SUPREME COURT OF NOVA SCOTIA
Citation: *Amirault v. Saturley*, 2023 NSSC 390

Date: 20231212
Docket: 500438
Registry: Halifax

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Between:

John Amirault, France Amirault, Sauna Anthony, Kim Arnold, Wilfred Arnold, Marla Cameron, RSC Investments Ltd., Richard Cameron, 3067556 Nova Scotia Ltd., Ashco Holdings Ltd., Sonia Chehil, Sonia Chehil in her capacity as the executor of the Estate of Dilip Chehil, Mary Cooke, Stephen Cooke, Crooks Investments Limited, Joanne Deal, Bernard Deak, Lindsay Deal, Christopher Deal, Ann Duffy, John Duffy, 2338987 Ontario Inc., Archie Gillis, Patricia Gillis, Lori Nickerson Graydon, John Graydon, Norman Greenberg, Paul Heighton, Mary Heighton, Vincent Heighton, Florence Heighton, Claude Hicks, Teresa Hicks, Richard Kent, Patricia Kent, Janet Khattar, Michael Killorn, Doug Legge, Daphne Legge, Trevor Long, Joanne Long, Donald MacAulay, Margaret MacAulay, Bob MacDonald, Eileen MacDonald, Joy Moore, Scott Moore, Heather Moss, Lorraine Mulrooney, Earl Munroe, Violet Munroe, Ronald Munroe, Doreen Munroe, Fred Myatt, James O'Keefe, Joyce O'Keefe, David Parsons, Greg Rhyno, Wanda Rhyno, Contrast Home Holdings Inc., Jean-Guy Richard, Lynn Richard, Heather Richmond, Paul Richmond, Riley Richmond, Heather Stewart, Jim Stewart, Brian Sutherland, Elizabeth Huyter, Snowcreek Building Design Solutions Inc., Belinda Swanson, Lary Trites, Kathleeen Trites, Richard Trites, Bonnie Trites-Beal, Andrews Robie Trites, Canadian Buckwheat Corporation, Robert Vair, Pamela Vair and Guenter Wiedekamp

Plaintiffs

v.

Frederick Saturley, Adrian Saturley, Mary Lyn Saturley, High Tide Wealth Management and National Bank Financial Inc/Financiere Banque Nationale Inc. c.o,b, as National Bank Financial Network

Defendants

DECISION ON SUMMARY JUDGMENT ON PLEADINGS

Judge: The Honourable Justice Scott C. Norton

Heard: November 30, 2023, in Halifax, Nova Scotia

Decision: December 12, 2023

Counsel: Christopher I. Robinson, for the Defendant/Applicant Mary Lyn Saturley
Eugene Y.S. Tan, for the Plaintiffs/Respondent

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By the Court:

Introduction

[1] The Defendant, Mary Lyn Saturley ("Mary Lyn"), moves for summary judgment on the pleadings pursuant to *Civil Procedure Rule* 13.03 to set aside the Amended Statement of Claim on the basis that it discloses no cause of action against her.

[2] The Plaintiffs are all former clients of the Defendant, High Tide Wealth Management ("High Tide"), an investment advising company. The Defendant, Fredrick Saturley ("Fredrick"), was an investment advisor and the President of High Tide. The Defendant, Adrian Saturley ("Adrian"), was an investment advisor and Chief Compliance Officer of High Tide.

[3] Mary Lyn is described in the Amended Statement of Claim as follows:

> 53 The Defendant Mary Lyn Saturley ("Mary Lyn") is a person resident in Prospect, Nova Scotia. She is Fredrick Saturley's wife and Adrian Saturley's mother. Mary Lyn Saturley maintained an office and/or workspace in the High Tide office and frequently contacted the clients of High Tide, include some or all of the Plaintiffs, on behalf of Fredrick Saturley. As such, it is alleged that she represented to the clients of High Tide that she was an employee or agent of High Tide at all material times.

[4] The Statement of Claim alleges that in or around early March 2020 the global financial markets took a sudden drop in value in large part due to the uncertainty surrounding the emerging COVID-19 pandemic. As a result of this drop, "put options" (options to sell a specified financial instrument at a specified price) sold by High Tide on the Plaintiffs' behalf were executed on a scale that caused significant and, in many cases, complete losses of the value of the Plaintiffs' portfolios.

[5] The Plaintiffs also claim against National Bank Financial Inc. ("NBFI"), the bank with whom High Tide lodged the Plaintiffs' securities. NBFI did not participate in the motion.

[6] In the Statement of Claim filed on September 14, 2020, the Plaintiffs claimed against Mary Lyn in negligence and negligent misrepresentation. Mary Lyn filed a motion for summary judgment on pleadings. It was adjourned. The Plaintiffs amended their Statement of Claim. The Amended Statement of Claim was filed on

February 23, 2021. The Amended Statement of Claim added the following claim against the Saturley defendants including Mary Lyn (para. 644):

> Further, and in the alternative, each of the Plaintiffs, and all of them excepting Sonia in her personal capacity, plead against High Tide, Fredrick, Adrian and Mary Lyn that they are liable in fraud or fraudulent misrepresentation.
>
> [Underline in original]

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[7] Mary Lyn asserts that the Plaintiffs have failed to plead material facts capable of supporting a duty of care on Mary Lyn for the allegations of negligence and negligent misrepresentation and have failed to plead material facts necessary to support the claim in fraud or fraudulent misrepresentation.

Law

[8] The parties agree that this motion is governed by *Civil Procedure Rules* 13.03 and 38.02:

> 13.01 Summary judgment on pleadings
>
> (1) A judge must set aside a statement of claim, or a statement of defence, that is deficient in any of the following ways:
>
> (a) it discloses no cause of action or basis for a defence or contest;
>
> (b) it makes a claim based on a cause of action in the exclusive jurisdiction of another court or tribunal;
>
> (c) it otherwise makes a claim, or sets up a defence or ground of contest, that is clearly unsustainable when the pleading is read on its own.
>
> (2) The judge must grant summary judgment of one of the following kinds, when a pleading is set aside in the following circumstances:
>
> (a) judgment for the party making a claim, when the statement of defence is set aside wholly;
>
> (b) dismissal of the proceeding, when the statement of claim is set aside wholly;
>
> (c) allowance of a claim, when all parts of the statement of defence pertaining to the claim are set aside;
>
> (d) dismissal of a claim, when all parts of the statement of claim that pertain to the claim are set aside.

(3) A motion for summary judgment on the pleadings must be determined only on the pleadings, and no affidavit may be filed in support of or opposition to the motion.

(4) A judge who hears a motion for summary judgment on pleadings may adjourn the motion until after the judge hears a motion for an amendment to the pleadings.

(5) A judge who hears a motion for summary judgment on pleadings, and who is satisfied on both of the following, may determine a question of law:

(a) the allegations of material fact in the pleadings sought to be set aside provide, if assumed to be true, the entire facts necessary for the determination;

(b) the outcome of the motion depends entirely on the answer to the question.

38.02 General principles of pleading

(1) A party must, by the pleading the party files, provide notice to the other party of all claims, defences, or grounds to be raised by the party signing the pleading.

(2) The pleading must be concise, but it must provide information sufficient to accomplish both of the following:

(a) the other party will know the case the party has to meet when preparing for, and participating in, the trial or hearing;

(b) the other party will not be surprised when the party signing the pleading seeks to prove a material fact.

(3) Material facts must be pleaded, but the evidence to prove a material fact must not be pleaded.

(4) A party may plead a point of law, if the material facts that make it applicable are also pleaded.

[9] The parties also agree on the case authorities establishing the approach to a motion for summary judgment on pleadings. The Nova Scotia Court of Appeal has provided a framework for determining whether summary judgment on the pleadings

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ought to be granted. In summing up the test under *Rule* 13.03, the Court of Appeal has found that in addition to striking a claim which "is absolutely unsustainable" or "discloses no cause of action," courts will also strike a claim that "is certain to fail": see *Nova Scotia v. Carvery*, 2016 NSCA 21 at para. 23.

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[10] A claim's likelihood of success is a central consideration under *Rule* 13.03. This was referenced in *Knight v. Imperial Tobacco Canada Ltd*., 2011 SCC 42, where the Supreme Court of Canada found that summary judgment on pleadings serves a valuable gatekeeper function:

> 19 The power to strike out claims that have no reasonable prospect of success is a valuable housekeeping measure essential to effective and fair litigation. It unclutters the proceedings, weeding out the hopeless claims and ensuring that those that have some chance of success go on to trial.

[11] The Nova Scotia Court of Appeal applied this principle in *Carvery*, *supra*, where Justice Fichaud concluded that *Rule* 13.03:

> 22 …clears the docket of claims or defences that are bound to fail.

[12] In *Holloway Investments Inc. v. Hardit Corporation*, 2020 NSSC 132, Justice Hunt provided the following helpful summary of the legal principles:

> [28] A statement of claim must plead a valid and recognizable cause of action and clearly set out the facts necessary to sustain that claim. If it does not do so, summary judgment on the pleadings must be granted, as the pleading discloses no cause of action and is accordingly unsustainable.
>
> [29] In *Knight v. Imperial Tobacco Canada Ltd., supra*, the Supreme Court of Canada put it in these terms:
>
>> 22 It is incumbent on the claimant to clearly plead the facts upon which it relies on making its claim.
>
> The Nova Scotia Court of Appeal has confirmed repeatedly that to avoid summary judgment, the statement of claim must plead the essential facts needed to support the asserted causes of action. In *Innocente v. Canada (Attorney General)*, 2012 NSCA 36, Justice Fichaud found that under Rule 13.03, the pleadings must advance a cause of action and plead the facts which satisfy the legal elements of that cause of action:
>
>> 23 Whether to grant an order for summary judgment on the pleadings usually is not discretionary. It is a matter of law, premised on assumed facts, and involves analysis and comparison of the written pleadings and the legal prerequisites for the cause of action that is advanced.

> [30] In *Canada (Attorney General) v. Walsh Estate*, 2016 NSCA 60, Justice Bryson relied on the Supreme Court of Canada in *Knight v. Imperial Tobacco*, *supra*, in finding that while the pleadings are assumed to be true, "they must plead facts material to the causes of action they assert."
>
> [31] In *Tapics v. Dalhousie University*, 2015 NSCA 72, at para 53, the Nova Scotia Court of Appeal put it this way - for pleadings to disclose a cause of action, the asserted cause of action needs to be "supplemented with essential facts" (para 53).
>
> [32] In the context of summary judgment on the pleadings, the importance of defendants knowing the case to be met was emphasized in *Kennedy v. Hewlett Packard (Canada) Co*, 2011 NSSC 502:
>
>> 29 The fundamental purpose of pleadings being properly drafted is to ensure the Defendant will know the case against it, including the material facts. This is in keeping with the Nova Scotia Civil Procedure Rules, to provide a just, speedy and efficient resolution of all matters.
>
> [33] The case law is clear that in weighing whether the statement of claim discloses a cause of action or is sustainable, a core consideration is whether the pleading clearly states the necessary facts to make out the elements of the asserted causes of action. A thorough illustration of how this works in practice can be seen in the Nova Scotia Supreme Court's decision in *MacLellan v. Canada (Attorney General)*, 2014 NSSC 280. The plaintiff brought action alleging various forms of wrongdoing against superiors in the Canadian military. The defendants sought summary judgment on the pleadings. The Court granted summary judgment and dismissed the proceedings. In his analysis, Justice LeBlanc stated:
>
>> 72 It is well established that the plaintiff must plead fact that will establish the necessary elements of the tort, not merely allegations or legal assertions.
>
> [34] In assessing the motion, the court weighed each asserted cause of action individually. Justice LeBlanc considered the material facts as advanced, and then set out the requirements for successfully establishing the alleged causes of action, and in each instance found that the pleadings did not sustain those various causes of action.

[13] In conducting this analysis, I assume the facts stated in the Amended Statement of Claim can be proved and ask whether it is plain and obvious that the pleading discloses no reasonable cause of action. *Hunt v. Carey Canada Inc*., [1990] 2 S.C.R. 959; *Cape Breton (Regional Municipality) v. Nova Scotia (Attorney General)*, 2009 NSCA 44, at para. 17.

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[14] With respect to material facts that must be pleaded in order to support a cause of action, I refer to the comments of Justice Robertson in *MacNeil v. Bethune*, 2005 NSSC 59, aff'd 2006 NSCA 21:

> [15] As agreed the law is well established. The pleadings should contain sufficient material facts to provide the opposing party with an understanding of the case they have to meet…
>
> [22] A mere plea of wrongdoing is not sufficient - there must be facts pleaded to support it… It is not sufficient to say that delivery of propery [sic] particulars must await discovery.

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Analysis

[15] In their motion brief dated November 23, 2023, the Plaintiffs refer to the following as being all the relevant references to Mary Lyn in the Amended Statement of Claim (and where factual allegations are made the paragraph is reproduced, with the underlined sections representing the 2021 amendments and the bold sections representing the factual allegations that the Plaintiffs say support the allegations made against Mary Lyn):

> 53 The Defendant Mary Lyn Saturley ("Mary Lyn") is a person resident in Prospect, Nova Scotia. She is Fredrick Saturley's wife and Adrian Saturley's mother. Mary Lyn Saturley maintained an office and/or workspace in the High Tide office and frequently contacted the clients of High Tide, include some or all of the Plaintiffs, on behalf of Fredrick Saturley. As such, it is alleged that she represented to the clients of High Tide that she was an employee or agent of High Tide at all material times.
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> 54
>
> 91 Between the initial demand for repayment on NBIN's behalf and March 13th, Fredrick ~~Saturley~~, Adrian ~~Saturley~~ and on several occasions Mary Lyn ~~Saturley~~ both passively and actively encouraged High Tide's clients and NBIN to carry on as though there were no problem.
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> 94
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> 115 On the morning of Monday March 16. 2020, the Amiraults received a phone call from Mary Lyn Saturley who told them not to transfer the funds as it was too late.

241 Later on, March 26, 2020 the Duffys received a phone call from Mary Lyn who told them that Fredrick would be calling them later that night. The Duffys told Marv Lyn that Adrian had answered their questions but to please have Fredrick call them the next day, he did not.

333 While in Adrian's office Khattar heard Fredrick speaking, raised and clearly aggregated, on the phone to Marv Lvnn [sic] telling her she needed to "hurry and pick [him] up, because [they] needed to move the money to the other bank". Fredrick left the office in a rush quickly after this phone call. Fredrick returned to the High Tide office approximately an hour later.

337 When Khattar arrived at the High Tide office she observed Mary Lyn leaving Fredrick's office. Mary Lyn said "I can't do this again" Khattar responded saying "you can, you have to help us".

644 For all the foregoing reasons, each of the Plaintiffs, and all of them, plead that the Defendants are liable in negligence the particulars of which are as follows: negligent misrepresentation and negligent provision of services. Further. and in the alternative, each of the Plaintiffs, and all of them excepting Sonia in her personal capacity, plead against High Tide, Fredrick, Adrian and Marv Lyn that they are liable in fraud or fraudulent misrepresentation.

647 As to High Tide, Fredrick Saturley, Adrian Saturley, and Mary Lyn Saturley

i) They negligently, knowingly or intentionally failed to warn their clients of the risky investment strategies employed by Defendant Fredrick Saturley, the initial drop in value of their accounts, and the demand for repayment of margin debt by Defendant NBIN.

ii) They negligently, knowingly or intentionally made deceptive representations to their clients, which their clients had a right to rely upon and which they did rely upon to their detriment, in order to obtain client assets and facilitate risky investment strategies.

iii) They had obligation to employ individualized investment strategies in accordance with the investment profile of each client, pursuant to Know Your Client principles and IIROC Regulations. They held themselves out to their clients to this effect and yet negligently or intentionally failed in the performance of this obligation;

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> iv) They negligently or intentionally failed to warn their clients of the risks of a particular investment strategy and an obligation to refrain from pursuit of strategies that were unacceptably risky given the investment objectives and risk tolerances of their clients;
>
> v) They negligently or intentionally failed to refrain from incurring margin debt without their client's specific knowledge or consent;
>
> vi) They knew or ought to have known of the financial circumstances and demographics associated with their clients, many of whom were nearing retirement and/or were retired and, as such, ought to have known that the Plaintiffs were not appropriate purchasers of high-risk margin accounts.

[16] I would also note the amendments made to para. 645 of the Statement of Claim in 2021, under the heading "Duty of Care", Mary Lyn from subpara. (a):

> 645. The Plaintiffs plead that the Defendants had a sufficiently close and direct relationship to each of them to give rise to a duty of care based on the following:
>
> (a) The Plaintiffs were clients of the Defendant High Tide, under the instruction of Defendants Fredrick ~~Saturley~~, and Adrian ~~Saturley~~, ~~and Mary Lyn Saturley~~;

[17] This left the only allegation against Mary Lyn under the heading "Duty of Care" in sub-para. 645(f):

> (f) The Defendants High Tide, Fredrick ~~Saturley~~, Adrian ~~Saturley~~, and Mary Lyn ~~Saturley~~ made representations to the Plaintiffs for the purpose of obtaining their assets for suitable investments.

[18] In paras. 91 and 92 of the Pleading, the Plaintiffs allege:

> 91. Between the initial demand for repayment on NBIN's behalf and March 13th, Fredrick ~~Saturley~~, Adrian ~~Saturley~~ and on several occasions Mary Lyn ~~Saturley~~ both passively and actively encouraged High Tide's clients and NBIN to carry on as though there were no problem.
>
> 92. Specifics of this deceit will be pleaded with reference to the clients who were deceived, but the Plaintiffs all allege that High Tide and the Saturley family deliberately misled clients to whom they owed a duty of honesty, and the deceit was motivated by a desire to materially gain from the deception.

[19] With respect, at best, the allegations in paras. 91 and 645(f) are mere pleas of wrongdoing. One would expect to find somewhere in the Statement of Claim, as promised, allegations of fact to support the allegation that "on several occasions Mary Lyn both passively and actively encouraged" the Plaintiffs. On the issue of a duty of care in negligence, one would expect to read of past communications from Mary Lyn related to investment advice or allegations of statements from Fredrick or Adrian to the Plaintiffs that the Plaintiffs should accept advice from Mary Lyn on behalf of them and High Tide. This would provide the necessary factual basis for an allegation of a duty of care on Mary Lyn. There are no such allegations.

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Negligence and Negligent Misrepresentation

[20] The first of the core requirements to establish a claim in negligence or negligent misrepresentation is that the defendant owed the plaintiff a duty of care. If no duty of care exists, no claim in negligence (or negligent misrepresentation) can succeed.

[21] In *Tri-County Regional School Board v. 3021386 Nova Scotia Limited*, 2021 NSCA 4, Justice Hamilton, for the Court stated the law as follows:

> [25] The Supreme Court of Canada has consistently indicated the existence of a duty of care is determined in the same way for claims in both negligence and negligent misrepresentation. For example, in *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 ("*Hercules*") the Court states:
>
>> 21 I see no reason in principle why the same approach should not be taken in the present case. Indeed, to create a "pocket" of negligent misrepresentation cases (to use Professor Stapleton's term) in which the existence of a duty of care is determined differently from other negligence cases would, in my view, be incorrect; see: Jane Stapleton, "Duty of Care and Economic Loss: a Wider Agenda" (1991), 107 L.Q. Rev. 249. This is not to say, of course, that negligent misrepresentation cases do not involve special considerations stemming from the fact that recovery is allowed for pure economic loss as opposed to physical damage. Rather, it is simply to posit that the same general framework ought to be used in approaching the duty of care question in both types of case. …

[22] This principle was adopted in both *Maple Leaf*, *supra*, at para. 60 and *Tri-County Regional School Board, supra,* at para. 26:

> [26] The actual test in Canada for determining whether a *prima facie* duty of care exists has developed over the years. It has moved from the two-part test enunciated by Lord Wilberforce in *Anns v. Merton London Borough Council*

("Anns"), [1978] A.C. 728 (H.L.), at pp. 751–52, where the first step focussed on foreseeability, to *Cooper v. Hobart*, 2001 SCC 79 ("*Cooper*"), with its shift to require "something more" than "mere foreseeability" (para. 42) at the first step—that "something more" being proximity. In *Cooper,* the Court said the following with respect to proximity:

> 32 On the first point, it seems clear that the word "proximity" in connection with negligence has from the outset and throughout its history been used to describe the type of relationship in which a duty of care to guard against foreseeable negligence may be imposed. "Proximity" is the term used to describe the "close and direct" relationship that Lord Atkin described as necessary to grounding a duty of care in *Donoghue v. Stevenson*, supra, at pp. 580-81:
>
>> Who then, in law, is my neighbour? The answer seems to be — persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called into question.
>>
>> …
>>
>> I think that this sufficiently states the truth if proximity be not confined to mere physical proximity, but be used, as I think it was intended, to extend to such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act. [Emphasis added.]
>
> 33 As this Court stated in *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 (S.C.C.) at para. 24, per La Forest J.:
>
>> The label "proximity", as it was used by Lord Wilberforce in *Anns*, supra, was clearly intended to connote that the circumstances of the relationship inhering between the plaintiff and the defendant are of such a nature that the defendant may be said to be under an obligation to be mindful of the plaintiff's legitimate interests in conducting his or her affairs. [Emphasis added.]
>
> 34 Defining the relationship may involve looking at expectations, representations, reliance, and the property or other interests involved. Essentially, these are factors that allow us to evaluate the closeness of the relationship between the plaintiff and the defendant and to determine whether it is just and fair having regard to that relationship to impose a duty of care in law upon the defendant. [Underlining in original; Bolding added]

[27] Later in *Livent, supra*, at para. 34, the Supreme Court of Canada found proximity was a distinct and more demanding hurdle than reasonable

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> foreseeability and that it should be considered before foreseeability because the proximity relationship informs the foreseeability analysis. Most recently in *Maple Leaf*, *supra*, the Court, not for the first time, stressed the importance of considering the contractual options available to parties in commercial transactions as part of the proximity inquiry at the first stage of determining whether there is a *prima facie* duty of care.

[23] The Supreme Court of Canada in *Deloitte & Touche v. Livent Inc.*, 2017 SCC 63, provided the following additional analysis on the issues of proximity and foreseeability, at paras. 34-36:

> 34 As we have already observed, however, reasonable foreseeability of injury is no longer the sole consideration at the first stage of the *Anns/Cooper* framework. Since *Cooper*, both reasonable foreseeability *and proximity* — the latter expressed in *Cooper* as a distinct and more demanding hurdle than reasonable foreseeability — must be proven in order to establish a *prima facie* duty of care. And, in cases of negligent misrepresentation or performance of a service, the proximate relationship — grounded in the defendant's undertaking and the plaintiff's reliance — informs the foreseeability inquiry. Meaning, the purpose underlying that undertaking and that corresponding reliance limits the type of injury which could be reasonably foreseen to result from the defendant's negligence.
>
> 35 As a matter of first principles, it must be borne in mind that an injury to the plaintiff in this sort of case flows from the fact that he or she detrimentally relied on the defendant's undertaking, whether it take the form of a representation or the performance of a service. It follows that an injury to the plaintiff will be reasonably foreseeable if (1) the defendant should have reasonably foreseen that the plaintiff would rely on his or her representation; and (2) such reliance would, in the particular circumstances of the case, be reasonable (*Hercules*, at para. 27). Both the reasonableness and the reasonable foreseeability of the plaintiff's reliance will be determined by the relationship of proximity between the parties; a plaintiff has a right to rely on a defendant to act with reasonable care for the particular purpose of the defendant's undertaking, and his or her reliance on the defendant for that purpose is therefore both reasonable and reasonably foreseeable. But a plaintiff has no right to rely on a defendant for any other purpose, because such reliance would fall outside the scope of the defendant's undertaking. As such, any consequent injury could not have been reasonably foreseeable.
>
> 36 We add this. Under the *Anns* test, the Court recognized that auditors may owe a *prima facie* duty of care to an innumerable number of parties on the basis of reasonable foreseeability alone (*Hercules*, at para. 32). We acknowledge that the *Anns/Cooper* framework, when applied to cases of negligent misrepresentation, will give rise to a far narrower scope of reasonably foreseeable injuries and, therefore, a narrower range of *prima facie* duties of care. This is no

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> indictment of the *Anns/Cooper* analysis. Rather, it was the very purpose and effect of this Court's instruction in *Cooper* that "something more" than mere foreseeability is required at the first stage of the *Anns/Cooper* framework. By requiring examination of the relationship between the parties as we have just discussed, *Cooper* gave Canadian courts a more complete array of legal tools to determine whether it is "just and fair" to impose a *prima facie* duty of care.

I again refer to the decision, at the time of amending the Statement of Claim, and in the paragraph of the Statement of Claim directed to the issue of duty of care, to remove the allegation that the Plaintiffs were clients of High Tide "under the direction of" Mary Lyn. Although it is not pleaded that she was, in fact, an employee of High Tide, taking from the pleadings as worded that she was an employee, not every employee of an investment company owes a duty of care to the company's clients with respect to investment advice. Put another way, there are no facts pleaded that suggest any basis for the Plaintiffs to reasonably expect to receive investment advice from Mary Lyn (*Livent*).

[24] Indeed, the Plaintiffs having turned their mind to adding to the allegations at para. 76 of the Amended Statement of Claim, decided not to allege that Mary Lyn owed a fiduciary duty to them:

> 76. It is pleaded that at all material times High Tide, Fredrick ~~Saturley~~ and Adrian ~~Saturley,~~ acting as agents for their clients in executing their investment strategy, owed their clients a fiduciary duty to put the clients' interest before their own, a duty to exercise the reasonable and proper care of a reasonably competent investment advisor, a duty to follow the instructions of their clients, and a duty to take care to fulfil the clients' investment objectives and strategies to the best of their ability.

[25] In analysing the relationship between Mary Lyn and the Plaintiffs based on the Amended Statement of Claim alone; assuming the allegations are true; and, examining the expectations, representations, reliance and the property or other interests involved, I find that the pleadings of fact are inadequate to establish a closeness of relationship such that it just and fair to impose a duty of care in law upon Mary Lyn. To borrow from the language in *Livent*, at para. 35: "Both the reasonableness and the reasonable foreseeability of the plaintiff's reliance will be determined by the relationship of proximity between the parties; a plaintiff has a right to rely on a defendant to act with reasonable care for the particular purpose of the defendant's undertaking, and his or her reliance on the defendant for that purpose is therefore both reasonable and reasonably foreseeable. But a plaintiff has no right to rely on a defendant for any other purpose, because such reliance would fall outside

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the scope of the defendant's undertaking. As such, any consequent injury could not have been reasonably foreseeable."

Fraud and Fraudulent Misrepresentation

[26] The elements of the civil tort of fraud or fraudulent misrepresentation were stated by the Supreme Court of Canada in *Bruno Appliance and Furniture Inc. v Hryniak*, 2014 SCC 8, at paras. 18-21:

> 18 The classic statement of the elements of civil fraud stems from an 1889 decision of the House of Lords, *Derry v. Peek* (1889), 14 App. Cas. 337, where Lord Herschell conducted a thorough review of the history of the tort of deceit and put forward the following three propositions, at p. 374:
>
> > First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false... . Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made.
>
> 19 This Court adopted Lord Herschell's formulation in *Parna v. G. & S. Properties Ltd.,* [1971] S.C.R. 306, adding that the false statement must "actually [induce the plaintiff] to act upon it" (p. 316, quoting *Anson on Contract*). Requiring the plaintiff to prove inducement is consistent with this Court's later recognition in *Snell v. Farrell*, [1990] 2 S.C.R. 311, at pp. 319-20, that tort law requires proof that "but for the tortious conduct of the defendant, the plaintiff would not have sustained the injury complained of".
>
> 20 Finally, this Court has recognized that proof of loss is also required. As Taschereau C.J. held in *Angers v. Mutual Reserve Fund Life Assn*. (1904), 35 S.C.R. 330, "fraud without damage gives ... no cause of action" (p. 340).
>
> 21 From this jurisprudential history, I summarize the following four elements of the tort of civil fraud: (1) a false representation made by the defendant; (2) some level of knowledge of the falsehood of the representation on the part of the defendant (whether through knowledge or recklessness); (3) the false representation caused the plaintiff to act; and (4) the plaintiff's actions resulted in a loss.
>
> [Emphasis added]

[27] The representations alleged in the pleadings to have been made by Mary Lyn are as follows:

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(a) *At para 53: "She represented to the clients of High Tide that she was an employee or agent of Hight Tide at all material times."*

There are no facts pleaded that this statement is false. There are no facts pleaded that this statement was made with some level of knowledge of the falsehood. There are no facts pleaded that this statement caused any plaintiff to act.

(b) *At para 91: "Mary Lyn both passively and actively encouraged High Tide's clients and NBIN to carry on as though there were no problem."*

As stated above, this is a mere claim of wrongdoing. There are no facts pleaded in para. 91 as to when or how Mary Lyn passively or actively encouraged any Plaintiff. The pleading says in para. 92 that "Specifics of this deceit will be pleaded with reference to the clients who were deceived". There are only three paragraphs referred to by the Plaintiffs as relating to communications between the Plaintiffs and Mary Lyn, as follows.

(c) *At para. 115: "On the morning of Monday March 16. 2020, the Amiraults received a phone call from Mary Lyn Saturley who told them not to transfer the funds as it was too late."*

This paragraph must be read in the context of paras. 113 and 114:

> 113. On Saturday March 14, 2020 the Amiraults received a call from Fredrick Saturley informing them that they were in margin call and that they would need to give High Tide and NBIN approximately $100,000 by open of markets Monday March 16, 2020 or they would be liquidated and lose all of their investments.
>
> 114. The Amiraults had a line of credit with [sic] allowed them to gather $75,000. Their plan was to liquidate their savings for the remaining amount.

There are no facts pleaded that the statement alleged in para. 115 is false. There are no facts pleaded that this statement was made with some level of knowledge of the falsehood. There are no facts pleaded that this statement caused the Amiraults to act.

(d) *At para. 241: "Later on, March 26, 2020 the Duffys received a phone call from Mary Lyn who told them that Fredrick would be calling them later that night. The Duffys told Marv Lyn that Adrian had answered their questions but to please have Fredrick call them the next day, he did not."*

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This is not in the nature of a representation. There are no facts pleaded that this statement is false. There are no facts pleaded that this statement was made with some level of knowledge of the falsehood. There are no facts pleaded that this statement caused the Duffys to act.

> *(e)* *At para. 333: "While in Adrian's office Khattar heard Fredrick speaking, raised and clearly aggregated, on the phone to Marv Lvnn [sic] telling her she needed to "hurry and pick [him] up, because [they] needed to move the money to the other bank". Fredrick left the office in a rush quickly after this phone call. Fredrick returned to the High Tide office approximately an hour later."*

This was not a representation made by Mary Lyn to anyone.

> *(f)* *At para. 337: "When Khattar arrived at the High Tide office she observed Mary Lyn leaving Fredrick's office. Mary Lyn said 'I can't do this again' Khattar responded saying 'you can, you have to help us'."*

This was not a representation made by Mary Lyn to Khattar. There are no facts pleaded that this statement is false. There are no facts pleaded that this statement was made with some level of knowledge of the falsehood. There are no facts pleaded that this statement caused Khattar or any plaintiff to act.

[28] To review, a statement of claim must plead a valid and recognizable cause of action and clearly set out the facts necessary to sustain that claim. With respect, the Amended Statement of Claim fails to plead sufficient material facts on the required elements for a claim of fraud.

Conclusion

[29] The Plaintiffs' Amended Statement of Claim is deficient in stating the required facts necessary to establish a cause of action against Mary Lyn Saturley in negligence, negligent misrepresentation, fraud, and/or fraudulent misrepresentation. As such, the motion for summary judgment on pleadings is allowed and the Amended Statement of Claim as against Mary Lyn only is set aside and the proceeding against her is dismissed.

[30] If the parties are unable to agree on costs, I will invite them to provide me with their respective submissions in writing on or before January 5, 2024.

[31] Order accordingly.

Norton, J.

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