CITATION: TSCC Corporation No. 2123 v. Times Group Principals, 2018 ONSC 4799
COURT FILE NO.: CV-17-574475
DATE: 20180713

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Toronto Standard Condominium Corporation No. 2123, Plaintiff/Moving Party

AND:

Times Group Corporation, 1540340 Ontario Inc., Life Construction Inc., Saeid Aghaei aka Saeid B. Aghaei, Harold Cipin, Sharam Seradj, Mohamad Ghadaki aka Mohammad Ghadaki, aka Mohamad B. Ghadaki, aka Mohamed Ghadaki, Hashem Ghadaki, Ali Reza Mesgarzadeh aka Ali Reza Meskarzadeh, aka Ali Renza Meskarzadeh, aka Ali R. Mesgarzadeh, Fereydoon Darvish, Defendants/Responding Parties

Primo Mechanical Inc., Calogero Agozzino, Leo Agozzino, Amith-Cooper International Inc., Northgrave Architect Inc., Paul H. Northgrave, M.V. Shore Associates (1993) Limited, Chung-Wai Bill Chan aka C.W.B. Chan, aka Bill Chan, Brian Strachan, Sigmund Soudack & Associates Inc., Sigmund Soudack, The SPG Engineering Group Ltd., Pat Silano, Andrew Wall, Times Property Management Inc. and The City of Toronto
Defendants

BEFORE: **B.A. ALLEN J.**

COUNSEL: *Collin Holland,* for the Plaintiff

Jason P. Mangano, for the Defendants, Times Group Principals & Times Management Inc.

HEARD: July 5, 2018

ENDORSEMENT

BACKGROUND

[1] The six individual defendant principals ("the Times Principals") of Times Group Corporation, 1540340 Ontario Inc., Life Construction, and Times Property Management Inc. ("Times Group") bring this motion under Rule 21.01 (1)(b) for an order to strike out a claim on the grounds that it discloses no reasonable cause of action.

[2] The plaintiff, Toronto Standard Corporation No. 2123 ("the Plaintiff"), issued a claim against some 26 defendants, among them, the corporations that comprise Times Group and the Times Principals. The Plaintiff claims that Times Group and the Times Principals are liable for deficiencies in the construction of the plaintiff condominium building. Among the types of harm pleaded are: damage caused by a burst water pipe as a result of deficient plumbing; failures in fire sprinkler, mechanical, heating and sanitary drain pipe systems; damage to a gas line, to elevators, and to the lobby and garage due to a flood.

[3] The Times Principals made a Demand for Particulars requesting details of the specific claims the Plaintiff was making against them individually. The Times Principals were of the view that the Plaintiff failed to distinguish the claims as between Times Group and the individual principals. The Plaintiff responded to the Demand and issued an amended claim ("the Amended Claim") in February 2018. The Times Principals submit that the Amended Claim does not present much of an improvement over the original claim. It is the Plaintiff's view that the new claim does sufficiently particularize the allegations against the individual Times Principals.

[4] The Plaintiff's claim sounds in fraudulent or negligent misrepresentation, breach of fiduciary duty, breach of contract, breach of statutory duties and oppression. Times Group is comprised of the developer of the condominium, the vendor of the condo units and the previous property manager for the condominium.

[5] The Plaintiff specifically alleges against the Times Principals:

- **Breach of Statutory Duty**:
    - that the Times Principals breached statutory duties under the Building Code by failing to construct the building in accordance with the Building Code by cutting corners on costs and using inferior materials; and negligently and fraudulently misrepresenting to the Plaintiff and unit holders the state of construction of the building;
    - that the Times Principals have acted in a manner that is oppressive and that unfairly prejudices the Plaintiff and unit owners and they seek a remedy under the *Condominium Act, 1998*, S.O. 1998, c. 19, s. 135 and the *Ontario Business Corporations Act*, R.S.O. 1990, c. B. 16, s. 248 (the "*OBCA*").
- **Breach of Fiduciary Duty:**
    - that the Times Principals breached their fiduciary duties to the Plaintiff and unit owners due to the Plaintiff's vulnerability in having to rely on the representations and warranties of the Time Principals; that the Times Principals breached their fiduciary duties by among other things hiring unqualified and incompetent architects, engineers, consultants, contractors, trades and employees and by not constructing the building in accordance with the Building Code.

- **Breach of Contract**
    - that the Times Principals together with Times Group entered into agreements of purchase and sale with the purchasers of the units and made contractual representations and warranties that the building was constructed in a good workmanlike manner, free from deficiency and defect and in accordance with the specifications of the Building Code; that due to the construction issues the Times Principals are in breach of contract.
- **Tortious Misconduct**
    - that the Times Principals failed to identify and notify the Plaintiff and its unit owners as to the construction issues and therefore negligently or fraudulently misrepresented the condition of the building to the purchasers, inducing the future owners to purchase units.

THE LAW ON MOTIONS TO STRIKE PLEADINGS

General Principles

[6] The Times Principals submit that the Plaintiff has not sufficiently pleaded breach of contract, breach of fiduciary duties, negligence, fraud and oppression and breach of the Building Code against the Times Principals.

[7] The principles governing the striking of pleadings are well-known. Success on a motion to strike allows the affected party early in litigation to free themselves of claims against them that have no chance of success at trial and clears the courts of meritless actions.

[8] The basic principles are:

a) The threshold to sustain a pleading is not onerous.

b) No evidence is admissible on a motion to strike.

c) It is incumbent on the claimant to clearly plead the facts upon which it relies in making its claim.

d) A claimant is not permitted to rely on the possibility that new facts will turn up as the case progresses.

e) The statement of claim should not be struck out unless it is "plain and obvious" that the claim discloses no reasonable cause of action.

f) The allegations in the statement of claim are to be taken as true or capable of being proven unless they are patently ridiculous or incapable of proof.

g) The statement of claim is to be read generously with due allowance for drafting deficiencies.

h) The court should not at this stage of the proceedings dispose of matters of law that are not fully settled in jurisprudence.

[*Knight v. Imperial Tobacco Canada Ltd.*, 2011 SCC, at para. 22, (S.C.C.) and *Dylex Ltd. (Trustee of) v. Anderson* (2003), 63 O.R. 659, at para. 8, (Ont. S.C.J.); *Hunt v. Carey Canada Inc*., [1990] 2 S.C.R. 959, at p. 960, (S.C.C.)]

THE TIMES PRINCIPALS' POSITION

Pleadings on Liability of Principals

[9] The "plain and obvious test" has gone through much interpretation and judicial refinement as it is applied to many types of claims. Among those cases are those where courts have determined the appropriateness of striking pleadings in claims brought against corporations and their principals.

[10] The Times Principals assert that the allegations in the Amended Claim fail to plead specific facts that support findings of fraud, deceit, dishonesty or want of authority on the part of the individual Times Principals that would allow the corporate veil to be pierced. They cite the Ontario Court of Appeal in *ScotiaMcLeod Inc. v. Peoples' Jewellers Ltd.* which reviews the history of cases considering principal liability.

[11] The court in *ScotiaMcLeod* observed that absent an allegation of fraud, deceit or dishonesty, courts have rarely found principals liable for the actions of corporations. The cases are fact-driven. The central tenet expressed by courts in these cases is that an allegation against a corporation does not automatically advance a claim against individual principals.

[12] *ScotiaMcLeod* categorizes cases where the corporate veil was successfully pierced and liability found against the corporation's principals:

a) Cases involving piercing the corporate veil frequently involve transactions where the corporate structure was used as a sham from the outset or as an after-thought to a deal gone sour.

b) In actions claiming liability against principals for inducing breach of contract and where liability is sought against principals in insolvency actions, the facts giving rise to personal liability have been specifically pleaded in every case where liability is found.

c) Principals of corporations are protected from personal liability unless it can be shown that their actions are themselves tortious or exhibit a separate identity or interest from that of the corporation so as to make the act complained of their own.

d) The decided cases in which employees and officers of companies have been found personally liable for actions presumably carried out under a corporate name are

fact-specific. In the absence of findings of fraud, deceit, dishonesty or want of authority on the part of employees or officers, they are also rare.

e) Principals must perform actions, for example signing contracts on behalf of a corporation because a corporation is an inanimate entity. As a general matter, if a principal's role in undertaking that type of action is found wanting this does not mean that liability will automatically flow through the corporation to those who caused the corporation to take an action. There has to be some activity on the principal's part that takes them out of the role of the directing mind of the corporation.

[*ScotiaMcLeod Inc. v. Peoples' Jewellers Ltd.* (1995), 25 O.R. (3d) 481, at paras. 39 and 26, (Ont. C.A.)]

[13] The Times Principals point out that there is no allegation in the Amended Claim that Times Group is a sham corporation. No claim that the Times Principals demonstrated a separate identity or interest from the corporation so as to make the alleged conduct their own.

[14] The Times Principals further contend that there are no allegations that fall within the categories of cases cited by *ScotiaMcLeod*. In their view, there are no allegations of specific activities on the part of the Times Principals that take them out of the role of the directing minds of Times Group.

[15] The Times Principals submit, taking from the principles expressed in *ScotiaMcLeod*, that there must be a differentiation between the allegations made against the corporation and its principals. It is not sufficient to simply repeat the same facts against the corporation as against the principals.

[16] Courts have considered that issue. The Times Principals referred the court to the following case by this court. *ACI v. Aviva* addressed the question of the necessity to differentiate allegations levelled against the corporation from those against the principals. The court found pleadings related to an employee of a corporation were not pleaded in sufficient particularity to determine what role the employee played in the alleged wrong doing as distinct from the corporation: [*ACI v. Aviva Insurance Company of Canada*, 2014 ONSC (CanLII), at para. 10, (Ont. S.C.J.)].

[17] *ACI v. Aviva* cited cases from the British Columbia Court of Appeal and the Ontario Superior Court. The British Columbia Court of Appeal applying *ScotiaMcLeod* held:

> … that claims against the individual must be based on the breach of a duty of care that would support an action against the individual personally. The material facts that support that personal claim in tort must be specifically pleaded to establish a possible cause of action.

[18] The British Columbia Court went on to say:

> The further amended statement of claim does not set out material facts to support the commission of an independent tort. The proposed amendments simply introduce the individuals as directors or employees of their corporate entities and then allege that they owed the same duties, committed the same breaches, and caused the same damages as their companies. Nothing in the pleading indicates why the corporate veil should be pierced to find liability on the part of these four individuals.
>
> Nor did the owners provide any evidence of the roles played by the four individuals in the construction of the Metropolitan, except to say that Messrs. Morris, Tearle and Sterling appeared on a list of "contacts" for their respective companies.
>
> [*Strata Plan No. VIS3578 v. John A. Neilson Architects Inc*., 2010 BCCA 329 (CanLII), at paras. 72 and 73, (B.C.C.A.)]

[19] The Ontario Superior Court case cited by *ACI v. Aviva*, *Lobo v. Carleton*, also addressed the need to differentiate claims:

> I remain of the view that the allegations as pleaded against the individual Defendants do not give rise to personal liability. All Defendants are identified as employees of CU. The allegations made against each in pith and substance relate to decisions made within their ostensible authority as CU employees.
>
> **…**
>
> In my opinion, the amended pleading before me does little more than "window dress" the suggestion of a separate identity or interest of the named Defendants from that of CU. There is no allegation of fraud, deceit, dishonesty or true want of authority. The new allegations do not cross into the category of rare cases where personal liability would be found. These claims are, therefore, struck without leave to amend.
>
> [*Lobo v Carleton University*, 2012 ONSC 254 (CanLII), at para 32, (Ont. S.C.J.)]

[20] *ACI v. Aviva* added that the use of "and/or" in pleadings connecting the individual defendants to every claim made against the corporation is also nothing more than "window dressing": [*ACI v. Aviva*, at para 12].

[21] The Times Principals submit that simply adding pleadings that claim the corporation is the *alter ego* of the principals and the principals the *alter ego* of the corporation, and using "and/or" in a pleading is not sufficient.

[22] The Times Principals submit that the Amended Claim is deficient for reason of the undifferentiated allegations as between the claims against Times Group and the Times Principals.

The Pleadings in Breach of Statutory Obligations

[23] Regarding the statutory breaches alleged, the Times Principals submit the *OBCA* does not allow the Plaintiff to assert the oppression remedy.

[24] The oppression remedy as set out under s. 248 of the *OBCA* provides that a cause of action against directors of a corporation can be brought where the powers of the directors have been exercised in an oppressive or unfairly oppressive manner. The Times Principals assert that s. 248 applies to corporations with share capital and a condominium corporation is not such a corporation. By that submission, the Times Principals suggest a condominium corporation is not entitled to *apply for* the remedy. It is the Times Principal's view that there is therefore no cause of action against them: [*Kim v. Trump*, 2014 ONSC 212, at para. 46, (CanLII) (Ont. S.C.J.)].

[25] The *Kim v. Trump* case involves a law suit against various defendants including a condominium corporation. The court decided the oppression remedy cannot be brought *against* a condominium corporation. *Kim v. Trump* did not determine that a condominium corporation cannot seek the remedy against a share capital corporation. That is the argument the Plaintiff makes below.

[26] The oppression provision under s. 135 of the *Condominium Act* provides:

> **135. (1)** An owner, a corporation, a declarant or a mortgagee of a unit may make an application to the Superior Court of Justice for an order under this section.
>
> **(2)** On an application, if the court determines that the conduct of an owner, a corporation, a declarant or a mortgagee of a unit is or threatens to be oppressive or unfairly prejudicial to the applicant or unfairly disregards the interests of the applicant, it may make an order to rectify the matter.

[27] Courts have applied the principles developed in relation to s. 248 to s. 135 of the *Condominium Act*. The recent Supreme Court of Canada decision in *Wilson v Alharayeri* held a director or officer can only attract personal liability where: (a) the oppressive conduct is directly attributable to the director/officer because he or she is directly implicated in the oppression; and (b) the imposition of personal liability is fit in all the circumstances:

> Where directors have derived a personal benefit, in the form of either an immediate financial advantage or increased control of the corporation, a personal order will tend to be a fair one. Similarly, where directors have breached a personal duty they owe as directors or misused a corporate power, it may be fair to impose personal liability. Where a remedy against the corporation would unduly prejudice other security holders, this too may militate in favour of personal liability.
>
> [*Wilson v. Alharayeri*, [2017] 1 S.C.R. 1037, at paras, 46 – 47 and 49, (Ont. S.C.J.)]

[28] The Times Principals assert that the Plaintiff's pleadings do not demonstrate that the directors met the two criteria set down by the court in *Wilson v. Alharayeri* since there are no facts specifically pleaded that implicate the Times Principals in the oppressive conduct cited by the court. It would therefore not be fair in the circumstances to make personal orders against the Times Principals

The Pleadings in Fraud

[29] The Amended Claim pleads fraudulent misrepresentation as an alternative to negligent misrepresentation. The Times Principals submit that the Plaintiff did not plead fraud with sufficient particulars. The elements of fraudulent misrepresentation must be pleaded.

Pleadings from the Same Factual Foundation

[30] The Plaintiffs also raise allegations of breach of contract, negligent misrepresentation and breach of fiduciary duty. The Times Principals assert those pleadings, like the fraud allegation, emerge from the same factual foundation, that being that representations were made that "the property would be constructed in a good and workmanlike manner", but it was not. The pleadings list a number of deficiencies for which the Plaintiff alleges Times Group and the Times Principals are obligated to pay for.

[31] The Ontario Court of Appeal struck a claim for conspiracy against the directors of the corporate defendants that were based in the same underlying facts as pleaded against the corporations for breach of contract and breach of fiduciary duty. The Court held:

> Despite the best efforts of counsel for the appellant to persuade me to the contrary, there can be no doubt on the plain reading of the statement of claim that the appellant is attempting to convert its straightforward action against the respondent corporations for breach of contract and breach of fiduciary duty arising out of that contract into a personal action against the officers and directors of the respondent corporations. The factual basis for and the damages flowing from the breach of the joint venture agreement and the so-called conspiracy to injure are one and the same.
>
> [*Normart Management Limited v. West Hill Redevelopment Company Limited et al*. 1998 CarswellOnt. 251, [1998] O.J. No. 391, at para. 17, (Ont. C.A.)].

CONCLUSION ON TIMES PRINCPALS' POSITION

The Times Principals submit based on the principles they draw from the case law that the Plaintiff's pleadings against the Times Principals personally should be struck out without leave to amend.

THE PLAINTIFF'S POSITION

Starting Point of Plaintiff's Position

[32] The Plaintiff submits the pleadings on all causes of action are sufficiently pleaded. They encourage the court to give them the opportunity to amend the Amended Claim accordingly if the court finds the pleadings to be lacking in particularity. The Plaintiff asks the court to consider the principles that claims must be read generously and any inadequacies in the form of the allegations that are merely drafting deficiencies are to be accommodated: [*728654 Ontario Inc. v. Ontario*, 2005 CarswellOnt 4889, at para. 3, (Ont. C.A)].

[33] The Plaintiff refers the court to the oft-cited Supreme Court of Canada case, *London Drugs v. Kuehne*, for the proposition that when an employee/principal is performing the "very essence" of their contractual obligations the employee has a duty of care to customers whether it is regarded as "independent" or not. The Supreme Court in that case posited that there is no general rule in Canada that an employee acting in the course of their employment cannot be sued personally for breaching a duty of care to a customer whether one labels it "independent" or otherwise: [*London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, 1992 CanLII 41 (SCC), [1992] 3 S.C.R. 299 at para. 185 and 97, (S.C.C.) and also see *Sataur v. Starbucks Coffee Canada Inc*., 2017 ONCA 1017, at para. 4, (Ont. C. A.)].

[34] In the Times Principals' submission this supports the legitimacy of alleging liability against directors for wrongs they personally commit against clients or customers, in this case, the Plaintiff and unit owners.

[35] The Plaintiff expressed the view, supported by the Supreme Court of Canada in *Knight v. Imperial Tobacco* that facts supporting a pleading need not be proven before a claim is made. In the early stage of a motion to strike, the claim may contain unproven facts that nonetheless must be pleaded. Not having proof is no bar to pleading. The Supreme Court of Canada held:

> A claimant is not entitled to rely on the possibility that new facts might turn up as the case progresses. The claimant may not be in a position to prove the facts pleaded at the time of the motion. It may only hope to be able to prove them. But plead them they must. The facts pleaded are the firm basis upon which the possibility of success of the claim must be evaluated. If they are not pleaded, the exercise cannot be properly conducted.
>
> [*Knight v. Imperial Tobacco*, at para. 22]

The Propriety of Pleading "*Alter Ego*"

[36] Applying that principle from *Knight v. Imperial Tobacco* the Plaintiff submits there is no barrier to making allegations against the Times Principals. On the question of the *alter ego* pleadings, the Plaintiff finds legal justification for advancing such allegations in view of the relationships between principals and corporations.

[37] The Ontario Court General Division in *Osiris v. International* found sufficient facts were pleaded to substantiate the allegation that the controlling minds were the *alter egos* of the corporation. The court dismissed the motion to strike: [*Osiris Inc. v. International Edge*, 2009 CarswellOnt 5689, at paras. 34 and 36, (Ont. S.C.J.) and also see *739016 Ontario Ltd. v. 76 Gerrard Street East Inc.*, 1994 CarswellOnt. 333, at paras. 2 and 4, and 8 - 9, (Ont. Gen Div.)].

Pleadings on the Oppression Remedy

[38] The Plaintiff contends it has sufficiently pleaded allegations against the Times Principals, separate and apart from allegations against Times Group, to justify continuing the action against the Times Principals.

[39] The Plaintiff asserts that it has pleaded an independent actionable wrong of oppression which they alleged specifically and solely against the Times Principals. This is a wrong committed separate of the actions of Times Group.

[40] The Plaintiff rightly points out that the *OBCA* does not prohibit a condominium from bringing an application for an oppression remedy. What the legislation precludes is an oppression remedy being brought against a non-share capital corporation. A condominium is a non-share capital corporation. The Plaintiff is therefore entitled to bring an oppression application against the directors of the corporate defendants in the Times Group.

[41] True it is a separate actionable wrong against directors of a corporation but the question in this case is whether the Plaintiff has sufficiently pleaded specific allegations based on the elements of oppression against the individual directors personally so as sustain the claims against the Times Principals.

[42] Relying on the Supreme Court of Canada in *Wilson v Alharayeri* the Plaintiff submits that courts have full authority to make findings of liability under the *Condominium Act*. The Plaintiff also cites the recent Ontario Court of Appeal case in *Dewan v. Burdet*.

[43] The Court of Appeal discusses the Supreme Court's decision and points out that s. 135 of the *Condominium Act* grants the court broad discretion to make an order requiring a payment of compensation, though the provision does so without specifying when it would be appropriate to find a director personally liable. This, the appeal court instructs is where guidance from *Wilson v. Alharayeri* can be considered: [*Dewan v. Burdet*, 2018 ONCA 195, 2018 CarswellOnt 3047, at paras. 6 and 7, (Ont. C.A.)].

[44] The Plaintiff relies on the ruling in *Wilson v. Alharayeri* which held that the list of categories where a director can be found personally liable for oppression is not restricted to evidence of personal benefit, breaches of personal duty or misused corporate power. The court held that it is "not a closed list of factors to be slavishly applied" and "neither a personal benefit nor bad faith is a necessary condition in the personal liability equation": [*Wilson v. Alharayeri*, at para. 50].

[45] The Plaintiff submits that if it is the case that they have not pleaded facts with sufficient specificity as to the liability of the Times Principals for oppression, the pleadings should not be struck. The Plaintiffs should be allowed to amend as required.

Pleadings on Building Code Non-Compliance

[46] The Plaintiff acknowledges that the Building Code does provide for a specific cause of action against the Times Principals under the *Building Code Act, 1992*, S.O. 1992, c. 23, Schedule B. However, the Plaintiff submits that s. 36(2) extends liability against corporate offenders to: "every director or officer of a corporation who 'knowingly concurs in the furnishing of false information". This provision the Plaintiff asserts should be considered as a factor in determining liability arising from corporate violation of its obligations under the Building Code.

Pleadings in Breach of Fiduciary Duties

[47] The Plaintiff submits it has pleaded sufficient particulars on the nature of the relationship between the Times Principals and the unit owners. The Amended Claim in the Plaintiff's view sets out specific breaches of duties and asserts the fact of the vulnerability of the unit owners to the directors. The Plaintiff commends to the court an Ontario General Division case which found that a claim against an employer for breach of fiduciary duty was a novel cause of action. Citing the Supreme Court of Canada in *Hunt v. Carey Canada Inc.,* the court refused to strike the claim as raising no reasonable cause of action because the law on fiduciary duties was ever-evolving and undergoing refinement: [*Adams-Smith v. Christian Horizons*, 1997 CarswellOnt 3200, para. 2, (Ont. Gen. Div.)].

[48] The Plaintiff submits that on that basis the claim against the Times Principals for breach of fiduciary duty should not be struck.

Pleading in Breach of Contract

[49] The Plaintiff submits if the court assumes the allegations related to breach of contract are true the claim against the Times Principals must stand.

[50] The Plaintiff alleges it is sufficient to find a cause of action in breach of contract in their allegations that Times Group and the Times Principals entered into agreements of purchase and sale with the purchasers of the units and made representations and warranties that the building was constructed in a good and workmanlike manner, free from deficiency and defect, and in compliance with applicable specifications, the Building Code and by-laws.

[51] It follows in the Plaintiff's submission that if it is proven that the Times Principals made representations directly to the unit purchasers that are proven false the Times Principals are subject to being found liable in breach of contract.

Pleadings in Tortious Misconduct

[52] The Plaintiff alleges negligence generally and negligent or fraudulent misrepresentation. The Plaintiff submits that the Amended Claim makes specific allegations against the Times Principals that are separate from allegations against Times Group.

[53] The allegations are: that the Times Principals had specific knowledge of the use of inferior materials that were likely to fail, that the Times Principals gave authorizations and directions in relation to those misrepresentations and that the Times Principals knew or ought to have known that their choice to save money and cut corners in the construction of the building was contrary to specifications, the Building Code and sound construction practices.

[54] The Plaintiff commends to the court another case by the Ontario General Division in which the determination whether to strike pleadings in induce breach of contract focussed on "the extent to which [the directors] acted in the *bona fide* interests of the company as opposed to being actuated by considerations extraneous to that duty: [*Colonia Life Holdings Ltd. v. Fargreen Enterprises Ltd.* 1990 CarswellOnt. 850, at para. 22, (Ont. Gen. Div.)]

[55] The Plaintiff submits that the allegations in tortious misconduct are sufficient to ground allegations of lack of *bona fide* conduct and failure to pursue the good faith interests of Times Group and the pleadings ought not to be stuck.

ANALYSIS

Summary of Relevant Principles

[56] The determination of whether a pleading can stand or must be struck has to start with considering the foundational principles, primarily:

- The threshold to sustain a pleading is very low;
- The facts as pleaded in the claim must be assumed to be true;
- Assuming the facts are true, a pleading should not be struck unless it is plain and obvious and beyond a doubt that it discloses no reasonable cause of action;
- The claimant may not be able to prove the facts pleaded, but the facts must be pleaded as they are the basis for the possible success of the claim;
- If there is a chance the plaintiff might succeed the plaintiff should not be barred from trial;
- Neither the length, complexity of the issues, the novelty of the cause of action, nor the potential for a strong defence should prevent the plaintiff from proceeding with their case. These types of claims should normally be decided on a full factual record after trial;
- The assessment of the claim must be generous erring on the side of permitting a novel but arguable claim to proceed to trial;
- Any deficiencies in the form of pleading are to be accommodated;
- Leave to amend should only be refused in the "clearest cases" when it is plain and obvious that no tenable cause of action is possible on the alleged facts;
- Leave to amend will not be granted where there is no reason to suppose that the party could improve his or her case by an amendment.

[*Hunt v. Carey Canada Inc*.; *Knight v. Imperial Tobacco*; *728654 Ontario Inc. v. Ontario*; *Leek v. Vaidyanathan*, [2011] O.J. No. 200, at para. 3, (Ont. C.A.); *Mitchell v. Lewis*, [2016] O.J. No. 6286, at para. 21, (Ont. C.A.); *Miguna v. Ontario (Attorney Genera*l), [2005] O.J. 5346, at para. 22, (Ont. C.A.); *Fournier Leasing Co. v. Mercedes Benz Canada Inc*., [2012] O.J. No. 2184, at para. 46, (Ont. S.C.J.)]

[57] Additional principles come into play in cases where a claim is being advanced against a corporation and its directors/officers. The sustainability of the pleadings must be considered in

the context of the principles developed by courts deciding liability of corporate defendants as distinct from the personal liability of an individual director/officer:

- To establish liability the actions of principals of corporations must themselves be tortious or demonstrate a separate identity or interest from the corporation so as to make the impugned conduct their own;

- If a principal is undertaking the regular actions of a principal on behalf of a corporation and the action is found deficient, this does not mean that liability automatically flows through the corporation to the principal who caused the corporation to take the action;

- Where actions claim liability against principals for inducing breach of contract and where liability is sought against principals in insolvency actions, the facts giving rise to personal liability have been specifically pleaded in every case where liability is found;

- Cases where principals of corporations have been found personally liable for actions presumably carried out under a corporate name are fact-specific. In the absence of findings of fraud, deceit, dishonesty or want of authority on the part of employees or officers, they are also rare.

- Cases involving piercing the corporate veil frequently involve transactions where the corporate structure was used as a sham from the outset or as an after-thought to a deal gone sour;

- Bald or vague assertions of intentional tortious conduct are insufficient to sustain the pleading. The pleading of intentional torts must meet a strict standard of particularity, that is, they must be pleaded with "clarity and precision". There must be sufficient pleading of the necessary elements of a specific and separate tortious act.

- A claim in negligence can lie against a director/officer personally for breaching a duty of care if the director/officer himself or herself acted negligently towards the plaintiff;

- The plaintiff cannot establish liability of directors/officers by simply converting a straightforward action against the corporation, for breach of contract and breach of fiduciary duty arising out of that contract, into a personal action against the officers/directors of the corporation. To do this is to simply window-dress the separate identity or interest of the directors/officers;

- The claims against the corporate entity and the officers/directors must be sufficiently differentiated so as to make the claims against the principals independent. The use of

"and/or" in pleadings related to the individual defendants with every claim made against the corporation is also nothing more than window dressing.

- The court struck a claim for conspiracy against directors of a corporate defendant that were based in the same underlying facts as pleaded against the corporations for breach of contract and breach of fiduciary duty.

  [*ScotiaMcLeod Inc. v. Peoples' Jewellers*; *Normart Management Limited v. West Hill*; *Lobo v. Carleton University*; *ACI v. Aviva Insurance*; *Ceballos v. DCL International Inc*., 2018 ONCA 49 (CanLII) (Ont. C.A.)]

A Framework for Analysis

[58] Paul M. Perell and John W. Morden in their text, *The Law of Civil Procedure in Ontario*, 3rd ed. (Lexis Canada: 2017), at p. 615 point out that failure to establish a cause of action arises in two situations:

a) when allegations in the statement of claim do not come within a recognized cause of action; and

b) when the allegations in the statement of claim do not plead all the elements necessary for a recognized cause of action.

At p. 616, the authors provide a useful summary of appellate decisions on motions to strike for not disclosing a reasonable cause of action. They identify three categories of outcomes:

a) the appellate court concludes that it is not plain and obvious that the plaintiff will not succeed in establishing a cause of action at trial;

b) the appellate court concludes that there is a cause of action and the plaintiff may succeed at trial;

c) the appellate court concludes that it is plain and obvious the plaintiff has not disclosed a reasonable cause of action.

Application of Framework

Pleadings on Liability of Corporations and Principals

[59] I believe, except with the oppression claim, the court is faced with Perell and Morden's second category of failure to establish a reasonable cause of action, a claim that does not plead all the elements necessary for a recognized cause of action. Except for with the oppression claim, the Times Principals' motion fits under the third type of appellate case where it is plain and obvious the claim has not disclosed a reasonable cause of action against the individual principals.

[60] The Amended Claim for the most part fails to satisfy the general principles that govern the striking of pleadings and in particular the claim does not accord with the principles

developed in the context of claims made against corporations and their principals. I come to my conclusion in full recognition of the low threshold and the requirement to assume the facts as pleaded are true.

[61] I will start with my more general concerns in relation to the principles that apply to actions against corporations and their officers and directors.

[62] The central problem is that it appears that the Times Principals were engaged in the ordinary human functions officers/directors are authorized to do as principals that the corporate entity is incapable of as a mere "piece of legal machinery". The Times Principals may have been deficient in the conduct of their duties but unless their conduct takes them outside those duties to make their actions their own and not the actions of the corporation, personal liability does not arise. Quoting more of the passage cited earlier from *Scotia McLeod*:

> A corporation may be liable for contracts that its directors or officers have caused it to sign, or for representations those officers or directors have made in its name, but this is because a corporation can only operate through human agency, that is, through its so-called "directing mind". Considering that a corporation is an inanimate piece of legal machinery incapable of thought or action, the court can only determine its legal liability by assessing the conduct of those who caused the company to act in the way that it did. This does not mean, however, that if the actions of the directing minds are found wanting, that personal liability will flow through the corporation to those who caused it to act as it did. To hold the directors … personally liable, there must be some activity on their part that takes them out of the role of directing minds of the corporation. In this case, there are no such allegations.
>
> [*ScotiaMcLeod*, at para. 25]

[63] When the Times Principals on behalf of Times Group entered into purchase and sale contracts with unit owners, made warranties and representations, made decisions, gave directions and assurances on the construction and maintenance of the building and other matters, they were acting as the directing minds of the corporate entity. That is what directing minds do.

[64] Those are the ordinary functions of directors/officers. Assuming that the Times Principals fell short of their obligations as alleged by the Plaintiff, when they did this they were also acting as the directing minds of the corporation unless it be shown actions on the principals' part that took them beyond their roles as directors/officers into activities that expose a separate interest from the corporation.

[65] The Plaintiff has not particularized any actions by the Times Principals that show a separate personal interest. The facts pleaded in breach of contract, negligent and fraudulent misrepresentation, breach of fiduciary duties and oppression do not contain particulars of any acts committed by the Times Principals that are in themselves tortious or exhibit a separate identity: [*ScotiaMcLeod*, at para. 25]. What flows from this is that the alleged wrongs by the Times Principals as pleaded create liability for the corporation and not themselves.

[66] The practical effect of this is seen in the drafting of the pleadings. The pleadings do not particularize claims against the Times Principals that are distinct from those advanced against the corporation. Throughout the pleadings in the Amended Claim the conjunctive "and" is used when the same claims are made side by-side in relation to Times Group and the Times Principals.

[67] The claims added in the amended pleadings in relation to the Times Principals that correspond to the same claims against the corporation make up almost the entirety of the amendments to the original statement of claim. As this court in *ACI v. Aviva* and *Lobo v. Carleton* held there must be a distinction, a differentiation made between the claims against officers/directors and the corporation. To simply use a conjunctive or a disjunctive or both to extend liability to a principal is not sufficient to establish liability: [*ACI v. Aviva*, at para. 12 and *Lobo v. Carleton*, para. 32].

[68] Although referring to a case involving striking a pleading in conspiracy, I think the principle enunciated holds true when considering other types of claims. The court in *Normart v. Westhill* held a plaintiff cannot establish liability of directors/officers by simply converting a straightforward action against the corporation, for breach of contract and breach of fiduciary duty arising out of that contract, into a personal action against the officers/directors of the corporation: [*Normart v. Westhill*, at para. 17].

[69] In the same vein, the Amended Claim amendments add in references to the Times Principals being the *alter egos* of Times Group and Times Group being the *alter ego* of the Times Principals. That concept in the corporate context is typically used to refer to a situation where a corporation is considered the *alter ego* of its stockholders, directors, or officers when it is used merely for the transaction of their personal business for which they are looking for immunity from personal liability. Finding liability requires piercing the corporate veil.

[70] A simple allegation of *alter ego* without the particular facts that characterize that concept is not a sufficient pleading to establish the liability of principals. *ScotiaMcLeod* observed, when a corporate veil has been pierced the corporate structure has been used as a sham from the outset or was an afterthought to a deal gone sour: [*ScotiaMcLeod*, at para. 24].

[71] Nowhere in the pleadings do the Plaintiffs allege facts that support the *alter ego* concept. Those words are bare words that do not add to the claim of liability against the Times Principals. There are no facts that support the idea that Times Group was employed as a sham to advance personal interests of the principals separate from the corporation.

[72] Looking from the broader perspective of the principles that apply to pleadings in actions against corporations and their principals, I find the allegations in the Amended Claim do not satisfy the pleadings rules. The Plaintiff has not established separate causes of action personally against the Times Principals.

The Sufficiency of Specific Causes of Actions in Breach of Contract, Negligent and Fraudulent Misrepresentation and Breach of Fiduciary Duty

[73] The facts on which a plaintiff relies in making its claim must be clearly pleaded and must not rely on the possibility that facts will turn up later in the litigation: [*Hunt v. Carey*]. The Plaintiff makes claims in breach of contract, negligence or fraudulent misrepresentation, breach of fiduciary duty, breach of statutory obligations and oppression. I will deal with the claim in oppression separately for reasons I will explain later.

[74] As I found above, this case falls under the second category of cases Perell and Morten identify, those cases that fail to establish a reasonable cause of action. For the purpose of looking at the pleadings in the individual causes of action, I leave aside for the time being the broader principles that govern pleadings against corporations and their principals.

[75] A proper claim must allege the necessary elements of a cause of action: [*Dawson v. Rexcraft Storage and Warehouse Inc*., 1998 CanLII 4831, at para. 10, (Ont. C.A.)]. The material facts necessary to support a claim, on which a party intends to rely, must be pleaded: [Rule 25.06].

[76] The Plaintiff pleads the various causes of action but does not in a clear and organized fashion plead all of the necessary elements of the causes of action. The Amended Claim alleges actions by the Times Principals in relation to the various causes of action that are drawn from the same fact pattern which approach to pleading has been the subject matter of judicial caution: [*Normart v. Westhill*, at para. 17].

[77] Pleadings are intended to clearly and precisely define the question at issue, to give fair notice of the precise case to be met, the precise remedies sought and to assist the court in its investigation of the truth: [*National Trust Co. v. Furbacher*, [1994] O.J. No. 2385 (Ont. Gen. Div.)]. The alleged misrepresentations to the purchasers and prospective owners and directions and decisions with respect to the construction of the building are central facts in the claims in breach of contract, the tortious claims, breach of fiduciary duty and breach of statutory obligations. The allegations do not clearly plead the necessary elements, as summarized below, in relation to the allegations on each cause of action.

- Breach of Contract/Inducement: the defendant made a representation of a material fact as part of making a contract between the plaintiff and the defendant; the representation was false when it was made; the plaintiff would not have entered the contract if she had known the representation was false when it was made; the plaintiff suffered a loss by entering into the contract, and the plaintiff's loss benefited the defendant: [*Dickinson v Dodds* (1876), 2 Ch. D. 46; *B.G. Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1993] 1 S.C.R. 12 (S.C.C.)].

- Negligent misrepresentation: that the defendant owed the plaintiff a duty of care; that the defendant's behaviour breached the applicable standard of care; that the plaintiff sustained damage; and that the damage was caused by the defendant's breach: [*Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 (CanLII) (S.C.C.)].

- Fraudulent misrepresentation: false representation made by the defendant; some level of knowledge of the falsehood of the representation on the part of the defendant (whether through knowledge or recklessness); the false representation caused the plaintiff to act; and the plaintiff's actions resulted in a loss: [*Bruno Appliance and Furniture, Inc. v. Hryniak*, [2014] 1 SCR 126 (SC.C.)].

- Fiduciary duty: the fiduciary has the ability to exercise some discretion or power; the fiduciary can unilaterally exercise that power so as to affect the interests of the beneficiary; the beneficiary is in a position of vulnerability at the hands of the fiduciary: [*Lac Minerals Ltd. v. International Corona Resources* [1989] 2 S.C.R. 574 (S.C.C.)].

[78] The Plaintiff has failed to set down the elements of each cause of action and make a concise statement of the material facts relied on in making each of their claims.

[79] The rules on pleading intentional torts such as fraud are particularly strict. In a case before the Ontario Court of Appeal, a pleading in fraud was not allowed to stand, the court holding that "bald or vague assertions of intentional tortious conduct are insufficient to defeat a r. 21 motion." The pleading of intentional torts must meet a stringent standard of particularity, that is, they must be pleaded with "clarity and precision": [*Ceballos v. DCL International Inc*., 2018 ONCA 49 (CanLII), para. 12, (Ont. C.A.)].

[80] The Plaintiff's pleading in fraudulent misrepresentation is insufficient as being vague which is made especially vague because it is pleaded in the alternative with negligent misrepresentation, using the disjunctive "or".

[81] In addition to the Plaintiff failing to clearly and precisely plead the necessary elements and material facts of each of the causes of action, the Plaintiff has not made separate allegations against each of the six Times Principals.

[82] The Plaintiff makes blanket allegations against the Times Principals. The pleadings are written *en masse* not differentiating the particular allegations made against each of them. This does not allow the individual Times Principals to fairly appreciate the case against them to allow them to raise an effective defence. For this further reason, the allegations against the Times Principals are not adequately pleaded: [*Sperling v. Queen of Nanaimo Ship* 2014 BCSC 326 CanLII, at paras. 25 and 29, (B.S.S.C.)].

[83] Regarding the allegations on breach of the Building Code, the same principles apply although there is no distinct cause of action provided for under the *Building Code Act*. Nonetheless, the Plaintiff has not made separate allegations against each Times Principal in regard to their individual alleged violations of the Building Code.

Conclusion

For all the reasons cited, I find it plain and obvious the pleadings in the Amended Claim in breach of contract, negligent misrepresentation, fraudulent misrepresentation, breaches of obligations under the Building Code and breach of fiduciary duties do not raise a reasonable cause of action against the Times Principals and do not have a chance to succeed at trial. Those pleadings shall be struck.

The Oppression Remedy

[84] As noted earlier, s. 248 of the *OBCA*, through the oppression remedy, provides a mechanism which protects the interests of shareholders and other stakeholders against wrongful corporate conduct. Corporate stakeholders are provided statutory rights against corporations that are otherwise precluded as result of the common law principle that a corporation is a legal entity distinct from its shareholders which restricts shareholders from seeking relief in respect of wrongs done to the corporation.

[85] The oppression remedy is a personal remedy available where a corporation, a board or a corporation's affiliate acts in a manner oppressive or unfairly prejudicial to, or which unfairly disregards, a complainant's individual interests. This is a personal right open to the Plaintiff against the Times Principals separate from their claims against Times Group.

[86] Earlier, I agreed with the Plaintiff that the *OBCA* does not prohibit a condominium from bringing an application under s. 135 of the *Condominium Act* for an oppression remedy and that they are entitled to bring an oppression claim against the directors of the corporate entities in the Times Group. As discussed earlier *Wilson v. Alharayeri* held that the conduct that a director can be held liable for can extend beyond the well-known allegations of personal benefit and breaches of personal duty or misused corporate power.

[87] I find the Plaintiff's claim in oppression as it stands shall be struck. It is not pleaded with sufficient particularity in terms of the material facts and the necessary elements that must be alleged. Nor is properly pleaded against the individual Times Principals. I allow the Plaintiff to maintain their oppression claim against the Times Principals, perhaps even novel claims; however, the Plaintiff has the obligation in doing so to comply with the governing principles. The allegations must be pleaded with particularity supported by the concise material facts to be relied on and pleaded separately against the individual directors of Times Group.

Leave to Amend

[88] Leave to amend should be refused where there is no reason to believe that the party's case could be improved by an amendment. "[I]f it is clear that the plaintiff cannot allege further facts that they know to be true to support the allegations in the pleading, leave to amend will be granted": [*Miguna v. Ontario*, para. 18].

[89] Only months before the hearing of this motion, the Plaintiff delivered a Response to a Demand for Particulars following which they amended the statement of claim to add in claims in relation to the Times Principals similar to those that were alleged against Times Group. The Plaintiff also included in the amendments the *alter ego* allegation.

[90] The Plaintiff stated throughout their Response, in answer to the request for particulars on each of the individually named Times Principals, "the particulars sought are not required by [the individually named principal]". I would imagine if the Plaintiff had more particulars about the individual directors they would have included those facts in the Amended Claim. I also suppose if the Plaintiff had more facts to distinguish the claims against Times Group and the Times Principals, the Plaintiff would have amended the statement of claim accordingly.

[91] For those reasons, I strike the claims against the Times Principals in breach of contract, breach of obligations under the Building Code, negligent misrepresentation, fraudulent misrepresentation and breach of fiduciary duty. I deny leave to amend those claims.

[92] For the reasons cited above I strike the claim in oppression and grant leave to amend.

ORDER

Order accordingly.

B.A. ALLEN J.

Released: July 13, 2018