IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *TA Hotel Management Limited Partnership (Re),* 2024 BCSC 902

Date: 20240529
Docket: B200415
Registry: Vancouver

In the Matter of the Bankruptcy of TA Hotel Management Limited Partnership

Before: The Honourable Justice Matthews

Reasons for Judgment

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Place and Date of Hearing:	Vancouver, B.C. January 15-18, 2024
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Place and Date of Judgment:	Vancouver, B.C. May 29, 2024

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Overview

[1] TA Hotel Management Limited Partnership ("TA Hotel Management") operated the Trump International Hotel and Tower Vancouver (the "Hotel Property"), and an adjacent property known as the Conference Centre, until it assigned itself into bankruptcy on August 27, 2020. Grant Thornton Limited was appointed trustee in bankruptcy. Maxfine International Limited and TA Properties (Canada) Ltd. own the Hotel Property and the Conference Centre, respectively. They allege that instead of undertaking an orderly and efficient bankruptcy, Grant Thornton enriched itself by prolonging the bankruptcy process and increasing its fees, causing Maxfine and TA Properties losses in excess of $3.8 million. They seek leave to commence proceedings against Grant Thornton for damages for breach of contract, negligence, trespass, and breach of fiduciary and other duties, pursuant to s. 215 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3.

[2] Grant Thornton asserts that the proposed claim against it is frivolous, vexatious and factually unfounded. It asserts that it cannot pass the low threshold for leave to commence proceedings against a trustee in bankruptcy.

Legal Principles

Leave Pursuant to s. 215 of the *Bankruptcy and Insolvency Act*

[3] Section 215 of the *Bankruptcy and Insolvency Act* provides that no action lies against a trustee with respect to any report made or action taken pursuant to the *Bankruptcy and Insolvency Act* except with leave of the court.

[4] In *GMAC Commercial Credit Corporation-Canada v. T.C.T. Logistics Inc.*, 2006 SCC 35, a majority of the Supreme Court of Canada described s. 215 as immunizing the conduct of receivers and trustees appointed under the *Bankruptcy and Insolvency Act* unless prior judicial authorization is received. At para. 55, Justice Abella, for the majority, observed that the threshold for granting leave under s. 215 is not high and that the provision "is designed to protect the receiver or trustee against only frivolous or vexatious actions, or actions that have no basis in fact". Justice Abella, at para. 60, described this test as calling for "an investigation as to whether

the proposed litigation discloses a cause of action", but the focus of that inquiry is not a determination of the merits.

[5] At paras. 57–58, Abella J. also cited *Mancini (Trustee of) v. Falconi,* [1993] O.J. No. 146, 61 O.A.C. 332 (C.A.) for the proposition that the other side of the balancing under s. 215 is to ensure that the legitimate claims can be advanced. Justice Abella adopted and summarized the "accepted principles" set out at para. 7 of *Mancini* as follows:

> 1. Leave to sue a trustee should not be granted if the action is frivolous or vexatious. Manifestly unmeritorious claims should not be permitted to proceed.
>
> 2. An action should not be allowed to proceed if the evidence filed in support of the motion, including the intended action as pleaded in draft form, does not disclose a cause of action against the trustee. The evidence typically will be presented by way of affidavit and must supply facts to support the claim sought to be asserted.
>
> 3. The court is not required to make a final assessment of the merits of the claim before granting leave.

[6] The evidentiary threshold is described as whether the pleadings and the evidentiary basis disclose a *prima facie* case: *GMAC Commercial Credit* at paras. 59–60. In *RoyNat Inc. v. Allan*, [1988] 6 W.W.R. 156, 1988 CanLII 3499 (Alta. Q.B.), Justice Conrad stated these requirements and also stated that in order to refuse leave, it would have to be "perfectly clear" that there was no foundation for the claim or that the action was frivolous or vexatious. The descriptor "perfectly clear" was not used in *Mancini* or in *GMAC Commercial Credit* and I do not consider it adds anything to the clear test enunciated by the Supreme Court of Canada and the Court of Appeal for Ontario in those cases.

[7] In cases where the court has expressly approved of the conduct of the trustee, such as where there is a discharge order containing a provision that the court approves of the trustee's steps, then there must be a strong *prima facie* case: *Royal Bank of Canada v. 6382330 Manitoba Ltd. et al.*, 2021 MBQB 72 at paras. 13, 15. That is not applicable in this case.

[8] Section 37 of the *Bankruptcy and Insolvency Act* provides for the bankruptcy court to confirm, reverse or modify the act or decision of a trustee where any of the creditors or any other person is aggrieved by any act or decision of the trustee and applies to the court for redress.

[9] In *GMAC Commercial Credit* at para. 66, Abella J. described the difference between ss. 37 and 215 as being that s. 215 provides for permission to seek a remedy other than in the bankruptcy court while s. 37 provides for remedies in the bankruptcy court. The difference can be significant because certain claims are beyond the jurisdiction of the bankruptcy court.

[10] In summary, the s. 215 leave inquiry is whether the party seeking to bring proceedings against the trustee has a *prima facie* case, involving a twofold inquiry:

a) whether the proposed claim as pleaded discloses a cause of action;

b) whether there is evidence of a factual foundation for the claim.

Legal Principles - Cause of Action

[11] Maxfine and TA Properties have included a proposed notice of civil claim in their materials on this application.

[12] While the matter was under reserve, the Court sent a memorandum to counsel for the parties asking for further submissions on the issues of whether the proposed notice of civil claim discloses causes of action for pure economic loss of negligence and for breach of statutory duty.

[13] In their submissions responding to the Court's memorandum, Maxfine and TA Properties raised the concern that the Court is engaged in an *ex mero motu* exercise of reviewing the pleadings from the point of view of striking them. Maxfine and TA Properties submit this is the wrong approach on an application pertaining to s. 215 of the *Bankruptcy and Insolvency Act.*

[14] I agree that this application is not about whether the proposed notice of civil claim ought to be struck, a step that is not possible for a proposed notice of civil claim.

[15] Maxfine and TA Properties assert that the purpose of the proposed notice of civil claim is to determine whether there are "sufficient evidentiary averments to support the cause of action pleaded" so that the trustee is not subjected to lawsuits which are frivolous or vexatious.

[16] If the import of that submission is that a s. 215 application does not squarely engage whether the proposed pleading discloses a cause of action, I disagree. On a s. 215 application, the review of the proposed pleading is not limited to the evidentiary averments. The goal of not subjecting the trustee to frivolous or vexatious claims is not limited to avoiding claims that are factually frivolous or vexatious. Claims that do not disclose a cause of action can be legally frivolous or vexatious. That is what the Supreme Court of Canada meant when it said, at para. 55, that the purpose of s. 215 is to protect the trustee against frivolous or vexatious actions, or actions that have no basis in fact.

[17] The importance of reviewing for the existence of a cause of action was stated expressly in *Mancini*, in which the Ontario Court of Appeal described the objective of requiring leave before commencing proceedings against a trustee as ensuring that the trustee is not "subjected to lawsuits which are frivolous or vexatious or which do not disclose a cause of action" [emphasis added]. *Mancini* was affirmed by the Supreme Court of Canada in *GMAC Commercial Credit* and applied by Chief Justice Brenner of this court in *Re Braich*, 2007 BCSC 1604 at para. 17

[18] For the question of whether the proposed claim discloses a cause of action, the starting point is the proposed pleading. Both *Mancini* at para. 7, and *GMAC Commercial Credit* at para. 57, refer to a review of the pleadings in draft form.

[19] Whether a pleading discloses a cause of action is the subject matter of jurisprudence in different applications and contexts, including applications to strike

pleadings for failing to disclose a cause of action under Rule 9-5 of the *Supreme Court Civil Rules*; applications to amend a notice of civil claim or counterclaim; and in certification applications in class proceedings because of s.4(1)(a) of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50. In many cases, the courts have held that the test to strike and the test to amend or certify a class proceeding are inverses and engage the same rules and principles. See, for example, *Finkel v. Coast Capital Savings Credit Union*, 2017 BCCA 361 at para. 16.

[20] In *MacCulloch v. Price Waterhouse Limited*, 115 N.S.R. (2d) 131, 1992 CanLII 2796 (S.C.), the Nova Scotia Supreme Court applied the principles that govern an application to strike a pleading for failing to disclose a cause of action on a s. 215 application.

[21] The applicable rules and principles to determine if a pleading or proposed pleading discloses a cause of action include that novel claims should be allowed to proceed to trial where they will permit an incremental development in the law: *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 at para. 19, citing *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 21. It is a generous approach, allowing for pleadings as they are presented or could be presented: *Finkel* at para. 17. However, a claim will not survive this analysis if it is doomed to fail: *Atlantic Lottery* at para. 19, citing *Imperial Tobacco* at para. 21. A court should not sidestep difficult legal issues that call into question whether there is a reasonable prospect that the case should proceed: *Finkel* at para. 18.

[22] A claim will be bound to fail if the pleading does not set out the elements of the cause of action and the material facts in support of the elements: *Imperial Tobacco* at para. 22. Bare allegations are not material facts: *Netlink Computer Inc. (Re)*, 2018 BCSC 2309 at para. 57, citing *Seattle Environmental Consulting Ltd. v. Workers Compensation Board of British Columbia*, 2016 BCSC 557 at para. 31.

[23] The proposed notice of civil claim that Maxfine and TA Properties have put forward has problems that are not directly engaged on this application. For example, in the statement of facts section there are paragraphs devoted to evidence, including

the expert evidence of Mr. MacLean. While part of the s. 215 test is whether the pleadings disclose a cause of action, I do not consider it part of the test to assess the pleadings to determine whether they comply with the *Supreme Court Civil Rules* and the law pertaining to pleadings other than to determine whether they disclose a cause of action. However, my reasons should not be taken to be broad approval of the proposed notice of civil claim in its current form.

Evidence Regarding a Factual Foundation for the Proposed Claim

[24] In *Nicholas v. Anderson*, [1996] O.J. No. 1068, 1996 CanLII 8256 (S.C.), Justice Blair held that even if the proposed defendants refute or explain each of the factual allegations made by the proposed plaintiff, the court is not, on that basis alone, justified in refusing leave. The court should not engage in the weighing or assessing of evidence; resolve hotly contested issues; drawing inferences where the evidence on the topic conflicts or making final assessments of the merits of the claims or the defences of the claims based on evidence or lack of evidence: *Nicholas* at para. 20; *Alberta Treasury Branches v. Elaborate Homes Ltd.,* 2014 ABQB 350 at para. 32; *Jadavji v. Khadjieva*, 2022 BCCA 116 at para. 28, citing *Etemadi v. Maali*, 2021 BCCA 298 at para. 51.

[25] On the other hand, the low threshold does not equate to a perfunctory review: *Alberta Treasury Branches* at para. 33. Bare allegations and allegations unsupported by evidence are not enough: *GMAC Commercial Credit* at para. 140. Evidence that is merely an affiant “contending to” the facts in the proposed claim or deposing that he believes that the facts alleged in the proposed claim are true or will be made out is insufficient: *Nicholas* at para. 20; and *Netlink Computer Inc. (Re)*, 2018 BCSC 2309 at paras. 32–33 and 57.

Preliminary Issue - Admissibility of the MacLean Report

[26] Maxfine and TA Properties seek to have the Court consider the report of Don A. MacLean, an insolvency advisor.

[27] As I will discuss below, there is no direct evidence of what is referred to as the "scheme" alleged to have been pursued by Grant Thornton to conduct the bankruptcy in a manner that maximized its fees in breach of the duties it owed to Maxfine and TA Properties. Mr. MacLean's report is submitted to assist the Court drawing inferences from the evidence to determine whether a factual foundation has been established.

[28] Grant Thornton objects to the report on the following bases:

a) instead of opining based on facts he was asked to assume, Mr. MacLean has done his own investigation and found his own facts, which have not been proven, and on which he bases his opinion;

b) some of his fact finding usurps with role of the trier of fact; and

c) in his fact finding, Mr. MacLean demonstrates advocacy and bias.

Legal Principles

[29] In *R. v. Mohan,* [1994] 2 S.C.R. 9, 1994 CanLII 80, the Supreme Court of Canada explained that opinion evidence must be relevant and necessary; it must not be rendered inadmissible by any other exclusionary rule; and it must be offered by a properly qualified expert in order to be admissible. In *White Burgess Langille Inman v. Abbott and Haliburton Co.,* 2015 SCC 23 at para. 2, the Supreme Court of Canada added that expert opinion evidence must also be fair, objective and non-partisan to be admissible. The trial judge has an important gatekeeper role for determining the admissibility of expert opinion evidence: *White Burgess* at paras. 12 and 16. See also *R. v. Bingley*, 2017 SCC 12.

[30] This is not a trial, it is a determination of whether the low s. 215 threshold is met. In *J.P. v. British Columbia (Children and Family Development),* 2017 BCCA 308, the Court of Appeal for British Columbia held that despite the relaxation of rules of evidence for child removal hearings under the *Child, Family and Community Service Act,* R.S.B.C. 1996, c. 46, the process must still be fair: at para. 151. In that

case the Court applied the rules of evidence applied in all civil proceedings to a proceeding which was both a removal hearing and a family law proceeding.

[31] In this case, where the question is whether there will be leave to grant a civil proceeding, while my ultimate findings are not findings of fact but rather whether there is a factual foundation, the usual rules of evidence apply to the admissibility of the evidence on which I make that determination.

[32] The *Mohan/White Burgess* framework for determining threshold admissibility has two stages. In the first stage, the court considers four criteria: relevance; necessity; absence of an exclusionary rule; and qualifications. At the second stage, the court considers whether the prejudicial effect of the evidence outweighs its probative value.

[33] With regard to the first stage, relevance is straightforward. Necessity is satisfied where the subject matter of the evidence is outside the experience of a trier of fact, however, an expert must not be allowed to usurp the functions of a trier of fact: *Mohan* at paras. 23–24. With regard to qualifications, an expert who assumes the role of an advocate is not properly qualified and the opinion is not admissible: *Bye v. Newman*, 2016 BCSC 2671 at para. 12.

[34] Similarly, an expert who usurps the role of the trier of fact is not impartial, and therefore not qualified. Whether that results in exclusion is a matter of degree. In *MacEachern v. Rennie*, 2009 BCSC 585 at para. 8, Justice Ehrcke explained that opinions that touch on the ultimate issue are admissible unless they are presented in a manner that obviously usurps the role of the trier of fact.

[35] If there are any concerns about impartiality or independence that did not result in the evidence being ruled inadmissible at the first stage, they must be considered during the second stage and weighed against the helpfulness of the evidence: *White Burgess* at para. 54.

[36] Experts often consider hearsay evidence when rendering their opinions, often in the form of facts they are asked to assume. That is not a basis for inadmissibility,

but the extent to which the facts are independently proven will determine the weight that can be given to the report: *R. v. Abbey*, [1982] 2 S.C.R. 24, 1982 CanLII 25. The assumption of those facts by the expert does not otherwise prove them.

Necessity

[37] If Mr. MacLean's finding of facts can be separated from his opinions, and if there is evidence that supports his opinions, then some of Mr. MacLean's opinions are on topics that might inform the standard of care and if so, would be of assistance to determining whether there is evidentiary foundation for a claim for breach of the standard of care.

[38] However, I do not agree with the position of Maxfine and TA Properties that Mr. MacLean's report is a merely a standard of care report and therefore of obvious assistance to the Court. Some of Mr. MacLean's opinions also appear to be findings of fact and are not necessary because the Court is equipped to find facts on matters such as: requirements of the *Bankruptcy and Insolvency Act*; whether there was a meeting of the minds on the topic of trustee fees; and duties owed by a bankruptcy trustee to stakeholders during the course of the bankruptcy (as opposed to how to execute those duties).

Exclusionary Rule - Fact Finding and Usurping the Trier of Fact

[39] I agree with Grant Thornton that Mr. MacLean has engaged in fact finding. The usual approach is to give an expert facts to assume. The weight given to the opinion will in part depend on the extent to which the facts assumed have been proven. If the expert has relied on evidence to form the opinion, and that evidence is not tendered at trial or is tendered and is not proved, the expert's opinion falls away.

[40] Mr. MacLean's report does not clearly identify whether he is assuming facts set out in the documents he has reviewed, investigating facts from other sources, or referring to facts for which no source is identified.

[41] For example, Mr. MacLean opines that when Grant Thornton's agents removed certain assets from the Hotel Property, the assets were damaged. He

opined that damaging assets during removal falls below the standard of conduct expected by a trustee in bankruptcy. His opinion in that regard is based in part on these factual findings:

> The callous removal of FFE including live lobsters being thrown onto the floor as water tanks were being forcibly removed from the walls, and other damages to the premises, was most inappropriate.

[42] Other than Mr. MacLean's evidence, there is no evidence about lobsters. Mr. MacLean does not reference a source for what he says about lobsters. Maxfine and TA Properties' affiant, Joo Kim Tiah, deposed about damage done to the Hotel Property and Conference Centre during the removal of FFE and fixtures and chattels. He did not make any reference to lobsters. Nobody who could have personal or direct knowledge deposed that there were live lobsters in the Hotel Property or the Conference Centre or that Grant Thornton or its agents threw them on the floor.

[43] Mr. MacLean's opinion that the lobster damage was "most inappropriate" and "there is no evidence justification for such aggressive actions by the trustee" cannot be given any weight.

[44] This is an example of the lack of evidence to support Mr. MacLean's opinion. There are others. They collectively raise the question of whether any weight can be given to the opinions. That is related to the next topic, lack of impartiality and advocacy.

[45] Before I turn to that, I address the related argument that Mr. MacLean usurps the trier of fact. Certainly, the facts that he states for which his expertise is neither needed nor deployed are unnecessary, and so his opinion is not admissible in those instances.

[46] In some cases, Mr. MacLean brings his expertise to bear, but he does not appropriately restrain his opinions and commentary to those on which the Court needs his assistance. For example, at page 5 of his report, Mr. MacLean states:

> The two landlords for the hotel facilities and the adjoining Conference Centre were the only preferred creditors and were being fully cooperative.

[47] Although Mr. MacLean does not say so, I assume the basis for the opinion on cooperation are in his next two sentences, in which he refers to Maxfine and TA Properties agreeing to a rent-free storage and access agreement and providing a fee guarantee of up to $25,000.

[48] It is common ground that Grant Thornton and Maxfine entered into a storage agreement over the Hotel Property and that Grant Thornton and TA Properties did not do so over the Conference Centre. The evidence about the content of the discussions between Grant Thornton and TA Properties about an access and storage agreement is contested and relevant to the assertion that TA Properties was cooperative. It is not contested that they did not agree and ultimately Grant Thornton brought a without notice application for access to the Conference Centre to secure assets it asserted were assets of the bankrupt. The appropriateness of that application is also hotly contested. The Court does not need the assistance of an expert to determine the content of communications between Grant Thornton and TA Properties or to determine whether the without notice application was appropriate.

[49] It is inappropriate for Grant Thornton to opine on “cooperation” in manner that goes to core contested issues on which the Court does not need the assistance of an expert.

[50] Another example is at page 5 of his report where Mr. MacLean states that “[i]t is evident that there was a meeting of the minds as to the magnitude of the fees.” This is repeated in the proposed notice of civil claim. This opinion is of questionable relevance. A trustee cannot contract with some but not all creditors and stakeholders over what work the trustee will do in the bankruptcy and therefore what its fees will be. If it is relevant, the Court does not require expert opinion on whether there was a meeting of minds on an issue.

[51] Related to this concern is Mr. MacLean’s presentation of his opinions and findings of fact. Mr. MacLean mixes facts he is relying on with those he has found,

without the reader being able to discern which is which and what the sources are. He also mixes them with his opinions, obliterating the ability of the reader to determine what is fact and what is opinion.

[52] At page 10 of his report Mr. MacLean says as follows:

> The only party to be enriched by the entire circular process was the trustee for the fees that it generated and which were by now, exceeding the funds otherwise on hand or coming in. It lent no benefit to the estate.
>
> I have several concerns with the professional conduct of the trustee in this bankruptcy and its adherence to the principles set out in the BIA concerning acting in good faith, carrying out its duties in a timely manner and performing its functions with competence, honesty, integrity and due care.

[53] As a result of his concerns, Mr. MacLean opines that: Grant Thornton's fees should be reduced to at least the original estimate if not more; Grant Thornton should bear the cost of the removal and storage and restoration of the assets removed from the premises of Maxfine and TA Properties; Grant Thornton should bear the costs of its legal fees in administering the estate; and Grant Thornton's conduct caused substantial damages to Maxfine and TA Properties.

[54] This is not a case where the ultimate issue is incidentally touched upon in the context of the expert providing opinion evidence on matters for which the court requires assistance. Mr. MacLean has fully engaged on the ultimate issues that are said to provide the requisite evidentiary support for the s. 215 application and on which the trier of fact will be making findings if leave is given to commence proceedings against Grant Thornton.

Impartiality and Advocacy

[55] Mr. MacLean's opinions usurp the role of the trier of fact significantly and thereby raise impartiality concerns.

[56] In addition, Mr. MacLean's report contains language that demonstrates that he has engaged in advocacy as opposed to giving impartial opinions. A few examples are:

a) Page 3 – the bankruptcy “should have been a relatively straight-forward administration contrary to the assertions of its former trustee, GTL”.

b) Page 3 - The decision of the inspectors to replace Grant Thornton produced a “retaliatory response from the trustee”.

c) Page 4 – Grant Thornton’s actions with regard to the lobsters were “aggressive” and “callous”.

[57] Mr. MacLean’s appendix A includes his commentary on Grant Thornton’s reports, one of which he describes as a dissertation that is tedious, protracted and self-serving, dissertation. In his appendix A, Mr. MacLean also provides commentary on the process of the bankruptcy in which he uses colourful expressions such as Grant Thornton appears to be “making a career” out of employee issues, the trustee is “spinning his wheels”, “the expression ‘chasing one’s tail’ comes to mind”, the trustee is taking “a very unreasonable position” based seemingly on “less than full disclosure to the court”, the trustee “jumped the gun”. While these expressions are typical in everyday parlance, the number and tenor of them demonstrate partiality.

[58] In addition, several of the arguments that Maxfine and TA Properties make about the conduct of Grant Thornton seem to have their genesis in the opinions of Mr. MacLean or vice versa. For example, Mr. MacLean comments on the allegation that counsel for Grant Thornton did not make full disclosure to the court on a without notice application. Mr. MacLean comments that the assets that were the subject of the application were not at risk because Maxfine and TA Properties had offered a standstill agreement. These passages do not contain opinion evidence, they repeat the arguments made by Maxfine and TA Properties. In this regard, his opinions cannot overcome the appearance of bias and advocacy.

[59] When these opinions are coupled with Mr. MacLean’s ultimate conclusions that Grant Thornton misled the court, that Grant Thornton should be required to absorb the fees in excess of the initial estimate including legal counsel fees, and that Maxfine and TA Properties suffered damage and loss due to Grant Thornton’s

conduct, the report is aptly characterized as biased advocacy, including on the ultimate issues.

Conclusion on Admissibility

[60] Where the report offers opinions that might be helpful to the court it is not clear to what extent they are based on evidence as opposed to Mr. MacLean's investigations and findings of facts that are not identified. The report does not just approach, it totally treads on the ultimate issue. Both those shortcomings are issues of what weight can be given to the report.

[61] However, the partiality and advocacy demonstrated in the report is so pervasive and substantial that I conclude that Mr. MacLean is not qualified to give expert opinion and his opinions could not be given any weight if he was qualified because they are unreliable due to bias.

[62] The report is inadmissible.

Maxfine and TA Properties' Proposed Claim

[63] In their notice of application, Maxfine and TA Properties seek leave to commence claims for:

a) breach of fiduciary duty and other duties;

b) breach of trust;

c) breach of contract;

d) negligence;

e) conflict of interest and wilful misconduct.

[64] In their proposed notice of civil claim, Maxfine and TA Properties seek:

a) damages for breach of fiduciary duty;

b) damages for breach of statutory duties;

c) damages for negligence;

d) special damages, interest and punitive damages.

[65] In the proposed notice of civil claim, Maxfine and TA Properties also plead that Grant Thornton breached the Storage Agreement but they do not seek relief with regard to breach of contract. Maxfine and TA Properties plead that Grant Thornton engaged in conduct that constitutes trespass and that they suffered damages from the wrongful conduct of Grant Thornton, including trespass but they do not claim any relief pertaining to trespass in the proposed notice of civil claim.

[66] As can be seen, the notice of application seeks leave to commence claim sounding in causes of action that are not set out in the proposed notice of civil claim. I address the application on the basis of the causes of action set out, or referred to, in the proposed notice of civil claim.

[67] Grant Thornton submits that Maxfine and TA Properties "package [the allegations] as negligence and breach of duty claims, but in substance they are allegations of fraud and wilful misconduct by the Trustee". For this reason, Grant Thornton asserts the court must be very careful to scrutinize the allegations to protect Grant Thornton from frivolous or vexatious claims, and "should be cautious to not allow unfounded claims of this nature to advance".

[68] I am not persuaded that the legal principles I have set out are affected by claims pleaded as negligence, breach of fiduciary duty and breach of statutory duty which include allegations of intentional conduct even where the cause of action does not require that type of intent.

[69] I will review the claims as they are pleaded to determine if the proposed pleading discloses a cause of action and if there is an evidentiary basis that provides a factual foundation such that a *prima facie* claims has been made out.

[70] Before doing so, I will review the factual allegations made by Maxfine and TA Properties in relation to these claims as well as the evidence led in support of the foundation for the claims.

Allegations and Evidence Pertaining to the Proposed Claims

Pre-Bankruptcy and Assignment in to Bankruptcy

[71] Maxfine leased the Hotel Property and FFE to the TA Hotel Management pursuant to a 25-year lease commencing in February 2017. TA Properties owned the Conference Centre. TA Properties leased the Conference Centre to the TA Hotel Management.

[72] TA Hotel Management's general partner is TA Hotel GP Ltd. Its limited partner is TA Management Limited.

[73] TA Hotel Management operated the Hotel Property and Conference Centre under a hotel management agreement with a locally incorporated affiliate of the Trump Hotels International, collectively referred to as the Trump Organization.

[74] Maxfine and TA Properties allege that prior to TA Hotel Management's voluntary assignment into bankruptcy, the March 2020 COVID-19 shutdown went into effect. They allege that TA Hotel Management decided to assign itself into bankruptcy as a result. The Trump Organization took the position that TA Hotel Management and its general partner improperly used the bankruptcy to terminate the hotel management agreement.

[75] It is not disputed that Maxfine, TA Properties and TA Hotel Management are closely related entities and are part of a group of companies referred to as the TA Group. They share the same senior employees. Despite being the landlords, and therefore potential creditors of the bankrupt, Maxfine and TA Properties were involved in the pre-bankruptcy planning, including interviewing potential trustees for a "simple and efficient" bankruptcy. They allege that Grant Thornton had ample opportunity to conduct due diligence with regard to the potential bankruptcy and

promised it would deliver a simple and efficient bankruptcy and provided the lowest estimate of fees of the trustees interviewed.

[76] Grant Thornton does not argue that it had information to conduct due diligence. However, it asserts that it did not have some records that it requested for this purpose, including comprehensive accounting records, employee information, lists and values of inventory. It also asserts that, post-bankruptcy, the process to obtain the necessary up to date and accurate records was protracted and time consuming due to the involvement of the Trump Organization in controlling those records and a dispute between TA Hotel Management and the Trump Organization over the hotel management agreement, a problem that TA Hotel Management did not disclose in the pre-bankruptcy period.

[77] The difference in the quality and quantity of information that Grant Thornton had to undertake due diligence is an example of what Grant Thornton submits undermines a factual foundation for the claims. Mr. Tiah deposed that TA Hotel Management provided “extensive information” including about employees, leases, contracts, inventory and debt. Mr. Tiah did not address the information that Mark Wentzell, the Grant Thornton person who acted as trustee, deposed that Grant Thornton asked for but did not get in the pre-bankruptcy period. Mr. Tiah also did not address Grant Thornton’s assertion that post bankruptcy, there continued to be problems accessing those records because access to them was controlled by the Trump Organization.

[78] I agree that this is an example of Maxfine and TA Properties putting forward broad-based vague evidence while Grant Thornton has put forward specific information that calls into question whether the evidence of Maxfine and TA Properties provides a factual foundation for its claims. The additional evidence does not conflict but when combined with the evidence of Maxfine and TA Properties paints a fuller factual picture that does not support the claims.

[79] It is also not disputed that, pre-bankruptcy, Grant Thornton provided an estimate of a fees in the range of $150,000. At the time the estimate was given,

Mr. Wentzell communicated to Mr. Tiah, part of senior management with the TA Group, that the estimate was based on incomplete information and the costs of administration would increase if there were complications.

[80] Maxfine and TA Properties alleged that Grant Thornton was engaged as trustee on August 4, 2020 and assigned Mr. Wentzell to conduct the trusteeship. TA Hotel Properties assigned itself into bankruptcy on August 27, 2020.

[81] On September 16, 2020, the first meeting of creditors was held. At that meeting, four individuals were appointed as estate inspectors, a representative of the Trump Organization, a representative of the limited partner, TA Management, a representative of Maxfine and a former employee of TA Hotel Management.

Trustee Fees

[82] Maxfine and TA Properties allege that s. 4.2(1) of the *Bankruptcy and Insolvency Act* imposes various duties on a trustee, including fiduciary duties, a duty to be fair, impartial and unbiased in adjudicating matters as trustee in bankruptcy, and to not prefer its own interests over those of the creditors. Maxfine and TA Properties allege that instead of adhering to this duty, Grant Thornton used the bankruptcy as a platform to enrich itself through unnecessary and wrongful actions that caused trustee fees to increase, and exposed the estate of the bankrupt to loss and risk of litigation.

[83] Maxfine and TA Properties allege that had Grant Thornton conducted the bankruptcy appropriately, and kept to its fee estimate of $150,000, Maxfine and TA Properties would have realized $400,000 on the debts they were owed, before the 5% levy to the Office of the Superintendent of Bankruptcies. They allege that instead, Maxfine mismanaged the bankruptcy and deliberately took steps to increase its fees to the detriment of the creditors, such that the fees exceeded $1 million dollars by the time it was replaced.

[84] Grant Thornton asserts that once its fees are taxed in accordance with the *Bankruptcy and Insolvency Act*, it will be apparent why the fees amounted to $1

million dollars. Grant Thornton asserts that Maxfine and TA Properties requested Mr. Wentzell to undertake tasks that involved the assets of TA Hotel Management but were directed towards the interests of Maxfine and TA Properties, such as the re-opening of the Hotel Property restaurant. Grant Thornton asserts that it had difficulty accessing the books and records of TA Hotel Management because the Trump Organization remotely cut off access to the network where the records were stored. Grant Thornton asserts that once it had access to the financial records, it became apparent that the affairs and financial reporting of TA Hotel Management had been mismanaged including failure to complete tax reporting and failure to issue records of employment to employees. Grant Thornton also asserts that these activities were being undertaken relatively early on in the COVID-19 pandemic and substantial efforts were directed towards, for example, remote meetings of creditors and inspectors.

[85] One of the issues pertaining to Grant Thornton's fees is the portion of its fees attributed to legal counsel. Section 30(1)(e) of the *Bankruptcy and Insolvency Act* provides that a trustee may engage a lawyer with approval from the inspectors. Grant Thornton did not seek approval to retain legal counsel from the inspectors even though it did so at the outset and introduced counsel to the creditors at the first meeting when the inspectors were appointed. It has sworn evidence that this was due to an oversight.

Claims made by Maxfine and TA Properties in the Bankruptcy

[86] On September 14, 2020, TA Management submitted a proof of claim for unpaid rent on the Conference Centre in the amount of $567,690.52. It is not clear why this was submitted by TA Hotel Management's limited partner, instead of by TA Properties, the Conference Centre.

[87] On September 15, 2020, Maxfine submitted a proof of claim claiming unpaid rent in the amount of $6,852,466.76, expenses paid by TA Management for the bankrupt and $3.2 million for the fair value of the FFE.

[88] Grant Thornton required Maxfine to submit a Reclamation of Property Claim in relation to the FFE if it was taking the position that it owned the FFE in the Hotel Property. Maxfine did so. Grant Thornton advised Maxfine that the Reclamation of Property Claim was deficient. Maxfine resubmitted it including a copy of the Head Lease.

[89] Grant Thornton concluded that the bankrupt had a security interest in the FFE and disallowed Maxfine's property claim pertaining to the FFE. Maxfine asserts the disallowance was without legal or factual validity.

[90] Grant Thornton sought and obtained inspector approval to disallow the claim. The inspectors representing Maxfine and TA Properties were not part of that discussion or approval due to their conflicts. Grant Thornton delivered a notice of dispute of Maxfine's FFE claim to Maxfine. The notice of dispute included notice that Maxfine could appeal to the bankruptcy court within 15 days. Maxfine's affiant, Mr. Tiah, deposed that Maxfine asked for an extension of the time to file an appeal and Grant Thornton agreed.

[91] Maxfine also asserted, through its affiant Mr. Tiah, that "they" (I presume "they" refers to Maxfine and TA Properties) learned that Grant Thornton had included property that was not part of the FFE but was their personal property in the list of assets of the bankrupt. Mr. Tiah refers to those as fixtures and chattels. Grant Thornton asked Maxfine and TA Properties to file property claim in relation to those.

[92] With regard to the FFE, there are competing views about the legal characterization of leases that applied to them. There were documents that were in favour of Maxfine and TA Properties' position – including a lease which said that no title to the FFE would pass to the bankrupt through the lease. But there were also financial records demonstrating that the bankrupt held the property as though it had a security interest in it. Grant Thornton sought and received a legal opinion that the leases were security leases. Mr. Tiah's affidavit evidence includes an email exchange between the in-house counsel for the TA Group and Grant Thornton's solicitors explaining why Grant Thornton had determined that the FFE lease was a

security lease including with reference to the *Personal Property Security Act* and the jurisprudence.

[93] According to Mr. Tiah's communication to his colleagues at TA Group, Mr. Wentzell told Maxfine that if he were Maxfine, he would appeal the notice of dispute. He added the caveat that the appeal would delay the resolution of the bankruptcy and increase fees.

[94] Maxfine and TA Properties assert that Grant Thornton recommended that Maxfine make a cash offer to purchase the FFE as a way to sidestep the true lease versus security lease impasse. Grant Thornton disputes that it made that recommendation. Based on the evidence, regardless of whether it was a recommendation or part of a discussion of how to move forward, a cash offer was discussed.

[95] Maxfine and TA Properties allege that further to Grant Thornton's recommendation, they made an offer to purchase the FFE, hotel operating supplies, hotel operating equipment, and the liquor for $400,000. Grant Thornton rejected the offer without discussing it with the bankruptcy inspectors. There was no competing offer for the FFE. There is evidence that Grant Thornton was obtaining appraisals of the assets. In an email to other persons with the TA Group about the cash offer, Mr. Tiah stated that Mr. Wentzell told him that the offer had to be one that he could justify to the court and that if the appraiser set a minimum value higher than $400,000 he would not be able to justify it to the court.

[96] There is also evidence that in the pre-bankruptcy period, Mr. Wentzell and Mr. Tiah discussed scenarios including that a member of the TA Group might want to buy the assets of the bankrupt. Mr. Wentzell deposed that he advised Mr. Tiah that any offer would have to be objectively justifiable to the inspectors and to the court.

[97] Maxfine and TA Properties allege that Mr. Wentzell then suggested that Maxfine could submit a credit bid for the FFE. A credit bid is where a creditor offers

to “purchase” assets of the bankrupt, not by putting up cash, but by agreeing to offset its claim as a creditor by the same amount. Mr. Tiah deposed that but for Mr. Wentzell’s urging regarding a credit bid, Maxfine would have appealed the notice of dispute on the FFE.

[98] Mr. Tiah deposed that Mr. Wentzell urged a credit bid at a meeting they had during which Mr. Wentzell referred to that possibility. However, this characterization is undermined by Mr. Tiah’s contemporaneous report to his colleagues about the meeting in which he reported that Mr. Wentzell “mentioned that there might be a possibility for us to submit an offer in the form of a credit big [*sic*]”. Mr. Tiah reported that during the meeting between Mr. Tiah and Mr. Wentzell, Mr. Wentzell made a call to legal counsel to confirm whether that option was available and the “short answer” was yes. Despite that, Mr. Tiah’s internal report was that Maxfine did not know whether a credit bid would work and needed to take that into account when deciding whether to appeal the notice of dispute issue or ask for another extension. Mr. Tiah reported that he felt Mr. Wentzell was being “as transparent as he can be”.

[99] Accordingly, Mr. Tiah’s evidence of his contemporaneous report does not demonstrate any urging by Mr. Wentzell that caused Maxfine to not appeal the dispute notice, but rather putting out an idea and telling Mr. Tiah that Maxfine should take its own counsel on the idea.

[100] That same dynamic was repeated in a subsequent meeting between one of Mr. Tiah’s colleagues at the TA Group, Jonathon Cooper, and Mr. Wentzell. According to Mr. Cooper’s email reporting on that meeting, Mr. Wentzell told Mr. Cooper that he was not in a position to give Maxfine professional advice about the credit bid. He stated that he had very little experience with them, and encouraged Maxfine to get legal advice on it.

[101] According to Mr. Cooper’s reporting email to TA Group personnel, Mr. Wentzell said if the credit bid did not include any cash, then it should not include the liquor assets as Grant Thornton could sell them to raise the cash to cover the priority payouts. Mr. Wentzell told Mr. Cooper that the credit bid would be more

acceptable to the court if it was above the forced liquidation value of assets under discussion and said that an appropriate bid would be an offer at the full quantum of Maxfine and TA Properties preferred claims which totalled $1.67 million.

[102] On December 7 and 9, 2020, Maxfine and TA Properties made respective credit bids that included the liquor, contained no cash, and exceeded the forced liquidation value but were well below the preferred claims value.

[103] Grant Thornton rejected the credit bid offers because they did not contain any cash and so did not provide for payouts of the priority claims ranking ahead of Maxfine and TA Properties. In the letter advising of the reasons for the rejection, Grant Thornton's counsel stated that Grant Thornton had advised Maxfine and TA Properties that a cash component was necessary in order to cover priority claims which include Grant Thornton's fees, legal costs, the 5% payable to the Officer of the Superintendent of Bankruptcy and amounts payable to the employees or former employees of the bankrupt.

The Storage Agreement and the Without notice Application

[104] It is not disputed that, on August 27, 2020, Maxfine and Grant Thornton entered into a storage agreement by which Maxfine allowed it to use the Hotel Property to store the property of the bankrupt then located in the Hotel Property. The storage agreement had a six-month term and was set to expire on February 27, 2021. There was no storage agreement with TA Properties pertaining to TA Hotel Management's assets located in the Conference Centre.

[105] On January 4, 2021, Maxfine and TA Properties issued notices terminating the leases for the Hotel Property and Conference Centre respectively.

[106] According to the evidence of Grant Thornton, the lease terminations raised issues about the storage of the bankrupt's property in the Hotel Property and the Conference Centre. Grant Thornton's evidence is that when storage agreement was negotiated, Mr. Wentzell believed that most if not all of the bankrupt's property was in the Hotel Property but it became aware that some property was stored in the

Conference Centre during the course of the bankruptcy. At that time, in October 2020, Grant Thornton asked TA Properties to agree to a storage agreement pertaining to the Conference Centre but TA Properties did not reply. When Maxfine and TA Properties issued notices terminating the leases, counsel for Grant Thornton wrote to counsel for Maxfine and TA Properties seeking to address the assets of TA Hotel Management stored in both locations.

[107] Between early January 2021 and mid February 2021, counsel for Grant Thornton asked for the storage agreement to be extended several times but did not receive a substantive response. On February 9, 2021, counsel for Grant Thornton advised counsel for Maxfine and TA Properties that it was taking steps to remove TA Hotel Management's assets from the Hotel Property and the Conference Centre.

[108] On February 12, 2021, Maxfine and TA Properties gave notice that they sought to have Grant Thornton replaced. That communication was not received by Grant Thornton until February 16, 2021 because it was sent on the Friday evening of a long weekend.

[109] Grant Thornton advised that it intended to bring an application to the court and to remove and store the bankrupt's property from the Hotel Property and Conference Centre. Counsel for Grant Thornton suggested that rather than having a meeting to replace Grant Thornton, Maxfine and TA properties could bring an application to the court to have Grant Thornton replaced at the same time that Grant Thornton applied for orders to secure the property.

[110] Grant Thornton, on the one hand, and Maxfine and TA Properties on the other hand, through their respective lawyers, then engaged in multiple communications about extensions for further credit bids, extensions on the storage agreement including expanding the storage agreement to cover the property stored in the Conference Centre (or entering into a second storage agreement), and a date for a meeting regarding replacing Grant Thornton. They did not agree on those issues.

[111] On February 17, 2021, Grant Thornton sent agents to remove TA Hotel Management's property from the Hotel Property and the Conference Centre. They were granted access to the Hotel Property, but not the Conference Centre. The stated reason for not granting access to the Conference Centre was that Grant Thornton had abandoned TA Hotel Management's property at the Conference Centre and it was now the property of TA Properties.

[112] The *Bankruptcy and Insolvency Act* provides that the bankrupt's property includes any property that the bankrupt was in possession of as of the date of bankruptcy and s. 81 provides that where a person claims property that is bankrupt's property, they shall file a proof of claim. That would appear to be the procedure applicable to property in the Conference Centre, which was run by TA Hotel Management, the bankrupt, on the date of the bankruptcy. The property in the Conference Centre was what TA Properties claimed to own by virtue of abandonment but pertaining to which it had not filed a proof of claim.

[113] On February 22, 2021, counsel for Maxfine and TA Properties suggested a "standstill agreement" with 8 terms, one of which was "the parties agree that the status quo, as to storage and removal of chattels, whatever that status quo might be, remains in effect until the creditors meeting".

[114] Grant Thornton proposed a standstill agreement with specifics as to how the standstill would be achieved, namely, that the "present storage arrangements" would remain in effect until March 19, 2021 "specifically that the existing Storage and Access Agreement is amended to include the bankrupt's property located in the Conference Centre and the termination date is extended to March 19, 2021."

[115] Maxfine and TA Properties replied that they would agree to "an actual standstill but not to amend the existing storage agreement to include items in the Conference Centre. Whatever status that stuff has to remain as it is, which is what a standstill is all about, after all, and my client has made it clear that nothing in the Conference Centre belongs to the estate, and they do not wish to compromise that

position". Maxfine and TA Properties had not, at that time, delivered a s. 81 property claim to Grant Thornton about that property.

[116] No agreement was reached.

[117] Grant Thornton proceeded to apply for a without notice order granting it authority to enter the Conference Centre and remove TA Hotel Management's property from it. Section 189(1) of the *Bankruptcy and Insolvency Act* provides that a trustee may proceed without notice to seek a warrant to enter a place for the purpose of identifying and removing property of the bankrupt.

[118] Section 189(1) does not require Grant Thornton to proceed without notice. In this case, Grant Thornton did so and accepted the onus on the application to make full and frank disclosure. I note that although it proceeded without notice, it had advised counsel for Maxfine and TA Properties that it would be applying to the court to secure the property and it did provide counsel for Maxfine and TA Properties of the specifics of the application by providing counsel with the materials for the application and the MS Teams log in info on the same day that it was brought.

[119] Maxfine and TA Properties assert that Grant Thornton did not make full and frank disclosure. They allege that Grant Thornton deliberately misled Justice Basran, who presided over the application by not apprising him of the standstill agreement proposed by Maxfine and TA Properties when Basran J. asked "…wouldn't you be incurring unnecessary expenses by going in and seizing that property in advance of that meeting, as opposed to simply just getting an injunction for everybody [to] stand still between now and then?"

[120] Counsel for Grant Thornton replied:

> … And that type of discussion has been ongoing, and that was Grant Thornton's purpose behind extend --- requesting the extension of the storage agreement and requesting that the storage agreement be extended to the Conference Centre premises.
>
> The landlords are the party that have refused to go along with that request, to essentially preserve the ability of Grant Thornton to store the property there. And what will happen or what the risk of what will happen if Grant Thornton

> now does not remove that property is that there's of course the risk of dissipation.

[121] Earlier in the application, counsel for Grant Thornton had advised Basran J. that TA Properties took the position that the property had been abandoned and that Grant Thornton had, for many months, requested that it be allowed to store the bankrupt's property in the Conference Centre.

[122] Justice Basran asked another question about injunctive relief and whether it would address the risk of dissipation and be less disruptive instead of an order that permitted Grant Thornton to enter the premises and remove the property. Counsel for Grant Thornton replied that there was no likely risk of dissipation if an injunction was granted instead of a warrant to enter the premises and remove the bankrupt's property, but an injunction would not satisfy s. 15 of the *Bankruptcy and Insolvency Act* which obligates the trustee to obtain possession of the bankrupt's property.

[123] Justice Basran asked whether there was anything else he should be told that counsel for Maxfine or TA Properties might submit to him. Counsel for Grant Thornton replied describing, in summary fashion, the dispute over Grant Thornton's fees, the dispute over property, and the dispute over credit bids and the relationship between those and Grant Thornton's fees. He also reported the position of TA Properties that the property in the Conference Centre had been abandoned and was the property of TA Properties. He added that notwithstanding, TA Properties had not filed a s. 81 dispute over the property in the Conference Centre and it remained the duty of Grant Thornton to secure it.

[124] Justice Basran granted an order permitting Grant Thornton access to the Conference Centre for the purpose of removing the assets.

[125] Maxfine and TA Properties assert that by removing the assets and seeking access to the Conference Centre, Grant Thornton's objective was to demonstrate to Maxfine and TA Properties that it had power and control to support its campaign to persuade Maxfine and TA Properties to improve their credit bids so that the payment

of Grant Thornton's fees was secured. They assert that Grant Thornton was not motivated by its duty to secure the property of the bankrupt.

The Consent Order

[126] After Grant Thornton had been discharged as a trustee, the new trustee, Maxfine and TA Properties entered into a consent order allowing Maxfine and TA Properties' appeal of the notice of dispute and allowing the FFE property claims.

[127] The consent order did not resolve the legal debate over the nature of the leases as true leases versus security leases. Its terms include:

> The Notice of Dispute of the Property Claim, dated December 30, 2020, be and the same is hereby set aside and the Property Claim is hereby allowed in the Bankruptcy Proceedings;
>
> Grant Thornton in its capacity as the trustee in bankruptcy of TA Hotel Management Limited Partnership (the **"Former Trustee"**), Mark Wentzell as representative of the Former Trustee and McMillan LLP as legal counsel to the Former Trustee, deny any all allegations made against each, or any of them in the Bankruptcy Proceedings, including those made in the affidavits of Joo Kim Tiah, sworn August 4, 2021 (the **"Allegations"**), and each of them specifically reserves all rights to respond to same by affidavit or otherwise in due course;
>
> The Current Trustee reserves all rights it may have against Maxfine, including, but not limited to Maxfine paying the storage costs for the assets that were the subject of the Property Claim (the **"Storage Costs");**
>
> Maxfine reserves its rights to claim it should not be required to pay for the Storage Costs or the costs of moving the assets included in the Property Claim and all other assets determined separately to be Maxfine's assets from the current location (the **"Moving Costs"**) and any other claims in connection with the assets subject to the Property Claim or determined separately to be Maxfine's being moved into storage, including claims based upon the Allegations and as to who should be responsible therefor;
>
> For even greater clarity, nothing in this Order shall prejudice the Former Trustee, McMillan LLP, Maxfine, or the Current Trustee with respect to all and any potential claims in this matter, including those concerning the Storage Costs and Moving Costs and who is responsible for the Storage Costs and Moving Costs, and no finding has been made by this Court concerning the Allegations;

Breach of Contract

[128] In Part 1 of the proposed notice of civil claim, the proposed plaintiffs plead the formation of a contract and terms of the contract. At Part 3, para. 11 of the proposed

notice of civil claim, they assert that Grant Thornton breached the storage agreement. There is no proposed pleading as to what conduct allegedly constitutes the breach. There is no proposed pleading of damages and no relief sought in relation to the alleged breach.

[129] I conclude that the proposed claim does not disclose a cause of action for breach of contract. I deny leave to bring an action in breach of contract.

Negligence

Whether the Proposed Claim Discloses a Cause of Action

[130] The elements of negligence are set out in para. 18 of *1688782 Ontario Inc. v. Maple Leaf Foods Inc.*, 2020 SCC 35 [*Maple Leaf Foods*]:

1) the defendant owed the plaintiff a duty of care;

2) the defendant's conduct breached the standard of care;

3) the plaintiff sustained damage; and

4) the damage was caused, in fact and in law, by the defendant's breach.

[131] To satisfy the element of damage, the loss sought to be recovered must be the result of an interference with a legally cognizable right: *Maple Leaf Foods* at para. 18. Only claims for damage to person or property and losses consequential on such damages are justiciable under negligence unless the relationship between the plaintiff and the defendant is sufficiently proximate such that a duty of care is owed to avoid pure economic loss: *Maple Leaf Foods* at paras. 18, 20.

[132] Sufficiently proximate relationships are those which fall within recognized categories of relationships so long as the requisite proximity actually exists in that relationship. The categories of pure economic loss that arise with relationships that are generally recognized to have the required degree of proximity were enumerated in *Maple Leaf Foods* at para. 21 as:

(1) negligent misrepresentation or performance of a service;

(2) negligent supply of shoddy goods or structures; and

(3) relational economic loss.

[133] Sufficiently proximate relationships are also those in analogous relationships recognized through application of the *Anns/Cooper* framework: *Maple Leaf Foods* at para. 22. The *Anns/Cooper* framework asks whether there is requisite proximity and foreseeability to justify a *prima facie* duty of care, and whether public policy negates a duty of care being imposed: *Maple Leaf Foods* at para. 30; and *Cooper v. Hobart*, 2001 SCC 79 at para. 30.

[134] Maxfine and TA Properties allege that Grant Thornton owed them a duty of care as creditors of the estate (proposed notice of civil claim, Part 3, para. 5).

[135] In Part 3, para. 7 of the proposed notice of civil claim, Maxfine and TA Properties allege that Grant Thornton breached “those duties” and provide particulars of the breaches. It is not clear whether the “duty of care” is included in “those duties” because in Part 3, para. 6, Maxfine and TA Properties allege duties owed other than the duty of care.

Negligent Damage to Property

[136] In Part 3, para. 9 of the proposed notice of civil claim, Maxfine and TA properties allege that Grant Thornton was negligent by removing fixtures and chattels from the Hotel Property and the Conference Centre. I understand some, but not all of these fixtures and chattels were FFE. At paras. 63–64 of Part 1 of the proposed notice of civil claim, Maxfine and TA Properties plead that the removal of the fixtures and chattels was done in a careless and highly improper manner causing damage to the Hotel Property and the “premises” which I presume includes the Conference Centre.

[137] At para. 80 of Part 1 of the proposed notice of civil claim, Maxfine and TA Properties plead that they suffered damages from the wrongful conduct of Grant Thornton, including “breach of its duty”. The damages claimed include damages for delay in the hotel re-opening, depreciation to assets due to their removal, costs to move the assets back to the hotel, repair costs to the assets and to plumbing and electrical hookups, a lost dividend of $400,000, loss of profit from delay in re-opening the hotel and reputational damage to the hotel.

[138] At Part 2, Relief Sought, in the proposed notice of civil claim, Maxfine and TA Properties seek general damages for negligence. As discussed above, damages for negligent damage to property can include consequential loss, which is “economic loss that results from damage to the plaintiff’s rights, such as wage losses or costs of care incurred by someone physically or mentally injured, or the value of lost production caused by damage to machinery, or lost sales caused by damage to delivery vehicles”: *Maple Leaf Foods* at para. 17.

[139] Paragraph 80(a) of the proposed notice of civil claim pleads damages of $2,706,863.09 as the direct cost of delaying the Hotel re-opening and para. 80(g) pleads loss of profit due to delay in the Hotel re-opening, but there is no factual or legal pleading to connect these claims to negligent property damage. Causation is an element of negligence that must be pleaded. With regard to para. 80(c), the claim of damages for costs of moving the assets back to the hotel, there is no pleading connecting that cost to the damage to the property. I reach the same conclusion about the proposed pleading for the loss of a dividend set out in para. 80(f) and loss of reputation in para. 80(h). I conclude that paras. 80 (a), (c), (f), (g) and (h) of the proposed notice of civil claim do not disclose a cause of action for damages consequential to damage to property.

[140] I conclude that those damages asserted at para. 80 of part 1 that relate to property damage and consequential loss are depreciation to assets due to their removal, costs to move the assets back to the hotel, and repair costs to the assets

and to plumbing and electrical hookups set out in paras. 80(b), (d), and (e) of the proposed notice of civil claim.

[141] Maxfine and TA Properties also submit that the statutory duties they allege inform the standard of care for negligence. As discussed below, that is a legally valid role for allegations of breaches of statutory duty (as opposed to a stand alone cause of action): *The Queen (Can.) v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205 at 227, 1983 CanLII 21. Accordingly, I conclude that references to statutory duties and breaches of those statutory duties are relevant to the claim of negligent damage to property and the permissible damages (damages to property and consequential damages) related to that claim.

[142] I conclude that the proposed notice of civil claim discloses a cause of action for negligence due to the damage to property, causing property loss and claims for the consequential losses set out in paras. 80(b), (d) and (e) of the proposed notice of civil claim.

Negligence Causing Pure Economic Loss

[143] In the proposed notice of civil claim, at Part 3 paras. 5 and 6, Maxfine and TA Properties allege that Grant Thornton owed them a duty of care “as creditors of the estate” and a duty of fairness, impartiality, and honesty as an officer of the Court and trustee in bankruptcy. They do not plead that their relationship with the trustee is one of the categories of established relationships of proximity and they do not plead that the nature of the relationship justifies imposing a duty of care based on the *Anns/Cooper* framework.

[144] In their written submissions, Maxfine and TA Properties submit that their claims include legally sound claims for damages for pure economic loss because:

a) the storage contract creates a relationship of proximity that is a recognized relationship giving rise to a duty of care to avoid pure economic loss, i.e. relational economic loss;

b) as trustee, Grant Thornton gave negligent advice that is akin to negligent misrepresentation and therefore within a recognized category of relationships that give rise to a duty of care to avoid pure economic loss;

c) the without notice application is a basis for proximity and foreseeability under the first branch of the *Anns/Cooper* framework; and

d) a trustee's duty of impartiality and duty to avoid acting in its self-interest creates the required proximity.

[145] Maxfine and TA Properties also submit that the statutory duties they allege, and the breaches, can be viewed as creating a private relationship of proximity that gives rise to a *prima facie* duty of care.

[146] I will not decide whether these submissions would disclose a cause of action for pure economic loss in negligence if pleaded, because these submissions are not the subject of pleadings in the proposed notice of civil claim.

[147] The proposed notice of civil claim contains statements of fact that relate to Maxfine's and TA Properties' theories about a categorical or analogous relationship of sufficient proximity or and foreseeability. However, the proposed notice of civil claim does not connect, in any discernible manner, those factual assertions to a pleading that their relationship with the trustee falls into one of the existing categories or justifies the imposition of a duty of care to a relationship characterized by proximity and foreseeability of loss.

[148] Grant Thornton submits that a fundamental building block of the claims of Maxfine and TA Properties is that duties were owed to them to administer the bankruptcy taking the highly likely waterfall into account. Grant Thornton submits that would amount to requiring it to abandon its duties to all creditors (regardless of whether they would benefit from the waterfall) and to the public at large. Grant Thornton submits that this fundamental problem with the claims are a fundamental reason why they are frivolous and vexatious: the duties owed cannot be such that the trustee is called upon to ignore the breadth of duties it owes.

[149] I consider Grant Thornton's submission to be an argument that is relevant to the second part of the *Anns/Cooper* framework, i.e.: whether policy considerations preclude the imposition of a duty of care despite the existence of a relationship of sufficient proximity and foreseeability of loss. Given that the proposed notice of civil claim does not plead an established category of relationship or proximity giving rise to a duty of care to avoid economic loss, it is not possible to consider whether policy concerns would negate a *prima facie* duty of care.

[150] I conclude that the proposed notice of civil claim does not disclose a cause of action for recovery of pure economic loss in negligence.

Whether there is a Factual Foundation for the Negligent Property Damage Claim

[151] Given my decision that the proposed notice of civil claim discloses a cause of action for negligence for damage to property and consequential losses, the question becomes whether there is evidence that demonstrates a factual foundation for the claim.

[152] The proposed notice of civil claim quotes from Mr. MacLean's report regarding "callous removal of the FFE including live lobsters being thrown on the floor". For the reasons I have given, Mr. MacLean's report is not evidence that provides a factual foundation for the claim. Nor is there any admissible evidence about lobsters.

[153] Mr. Tiah deposed that the removal of fixtures, chattels and FFE caused damage to them and to the premises from which they were removed with supporting evidence such as pictures and repair invoices and estimates. That evidence provides factual support for the claim for negligent damage to property and the consequential damages I have addressed above.

Conclusion on Negligence

[154] I grant leave to proceed with the claims for negligent damage to property and consequential losses described at paras. 80(b), (d) and (e) of the proposed notice of civil claim.

Trespass

[155] Maxfine and TA Properties submit that the act of seizure of the property, made pursuant to the inappropriately obtained without notice order, was an act of trespass. Maxfine and TA Properties did not address how a claim in trespass could apply to the seizure of fixtures and chattels from the Hotel Property given that the without notice order only pertained to the Conference Centre.

[156] Trespass is not listed in the Notice of Application as one of the claims for which Maxfine and TA Properties seek leave to pursue but it did feature in their written submissions and oral submissions.

Whether the Proposed Claim Discloses a Cause of Action

[157] With regard to the Conference Centre, in Part 1 (statement of facts) at para. 62 of the proposed notice of civil claim, Maxfine and TA Properties plead that Grant Thornton's "seizure of the assets, in the circumstances constitutes trespass". That proposed plea is under the subheading "Without notice Application" and so I presume that the reference to "in the circumstances" is a plea that given that the without notice order was obtained inappropriately, Grant Thornton committed trespass when it sent its agents to remove assets from the Conference Centre.

[158] At para. 80 of Part 1 of the proposed notice of civil claim, Maxfine and TA Properties plead that they suffered damages from the wrongful conduct of Grant Thornton, including trespass.

[159] In Part 2, Relief Sought, of the proposed notice of civil Claim, no relief is sought pertaining to trespass.

[160] In Part 3, Legal Basis, section of the proposed notice of civil claim, Maxfine and TA Properties do not make any reference to trespass, do not set out the elements of trespass and do not plead material facts in relation to those elements.

Conclusion on Trespass

[161] Given the inadequacy of the proposed pleadings pertaining to trespass, I do not grant leave to pursue a claim in trespass.

Breach of Fiduciary Duty

[162] A fiduciary duty is imposed where necessary to protect a vulnerable party against abuse by another in certain types relationships or in particular situations. Within the context of a fiduciary relationship, the fiduciary must act with undivided loyalty to the beneficiary by placing the beneficiary's interest above their own and forsaking all other interests in favour of the beneficiary: *Alberta v. Elder Advocates of Alberta Society,* 2011 SCC 24; and *Roussy v. Savage*, 2019 BCSC 1669.

[163] Certain types of relationships, referred to as *per se* fiduciary relationships, give rise to fiduciary duties as a matter of course. These include a trustee-beneficiary or a solicitor-client relationship. It is clear that vis à vis the bankrupt, a trustee in bankruptcy is a fiduciary: *Commonwealth Investors Syndicate Ltd., Re*, 69 B.C.L.R. 346, 1985 CanLII 333 at para. 29.

[164] With regard to the relationship between a trustee and bankruptcy stakeholders including creditors, the weight of the authority is that a fiduciary duty is owed: *Petrowest Corporation v. Peace River Hydro Partners*, 2020 BCCA 339 (with regard to a receiver); *Salewski Inc. v. BDO Canada Ltd.,* 2016 ONSC 133; and *McKibbon v. BDO Canada Limited*, 2021 BCCA 303 at para. 54.

[165] As noted above, a fiduciary must act with undivided loyalty to a beneficiary. In a bankruptcy, where there are potentially many beneficiaries with disparate interests, the essential aspect of the duty is impartiality and avoiding conflicts of interest: *Salewski* citing *Chaban*, *Re,* 165 Sask. R. 177, 1998 CanLII 13450 (Q.B.) and Morawetz & Houlden, *Bankruptcy and Insolvency Law of Canada* at pages 1-62/3.

As a fiduciary, it must act in the best interests of the creditors, the bankrupt and the community, while always considering the public interest in the discharge of its duties: *McKibbon* at para. 54

[166] The content of the fiduciary duty is therefore conscribed. It is not possible for a fiduciary duty to be owed to any class of stakeholder to the exception of any other class or the public and the content of the duty cannot extend to acting in the interests of one stakeholder if that is inconsistent with the interests of another stakeholder: *Alberta Treasury Branches* at para. 63.

[167] Not every legal claim arising out of a fiduciary relationship will necessarily ground a claim for breach of fiduciary duty: *Galambos v. Perez*, 2009 SCC 48 at para. 36; and *Meng Estate v. Liem*, 2019 BCCA 127 at para. 33. It is necessary to identify the nature of the duty owed and the breach alleged in order to determine whether it engages a breach of a fiduciary duty. In *Perez*, the Supreme Court of Canada emphasized, at paras. 67–69, that the focus is on the duty of loyalty that a fiduciary accepts in relation to a vulnerable party and the power that the fiduciary has over the vulnerable party in relation to that vulnerability.

Whether the Proposed Claim Discloses a Cause of Action

[168] The constituent elements of breach of fiduciary duty are:

a) the defendant was in a fiduciary relationship with the plaintiff;

b) the defendant acted in a manner inconsistent with that fiduciary relationship which could include breach of the duty of loyalty, acting in the face of a conflict, preferring a personal interest, taking a profit, acting dishonestly; and

c) loss or damage, which could be remedied by monetary remedy or a proprietary remedy such as a constructive trust.

[169] Maxfine and TA Properties allege that Grant Thornton owed them a fiduciary duty, as creditors of the bankrupt estate (proposed notice of civil claim, Part 3, para. 4).

[170] Maxfine and TA Properties allege that Grant Thornton breached its fiduciary duty by prioritizing its own personal gain over the legitimate interests of the estate and Maxfine and TA Properties (proposed notice of civil claim, Part 1, para. 77).

[171] Maxfine and TA Properties allege that Grant Thornton breached its fiduciary duty to them by misleading the court on the without notice application seeking an order to enter the Conference Centre and remove the bankrupt's property from it (proposed notice of civil claim, Part 1, paras. 59-61).

[172] Maxfine and TA Properties allege that Grant Thornton's breach of fiduciary duty and breaches of duty caused them loss and damage by lengthening the bankruptcy and protracting the issues, resulting in greater fees and lesser funds left in the estate for distribution to them, and precluding Maxfine and TA Properties from re-leasing the Hotel Property and Conference Centre (Proposed notice of civil claim, Part 1, paras. 77-80 and Part 3, para.12).

[173] Subject to being constrained to claims that would not result in Grant Thornton having divided or conflicting duties to the bankruptcy stakeholders and the public interest in the integrity of the bankruptcy process, the proposed notice of civil claim discloses a cause of action for breach of fiduciary duty.

Whether there is a Factual Foundation for the Claims

Grant Thornton's Handling of the Property Claims

[174] It is central to Maxfine and TA Properties' allegations that they, as landlords, were the largest creditors of the bankrupt TA Hotel Management. It is not disputed that after the priority claims, Maxfine's and TA Properties' preferred claims as landlords were such that no one below them would likely benefit from the bankruptcy. However, Grant Thornton points out that there were several other large claims including a $1 million claim from the Trump Organization and claims from

employees which totalled $2.4 million (in addition to the Wage Earner Protection Program claim). Grant Thornton asserts that, notwithstanding this “waterfall”, it was not permitted to ignore the interests of lower creditors or short cut the appropriate steps in approving property claims even though those after Maxfine and TA Properties were unlikely to benefit.

[175] The question is whether there is evidence to support a *prima facie* case that Grant Thornton handled the property claims in a manner designed to increase its fees by prolonging the bankruptcy.

[176] Grant Thornton asserts that it undertook the bankruptcy in accordance with what the law requires while attempting to be practical given the “waterfall”. Mr. Wentzell deposed that the handling of Maxfine’s property claim was not animated by Grant Thornton’s fees. He has also given evidence as to why the fees were much higher than the pre-bankruptcy estimate.

[177] There is no direct evidence that Grant Thornton reached a determination on Maxfine’s property claim that was based on its motivation to increase its fees.

[178] Counsel for Maxfine and TA Properties assert that the trial court may have to make findings of fact based on drawing inferences from evidence, and in the circumstances where there is unlikely to be any direct evidence of Grant Thornton having an unlawful intention such as alleged, the factual foundation for the claim can be based on this Court, the bankruptcy court, drawing an inference.

[179] It is permissible to find facts by drawing inferences when they are reasonably supported by the evidence and so long as they are not used to bridge a gap using speculation or conjecture: *Megaro v. Insurance Corporation of British Columbia*, 2020 BCCA 273 at para. 30, citing *R. v. Munoz* (2006), 86 O.R. (3d) 134 at paras. 30–31, 2006 CanLII 3269 (S.C.J.); and *District of West Vancouver (Corporation of) v. Liu*, 2016 BCCA 96. As noted above, on a s. 215 application, inferences should not be drawn based on evidence that conflicts.

[180] I am not persuaded that it is appropriate to draw the inferences that Maxfine and TA Properties seek in this regard. The jurisprudence acknowledges that while the s. 215 threshold is low, it must be met. Despite that the proposed plaintiff may be challenged to muster the evidence before having discovery, the plaintiff must lead evidence: *Nicholas* at para. 21. While that may be evidence from which an inference can be drawn, there should be evidence that at least supports that inference.

[181] In this case, the evidence does not support the specific inference that Grant Thornton made the decision with the aim of increasing its fees as opposed to with the aim of making the correct decision. As described above there was some evidence in favour of Maxfine and TA Properties' position about the nature of the leases and some against it. There is also evidence that Grant Thornton sought legal advice on that issue and handled the property claim in accordance with the legal advice. That evidence supports Grant Thornton's position that its decision on the issue, right or wrong, cannot be a breach of a fiduciary duty based on the theory that it was undertaken to increase its fees in priority to making the right decision. As counsel for Grant Thornton points out, to conclude otherwise would be to accept that outside counsel for Grant Thornton was complicit in Grant Thornton's scheme to increase its fees at the costs of the assets of the bankrupt and its creditors. Maxfine and TA Properties do not make that allegation.

[182] I conclude that the evidence, including the evidence led by Maxfine and TA Properties does not support the inference which Maxfine and TA Properties seek this Court to draw.

[183] Maxfine and TA Properties also assert that the evidence that the decision to disallow the FFE claims was not *bona fide* can be found in the later consent order, made after Grant Thornton had been discharged as a trustee, allowing Maxfine and TA Properties' appeal of the notice of dispute and allowing the FFE property claims. Maxfine and TA Properties submit that I should conclude that based on that consent order, a court has determined that Grant Thornton's determination was wrong.

[184] I do not accept that the consent order is evidence that Grant Thornton was wrong. As with many matters that come before a bankruptcy court, there was room for different views on the legal characterization of the lease and therefore ownership of the FFE. In this case, the room for the debate was obvious since Mr. Wentzell told Mr. Tiah that if he were in Mr. Tiah's shoes, he would appeal the FFE disallowance because it would resolve the debate one way or another and might resolve it in Maxfine's favour.

[185] The consent order demonstrates that the parties agreed there was a way to move the bankruptcy forward with a different outcome on the FFE issue. The consent order was made after Maxfine finally appealed the notice of dispute, an avenue that was open to Maxfine while Grant Thornton was trustee. The consent order does not state that Grant Thornton's decision was wrong nor does it support that inference.

[186] The allegation that Grant Thornton denied the property claims of Maxfine and TA Properties to protract the bankruptcy so that it could charge more fees is not supported by evidence that meets the low threshold of a *prima face* case.

[187] With regard to the cash offer to purchase the FFE, Maxfine and TA Properties assert that it was improper for Grant Thornton to recommend they make one, but if it did so, it was required to be fair, honest and forthright and to give advice unencumbered by self interest which it failed to do.

[188] Maxfine and TA Properties allege that, based on the recommendation of Grant Thornton, they made an offer to purchase the FFE, hotel operating supplies, hotel operating equipment, and the liquor for $400,000. They assert that Grant Thornton rejected out of hand, without discussing it with the bankruptcy inspectors. Maxfine and TA Properties allege that because there was no competing offer, Grant Thornton's rejection of the offer demonstrates that Grant Thornton was motivated to increase its fees by recommending the offer and then immediately rejecting it, thereby keeping the property dispute alive.

[189] There is no evidence that Grant Thornton was motivated by its fees when rejecting that offer. While the evidence is that there was no competing offer, there is also uncontradicted evidence that Grant Thornton was obtaining appraisals of the assets. There would be, as in any bankruptcy, a value assigned to the assets and Grant Thornton could not sell them well below that value to a non-arms length party while comporting itself in accord with its duties to all creditors and with the integrity of the bankruptcy. The evidence of Maxfine and TA Properties' deponent demonstrates that Mr. Wentzell told Mr. Tiah this.

[190] With regard to the credit bid, Maxfine and TA Properties submit that Grant Thornton inappropriately suggested the credit bid to dissuade Maxfine from appealing the FFE notice of dispute, and then rejected the credit bid when it was too late to appeal. There are several problems with the factual foundation said to support these allegations.

[191] First, according to Mr. Tiah's report to his colleagues, Mr. Wentzell told Mr. Tiah he would appeal the notice of dispute if he were in Mr. Tiah's position.

[192] Second, the allegation that Mr. Wentzell "urged" a credit bid is undermined by Mr. Tiah's contemporaneous report to his colleagues about the meeting where it was discussed which does not demonstrate urging by Mr. Wentzell. Similarly, Mr. Cooper reported to the TA Group that Mr. Wentzell urged the TA Group *to get advice* about a credit bid.

[193] Third, the evidence about the credit bid discussions did not include the concept that Maxfine could make an acceptable credit bid at any price and in any form.

[194] I conclude that the evidence led by Maxfine and TA Properties does not support the assertion that Grant Thornton engaged in a "bait and switch" with regard to the credit bid.

[195] Maxfine and TA Properties assert that since Grant Thornton's fees were a priority claim, Grant Thornton rejected the credit bids, despite encouraging Maxfine

and TA Properties to make them, because the credit bids would not guarantee that Grant Thornton's mounting fees were paid.

[196] The evidence is that the inadequacy of the credit bids in relation to the priority claims, including securing Grant Thornton's fees, was a reason for the rejection and thereby supports the thesis underlying the claim for breach of fiduciary duty. The question is whether such evidence can support a breach of fiduciary duty claim in circumstances where the fees are subject to taxation and reduction if they are not reasonable. In other words, the inference that can be drawn from the math is some support for the theory of Maxfine and TA Properties, but it ignores the reality that if Grant Thornton's fees were not reasonable, they would not be approved or paid.

[197] I will return to this question.

The Storage Agreement and the Without Notice Application

[198] In the proposed notice of civil claim, Maxfine and TA Properties assert that actions taken in relation to the without notice application brought by Grant Thornton and the order obtained permitting Grant Thornton to remove property from the Conference Centre was in breach of its fiduciary duty owed to Maxfine and TA Properties.

[199] I pause to note that it does not make a lot of sense that Maxfine is engaged in any claims pertaining to property in the Conference Centre. Maxfine does not have an interest in the Conference Centre nor has it asserted an interest in property in the Conference Centre. Maxfine and TA Properties have been at pains to assert that the storage agreement between Maxfine and Grant Thornton over the property in the Hotel Property does not extend to and cannot affect the property stored in the Conference Centre, because TA Properties owns the Conference Centre. The inverse must therefore also be correct.

[200] However, in the notice of application for the without notice order, which only pertained to property stored in the Conference Centre, Grant Thornton sought relief in relation to both Maxfine and TA Properties. Accordingly, there is some basis for

Maxfine to join in TA Properties' proposed claim in relation to that application. Given my view on this matter, which is that the claim is not supported by a sufficient evidentiary foundation, I need not address this anomaly further.

[201] One of the proposed allegations is that Grant Thornton's steps to remove TA Hotel Management's property from the Hotel Premises and the Conference Centre were in retaliation to Maxfine and TA Properties' move to replace Grant Thornton, and not because Maxfine and TA Properties prompted concerns about the storage of TA Hotel Management's property when they issued notices to terminate the leases.

[202] Maxfine and TA Properties have not led evidence in support of their theory that their stated intention of replacing Grant Thornton prompted retaliatory behaviour by Grant Thornton. They have led evidence that Grant Thornton expressed concerns over storage five weeks prior to Maxfine and TA Properties advising that they wanted the creditors to vote on having Grant Thornton replaced. There is also evidence of requests by Grant Thornton and its counsel to extend the storage agreement followed by a communication that Grant Thornton was taking steps to remove TA Hotel Management's assets from the Hotel Property and the Conference Centre, all prior to Maxfine and TA Properties advising they were taking steps to remove Grant Thornton as trustee.

[203] This is not a matter of weighing evidence, it is a matter of examining the evidence that Maxfine and TA Properties have led as well as email correspondence led by Grant Thornton which is not controverted. That evidence does not provide evidentiary support for the allegation that Grant Thornton's steps with regard to the storage agreement and the without notice application were retaliatory.

[204] Maxfine and TA properties have also led no evidence in support of their theory that Grant Thornton's expressed concerns over storage of the bankrupt's property and threats to remove it from the Hotel Property and Conference Centre were really to further its "extortion of fees". There is evidence that around this time, Maxfine and TA Properties continued to communicate with Grant Thornton about

revised credit bids. Those communications included the quantum of credit bids. Those communications included discussion of Grant Thornton's fees and included Grant Thornton agreeing to reduce its fees so that a given credit bid would go further and be more likely to be approved by the court.

[205] In my view, while it is conceptually possible to argue that an inference of self-interested behaviour by Grant Thornton could be drawn from that evidence, on the evidence as a whole, it is not a reasonable inference to draw. There is no doubt that a trustee's fees will erode the assets available to satisfy creditors in a bankruptcy. In this case, that was complicated by a dispute over property, and the form and quantum of bids by some creditors to buy that property. The form and contents of those bids would have consequences for the payment of Grant Thornton's fees and the other creditors. But it must be remembered that at this stage, Grant Thornton's fees were hypothetical because they had not been approved or taxed. The discussions about how large and in what form the credit bids needed to be were premised on the fees, as presented or as Grant Thornton proposed to reduce them, being approved. That was, essentially, a worse case scenario for the cash shortfall position. Grant Thornton was addressing the credit bids assuming that worst case. If the fees were reduced on taxation to below what Grant Thornton asserted was reasonable, then cash would flow down the waterfall to the creditors. But if the fees were not reduced, then the credit bids needed to be in a form and quantum sufficient to cover the priority claims including those fees.

[206] In these circumstances, I do not consider that Grant Thornton's positions on the credit bids in relation to its fees to be evidence that supports a *prima facie* case of breach of fiduciary duty.

[207] With regard to Grant Thornton's motivations and actions in relation to the assets in the Hotel Property and the Conference Centre, the timing of how matters unfolded does not support the thesis that Grant Thornton was acting in retaliation as opposed to reasonable concerns about the assets it was statutorily required to secure. Grant Thornton raised the issue of obtraining and access and storage

agreement with regard to the assets in the Conference Centre and extending the access and storage agreement on the Hotel Property assets before Maxfine and TA Properties gave notice that they would seek to replace Grant Thornton as trustee. They also issued the notices to terminate the leases before they asserted that they were seeking to replace Grant Thornton as trustee. Grant Thornton's concerns about the security of the property were confirmed when TA Properties denied Grant Thornton's agents access to the Conference Centre to secure the property, on the basis that it considered that Grant Thornton had caused TA Hotel Management to abandon its property by leaving it in the Conference Centre without a storage agreement. That position was reaffirmed by Maxfine and TA Properties in their notice of application in which they state that any assets left on the premises in the Conference Centre were deemed to be abandoned under the terms of the lease given the notice of termination of the lease.

[208] Section 16(3) of the *Bankruptcy and Insolvency Act* requires the trustee to take possession of, create an inventory of, and safeguard the bankrupt's property. If there are competing claims to the property, such as the dispute over the FFE or over whether TA Hotel Management had abandoned its property in the Conference Centre, that was to be resolved through a claim made under s. 81 of the *Bankruptcy and Insolvency Act*. But the trustee must safeguard it pending that process.

[209] TA Properties asserts that Grant Thornton deliberately misled Basran J. on the without notice application when Basran J. asked whether a "standstill injunction" would resolve the issue. TA Properties asserts that Grant Thornton misled Basran J. by not referring to the standstill agreement that Maxfine and TA Properties had proposed, and by submitting to Basran J. that there was a risk of dissipation, even if a standstill injunction was granted.

[210] The standstill agreement that Maxfine and TA Properties proposed had 8 terms, most of which did not refer to the property stored in the Conference Centre. The term which did apply proposed that the parties agree to the status quo, "whatever that status quo might be". From that language, I conclude that there was

no meeting of the minds as to what the status quo was, and so it is hard to understand how that term could be part of an agreement. I also observe that Maxfine and TA Properties' position on the status quo was that there was no storage agreement on the property in the Conference Centre, and since TA Properties had terminated that lease, the bankrupt would be held to have abandoned the property in the Conference Centre.

[211] Grant Thornton's counsel has sworn an affidavit on this application advising that the reason he did not refer Basran J. to the standstill agreement proposed by Maxfine and TA Properties was that it was part of without prejudice negotiations and he did not think he should bring that to the court's attention given that Maxfine and TA Properties were not there to make submissions on that.

[212] TA Properties rejoins that explanation by submitting that counsel for Grant Thornton did refer Basran J. to other parts of those without prejudice negotiations. This, TA Properties asserts, demonstrates that Grant Thornton brought deliberation to misleading Basran J.

[213] The parties dispute which communications are without prejudice and whether there was waiver of the privilege. In my view, the court should not dive deeply into that kind of dispute on this kind of an application and it is not necessary to do so. Some of what counsel for Grant Thornton told the court was a summary of what had transpired during what may have been without prejudice negotiations to which waiver may or may not apply. However, it was also part of with prejudice communications, including Grant Thornton's October 2020 request about storing the bankrupt's property in the Conference Centre and TA Properties' assertion on February 17, 2021 when it denied Grant Thornton's agents access to the Conference Centre on the basis that it had abandoned the bankrupt's property there.

[214] In any event, the standstill agreement pertaining to the Conference Centre that Maxfine and TA Properties proposed was to maintain the status quo "whatever that status quo may be". Despite the vague language, it is readily apparent that to TA Properties, the status quo was that Grant Thornton had caused TA Hotel

Management to abandon its property in the Conference Centre, and by that abandonment, ownership had transferred to TA Properties.

[215] A standstill predicated on that status quo is not the type of standstill arrangement that Basran J. asked about. Justice Basran asked his question having been told about TA Properties position on abandonment. His question was about an injunctive standstill, one where Grant Thornton would secure the property that the bankrupt owned on the date of bankruptcy, subject to the right of another party, such as TA Properties, to assert ownership. This is the type of standstill arrangement that Grant Thornton had proposed and TA Properties and Maxfine had rejected. I do not consider Basran J.'s question to have allowed for a standstill arrangement premised on a status quo that TA Properties asserted ownership to the property pursuant to its argument about abandonment.

[216] I consider counsel for Grant Thornton's reply to have been appropriate. He stated that type of discussion had been ongoing, which was correct because Grant Thornton had proposed the kind of standstill arrangement that Basran J. asked about. He stated that Maxfine and TA Properties had refused to agree to it, which was also correct.

[217] On the without notice application, counsel for Grant Thornton also submitted that the situation gave rise to the risk of dissipation. Maxfine and TA Properties strongly object to the suggestion that there was a risk of dissipation. They argue that this is where their standstill agreement proposal clearly ought to have been disclosed to Justice Basran because it dispelled any risk of dissipation.

[218] I disagree. Maxfine and TA Properties insisted on the status quo, instead of a storage and access agreement, because they wish to maintain their position on the abandonment of the property. It was entirely reasonable for Grant Thornton to take the view that an arrangement predicated on the assertion of abandonment and transfer of ownership of the property put the property at risk of dissipation by its asserted owner and was inconsistent with Grant Thornton's duty to secure property of the bankrupt.

[219] I do not see how Basran J. would have been assisted by knowing in detail the back and forth on the standstill or that TA Properties had proposed a standstill agreement to maintain the status quo, "whatever the status quo may be".

[220] Justice Basran's second question on a standstill injunction returned to the issue, honing in on a standstill injunction by which Maxfine and TA Properties would be enjoined from dealing with the property as requested in the alternate relief Grant Thornton requested in the notice of application. Counsel for Grant Thornton replied that there was no likely risk of dissipation if an injunction was granted instead of a warrant to enter the premised and remove the bankrupt's property, but it would not satisfy s. 16(3) of the *Bankruptcy and Insolvency Act* that obligates the trustee to obtain possession of the bankrupt's property.

[221] Justice Basran's final question was whether there was anything else he should be told that counsel for Maxfine or TA Properties might submit to him. Counsel for Grant Thornton replied describing, in summary fashion, the dispute over Grant Thornton's fees, the dispute over property, the dispute over credit bids and the relationship between those and Grant Thornton's fees. He also repeated the position of TA Properties that the property in the Conference Centre had been abandoned and was the property of TA Properties. He added that notwithstanding, TA Properties had not filed a s. 81 dispute over the property in the Conference Centre and it remained the duty of Grant Thornton to secure it.

[222] I do not consider the evidence of what occurred at the without notice hearing to provide a factual foundation for a breach of fiduciary duty claim based on deliberately misleading the court.

[223] Having reached that conclusion, I do wish to comment on one of the submissions made by Grant Thornton about this matter. Counsel on this application was not counsel at the without notice application. Counsel on this application made a submission that if the court too finely parses the submissions of counsel on the without notice application, inevitably some slight transgression of the full and frank disclosure rule will be found. In this case, the fine parsing, although not successful,

was brought on by counsel for Grant Thornton proceeding without notice when it was not necessary to do so. The statute allows a trustee to bring a without notice application to secure the property of a bankrupt, but it is not mandatory. Urgency can be addressed through short notice. Having proceeded without notice, counsel for the trustee can expect submissions to the court to be finely parsed after the fact.

General Mismanagement as a Scheme to Increase Fees

[224] More generally, Maxfine and TA Properties seek to claim that Grant Thornton's management of the bankruptcy as a whole was motivated by its goal to enhance its fees, and not by the goal to be efficient.

[225] I accept that this engages the interest of all stakeholders in the same way. Accordingly, to base a claim of breach of fiduciary duty on this theory is not offside the legal precepts of a breach of fiduciary duty.

[226] With regard to evidence, Maxfine and TA Properties point to Grant Thornton's initial estimate of approximately $150,000 and the total of the fees when Grant Thornton was removed as trustee, which were over $1 million dollars. Grant Thornton points to many issues and events it says justifies these increased fees which I have set out above.

[227] Whether the fees were justifiably incurred and were reasonable will be the subject of a review independent of this proposed claim pursuant to the *Bankruptcy and Insolvency Act*. The fact of overlap between the bankruptcy court and a court on a civil claim if leave is given is not necessarily impermissible and so does not preclude granting leave under s. 215: *GMAC Commercial Credit* at para. 66.

[228] In *GMAC Commercial Credit*, the Supreme Court of Canada was influenced by the fact that the issue on which leave was sought was an issue over which the bankruptcy court had no jurisdiction. The Court held that the *Bankruptcy and Insolvency Act* did not immunize court appointed officers from scrutiny on issues for which the bankruptcy court has jurisdiction: at para. 66. In this case, it is clear that

the bankruptcy court has jurisdiction to address the fees, including the arguments of improper conduct that Maxfine and TA Properties made.

[229] However, the bankruptcy court does not have jurisdiction to make an award of damages for beach of fiduciary duty. The question is whether there is evidence that supports a claim that Grant Thornton prioritized its fees in a manner inconsistent with its duties as trustee in bankruptcy and in breach of its fiduciary duty.

[230] In my view, the quantum of the fees alone is not sufficient evidence to raise a *prima facie* claim that Grant Thornton preferred increasing its fees to the interests of the bankruptcy stakeholders and creditors. The quantum of the fees raises an issue squarely within the jurisdiction of the bankruptcy court. Higher fees than estimated are not *per se* evidence of a breach of fiduciary duty.

[231] Maxfine and TA Properties allege that Grant Thornton failed to obtain the appropriate statutory pre-approval to engage legal counsel contrary to ss.19 and 30 of the *Bankruptcy and Insolvency Act*. Maxfine and TA Properties allege that when Grant Thornton retroactively sought approval by the inspectors, it did not tell the inspectors that, since pre-approval was necessary, Grant Thornton would be responsible for legal fees incurred prior to inspector approval. Maxfine and TA Properties allege that this conduct was dishonest and in the self-interest of Grant Thornton to avoid having to absorb the pre-approval legal fees.

[232] With regard to the failure to obtain s. 30(1)(e) approval to retain counsel, there is authority for the proposition that where a trustee employs a solicitor without obtaining the approval of the inspectors, the trustee will be personally liable for the solicitor's costs: Lloyd W. Houlden, Geoffrey B. Morawetz, Janis P. Sarra, *The 2022 Annotated Bankruptcy and Insolvency Act*, Toronto, Thomson Reuters, 2022, §2:92, pp. 81-82, citing *Wedlock Ltd.*, *Re,* [1925] 2 D.L.R. 566, 5 C.B.R. 662 (P.E.I.S.C.). By the time that the inspectors retroactively approved the retention of counsel, the inspector representing Maxfine and TA Properties had raised the issue of the failure to obtain s. 30(1)(e) with Grant Thornton. Grant Thornton responded to that concern with a communication sent to all inspectors.

[233] No authority has been provided to me that if the inspectors provided a subsequent approval for counsel, the fees incurred prior to approval are not subject to review on taxation. It does not appear to me that inspector approval would insulate challenge under the s. 152 regime. Accordingly, whether legal fees incurred prior to inspector approval can be recovered will be a matter for taxation. Evidence that approval was sought late and the prospect that Grant Thornton might be required to absorb the fees was not discussed with the inspectors is not evidence of a scheme by Grant Thornton to enrich itself at the expense of the bankrupt's estate.

[234] Maxfine and TA Properties also allege that Grant Thornton constantly pressured the inspectors to approve its fees, demonstrating that it was elevating the priority of this issue in breach of its duty to not engage in self-interested conduct.

[235] The description of constant pressure is Mr. Tiah's characterization based on the agenda for inspector's meetings and the minutes of the meetings. The minutes of inspector meetings show that the topic was deferred more than once for various reasons given by various inspectors, including wanting more detail on the invoices, wanting more time to review the invoices, the view that approving invoices for professional fees was premature, and the concern that approving the invoices might jeopardize the employees' claims. The minutes indicate that Mr. Wentzell told the inspectors that if they were unwilling to approve the fees, Grant Thornton would seek an interim taxation by the court.

[236] Inspector approval and taxation of trustee fees is part of the statutory process: s. 152 of the *Bankruptcy and Insolvency Act*. Evidence that Grant Thornton put that issue before the inspectors regularly or even frequently does not support a claim that Grant Thornton was acting in its own interest to the detriment of others.

[237] Maxfine and TA Properties assert that the amount by which the fees outstripped the estimate, together with the evidence of constantly pressuring inspectors to approve fees and the nonsensical decisions on their property claims, should result in an inference that supports the claim for beach of fiduciary duty.

[238] This is related to the theory that Maxfine and TA Properties seek to advance that Grant Thornton made decisions that would create conflict and controversy because those decisions would create more work and increase Grant Thornton's fees. That inference could be drawn in any case where a trustee makes a decision that is controversial and requires a stakeholder to challenge the decision in court. Such bare allegations and requests for inferences is not consistent with the s. 215 jurisprudence of a threshold that protects trustees from frivolous or vexatious suits or suits that have no factual foundation.

Conclusion on Breach of Fiduciary Duty

[239] I conclude that there is not an evidentiary foundation to support a *prima facie* claim for breach of fiduciary duty. I do not grant leave to commence a claim for breach of fiduciary duty.

Breaches of Statutory Duties

[240] At para. 2 of Part 2, Relief Sought, Maxfine and TA Properties seek "[g]eneral damages for breach of statutory duties".

[241] *Saskatchewan Wheat Pool* at 227 establishes that statutory breaches do not give rise to a cause of action, but they may nonetheless be relevant as evidence of negligence. The Supreme Court of Canada described statutory breaches to be properly regarded as "subsumed" in the law of negligence.

[242] I conclude that there is no cause of action for breach of statutory duty. I do not grant leave for Maxfine and TA Properties to bring a claim for damages for breach of statutory duty.

Potential Amendments to the Proposed Claim

[243] In conjunction with its submissions raising concerns that the Court has embarked on an *ex mero motu* application to strike the proposed notice of civil claim, Maxfine and TA Properties assert that the Court should consider the potential of amendments to address any shortcomings in the proposed notice of civil claim.

[244] It is not clear to me whether Maxfine and TA Properties seek leave to produce an amended proposed notice of civil claim for the purpose of leave under s. 215 in the bankruptcy court, or whether they submit that given that they have demonstrated an evidentiary basis for their proposed claims, they should be given leave and the matter of proceeding with a notice of civil claim that discloses a cause of action can be addressed in the court that will hear the civil claim.

[245] The latter approach was rejected in *Re Netlink Computers Inc*, at para. 66 because it is inconsistent with the bankruptcy court's gatekeeping function required by s. 215. I conclude that leave should not be granted unless the bankruptcy court has determined that the proposed claim passes the low s. 215 threshold.

[246] There is support for the approach of permitting Maxfine and TA Properties to reapply in the bankruptcy court with a revised proposed notice of civil claim in the jurisprudence from which I have drawn the legal principles and rules pertaining to when a claim or proposed claim discloses a cause of action. Sometimes, courts dispense with a matter by including leave to reapply when striking the claim, dismissing an application to amend, or refusing certification of a proposed class proceeding. In some cases, courts require that the party seeking that opportunity demonstrate that it intends to and can produce feasible revisions to the pleading by providing them in draft at the hearing.

[247] In this case, the focus of all of the parties' submissions was on the evidentiary aspects of the s. 215 application. That is why the Court was prompted to seek further submissions on whether the proposed notice of civil claim of Maxfine and TA Properties discloses causes of action for pure economic loss arising from negligence and/or for damages for breach of statutory duty.

[248] In this case, I have concluded that the proposed notice of civil claim does not disclose a cause of action in breach of contract, damages for pure economic loss arising from negligence or trespass. Dismissing the application with leave to re-apply based on a revised proposed notice of civil claim is appropriate. On a re-application,

Maxfine and TA Properties will be required to satisfy both aspects of the s.215 test with regard to the claim or claims to which the re-application pertains.

Disposition

[249] The application of Maxfine and TA Properties to bring a civil claim against Grant Thornton is allowed with regard to the proposed claim for negligent damage to property and consequential damages as set out above. The application is dismissed in all other regards, with leave to re-apply based on a revised proposed notice of civil claim pertaining to breach of contract, damages for pure economic loss arising from negligence and trespass.

"Matthews J."