SUPREME COURT OF NOVA SCOTIA

Citation: *Holloway Investments Inc. v. Hardit Corporation*, 2020 NSSC 132

Date: 20200407
Docket: Hfx. No. 486677
Registry: Halifax

Between:

Holloway Investments Inc., Pacrim Hospitality Services Inc., William Glenn Squires and Edward ("Ted") Clift Good

Applicants/Defendants

v.

Hardit Corporation

Respondent/Plaintiff

DECISION

Judge:	The Honourable Justice Jeffrey R. Hunt
Heard:	March 10, 2020, in Halifax, Nova Scotia
Written Decision:	April 7, 2020
Counsel:	Richard Norman, Solicitor for the Applicant/Defendant, William Squires John T. Rafferty, Q.C., Solicitor for the Applicant/Defendant, Edward Good Gavin Giles, Q.C, Solicitor for the Respondent/Plaintiff

By the Court:

Background

[1] William Squires ("Squires") and Edward Good ("Good") seek summary judgment removing them from the underlying proceeding in this matter, a loan recovery action advanced by Hardit Corporation ("Hardit") against the two corporate Defendants.

[2] Squires and Good were officers and directors of the corporate Defendants, Holloway Investments Inc. ("Holloway") and Pacrim Hospitality Services Ltd. ("Pacrim"). These Nova Scotia corporations were engaged in the business of hotel development and management.

[3] In 2005 and 2006, Holloway and Pacrim became indebted to the Plaintiff, Hardit Corporation ("Hardit"), a commercial real estate lender based in Ontario.

[4] Squires and Good were the directing minds of the companies. Over a span of several years they first negotiated and then acted on behalf of Holloway and Pacrim. The loans between Hardit and the Nova Scotia corporations went into default in or about 2014 and 2015. Hardit eventually brought action on the loans against Holloway and Pacrim, as well as Squires and Good personally.

[5] In a Motion for Summary Judgment on Pleadings any alleged fact in the Statement of Claim is accepted for its truth. The Applicants argue, notwithstanding this assumption, that the personal claims against them must fail when scrutinized as required under Civil Procedure Rule 13.03.

Position of Parties

[6] The two Applicants say the Respondent has taken a relatively straightforward corporate debt collection claim and wrongfully added to it wholly unsustainable personal claims against them personally.

[7] The pleading does not allege the men guaranteed the debt. This is not contested. Additionally, the Applicants say the pleading does not contain allegations and material facts necessary to support a piercing of the corporate veil. They argue the Respondent's decision to add them to the suit is purely a litigation tactic. The Applicants point to a line of cases where courts have refused to allow such claims to proceed.

[8] The Respondent, Hardit, asserts it has separate viable claims against Squires and Good. It denies that adding personal claims against them was a litigation tactic. It says the pleading is sustainable and ought to be permitted to proceed to further discovery and trial. Hardit acknowledges the claim of liability

asserted against Squires and Good may be somewhat unusual, but says the law is always evolving. They argue it would be unjust to deny the Respondent its day in court on these claims.

The Pleading

[9] Before engaging in an analysis of the applicable Civil Procedure Rules and caselaw, it will be helpful to review the Statement of Claim under challenge.

[10] It contains two critical sets of allegations against Squires and Good. One relating to when the loans were being negotiated and the second pertaining to the period after the loans went into default.

[11] With respect to the earlier (pre-contractual) period, the Statement of Claim asserts as follows:

> 6. In May of 2005, as owners, managers and directing minds of Pacrim and on Pacrim's behalf, Squires and Good sought a loan from the Plaintiff in the sum of "up to" $2 Million. In the course of their further dealings with the Plaintiff on Pacrim's behalf, Squires and Good agreed with the Plaintiff that it would lend $1,738,500 to Pacrim for a term of three years with interest to be compounded monthly in arrears and paid monthly at the rate of 10% annually, with additional interest compounded monthly in arrears and paid at the rate of 5% annually and capitalized into the repayment of the loan principal.

> 7. In 2006, as owners, managers and directing minds of Holloway and on Holloways behalf, Squires and Good sought a loan from the Plaintiff in the sum of $1 Million. In the course of their dealings with the Plaintiff on Holloway's behalf, Squires and Good agreed with the Plaintiff that it would lend $1 Million to Holloway for a term of three years with interest to be calculated and paid monthly at the rate of 12% annually.
>
> 8. In both 2005 and 2006, Squires and Good, as owners, managers and directing minds of Pacrim and Holloway, made numerous representations to the Plaintiff, both orally and in writing with respect to the creditworthiness of both Pacrim and Holloway and the abilities and intentions of both to repay the loans referred to herein. The sole purpose of these representations by Squires and Good to the Plaintiff was to influence and induce the Plaintiff to provide the loans to Pacrim and Holloway as referred to herein.

[12] The Applicants argue it is critical to appreciate these claims are said to relate to actions in their capacity as "owners, managers and directing minds" of the defendant companies and for the benefit of those companies. This is highly relevant, they say, in light of the caselaw to be reviewed shortly.

[13] The Applicants argue these allegations, even if accepted as fully accurate, as they must be in a motion for summary judgment on pleadings, disclose no claim of independent tortious action against them. They say the conduct described is exactly what a diligent directing mind of a corporation would do in organizing operating loans. The fact those loans may have gone into arrears almost a decade later does not expose them to personal liability - except under the most unusual of circumstances, none of which are plead here.

[14] The following two paragraphs (9 -10) of the Statement of Claim set out material facts relied on by the Respondent. In summary they assert that Squires and Good presented Holloway and Pacrim as enterprises which were, and would continue to be, good credit risks because of the existing and anticipated future income stream to be enjoyed by the companies. It is stated that certain circumstances did not come to pass or were misrepresented. The pleading says that the men "failed to ensure" or "failed to use their best efforts" to achieve certain outcomes.

[15] The Statement of Claim goes on to acknowledge the corporate Defendants serviced the respective loans until December of 2014 (Pacrim) and July of 2015 (Holloway).

[16] The pleading then moves onto the second set of allegations – those pertaining to the period after the loans went into default:

> 14. Despite the long periods in which its loans to Pacrim and Holloway were in arrears, the Plaintiff maintained open and frequently constructive lines of communication predominantly by Squires. In all such instances, the messages and representations delivered by Squires to the Plaintiff were essentially the same:
>
> > (a) That Pacrim and Holloway were experiencing business challenges but that their security in favour of the Plaintiff was secure and that their borrowings from Plaintiff would be repaid; and,

(b) That Squires had been in communication with Good regarding the continuing obligations to the Plaintiff and that Good was generally in agreement with the contents and spirit of the messages and representations being delivered by Squires to the Plaintiff.

15. Additionally, and without limitation, between or about 2014 and 2019, when Pacrim's and Holloway's indebtedness to the Plaintiff were seriously in arrears, Squires would meet with the Plaintiff, either in person or by telephone, no less frequently than quarterly, to give his continued assurances to the Plaintiff that all of Pacrim's and Holloway's indebtedness to the Plaintiff would eventually be paid in full and that enforcement measures or proceedings by the Plaintiff against Pacrim or Holloway would not be required. Many of these meetings and telephone discussions were initiated by Squires.

16. Again without limitation, Squires' no less than quarterly representations to the Plaintiff between 2014 and 2019 regarding Pacrim's and Holloway's outstanding indebtedness to the Plaintiff engaged the following general themes:

(a) That Squires was a person of integrity and that he was doing whatever he could to ensure that Pacrim's and Holloway's indebtedness to the Plaintiff was paid in full;

(b) That Squires was an honest person who was doing whatever he could to ensure that Pacrim's and Holloway's indebtedness to the Plaintiff was paid in full;

(c) That Squires was examining all his assets carefully in an effort to realize enough out of them to ensure that Pacrim's and Holloway's indebtedness to the Plaintiff was paid in full;

(d) That Squires did not want to see the Plaintiff taking enforcement measures or proceedings against Pacrim or Holloway because he wanted those businesses, especially Pacrim, to survive so that he could pass it along to his son; and,

> (e) That should the Plaintiff take enforcement measures against Pacrim and Holloway, both companies would likely collapse; thus, placing in jeopardy the re-payment Pacrim's and Holloway's indebtedness to the Plaintiff. (reproduced as in original)

[17] The Statement of Claim goes on to allege these representations were made "carelessly and negligently" without regard to their truth. It asserts the representations induced the Plaintiff to forebear against the debtor companies, to the eventual detriment of the Plaintiff.

[18] The Applicants respond that even if all this is accepted for its truth, it does not allege independent tortious actions against Squires and Good which would take them outside their legitimate roles with the corporate Defendants. They were not guarantors of corporate debt or performance and there are no allegations which rise to the level necessary to pierce the corporate veil. Accordingly, the pleading must fail against them individually by virtue of the Civil Procedure Rules and the application of the law which will be considered shortly.

Civil Procedure Rules

[19] Summary judgment on the pleadings is governed by Rule 13.03. This rule has been interpreted and applied many times by our courts.

[20] Rule 13.03(1) requires the court to strike a statement of claim in three circumstances. These being if the statement of claim discloses no cause of action, makes a claim based on a cause of action in the excusive jurisdiction of another court or tribunal, or seeks to advance a claim that is clearly unsustainable on its face.

[21] Rule 13.03(2) directs that a court must grant one of two types of judgment when a plaintiff's pleading is set aside:

> 13.03(2) The judge must grant summary judgment of one of the following kinds, when a pleading is set aside in the following circumstances:
>
> …
>
> (b) dismissal of the proceeding, when the statement of claim is set aside wholly;
>
> …
>
> (d) dismissal of a claim when all parts of the statement of claim that pertain to the claim are set aside.

[22] Rule 13.03(3) mandates that a motion such as this will be decided on the pleadings only:

> 13.03(3) A motion for summary judgment on the pleadings must be determined only on the pleadings, and no affidavit may be filed in support of or opposition to the motion.

[23] The summary judgment rule must be read in conjunction with Rule 38, which pertains to pleadings. This provision mandates that pleadings must provide sufficient information to allow the other party to respond:

> 38.02(2) The pleading must be concise, but it must provide information sufficient to accomplish both of the following:
>
> (a) the other party will know the case the party has to meet when preparing for, and participating in, the trial or hearing;
>
> (b) the other party will not be surprised when the party signing the pleading seeks to prove a material fact.

Case Law and Analysis

[24] Under Rule 13.03(1)(a) and Rule 13.03(1)(c), summary judgment on the pleadings must be granted if a statement of claim discloses no cause of action or makes a claim which is clearly unsustainable when the pleadings read on its own. The Nova Scotia Court of Appeal has provided a framework for determining whether summary judgment on the pleadings ought to be granted.

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

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

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

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

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

What Must be Plead

[28] A statement of claim must plead a valid and recognizable cause of action and clearly set out the facts necessary to sustain that claim. If it does not do so, summary judgment on the pleadings must be granted, as the pleading discloses no cause of action and is accordingly unsustainable.

[29] In *Knight v. Imperial Tobacco Canada Ltd., supra,* the Supreme Court of Canada put it in these terms:

> 22 It is incumbent on the claimant to clearly plead the facts upon which it relies on making its claim.

The Nova Scotia Court of Appeal has confirmed repeatedly that to avoid summary judgment, the statement of claim must plead the essential facts needed to support the asserted causes of action. In *Innocente v. Canada (Attorney General)*, 2012 NSCA 36, Justice Fichaud found that under Rule 13.03, the pleadings must advance a cause of action and plead the facts which satisfy the legal elements of that cause of action:

> 23 Whether to grant an order for summary judgment on the pleadings usually is not discretionary. It is a matter of law, premised on assumed facts, and involves analysis and comparison of the written pleadings and the legal prerequisites for the cause of action that is advanced….

[30] In *Canada (Attorney General) v. Walsh Estate*, 2016 NSCA 60, Justice Bryson relied on the Supreme Court of Canada in *Knight v. Imperial Tobacco, supra*, in finding that while the pleadings are assumed to be true, "they must plead facts material to the causes of action they assert."

[31] In *Tapics v. Dalhousie University*, 2015 NSCA 72, at para 53, the Nova Scotia Court of Appeal put it this way - for pleadings to disclose a cause of action, the asserted cause of action needs to be "supplemented with essential facts" (para 53).

[32] In the context of summary judgment on the pleadings, the importance of defendants knowing the case to be met was emphasized in *Kennedy v. Hewlett Packard (Canada) Co***,** 2011 NSSC 502**:**

> 29 The fundamental purpose of pleadings being properly drafted is to ensure the Defendant will know the case against it, including the material facts. This is in keeping with the Nova Scotia Civil Procedure Rules, to provide a just, speedy and efficient resolution of all matters.

[33] The case law is clear that in weighing whether the statement of claim discloses a cause of action or is sustainable, a core consideration is whether the pleading clearly states the necessary facts to make out the elements of the asserted causes of action. A thorough illustration of how this works in practice can be seen in the Nova Scotia Supreme Court's decision in *MacLellan v. Canada (Attorney General)***,** 2014 NSSC 280. The plaintiff brought action alleging various forms of wrongdoing against superiors in the Canadian military. The defendants sought summary judgment on the pleadings. The Court granted summary judgment and dismissed the proceedings. In his analysis, Justice LeBlanc stated:

> 72 It is well established that the plaintiff must plead fact that will establish the necessary elements of the tort, not merely allegations or legal assertions.

[34] In assessing the motion, the court weighed each asserted cause of action individually. Justice LeBlanc considered the material facts as advanced, and

then set out the requirements for successfully establishing the alleged causes of action, and in each instance found that the pleadings did not sustain those various causes of action.

[35] The Ontario Court of Justice followed a similar analytical path in *TSCC Corporation No 2123 v. Times Group Principals,* 2018 ONSC 4799. In this case, the court dealt with an action brought against a set of corporations, but also against various principals of those companies. In granting summary judgment on the pleadings and dismissing various claims as against the principals personally, the court found the allegations to be unsustainable and the circumstances as pled insufficient to move behind the corporate veil and into the realm of personal liability.

Piercing the Corporate Veil

[36] For the Respondent's claims against the Applicants' to be sustainable, the Statement of Claim must contain a cause of action based on actions taken outside their roles as directing minds of Pacrim and/or Holloway.

[37] The pleading states that the loans in question were provided to Pacrim and Holloway. The individual Defendants did not guarantee or otherwise become directly obligated under these loans.

[38] The British Columbia Court of Appeal in *311165 BC Ltd. v. Derewenko*, 2019 BCCA 217, recently affirmed this principle saying that to strip away the protection of incorporation, a court would have to find that the directing mind acting behind the corporation was fraudulent, dishonest, or guilty of improper conduct. Put another way, for there to be a "basis to pierce the corporate veil", there must be evidence that a company "was being used as a shield for fraudulent or improper conduct…" (para. 26).

[39] It has been stated on multiple occasions that the corporate veil may only be pierced when a corporation is created or employed for illegal, fraudulent, or improper purposes, or when the directing mind of the entity directs or engineers such activity. See for eg: *642947 Ontario Limited v. Fleischer*, [2001] O.J. 4771 (Ont. C.A.).

[40] Nova Scotia courts have weighed these issues as well. In *Lockharts Ltd. v. Excalibur Holdings Ltd.*, [1987] NSJ No. 40, the court stated that piercing the corporate veil is only done in exceptional circumstances:

> 36 What can be drawn from the foregoing authorities? In my assessment, the fundamental principle enunciated in the *Salomon* case remains good law in Canada and "One Man Corporations" should be considered as separate entities from their major shareholder save for certain exceptional cases. A Judge should not "lift the veil" simply because he believes it would be in the interest of "fairness" or of "justice". If that was the test the veil in the *Solomon* case would have been lifted. On the other hand, the Courts have the power, indeed the duty,

> to look behind the corporate structure and to ignore it if it is being used for fraudulent or improper purposes or as a "puppet" to the detriment of a third party.

[41] In *Haggan v. Mad Dash Transport Ltd et al*, 2019 ONCS 3654, the Ontario Superior Court of Justice concluded that for personal liability to attach to a corporate directing mind, that individual must engage in some sort of action which effectively takes him or her outside his or her role as a representative of the company:

> 34 A corporation is an inanimate legal entity. It can only operate through the actions of its directors, officers and employees. They take steps on behalf of the corporation by entering into negotiations, signing and terminating contracts. The corporation's legal actions can only be assessed through the conduct of its officers, directors and employees, in order to find those individuals personally liable for actions taken on behalf of the corporation, there must be some activity that takes them out of their role as directing minds of the corporation: *Normart*, at para. 18.

[42] Courts in this context have weighed whether a company is a mere agent, alter ego, or puppet of the directing mind or used as a shield to loot the assets.

[43] In *White v. EBF Manufacturing Ltd*, 2005 NSCA 167 the Nova Scotia Court of Appeal stated that in considering whether a corporation is being used as an alter ego for wrongdoing, the question will essentially be if the corporation has "no independent functioning of its own." The Ontario Court of Appeal in *Gregorio v. Intrans-Corp*, [1994] OJ No 1063, found that the alter ego question focuses on whether a company has been used by someone simply to improperly avoid liability:

> 28 … Generally, a subsidiary, even a wholly owned subsidiary, will not be found to be the alter ego of its parent unless the subsidiary is under the complete control of the parent and is nothing more than a conduit used by the parent to avoid liability. The alter ego principle is applied to prevent conduct akin to fraud that would otherwise unjustly deprive claimants of their rights.

[44] The Nova Scotia Court of Appeal in *Globex Foreign Exchange Corp v. Launt,* 2011 NSCA 67, directed itself to the purpose of incorporation:

> 60 The law is clear that the use by a sole shareholder of his corporation to shield himself form personal liability is not wrongful. In most cases that is business as usual. Nor is it wrongful to do business with third parties when the corporation has limited assets or means to pay. There must be more. At the very least, there must be some kind of improper conduct, or "unique circumstances", (per Saunders J.A., in *White*, para. 47: para. 65 below).

[45] The Prince Edward Island Court of Appeal put it this way in *Kay Aviation v. Rofe*, 2001 PESCAD 7:

> "19… the directing minds of a corporation should not have to be continually looking over their shoulder in the fear of being sued when they direct a corporation to take certain action in relation to a contract. The directing minds of the corporate entity cannot be held liable for the actions of the corporation unless there is independent tortious conduct such as fraud, deceit, dishonesty or want of authority. See: *Normart Management Ltd. v. West Hill Redevelopment Co.* (1998), 155 D.L.R. (4th) 627 (Ont. C.A.) at para.18; and *Montreal Trust Co. of Canada v. ScotiaMcLeod Inc. (*Sub.nom**.** *Scotia MacLeod Inc. v. Peoples Jewellers Ltd.)* (1995), 26 O.R. (3d) 481(Ont. C.A.).

[46] A survey of case law reveals that in the context of summary judgment on the pleadings, if an action is brought against both a corporation and its directing minds personally, the pleading must meet specific conditions to be sustainable against the individual(s). There may be a personal guarantee. This is not

suggested in this case. Alternatively, the pleading must allege actions by the directing mind which are themselves tortious or which remove the principal from his or her role as a directing mind or establish that the corporate structure was used as a sham or alter ego. The pleadings must differentiate the claims against the corporation and the directing minds and the facts supporting each.

[47] A plaintiff cannot simply translate an action against a corporation into a personal claim against the officers or directors of a company with bare allegations of wrongdoing. In *TSCC Corporation No. 2123 v. Times Group Principals*, 2018 ONSC 4799 the Ontario Superior Court of Justice summarized the well-established legal principles:

> 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 of 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 intention 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, 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;

[48] The Court in this case struck the claims against the directors personally because the allegations against the principals, which included breach of contract and misrepresentations, concerned acts which the principals engaged in as directing minds of the companies. The pleadings failed to disclose causes of

action against those principals separately which took them out of their roles as directing minds. The pleadings were thereby unsustainable:

> 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 *ScotiaMcLeod*:
>
> > 25 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.
>
> 63 When the Times Principals on behalf of Times Group entered into purchase and sale contract 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 contact particulars of any acts committed by the Times Principals that are in themselves tortious or exhibit a separate identity. … What flows from this is that the alleged wrongs by the Times Principals as pleaded create liability for the corporation and not themselves. (emphasis added)

[49] The Court has reviewed a substantial body of case law in which claimants seek to advance claims against directing minds, which claims fail at the summary judgment stage. For example, pleadings are deemed unsustainable and bound to fail where contractual claims are brought against both a corporation and the corporation's principal, but the pleadings fail to demonstrate a valid claim over or against the directing mind.

[50] This was the case in *Twelve Gates Capital Group v. Mizrahi Development Group*, 2018 ONSC 7656, where the Ontario Superior Court of Justice struck a claim as against a corporate principal personally, in these terms:

> 26 In the cases that the Plaintiff relies upon, specific facts indicated that the individual defendants may have also entered into the contracts at issue in their personal capacity and could thus be sued personally: *Prouix v. Canadian Cove Inc.*, 2014ONSC 3493 (Ont. S.C.J.); *University Plumbing & Heating Ltd. v. HTS Engineering Ltd.*, 2010 ONSC 3709, 95 C.L.R. (3d) 298 (Ont. S.C.J.). In *Wyman v. Kadiec*, 2014 ONSC 4710 (Ont. S.C.J.), the individual defendant was held liable for unjust enrichment because he benefitted personally from the plaintiff's work, for example, by tasks which the plaintiff performed as favours that went beyond the scope of an agreement with the corporate defendant. In this case, Twelves Gates has not pleaded any specific benefit to Mr. Mizrahi to support its unjust enrichment claim against him.
>
> 27 Other than referring to the Defendants together in the plural, the Statement of Claim contains no facts or allegations that would suggest that Mr. Mizrahi entered into the agreement personally. The Statement of Claim does not allege that he has a personal interest in the Project, other than as the principal of MDG, that would support a claim for unjust enrichment, if there is a basis upon which to allege that Mr. Mizrahi entered into the agreement in his personal capacity,

> Twelve Gates would be expected to plead it. The Plaintiff should not be able to avoid having its claim struck by making vague, non-specific allegations about the Defendants generally.
>
> 28 It is plain and obvious that the Statement of Claim discloses no reasonable cause of action against Mr. Mizrahi. Accordingly, I grant the Defendants' motion to strike.

[51] I refer again to the decision of the Prince Edward Island Court of Appeal in *Kay Aviation v. Rofe*, supra:

> 42 There are many situations where a party has contracted with a corporation, having a sole director and officer, in full knowledge of the limited liability of that corporation and without obtaining the personal covenant of the director or officer. Subsequent to the breach of the contract by the corporation, the third party frequently wished it had an action, personally, against the sole director or officer for his or her actions as the sole directing mind of the corporation. However, such an action is the exception rather than the rule. In the instance of retaining some semblance of order to commercial transactions, lawsuits of this nature must be vigilantly monitored by the court. **If the material facts of a statement of claim do not disclose the underpinnings of a reasonable cause of action founded on the independent tortious conduct of the employee, director or officer, the statement of claim should be struck out without placing the individual in the position of having to defend a spurious action.** (emphasis added)

[52] In light of this case law, the contents of the Statement of Claim must be reviewed again and with an appreciation that all the allegations contained therein are accepted for their truth.

Pre-Contractual Negotiations

[53] The first set of allegations states that Squires and Good were acting as "owners, managers and directing minds" of the two corporate Defendants. This

in and of itself highlights a core issue with the pleading. The pre-contractual allegations are not independently tortious. The pleading alleges Squires and Good acted on behalf of Holloway and Pacrim.

[54] It is impossible to read the material facts said to support the claim and not be struck with how it appears to be describing quite usual happenings. The fact that two officers of a company are providing optimistic views of its current and future prospects is so commonplace as to be nearly innocuous.

[55] The fact that representations about existing and future corporate prospects induced the Plaintiff to enter the business arrangement with Pacrim and Holloway seems similarly unsurprising. There is no allegation of fraud anywhere in the pleading. It is not said the companies were alter ego structures used to conceal the looting of funds. There is no allegation the corporations were used for the sorts of purposes touched on in any number of the cases reviewed above.

[56] In short, allegations that Squires or Good would use their best efforts to do certain things or maintain certain values in the companies, does not rise to an actionable representation. They could even be said to be the stock and trade of optimistic business persons seeking to talk up the prospects of their enterprise.

This is to be entirely distinguished from fraud or the wrongful manipulation of data or records. This is quite simply not alleged and no discernible material facts supporting such allegations of fraud can be extracted here.

[57] The rationale at paragraph 62 of the Court in the *Times* case, cited above, is fully applicable:

> 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.

Post-Contractual Dealings

[58] As to the allegations dating to the period following default, these too are devoid of allegations of fraudulent or other conduct sometimes referenced in the caselaw.

[59] They contain almost no reference to the actions of the Defendant, Good. Where he is mentioned it is largely to attempt to associate him with the actions or statements of Squires. I will accept for the purposes of this analysis that Squires was acting as the agent for Good. This appears to be the thrust of the pleading and I will accept this as proven for purposes of the Motion.

[60] The pleading alleges that, post default, Squires sought more time for the corporate Defendants to work things out. The assertion is he talked the Respondent into moving slowly in the hope the loans might be brought into good standing.

[61] For reference, I refer again to the Statement of Claim:

> 16 Again without limitation, Squires' no less than quarterly representations to the Plaintiff between 2014 and 2019 regarding Pacrim's and Holloway's outstanding indebtedness to the Plaintiff engaged the following general themes:
>
> (a) That Squires was a person of integrity and that he was doing whatever he could to ensure that Pacrim's and Holloway's indebtedness to the Plaintiff was paid in full;
>
> (b) That Squires was an honest person who was doing whatever he could to ensure that Pacrim's and Holloway's indebtedness to the Plaintiff was paid in full;
>
> (c) That Squires was examining all his assets carefully in an effort to realize enough out of them to ensure that Pacrim's and Holloway's indebtedness to the Plaintiff was paid in full;
>
> (d) That Squires did not want to see the Plaintiff taking enforcement measures or proceedings against Pacrim or Holloway because he wanted those businesses, especially Pacrim, to survive so that he could pass it along to his son; and,
>
> (e) That should the Plaintiff take enforcement measures against Pacrim and Holloway, both companies would likely collapse; thus placing in jeopardy the re-payment of Pacrim's and Holloway's indebtedness to the Plaintiff. (reproduced as in original)

[62] It is said that these representations were made "carelessly" or "negligently" and for the purpose of inducing delay on the part of Hardit. On the plain reading of these assertions it is evident they relate to general assertions of integrity and possible future actions or intentions. They are not enforceable and

do not rise to the level of independent tortious actions. They could be the equivalent of "mere puffery" if analyzed at the pre-contractual stage.

[63] There is no allegation of unjust enrichment or the pleading of facts necessary to support such an assertion.

[64] Even when accepted for its truth, the contents of Hardit's pleading against Squires and Good must fail. No clear cause of action is pled, and even if accepted as being pled, I find the alleged representations would not be actionable in the circumstances alleged.

[65] Accepting all the facts as pled, there is no prospect whatsoever of these rising to the level necessary in law to pierce the corporate veil. I fully accept and apply the legal principles as set out and summarized in the case law discussed above. I conclude the attempt to include the two individual Applicants in the claim is misguided and bound to fail.

[66] I have carefully considered Respondent Counsel's argument that the law must be allowed the room to develop and evolve. Innovative cases have to be allowed to advance in order for the law to advance. I accept this. There must, however, be some limits to this otherwise it would become a circular answer to any attempt to strike a claim unknown or unsupported at law.

[67] The Court must bring reasonable judgment to whether this case and these facts have any prospect of being one which may result in an evolution of the law. I have reviewed all the facts and circumstances and conclude it does not.

[68] The claims against Squires and Good in their personal capacities are hereby struck. The balance of the pleading, being the claims against Holloway and Pacrim, are undisturbed.

[69] The Applicants advanced an alternative argument that the claims were also statute barred as of September 1, 2017. They maintain the limitation period ought to be considered triggered as of September 1, 2015, based in a discoverability analysis. It is not plain and obvious to me that this issue is resolvable solely on the pleadings. Discoverability inferences, as asserted in this case, are not particularly well suited to treatment in a summary judgement on pleading. I would not have granted Rule 13.03 summary judgement solely on this point.

[70] I ask that Counsel to the Applicant, Squires, take the lead in producing an Order giving effect to these reasons. The Applicants will have their costs in the cause on a party and party basis. In the event Counsel are unable to agree

on quantum within 30 days, I invite written submissions which can be directed through Court Administration at the Law Courts.

J.