CITATION: *OCHC v. Sloan Valve Company*, 2024 ONSC 1493
COURT FILE NO.: CV-22-90866
DATE: 2024/03/12

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
OTTAWA COMMUNITY HOUSING CORPORATION Plaintiff	Joseph Obagi and Elizabeth Quigley, for the Plaintiff Corporation
– and –	
SLOAN VALVE COMPANY and WOLSELEY CANADA INC. o/a WOLSELEY MECHANICAL GROUP Defendants	Jim Holloway, for the Defendants
	HEARD: April 13, 2023

RULING ON MOTION

CORTHORN J.

Introduction

[1] The Ottawa Community Housing Corporation ("OCHC") provides affordable housing to singles, families, seniors, and persons with special needs. OCHC owns, operates, and maintains approximately 15,000 residential units throughout Ottawa.

[2] In 2011, OCHC was exploring ways to make its buildings more sustainable and cost effective. OCHC was searching for a way to address undetected silent leaks in toilets, which result in increased water use. In 2012, OCHC decided to proceed with an energy retrofit. The retrofit included the replacement of plumbing fixtures, including toilets, with new energy efficient fixtures for all of OCHC's residential units. With the retrofitting, OCHC hoped to achieve its goal of a 40 percent cost savings related to water consumption.

[3] Prior to proceeding with the retrofit, OCHC communicated with Sloan Valve Company ("Sloan") regarding their Flushmate System. OCHC ultimately decided to purchase the Flushmate System. Wolseley Canada Inc. ("Wolseley") was the successful bidder for the contract with OCHC for the sale and supply of the Flushmate System.

[4] The retrofitting was carried out by OCHC from the spring of 2012 to the summer of 2013. In the years 2013, 2014, 2015, and 2016, OCHC realized a marked reduction in water consumption and water costs across its units.

[5] In 2018, when reviewing its water costs for 2017, OCHC noticed a rise in water consumption and higher water costs at several of its properties. In some instances, the increased consumption was almost double the usage seen in 2016.

[6] In the fall of 2018, OCHC concluded that the cause of the increase observed in water usage was the failure, *en masse*, of a cartridge which forms part of the Flushmate System.

[7] OCHC alleges that it chose the Flushmate System because it was led to believe that the normal failure mode for the system was to leak air and eventually cease flushing altogether. OCHC alleges that, rather than fail in the normal mode, the Flushmate System installed in OCHC units continued to operate, leaked water, and resulted in increased water consumption over time.

[8] In 2019, and under a reservation of rights, Sloan provided OCHC with 16,000 replacement cartridges. The replacement cartridges included a different type of O-ring from the type used in the cartridge for the Flushmate System when it was originally supplied. OCHC engaged certified contractors who carried out a full retrofit, replacing the existing cartridges in the toilets of all the subject units.

[9] OCHC commenced this action in December 2022. OCHC seeks damages of $7,670,000 and special damages in an unspecified amount. The damages claimed include (a) excess water costs arising from the alleged failure of the Flushmate System; (b) incidental labour costs; and (c) expenses incurred for external vendors retained by OCHC to investigate the cause of and to remediate the increased water consumption.

[10] In its statement of claim ("the Pleading"), OCHC identifies three causes of action in bold, all upper-case font: (1) breach of warranty under the *Sale of Goods Act*, R.S.O. 1990, c. S.1 ("*SGA*"); (2) negligence; and (3) negligent misrepresentation.

[11] The breach of warranty claim is made against both defendants and is based on both express and implied warranties. The claims in negligence are also made against both defendants. As against Sloan, OCHC alleges that Sloan was negligent in the design, development, manufacture and/or testing of the Flushmate System. As against Wolseley, OCHC alleges that Wolseley was negligent in the distribution, marketing and/or sale of the Flushmate System.

[12] Last, OCHC alleges that both Sloan and Wolseley made negligent misrepresentations, including with respect to the design, testing, manufacture, performance, and efficiency of the Flushmate System. OCHC alleges that it relied on those negligent misrepresentations, to its detriment, and sustained significant economic damages because of the increased water consumption caused by the failure of the Flushmate System.

[13] At issue on the motion are the claim in breach of implied warranty against Sloan and the claim against both defendants in negligence for damages for economic losses only (collectively, "the Claims").

The Issues

[14] The defendants bring their motion under Rule 21 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. The defendants seek two alternative forms of relief.

[15] First, relying on r. 21.01(1)(b), the defendants ask the court to strike the Claims. The defendants ask the court to reach one or more of the following conclusions about the Claims: they disclose no reasonable cause of action; they have no prospect of success; or they are scandalous, frivolous, vexatious, or an abuse of process.

[16] If the defendants' motion under r. 21.01(1)(b) is dismissed, in whole or in part, then the defendants rely on r. 21.01(1)(a) and raise two legal questions. The defendants ask the court to determine, as may be necessary, the following questions:

a) Can the purchaser of a product in Ontario assert implied warranty claims under the *SGA* against the manufacturer of the product, where the manufacturer is not the seller of the product?

b) Does the manufacturer or seller of a product, which is not alleged to be dangerous, and which presents no risk of harm, owe the purchaser/user of that product a duty of care, such that the purchaser/user has a claim in negligence to recover damages for a pure economic loss?

[17] I will briefly review the law relevant to Rule 21 motions. Thereafter, I will address the claim against Sloan in breach of implied warranty and then the claim in negligence against both defendants.

The Law

[18] In *R. v. Imperial Tobacco*, 2011 SCC 42, [2011] 3 S.C.R. 45, the Supreme Court of Canada considers the purpose of the test to be applied on motions to strike. Writing for the court, McLachlin C.J., at paras. 19 and 20, identifies the following purposes:

a) Uncluttering proceedings by "weeding out" claims that are hopeless;

b) Ensuring that claims which have "some chance of success" proceed to trial;

c) The promotion of litigation efficiency, including the reduction of time in and the costs of litigation; and

d) Focussing the evidence and argument on the real issues, and as a result, increasing the likelihood that the trial process "will successfully come to grips with the parties' respective positions on those issues and the merits of the case."

[19] The tools available in Ontario to achieve that purpose, are set out in rr. 21.01(1)(a), (1)(b), and (3) of the *Rules of Civil Procedure*, as follows:

> 21.01(1) A party may move before a judge,
>
> (a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs; or
>
> (b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence[.]
>
> ….
>
> (3) A defendant may move before a judge to have an action stayed or dismissed on the ground that,
>
> ….
>
> (d) the action is frivolous or vexatious or is otherwise an abuse of the process of the court[.][1]

[20] For motions under either r. 21.01(1)(a) or r. 21.01(1)(b), "The court must take the facts pleaded in the statement of claim as true, unless they are patently ridiculous or manifestly incapable of being proven": *Paton Estate v. Ontario Lottery and Gaming Corp.*, 2016 ONCA 458, 131 O.R. (3d) 273, at para. 12.

[1] For the motion before this court, only subsection (d) of r. 21.01(3) is relevant.

[21] In *Beaudoin Estate v. Campbellford Memorial Hospital*, 2021 ONCA 57, 154 O.R. (3d) 587, at para. 14, the Court of Appeal for Ontario highlights that the same test is applied under r. 21.01(1)(a) as is applied under r. 21.01(1)(b). The court therein likens whether the outcome on an issue of law is "plain and obvious" (r. 21.01(1)(a)) to whether a pleading should be struck because it discloses no reasonable cause of action or defence (r. 21.01(1)(b)).

[22] The pleading under scrutiny should be read as generously as possible, with accommodation for any drafting deficiencies in the pleading: *Beaudoin Estate*, at para. 14.

[23] The threshold to be met on a motion to strike is high. For example, claims that have "some chance of success" should be permitted to proceed: *Imperial Tobacco*, at para. 19. More recently, in *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19, [2020] 2 S.C.R. 420, at para. 90, Karakatsanis J. (dissenting in part, but not on this point) describes, as follows, the approach to be taken on a motion to strike:

> The threshold to strike a claim is therefore high. Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial. The correct posture for the Court to adopt is to consider whether the pleadings, as they stand or may reasonably be amended, disclose a question that is not doomed to fail. [Citations omitted.]

[24] The motivating rationale behind this high standard is explained by Roberts J., at para. 33 of *PMC York Properties Inc. v. Siudak*, 2022 ONCA 635, 473 D.L.R. (4th) 136. First, a liberal construction of rules and pleadings underlies the *Rules of Civil Procedure*. Second, a generous approach to pleadings is required generally, to "secure the just, most expeditious and least expensive determination of every civil proceeding on its merits" in accordance with r. 1.04(1).

[25] I turn first to consider the claim against Sloan based on breach of implied warranty.

1. Breach of Implied Warranty (the SGA)

a) The Sale of Goods Act

[26] Section 1(1) of the *SGA* includes the following definitions:

> "buyer" means the person who buys or agrees to buy goods;
>
> "contract of sale" includes an agreement to sell as well as a sale;
>
> ….
>
> "sale" includes a bargain and sale as well as a sale and delivery;
>
> "seller" means a person who sells or agrees to sell goods[.]

[27] For the purpose of this motion, it is undisputed that the relevant section of the *SGA* is s. 15. That section is titled, "Implied conditions as to qualify or fitness" and provides as follows:

> Subject to this Act and any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:
>
> 1. Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description that it is in the course of the seller's business to supply (whether the seller is the manufacturer or not), there is an implied condition that the goods will be reasonably fit for such purpose, but in the case of a contract for the sale of a specified article under its patent or other trade name there is no implied condition as to its fitness for any particular purpose.
>
> 2. Where goods are bought by description from a seller who deals in goods of that description (whether the seller is the manufacturer or not), there is an implied condition that the goods will be of merchantable quality, but if the buyer has examined the goods, there is no implied condition as regards defects that such examination ought to have revealed.
>
> 3. An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.
>
> 4. An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith.

[28] I next review the Pleading – specifically the allegations in support of the claim against Sloan based on the implied warranties under s. 15 of the *SGA*.

b) The Pleading

[29] In the Pleading, the only reference to the *SGA* is found in para. 30 (quoted in para. 32, below). The reference therein is to the statute in its entirety, without mention of a specific section or subsection. Para. 30 of the Pleading does not provide the defendants or the court with the requisite particulars of the claims made against them. In that regard, the Pleading is deficient.

[30] Central to the defendants' motion regarding the breach of implied warranty claim is Sloan's status as the designer and manufacturer of the Flushmate System. At para. 3 of the Pleading, OCHC describes Sloan as follows:

> At all material times, Sloan was involved in the design and manufacturing of plumbing valves and fixtures. Specifically, Sloan's Flushmate division specializes in the design and manufacture of pressure-assisted flushing systems, which are installed inside toilet tanks. The Sloan Flushmate IV System (the "Flushmate System") is a pressure-assisted system, installed inside toilet tanks, designed and manufactured by Sloan to achieve maximum reduction of water consumption and cost savings.

[31] OCHC does not allege that Sloan was 'the' or even 'a' seller of the Flushmate System. At para. 4 of the Pleading, OCHC describes Wolseley as "a wholesale distributor of plumbing fixtures and similar products." At para. 13, after addressing representations alleged to have been made by Wolseley and Sloan, OCHC alleges that it "awarded Wolseley the contract to supply plumbing fixture packages."

[32] The allegations specific to the claim based in breach of warranty are set out, as follows, in paras. 26-30 of the Pleading:

> 26. The Flushmate Systems that OCHC purchased came with express or implied warranties that:
>
> (a) they would be fit for their intended purpose, which was the reduction of water consumption; and
>
> (b) they would be of merchantable quality.
>
> 27. Sloan regularly and repeatedly represented to the public and to OCHC that Flushmate Systems were a highly effective solution to reduce water consumption resulting in water cost savings. It provided literature and marketing materials to its distributors, including Wolseley, knowing and expecting that they would pass on these representations, which would then be relied upon by purchasers, including OCHC.
>
> 28. OCHC relied upon these representations made by Wolseley and Sloan. A collateral contract was formed with Sloan with an express warranty that the Flushmate Systems would be fit for their intended purpose of reducing water consumption.

29. In actual fact, the Flushmate Systems purchased by OCHC were not fit for their intended purpose and were not of merchantable quality.

30. OCHC pleads and relies upon the *Sale of Good Acts*, RSO 1990, c S-1.

[33] No other allegations specific to the breach of warranty claim are made in the Pleading.

b) Is it plain and obvious, assuming the facts pleaded are true, that the Pleading discloses no reasonable cause of action or has no reasonable prospect of success? (r. 21.01(1)(b))

- ***The Positions of the Parties***

[34] The defendants rely on four decisions in support of their position that the implied warranties under s. 15 of the *SGA* do not apply to manufacturers who are not sellers. One decision is from the Court of Appeal for Ontario: *Arora v. Whirlpool Canada LP*, 2013 ONCA 657, 118 O.R. (3d) 113, leave to appeal refused, [2013] S.C.C.A No. 498. The other three decisions are from this court: (1) *Greenough v. Maple Ridge Media Inc*., 2018 ONSC 660; (2) *Haliburton Forest & Wildlife Reserve Ltd. v. Toromont Industries Ltd. et al*., 2016 ONSC 3767; and (3) *Marcinkiewicz v. General Motors of Canada Co*., 2022 ONSC 2180.

[35] The defendants submit that, absent the privity created by a purchaser-seller relationship, a claim in breach of implied warranty cannot succeed against Sloan. The defendants ask the court to conclude that it is plain and obvious that OCHC's claim against Sloan based in breach of implied warranty cannot succeed and to strike that portion of the Pleading.

[36] OCHC submits that paras. 26-30 of the Pleading deal with more than the claims against the defendants in breach of implied warranty. OCHC asks the court to not restrict its consideration of the allegations in paras. 26-30 to only those made in support the claim against Sloan based in breach of implied warranty. OCHC makes that request because it also relies on those allegations in support of the claim against Sloan for breach of express warranty in a collateral contract alleged to have been formed by Sloan with OCHC.

[37] OCHC relies on the 2005 decision of the Court of Appeal for Ontario in *CIT Financial Ltd. v. Sellter Industries Inc.*, 2005 CanLII 8191 (Ont. C.A.). In a four-paragraph endorsement, the court allowed an appeal from the motion judge's decision to strike a third party claim. At para. 1 of the endorsement, the court set out its reasons for allowing the appeal as follows:

> While the Third Party Notice is not a model pleading there is in our view nevertheless, enough to enable us to discern possible causes of action – that the warranty here is unconscionable, breach of the *Sale of Goods Act* (cases have held that where a purchaser makes known the purpose of the sale to a manufacturer, and is assured that a certain product would do the job, the manufacturer can be considered a seller for the purposes of the *Sale of Goods Act* – see *Great West Van Conversions Inc. v. Langevin*, [2000] B.C.J. No. 2547) and negligent misrepresentation.

[38] In allowing the appeal, the court also said, at para. 2, that the defendant "should have the further opportunity to properly articulate its causes of action before the door is forever shut."

[39] OCHC submits that the decision in *CIT Financial* is binding on this court. OCHC submits that the only appellate decision on which the defendants rely (i.e., *Arora*) is distinguishable on its facts from the matter before this court. OCHC asks the court to dismiss this first portion of the defendants' motion under r. 21.01(1)(b).

- ***Overview***

[40] Sloan is described in the Pleading as "involved in the design and manufacturing of plumbing valves and fixtures." In paras. 6 and 27 of the Pleading, OCHC alleges that Sloan made representations directly to OCHC.

[41] Paragraph 6 sets out representations alleged to have been made by Sloan directly to OCHC during the latter's pilot project (i.e., before OCHC placed its order with Wolseley for the sale and supply of the plumbing fixture packages).

[42] In para. 27, OCHC alleges that Sloan repeatedly made representations to the public and to OCHC about the effectiveness of the Flushmate System in the reduction of water consumption. In the same paragraph, OCHC refers to "literature and marketing materials" provided by Sloan to Wolseley. OCHC alleges that Sloan knew and expected that the representations made in the literature and materials would be passed on by Wolseley to and relied upon by purchasers, including OCHC.

[43] In para. 28, OCHC alleges that it relied on representations made by Sloan (and Wolseley). In the same paragraph, OCHC alleges that, "A collateral contract was formed with Sloan with an express warranty that the Flushmate System would be fit for their intended purpose of reducing water consumption."

[44] The defendants do not ask the court to address OCHC's allegations regarding the formation of a collateral contract between OCHC and Sloan – including the express warranties alleged to form part of that contract. The defendants ask the court to address only the claim against Sloan based on the implied warranties stipulated in s. 15 of the *SGA*.

[45] For the reasons which follow, I conclude that, assuming the facts pleaded are true, it is plain and obvious that the claim against Sloan pursuant to s. 15 of the *SGA* has no reasonable prospect of success. That claim is struck.

[46] Further, no purpose would be served by granting OCHC leave to amend the Pleading as it relates to the claim against Sloan based on the implied warranties under s. 15 of the *SGA*.

- ***Analysis***

[47] Two key principles emerge from the decisions upon which the defendants rely. First, privity of contract is required for a buyer to be entitled to rely on the implied warranties under s. 15 of the *SGA*. Second, the implied warranties under that section are intended to be narrowly applied: *Marcinkiewicz*, at paras. 151-53.

[48] The most recent Court of Appeal decision upon which any of the parties rely is the 2013 decision in *Arora*. That case involved a proposed class action against a washing machine manufacturer. The plaintiffs alleged the defendant manufacturer's front-loading washing machines were poorly designed and prone to developing an unpleasant smell. The gist of the plaintiffs' claim was that the washing machines were shoddy goods and not worth their purchase price.

[49] At first instance, the plaintiffs' motion to certify the class proceeding was dismissed. The motion judge concluded that none of the claims disclosed a cause of action. The Court of Appeal for Ontario dismissed the plaintiffs' appeal.

[50] At para. 31 of *Arora*, Hoy A.C.J.O. concludes, "The fact that Whirlpool did not sell the machines directly to consumers is critical to the viability of the appellants' implied warranty claim." Hoy A.C.J.O. distinguishes between the language in s. 15 of the *SGA* and the analogous legislation in other provinces. At para. 32, she highlights that legislation in two other provinces "expressly provides that lack of privity does not defeat a third party's claim for damages as a result of a breach of an implied warranty".

[51] Hoy A.C.J.O. agrees with the motion judge that the appellants' claim against the washing machine manufacturer for a breach of the implied warranty of fitness for purpose (s. 15, item 3) had no reasonable prospect of success: at para. 33. Hoy A.C.J.O. emphasizes that the appellants' remedy under the *SGA* was against the seller and "in this case [the washing machine manufacturer] was not the seller": at para. 33.

[52] I agree with OCHC that the facts in *Arora* are distinguishable from those in the matter before this court. In *Arora*, the plaintiffs/appellants did not allege any direct communication, either pre-sale or as part of the sales, with the washing machine manufacturer. The 2016 decision from this court in *Haliburton* addresses such a scenario. At para. 100 of *Haliburton*, Gilmore J. said that she did "not agree that [the manufacturer's] involvement in pre-sale negotiations or discussions can attribute to it the role of a seller in these circumstances." In the same paragraph, Gilmore J. highlights, "there does not appear to be any authority to support that proposition".

[53] Haliburton operated a large managed forest in Ontario. The defendant, Toromont Industries Ltd, ("Toromont") is an authorized dealer of Caterpillar products. Caterpillar is a well-known world leader in the manufacture of heavy equipment.

[54] Haliburton commenced an action against both Caterpillar and Toromont, seeking damages for breach of contract, negligence, and negligent misrepresentation. Haliburton sought rescission of dealer contracts for two pieces of forestry equipment, a refund of the full purchase price paid, and damages under several headings. Toromont was partially successful and Caterpillar was entirely successful on their respective motions for summary judgment.

[55] Haliburton conceded that Caterpillar was not a party to either of the sales agreements. Haliburton's position was that Caterpillar representatives took on a significant role in the negotiations leading up to the two sales agreements (between Haliburton and Toromont). Haliburton submitted that involvement in pre-sale negotiation resulted in Caterpillar being a seller of goods within the meaning of s. 1 of the *SGA*.

[56] At para. 102, Gilmore J. concluded that it is clear from *Arora* "that where a party does not sell directly to a consumer, the lack of privity will defeat a claim for damages as a result of an alleged breach of an implied warranty." No genuine issue was raised that required a trial; the claim against Caterpillar was dismissed: *Haliburton*, at para. 103.

[57] I conclude the consideration of the decisions upon which the defendants rely with the decision of Gomery J. (as she then was), in *Greenough*. It does not deal with a claim based on implied warranties under s. 15 of the *SGA*. *Greenough* deals with a claim that is analogous to the claim by OCHC against Sloan based on an express warranty in a collateral contract.

[58] Applying the principles discussed in the preceding paragraphs to the Pleading, it is plain and obvious that the claims against Sloan based on the implied warranties in s. 15 of the *SGA* cannot succeed.

[59] OCHC submits that this court is bound by the 2005 decision of the Court of Appeal for Ontario in *CIT Financial*. Critical to OCHC's position is the reference at para. 1 of *CIT Financial* to a purchaser making the purpose of the sale known to the manufacturer. At para. 6 of the Pleading, OCHC sets out the concerns it alleges it made known to Sloan about "undetected silent leaks resulting in an increase in water usage and costs." OCHC relies on the expression of those concerns as the method by which it made the purpose of the sale known to Sloan.

[60] I prefer and follow the reasoning of the Court of Appeal for Ontario in *Arora*, and the decisions from this court in *Haliburton* and *Marcinkiewicz*. A close analysis of the decision in *CIT Financial* does not persuade me to disregard the principles derived from the more recent decisions.

[61] In support of its decision in *CIT Financial*, the Court of Appeal for Ontario refers to "cases" (i.e., plural) in which it had been held that where the purchaser makes known to the manufacturer the purpose of the sale, "the manufacturer can be considered a seller for the purpose of the [*SGA*]". Despite referring to "cases", the court cites only one such case: *Great West Van Conversions Inc. v. Langevin*, 2000 BCSC 1830, [2000] B.C.T.C. 1029.

[62] *Great West* is a decision of Romilly J. on appeal from a Small Claims Court judgement. At trial, Langevin was awarded a total of $10,735 in damages, expenses, and interest arising from problems encountered with a recreational vehicle (the "van"). Langevin purchased the van from a dealer. Great West converted the van to a recreational vehicle. The problems encountered included a non-working kitchen appliance, and repeated flooding.

[63] At trial, Great West and the dealer were found jointly and severally liable to Langevin. Only Great West appealed the trial decision. At paras. 45-49 of the decision on appeal, Romilly J. concludes that Great West should be held liable for damages flowing from the breach of a collateral warranty. The collateral warranty was found in representations made in promotional materials.

[64] Romilly J. concluded that, in any event, the *Sale of Goods Act* should apply because Langevin "went to the manufacturer" based on the representations made in promotional materials: at paras. 50-51. In support of that conclusion, Romilly J. relied on a 1966 decision from the Alberta Supreme Court, Appellate Division: *Traders Finance Corp. Ltd. v. Haley* (1966), 57 D.L.R. (2d) 15 (A.B.S.C. (A.D.)). Romilly J. quoted the following passage from the decision of Johnson J.A. in *Traders*:

> The appellant submitted that the vendor in this case was the Ford Motor company and that the implied conditions and warranties under the ***Sale of Goods Act*** (R.S.A. 1955, c. 295, and particularly as contained in s. 17) applied to that company. The respondent contended and the learned trial Judge held, that the Ford company was not the seller….
>
> When, as here, a purchaser goes to a manufacturer, makes known the purpose for which he requires equipment, is told that specific pieces of equipment shown to him would do the required job, then, notwithstanding who may be the parties to the ultimate agreement of sale, the manufacturer is, in my opinion, the seller within the ***Sale of Goods Act***. [Emphasis in original.]

[65] At para. 51 of *Great West*, and referring to Langevin, Romilly J. said that she "was purchasing a specific product with particular characteristics. [She] clearly was relying on the manufacturer to produce that product, and the manufacturer had to be aware that [Langevin] would want a non-leaking recreational vehicle."

[66] At para. 52, Romilly J. highlighted that the definition of "seller" in the B.C. legislation under consideration was the same as that in the Alberta legislation considered in *Traders*. In both statutes, "seller" is defined to mean "a person who sells or agrees to sell goods".

[67] At para. 52, Romilly J. briefly addressed the existence of a collateral warranty and continued his consideration of the application of the B.C. *Sale of Goods Act* to Langevin's claims against Great West as follows:

> While the Respondent did not physically go to Great West and discuss her requirements with a representative, the Respondent did rely on brochures promising quality craftsmanship. This is a collateral warranty, but in my view the facts should also make the ***Sale of Goods Act*** applicable to Great West in these circumstances. Great West was producing a specialty conversion vehicle to fulfil the known needs of persons such as the Respondent and her partner. It is patently obvious that the leak in question makes the van unfit for those needs. It would be nonsensical if a technical reading of the ***Sale of Goods Act*** precluded recovery from the manufacturer in this case. [Emphasis in original.]

[68] It is not entirely clear from the decision in *Great West*, but it appears that Langevin purchased the van from a dealer, had no direct contact with Great West, relied on representations made in Great West's promotional materials, and, through the dealer, arranged for Great West to carry out the van conversion.

[69] Based on my understanding of the factual matrix in *Great West*, I do not agree with Romilly J.'s finding that Langevin "went to" the manufacturer. In any event, this court is not bound by the decision in *Great West.*

[70] I go one step further and highlight that the Alberta Court of Appeal decision upon which Romilly J. relied is distinguishable, on its facts, from the facts alleged by OCHC in the Pleading. In *Traders*, Haley wished to purchase several Ford trucks. Haley made his requirements known to an individual ("Fix"), who was not a Ford dealer, and to an employee of Ford. To facilitate the sale of the trucks to Haley, Ford delivered the trucks to a Ford dealership, the dealership transferred the trucks to Fix (without the payment of any money), and Haley entered into a conditional sales agreement with Fix. That agreement was assigned to *Traders*.

[71] At trial, Haley was awarded $1,500 in damages on his counterclaim against Ford for breach of warranty on the sale of the trucks to Haley. On appeal, Haley relied on both an express warranty and on the implied condition set out in s. 17 of the *Sales of Goods Act*, R.S.A. 1955, c. 295 (as to fitness for purpose). The appeal was allowed, with the finding made that the implied warranty of fitness for purpose was breached. On appeal, the damages awarded to Haley were increased.

[72] The facts in *Traders* are distinguishable from those alleged in the matter before this court. There was no special arrangement made to facilitate the sale of the Flushmate System to OCHC. The contract for the supply and sale of the plumbing valve fixtures was entered into by OCHC with Wolseley in accordance with a Request for Quotation process.

[73] When the two decisions from the Court of Appeal for Ontario, the 2000 decision from British Columbia, the 1966 decision from Alberta, and the three decisions from this court (all from the past decade) are considered, I am not persuaded that a single paragraph in a four-paragraph endorsement from *CIT Financial*, based on a British Columbia Supreme Court decision on an appeal from a Small Claims Court decision, carries the day.

[74] The end result is that OCHC is not permitted to pursue against Sloan the statutory claim based on the implied warranties under s. 15 of the *SGA*. OCHC may still pursue its claim based on the express warranties it alleges from part of a collateral contract with Sloan.

[75] Even though the claim against Sloan based on the implied warranties under s. 15 of the *SGA* is struck, I will briefly address the question of law arising from the related motion under r. 21.01(1)(a).

c) Can the purchaser of a product in Ontario assert implied warranty claims under the SGA against the manufacturer of the product, where the manufacturer of the product is not the seller of the product?

[76] There are several reasons why the answer to this question is "no". First, the implied warranties under s. 15 of the *SGA* are "narrowly prescribed statutory warrant[ies]": *Marcinkiewicz*, at paras. 152-53.

[77] Second, for OCHC to succeed, it would require what the Court of Appeal described at para. 41 of *Arora* as a "monumental change" to the doctrine of privity. The paragraph quoted immediately below is para. 40 of *Arora* – the names of the parties before this court are inserted in place of the names of the parties in *Arora*:

> Had [OCHC] pleaded that the contracts between [Sloan] and [Wolseley] included the implied condition on which they seek to rely, and that [Sloan] and [Wolseley] intended to extend the benefit of that provision to [OCHC], they would also have to establish that allowing [OCHC] to sue under those contracts would be an incremental change to the doctrine of privity.

[78] The Pleading is devoid of allegations regarding the terms of the contract between Sloan and Wolseley. Neither in its factum nor in oral submissions did OCHC suggest that it relies in any way on the terms of a contract between Sloan and Wolseley. OCHC does not request leave to amend the Pleading so as to address the terms of a contract between the defendants.

[79] Last, in neither its factum nor in oral submissions, did OCHC suggest that it is relying on an incremental change to the doctrine of privity.

[80] I turn next to the second component of the defendants' motion – the claims against the defendants in negligence for damages for economic losses.

2. The Claims in Negligence and Damages for Economic Losses

[81] OCHC claims in damages for economic losses in an amount in excess of $7,670,000. Damages under that heading are claimed against the defendants both in negligence and in negligent misrepresentation. The defendants' position is that a plaintiff may be entitled to damages for economic losses arising from negligent misrepresentation but not from negligence.

[82] The defendants request an order under r. 21.01(1)(b) striking the claim for damages for economic losses resulting from the alleged negligence. In the alternative, the defendants rely on r. 21.01(1)(a) and pose a question of law to be determined.

a) The Pleading

[83] OCHC distinguishes between its claims based in negligence and its claims based in negligent misrepresentation. In the Pleading, OCHC relies on the titles "NEGLIGENCE" (paras. 31-36) and "NEGLIGENT MISREPRESENTATION" (paras. 37-42) to differentiate between the two causes of action. OCHC also differentiates between the two causes of action when, at para. 44 of the Pleading, OCHC sets out the damages it alleges it has suffered:

> As a result of the Defendants' breaches of duty, warranty and/or contract, and misrepresentations, OCHC has suffered damages, including, but not limited to:
>
> (a) excess water costs arising from the failure of the Flushmate Systems;
>
> (b) internal labour costs; and
>
> (c) external vendor costs for investigating and remediating the increased water consumption caused by the deficient Flushmate Systems.

[80] The allegations in support of the claims in negligence are set out in paras. 31-36. Those paragraphs appear below in their entirety, except for paras. 33 and 34. Paragraphs 33 (a)-(w), include the particulars of Sloan's alleged negligence. Paragraphs 34(a)-(j) include the particulars of Wolseley's alleged negligence. In place of the particulars, I summarize the particulars:

> 31. The Defendants each owed a duty of care to OCHC, which they breached.
>
> 32. OCHC suffered damages solely as a result of the negligence of the Defendants, the particulars of which are set out below.
>
> 33. The Plaintiff states that Sloan was negligent in its design, development, manufacture, and/or testing of the Flushmate Systems, the particulars of which include, but are not limited to:
>
> (a)-(w): The particulars of the alleged negligence relate, amongst other things, to,
>
> - design, assembly, manufacturing, labelling and distribution of the Flushmate System;
>
> - design and manufacturing defects about which Sloan knew or ought to have known; and

- the failure to warn and/or instruct suppliers, sellers and, specifically, OCHC of certain features about the Flushmate System.

34. The Plaintiff states that Wolseley was negligent in its distribution, marketing, and/or sale of the Flushmate Systems, the particulars of which include, but are not limited to:

    (a)-(j): The particulars of the alleged negligence relate, amongst other things, to,

    - Wolseley's state of knowledge about design and manufacturing defects in the Flushmate System;

    - the failure to provide adequate instruction regarding the use and application of the Flushmate System; and

    - the failure to warn OCHC as to how the components of the Flushmate System may degrade and render the system ineffective.

35. It was foreseeable to the Defendants that the negligence described above would cause injury and damage to OCHC and the Defendants' negligence was in fact the proximate cause of the damages suffered by OCHC.

36. The Defendants knew or ought to have known that the damages described herein would be suffered by OCHC as a result of the Defendants' negligence.

[84] No other allegations specific to the claims in negligence are made in the Pleading.

b) Is it plain and obvious, assuming the facts pleaded are true, that the Pleading discloses no reasonable cause of action or has no reasonable prospect of success? (r. 21.01(1)(b))

- ***The Positions of the Parties***

[85] The defendants submit that OCHC is not entitled to damages for economic losses arising from the sale of allegedly shoddy, non-dangerous goods. The defendants submit that OCHC cannot establish that either of the defendants owed it a duty of care, specifically because OCHC does not allege that the Flushmate System posed a real and substantial danger to persons or property. The defendants ask the court to strike the claims in negligence – leaving OCHC with statutory and contractual remedies and the claims in negligent misrepresentation.

[86] The starting point for consideration of OCHC's position regarding the claims in negligence is its submission that the damages it is seeking are not for pure economic loss. If permitted to do so, OCHC intends to advance the argument that the water flowing through its units was property, which it owned; and, as a result of the alleged negligence of the defendants, OCHC experienced a loss of property valued at $7,670,000. OCHC submits that it is not, at this stage of the proceeding, plain and obvious that the trial judge will find that the water is not property and/or that the loss of the liquid is not a consequential loss.

[87] In the alternative, OCHC submits that the particulars of negligence alleged in paras. 33 and 34 are relevant to the claims in negligent misrepresentation. OCHC asks that, at a minimum, those paragraphs are not struck and/or it is granted leave to amend the Pleading as it relates to the claims in negligent misrepresentation.

- ***Overview***

[88] For the reasons which follow, I conclude that, assuming the facts pleaded are true, it is plain and obvious, that claims in negligence (paras. 31-36 of the Pleading) have no reasonable prospect of success.

[89] OCHC is granted leave to amend the Pleading to incorporate the allegations made in para. 33(v) of the Pleading in the section of the Pleading in which the allegations related to the claims in negligent misrepresentation are made.

- ***Analysis – Shoddy, Non-Dangerous Goods***

[90] OCHC does not allege that the Flushmate System posed a real and substantial danger to OCHC's rights in person or property. The claims advanced by OCHC relate to what are described in the case authorities as "shoddy goods": see *Wise v. Abbott Laboratories, Limited*, 2016 ONSC 7275, 34 C.C.L.T. (4th) 25, at para. 394.

[91] The case authorities clearly state that there is no cause of action in negligence regarding shoddy, non-dangerous goods: *Haliburton*, at para. 113; *1688782 Ontario Inc. v. Maple Leaf Foods Inc.*, 2020 SCC 35, [2020] 3 S.C.R. 504.

[92] To establish that the Flushmate System constituted dangerous goods, OCHC has a high threshold to meet: *Maple Leaf*, at para. 53. It will be a rare case when a plaintiff meets that threshold: *Maple Leaf*, at para. 53.

[93] OCHC does not ask the court to permit it to advance a claim of dangerous goods. Instead, it asks the court to consider the nature of the damages claimed and the interplay between claims in negligence and claims in negligent misrepresentation. I start with OCHC's submission that the water it lost (valued at $7,670,000) was "property".

- ***Analysis – The Water is Not Property***

[94] OCHC does not assert that it specifically pleaded that the water which flows through its units is "property". OCHC asks the court the consider the description, in para. 44 of the Pleading, of the damages OCHC alleges it suffered as a result of the defendants' conduct. Those damages include "excess water costs arising from the failure of the Flushmate Systems": at para. 44(a).

[95] OCHC submits that, if the Pleading is given the generous reading required at this stage of the proceeding, the use of the phrase "excess water costs" is an indication of OCHC's characterization of the water as property it owned. Based on that "indicia" of property ownership, OCHC asks the court to conclude that it is not plain and obvious from the Pleading that a trial judge will conclude that the water lost by reason of the failure of the Flushmate System was not property.

[96] The level of generosity that would have to be applied to give the Pleading the reading suggested by OCHC – with the lost water constituting the loss of property – goes beyond the level of generosity required at this stage of the proceeding.

[97] I agree with the defendants that OCHC is attempting to re-characterize a claim for damages for economic losses as a claim related to damaged property. On the most generous of readings of the Pleading, such a claim is entirely unsupported.

[98] The two decisions upon which OCHC relies do not, individually or collectively, provide support for OCHC's submission that the excess water for which it paid was OCHC's property.

[99] First, OCHC relies on a decision of the Exchequer Court in, *The Nicholls Chemical Co. of Canada v. The King* (1905), 9 Ex. C.R. 272. Nicholls brought an action against the Crown for damages arising from the loss of a quantity of sulphuric acid. Nicholls had arranged for the sulphuric acid to be shipped by rail in a tanker car. The sulphuric acid leaked from the tanker because of a cracked or broken discharge pipe.

[100] OCHC submits that its loss of water is analogous to the loss of sulphuric acid, in liquid form, sustained by Nicholls and for which Nicholls was awarded damages. For several reasons, the circumstances in *Nicholls* are distinguishable from those in the matter before this court:

- Nicholls was the "suppliant" of the sulphuric acid. OCHC is not a suppliant of the water; it is an end-user of water supplied by the municipality; and

- The damages awarded to Nicholls related to freight charges, calculated based on the weight of the sulphuric acid. Reimbursement of freight charges paid on the sulphuric acid is not analogous to the costs incurred by OCHC for excess water.

[101] Second, OCHC relies on *R. v. Su*, 2016 ONSC 195 as an example of a decision in which this court concluded that water is property capable of being stolen. The decision is in the form of a transcript; it is from the sentencing of Mr. Su, following a guilty plea to charges related to a grow-op, involving 1331 plants.

[102] At pp. 43 and 44 of the transcript, Carey J., in his reasons for sentence, refers to restitution orders made in a separate proceeding in the Provincial Court. Carey J. therein says, "I am advised that Mr. Su has made restitution in full for the theft of water and electricity that was used illegally by bypassing the meters for the water and the electricity for this residence in Windsor." Carey J. notes that the value of the restitution ordered was $121 for water and $18,613 for electricity.

[103] The particulars of the charges for which Mr. Su was convicted and for which restitution was ordered by the Provincial Court are not mentioned in the transcript. The terms "theft of water" and "water theft", as they appear in the reasons of Carey J. in a sentencing decision related to a grow-op, do not assist OCHC on the motion before this court.

[104] I conclude that the damages claimed by OCHC fall within the category of damages for economic loss; the damages claimed do not relate to damaged or lost property.

[105] Even if OCHC were entitled to advance claims in negligence, which I find it is not, the damages for economic loss would not be recoverable: *Wise*, at para. 394.

- ***Analysis – Negligence and Negligent Misrepresentation are Two Separate Causes of Action***

[106] The defendants do not ask the court to strike OCHC's claims in negligent misrepresentation. The defendants concede that, assuming the pleaded facts are true, it is not plain and obvious that the claims in negligent misrepresentation cannot succeed.

[107] The defendants do not, however, admit that they owed a duty of care to OCHC. In para. 31 of the Pleading, OCHC alleges that "[t]he Defendants each owed a duty of care to OCHC, which they breached." Paragraph 31 is the first of the six paragraphs in which the claims in negligence are particularized. The defendants ask that paras. 31-36 be struck.

[108] OCHC's submissions regarding the relationship between a claim in negligence and a claim in negligent misrepresentation are perplexing. For example, OCHC submits that if they are able to establish a duty of care regarding representations (or, more accurately, the alleged negligent misrepresentations), they are entitled to rely on the existence of *that* duty in support of a separate claim in negligence. OCHC is attempting to anchor a claim in negligence on a claim in negligent misrepresentation. OCHC did not provide any case authorities in support of that submission.

[109] As another example of a perplexing submission, shortly after making the submission described in the preceding paragraph, OCHC submitted that it is not advancing claims in negligence that are separate from the claims in negligent misrepresentation. OCHC does, however, wish to rely on at least some of the allegations made in paras. 31-36 in support of the claims in negligent misrepresentation set out in later paragraphs of the Pleading.

[110] On a generous reading of the Pleading, the only allegations in paras. 31-36 which may be relevant to the claims in negligent misrepresentation are those made in para. 33(v), as against Sloan. OCHC therein alleges that Sloan, "represented and marketed that the Flushmate Systems would reduce water consumption when they knew or ought to have known of a design flaw or other defect in the Flushmate Systems rendering them incapable of providing a reduction in water consumption without further modifications being made to the Flushmate Systems".

[111] The claims in negligence are struck. OCHC is granted leave to amend the Pleading to incorporate the allegations made in what is now para. 33(v) in the allegations regarding the claims in negligent misrepresentation.

c) Does the manufacturer or seller of a product, which is not alleged to be dangerous, and which presents no risk of harm, owe the purchaser/user of that product a duty of care, such that the purchaser/user has a claim in negligence to recover damages for a pure economic loss?

[112] Relying on the cases cited in para. 91, above, the answer to this question is "no".

Disposition

[113] The claim against Sloan based on the implied warranties set out in s. 15 of the *SGA* is struck. The claims in negligence against both defendants are struck.

[114] OCHC is granted leave to amend the Pleading to incorporate the allegations made in what is presently para. 33(v) in the section of the Pleading addressing the claims in negligent misrepresentation.

[115] Prior to the return of the motion, the parties reached an agreement on costs. The parties agree that the costs of the motion shall be fixed, on the partial indemnity scale, in the amount of $40,000 for fees, disbursements, and applicable HST.

[116] The parties agreed that written submissions on costs would only be required if there was divided success on the motion. The defendants are entirely successful on the motion.

[117] The treatment of para. 33(v) of the Pleading does not warrant denying the defendants their costs of the motion.

[118] OCHC shall, within 30 days of the date of this endorsement, pay to the defendants, their costs of the motion, fixed on the partial indemnity scale in the all-inclusive amount of $40,000.

Madam Justice Sylvia Corthorn

Released: March 12, 2024

CITATION: *OCHC v. Sloan Valve Company*, 2024 ONSC 1493
COURT FILE NO.: CV-22-90866
DATE: 2024/03/12

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

OTTAWA COMMUNITY HOUSING CORPORATION

Plaintiff

– and –

SLOAN VALVE COMPANY and WOLSELEY CANADA INC. o/a WOLSELEY MECHANICAL GROUP

Defendants

RULING ON MOTION

Madam Justice Sylvia Corthorn

Released: March 12, 2024