CITATION: Grozelle v. Corby Spirit and Wine Limited, 2023 ONSC 7212
COURT FILE NO.: CV-21-00664146-720600CP
DATE: 20231221

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Russell Grozelle, Gilda Everett, Lucie Lombardo, Thomas Beukelman, Mike Wilkinson, and Larry Howe

AND:

Corby Spirit and Wine Limited

BEFORE: J.T. Akbarali J.

COUNSEL: *Darryl Singer, Mathura Santhirasegaram and Kristina Olivo*, for the plaintiffs

Christopher Hubbard, Dorothy Charach and Sharanya Thavakumaran, for the defendant

HEARD: October 3 and 5, 2023

Proceeding under the *Class Proceedings Act, 1992*

ENDORSEMENT

Overview

[1] The plaintiffs bring this proposed class action alleging that emissions from whisky aging warehouses in Lakeshore, Ontario have caused the growth of baudoinia compniacensis fungus, (commonly known as "whiskey fungus"), which in turn has caused damage to their properties for which the defendant is responsible. On this contested motion, the plaintiffs seek certification of their action.

Background

[2] At this stage, I set out some brief background to the action to orient the reader.

[3] The defendant, Corby Spirit and Wine Limited ("Corby") is a publicly traded company with its head office in Toronto. It is in the business of importing, manufacturing, marketing, and selling wines and spirits.

[4] There is some disagreement about the nature of Corby's connection to the whisky aging warehouses. According to Corby, it managed the warehouses between September 2006 and June 2020, a portion of the class period. The plaintiffs allege that Corby operated and managed the warehouses from 1980 to present. The owner of the warehouses is Hiran Walker & Sons Limited

("Hiram Walker"), which was acquired by Pernod Ricard in 1987. The plaintiffs allege Pernod Ricard is the majority shareholder of Corby, as of 2005. Pernod Ricard's website represents that Corby is an affiliated partner of Pernod Ricard.

[5] The warehouses are located in Lakeshore, Ontario, and occupy about 500 acres of land. The warehouses have been used to age whisky since approximately 1962.

[6] The process of aging Canadian whisky is regulated by the *Food and Drugs Act*, R.S.C. 1985, c. F-27 ("*FDA*"). Canadian whisky must be aged in wood barrels for at least three years. There is no dispute that aging Canadian whisky in porous wood barrels results in the release of small amounts of ethanol.

[7] Ethanol emissions are regulated pursuant to the Ambient Air Quality Criteria set by the Ontario Ministry of Environment, not because they pose a health hazard at greater levels, but because ethanol emissions produce an odour. There is no dispute that the ethanol emissions at the warehouses are well within permissible levels.

[8] Ethanol is one factor that can promote the growth of whisky fungus, which presents as a black mold-like substance.

[9] In the early 1980's, residential development began in the area around the warehouses.

[10] The proposed representative plaintiffs state that a black mold-like substance has been accumulating in, on, and around their homes, properties and possessions, resulting in a dirty and unsightly appearance, which has resulted in excessive cleaning costs for them to remove the substance.

[11] Corby denies that there is any evidence that ethanol emissions from the warehouses caused the black mold-like substance. It points to other causes that may explain the presence of mold and fungal growth, including the fact that the residences in question are proximate to two large bodies of water. Humidity is another factor that can promote the growth of whisky fungus.

[12] Notwithstanding Corby's position on the role of ethanol in the development of the black mold-like substance, beginning in 2003, Hiram Walker organized and funded a cleaning program (the "home-washing program") which provides annual cleaning of some surfaces to residents in an area Hiram Walker designated around the warehouses. The plaintiffs state that the cleaning is not sufficient, because it does not clean all surfaces and properties that are affected by the fungus, it does not clean them often enough, and it does not extend to enough properties. They state that the enjoyment of their homes and properties has been significantly and negatively impacted by the black mold-like substance notwithstanding the home-washing program.

[13] The plaintiffs assert causes of action in negligence, and negligent misrepresentation. They seek general damages of $50 million, and punitive damages of $50 million.

Issues

[14] On this motion, I must determine whether to certify the plaintiff's action as a class proceeding under s. 5 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("*CPA*"). This case raises the following issues:

a. Do the pleadings disclose a cause of action in:

   i. negligence? Corby argues they do not because the pleadings do not identify a breach of duty and only baldly allege causation;

   ii. negligent misrepresentation? Corby argues they do not because the plaintiff has failed to plead the requisite elements of negligent misrepresentation, including failing to allege a special relationship between Corby and the plaintiffs or putative class members, and failing to plead a misrepresentation, negligence in making a misrepresentation, or reasonable and detrimental reliance on a misrepresentation.

   iii. punitive damages? Corby argues they do not because the claim does not plead any material facts alleging conduct that could meet the high standard for an award of punitive damages.

b. Do the pleadings fail to disclose a cause of action because the plaintiffs' claims are statute-barred? Corby argues the applicable limitation period has expired and the plaintiffs have not pleaded discoverability.

c. Is there an identifiable class of two or more persons that would be represented by the proposed representative plaintiff? In the face of Corby's argument that the proposed class definition was merits-based, the plaintiffs have proposed (in their reply factum) a new class definition. Corby argues the new class definition is arbitrary.

d. Do the claims of the class members raise common issues?

   i. With respect to negligence, Corby argues that the plaintiffs have failed to establish any basis in fact that Corby failed to meet the requisite standard of care, and the evidence demonstrates that causation and quantum of damages are inherently individual issues.

   ii. With respect to negligent misrepresentation, Corby argues that the plaintiffs have failed to lead any evidence that Corby made a misrepresentation, and in any event, reasonable and detrimental reliance, and resulting damages, are inherently individual issues.

   iii. With respect to punitive damages, Corby argues that there is no basis in fact to support a conclusion that Corby's conduct warrants a punitive damages award.

e. Is a class proceeding the preferable procedure? Corby argues that the common issues predominate over the individual issues, such that extensive individual trials involving factual and expert evidence would be inevitable. Corby argues that individual trials are a preferable procedure.

f. Is there a representative plaintiff who would fairly and adequately represent the interests of the class, has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and notifying class members, and does not have, on the common issues for the class, an issue in conflict with the interests of the other class members? Corby argues that the plaintiffs are not suitable representative plaintiffs because they do not understand the proceeding, and because their claims are statute-barred.

Brief Conclusion

[15] For the reasons below, I decline to certify this action as a class proceeding. It is not properly pleaded, there is no basis in fact to conclude that the alleged common issues truly exist, and the individual issues predominate. I have other concerns with respect to the adequacy of the pleading, the class definition and the adequacy of the proposed representative plaintiffs. I describe these in greater detail below.

Preliminary Issue: Qualification of Experts

[16] The plaintiffs have adduced evidence from two proposed experts who have collaborated to prepare a joint report. As a preliminary issue, I must exercise my gatekeeping obligation and determine whether the evidence of the experts ought to be admitted.

[17] One of the experts is Chris Pare, who is a senior hydrogeologist with Dragun Corporation. The other is Dr. Farida Dehghan, a professional engineer and air quality consultant with Airzone One.

[18] Mr. Pare and Dr. Dehghan were retained to provide a peer review of information provided in (i) an existing peer review letter dated June 1, 2020 prepared by Dr. Khaled Chekiri of Dragun Corporation, who has since retired, (ii) the Ministry of Environment file relating to Lake Shore Township; and (iii) questions posed by plaintiffs' counsel. Dr. Dehghan was the technical lead, while Mr. Pare provided the factual knowledge behind the joint report.

[19] The original peer-review letter prepared by Dr. Chekiri was provided for preliminary investigation purposes only, according to both Mr. Pare and Dr. Dehghan. In it, Dr. Chekiri peer reviews a report titled "Engineering Analysis of Alternatives to Mitigate Black Fungal Growth in the Vicinity of the Pike Creek Warehouses", dated April 2004. This April 2004 report was prepared for Hiram Walker by MACTEC FPI of Herndon, Virginia.

[20] I note that the June 1, 2020 letter prepared by Dr. Chekiri is also signed by Mr. Pare, but even Mr. Pare, in his affidavit, describes it as a letter prepared by Dr. Chekiri. It is unclear to me what role Mr. Pare played in the June 1, 2020 letter. Moreover, it is unclear to me exactly what

Dr. Chekiri's qualifications were. His signature indicates he holds a Ph.D., and is an Environmental Engineer, and a licenced professional engineer. That is all I know.

[21] Mr. Pare and Dr. Dehghan's evidence includes their joint report, the original peer review letter, and the Ministry of the Environment file. It also includes a Form 53, acknowledgement of expert's duty, which each has signed.

[22] Remarkably, I can find nowhere in the record a *curriculum vitae* for either Dr. Dehghan or Mr. Pare. This creates a hurdle for me as I have a gatekeeping responsibility with respect to expert evidence. The plaintiffs have put me in the position of having to determine whether to admit the evidence of Mr. Pare and Dr. Dehghan with no information about their qualifications beyond the fact that Mr. Pare is a senior hydrologist and Dr. Dehghan is a professional engineer.

[23] Determining whether to admit expert evidence is a two-stage analysis. In the first stage, there are four threshold requirements that must be established (*White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, [2015] S.C.R. 182, at paras. 19 and 23, citing *R. v. Mohan*, [1994] 2 S.C.R. 9, at pp. 20-25; see also *R. v. Abbey*, 2017 ONCA 640, [2017] O.J. No. 4083, at para. 48):

a. Relevance, which at this stage means logical relevance;

b. Necessity in assisting the trier of fact;

c. Absence of an exclusionary rule; and

d. A properly qualified expert, which includes the requirement that the expert be willing and able to fulfil the expert's duty to the court to provide evidence that is impartial, independent and unbiased.

[24] If the threshold requirements are met, the court moves on to the second stage of the analysis. There, the judge, as gatekeeper, determines whether the benefits of admitting the evidence outweigh its potential risks, considering factors such as legal relevance, necessity, reliability, and absence of bias.

[25] In this case, the evidence cannot clear the first stage of the test because there is almost no evidence before me to assist in understanding whether Mr. Pare and Dr. Dehghan are properly qualified experts. To be clear, they may be. I just have no evidence of it.

[26] This is an unfortunate gap in the evidence, as expert evidence about the manner in which ethanol may influence the production of whisky mold would have been both relevant and necessary. But in the circumstances, as I am unable to ascertain whether the proposed experts are properly qualified, I must decline to admit their report.

[27] The letter from Dr. Chekiri and the Ministry of Environment file, each of which are identified and attached to Mr. Pare's report remain admissible as exhibits thereto. However, to the

extent the parties rely on these documents, questions arise as to the proper use to which they can be put.

[28] The letter from Dr. Chekiri is, as I have noted, described as being provided for preliminary investigation purposes only. Dr. Chekiri did not give evidence, and there is scant evidence of his qualifications. Mr. Pare is not a qualified expert, and does not depose to having played any part in the preparation of the June 1, 2020 letter, despite having signed it.

[29] In my view, the June 1, 2020 letter is not properly admissible for proof of the truth of its contents. No one has deposed to its veracity, although Dr. Chekiri, or another properly qualified expert could have. Thus, I cannot find that its admission as an exception to the hearsay rule is necessary. Moreover, given the limited ("preliminary") scope of the letter and without admissible expert evidence to contextualize it, I cannot find it to be reliable either. I have no expertise to allow me to determine what to make of it and I decline to become my own expert. As a result, the report is admissible only for proof of the fact that it was made.

[30] With respect to the file from the Ministry of the Environment, I am prepared to accept that certain documents contained therein are admissible as an exception to the hearsay rule, and in particular those documents prepared by Ministry staff in accordance with their duties. These documents are necessary because of the inconvenience of calling Ministry staff to authenticate them, and they are reliable because they were prepared by staff in accordance with their duties. To the extent I make findings drawn from the documents from the Ministry of the Environment file, I do so having concluded that the documents in issue may be admitted as exceptions to the hearsay rule for the reasons set out above.

[31] Having concluded that the expert evidence is inadmissible, I turn to the merits of the certification motion.

General Principles Applying to Certification Motions

[32] At a certification motion, the court does not resolve conflicting facts and evidence, nor engage in a robust analysis of the merits of a claim. The outcome of a certification motion is thus not predictive of the success of the common issues trial. However, neither does the certification motion "involve such a superficial level of analysis into the sufficiency of the evidence that it would amount to nothing more than symbolic scrutiny": *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, [2013] 3 S.C.R. 477, at paras. 99, 102, 103, 105.

[33] On a certification motion, the plaintiff is required to show some basis in fact for each of the certification requirements set out in the *CPA*, other than the requirement that the pleadings disclose a cause of action. The focus is on whether the form of the action is such that it can proceed as a class action. Thus, the question is not whether there is some basis in fact for the claim itself, but whether there is some basis in fact that establishes the certification requirements: *Pro-Sys*, at paras. 99-100.

Analysis of Certification Criteria

S. 5(1)(a) – do the pleadings disclose a cause of action?

[34] The court assesses whether the pleadings disclose a cause of action on the same standard of proof that applies to a motion to dismiss: assuming all facts pleaded to be true, is it plain and obvious that the plaintiff's claim cannot succeed: *Pro-Sys*, at para. 63.

[35] Material facts pleaded are accepted as true, unless they are patently ridiculous or incapable of proof. Pleadings are read generously. However, bare allegations and conclusory legal statements based on assumptions or speculation are not material facts, and not assumed to be true for the purposes of determining whether a viable cause of action has been pleaded: *Whitehouse v. BDO Canada LLP*, 2021 ONSC 2454, at para. 19 (Div. Ct.).

[36] In this case, the plaintiffs' pleading of negligence is wanting. While the plaintiffs have pleaded what they argue the duty of care requires of Corby, they do not plead any material facts to support the allegation that a duty of care exists. Nor do they plead that Corby breached any of the duties that they say it was required to meet.

[37] The pleading of negligent misrepresentation is even sparser. The plaintiffs do not plead any elements of negligent misrepresentation. They do not allege a special relationship between the plaintiffs or the class and Corby. They do not plead a misrepresentation. They do not allege Corby acted negligently in making any misrepresentation. They do not allege reasonable and detrimental reliance. Read very generously, one might perhaps see a suggestion that Corby failed to disclose information it had about the existence of the black mold-like substance, but even if that is the nub of a pleading of misrepresentation by omission, the pleading remains deficient for failing to plead a special relationship, negligence in omitting to disclose information, or reasonable and detrimental reliance.

[38] Finally, the pleading in respect of punitive damages is bald. It does not meet the standard set out by the Supreme Court of Canada in *Whiten v. Pilot*, 2002 SCC 18, [2002] 1 S.C.R. 595, at paras. 86-87, that the facts alleged to warrant punitive damages "should be pleaded with some particularity. The time-honoured adjectives describing conduct as 'harsh, vindictive, reprehensible and malicious'…are conclusory rather than explanatory".

[39] In their reply factum, the plaintiffs attempt to shore up some of the pleading deficiencies. For example, they allege that as manager of the warehouses, Corby owed a duty of care to prevent foreseeable harm to others, and it failed to take reasonable steps to prevent or reduce the ethanol emissions that they knew or ought to have known caused damage to the neighbouring properties. Even if this were in the pleading, or the pleading were amended to include this language, the pleading is still deficient because it contains no pleading of material facts of causation. There is no pleaded link between the duties pleaded and the pleaded damages.

[40] The plaintiffs made a similar effort in their reply factum with respect to the negligent misrepresentation pleading. While they assert in argument that there is a special relationship between the defendant, and plaintiffs and class, the assertion is bald. Similarly, the reply factum continues to use language to the effect that Corby made a misrepresentation, while also stating that it had the obligation to provide accurate information. Is this an alleged misrepresentation by

omission, or by commission? If the former, what was omitted to be disclosed, and when? If the latter, what was the misrepresentation specifically, and when was it made? Even the argument does not make it clear. Finally, the reply factum states that the misrepresentation was relied on, without any material facts in support, and without even a statement that reliance was reasonable.

[41] Thus, even when specifically trying to ameliorate the nature of the allegations to establish claims that could be adequately pleaded, the plaintiffs have fallen short.

[42] Finally, Corby's statement of defence raises a limitation period defence. Discoverability of the claim is not pleaded in the claim, nor was any reply filed pleading discoverability. Where a plaintiff relies on discoverability to prove a limitation period has not expired, they must clearly plead it, and the facts supporting it, in the statement of claim: *Parsons v. Deutscher Estate*, 2014 ONSC 5007. As I discuss below in my analysis about the suitability of the proposed representative plaintiffs, the plaintiffs rely on discoverability of the Dragun peer-reviewed paper in June 2020 to commence the running of the limitation period at that time, but they have not pleaded discoverability. This is yet another reason the pleading is deficient.

[43] For these reasons, I conclude that the pleading does not disclose a cause of action.

Section 5(1)(b) – is there an identifiable class?

[44] For this criterion to be satisfied, there must be a rational relationship between the class, the cause of action, and the common issues, and the class must not be unnecessarily broad or over-inclusive: *Pearson v. Inco Ltd., et al.*, 2006 CanLII 913, at para. 57 (ON CA).

[45] In their reply factum, the plaintiffs redefined the class that they wish to certify as follows:

> All persons who have lived or are currently living within the "Approved Cleaning Zone" and all persons outside the "Approved Cleaning Zone", generally understood to be the area within the Municipality of Lakeshore, north of Country Road 42, from Pike Creek to Patillo Road.

[46] This revised class definition does not specifically allude to the time-frame of the class, but I assume the plaintiffs intend it to begin with the original residential development in the 1980s, because (i) the wording "have lived" in the new proposed definition is unlimited, and (ii) the prior proposed class definition explicitly dated the class to the development of the first homes in the area, in the 1980s.

[47] The plaintiffs have thus sought to redefine the class by having reference to a geographic area. They explain that they have sought to limit the geographic area to the town of Lakeshore, and that I should be hesitant to reject the class definition because of under-inclusivity, especially because in cases of environmental claims, the very nature of pollution is that its effects are widespread and diffuse. It is not a legitimate complaint that the plaintiffs have chosen to define the class in a way that makes it more amenable to certification: *Pearson*, at paras. 61, 62.

[48] Corby argues that the new class definition is arbitrary, and unconnected to the common issues.

[49] In this case, unlike most environmental litigation, the emissions said to emanate from the warehouses are not directly impacting the plaintiffs' property. Rather, the allegation is that the emissions promote the growth of the black mold-like substance that is damaging the plaintiffs' property.

[50] Evidence in the record from the Ministry of the Environment file indicates that air sampling undertaken in 2003 measured ethanol concentration in a number of locations within the proposed geographic boundaries of the class. The samplings disclosed concentrations at varying levels, from 0 ppm, to 2.356 ppm, and one location where the levels were below the detection limit.

[51] The evidence of surveying for ethanol emissions during the lengthy class period is limited, and includes no recent evidence. And there is no evidence to provide some basis in fact linking the ethanol to the black mold-like substance on a class-wide basis.

[52] The record does not disclose a basis in fact to conclude that ethanol emissions are present throughout the proposed geographic boundary of the class (or that it is not present outside of the proposed geographic boundary). Nor does the record disclose a basis in fact to find that ethanol is linked to the black mold-like substance within the geographic boundary, or even that all houses within that boundary suffer from the black mold-like substance.

[53] I am thus not satisfied that the proposed class boundaries are rationally connected to the common issues.

Section 5(1)(c) - Are there issues in common?

[54] Common issues are defined in the *CPA* as "common but not necessarily identical issues of fact, or common but not necessarily identical issues of law that arise from common but not necessarily identical facts."

[55] To satisfy this requirement of the certification test, the plaintiffs must establish that there is some basis in fact to conclude that (i) the proposed common issues actually exist; and (ii) the proposed common issues can be answered in common across the entire class and will significantly advance the claims of the entire class: *Simpson v. Facebook*, 2021 ONSC 963, at para. 43, *Pioneer Corp. v. Godfrey*, 2019 SCC 42, [2019] 3 S.C.R. 295, at para. 105, *Battan v. Boehringer Ingelheim (Canada) Ltd.*, 2017 ONSC 53, at para. 162, aff'd 2017 ONSC 6098 (Div. Ct.), leave to appeal ref'd (unreported) (ONCA).

[56] The plaintiffs seek to certify common issues with respect to: (i) negligence; (ii) negligent misrepresentation and concealment damages; (iii) punitive damages. I consider each of these in turn.

Proposed Common Issues Regarding Negligence

[57] The common issues proposed by the plaintiffs with respect to negligence are:

a. Did the defendant owe a duty of care to the representative plaintiffs and to the class members to, among other things:

i. Exercise reasonable care in formulating, manufacturing, and testing of the products;

ii. Study and conduct trials on the release of ethanol on an ongoing basis to determine safety issues;

iii. Rectify any problems as they arise and alert the regulatory authorities;

iv. Conduct ongoing testing and analyses to determine if any impurities or risks associated with the release of ethanol in the production of its good exist or arise;

v. Test their products' effect on the surrounding environment;

vi. Inform the public and regulatory authorities if any problems arise; and

vii. Warn the public and alert Health Canada;

b. If the answer to any of the common issues in (1) is "yes", did the defendant breach any of those duties or obligations in the manner or manners alleged in the statement of claim?

[58] The plaintiffs describe these questions as, in essence, asking about the existence and nature of a duty of care owed by the defendant to the representative plaintiffs and the class members.

[59] They argue (but do not plead) that the relationship between the parties was one of proximity and damage was reasonably foreseeable by the defendant's conduct. The plaintiffs rely on various studies and communications within the Ministry of the Environment, and argue that the defendant knew or ought to have known that the emissions from the warehouses were causing fungal growth, and that the defendant was negligent in not mitigating the issues. The plaintiffs also argue that the fact that the defendant implemented the home-washing program infers a duty of care owed to the plaintiffs and class members based on the defendant's voluntary assumption of responsibility.

[60] In their factum, the plaintiffs acknowledge that these proposed common issues with respect to the standard of care "require significant expert and fact evidence". As I have noted, the plaintiffs have failed to lead evidence about their experts' qualifications, so there is no expert evidence before me.

[61] I am troubled because there is no evidence whatsoever to establish that these proposed common issues actually exist. The plaintiffs' affidavits do not provide any basis in fact to establish anything beyond the fact that the black mold-like substance has occurred on their property. They

have no knowledge of any applicable standard of care; they are not experts. The pleading does not allege breaches of the duties identified, nor plead any materials facts in support of such breaches. The record contains no evidence of the standard of care or alleged breaches. On this record, the plaintiff has failed to demonstrate some basis in fact that the common issues regarding negligence, and particularly the breaches of the alleged standards of care, exist.

[62] I add that I would have reached no different conclusion on this issue had the expert evidence been admitted. Dr. Dehghan confirmed on cross-examination that she was not retained to provide evidence of the standard of care of a manager or operator of an alcohol aging or storage facility, or an opinion that Corby failed to meet the requisite standard of care.

[63] Finally, I note that the plaintiff proposes no common issue regarding causation, and no evidence to support an argument that causation is a common issue. This may be a deliberate omission, because Dr. Dehghan's evidence was that there was "no basis in fact to conclude that there is a causal relationship between ethanol emissions from the aging facility and the presence of mold."

Proposed Common Issues regarding Negligent Misrepresentation and Concealment Damages

[64] The plaintiffs propose the following common issues regarding negligent misrepresentations and concealment damages:

a. As a result of the defendant's actions, errors, or omissions, did the representative plaintiffs and the class members suffer and/or continue to suffer damages, among other things, due to the:

    i. Cleaning and repair expenses incurred in relation to one's property and the surrounding yard;

    ii. Impairment of the quiet enjoyment of one's property and the surrounding yard;

    iii. Diminution of the value of one's property; and

    iv. Such further and other harms and injuries as shall be discovered and/or particularized.

b. If the answer to any of the common issues above is "yes", did the defendant contribute to the representative plaintiffs' and the class members' incurred expenses, including repairs and replacement of the siding of their homes and other collateral around and outside the home as well as out-of-pocket expenses?

c. If the answer to common issue (b) above is "yes", did the representative plaintiffs and class members suffer compensable damages as a result of the defendant's actions?

d. If the answer to common issue (c) above is “yes”, can damages be determined on a class-wide aggregate basis?

[65] The proposed common issues set out above speak more to causation and the plaintiffs’ alleged damages than they do to the tort of negligent misrepresentation. I have already noted there is no evidence that would allow me to find a basis in fact that causation is a common issue. (The evidence that was proffered from Dr. Dehghan, but not admitted, not only did not offer a basis to find causation to be a common issue, but was to the opposite effect, that determining the presence of ethanol is an undertaking that is site-specific, as is whether local ethanol concentrations are causing or contributing to mold or fungal growth.)

[66] The plaintiffs’ damages are also individual issues. Different plaintiffs have experienced different impacts from the black mold-like substance.

[67] To the extent I am meant to infer common issues relating to the unpleaded elements of negligent misrepresentation, like whether a special relationship exists between the defendant and class members, whether the defendant made misrepresentations by commission or by omission, and whether the plaintiffs and class members reasonably relied on those misrepresentations to their detriment, the evidence in the record is again deficient to establish any basis in fact for such questions.

[68] No misrepresentation by commission or omission is identified or pleaded, making it impossible to assess whether the alleged misrepresentations were made (or not made) globally to the class as a whole, or to individuals, and when the impugned conduct ostensibly occurred.

[69] Moreover, the evidence that exists indicates that all communications between the class, their community, the town and the Ministry of the Environment was with Hiram Walker, not the defendant which is a separate legal entity with its own legal personality.

[70] Nor is there evidence in the record to establish some basis in fact that any (mis)representation was made (or omitted to be made) negligently.

[71] The questions of reasonable and detrimental reliance are also individual questions.

[72] Lastly, there is no basis in fact for concluding that a common issue regarding aggregate damages actually exists. There is no evidence of a workable methodology for determining damages on a class-wide basis.

[73] The plaintiffs have not established some basis in fact to conclude that common issues relating to negligent misrepresentation and concealment damages exist.

Proposed Common Issues regarding Punitive Damages

[74] The plaintiffs propose the following common issues with respect to punitive damages:

a. Did the defendant's conduct constitute highhanded, malicious, and reprehensible conduct that departs from a marked degree of the standards expected of the designers, manufacturers, marketers, suppliers, distributors, and sellers of goods?

b. If the answer to common issue (a) above is "yes", was the defendant's conduct so egregious as to justify an award of exemplary or punitive damages?

[75] There is no evidence in the record of conduct that could give rise to punitive damages, and thus no basis in fact for a common issue regarding punitive damages.

[76] In summary on this point, the plaintiffs have not shown that there is some basis in the evidence from which to conclude that the common issues proposed actually exist.

Section 5(1)(d) – Preferable Procedure

[77] In order to determine whether a class proceeding is the preferable procedure for the resolution of the common issues, the court must consider the importance of the common issues in relation to the claims as a whole: *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, at para. 30.

[78] In *Bennett v. Lenovo (Canada) Inc.*, 2017 ONSC 5853, at para. 84, Perell J. summarized the criteria relevant to a preferable procedure analysis, including

a. whether a class proceeding would be better than other methods, such as joinder, test cases, or other means of resolving the dispute;

b. whether a class proceeding represents a fair, efficient, and manageable procedure that is preferable to any alternative method of resolving the claims;

c. whether a class proceeding is the preferable procedure is judged by reference to the purposes of access to justice, behaviour modification, and judicial economy, and by taking into account the importance of the common issues to the claims as a whole, including the individual issues.

[79] The recent amendments to the *CPA* have added to the preferability analysis. Section 5(1.1) of the *CPA* states that a class proceeding is only preferable if it is:

a. Superior to all reasonably available means of determining the entitlement of the class members to relief; and

b. The questions of fact or law common to class members predominate over any questions affecting individual class members.

[80] The import of these amendments was considered recently by Perell J. in *Banman v. Ontario*, 2023 ONSC 6187, at paras. 317-322. He concluded that the addition of s. 5(1.1) to the *CPA* imposes a stricter test for preferability than the test that governed since 1994 when the *CPA*

came into force. The preferable procedure analysis is now more rigorous and involve determining, through the lens of judicial economy, behaviour modification, and access to justice:

a. whether the design of the class action is manageable as a class action;

b. whether there are reasonable alternatives;

c. whether the common issues predominate over the individual issues;

d. whether the proposed class action is superior (better) to the alternatives.

[81] In his reasons, at para. 321, Perell J. noted that the fact that a class action may involve both a common issues phase and an individual issues phase is not an obstacle to certification,

> but the court must consider the contributions of both the common issues phase and the individual issues phase in the preferable procedure analysis. The purpose of determining whether the common issues predominate over the individual issues is to ensure that the common issues – taken together – advance the objective of judicial economy and sufficiently advance the claims of the class members to achieve access to justice. A class action will not be preferable if, at the end of the day, claimants remain faced with the same economic and practical hurdles that they faced at the outset of the proposed class action.

[82] I agree with Perell J.'s view of the impact of the recent amendments.

[83] In my view, a class proceeding is not the preferable proceeding in this case, for much the same reasons that I have just reviewed in the context of the common issues analysis. Even if one could fashion common issues (say, for example, a properly pleaded breach of the standard of care for which there is some basis in the evidence), the potential for common issues in this case is overwhelmed by the individual issues that would remain.

[84] These include causation and damages in the context of negligence. In the context of negligent misrepresentation, they include reasonable reliance, detrimental reliance/causation, damages, and potentially (depending on what misrepresentation or omission is alleged) the existence of a special relationship, whether there is a misrepresentation, and whether it was made negligently. Discoverability is also an individual issue that many, if not all, class members will face.

[85] Given the plethora of individual issues that arise in this case, I find that the common issues, to the extent any could be fashioned, would not predominate over the individual issues. The individual issues would, first, be more significant in quantity.

[86] More importantly, the individual issues would be equally or more significant in terms of the nature of proof required to deal with them. In this case, the evidence in the record indicates that there has been variance in ethanol emissions in the geographic area near the warehouses on the occasions it has been measured. It also indicates that whisky mold growth can be contributed

to by factors including humidity, of particular potential relevance here due to the proximity of the properties near the warehouses to two bodies of water. The individual issues would require individual plaintiffs or class members to each adduce expert evidence specific to their particular property, along with fact evidence supporting their damages, and potentially all the elements of a claim in negligent misrepresentation.

[87] For these reasons, the common questions do not predominate over the individual issues. At the end of the resolution of any common issue trial that conceivably could be properly structured in this case, each class member would be left with litigation on their individual issues that would carry the same practical and economic hurdles that they would face in an individual action.

[88] There are other reasonable alternative methods to addressing this dispute, such that a class action is not superior. The obvious alternative is that claims can be tried individually. Given the challenges that an individual issues trials in this class action, if certified, would involve, I do not view the objectives of access to justice or judicial economy being significantly advanced through a class proceeding. Nor am I convinced that a myriad of individual actions would do less to promote behaviour modification (if indeed there is behaviour that requires modifying) than a class proceeding would.

[89] I thus find that a class proceeding is not the preferable procedure in this case.

Section 5(1)(e) – Representative Plaintiff

[90] Of the six named plaintiffs, four are put forward as proposed representative plaintiffs: Gilda Everett, Lucie Lombardo, Mike Wilkinson and Larry Howe.

[91] A suitable representative plaintiff must fairly and adequately represent the interests of the class, have produced a workable litigation plan, and must not have, on the common issues, an interest in conflict with the interests of other class members.

[92] I have concerns about the appropriateness of the representative plaintiffs, for two reasons.

[93] First, there is confusion amongst the representative plaintiffs about what this litigation is designed to achieve. On cross-examination, Mr. Wilkinson did not know what certification is, had no input into the litigation plan and, most worryingly, believes the litigation will result in the ethanol emissions being stopped when there is no such relief sought. Mr. Howe also thought that the action might be resolved by getting property cleaned and to stop the black mold-like substance from floating anywhere. Neither Ms. Lombardo nor Ms. Everett appeared to understand the class action process. Plaintiffs' counsel suggests that the representative plaintiffs are not sophisticated. My concern is not related to their sophistication; I am troubled because they are not informed, and indeed, may be misinformed. In such circumstances, it is difficult to see how they can adequately represent the interests of the class.

[94] Second, Corby argues that all the proposed representative plaintiffs' claims are statute-barred, in reliance on ss. 4, 5, and 15 of the *Limitations Act, 2001*, S.O. 2002, c. 24.

[95] A representative plaintiff, who, for reasons personal to her, is definitively shown as having no claim because of the expiry of a limitation period cannot be a member of the proposed class, and thus cannot be a representative plaintiff, because she would have no stake in the outcome of the proceeding: *Stone v. Wellington County Board of Education*, 1999 CanLII 1886, (ON CA), at para. 10.

[96] In this case, all the plaintiffs gave evidence that believed there was a connection between the emissions from the warehouses and the black mold-like substance for at least a decade prior to the issuance of the statement of claim. There were town meetings at least as early as 2002 and discussions among neighbours as early as 1986 linking the black mold-like substance to the warehouses.

[97] One of the lawyers listed as plaintiffs' counsel on the plaintiffs' statement of claim is also a class member. Evidence indicates that he was seeking information from the Ministry of the Environment regarding the black mold-like substance and the warehouses since October 7, 2013, almost eight years prior to this action being commenced.

[98] As I have already noted, discoverability is not pleaded in the statement of claim, nor in reply to the statement of defence that raised the limitations defence.

[99] The plaintiffs argue that their claims are not statute-barred. They rely on the fact that only in June 2020 did the plaintiffs receive Dragun's peer-reviewed paper that substantiated their suspicions, and only then did a duty arise to diligently investigate and commence claims. This allegation is not pleaded, nor did any representative plaintiff give any evidence to this effect.

[100] Corby argues that, in the circumstances of this case, there was a plausible inference of liability that gave rise to a duty to diligently investigate and commence claims. In *Grant Thornton LLP v. New Brunswick*, 2021 SCC 31, at para. 44, the Supreme Court held that, when assessing a plaintiff's state of knowledge, direct and circumstantial evidence may be used. Moreover, a plaintiff will have constructive knowledge when the evidence shows that the plaintiff ought to have discovered the material facts by exercising reasonable diligence, and suspicion may trigger that exercise.

[101] In *Tender Choice Foods Inc. v. Versacold Logistics Canada Inc.,* 2013 ONSC 80, at paras. 59, 60, aff'd 2013 ONCA 474, the court held that later discovery of facts which change a borderline claim into a viable one does not postpone the discovery of the claim. The limitation period begins to run when the plaintiff has *prima facie* grounds to infer the defendant caused him harm, but certainty of the defendant's responsibility for the loss is not a requirement.

[102] Moreover, expert opinion is not required before commencing a claim; the idea that it is confuses the issue of when a claim is discovered with the process of assembling the necessary evidentiary support to make the claim winnable. To discover a claim, a plaintiff need only have sufficient facts upon which she could allege negligence: *Lawless v. Anderson*, 2011 ONCA 102, at para. 36.

[103] In this case, the proposed representative plaintiffs had knowledge of the damages they allege they suffered, and believed (not simply suspected) that the warehouses were the cause of the damages. To the extent there were facts of which they were unaware, the duty to diligently investigate arose long before two years before the commencement of the claim.

[104] In my view, the proposed representative plaintiffs do not have an interest in this class proceeding because their claims are statute-barred. As a result, there is no basis in the evidence to conclude that they are appropriate representative plaintiffs.

Costs

[105] The parties agreed that the successful party on this motion would be entitled to $275,000 all-inclusive in costs.

[106] The defendant is the successful party. The plaintiffs shall pay its costs of $275,000 all-inclusive within thirty days.

Summary

[107] In summary, I make the following order:

a. The motion for certification is dismissed;

b. The plaintiffs shall pay the defendant's costs fixed at $275,000 all-inclusive within thirty days of the release of these reasons.

J.T. Akbarali J.

Date: December 21, 2023