CITATION: Darmar Farms Inc. v. Syngenta Canada Inc., et al., 2024 ONSC 5968
COURT FILE NO.: CV-15-2613
DATE: 20241028

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
DARMAR FARMS INC.	)	M. Peerless, M. Baer, for the Plaintiff
Plaintiff	)	
– and –	)	
SYNGENTA CANADA INC. and SYNGENTA AG	)	C. Zayid, S. Sugar, for the Defendants
Defendants	)	
	)	**HEARD:** January 15 and 16, 2024

JUSTICE H.A. RADY

REASONS FOR DECISION

Introduction

[1] This proceeding is a certified class action for the recovery of economic losses allegedly sustained by class members arising from what it says is the premature commercialization of genetically modified corn seed marketed by Syngenta Canada referred to variously as MIR-162 corn, Agrisure, Duracade or Viptera. The plaintiff, a commercial corn grower, alleges that the defendants undertook to Canadian corn producers that it would not release Agrisure into the North American market before receiving import approval from China. In addition, the plaintiff originally alleged that the defendants negligently misrepresented the timing and substance of its application for approval of Agrisure in Canada.

[2] The plaintiff alleges that North American corn prices fell when China rejected shipments of North American corn in 2013 and 2014, after it discovered some shipments from the United States contained Agrisure, a product it did not approve for import until December 2014. The plaintiff alleges that a glut in the domestic corn supply resulted, depressing the prices it could charge third parties for its non-Agrisure corn. It sustained an economic loss as a result.

[3] The claim has survived a Rule 21 motion and a contested certification motion. The defendants now move pursuant to Rule 20 seeking summary judgment dismissing the claim. They focus on the first certified common issue — whether the defendants owed the Class a duty of care. They submit that the plaintiff has failed to lead any evidence of a representation or undertaking by the defendants to Canadian corn growers that they would withhold sale of Agrisure in Canada until Chinese import approval was obtained or that Canadian corn growers relied on that undertaking or representation. As a result, they ask that the claim be dismissed on the basis that there is no evidence supporting a finding that the defendants owed the plaintiff a duty of care. Such a decision could result in the dismissal of the entire action.

Procedural History

[4] The plaintiff delivered its Statement of Claim in late 2015. The claim has been amended three times most recently in January 2021. The defendants delivered a Demand for Particulars following which a Statement of Defence was served in February 2021.

[5] On April 25, 2018, the defendants moved for an order pursuant to Rule 21 dismissing the claim on the basis that the defendants did not owe the plaintiff a duty of care. I granted the motion and dismissed the claim, concluding that it was plain and obvious the claim would not succeed on the duty of care issue: *Darmar Farms Inc. v. Syngenta Canada Inc.*, 2018 ONSC 7129.

[6] The plaintiff appealed to the Court of Appeal, which reversed my decision in part: *Darmar Farms Inc.*, 2019 ONCA 789. It upheld the dismissal of the claim for negligent misrepresentation and reinstated the claim for premature commercialization.

[7] In coming to its decision, the Court described the basis on which a relationship of proximity could be found.

> [76] …there are several factors that Darmar pleads that, under the *Anns/Cooper* test, as it has been applied in this court, arguably support a relationship of proximity:
>
> (a) *Syngenta gave an undertaking in response to concerns from industry associations.* The industry associations to which Syngenta belonged were allegedly formed for the purpose of protecting the public and participants in the corn market. Those industry associations had warned Syngenta of harm in the form of trade disruptions if a product were commercialized without appropriate steps toward global approvals. In response, Syngenta is alleged to have undertaken not to cause harm to the corn market by commercializing a product with MIR-162 without global approvals. It is not alleged that this undertaking was given for the limited purpose of inducing customers to buy Agrisure, but rather to respond to concerns of those interested in the protection of the public and corn market participants. Darmar alleges it relied on that undertaking, and alleges it had an expectation based on that undertaking that premature commercialization would not occur. Although a bare allegation of

reasonable reliance or expectations may qualify as a conclusory statement of fact, here the reliance and expectations are alleged to have arisen from a statement made in response to concerns from industry associations about the prospect of the very harm that is alleged to have occurred here. Some factual basis for the conclusions is therefore present. Reliance and expectations are important factors in a full proximity analysis: *Deloitte*, at para. 29.

(b) *The interconnectedness and interdependency of the corn market.* Syngenta is alleged to have known that upon commercialization its genetically modified product would impart its characteristics on all corn so that even corn not purchased from Syngenta would be vulnerable to be treated by export markets in the same way as Syngenta's products. Proximity is about the nature of the relationship between plaintiff and defendant. The alleged fact that Syngenta's product would inevitably commingle with all other producers' corn, including Darmar's, imparting traits that affect the markets in which it could be sold, and that Syngenta knew this, arguably put Syngenta in a relationship with Darmar, even if Darmar did not purchase Agrisure.

[8] Leave to appeal the Court of Appeal's decision to the Supreme Court of Canada was refused.

[9] The certification motion followed and now this one.

The Parties' Positions

[10] The defendants assured me that this motion was not a "do-over" but rather was motivated by a clarification in the law since the Rule 21 motion was heard by reason of the decision of the Supreme Court of Canada in *1688782 Ontario Inc. v. Maple Leaf Foods Inc.*, 2020 SCC 35. They also submit that the plaintiff has not met its evidentiary onus on a Rule 20 motion.

[11] The plaintiff submits that this motion is premature, that documentary and oral discovery has not taken place and the motion is a collateral attack on the Court of Appeal's decision.

The Claim

[12] The plaintiff amended its claim to track the Court of Appeal's reasoning on the Rule 21 decision. In respect of the claim for premature commercialization, the plaintiff particularizes it at para. 47 as follows:

(a) Prematurely commercializing Agrisure products on a widespread basis without reasonable or adequate safeguards;

(b) Releasing a product into the market without regulatory approval;

(c) Instituting a careless and ineffective stewardship program;

(d) Actively failing to provide assistance to stakeholders in the form of channeling and stewardship programs without which growers and non-growers could not reasonably avoid contamination and commingling;

(e) Failing to enforce or effectively monitor its stewardship program;

(f) Failing to refrain from actively misleading the Plaintiff and class members;

(g) Failing to warn the Plaintiff and class members;

(h) Manipulating the Plaintiff and class members and interfering with their personal rights;

(i) Not living up to a commitment to ensure MIR-162 corn would not appear in export shipments;

(j) Selling Agrisure Viptera and/or Agrisure Duracade products to thousands of farmers with knowledge that they lacked the mechanisms, experience, ability and/or competence to effectively isolate or channel those products in such a way as not to negatively impact exports and/or North America market value;

(k) Acting in a manner inconsistent with industry standards and the conduct of other biotechnology companies;

(l) Failing to adequately warn and instruct farmers on the dangers of the foreseeable reality of and economic consequences of contamination by MIR-162 and at least the substantial risk that growing Agrisure Viptera products would lead to the loss of the Chinese market;

(m) Distributing misleading information regarding the timing of China's approval of Agrisure Viptera and/or Agrisure Duracade;

(n) Breaching other duties of care to the Plaintiff and putative class members, details of which are known only to the Defendants; and

(o) Alternatively acting and failing to act with conscious disregard for the rights of others, including the Plaintiff and putative class.

The Parties' Evidence

[13] The defendants have filed the following material:

1. Expert Report of Gilles Gauthier, "whether there is or ought to be a duty or obligation on Canadian Manufacturers in the agricultural sector to obtain global import approvals prior to domestic commercialization and sale of domestically approved agricultural seed products, and the potential implications thereof."

2. Expert Opinion of Al Mussell respecting the nature of "risks for, and relationship between, the many participants and stakeholders in the corn market".

3. Affidavit of Dan Wright, the Head of Seeds at Syngenta Canada Inc.

[14] The plaintiff has filed the following materials:

1. Affidavit of Dale McFeeters, the founder and president of the plaintiff;

2. Affidavit of Sébastien Pouliot, an economic consultant, retained to provide an opinion with respect to the motion for summary judgment;

3. Affidavit of Brandon Schaufele, who was also retained to give his opinion respecting the motion; and

4. Affidavit of Gary Martin, president of the North American Export Grain Association, an industry trade association (NAEGA).

[15] The affiants were cross-examined and transcripts were filed.

[16] The parties and their experts seem to agree that the corn market is interconnected and interdependent. They also agree that the actions of participants in the markets can economically affect other market participants. The experts part company, however, with respect to whether it is possible to measure those economic effects. I do not propose to discuss the expert reports further because in my view, they cover ground already trod on the earlier motions and are unnecessary to the disposition of this motion.

[17] I focus rather on the evidence of Mr. Martin, which is directly relevant to whether a triable issue is raised that requires a trial.

[18] Mr. Martin has been the president and CEO of NAEGA since June 2000. He has also been the president of the International Grain Trade Coalition Association (IGTC). One of his responsibilities is to "… identify and respond to challenges to the global trade in agri-bulk commodities and their products". Mr. Martin has extensive experience in the agriculture industry and held positions in both the Bush and Clinton administrations.

[19] NAEGA is a not-for-profit trade association. Its mission is to "promote and sustain the development of commercial export in the North American grain industry". Its members include private and public corporations and farmer owned operations, and are exporters of a majority of North American grain and oilseeds in international markets.

[20] NAEGA has a Production Technology Committee which focuses on the accommodation of technologies used to produce seeds for food, feed and processing. It has developed policies to address the introduction and utilization of plant breeding technologies and to that end, it has a Crop Technology Policy.

[21] Mr. Martin summarizes its relevant provisions as follows:

(a) Until there is a comprehensive and harmonized global regulatory approval process that addresses key issues concerning the export trade of crop products derived from genetic modification, the "commercialization of genetically modified plants without prior approval by the governments in major international markets for such products should be avoided";

(b) Commercializing crops derived from GMO products without prior regulatory approval from governments can disrupt the trade and adversely impact the entire value chain; and

(c) The grain trade requires transparency with respect to the development and commercialization of GMO products. Developers, such as Syngenta, bear the responsibility to "to provide accurate, timely and authoritative information, as well as to identify and mitigate any risks associated with the marketability and consumer acceptance of such traits to avert trade disruption".

[22] Mr. Martin continues by describing the Excellence Through Stewardship program (ETS), which is said to promote policies and provide guidance and education to developers of biotechnology derived seeds through responsible stewardship practices. Industry heavyweights such as Monsanto, DuPont and Dow had committed to such stewardship programs, as did Syngenta.

[23] ETS has developed a best practices guide for the launch of biotechnology derived plant products. Mr. Martin attaches a copy of the guide to his affidavit. Its introduction reads as follows:

> Organizations that develop and market biotechnology-derived plant products should consider policies for product launch stewardship as well as appropriate processes and plans that manage the commercialization activities. When carefully thought out, those steps will help an organization initiate actions that promote the responsible introduction of new products, minimize trade disruptions and facilitate the availability of crops and products with the appropriate function and composition for intended uses. The results of the planning will facilitate continued global adoption of plant biotechnology-derived products, and bring additional benefits and value to the marketplace.
>
> The *Guide for Product Launch Stewardship* provides guidance to an organization in its development and implementation of the policy and related activities recommended above for biotechnology-derived plant products, including commodity and specialty crops and, where applicable, consideration of their derivative products and by-products. For example, an organization may choose to implement product launch stewardship activities that are designed to direct biotechnology-derived plant products and crops either to or away from specific markets.

> Depending on the complexity of the organization, the product launch stewardship policy and related activities may be "stand-alone" elements or may be incorporated into the company's broader product-stewardship program.

[24] Mr. Martin reiterates that comingling of different varieties of corn occurs at various stages of production, marking and sale. Consequently, when a “genetic event” is introduced, it can be found in present and future consignments of corn. This in turn can have a significant impact on industry stakeholders – if, for example, an unapproved trait is introduced into the production chain.

[25] In view of the risk posed by unapproved GMO products finding its way into the supply chain, NAEGA engages with market leaders and provides information and policies important to the trade information.

[26] Importantly, Mr. Martin deposes that industry associations had warned Syngenta about the risks involved in commercializing GMO products. He says:

> 21. In 2007, prior to the release of Viptera and Duracade, Syngenta had been warned when it planned to commercialize MIR-604 (“Agrisure RW”) prior to receiving regulatory approvals in various key export markets (hereinafter referred to as the “Agrisure RW Controversy”).
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> 22. The risks associated with planting of seeds that contain or have been produced with unapproved genetic modifications are well-known in the industry. At the time Syngenta planned to release Agrisure RW, I had been president and CEO of NAEGA for approximately 7 years. At the time, myself, along with various industry stakeholders, were increasingly concerned by Syngenta’s plans to commercialize Agrisure R.W. without first obtaining acceptance in import markets.
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> 23. On behalf of NAEGA, I, along with Kendell W. Keith, president of the U.S. National Grain and Feed Association (“NGFA”), an organization of which Syngenta is a member, issued a joint statement warning Syngenta of its “ill-conceived plan” to provide for the planting of seeds that contain or have been produced with Agrisure RW without prior approval for importation. Attached hereto and marked as Exhibit “D” is a copy of the joint statement issued in Farm World on April 25, 2007.

[27] IGTC also warned Syngenta about its plans to launch Agrisure before importing countries had given regulatory approvals. It voiced concern about the exposure of “downstream members” to significant liability and urged Syngenta to reverse its decision. NAEGA echoed those concerns. Although by 2010 the GMA seed had received domestic approval, there was industry concern about commercializing it without approval from key importing markets which it is said included China.

[28] The following paragraphs of Mr. Martin’s are reproduced in their entirety because of their significance to the analysis that follows:

26. Consequently, I believe that when Syngenta commercialized Viptera in 2011, Syngenta knew that it was highly probable that Viptera corn would enter North American export channels and there was the potential for China to deploy its zero tolerance policy on imports. I also believe that Syngenta was aware of the fact that China had a strict zero-tolerance policy with respect to unapproved genetic traits in imported crops, and that the detection of Viptera in imports would likely lead to a rejection of corn at import.

27. I, on behalf of NAEGA, raised these concerns and warned Syngenta of the risks associated with commercialization as early as August of 2010 during an industry meeting organized by the NGFA. In response, Syngenta representatives, stated that their intention to commercialize Viptera in 2011 remained the same. The details of this meeting were later publicized in NGFA's newsletter dated July 14, 2011. Attached hereto and marked as **Exhibit "F"** is a copy of the NGFA newsletter dated July 14, 2011. NGFA similarly raised this same issue during their Biotechnology Committee meeting in or around March of 2011, as well as during a subsequent convention in or around June of 2011.

28. Once it was clear that Syngenta was not taking our warnings seriously, both NAEGA and NGFA released a joint statement in or around August 2011. Attached hereto and marked as **Exhibit "G"** is a copy of the joint statement dated August 26, 2011.

29. The joint statement stated the following:

> "The grain handling and export industry have communicated consistently, clearly and in good faith with biotechnology providers and seed companies about the importance of biotech-enhanced events in commodity crops receiving regulatory approvals or authorizations - prior to commercialization - in key export markets where foreign governments have functioning regulatory systems that approve biotech-enhanced traits. Putting the Chinese and other markets at risk with such aggressive commercialization of biotech-enhanced events is not in the best interest of U.S. agriculture or the U.S. economy."

30. Despite its warnings from industry associations, Syngenta launched Viptera in or around 2011 without acceptance in China. At the time, NAEGA had made Syngenta fully aware of our evaluation of the risks involved in commercializing Viptera and its potential to jeopardize the North American corn market.

31. On or about August 9, 2013, I corresponded via e-mail with Angus Kelly, who, at the time was Syngenta' s Senior Advisor of the European Union and Public Affairs, to inquire about the status of the MIR 162 genetic trait in the European Union and China. Mr. Kelly responded that while MIR 162 genetic trait was accepted in the European Union in 2012, it still hadn't been accepted in China, which was, according to Mr. Kelly, "a real mess". Attached hereto and marked as

Exhibit "H" is a copy of the email correspondence between myself and Angus Kelly dated August 9, 2013.

32. As was expected and expressly warned about by various stakeholders, China took action to prevent imports of corn from North America. This action was announced in or around November of 2013.

33. In or around December 2013, myself, along with other NAEGA representatives, traveled to China to meet with representatives of the General Administration of Quality Supervision, Inspection and Quarantine **("AQSIQ")** to discuss China's rejection of Viptera. During this meeting, a representative of AQSIQ informed us that Syngenta's application to approve Viptera was not yet complete and contained two deficiencies.

34. On or about December 17, 2013, myself and other NAEGA representatives met with Syngenta China to inquire about the deficiencies in the Viptera application. Pierre Cohadon, the president of Syngenta China at the time, told me that we "weren't supposed to know that", and that he would commit to providing NAEGA with an answer to this inquiry. It was during this trip to China that an industry colleague, in the United States, informed me, which I verily believe, that Syngenta was also planning to commercialize Duracade ahead of its acceptance in China.

35. In or around February 2014, a Syngenta representative confirmed in a subsequent meeting with myself and other NAEGA representatives that Syngenta would be completing its application for imports of Viptera in China.

36. In response to China's rejections of consignments, on or about January 23, 2014, NAEGA and the NGFA released a joint statement indicating that a letter had been sent to Syngenta urging the immediate suspension of Viptera and Duracade. Attached hereto and marked as **Exhibit "I"** is a copy of the joint statement issued by NAEGA and the NGFA on January 23, 2014.

37. The joint statement further stated that:

(a) Syngenta's approach to the stewardship of Viptera had NAEGA and NGFA "gravely concerned about the serious economic harm to exporters, grain handlers and, ultimately, agricultural producers - as well as the United States' reputation", with those same concerns having transcended to Syngenta' s plans to launch Duracade;

(b) The adverse consequences resulting from Syngenta's approach to commercialization of biotechnology-enhanced seeds prior to regulatory approvals include "reducing the value and demand for the U.S. farmers' products, preventing foreign consumer access to much-needed supplies, shutting off or increasing the cost of U.S. producers' access to some export

> markets for their crops, exposing exporting companies to financial losses because of cargo rejections and contract cancellations, and ultimately diminishing the United States' reputation as a reliable, often-preferred supplier of grains, oilseeds and grain products in world markets", as well as has a negative impact on "U.S. corn and other grain value chains"; and
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> (c) U.S. farmers, as well as the commercial grain handling and export industry, depend heavily upon the exercise of corporate responsibility by biotechnology providers with respect to the timing of product launch and commercialization.

Motions for Summary Judgment

[29] The principles governing Rule 20 are well established. Given their importance to the disposition of this motion, I set out my appreciation of those principles here.

[30] Rule 20.04(2)(a) of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194 provides that "[t]he court shall grant summary judgment if the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence."

[31] Rule 20.04(2.1) lists the court's powers on a motion for summary judgment:

> In determining under clause (2)(a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:
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> 1. Weighing the evidence.
> 2. Evaluating the credibility of a deponent.
> 3. Drawing any reasonable inference from the evidence.

[32] In *Hryniak v. Mauldin*, 2014 SCC 7, the Supreme Court of Canada had occasion to outline at para. 66 a two-part framework to guide judges hearing motions for summary judgment:

> On a motion for summary judgment under Rule 20.04, the judge should first determine if there is a genuine issue requiring trial based only on the evidence before her, without using the new fact-finding powers. There will be no genuine issue requiring a trial if the summary judgment process provides her with the evidence required to fairly and justly adjudicate the dispute and is a timely, affordable and proportionate procedure, under Rule 20.04(2)(a). If there appears to be a genuine issue requiring a trial, she should then determine if the need for a trial can be avoided by using the new powers under Rules 20.04(2.1) and (2.2). She may, at her discretion, use those powers, provided that their use is not against the interest of justice. Their use will not be against the interest of justice if they

> will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole.

[33] However, even with these expanded powers, summary judgment is appropriate only if the material filed on the motion "gives the judge confidence that she can find the necessary facts and apply the relevant legal principles so as to resolve the dispute", *Hryniak*, at para. 50.

[34] A plaintiff or defendant bringing a motion for summary judgment has the initial onus of proving that there is no genuine issue for trial and must file some affidavit evidence to support that position. See, for example, *Sanzone v. Schechter,* 2016 ONCA 566, at paras. 30-32, confirming the initial evidentiary obligation borne by the moving party (in that case the defendant) on a summary judgment motion:

> First, the evidentiary burden on a moving party defendant on a motion for summary judgment is that set out in rule 20.01(3) – "a defendant may…move with supporting affidavit material or other evidence." As explained in *Connerty*, at para. 9, only after the moving party defendant has discharged its evidentiary burden or proving there is no genuine issue requiring a trial for its resolution does the burden shift to the responding party to prove that its claim has a real chance of success.

[35] If the moving party meets the evidentiary burden of producing evidence on which the court could conclude there is no genuine issue of material fact requiring a trial, the responding party must either refute or counter the moving party's evidence or risk a summary judgment.

[36] Consequently, it is now well settled that "both parties on a summary judgment motion have an obligation to put their best foot forward": *Mazza v. Ornge Corporate Services Inc.*, 2016 ONCA 753, at para. 9. Given the onus placed on the moving party to provide supporting affidavit or other evidence under Rule 20.01, "it is not just the responding party who has an obligation to 'lead trump or risk losing'": See *Ipex Inc. v. Lubrizol Advanced Materials Canada*, 2015 ONSC 6580, at para. 28.

[37] In order to resist a motion for summary judgment, the responding party must put forward some evidence to show that there is a genuine issue requiring a trial. A responding party may not rest on mere allegations in its pleadings, but must set out – in affidavit material or other evidence – specific facts establishing a genuine issue requiring a trial.

[38] The motion judge is entitled to assume that the record contains all of the evidence that would be introduced by both parties at trial. A summary judgment motion cannot be defeated by vague references to what may be adduced if the matter is allowed to proceed to trial: *Dawson v. Rexcraft Storage and Warehouse Inc.* (1998), 111 O.A.C. 201, at para. 16; *Connerty v. Coles*, 2012 ONSC 5218, at para. 9; *Tropper v. RBC Life Insurance Company*, 2013 ONSC 2135, at para. 13.

[39] This last direction is not immutable, however. There may be circumstances where to grant summary judgment would work an unfairness to the responding party.

[40] In the Court of Appeal's decision in *Hryniak's* companion appeal, reported as *Combined Air Mechanical Services Inc. v. Flesch*, 2011 ONCA 764, the Court observed as follows:

> [56] By adopting the full appreciation test, we continue to recognize the established principles regarding the evidentiary obligations on a summary judgment motion. The Supreme Court of Canada addressed this point in *Lameman*, at para. 11, where the court cited Sharpe J.'s reasons in *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423, [1996] O.J. No. 1568 (Gen. Div.), at p. 434 O.R., in support of the proposition that "[e]ach side must 'put its best foot forward' with respect to the existence or non- existence of material issues to be tried". This obligation continues to apply under the amended Rule 20. On a motion for summary judgment, a party is not "entitled to sit back and rely on the possibility that more favourable facts may develop at trial": *Transamerica*, at p. 434 O.R.
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> [57] However, we add an important caveat to the "best foot forward" principle in cases where a motion for summary judgment is brought early in the litigation process. It will not be in the interest of justice to exercise rule 20.04(2.1) powers in cases where the nature and complexity of the issues demand that the normal process of production of documents and oral discovery be completed before a party is required to respond to a summary judgment motion. In such a case, forcing a responding party to build a record through affidavits and cross-examinations will only anticipate and replicate what should happen in a more orderly and efficient way through the usual discovery process.
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> [58] Moreover, the record built through affidavits and cross- examinations at an early stage may offer a less complete picture of the case than the responding party could present at trial. As we point out below, at para. 68, counsel have an obligation to ensure that they are adopting an appropriate litigation strategy. A party faced with a premature or inappropriate summary judgment motion should have the option of moving to stay or dismiss the motion where the most efficient means of developing a record capable of satisfying the full appreciation test is to proceed through the normal route of discovery. This option is available by way of a motion for directions pursuant to rules 1.04(1), (1.1), (2) and 1.05.

[41] I see nothing in the Supreme Court's decision on appeal that disapproves of the Court of Appeal's caution.

Analysis

[42] I have concluded that the motion should be dismissed for two reasons. First, it premature. Second, there is some evidence that raises a genuine issue about aspects of the proximity analysis.

[43] With respect to the first conclusion, there has been no documentary or oral discovery. I pause here to acknowledge that there have been extensive cross-examinations, but their purpose is entirely different from the discovery process.

[44] The caselaw under Rule 39.02 makes it clear that a cross-examination is narrower than an examination for discovery and is limited or constrained by the contents of the affidavit on which the examination is conducted. It is no substitute for examination for discovery or document production.

[45] In contrast, discoveries are aimed at securing admissions and understanding the case to be met. The test for production and questioning is relevance: Rules 30 and 31.

[46] I recognize that this claim has been in existence almost a decade. Nevertheless, it is still in its early stages, there having been no documentary or oral discovery. This is not uncommon in class action litigation, in my experience. I acknowledge the defendants' assurance that they have produced any documents that are relevant to the motion. However, with respect, the plaintiff is entitled to test that assertion through the documentary disclosure process mandated by the Rules. Further, the affiant produced by the defendants for cross-examination, Mr. Wright, was not with Syngenta Canada Inc. until 2018 and well after the events giving rise to the claim.

[47] My concern is that unfairness may result if a decision were made at this stage of the proceedings, in the absence of a fuller evidentiary record that will undoubtedly be available after discovery. This squares with the Supreme Court's *caveat* in *Hryniak* and is echoed by Justice Lauwers' caution in *Baywood Partnership v. Haditaghi*, 2014 ONCA 450, at para. 44 that care must have been taken "by the motion judge to ensure that decontextualized affidavit and transcript evidence does not become the means by which substantive unfairness enters, in a way that would not likely occur in a full trial where the trial judge sees and hears all".

[48] I am also satisfied that even on the limited information available, there is a genuine issue for trial about whether a duty of care may arise even in the absence of an explicit undertaking. In my view, and in light of the Court of Appeal's reasoning on the Rule 21 appeal, the plaintiff's failure to adduce evidence that it relied on an undertaking is not fatal, at least at this pre-discovery stage of the proceeding.

[49] The parties agree that this case is not about relational economic loss where the loss is caused by physical damage arising from the relationship. This is not a defective or dangerous product case. Rather, the loss is said to flow from market destruction caused by the premature release of Agrisure into the market. In this way, the case is similar to *Perre v. Apand Pty Ltd.*, [1999] H.C.A. 36 and *Sauer v. Canada (Attorney General)*, 2007 ONCA 454.

[50] In order to frame my reasoning, I return to Justice Zarnett's analysis in the Rule 21 appeal decision. He began at para. 74:

> The claim for premature commercialization requires the establishment of a duty of care that is somewhat different than the duty that would support its misrepresentation claims. Darmar characterizes the duty it contends for as "a duty

> of reasonable care with respect to the timing, manner, and scope of Syngenta's commercialization of its Viptera and Duracade products", adopting that description from the U.S. decision.

[51] He referred to the analysis in the parallel U.S. litigation in the following passage:

> [75] The U.S. decision held that the assertion of such a duty passed the test at a pleadings stage of a claim that was "plausible" and that rose above a "speculative level": at p. 1187 F. Supp. 3d. Darmar concedes that the law the U.S. court applied is not identical to Canadian law but argues that, especially as it concerns a novel claim at the pleading stage, the decision of the U.S. court is instructive. I agree that some guidance can be gleaned from the U.S. decision. Although the U.S. court did not precisely apply the *Anns/Cooper* test, what it did apply bears some similarity to it. It cited as relevant factors, among others, the foreseeability of injury by Syngenta, and the existence of an interconnected market that gave rise to expectations among growers and sellers that they would act at least in part for the mutual benefit of all: at p. 1189. The U.S. court was not persuaded that policy considerations precluded the recognition of a duty: at p. 1189. (emphasis is mine)

[52] He spoke of several factors that could arguably support a relationship of proximity. As already noted, he identified two: an undertaking given to respond to industry concerns and the interconnectedness and interdependency of the market (para. 76).

[53] I do not read the decision as setting out an exhaustive list of those factors that might support the finding of a duty of care. It is important to remember that the claim for premature commercialization is novel and its contours have not yet been explored, and particularly with the benefit of a more complete evidentiary record.

[54] The Statement of Claim sets out a number of other factors that may well support the finding of a duty of care, for example, by failing to enforce or monitor its stewardship plan.

[55] The Court cited *Sauer* for the following proposition:

> [77] In *Sauer*, the claim alleged that a manufacturer, who supplied seed contaminated with "mad cow disease" to an Alberta farmer resulting in the closing of foreign markets to all Canadian cattle and beef products, owed a duty of care to an Ontario farmer who had not purchased the defendant's feed. This court upheld a decision allowing that claim to proceed.
>
> [78] Goudge J.A. noted that the relationship between, on the one hand, a defendant manufacturer of feed, and on the other, the plaintiff Ontario farmer who did not purchase the defendant's feed, fell outside of any previously recognized category of relationship in which proximity was established. But applying the *Anns/Cooper* test, he found it was not plain and obvious that proximity, and therefore a duty of care could not be established. The defendant and plaintiff were part of an "integrated" industry, the feed component was regulated nationally in

> the interests of the public and participants in the industry, and "most importantly" the economic effects of a single contaminated cow would be shared by all cattle farmers because foreign sales would be eliminated for all: at paras. 35-39. These factors are similar to what Darmar here alleges.

[56] Mr. Martin's evidence makes it clear that the industry was very concerned about Syngenta's plan to market Agrisure even without the necessary import approvals from China and other countries. The industry voiced to Syngenta its concern about the potential for negative market consequences in North America. Mr. Martin's evidence speaks primarily to the American market, but there seems no reason that it would not also apply to the Canadian market, given the interconnectedness of the two markets.

[57] The last paragraph of Mr. Martin's affidavit is particularly significant. He observes that the health of the grain handling and export industry is heavily reliant on "the exercise of corporate responsibility by biotechnology providers with respect to the timing of product launch and commercialization". One of the ways to promote corporate responsibility is through ETS.

[58] The ETS program does not create liability but does speak to industry expectations and may well bear on duty and standard of care issues and the shared expectation of shareholders that Syngenta would not act in a way that would cause harm to them. Whether that might ground a duty of care is a decision for another day.

[59] I acknowledge that the *Sauer* case went to trial and the claim was dismissed: *Flying E Ranche Ltd. v. Attorney General of Canada*, 2022 ONSC 601. The trial judge conducted an extensive analysis of the duty of care issue and concluded that the defendant did not owe the plaintiff a duty. His conclusions are summarized at paras. 16 and 17:

> 16. First, I find that the action is barred by s. 9 of the *CLPA.* Between 2003 and 2007 Canada provided financial assistance to the Class of close to $2 billion in specific BSE-related programs authorized under the *Farm Income Protection Act*, S.C. 1991, c. 22 ("*FIPA*"). Canada made cash payments to members of the Class which provided a form of compensation to them arising from the economic losses suffered as a result of the border closure in and following May 2003, which are the same losses for which damages are sought in this action.
>
> 17. Second, apply the "*Anns/Cooper"* test, I find that although damage to the Class was foreseeable by Canada (indeed, Canada was conscious of the potential harm BSE could cause), the statutory framework and the interactions between Canada and the Class do not create a relationship of proximity such that a duty of care should be recognized. The relevant statutes, in particular the *Animal Disease and Protection Act,* R.S.C. 1985, c. A-13 ("*ADPA*"), the *Health of Animals Act,* S.C. 1990, c. 21 ("*HAA*"), and the *Feeds Act*, R.S.C., 1985, c. F-9, ("*Feeds Act*"), have broad public purposes and do not create a duty of care between Canada and the cattle-producing industry. Nor was there a "special relationship" between Canada and the Class arising from interactions between them. At various points in the period of the relevant events in the 1990s Canada consulted, and had close contacts with the cattle farming industry, but in doing so it was engaging in its

> role as a responsible regulator acting the public interest under its broad statutory mandate. While many steps taken by Canada were directed at the cattle industry, those actions did not create a special relationship with members of the Class.

[60] The Court of Appeal upheld the decision earlier this year: *Flying E. Ranche*, 2024 ONCA 72. Its decision turned on the interpretation of s. 9 of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. c-50. The Court did not discuss whether the respondent owed the appellant a duty of care because s. 9 was dispositive. The Supreme Court of Canada recently refused leave to appeal.

[61] I am not persuaded that the Supreme Court's decision in the *Maple Leaf Foods* case has changed the landscape such that my earlier decision requires revisiting at this time albeit in the Rule 20 context. Indeed, much of the defendants' factum and argument mirrors those submitted at the Rule 21 motion.

[62] Therefore, for these reasons, the defendants' motion for summary judgment is dismissed.

[63] If the parties cannot agree on costs, I will receive written submissions not exceeding five pages within four weeks of the release of this decision.

"Justice H.A. Rady"
Justice H.A. Rady

Released: October 28, 2024

CITATION: Darmar Farms Inc. v. Syngenta Canada Inc., et al., 2024 ONSC 5968
COURT FILE NO.: CV-15-2613
DATE: 20241028

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

DARMAR FARMS INC.

-and-

SYNGENTA CANADA INC. and SYNGENTA AG

REASONS FOR DECISION

Justice H.A. Rady

Released: October 28, 2024