assurance Co*. (1986), 57 O.R. (2d) 117 (Ont. H.C.), Henry J. held

> … that the collateral or improper purpose must be "entirely outside the ambit of the legal claim which the Court is asked to adjudicate.

[93] In *O.P.S.E.U. J. National Citzens' Coalition Inc*. (1990), 38 O.A.C. 70 (Ont. C.A.), Dubin J.A. elaborated on the issue of dominant improper purpose by stating:

> This is consistent with the English rule that an action will not be dismissed as an abuse of process unless the litigant is pursuing an ulterior purpose unrelated to the subject matter of the litigation and "but for" the ulterior purpose, the action would not have been commenced at all.

[94] In the circumstances of this case where Edwards J. found in *Rolling Meadows 2022* that Gordon had "seller's remorse" and had "agreed to a purchase price that in retrospect he feels was too low and is searching for any reason to terminate the transaction" (at para. 105), it is plain and obvious to me that it cannot be successfully argued that but for the alleged collateral purpose of causing economic harm to the Plaintiff, Rolling Meadows, with Gordon as its directing mind, would have not only defended the Plaintiff's application but initiated its own proceeding for a determination of its rights and obligations under the Agreement of Purchase and Sale. In other words, it is plain and obvious to me based on the binding determination of Edwards J. that the dominant purpose in Rolling Meadows' 2022 application was not to cause economic harm to the Plaintiff.

[95] It is also my opinion that it is not open to Pine Glen to argue that an improper purpose can be established solely on the basis that the legal proceeding had the incidental effect of causing it economic harm. Macdonald J. made this clear in *Canadian Pacific International Freight Services*

Ltd. v. Starber International Inc. (1992), 44 C.P.R. (3d) 17 (Ont. Gen. Div), where after approving the decision of Gravely J. in *Poulos v. Matovic* (1989), 47 C.C.L.T. 207 (Ont. H.C.), she held:

> … the fact that a legitimate claim may have an incidental effect of antagonizing, impoverishing, or intimidating a plaintiff is not in itself to justify a claim for abuse of process. What is required is some purpose extrinsic to the legal proceedings complained of.

[96] To the extent that Pine Glen incurred any economic loss as a result of Rolling Meadows' 2022 application, such loss was corollary to Rolling Meadows' interest in determining whether the Agreement of Purchase and Sale was to be terminated at law and not as a result of some improper purpose "entirely outside the ambit" of the application that was before Edwards J.

[97] The Plaintiff's alleged tort of abuse of process must also fail on the basis of the third element of the tort identified by Perell J. in *Harris*. Specifically, the Amended Statement of Claim fails to plead that the Defendants made a definite act or threat in furtherance of the improper purpose of causing Pine Glen economic harm. As the Ontario Court of Appeal held in *Metrick v. Deeb*, 2003 CanLII 804 (Ont. C.A.), quoting from *Fleming on Torts*, 4th ed. (1971) at page 548:

> Some such overt conduct is essential, because there is clearly no liability when the defendant merely employs regular legal process to its proper conclusion, albeit with bad intentions.

[98] Equally relevant to the third element of the tort of abuse of process is that the definite act or threat must be made beyond the ambit of the litigation. As this Court has held in *Teledata Communications Inc. v. Westburne Industrial Enterprises Ltd*., [1990] O.J. NO. 27 (S.C.J.) ('*Teledata*') at para. 9:

> I conclude therefore that the bringing of an action, even if factually groundless, together with wrongful motives for bringing the action, are not sufficient to constitute the tort of abuse of process. What lies at the heart of the cause of action is an act, or threat of an act, outside the ambit of the action.

[99] Because I adopt the finding in *Teledata* (see also: *Hunt Oil Company of Canada Inc. v. Galleon Energy Inc.*, 2010 ABQB 212 at para. 30) and also find that Pine Glen has not plead any direct act in furtherance of the Defendants' alleged improper purpose, I conclude that the claim of abuse of process must be struck as it fails to disclose any reasonable cause of action.

Leave to Amend

[100] Having struck all nine of the causes of action plead in the Amended Statement of Claim, Pine Glen submits that I should follow the "normal" practice and grant leave to amend its claim. For their part, the Defendants submit that leave to amend should not be granted because the dispute between the parties resolved in October 2022 when the purchase and sale transaction was completed and the serial litigation between Rolling Meadows and Pine Glen should be brought to an end.

[101] I accept that on motions brought to strike a claim as untenable in law pursuant to Rule 21.01(1)(b) of the Rules, leave to amend usually will be given (see: *McDonald v. Mulqueen*, [1922] O.J. No. 34). Leave to amend is to be denied in only of the clearest of cases where it is plain and obvious that no tenable cause of action is possible on the facts as alleged (see: *Mitchell v. Lewis*, 2016 ONCA 903 at para. 21.

[102] Leave to amend is also to be refused where there is no reason to suppose that the plaintiff could improve his or her case by any amendment or if an entirely new course of action would have to be advanced (see: *1523428 Ontario Inc. v. TDL Group Corp*., 2018 ONSC 5886.

[103] I am not prepared to grant leave to amend in the instance. Not only have I already found that no tenable cause of action is possible on the facts as alleged, but it is also my view that there is not any reason to believe that Pine Glen's case can be improved by further amendment, particularly in light of the finding Edwards J. that Gordon had "seller's remorse" and was searching for any way to terminate the agreement. The Defendants' motion to strike had been outstanding for some seven months prior to its first day of argument and at some point, following the delivery of the moving parties' record, Pine Glen delivered its Amended Statement of Claim. In these circumstances, I have no confidence that Pine Glen could improve its position by alleging further facts to support its alleged causes of action. Rather, I conclude that the Amended Statement of Claim is Pine Glen's best position, and that position does not meet the minimum threshold standard

for each of the plead causes of action (see: *Glycobiosciences v. Amosey*, 2020 ONSC 2566, at para. 42).

[104] Furthermore, any amendments that might improve Pine Glen's position would be fundamentally different causes of action. Given the passage of time since the causes of action arose, these different causes of action are likely statute-barred. Its is clear that leave to amend is to be refused if the amendments raise statute-barred causes of action (see: *Taylor v. Tamborill Cigar Co*., [2005] OJ No. 4182 (Ont. C.A.), at para. 2).

Alternative Relief Sought by the Defendants

[105] As I have struck the nine causes of action in the Plaintiff's Amended Statement of Claim without leave to amend, I find that I need not consider the alternative relief sought by the moving parties pursuant to Rule 21.01(1)(a) and Rule 21.01(3)(d).

Disposition

[106] For all the above noted reasons, I order that the Plaintiff's claims for breach of contract, attempted breach of contract, inducement of breach of contract, intentional interference with contractual relations, breach of contractual duty of good faith, breach of the duties imposed by s. 134 of the *OBCA*, oppression, the tort of intimidation, the tort of concerted design and the tort of abuse of process be struck as against the Defendants without leave to amend. Because these causes of action form the entirety of the Plaintiff's claims against the Defendants, I further order that the action be dismissed.

Costs

[107] I strongly encourage the parties to agree on the issue of costs. In the unfortunate event that they are unable to do so, however, the party seeking costs shall deliver cost submissions within 15

days of the release of this decision and the responding party shall deliver responding submission within 10 days of receipt of the submissions of the party seeking costs. Reply submissions, if any, are to be delivered within 5 days of receipt of the submissions on behalf of the responding party. The initial and responding submissions are not to exceed 3 pages double spaced excluding bills of costs, offers to settle and authorities. Any reply submissions are not to exceed 2 pages. All submissions are to be sent to my attention via my judicial assistant, Linda Kinkasone, at linda.kinkasone@ontario.ca with a copy to Kitchener.SCJJA@ontario.ca.

M. J. Valente, J.

Released: March 11, 2024

CITATION: Pine Glen v. Rolling Meadows, 2024 ONSC 1464
COURT FILE NO.: CV-22-14203
DATE: 2024/03/11

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Pine Glen Thorold Inc.

Plaintiff/Responding Party

-and-

Rolling Meadows Land Development Corporation and Glen Gordon

Defendant/Moving Parties

REASONS FOR DECISION

M.J. Valente J.

Released: March 11, 2024