SUPREME COURT OF NOVA SCOTIA

Citation: *Southwest Construction Management Limited v. EllisDon Corporation*, 2020 NSSC 99

Date: 20200428
Docket: 440897
Registry: Halifax

Between:

Southwest Construction Management Limited
and EllisDon Corporation

Plaintiffs

v.

EllisDon Corporation, Southwest Properties Limited,
Southwest Construction Management Limited,
and Summer Wind Partners II Limited

Defendants

LIBRARY SHEET

Judge: The Honourable Justice Peter Rosinski

Heard: December 11, 2019, in Halifax, Nova Scotia

Counsel: William Ryan QC and John Shanks, for the Plaintiffs
Christopher Robinson and Kevin Gibson QC, for the Defendants

Subject: CPR 38.05 and 83.11 – adding parties and amending pleadings in the context of s. 22 *Limitation of Actions Act*, SNS 2014, C. 35 (in force September 1, 2015)

Summary: The Maple commercial/residential complex was being built for Southwest Construction Limited (SWC) with EllisDon as

the construction manager. SWC unilaterally terminated the contract and shortly thereafter filed a Statement of Claim alleging that EllisDon had breached its contract, and that it was negligent in the provision of its services (claims in contract and tort). SWC sought to amend its pleadings to add a new cause of action (negligent misrepresentation) and new parties (related companies in the so-called Southwest Group of Companies) who were seeking damages for "increased financing costs" as a result of the delay in the project attributable to EllisDon's breach of contract and negligent provision of services , arising from increases in interest rates for such financing.

Issues:

(1) Should leave to amend the pleadings be denied because:

a) bad faith on the part of SWC and its related entities? No

b) EllisDon will suffer serious non-compensable prejudice? No

c) the proposed pleading contains no material factual basis disclosing a cause of action and hence is unsustainable? No (including insofar as the claims made here are for "pure economic loss")

(2) What are the relevant limitation periods and do the provisions of the *Limitation of Actions Act* (*LAA*) permit the court a discretion to grant leave to amend the pleadings vis-à-vis:

a) the new claim of negligent misrepresentation?

b) The addition of new parties specifically claiming "increased financing costs" damages?

While the basic limitation periods for the addition of the new claim of negligent misrepresentation and the new parties or claimants both have expired, the Southwest Group of

Companies can successfully rely on ss. 22(a) and 22(c) of the *LAA* to allow the court the discretion to permit the amendments sought.

The court was satisfied that it was in the interests of justice to permit the amendments as proposed.

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DECISION

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By the Court:

Introduction

[1] This litigation concerns the building and premises known as the "Maple", located at 1583 Hollis St., Halifax, NS.[1]

[2] Southwest Construction Management Limited (SWC) seeks leave to amend its previously amended Statement of Claim herein. After careful consideration of the principles and circumstances here, I find it is in the interests of justice to permit the proposed amendments.

Background

[3] In 2013, SWC was tasked to oversee the construction of Maple. It entered into a contract with EllisDon, under which EllisDon would provide construction management services related to those premises. The contract references SWC as "the owner" and EllisDon as "the construction manager".

[4] On July 2, 2015, SWC commenced an action for breach of contract and negligence against Elli Don ("the main action").

[1] Justice Timothy Gabriel has rendered several decisions already in relation to this litigation: 2018 NSSC 25, 2018 NSSC 162, 2018 NSSC 270.

[5] On August 6, 2015, EllisDon filed a Statement of Defence (and Counterclaim) in the main action, and commenced an action under the *Builders' Lien Act*, R.S.N.S. 1989, c. 277, naming as defendants SWC, Southwest Properties Limited (SWP) and Summer Wind Partners II Limited (WP2) (the "builders' lien action").

[6] On the same day, EllisDon concurrently filed a Notice of Claim as against a Third Party, Southwest Properties Limited (SWP), in the main action.

[7] On September 22 and 23, 2015, respectively, SWC filed a Defence to the Counterclaim of EllisDon in the main action, and SWC, SWP, and WP2 filed a Defence to the builders' lien action.

[8] On February 28, 2017, by a Consent Order the main action and the builders' lien action were consolidated. At that time, the only parties to the litigation were: SWC, SWP and WP2; and EllisDon.

[9] On February 26, 2019, the court issued a consent order permitting SWC to amend the existing pleadings. The amended Notice of Action, filed the same day, differed only insofar as the addition of the following paragraphs:

> 13) Southwest [i.e. SWC] further states that EllisDon's breach of contract and/or negligence in the performance of its duties under the Contract caused delay in the completion of the Project such that Southwest was

> prevented from finalizing its financing for the project at a time when the interest rates for such financing were lower than when this traction [sic] was actually completed.
>
> 14) The delay in completing the construction of the Project, which was caused by EllisDon, will result in increased debt servicing payments for Southwest in the amount of $5,184,000 over the initial 10-year period for financing of the Project. This amount is in excess of the projected $9.2 million loss claimed in paragraph 12 above.

[10] Thus, no new parties were added in February 2019.

[11] In March 2019, I was assigned as case management judge in this litigation. In the initial case management conference, I determined that it was appropriate to first deal with Southwest's further motion to amend the Notice of Action and Statement of Claim, and thereafter consider EllisDon's motion for Summary Judgment on Evidence, filed July 5, 2019. This is the decision on the Motion to amend.

The present proposed amendments to the statement of claim

[12] The wording of the SWC motion to amend its Statement of Claim reads[2]:

> Collectively "Southwest" moves for an order to amend its pleadings in this proceeding *to include a claim for increased financing costs* as set out in the draft Amended Notice of Action attached to this Notice as Schedule "A".[3]

[2] For convenience, generally when I reference herein "Southwest", I mean to reference, as the case may be, the whole or relevant entities of the so-called "Southwest Group of Companies".

[13] The proposed amendments include the following:

1. adding new *Plaintiffs* in what was the main action: namely, WP2 (presently a defendant in the *Builders' Lien Act* action); Summer Wind Partners III Limited (WP3) and Summer Winds Holdings Limited (SWH), organized in partnership as SWP Maple Operating Partnership; and SWP, in addition to its present status as Third Party in the Main Action and Defendant in the *Builders' Lien Act* action;

2. adding new claims, namely, amendments which, broadly speaking, may be characterized as negligent misrepresentation *vis-à-vis* SWC, and the existing pleadings of negligent provision of services and negligent misrepresentation *vis-à-vis* WP2, SWP Maple, and SWP.[4]

[14] In summary, the proposed amendments effect the following additions to the litigation:

1. SWC making a *new claim* of negligent misrepresentation;

2. WP2, SWP Maple, and SWP as *new claimants*, joining in existing claims of negligent provision of services, making a *new claim* of

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[3] Which although not attached in the court filed original, may be found at Exhibit " P " of Gordon Laing's affidavit sworn November 19, 2019 filed December 6, 2019.

[4] See attached hereto as Appendix "A", the proposed Amended Statement of Claim, and Appendix "B", the present February 26, 2019, Amended (by consent) Statement of Claim

negligent misrepresentation, *and substituting them for SWC regarding the claimed damages for increased debt financing costs* in relation to both the existing and the new claims.[5]

The positions of the parties

A. The Southwest group of entities

[15] Southwest says the proposed amendments include clauses relating to "the identification and inclusion of additional Southwest companies which both own and operate the Maple and which have suffered the loss as identified in the original and in the amended Statement of Claim" Southwest then (in its brief) repeats verbatim the proposed amended paragraphs - 2, 3, 4, 5, 7,8, 9, 10, 11, 12, 15, 16, 19, 20, 30, 31, 32, 33, 34, and 35.

[16] Southwest says that Civil Procedure Rules (CPR) 35 (adding new parties - see proposed paras. 2-5, 30-35) and 83 (adding new particulars to existing claims - see proposed paras. 7-12, 15-16, 19-20) govern this motion. Regarding the addition of new parties, Southwest states in its brief:

[5] See for example, although in the context of a contract to build as opposed to contract to manage building construction, a discussion of the difficult kinds of questions that can arise in such situations: *Clark Builders and Stantec Consulting Ltd. v. GO Community Centre*, 2019 ABQB 706, at paras. 165 – 234, per Renke, J. See paras. 33-35 proposed Amended Statement of Claim.

> CPR 83.04 (1)… The provisions of that Rule do not apply in this situation as they are limited to circumstances in which the Amendment "makes a claim against a new party"… Southwest submits that Rule 35.06(1) has direct application to the case before your Lordship. The original pleading that was issued in July 2015… properly identified the causes of action and heads of damage claimed against the Defendant EllisDon. Rule 35.06 (1) requires the addition of a proper party to a proceeding unless the order adding the party causes 'serious prejudice that cannot be compensated in costs or an abrogation of an enforceable limitation.'… Rule 35.08 imposes some restrictions to adding parties. In particular, Rule 35.08 (1) provides a judge with discretion to add a party to a proceeding at any stage of the proceeding subject to determinations as to whether the joinder of a new party would cause prejudice to a party in the proceeding. Rule 35.08 (5) also raises the issue of the limitation period, providing that the joinder of a party may not occur in circumstances where the expiry of a limitation period precluding the claim, and which is able to be enforced by the opposing party, has occurred…. *in both instances, the proposed amended pleading adding the additional Southwest entities as Plaintiffs in this proceeding do not violate either of these two requirements. Consequently, the court has the discretion as contained in the Rules to allow the amendment adding these entities as parties to the proceeding.*
>
> [My italicization added]

[17] Regarding the issues potentially arising under the *Limitation of Actions Act*, SNS 2014, c. 35 (in force September 1, 2015) (*LAA*), in relation to the addition of new parties, Southwest's position is as follows:

> …there is no question but that the claims advanced by the proposed new plaintiffs relate to the same circumstances as those contained in the existing pleading… The claims are not just related to the same events but are in fact the same claims only advanced by different and related corporate entities… They do not in any way alter the allegations made against EllisDon.… The allegations have only become more specific in nature in regard to what entities within the Southwest Group of Companies suffered the alleged losses. Given that the proposed new plaintiffs are not parties to the agreement their primary allegation against EllisDon will rest in negligence, subject to issues of agency such as those raised by EllisDon in its pleadings.

> Once it has been determined [via s. 22(c) *LAA*] that the new claim is related to the "conduct, transaction or events" described in the original pleadings, the analysis shifts to whether the defendant has received within the limitation period sufficient knowledge of the added claim that they will not be prejudiced when defending against it… *While it may not have been aware of the specific name of the Southwest company that would ultimately operate the project, [EllisDon] knew that the Project was being constructed for Southwest Properties and ultimately would be operated by one of its corporate entities.*
>
> In addition to the third-party claim naming Southwest Properties, EllisDon also named Summer Wind II as a defendant in its Lien action on the basis that this company was the registered owner of the lands on which the Project was constructed. In this pleading EllisDon also named Southwest Properties, again repeating its allegation that Southwest Construction acted as agent for Southwest Properties as the principal Southwest company… *There can be no doubt that EllisDon was aware of the nature of the claims made against it in this proceeding. It was specifically aware of the claims for damages relating to interest costs, lost revenue and financing costs, it was likewise aware that these claims are being advanced by members of the Southwest Group of Companies and that Southwest operated under a number of corporate entities, all of which were related.*
>
> Given that section 22 of the *Limitation of Actions Act* specifically addresses the situation as an exception to the usual provisions of the Act which would bar new claims following the expiry of the limitation period, this court is able to permit the addition of the new parties without violating the restrictions imposed in Rule 35.08 (5).
>
> [My italicization added]

[18] As to the addition of new particulars or claims, Southwest's position from its brief follows:

> The addition of new particulars to an amended pleading is governed by Rule 83.11. This Rule allows a judge to permit an amendment even after the expiry of the limitation period, if the material facts supporting the cause have been pleaded and the amendment merely identifies or better describes the cause of action. Southwest Construction submits that this provision exactly describes the proposed amendments contained within this category of its proposed amended pleadings.

> This provision was considered by Justice Farrar in his decision in *Automattic Inc. v Trout Point Lodge Ltd.*, 2017 NSCA 52 [at paragraphs 28-32]… Justice Bodurtha also considered the impact of section 22 of the *Limitation of Actions Act* and of Rule 83.11 upon proposed amendments to a pleading in the case of *Altschuler v Bayswater Construction Limited*, 2019 NSSC 197 [at paragraphs 22 – 23, 32 – 36, and 41].….As noted by Justice Bodurtha, once this analysis is complete the issue as to whether an amendment will be permitted under Rule 83.11 again turns in large part on the notion of prejudice.
>
> Is there 'serious prejudice' to EllisDon if the amendments are allowed?
>
> …
>
> In *Bayswater*, Justice Bodurtha further considered the nature of prejudice which is unable to be compensated for by way of costs [at paragraphs 16 – 18].
>
> Southwest Construction submits that EllisDon is unable to claim 'serious prejudice' as required by CPR 35.06 (1) in relation to the proposed amendments… *The pleading set out allegations against EllisDon both in breach of contract and negligence… [and] was explicit in that the claims being advanced against EllisDon included claims for interest costs, lost revenue, costs of financing and other delay costs.* In the original pleading EllisDon was explicitly put on notice that it was facing claims, in relation to alleged delay caused in the completion of the Project. *The substance of the current proposed amendments is to expand upon and provide additional particulars, both with respect to the nature of the allegations in breach of contract and in negligence against EllisDon, as well as to properly identify the parties which within the Southwest Group of Companies experienced the losses claimed…* Having been well aware that the Southwest group of companies operated through multiple related corporate entities, EllisDon cannot credibly claim that it will be 'caught unaware' and thereby prejudiced and be unable to respond to this action should the proposed amendments be allowed.
>
> [My italicization added]

[19] Regarding the limitation period, in its Reply brief Southwest argues that both parties acknowledge that the *Limitation of Actions Act*, and CPRs 35.06, 35.08, 83.01, and 83.04 have particular application to this motion. They disagree, however, on the interpretation and application of the legislation and those Rules.

[20] Presuming that the court may grant such amendments unless so doing would cause serious prejudice to a party not able to be compensated by way of costs, or would breach an enforceable limitation period, Southwest notes, "it is difficult for EllisDon to maintain an argument in favour of serious prejudice when it has itself suggested that costs should be granted by the court to compensate it for the allowance of these amendments to the pleadings."

[21] Southwest argues that allowing the amendments would not violate an enforceable limitation period, as EllisDon claims pursuant to section 22 of the Act. This is because the original pleadings and the amended pleadings of February 2019 both:

> …provide notice to EllisDon that claims in relation to the delay of the construction project in question were being advanced for damages related to financing and interest costs associated with the Project. While the amount of the damages claimed were not included in the original pleading, (which amounts have been better particularized in the proposed amendment and were first introduced with respect to financing amounts in the February 2019 amendment) the claims under both breach of contract and of negligence for these heads of damages were clearly expressed in the original pleadings. *Furthermore details of the claims to be raised by the proposed new plaintiffs all of which are corporate entities within the Southwest group of companies, were also included in the supplemental document production provided to EllisDon December 2018 and formed part of the question [ing] of Joseph Spatz by counsel for EllisDon in the March 2019 discovery examination.*
>
> [My italicization added]

[22] In relation to EllisDon's suggestion that the court should infer bad faith motivations by the Plaintiff, Southwest notes that the burden is upon EllisDon, and says the reason for the proposed amendments is obvious: namely, "the effect of the amendments is to properly include in the proceeding those parties which are able to claim the already pleaded claims for loss of revenue interest cost and financing cost in relation to the Maple Project." Southwest states in its brief:

> The motivation for the amendment to the pleadings is to correct deficiencies in the original pleadings regarding the identification of the corporate entities within the Southwest Group of Companies which had undertaking [sic] the mortgage financing and leasing responsibilities with respect to the project in question. There is no evidence that Southwest Construction is acting in bad faith and no evidence has been proffered or even identified by EllisDon in support of an inference to this effect.

[23] Lastly, in relation to EllisDon's argument that the form of the proposed amendments is inadequate to identify a cause of action in negligence against it as advanced by the proposed new Plaintiffs, Southwest notes that at paragraph 35 of the proposed Amended Statement of Claim the new Plaintiffs expressly "repeat and rely" on the foregoing allegations in the Statement of Claim to support their claim for damages against EllisDon. Moreover paragraphs 22, 23, 24, and 25 contain particulars of allegations of negligence against EllisDon in its role as Construction Manager; and paragraphs 15 and 16 also contain allegations in support of negligence allegations regarding Elli Don's knowledge that delay in the

construction, for which it was construction manager, would cause foreseeable loss to the parties owning and operating the Project.

[24] Southwest Construction also requests costs of the motion. It argues that EllisDon's request for the costs of additional discovery examinations "made necessary" by the amendments to Southwest's pleadings, if granted, should not be granted, because:

> at the termination of the March 12, 2019 discovery examination of Joseph Spatz it was specifically contemplated by the parties that additional discovery would take place. Those discoveries were truncated, primarily by counsel for EllisDon in the recognition that these proposed amendments would be forthcoming in this proceeding. Therefore EllisDon will not face duplication of efforts as the necessary discovery examinations were adjourned pending this motion coming forward.

B. Ellis Don Corporation

[25] EllisDon states correctly that amendments are normally permitted unless an applicant for leave is shown to be acting in bad faith or it is shown that by allowing an amendment another party would suffer some serious prejudice that could not be compensated by costs (citing *Altschuler v Bayswater Construction Limited*, 2019 NSSC 197, at paragraph 14).

[26] EllisDon submits that the amendments are significant in effect and timing:

> The circumstances in which this motion is resisted are extraordinary and warrant the court's intervention to prevent the circumvention of clear limitation periods and the presentation of claims which lack any pleaded basis in fact, are on their face unsustainable, and are intended to intimidate a party in a proceeding in which the conduct of Southwest in its dealings with EllisDon, and its failure to perform the contract in good faith and honesty, have been central issue since the commencement of action in 2015. EllisDon submits that the moving party's motion should fail for two reasons:
>
> 1. the claims sought to be added to the Statement of Claim of Southwest through its proposed amendments are brought out of time; and
> 2. the claims sought to be advanced in the amended statement of claim lack any pleaded factual basis which would warrant to the amendments sought.

[27] Thus, for example, WP2 is presently not a party to the main action – it is a defendant only in the builders' lien action by reason of its interest in the lands constituting the Project. Yet it seeks leave to amend the pleading in the main action to which it is not a party.

[28] When the matters were consolidated, the order provided that all disclosure in each of the two actions "shall be deemed to be produced in the other action and may be used by the parties in each action as permitted by the Civil Procedure Rules"; that all evidence given in oral discovery pursuant to Civil Procedure Rule 18 in either of the two actions "shall also be evidence given on oral discovery in the other action, and may be used at trial of the actions in accordance with the provisions of the Civil Procedure Rules and the rules of evidence"; and that "at the trial of these actions, evidence given in Halifax No. 440897 or Halifax No. 441961 shall be the evidence given in the other action".

[29] At paragraphs 6 - 10 of its brief EllisDon sets out numerous circumstances it says support its submission that the court should infer bad faith on the part of the Southwest parties.

[30] EllisDon points out that, in response to its request that Southwest make admissions per CPR 20, Southwest proposed the new plaintiffs (on June 12, 2019 – Gibson affidavit Exhibit "G") to whom EllisDon is not alleged to have any contractual or tort duty.[6]

[31] On July 5, 2019, EllisDon provided Southwest a copy of its Notice of Motion for summary judgment on evidence, supported by the July 5, 2019, affidavit of Mr. C.C. Robinson, QC. In response Southwest delivered a proposed new amended pleading (Laing affidavit Exhibit "N"; see Gibson affidavit Exhibit "I"), which did not contain the pleading now presented to the court (Laing affidavit Exhibit "P").

[32] The numerous changes are summarized by EllisDon in its brief at paragraph 9.

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[6] Notably paragraphs 13 and 14, which had been added to the pleadings by Order of February 26, 2019, which then became paragraphs 14 and 15 in that June 12, 2019, proposed amended Statement of Claim, and in June 11, 2019, revision, see Gibson affidavit Exhibit "I" (which are now 27 and 28 in the present proposed Amended Statement of Claim) and presently identified for deletion).

[33] EllisDon argues that there are indicia of bad faith on the part of Southwest on the bases (1) of failure to explain the purpose for seeking an amendment (*National Bank Financial Ltd. v. Potter*, 2008 NSSC 135, at paras. 115 and 139, affirmed, 2008 NSCA 92); (2) that facts which could justify the proposed amendment have not been set forth (*Prenor Trust Company of Canada v S.B. Gupta Investments Ltd.*, (1991) 105 NSR (2d) 251 (SC)); and (3) that the timing of the application for leave to make amendments would introduce substantial new issues requiring examination of matters not previously in issue (*Hardy v. Prince George Hotel Ltd.*, 2004 NSSC 168, at para. 24, affirmed 2004 NSCA 120).

[34] EllisDon also relies on, *inter alia*, CPR 35.06, 35.08, 83.04, and 83.11 in support of its argument that if a limitation period has expired, there is no discretion in the court to add new parties (see *Automattic Inc.*, at para. 38).

[35] The limitation period herein is rooted in the *Limitation of Actions Act*, (in force September 1, 2015), specifically sections 8, 9 and 22. EllisDon argues that the limitation period started to run on June 1, 2015 (the point at which Southwest terminated the contract), ran for three years (two years under the *LAA*, plus one year permitted for service of a Notice of Action and Statement of Claim, pursuant to CPR 4.04 (1)), and ended on June 1, 2018. EllisDon advances several arguments.

[36] Insofar as "new claims" are put forward as amendments to the existing pleadings, EllisDon says that s. 22(c) *LAA*, which provides the court a discretion to decide whether such claims should be permitted, cannot be relied upon by Southwest in these circumstances because the proposed new claims are not "related to the conduct, transaction or events described in the original pleadings" and EllisDon is prejudiced in defending against the added claims on the merits, because EllisDon did not have sufficient knowledge of the added claims before or within the limitation period, nor is the claim "necessary or desirable to ensure the effective determination or enforcement of the claims asserted or intended to be asserted in the original pleadings".

[37] Secondly, EllisDon says, the proposed new pleadings should not be allowed because they do not disclose a cause of action. According to EllisDon, other than in the most general language (that EllisDon "through breach of contract and/or negligence in relation to the construction of the Project generally" and "negligence in relation to the construction of the Project generally", caused the plaintiffs to suffer damages), the pleadings do not allege facts which:

1. suggest any privity of contract between the proposed new parties and EllisDon; notably, the only parties to the only contract alleged are

SWC and EllisDon; and SWP Maple Operating Partnership was only registered as an entity on March 23, 2015; or which

2. place upon EllisDon any duty vis-à-vis any of the proposed new plaintiffs, nor is any breach of such duty pleaded. In addition, EllisDon says the added claim for economic loss in tort is not within any category recognized by the Supreme Court of Canada for the recovery of such loss (*Winnipeg Condominium Corporation No. 36 v. Bird Construction Co. Limited*, [1995] 1 SCR 85, at 96). Even the proposed Amended Statement of Claim (paras. 7-12) alleges that EllisDon made representations *only to SWC*, and not any of the proposed new plaintiffs, and similarly that *only SWC* relied upon any alleged representations.

[38] EllisDon reiterated the following in oral argument:

> The only facts that are pleaded as the basis for a cause of action which the proposed new plaintiffs could have against EllisDon in tort are set forth in the new paragraphs 15 and 16 of the proposed amended statement of claim:
>
> 15. At all times material hereto EllisDon was aware that the Project was to be a mixed residential and commercial development and that the Project would be owned and operated by one or more companies related to Southwest.
>
> 16. Furthermore, EllisDon was at all material times aware, or ought to have been aware that a delay in the construction and completion of the Project would cause losses plus additional costs to the entities which would own and operate the Project.

> Even if these allegations are taken to be correct, which is denied, they do not plead facts that disclose a cause of action by the proposed new Plaintiffs. It is important to observe that the Contract between Southwest Construction Management Limited and EllisDon was not for the construction of the Project, but for construction management services to be provided in connection with the work carried out by individual trade contractors employed directly by Southwest Construction Management Limited. Any claim for damages for negligence by the proposed new Plaintiffs would therefore depend upon an allegation that the breach of some duty owed by EllisDon, which has not been identified or pleaded, to the proposed new Plaintiffs, which are not alleged to have been known to EllisDon, caused a delay in the construction and completion of the Project constructed by others pursuant to their own contracts with Southwest Construction Management Limited, which in turn resulted in loss to the proposed new Plaintiffs… Moreover, the loss claimed by the proposed new Plaintiffs in tort is purely economic, and there is no basis pleaded for the recovery of such loss in accordance with the analytical framework established by the Supreme Court of Canada for the evaluation [of] claims for pure economic loss in tort … The proposed amended pleading does not allege facts which would place the proposed new plaintiffs claim for economic loss in tort within any category recognized by the Supreme Court of Canada for the recovery of such loss. The proposed claims for losses in tort are without any factual basis and unsustainable on their face.

Law on Amending Pleadings

[39] EllisDon cites a number of cases for the proposition that Canadian courts have dismissed motions for leave to amend pleadings in circumstances in which proposed amendments have advanced no reasonable cause of action, and have dismissed appeals of decisions of lower courts refusing leave to amend in such circumstances: *Lehan v. St. Catharines (City)*, 2010 ONCA 318; *Hester v. Canada*, 2008 ONCA 634; *Carom v Bre -X Minerals Ltd*., [1998] OJ No. 4496 (Ct. J. Gen. Div), per Winkler J, as he then was; and *Hunt v Carey*, [1990] 2 SCR 959, which articulated the principle that an amendment should be granted "unless it is shown

that it is beyond all doubt that the claim is one that is clearly impossible of success" (para. 10).

[40] Moreover, some cases have held that untenable proposed amended pleadings, if granted, would constitute prejudice that cannot be compensated by costs: *Segal v Plazavest*, [2004] OJ No. 4539 (SC); *Marks v Ottawa (City)*, 2011 ONCA 248, at para. 19*; Geographic Resources Integrated Data Solutions Ltd. v. Peterson*, 2015 ONSC 4658, at para. 25; and *Pantaleo v. Wood*, 2015 ONSC 1850 at para. 24.

[41] Nova Scotia courts have held that, in spite of the introduction of new Civil Procedure Rules effective January 1, 2009, the general rule regarding amendments to pleadings has been maintained, subject to specific authority in the Rules. In *Altschuler v Bayswater Construction Limited*, 2019 NSSC 197, Bodurtha J., speaking in the context of whether "new claims" should be permitted as amendments to an existing claim, said (some citations omitted):

> The law of amendments generally
>
> 14 Justice Rosinski in *Oldford v. Canadian Broadcasting Corp.*, 2011 NSSC 49, summarized the relevant law in relation to adding amendments:
>
> > [4] Counsel agree on the proper legal test that the Court should use. The test is found in *Stacey v. Consolidated Fund Corp. or Canada Ltd.* (1986), 76 N.S.R. (2d) 182 (C.A.) per Clarke, C.J.N.S.:
> >
> > > ... **the amendment should have been granted unless** it was shown to the Judge that the Applicant was acting in **bad faith** or

> that by allowing the amendment, the other party would suffer **serious prejudice that could not be compensated by costs.**" [emphasis added]
>
> ...
>
> [8] The only reported cases which have considered this issue under the new Rules are *Canada Life Assurance v. Saywood et al* (2010), 288 N.S.R. (2d) 273 (NSSC) and *M5 Marketing Communications v. Ross* 2011 NSCC 32, both decisions of McDougall, J.
>
> [9] As Justice McDougall concluded, I also do not believe the new Rules intended to alter, and I accept that they therefore have not altered, the appropriate legal test regarding when leave will be granted to amend court documents.

15 In *Canada Life Assurance Co. v. Saywood*, 2010 NSSC 87, McDougall J. summarized the law as follows:

> [7] Apparently there are no written decisions regarding the new Rule 83.02. There are, however, a number of cases pertaining to the predecessor Rule 15 (1972 Rules). In the case of *Global Petroleum Corp v. Point Tupper Terminals Co.* (1998), 170 N.S.R. (2d) 367, Bateman, J.A., at para. 15, stated:
>
> > [15] The law regarding amendment of pleadings is not complicated: leave to amend will be granted unless the opponent to the application demonstrates that the applicant is acting in bad faith or that, should the amendment be allowed, the other party will suffer prejudice which cannot be compensated in costs. (*Baumhour et al. v. Williams et al.* (1977), 22 N.S.R. (2d) 564; 31 A.P.R. 564 (C.A.))
>
> [8] This same statement of the law was cited by the Honourable Justice Arthur J. LeBlanc in the case of *Shea v. Whalen* (2008), 250 N.S.R. (2d) 65 at para. 6.
>
> [9] In the case of *Garth v. Halifax (Regional Municipality)* (2006), 245 N.S.R. (2d) 108 Cromwell, J.A. (as he was then) stated the following at para 30:
>
> > [30] The discretion to amend must, of course, be exercised judicially in order to do justice between the parties. Generally, amendments should be granted if they do not occasion prejudice which cannot be compensated in costs:
> >
> > …
>
> [10] While these cases were all decided prior to the implementation of the new rule they continue to offer guidance despite these recent changes.

16 In *Thornton v. RBC General Insurance Company*, 2014 NSSC 215, at para. 33, Justice Wood (as he then was), described prejudice that cannot be compensated in costs:

> 33 ... That type of prejudice is typically evidentiary in nature, which requires a consideration of whether documents and witnesses have been lost due to the passage of time.

17 In *1588444 Ontario Ltd. (c.o.b. Alfredo's) v. State Farm Fire and Casualty Co.*, 2017 ONCA 42, [2017] O.J. No. 241, the Ontario Court of Appeal said the following about non-compensable prejudice at para. 25:

> *There must be a causal connection between the non-compensable prejudice and the amendment. In other words, the prejudice must flow from the amendments and not from some other source: …
>
> *The non-compensable prejudice may be actual prejudice, i.e. evidence that the responding party has lost an opportunity in the litigation that cannot be compensated as a consequence of the amendment. Where such prejudice is alleged, specific details must be provided: …
>
> *Non-compensable prejudice does not include prejudice resulting from the potential success of the plea or the fact that the amended plea may increase the length or complexity of the trial: …
>
> *At some point the delay in seeking an amendment will be so lengthy and the justification so inadequate, that prejudice to the responding party will be presumed: …
>
> *The onus to prove actual prejudice lies with the responding party: …

18 In *Mitsui & Co. (Point Aconi) Ltd. v. Jones Power Co. Ltd.*, 2001 NSSC 178, the defendant asserted prejudice of a similar nature to that claimed by the defendant in this case. Justice Wright concluded that the defendant had failed to demonstrate prejudice that could not be compensated in costs:

> 32 The demonstration of prejudice alone, however, does not satisfy the legal test to be applied on this application. The burden is on Mitsui to further demonstrate that the prejudice caused cannot be compensated in costs. *Undoubtedly these amendments, if permitted, will necessitate further discovery and the re-instruction of experts which inevitably will result in more cost and some measure of delay. There has not as yet been any discovery of experts, however, and although there is always a risk of fading memories, any lay witnesses who do need to be re-examined will at least have the benefit of the transcripts of their earlier discovery evidence in a situation where the factual underpinning of the case has not changed.*

19 *These are the principles that are applied on an ordinary motion to amend.* The analysis becomes more complicated, however, where the amendment is sought after the expiry of a limitation period.

[My italicization added]

A. The parameters of the general rule regarding leave of the court to make amendments[7]

[42] In considering whether the court should grant leave, there are three aspects to consider:

1. Is there sufficient evidence of bad faith on the part of the Southwest Group of Companies to preclude granting leave to amend?

2. Is there serious non-compensable prejudice to EllisDon flowing from granting leave to amend?

3. Can it be said that any part of the proposed pleadings are unsustainable or untenable in law such that leave to appeal should not be granted regarding those amendments?[8]

1. No "bad faith" established

[7] Justice Keith has addressed the distinctions between situations of claimed "as of right" amendments and those where leave from the court is required (CPR83.11) in *Garian Construction Ltd. v Dixon Marine Group 2000 Inc.*, 2019 NSSC 357. My conclusions regarding serious non-compensable prejudice and the limitation periods are applicable to CPR 35.08 as well, insofar as the addition of new parties is concerned – the requirements in the Rule for joining the relevant parties are met.

[8] While this aspect is not strictly speaking part of the general rule, it is of that nature, and thus it is appropriate to consider it here. The jurisprudence does tend to support the principle that amendments should rarely be denied based on untenable pleadings "unless it is shown that it is beyond all doubt that the claim is one that is clearly impossible of success", per *Hunt v Carey*, [1990] 2 SCR 959, at para. 10, or it is "plain and obvious" that the assertion is certain to fail because of a radical defect-see also *Lehan v St. Catharines (City)*, 2010 ONCA 318.

[43] I conclude that EllisDon has not established that there has been bad faith by Southwest that should disentitle it to leave to make the amendments sought.

[44] EllisDon had previously argued, *inter alia*,[9] that Southwest failed to explain the purpose for seeking an amendment, and had not pleaded facts which could justify the proposed amendment. EllisDon also questioned the timing of the proposed amendments, including the suggestion that they were used in a tactical manner so as to provide greater bargaining power to Southwest in any settlement discussions. They make these arguments in light of the history of the litigation, and the conclusions of the court at paragraphs 31 and 40 of Justice Gabriel's decision, 2018 NSSC 270. In response, Southwest stated in its brief:

> The motivation for the amendment to the pleadings is to correct deficiencies in the original pleadings regarding the identification of the corporate entities within the Southwest Group of Companies which had undertaking [sic] the mortgage financing and leasing responsibilities with respect to the project in question. There is no evidence that Southwest Construction is acting in bad faith, and no evidence has been proffered or even identified by EllisDon in support of an inference to this effect.

[45] The basic facts alleged here are that EllisDon presented itself as capable of being, and agreed to be, construction manager to the Maple Project, but did not

[9] See also a listing of the frustrations EllisDon says it has encountered in relation to this litigation at paras. 6-9 of EllisDon's brief filed December 4, 2019.

reasonably diligently provide its services, thereby causing a delay in the project and losses to the various entities within the Southwest Group of Companies.

[46] In the circumstances, EllisDon says, the Southwest Group of Companies, better than anyone else would know, or did know, the actual or reasonably expected financial impacts of the delay, and upon which of its entities those impacts would fall. Yet not only do the Southwest Plaintiffs (existing and proposed) argue that the court should find that they are all "related" entities, but they also argue that EllisDon knew or ought to have known that one or more of them, regardless of specifically which ones, would suffer the damages they now claim in their proposed Amended Statement of Claim.

[47] Moreover, that argument, which suggests a close working relationship between all of the companies, is at odds with the presentation of yet another substantial group of proposed amendments by the Southwest Group of Companies some four years after the initial Statement of Claim was filed, particularly in light of the frequency and timing of Southwest's repeated proposed amendments to date.

[48] While there is some merit to EllisDon's arguments, which do trouble the court, I remind myself that an allegation of bad faith is a serious one, and courts from their isolated position should not lightly come to that conclusion. I conclude

that the evidence presented does not rise to a level which would allow me on a balance of probabilities to infer bad faith on the part of Southwest.

2. No non-compensable prejudice

[49] As to whether adding the proposed "new claimants" SWC (in relation to the newly claimed negligent misrepresentation) and WP2, SWP Maple, and SWP (in relation to the newly-claimed negligent misrepresentation and existing claim of negligent provision of services, and the claim for increased debt interest financing) would cause prejudice that could not be compensated for in costs, I find there is no such prejudice here.

[50] The law respecting non-compensable prejudice was helpfully summarized by the Ontario Court of Appeal in *1588444 Ontario Ltd. v State Farm Fire and Casualty Co.*, 2017 ONCA 42 (some citations omitted):

> 1. Motion to amend
>
> (a) Legal principles
>
> [24] Motions for leave to amend a pleading are governed by rule 26.01 of the Rules of Civil Procedure, –R.R.O. 1990, Reg. 194, which provides:
>
> > 26.01 On motion at any stage of an action the court shall grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.
>
> [25] The law regarding leave to amend motions is well developed and the general principles may be summarized as follows:
>
> - **The rule *requires* the court to grant leave to amend unless the responding party would suffer non-compensable prejudice; the amended pleadings are**

scandalous, frivolous, vexatious or an abuse of the court's process; or the pleading discloses no reasonable cause of action: ...

- **The amendment may be permitted at any stage of the action**: ...
- **There must be a causal connection between the non-compensable prejudice and the amendment. In other words, the prejudice must flow from the amendments and not from some other source**: ...
- **The non-compensable prejudice may be actual prejudice, *i.e.*, evidence that the responding party has lost an opportunity in the litigation that cannot be compensated as a consequence of the amendment. Where such prejudice is alleged, specific details must be provided**: ...
- **Non-compensable prejudice does not include prejudice resulting from the potential success of the plea or the fact that the amended plea may increase the length or complexity of the trial**: ...
- **At some point, the delay in seeking an amendment will be so lengthy, and the justification so inadequate, that prejudice to the responding party will be presumed**: ...
- **The onus to prove actual prejudice lies with the responding party**: ...
- **The onus to rebut presumed prejudice lies with the moving party**: ...

[26] Bearing in mind these principles, I turn to a consideration of the actual and presumed prejudice in the present case. [page689]

(b) Actual prejudice

…

[31] *To meet their onus, the respondents were obliged to adduce specific evidence of actual prejudice.* For example, such evidence could include details of witnesses who were available previously but are no longer available. Noting that witnesses' memories may have faded is really just a generalized description of presumed prejudice. Such evidence lacks the required degree of specificity to qualify as evidence of actual prejudice.

[32] I agree with the observation of William J. Poulos in his article *Prejudice: Taking a Hard Look at the Merits* (1999), 22 C.P.C. (4th) 366, at p. 379, that when it comes to alleging actual prejudice in response to a motion to amend,

> The specific allegation of prejudice should be detailed in sufficient particularity in evidence to allow the opposing party to respond to the allegation and to allow the court to take a hard look at the merits of the allegation.

…

(c)Presumed prejudice

[36] The seminal case in Ontario considering the concept of presumed prejudice in the context of a rule 26.01 motion is the *Family Delicatessen* decision. In that case, this court

observed that at a certain point after an exceptional delay, non-compensable prejudice will be presumed absent evidence to the contrary. In other words, after inordinate delay, the presumption in favour of granting leave shifts to a presumption that non-compensable prejudice will result if leave is granted. This makes sense as a matter of fairness. It would be very difficult for a responding party to prove, for example, the generalized prejudice that witnesses' memories will be diminished after a lengthy passage of time.

[37] The presumption of prejudice is rebuttable. Where the moving party provides an adequate explanation for the delay or tenders evidence that there is no non-compensable prejudice, the presumption will be rebutted.

[38] The court in *Family Delicatessen* did not elaborate on when the shift in onus takes place, i.e., the point at which the delay will be so lengthy that prejudice will be presumed. It also did not explain what evidence would need to be led by the moving party to rebut the onus.

[39] The Divisional Court elaborated on the concept of presumed prejudice in *Ontario Securities Commission v. McLaughlin*, [2009] O.J. No. 1993, 2009 CarswellOnt 2694 (Div. Ct.). There the court stated, at para. 6, that to rebut the presumption of prejudice, a moving party needs to provide "some explanation of the delay in seeking the amendments and the presence or absence of prejudice to the opposite party and the need to show a nexus between the proposed amendments and the facts or evidence said to be recently discovered".

[40] The respondents submit that the OSC case provides a framework to determine whether the presumption has been rebutted. They urge the court to adopt a three-part test that the moving party must satisfy as follows: (i) an explanation for the delay; (ii) the absence of non-compensable prejudice to the responding party; and (iii) a nexus between newly discovered information and the proposed pleading. The respondents submit that unless a moving party can adduce compelling evidence on all three parts of the test, then they have not rebutted the presumption.

[41] I would not adopt the rigid test urged upon us by the respondents. In my view, the Divisional Court in OSC did not purport to establish a stringent test for rebutting the presumption. Rather, they were simply referencing the types of evidence that might be adduced by a moving party to rebut the operation of the presumption.

[42] In any event, such a rigid test is contrary to the fairness considerations that underlie the court's recognition of the concept of presumed prejudice in *Family Delicatessen*. It would be inequitable to require a moving party to satisfy all three parts of the proposed test in all cases. For example, if a moving party were able to establish that the responding party would suffer no non-compensable prejudice by reason of the amendment, then it would be an odd result if the presumption was not rebutted simply because an adequate explanation for the delay had not been established.

[My bolding added]

[51] The combination of proposed amendments which would see "new claimants" and "new claims"[10] simultaneously added at this stage in the litigation could naturally lead one to suspect that there is likely serious "prejudice" to the responding party. However, ultimately I do not find that to be the case in the circumstances here.

[52] I have evidence that the Southwest Group of Companies are "related". No significant specific elaboration to that conclusory statement was provided. However, the drawing of reasonable inferences leads to the conclusion that, without piercing the corporate veil, all the relevant entities of the Southwest Group of Companies should be considered as imbued with like knowledge of each of their parts, and as working "hand in glove" together regarding the Maple Project.

[53] On the other hand, while EllisDon argues generally that it was unaware of which Southwest entities were tasked with the operation of the Project post-construction, no evidence was presented in support of the assertion that EllisDon

[10] The nomenclature is confusing, but necessary. In the *Limitation of Actions Act*, the defined terms "claim" and "claimant" are used. In the Civil Procedure Rules, the terms "party" and "person" are used – eg. See CPRs 35, 83 and 94.08. "Claim" and "corporation" are defined in CPR 94.10 as interpreted per 94.11(2).

was *unaware* that one or more of the Southwest Group of Companies would be tasked with the operation of the Project post-construction.[11]

[54] An examination of the record reveals no compelling evidence of serious non-compensable actual prejudice to EllisDon if the amendments were permitted. No serious non-compensable prejudice of the kind referenced by Justice Bodurtha in *Bayswater* has been established here: namely, prejudice of an evidentiary nature, such as documents and witnesses that have been lost due to the passage of time; lost opportunity in the litigation that cannot be compensated as a consequence of the proposed amendments, etc.

[55] In relation to presumed prejudice due to excessive delay, that is not a persuasive argument in this case where the basic facts involve a contractual relationship between the parties, and the acts or omissions that caused the alleged damages were generally knowable by all parties on or before June 1, 2015, based

[11] Notably, in its August 6, 2015, "Statement of Claim against Third Party" (ie SWP), which incorporated its Statement of Defence and Counterclaim, EllisDon pleaded that it knew in June 2013 that SWP was the owner of the premises, and alleged that SWC acted as agent for SWP. Moreover, had EllisDon searched the land registry records it would have discovered the April 9, 2018, Notice of the Lease between WP2 and SWP Maple, dated April 1, 2018- though as I noted earlier it references a commencement date of April 1, 2015- see paras. 13-15 and Exhibits "D" and "E" Laing affidavit. As early as December 6, 2018, when counsel for EllisDon received the Second Supplemental Affidavit Disclosing Documents (para. 9, 2019, Shanks affidavit) EllisDon was thereby aware which Southwest entities were going to operate the Maple and were mortgagors and guarantors of the financing for the Project. Thus, when EllisDon consented to the February 2019 amendments, it had this disclosure.

on their intimate involvement in managing the construction flowing from the construction management services contract.

[56] Both breach of contract and negligent provision of services are already pleaded by SWC.

[57] To be clear, there is no evidence of serious non-compensable presumed prejudice herein.

3. Leave to amend should not be precluded on the basis of the argued untenability of the amendments

[58] EllisDon says the claims sought to be advanced in the proposed Amended Statement of Claim lack any pleaded material factual basis which would support the relevant allegations of breach of contract and negligence asserted by the various Southwest entities. Their complaint may be put as follows:

> There are two basic routes for the Southwest Group of Companies to recover as against EllisDon: breach of contract and the tort of negligence (whether that be negligent misrepresentation or negligent provision of services, claiming pure economic loss).

[59] None of the proposed "new claimants" (WP2, SWP Maple, and SWP) are parties to the contract between SWC and EllisDon. Generally speaking, without being privy to the contract, the new claimants have no recourse thereunder.[12]

[60] While the new claimants argue that they have claims against EllisDon in both negligent misrepresentation and negligent provision of services, EllisDon says it did not have a duty to any of the proposed new plaintiffs, nor is a such a duty, or a breach of such duty, *pleaded*. Moreover, EllisDon says, claims for pure economic loss in tort must be within a category recognized by the Supreme Court of Canada for such recovery of loss, and Southwest's claims do not have that character: see *Winnipeg Condominium Corporation No. 36 v Bird Construction Co*. [1995] 1 SCR 85.

[61] A determination of this issue requires an examination of the constituent elements and restraints upon these two forms of negligence.

[12] Technically, it *may* be possible, in proper circumstances, for them to claim a contractual relational economic loss: *Clark Builders*, at paras. 201-233 (as to the distinction between relational economic loss and consequential economic loss, see Prof. Brown's discussion at pp.59-66, in *Pure Economic Loss in Canadian Negligence Law). B*ut such was not argued before me and I do not intend to pursue it. Moreover, even if it were possible to link the new parties' claim to increased financing costs through the breach of contract claim, as presently formulated, principles of reasonable foreseeability and remoteness of damages tend to militate against *their* success – see Chief Justice McLachlin's statements in *RBC Dominion Securities Inc. v. Merrill Lynch Canada Inc.,* 2008 SCC 54, at paras. 63-64, in the contractual context.

[62] EllisDon's argument that the proposed pleadings are unsustainable or untenable approximates a motion for summary judgment on pleadings pursuant to CPR 13.03. That Rule requires a judge to set aside a statement of claim that "discloses no cause of action" (CPR 13.03(1)(a)) or which makes a claim "that is clearly unsustainable when the pleadings is read on its own" (CPR 13.03(1)(c)).

[63] In the case at Bar, affidavit evidence has been filed, and the comparison with summary judgment on pleadings is limited. Nevertheless, from the perspective of the unsustainability of pleadings, I find helpful, as a succinct statement of the applicable principles, Justice Keith's reasons at para. 44 in *Keleher v Nova Scotia (Atty. Gen.)*, 2019 NSSC 375:

> 44 Four key principles govern motions for summary judgment on the pleadings:
>
> a. For the purposes of the motion to strike, the facts contained in the challenged pleading must be taken as being proven and true (*Homburg Canada Inc* v *Halifax (Regional Municipality)* (2003), N.S.J. No. 194, (2003), 216 NSR (2d) 67 (NSCA), at para 7).
>
> b. Although the pleaded facts are deemed to be true, a plaintiff cannot simply stand on the mere possibility that the material facts necessary to sustain a cause of action might eventually pop up. A plaintiff "must plead fact material to the causes of action they assert" (*Canada (Attorney General)* v *Walsh Estate*, 2016 NSCA 60, [2016] N.S.J. No. 298, at para 18);
>
> c. It must be "plain and obvious" that the claims as pleaded cannot succeed because, for example, "the pleading, on its face, discloses no reasonable cause of action; or ... the claim is absolutely unsustainable; or ... it is certain to fail because of a radical defect" (*Hunt* v *Carey Canada Inc*, [1990] 2 SCR 959, at paras 30-34; *Homburg Canada Inc.* v *Halifax (Regional Municipality)*, *supra*, at para 7)

> d. The power to strike should be used with care. The law evolves. The court should be generous and err on the side of permitting novel, but arguable, claims to proceed" (*Canada (Attorney General)* v *Walsh Estate, supra*, at para 18).

[64] Next let me briefly state the constituent elements of claims for negligent misrepresentation and negligent provision of services, as well as the limitations on claims thereunder for pure economic loss.[13]

[65] Regarding the categories of recoverable pure economic loss, I also find it helpful to cite from the recent decision in *Clark Builders*:

> (b) Categories of Recoverable Economic Loss
>
> 144 The common law has only reluctantly and grudgingly extended liability in negligence for causing pure economic loss. As doctrine has evolved, the recoverable economic loss cases have fallen into five main categories, outlined by Justice La Forest in *Bird Construction* at para 12:
>
> > 12 This case gives this Court the opportunity once again to address the question of recoverability in tort for economic loss. In *Norsk, supra*, at p. 1049, I made reference to an article by Professor Feldthusen in which he outlined five different categories of cases where the question of recoverability in tort for economic loss has arisen ("Economic Loss in the Supreme Court of Canada: Yesterday and Tomorrow" (1990-91), 17 Can. Bus. L.J. 356, at pp. 357-58), namely:
> >
> > 1. The Independent Liability of Statutory Public Authorities;
> > 2. Negligent Misrepresentation;
> > 3. Negligent Performance of a Service;
> > 4. Negligent Supply of Shoddy Goods or Structures;
> > 5. Relational Economic Loss ...

[13] A fulsome discussion of the component aspects of negligence may be found in Justice Bryson's reasons in *Canada (Atty. Gen.) v Walsh*, 2016 NSCA 60.

> See also *D'Amato v Badger* at para 30; *Design Services* at para 31; Brown, *Pure Economic Loss* at 5, 47-54; Osborne, *Law of Torts* at 182.
>
> 145 While a categorical approach might seem out-moded given the Supreme Court's abstract "principled" approaches in a variety of legal areas, a categorical approach in the economic loss area is appropriate. *First*, as Professor Feldthusen has warned, the different categories of economic loss doctrine have evolved in particular contexts as solutions for particular problems. *The categories are not examples or instances of general doctrinal principles* (as if a single Hegelian idea were being made manifest through concrete instances), *but were distinct doctrinal solutions concerning distinct types of interactions (the individual doctrinal areas have some broad "family resemblances" but serve different purposes and functions).* The categories do share some elements, since all come under the wing of the tort of negligence. The common elements, though, should not be over-emphasized to impose uniformity. *Second, from the standpoint of litigation methodology, the categorical approach gives analysis a starting point. An economic loss problem emerging from particular circumstances should be assessed under the categories, to determine whether the jurisprudence accommodates a response to that problem in those circumstances*: *Livent* at paras 28-19. The law, though, is not static. *If the problem is not amenable to categorical resolution, it may be that the law should be extended to provide a remedy in a new set of circumstances*. To determine whether an extension is warranted, tort principles, particularly those governing the recognition of a duty of care would come into play: see, e.g., *Livent* at para 29; *Bow Valley Husky (Bermuda) Ltd v Saint John Shipbuilding Ltd*, [1997] 3 SCR 1210, McLachlin J, as she then was, at para 47; Brown, *Pure Economic Loss* at 14-17."
>
> [My italicization added]

[66] It is also worth noting that a tort duty of care may exist with a duty in contract. As noted by Justice LaForest, in *Bird Construction*:

> 23 Turning to the first of these reasons, I observe that it is now well-established in Canada that *a duty of care in tort may arise coextensively with a contractual duty.* In *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147, Le Dain J. explained the relationship between tort and contractual duties as follows, at pp. 204-5:
>
> > 1. The common law duty of care that is created by a relationship of sufficient proximity, in accordance with the general principle affirmed by Lord Wilberforce in *Anns v. Merton London Borough Council*, is not confined to relationships that arise apart from contract. Although the relationships in *Donoghue v. Stevenson*, *Hedley Byrne* and *Anns* were all of a non-contractual nature and there was necessarily reference in the

> judgments to a duty of care that exists apart from or independently of contract, I find nothing in the statements of general principle in those cases to suggest that the principle was intended to be confined to relationships that arise apart from contract. . . . *[T]he question is whether there is a relationship of sufficient proximity, not how it arose. The principle of tortious liability is for reasons of public policy a general one.*
>
> This is not to say, of course, that a duty in tort arises out of a duty in contract. In Rafuse, Le Dain J. made it clear that, although duties in tort and contract may arise concurrently, the duty in tort must arise independently of the contractual duty. He stated, at p. 205:
>
> > 2. What is undertaken by the contract will indicate the nature of the relationship that gives rise to the common law duty of care, but the nature and scope of the duty of care that is asserted as the foundation of the tortious liability must not depend on specific obligations or duties created by the express terms of the contract. It is in that sense that the common law duty of care must be independent of the contract.
>
> [My italicization added]

i) Negligent misrepresentation

[67] The Supreme Court of Canada authoritatively determined the parameters of this civil claim in *R v Cognos Inc.*, [1993] 1 SCR 87, and *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1993] 1 SCR 12.[14]

[68] In *Cognos* the court set out the constituent elements of negligent misrepresentation (some citations omitted):

---

[14]The latter case discussed the controversy surrounding whether concurrent contractual and tort-based negligence claims may coexist. Notably, at para. 39, the court pointed out the differences between damages in tort and contract: "the measure of damages in contract and for the tort of negligent misrepresentation are: contract: the plaintiff is to be put in the position it would have been in had the contract been performed as agreed. Tort: the plaintiff is to be put in the position it would have been in had the misrepresentation not been made." Importantly, the court also points out at para. 15 that "where a given wrong *prima facie* supports an action in contract and in tort, the party may sue in either or both, except where the contract indicates that the parties intended to limit or negative the right to sue in tort."

> 30 … Though a relatively recent feature of the common law, the tort of negligent misrepresentation relied on by the appellant and first recognized by the House of Lords in *Hedley Byrne*, *supra*, is now an established principle of Canadian tort law. This Court has confirmed on many occasions, sometimes tacitly, that an action in tort may lie, in appropriate circumstances, for damages caused by a misrepresentation made in a negligent manner: …
>
> 31 While the doctrine of *Hedley Byrne*, *supra*, is well established in Canada, the exact breadth of its applicability is, like any common law principle, subject to debate and to continuous development. … Without question, the present factual situation is a novel one for this Court.
>
> ...
>
> 33 The required elements for a successful *Hedley Byrne* claim have been stated in many authorities, sometimes in varying forms. The decisions of this Court cited above suggest *five general requirements: (1) there must be a duty of care based on a "special relationship" between the representor and the representee; (2) the representation in question must be untrue, inaccurate, or misleading; (3) the representor must have acted negligently in making said misrepresentation; (4) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and (5) the reliance must have been detrimental to the representee in the sense that damages resulted*.
>
> [My italicization added]

[69] It is not contested that the damages claimed in the case at bar are in the nature of "pure economic loss". In spite of the Supreme Court of Canada's articulation of the parameters of "negligent misrepresentation" in 1993, we find the following remarks in *Pure Economic Loss in Canadian Negligence Law* (Markham, Ontario: Lexis-Nexis Canada, 2011) at pp. 232-235, per Prof. Russell Brown (as he then was – now of the Supreme Court of Canada):

> While negligent misrepresentations have engendered the largest body of case authorities among the different forms of judicially recognized pure economic loss in Canada, *a pithy encapsulation of just what a negligent misrepresentation constitutes for the purposes of negligence law does not appear in any of the leading Canadian authorities. This is unsurprising since, as will be shown in this*

> *chapter, the fundamental prerequisites for imposing liability for a negligent misrepresentation – after nearly 50 years of judicial recognition – remain unsettled at the Supreme Court of Canada.*
>
> …
>
> For the present purpose of introducing the concept of a negligent misrepresentation, however, the elements which a plaintiff must show in order to support the imposition of a duty of care upon the maker of negligent misrepresentation will be taken as:
>
> 1. a statement by the defendant to the plaintiff that is untrue (or otherwise inaccurate or misleading);
> 2. the accuracy for which the defendant assumed or undertook responsibility to the plaintiff; and
> 3. upon which the plaintiff reasonably relied.
>
> Perhaps because it was the first form of pure economic loss to be recognized as recoverable in Canadian and Commonwealth negligence law, negligent misrepresentation has occasionally been spoken of as if it were its own nominate "tort of negligent misrepresentation", even at the Supreme Court of Canada. Certainly, *those duty elements enumerated above do not apply to claims for negligence simpliciter*. As was explained in Chapter 1, however, *the better way of understanding them is that, taken together, they comprise a specific instance of 'proximity' within the general duty of care test in negligence law, tailored to cases where the defendants negligent conduct was in making a misrepresentation.* Negligent misrepresentation therefore occupies a subset within the tort of negligence, in the same way as other kinds of negligent conduct for which the elements of proximity have been similarly specified….Despite the different (or rather, specified) duty of care elements, the cause of action remains that of negligence. *Plaintiffs must therefore still prove a breach of the common law standard of care of the 'reasonable person', the content of which might be informed by custom, trade practice, expertise are statute, as well as by the degree of risk, the scope of the potential harm, and sometimes the cost to the defendant of harm-avoidance.*
>
> [My italicization added]

[70] Prof. Brown goes on to note that the Supreme Court of Canada expounded upon the line between indeterminate and determinate liability in economic loss cases in *Haig v Bamford*, [1977] 1 SCR 466, where the issue was the liability of an

accountant to parties other than his employer for negligent statements, and specifically whether there was sufficient proximity for a duty of care to arise. The claim related to the potential damage to economic interests relating to financial statements, and the scopes of liability arriving from accountants' professional activities. Dickson J. (as he then was) said:

> ... The complexities of modern industry combined with the effects of specialization, the impact of taxation, urbanization, the separation of ownership from management, the rise of professional corporate managers, and a host of other factors, have led to marked changes in the role and responsibilities of the accountant, and in the reliance which the public must place upon his work. The financial statements of the corporations upon which he reports can affect the economic interests of the general public as well as of shareholders and potential shareholders.
>
> With the added prestige and value of his services has come, as the leaders of the profession have recognized, a concomitant and commensurately increased responsibility to the public. It seems unrealistic to be oblivious to these developments. It does not necessarily follow that the doors must be thrown open and recovery permitted whenever someone's economic interest suffers as the result of a negligent act on the part of an accountant. Compensation to the injured party is a relevant consideration but it may not be the only relevant consideration.
>
> …
>
> In the case at bar, the accounts were prepared for the guidance of a "specific class of persons", potential investors, in a "specific class of transactions", the investment of $20,000 of equity capital. The number of potential investors would, of necessity, be limited because the company, as a private company, was prohibited by s. 3(o) (iii) of *The Companies Act of Saskatchewan* (R.S.S. 1965, c. 131) from extending any invitation to the public to subscribe for shares or debentures of the company.
>
> One comes then to the *Hedley Byrne* case. The argument was raised in that case that the relationship between the parties was not sufficiently close to give rise to any duty. Lord Reid dealt with that argument in these words (p. 580):
>
> > ... It is said that the respondents did not know the precise purpose of the inquiries and did not even know whether National Provincial Bank, Ltd. wanted the information for its own use or for the use of a customer: they knew nothing of the appellants. I would reject that argument. They knew

> that the inquiry was in connection with an advertising contract, and it was at least probable that the information was wanted by the advertising contractors. It seems to me quite immaterial that they did not know who these contractors were: there is no suggestion of any speciality which could have influenced them in deciding whether to give information or in what form to give it. I shall therefore treat this as if it were a case where a negligent misrepresentation is made directly to the person seeking information, opinion or advice, and I shall not attempt to decide what kind of degree of proximity is necessary before there can be a duty owed by the defendant to the plaintiff.

In the present case the accountants knew that the financial statements were being prepared for the very purpose of influencing, in addition to the bank and Sedco, a limited number of potential investors. The names of the potential investors were not material to the accountants. What was important was the nature of the transaction or transactions for which the statements were intended, for that is what delineated the limits of potential liability. The speech of Lord Morris in *Hedley Byrne* included this observation, p. 588:

> It is, I think, a reasonable and proper inference that the bank must have known that the National Provincial were making their inquiry because some customer of theirs was or might be entering into some advertising contract in respect of which Easipower, Ltd., might become under a liability to such customer to the extent of the figures mentioned. The inquiries were from one bank to another. The name of the customer (Hedleys) was not mentioned by the inquiring bank (National Provincial) to the answering bank (the bank): nor did the inquiring bank (National Provincial) give to the customer (Hedleys) the name of the answering bank (the bank). These circumstances do not seem to me to be material. The bank must have known that the inquiry was being made by someone who was contemplating doing business with Easipower Ltd. and that their answer or the substance of it would in fact be passed on to such person.

Lord Devlin stood on narrow ground, content with the proposition that wherever there is a relationship equivalent to contract, there is a duty of care and such relationship may be either general, such as that of solicitor and client and of banker and customer, or particular, created *ad hoc*, in which case it becomes necessary to examine the particular facts to see whether there is an express or implied undertaking of responsibility. This reference to "assumption of responsibility" is crucial in cases involving economic loss, according to C. Harvey, "Economic Losses & Negligence" (1972), 50 Can. Bar Rev. 580. Harvey devises a test for imposing a duty of care in cases of economic loss which he phrases as follows (p. 600):

> a, person should be bound by a legal duty of care to avoid causing economic loss to another in circumstances where a reasonable man in the

> position of the defendant would foresee that kind of loss and would assume responsibility for it.
>
> This "assumption of responsibility" test is an interesting one, although it is no more objective than a foreseeability test. It would allow the Court to narrow the scope of liability from that resulting from a foreseeability test, but it would still require scope of liability. As Lord Pearce stated in *Hedley Byrne* (p. 615):
>
> > How wide the sphere of the duty of care in negligence is to be laid depends ultimately on the courts' assessment of the demands of society for protection from the carelessness of others.
>
> Lord Pearce in *Hedley Byrne* adopted Lord Denning's dissent in *Candlers case*, to which I have already referred, noting that the result produced was somewhat similar to the American Restatement of the Law of Torts.
>
> [My italicization added]

[71] Justice Dickson went on to review a line of English and American authorities addressing the scope of the duty of care in economic loss cases, including two decisions of Cardozo J.:

> *The American authorities: Judgment in the two leading cases was written by Mr. Justice Cardozo. In Glanzer v. Shepard [(1922), 233 N.Y. 236.] the defendants, public weighers, at the request of a seller of beans, made a return of the weight and furnished the plaintiff buyer with a copy. The buyer paid the seller on the faith of the certificate which turned out to be erroneous. The buyers were entitled to recover from the weighers. The certificate was held to be the very "end and aim" of the transaction* and not something issued in the expectation that the seller would use it thereafter in the operations of his business as occasion might require.
>
> The question whether third parties were protected from the negligence of accountants came before the New York Courts in *Ultramares Corp. v. Touche, supra*. The breach made in the wall of privity by Glanzer's case was narrowed in *Ultramares*. In that case, a company showed a balance sheet prepared by the defendants to a factor who advanced money to the company. The factor was unknown to the defendants, and Cardozo J. held that the defendants owed the factor no duty of care. Although the *Ultramares* decision has been followed widely in the United States, it has also been criticized. (See Prosser, Law of Torts, 4th ed., pp. 706 to 709; Hawkins, "Professional Negligence Liability of Public Accountants" (1959), 12 Vand. Law Rev. 797; Note, "Accountants' Liability for False and Misleading Statements" (1967), 67 Colum. L. Rev. 1437.) *Ultramares*

has also been distinguished in a case similar to the one at bar, *Rusch Factors, Inc. v. Levin* [(1968), 284 F. Supp. 85 (Dist. Ct., R.I.).]. In *Rusch,* the Court held that the plaintiff investor, who had relied on the financial statement prepared by the defendant, was actually foreseen by the defendant. Pettine J. distinguished *Ultramares* in these words (p. 91):

> ... There, the plaintiff was a member of an undefined, unlimited class of remote lenders and potential equity holders not actually foreseen but only foreseeable.

The Rusch case was followed by the U.S. Court of Appeals (4th Circuit) in *Rhode Island Hospital Trust National Bank v. Swartz* [(1972), 455 F. 847.]. That case mentions that Rusch has been followed in Iowa and Minnesota.

[My italicization added]

[72] Justice Dickson continued:

The case before us is closer to Glanzer than to Ultramares. The very end and aim of the financial statements prepared by the accountants in the present case was to secure additional financing for the company from Sedco and an equity investor; the statements were required primarily for these third parties and only incidentally for use by the company. In the *Ultramares* case, Touche would know that the statements were primarily for company use although they might be read in the ordinary course of business by shareholders, investors, banks and countless others.

Prosser, Law of Torts, 4th ed., notes at p. 707 that a duty of reasonable care has been found where a representation is made to a third person with knowledge that he intends to communicate it to the specific individual plaintiff for the purpose of inducing him to act, and that most of the courts have drawn the line there. The following question is posed, however, (p. 708):

> But what if the defendant is informed that his representation is to be passed on to some more limited group, as a basis for action on the part of some one or more of them?

and *the answer is* in these words, (p. 709):

> ... where the group affected is a sufficiently small one, and particularly, as in the case of the successful bidder, only one person can be expected to suffer loss, the guess may be hazarded that the recovery will be allowed. Certificates of expert examination are intended to be exhibited, not hidden under a bushel; and a rule which denies recovery because the defendant who has provided one for such a purpose does not know the plaintiff's name, or the particulars of the transaction, has a very artificial aspect.

> The approach taken in the *American Restatement of Torts* (2d) SS 552 is to permit recovery for loss suffered by the person or one of the persons for whose benefit or guidance the professional person intends to supply the information or knows that the recipient intends to supply it. A duty of care arises if the defendant accountant knows that a third party will receive his statements. This knowledge is not with regard to the specific individual, but to a limited class of which he forms a part. …
>
> [My italicization added]

[73] Justice Dickson went on to consider the Canadian authorities relevant to the issues, and concluded that liability had been established:

> The Canadian authorities: The *Hedley Byrne* case has been considered by this Court in *Well-bridge Holdings Ltd. v. Metropolitan Corp. of Greater Winnipeg* [[1971] S.C.R. 957]. Recovery for economic loss caused by negligence has been allowed in *Rivtow Marine Ltd. v. Washington Iron Works* [[1974] S.C.R. 1189.], where Mr. Justice Ritchie said, p. 1213:
>
> > ... I am of opinion that the case of *Hedley Byrne* represents the considered opinion of five members of the House of Lords to the effect that a negligent misrepresentation may give rise to an action for damages for economic loss occasioned thereby without any physical injury to person or property and apart from any contract or fiduciary relationship...
>
> (See also *J. Nunes Diamonds Ltd. v. Dominion Electric Protection Co.* [[1972] S.C.R. 769.])
>
> In summary, Haig placed justifiable reliance upon a financial statement which the accountants stated presented fairly the financial position of the company as at March 31, 1965. The accountants prepared such statements for reward in the course of their professional duties. The statements were for benefit and guidance in a business transaction, the nature of which was known to the accountants. The accountants were aware that the company intended to supply the statements to members of a very limited class. Haig was a member of the class. It is true the accountants did not know his name but, as I have indicated earlier, I do not think that is of importance. *I can see no good reason for distinguishing between the case in which a defendant accountant delivers information directly to the plaintiff at the request of his employer, (Candler's case and Glanzer's case) and the case in which the information is handed to the employer who, to the knowledge of the accountant, passes it to members of a limited class (whose identity is unknown to the accountant) in furtherance of a transaction the nature of which is known to*

> *the accountant*. I would accordingly hold that the accountants owed Haig a duty to use reasonable care in the preparation of the accounts.
>
> [My italicization added]

[74] In *Haig*, a duty of care was extended for *a known* (rather than foreseeable) *class of potential plaintiffs* in the case of negligent misrepresentation.[15]

[75] Prof. Brown concludes at page 307[16] that the question of indeterminate liability was one to be addressed at the stage of determination of *prima facie* duty of care, at the first stage of the *Anns* test, as indicated by *Fullowka v. Pinkerton's of Canada Ltd.*, [2010] 1 SCR 132:

> In short, Cromwell J's approach in *Fullowka* [*v Pinkerton's of Canada Ltd.*, [2010] 1 SCR 132] is correct in viewing concerns of indeterminate liability as pertaining to the determination of the *prima facie* duty of care. Such concerns are 'directly relevant to ascertaining the existence and the extent of an invitation to rely in given circumstances'. As such, they belong to the first stage of the *Anns*/*Cooper v Hobart* duty of care test.

ii) Negligent provision of services

[76] In relation to this tort, Prof. Brown states at page 52 – 54 in *Pure Economic Loss in Canadian Negligence Law*:

---

[15] Which I note was relied upon by that court in *Edgeworth Construction Ltd. v. ND Lea and Associates Ltd.*, [1993] 3 SCR 206.

[16] Prof. Brown acknowledges that in two more recent decisions (*Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24, and *R v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, the Supreme Court of Canada reverted to the *Design Services*, 2008 SCC 22, approach of deferring considerations of indeterminate liability until the second stage of the *Anns* test.

Claims for negligent performance of a service are also resolved with reference to the reliance loss basis for a duty of care. As Chapter 5 discusses, the scope of claims covered by this form of pure economic loss is not yet clearly agreed upon. It is, however, fair to say that Canadian courts have recognized that it covers claims arising from the defendant's negligent performance of a business or professional service undertaken for the plaintiff's benefit. *The case authorities are typically divided by commentators into two categories. First, there are cases where the defendant undertook directly to the plaintiff to perform a service to the plaintiff's benefit. And, secondly, there are cases where the defendant undertook indirectly – typically by way of a contract with a third party – to perform a service to the plaintiff's benefit.*

Despite this general agreement upon the taxonomy of claims for negligent performance of a service, there remains a dispute (both among commentators and in the courts) about the necessary elements for successfully bringing such a claim. The issue is whether the plaintiff must prove that he or she reasonably relied on the undertaking to provide the service, or whether instead the mere fact of the defendant's undertaking is sufficient to ground liability. The argument against a reliance requirement is that the plaintiff's reliance goes only to proving the causal sequence that led to the loss, and not to the duty of care. If that causal sequence can be proven in some other way, the argument goes, then a reliance requirement would be superfluous. As will be shown in Chapter 5, however, *the bulk of Canadian appellate authority affirms that reasonable reliance is a necessary precondition to liability for the negligent performance of a service, just as it is in the claims for negligent misrepresentation. Whether, therefore, the presence or absence of reasonable reliance is being considered from the standpoint of a principled view of negligence law or from the standpoint of Canadian case authorities, reasonable reliance remains a prerequisite to recovery for negligent performance of a service*.

Given that the recoverability of pure economic loss that is incurred by the defendant's breach of a reliance loss – based duty of care, it might be wondered why Canadian negligence law distinguishes between pure economic loss arising from a negligent misrepresentation and pure economic loss arising from the negligent performance of a service. Such a distinction has never been explained by courts or commentators, nor is it obvious that any distinction is necessary… All that having been said, negligent misrepresentation and negligent performance of a service will in this book be treated in separate chapters, thereby conforming to the subsisting distinction Canadian negligence law draws between those two forms of pure economic loss.

[My italicization added]

[77] Professor Brown begins Chapter 5 (Negligent Performance of a Service) with the following:

> This chapter addresses a collection of cases whose parameters, as a form of pure economic loss, have not yet been widely settled upon… They are seen by another in more specific terms, comprising four distinct types of claims.[17]
>
> For present purposes, it can at least be said that Canadian courts have recognized a distinct form of pure economic loss that arises where the defendant negligently performs a business or professional service that was undertaken for the plaintiff's benefit. Even within that basic statement of parameters, however, the law governing claims for negligent performance of a service remain unsettled, such that the leading commentators do not agree upon the fundamental elements for liability. They are agreed however, that the cases are usefully divided into two groups: first, cases where the defendant undertook directly to the plaintiff to perform a service to the plaintiffs benefit; and cases where the defendant undertook indirectly – typically by way of contract with a third party – to perform a service to the plaintiff's benefit.[18]

[17] Identified by Brown at page 379, in footnote 4, as Bruce Feldthusen, *Economic Negligence: The Recovery of Pure Economic Loss*, 5th edition (Toronto: Thomson Carswell, 2008) at p. 128. I have compared with Feldthusen's 6th edition (2012) at pp. 129 -172, with its predecessor, and for present purposes, his position remains unchanged.

[18] He notes that Prof. Feldthusen envisages two further distinct types of claims (my italicization added):

> "1- the '*imposition of additional duties derived from the plaintiff's contract with a third party*',('where the defendant's breach of contract injures the other contracting party and/or the intended third-party beneficiary of the contract, and *in addition*, injures the plaintiff who is not an intended beneficiary of the contractual duty'); 2- the '*imposition of duties of affirmative action*', ('where affirmative obligations are imposed on the defendant in the absence of any breach of duty to a party or breach of a specific undertaking to the plaintiff' itself). In relation to these respectively, Prof. Feldthusen says "the analysis of *Hawthorne*, [640 P.2d 467 (US Mont. SC,1982)] was not meant to suggest that there will never be cases in which the courts should *impose* negligence liability in favour of a third party *in addition* to liability specifically assumed in the contract.… To date there have been very few such cases which cannot be explained to situations in which the defendant was held liable for the very responsibility which she assumed, so *it would be premature to attempt to develop a general theory*." And "*once again, it is extremely difficult to categorize accurately the cases discussed here, let alone to identify precisely the legal foundation for the recognition for the duty of care*. *Further decisions are necessary before a complete theory of liability can be developed*."

[78] In their book, *Economic Torts in Canada*, Second Edition, (LexisNexis Canada Inc., 2016) Professors Peter T. Burns and Joost Blom state in relation to "negligent performance of a service", at p. 410:

> Where the defendant's failure to perform competently a task that the defendant had undertaken to perform] if the undertaking was as against the plaintiff, it will usually have been in the context of a contract, and the plaintiff will have a remedy for breach of contract. If the undertaking was as against a third party, the plaintiff faces the difficulty of showing that, in assuming responsibility towards the third party, the defendant was at the same time taking on a duty of care to the plaintiff. For this reason, claims for financial loss occasioned by the failure to render a service to somebody else have generally been unsuccessful.

[79] What then can be said to be the elements of a claim for the negligent provision of services in present circumstances? I suggest they may be roughly stated, for present purposes, as the following[19]:

1. Where the defendant has contractually directly undertaken to provide a service to the plaintiff, and concurrently, *knowingly* indirectly (per *Haig v Bamford*) undertaken to an intended third party beneficiary (including a known class of potential plaintiffs) to provide that service to the plaintiff, a duty of care is created between the defendant and the third party. This presumes that the defendant reasonably foresaw that its negligent provision of the services would cause harm to the plaintiff *and* the third party- and that the third party reasonably relied upon the defendant's competent provision of those services;
2. Breach of the duty of care and causation of damages to the third party;
3. Reliance-based damages, subject to the principle of remoteness, are available to compensate the third party.

[19] See also for comparison paragraph 33 in *Cognos*, regarding the elements of negligent misrepresentation.

Conclusion regarding the sustainability of the proposed amended pleadings

[80] Given the unsettled jurisprudence,[20] and the reluctance of courts generally to preclude otherwise sustainable claims that have "novel" characteristics, I am not satisfied that it is plain and obvious that the proposed claim(s) of "pure economic loss" (including the increased debt financing costs) flowing from the *existing* claim of negligent provision of services *vis-à-vis* the existing party SWC *and* the proposed new parties WP2, SWP Maple, and SWP, cannot succeed.[21]

[81] In relation to the specific argument that insufficient necessary material facts have been pleaded in support of the claimed pure economic loss flowing from the *new* claim of negligent misrepresentation *vis-à-vis* SWC, to the extent that this argument was being made, I conclude that sufficient material facts have been pleaded here.

[82] SWC's proposed pleadings provide a sufficient basis upon which it can be concluded that the material facts of the pleadings touch on all five *Cognos* prerequisites of negligent misrepresentation.

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[20] Justice Renke's recent decision in *Clark Builders*, 2019 ABQB 706, updates some of the general principles arising in the jurisprudence.

[21] I conclude similarly so in relation to the *new* claim of negligent misrepresentation *vis-à-vis* SWC as an "existing" party, and WP2, SWP Maple, and SWP, as "new" parties, although I do so less confidently than in relation to the negligent provision of services claim.

[83] In relation to the specific argument that necessary material facts have not been pleaded in support of the claimed pure economic loss flowing from the *new* claim of negligent misrepresentation and the *existing* claim of negligent provision of services *vis-à-vis* WP2, SWP Maple, and SWP (bearing in mind cases like *Haig v Bamford*), I conclude that sufficient material facts have been pleaded here.

[84] WP2, SWP Maple, and SWP's proposed pleadings provide a sufficient basis to conclude that the material facts asserted by the pleadings address the five prerequisites of negligent misrepresentation, by virtue of the words "repeat and rely on the foregoing" in paragraph 35 of the proposed pleading, and their nexus with SWC, to whom the alleged negligent misrepresentations were directly made by EllisDon, as well as, in particular, the pleaded basis upon which the increased debt financing costs are claimed (paras. 30-34).

[85] Similarly, WP2, SWP Maple, and SWP's proposed pleadings provide a sufficient basis to conclude that the material facts asserted by the pleadings touch on the prerequisites of negligent provision of services, by virtue of their use of "repeat and rely on the foregoing" in paragraph 35 of the proposed pleading[22], and their nexus with SWC, which was directly impacted by the alleged negligent

[22] I note that EllisDon does not challenge the sustainability of SWC's pleadings of negligent provision of services, which are already incorporated into the consented-to February 2019 pleadings.

provision of services, whereas they were indirectly impacted, giving rise to a pleaded basis upon which the increased debt financing costs are claimed (paras. 30-34).[23]

[86] In summary, while the proposed pleadings are not elegant, they are sufficiently sustainable on their face to forestall the court denying leave to amend.[24]

A consideration of the existence and effect of any limitation periods on the court's authority to grant leave to amend the pleadings herein

[87] Having canvassed the general rule, and finding no impediment to granting leave to amend the pleadings, I will now turn to a consideration of the relevant limitation periods and the specific requirements contained in the Civil Procedure Rules, namely Rules 35 (Parties) and 83 (Amendments).

[88] The determination of whether I should permit Southwest's requested amendments regarding "new parties" and "new claims" may perhaps best be

[23] For example, that EllisDon "was aware, or ought to have been aware" that other Southwest entities would own and operate the mixed residential and commercial development project, and as such were a known class of potential plaintiffs, to whom EllisDon also owed a duty of care, and that EllisDon reasonably foresaw the negligent provision of its services would cause harm to SWC and those other Southwest entities who relied upon the competent provision of services by EllisDon.

[24] EllisDon has also argued that no contractual basis for relief has been pleaded *vis-à-vis* WP2, SWP Maple, and SWP. I agree that no sustainable contractually-based claims exist in law for any Southwest entity, save SWC.

examined by first considering whether there is any expired limitation period which could preclude such amendments, either because discretion to do so has been removed from the court, or otherwise where the court, in the exercise of its discretion, concludes that the amendments should not be permitted.

[89] Therefore, next, I will examine the applicable limitation periods.

(a) What is the limitation period in relation to the requested addition of the "new parties" WP2, SWP Maple and SWP to existing claims of negligent provision of services and damages for increased financing costs and for making "new" claims of negligent misrepresentation and damages for increased financing costs, and for new claims of negligent misrepresentation made by SWC, an existing party?

[90] Statutory limitation periods are intended to limit liability, by setting deadlines by which *claims* must be advanced. I adopt what Justice Chipman stated in *Dyack v Lincoln*, 2017 NSSC 187:

> Purpose of Limitation Periods
>
> 27 In *M.(K.) v. M.(H).*, [1992] 3 S.C.R. 6, at paras. 22-24, the Supreme Court of Canada identified three rationales that underlie limitations legislation. They have been described as the certainty, evidentiary and diligence rationales:

> Statutes of limitations have long been said to be statutes of repose. ... The reasoning is straightforward enough. There comes a time, it is said, when a potential defendant should be secure in his reasonable expectation that he will not be held to account for ancient obligations. ...
>
> The second rationale is evidentiary and concerns the desire to foreclose claims based on stale evidence. Once the limitation period has lapsed, the potential defendant should no longer be concerned about the preservation of evidence relevant to the claim. ...
>
> Finally, plaintiffs are expected to act diligently and not "sleep on their rights"; statutes of limitation are an incentive for plaintiffs to bring suit in a timely fashion.
>
> ...

28 There are also economic and public interest reasons for limitations legislation:

> People who provide goods and services may be adversely affected by the uncertainty of potential litigation. Economic consequences will directly flow. A potential defendant faced with possible liability of a magnitude unknown may be unable or unwilling to enter into other business transactions. Others may be unaware of a specific claim until many years after an event upon which the claim is based. The cost of maintaining records for many years and obtaining adequate liability insurance is ultimately passed on to the customer.

29 Finally, there are judgmental reasons for limitation periods:

> If a claim is not adjudicated until many years after the events that give rise to it, different values and standards from those prevailing at the time the events occurred may be used in determining fault. Because of changes in cultural values, scientific knowledge, and societal interests, injustice may result. Can it be said that the conduct of the "reasonable person" as perceived by a court today would accord with the view taken by a judge of an earlier generation?

30 Accordingly, limitations legislation serves many important purposes. Over the last two decades, Alberta, Saskatchewan, Ontario, New Brunswick and Nova Scotia have all reformed their limitations legislation to serve those purposes more effectively. Furthermore, in 2005, the Uniform Law Conference of Canada (ULCC) adopted the *Uniform Limitations Act*, a model uniform limitations statute based on the modernized legislation enacted in Alberta, Ontario and Saskatchewan.

31 Nova Scotia is the most recent province to overhaul its limitations legislation. In drafting the *Discussion Paper on Limitation of Actions Act* the Nova Scotia Department of Justice relied on the discussion papers and modernized legislation of other provinces, along with the ULCC's *Uniform Limitations Act*. The

> *Limitation of Actions Act*, S.N.S. 2014, c. 35, came into force on September 1, 2015.

[91] Generally speaking, the "Big Bang"[25] of litigation may be said to be the day the relevant act(s) or omission(s) effectively cease (s. 8(3) *LAA*) and trigger the start of the limitation period. Therefore *claims*, rather than claimants, tend to be the predominant focus when limitation period issues arise such as I face here.[26]

[92] At this juncture, it is useful to introduce some of the relevant sections of the *Limitation of Actions Act*, c. 35, SNS 2014:

> Interpretation
>
> 2 (1) In this Act,
>
> > (a) "claim" means a claim to remedy the injury, loss or damage that occurred as a result of an act or omission;
> >
> > (b) "claimant" means a person who has a claim, regardless of whether the claim has been brought;
> >
> > (c) "defendant" means a person against whom a claimant has a claim, regardless of whether the claim has been brought.
>
> (2) For the purpose of this Act, a claim is brought

---

[25] The present day significance of this colloquial reference to our understanding of "the beginning of time" is explained in a fascinating book by Jacob Berkowitz: "*The Stardust Revolution* (The New Story of our Origin in the Stars), Prometheus Books, Amherst, New York, USA, 2012.

[26] More precisely however, as noted below, *all* of the s. 8(2) (a)-(d) *LAA* requirements must be met before a "claim" is considered discoverable, and hence the limitation period triggered. Therefore, although damages arising from actionable legal wrongs (acts or omissions) necessarily arise after those acts or omissions, I conclude, in the case of the interest debt financing damages (per s. 8(2) *LAA*), that because the interest rate fluctuates unpredictably over time, and whether a loss was to be occasioned or not could not reasonably be pleaded until a point in time closer to when the actual financing was or would have been put in place, in the circumstances of this case, those damages were not discoverable or known until June 1, 2017. Consequently, the limitation period in relation to those "claims" made by the new parties, (WP2, SWP Maple, and SWP) from which flowed those damages, did not commence until June 1, 2017. On the other hand, although SWC also makes the same claims as the new parties (negligent provision of services; and negligent misrepresentation), its limitation period for those two causes of action starts on June 1, 2015, because it does not claim those damages.

(a) when a proceeding in respect of the claim is commenced; or

(b) where the claim is added to an existing proceeding by a new or an amended pleading that is not an originating process, when that pleading is filed.

Application of Act

3 Subject to Section 4, this Act applies to a claim pursued in a court proceeding, other than a claim

(a) to which the *Real Property Limitations Act* applies; or

(b) in a proceeding for judicial review.

…

Conflict with other enactments

6 Where there is a conflict between this Act and any other enactment, the other enactment prevails.

…

General rules

8 (1) *Unless otherwise provided in this Act*, a claim may not be brought after the earlier of[27]

(a) two years from the day on which *the claim is discovered*; and

(b) fifteen years from the day on which the act or omission on which the claim is based occurred.

(2) *A claim is discovered on the day on which the claimant first knew or ought reasonably to have known*[28]

(a) that the injury, loss or damage had occurred;

(b) that the injury, loss or damage was caused by or contributed to by an act or omission;

(c) that the act or omission was that of the defendant; and

---

[27] For example, see the transitional provision, s. 23(3) *LAA*, which applies in cases where *claims are discovered before* the effective date in force of the legislation – September 1, 2015; *and no proceedings are commenced before* September 1, 2015. In the case at Bar, subsection 23(3) *LAA* is not applicable because proceedings were commenced before September 1, 2015, in addition to "claims" discovered before September 1, 2015; including the "new claims" (negligent misrepresentation) which were discovered before September 1, 2015, except those claiming damages arising from fluctuating (higher) interest rate-based debt financing, which I conclude *only became discoverable by June 1, 2017*. However, I reiterate that in my opinion, the transitional provision was not intended to apply in the circumstances of this case.

[28] The Alberta legislation bears similarity. Hence Justice Renke's recitation of the applicable jurisprudence thereon in *Clark Builders* is of interest – see paragraphs 241 – 267.

(d) that the injury, loss or damage is sufficiently serious to warrant a proceeding.

(3) For the purpose of clause (1)(b), the day an act or omission on which a claim is based occurred is

(a) in the case of a continuous act or omission, the day on which the act or omission ceases; and

(b) in the case of a series of acts or omissions concerning the same obligation, the day on which the last act or omission in the series occurs.

…

9 (1) A claimant has the burden of proving that a claim was brought within the limitation period established by clause 8(1)(a).

(2) A defendant has the burden of proving that a claim was not brought within the limitation period established by clause 8(1)(b).

[93] The *LAA* deems the claimant to have knowledge in certain circumstances:

16 (1) In the case of a proceeding commenced by a claimant claiming through a predecessor in right, title or interest, the claimant is deemed to have had knowledge of the matters referred to in subsection 8(2) on the earlier of

(a) the day on which the claimant first knew or ought to have known of those matters; and

(b) the day on which the predecessor first knew or ought to have known of those matters.

(2) In the case of a proceeding commenced by a claimant who is the principal of an agent, the claimant is deemed to have had knowledge of the matters referred to in subsection 8(2) on the earlier of

(a) the day on which the claimant first knew or ought to have known of those matters; and

(b) the day on which the agent first knew or ought to have known of those matters,

if the agent had a duty to communicate knowledge of those matters to the claimant.

(3) The day on which a predecessor or agent ought to have known of the matters referred to in subsection 8(2) is the day on which a reasonable person in the

predecessor's or agent's circumstances and with the predecessor's or agent's abilities ought first to have known of the matters.[29]

[94] The *LAA* also makes specific provision for adding claims in "proceedings":

> Claims added to proceedings
>
> 22 Notwithstanding the expiry of the relevant limitation period established by this Act, **a claim may be added**, through a new or amended pleading, **to a proceeding previously commenced if the added claim is related to the conduct, transaction or events described in the original pleadings and if the added claim**
>
> (a) is made by a party to the proceeding against another party to the proceeding and does not change the capacity in which either party sues or is sued;
>
> (b) adds or substitutes a defendant or changes the capacity in which a defendant is sued, but the defendant has received, before or within the limitation period applicable to the added claim plus the time provided by law for the service of process, sufficient knowledge of the added claim that the defendant will not be prejudiced in defending against the added claim on the merits; or
>
> (c) **adds or substitutes a claimant** or changes the capacity in which a claimant sues, **but the defendant has received**, **before or within the limitation period applicable to the added claim plus the time provided by law for the service of process**, **sufficient knowledge of the added claim that the defendant will not be prejudiced** in defending against the added claim on the merits, **and** the addition of the **claim is necessary or desirable to ensure the effective determination or enforcement of the claims asserted or intended to be asserted in the original pleadings.**[30]
>
> [My bolding added]

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[29] The contract herein was *not* assignable by EllisDon, *but* SWC reserved the right to assign the contract (Laing affidavit, Exhibit "B", Article GC 1.4 as replaced in the Supplementary Conditions Article 11: "The Contract is not assignable by the Construction Manager. The Owner shall have the right without consent of the Construction Manager to assign the Contract to its parent or any subsidiary or affiliate." For clarity's sake, there is no suggestion, or evidence before me, that this has been done herein.

[30] This provision has similarities with CPR 83.11, which allows amendments *after* a limitation period. See also CPR 35.08.

[95] Finally, the *LAA* included transitional provisions at Section 23:

> Transitional
>
> 23 (1) In this Section,
>
> (a) "effective date" means the day on which this Act comes into force;
>
> (b) "former limitation period" means, in respect of a claim, the limitation period that applied to the claim before the effective date.
>
> (2) Subsection (3) applies to claims that are based on acts or omissions that took place before the effective date, other than claims referred to in Section 11, and in respect of which no proceeding has been commenced before the effective date.
>
> (3) Where a claim was discovered before the effective date, the claim may not be brought after the earlier of
>
> (a) two years from the effective date; and
>
> (b) the day on which the former limitation period expired or would have expired.
>
> (4) A claimant may bring a claim referred to in Section 11 at any time, regardless of whether the former limitation period expired before the effective date.
>
> [My emphasis added]

[96] Let me reiterate - I interpret s. 22 *LAA*, and specifically the phrase "a claim may be added", as including situations where a new party is being added who is joining in a claim already being made in the proceeding, and where a new party is being added to bring a new claim in the proceeding (see also s. 2(2). In this way, section 22 applies to: the new parties joining in an existing claim (negligent provision of services), as well as those joining in a new claim (negligent misrepresentation), regarding their increased interest costs claims; *and* to an

existing party (SWC) bringing a new claim (negligent misrepresentation, but not in relation to its abandoned increased interest costs claim).

[97] Taking a step back to examine the existing pleadings, we see that the "new parties" (in relation to the claim for increased debt servicing payments and rental amounts) are identified by Southwest in the proposed Amended Statement of Claim as WP2, WP3 and SWH operating as SWP Maple, and SWP. *Only* SWP Maple is *not* already a party to the consolidated proceeding. However, are each of WP2 and SWP properly considered to be "a party" as that term is used in s. 22(a) *LAA*? I am inclined to answer in the affirmative.

[98] In the three subsections of section 22, there appear respectively the phrases, (a) "does not change the *capacity* in which either party sues or is sued"; (b) "changes the *capacity* in which a defendant is sued"; and (c) "changes the *capacity* in which a claimant sues".

[99] Based on the wording in those subsections, those references to the "capacity" in which a claimant sues or a defendant is sued, must mean something other than their status as a "claimant" or "defendant". To my mind, the reference to "capacity" is a recognition of the legal reality that different legal entities may sue or be sued in more than one capacity. For litigation purposes, a natural person may

be involved in their individual capacity, and also in another capacity – for example, as a representative (guardian *ad litem*; executor; etc.)

[100] Moreover, subsections (b) and (c) deal with "a defendant" and "a claimant", whereas subsection (a) refers only to an added claim by "a party to the proceeding against another party to the proceeding, and does not change the capacity in which either party sues or is sued". Therefore, as I interpret s. 22 *LAA*, WP2 and SWP are not only each an *existing* party to the proceeding in the nominal sense, but also "a party" as contemplated by s. 22(a).

[101] The parties agreed that regarding claims generally between SWC and EllisDon *directly*, the *start* of the relevant limitation period should be considered *June 1, 2015*. Hence, presumptively it should run for two years, per s. 8(1)(a) *LAA*, ending June 1, 2017.[31] However, as I understand their argument, Southwest would suggest in relation to the proposed new *plaintiffs* (WP2, SWP Maple and SWP) who were involved in financing the Project for Southwest, and thus making claims

[31] In proper cases, it may be effectively extended in an existing proceeding for an *indeterminate period* pursuant to s. 22(c) *LAA* and CPR 4.04 (time permitted for service of a Notice of Action), provided that, within three years beyond the start of the limitation period, *inter alia*, the defendant had "sufficient knowledge of the added claim". It must be reiterated that s. 22(c) *LAA* may not be applicable, *unless* the claim is sought to be added to an existing proceeding, *after* the expiration of a limitation period, and the other relevant requirements therein are met. That determination also may be, where applicable, subject to the effect on the limitation period of the transitional provision, subsections 23(2) and (3). I conclude that section 23 is not intended to be applicable here to the higher interest cost financing (damages) claims because the "acts or omissions" founding the claim took place before September 1, 2015, and proceedings had been commenced before September 1, 2015.

for increased financing costs consequent to delay caused by EllisDon,[32] that the limitation period *start date for them as claimants* should be in 2017, since only at that time was their claim to that loss "discovered" (s. 8(2) *LAA*) – i.e. the prevailing interest rate range which would be the basis for the rate of financing granted to the Southwest Group of Companies by lenders, and which would be determinative as to whether Southwest or related entities had suffered a loss. The interest rate was confirmed on November 29, 2017 as 2.881%; which on February 9, 2018, rose to 3.206% (Exhibit "B", Shanks affidavit, December 6, 2019). Ultimately, the two 10-year Leasehold and Property mortgages were each dated April 6, 2018, and each contained a nominal interest rate of 3.027%.[33]

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[32] Which "claim" amendment (ie. regarding "the claim [by SWC] for increased interest costs") was permitted *by consent* in the February 26, 2019 Order. However, in the Shanks, December 6, 2019, affidavit, at paragraph 11 and Exhibit "B", the evidence presented to me identifies as mortgagors: *WP2* (the property owner/para. 10 Laing affidavit); *WP3 and SWH* (together constituting SWP Maple Operating Partnership as lessees to WP2/ para. 12 – 19 Laing affidavit – although I note on the first page of the July 25, 2017 financing letter of interest in the Exhibit, the borrowers are identified in handwriting as WP2,WP3 and SWP Maple Operating Partnership – I believe it likely the parties meant to refer there to SWH rather than WP3); and SWP (referenced as "the principle [sic] company in the Southwest Group of Companies which includes all of the Southwest and Summer Wind entities listed above"/para.19 Laing affidavit.)

[33] Although I note that the Lease was *dated April 6, 2018*, the recitals clause reads: "*By Lease dated January 1, 2015*… The Landlord [WP2] leased to the Tenant [SWP Maple] certain lands and premises known municipally as 1579 and 1583 Hollis St., and 5146 Sackville St. in Halifax, NS bearing PID 00003673… The Landlord and the Tenant have agreed to the execution and registration of this Notice of Lease to provide notice of the lease"; and that the body of the lease contains the following: "The term of the Lease is for a period of three years commencing on the first day of January 2015 with a right to renew for one further term of two years and a further renewal term of three years, each on such terms as therein stated in the Lease. The Landlord and the Tenant each acknowledge, confirm, and agree that this Notice has been executed only for the purpose of registration and thereby giving notice of the Lease and reference is to be made to the Lease for particular terms and obligations. As Secretary (representative) for every party to the Lease, Paul Murphy signed the Lease repeatedly, and swore the associated affidavits for WP2, SWH and WP3,all dated April 5, 2018. EllisDon questions the motivation for not registering this Lease and publicly giving notice of it earlier than 2018.

[102] I have had some difficulty with the conclusion that the limitation period for the "new parties", whose claims involve the financing of the Project, did not commence until 2017. The initial bases for *liability* (breach of contract and negligent provision of services) alleged against EllisDon by SWC were actionable by June 1, 2015. SWC alleged in the July 2, 2015, Notice of Action and Statement of Claim that EllisDon "caused material delay and cost growth resulting in substantial damages to Southwest… which include… costs of financing and bonding; interest costs; property taxes; head office overheads; loss of revenue; lost profits; loss of productivity; loss of use; other costs of delay; and such further and other losses and damages as may appear."

[103] On July 2, 2015, the Southwest Group of Companies clearly believed that they would suffer *damages* related to "costs of financing and bonding and interest costs". Therefore, should they not also have known and determined which of them reasonably foreseeably would suffer damages, and of what kind, such as breach of contract or some form of negligence?[34] They did not formally request to add any of the relevant "new parties" as *claimants*, or the new negligent misrepresentation

[34] I note that in its existing pleading, paragraphs 13 and 14- added by consent in February 2019- make it clear that the SWC claim to "costs of financing and bonding; interest costs" is not the same as the "increased debt servicing payments" claimed by the new parties in paragraph 35 of the proposed Amended Statement of Claim. I appreciate that Southwest, for purely practical reasons, may have delayed the creation of new entities or designation of responsibilities among its related entities closer to the completion of the Project – such as SWP Maple, which was only registered on March 23, 2015.

claim, (though the claim for higher interest costs was consented to in February 2019) until they filed their Notice of Motion herein on November 1, 2019. It appears that not long after the February 26, 2019, Consent Order permitting the pleadings to be amended, Southwest made EllisDon aware of its intention to seek further amendments. EllisDon thus discovered the extent of the newest proposed amendments: that Southwest would seek to add as *plaintiffs* the leasehold and property mortgagors, as well as SWP as the guarantor of both mortgages (see Exhibits "I" and "J", Laing affidavit).

[104] On the other hand, interest rates fluctuate, and so could have increased or decreased between June 1, 2015, and the time when the delayed financing would be put in place.[35] Only at the point when the Southwest Group of Companies could reasonably have known (per s. 8(2) *LAA*) what the likely range of interest rate financing was going to be (ie. an increase or decrease in rates as compared to the rates their original expected time-line for completion of the Project would have entailed), although this would be before their interest rate was confirmed, should *they* be considered as knowing they would face *increased* financing costs, and hence potential damages.

[35] In the July 25, 2017, Letter of Interest, (Shanks December 6, 2019, affidavit, Exhibit "B") it states that *the funding date was expected to be November 2017* and the interest rate in July 2017 *would have been* 2.55%. As I noted earlier, ultimately the nominal rate in the mortgages, dated April 6, 2018, was 3.027%.

[105] I conclude it is safe for me to infer that, *by June 1, 2017*, the Southwest Group of Companies *knew* the interest rates they would be offered for financing had risen and consequently that they would face higher interest payments in the short term. They might even have *reasonably known* this earlier than June 1, 2017, but the evidence is unclear or insufficient in that respect.[36] Yet, though the action had been started on July 2, 2015, no formal attempt was made to include the proper parties, namely WP2, SWP Maple Operating Partnership, and SWP, as plaintiffs until *after* the February 26, 2019, amendments that had been requested by Southwest.

[106] As I have noted elsewhere, in spite of the start of the limitation period for Southwest's other claims herein being June 1, 2015, generally speaking, I conclude that June 1, 2017, should be considered as the start of the limitation period for Southwest's claims in negligent provision of services/negligent misrepresentation and higher interest financing costs as proposed by the new parties.

[107] The paragraphs in subsections 8(2) *LAA* are all written in the past tense ((a)-"had"; (b)-"was caused by or contributed to by an act or omission" etc.),

[36] Ultimately, the full impact of this claim will depend on the interest rates that prevail during the life of the premises that were "the Project". Given that the Project start date was delayed between one and two years, likely causing the interest rate actually payable to have increased in the short term, correspondingly as a result of the delay the end date of the project is also later, hence it *may* become the case, for interest rate renewals during the life of the Project, that the interest rate may comparatively be lower in the long term because of the delay.

suggesting that *until* the loss or damages were reasonably foreseen, there could be no material facts pleaded regarding whether there is an anticipated loss *or* benefit (s. 8(2)(a) and (d), *LAA*) resulting from the delay alleged against EllisDon, and therefore, as opposed to claims for delayed lost rental revenues/profits, which were foreseeable by June 1, 2015, the mere existence of a "claim" for having to pay increased interest financing costs, perhaps somewhat uniquely as claims go, was not "discoverable" until June 1, 2017.

[108] As Justice Keith pointed out in *Keleher v Nova Scotia (Attorney General)*, 2019 NSSC 375, before a court can conclude when a claim is "discovered", it must examine when the claimant first knew or ought reasonably to have known *each of the requirements* contained in s. 8(2):

> (a) that the injury, loss or damage had occurred;
>
> (b) that the injury, loss or damage was caused by or contributed to by an act or omission;
>
> (c) that the act or omission was that of the defendant; and
>
> (d) that the injury, loss or damage is sufficiently serious to warrant a proceeding.

[109] Therefore, I conclude for that category of damages, any "claim" of the "new parties" was only discoverable as of June 1, 2017.

[110] In summary, I conclude that the start of the limitation period is June 1, 2015 in relation to any of the proposed "new parties" joining in existing claims (negligent provision of services) and bringing "new claims" (negligent misrepresentation)- *except for* their claims of higher interest rate financing costs regarding the Leasehold and Property Mortgages, which directly impacted the following Southwest companies: WP2 (as owner/mortgagor), SWP Maple (as lessee/mortgagor), and SWP (as guarantor), for whom the limitation period start date is June 1, 2017.[37]

Conclusion regarding the limitation period issues

[111] A "claim" is defined in s. 2(1) *LAA* as a "claim to remedy the injury, loss or damage that occurred as a result of an act or omission". As I stated earlier, claims- not claimants -must be the focus when examining the limitation period issues.

[37] Given their different roles (WP2, SWP Maple, as mortgagors- and SWP as guarantor; and SWP Maple as operator of the Project once completed), for present purposes, their claims may be seen as distinguishable insofar as they are related to the increased debt financing damages, *and* the loss of revenue/profit respectively. In effect therefore, the start of the limitation period for WP2 (as mortgagor), SWP Maple (as mortgagor), and SWP (as guarantor) should be considered the later date of June 1, 2017, but only any higher interest rate financing costs claim. Otherwise their claims (eg. for "lost rental amounts") were discoverable by June 1, 2015, and that date is the start of the limitation period for those claims.

[112] **The "new" negligent misrepresentation claims by SWC** were discoverable by **June 1, 2015**. That claim has been brought by SWC, and joined in by the new parties, *after* the basic limitation period *ended on June 1, 2017*. **Without recourse to s. 22 *LAA* those claims may not be brought after June 1, 2017 by the new parties.**

[113] ***For claims related to the higher interest rate costs arising from the mortgages* (negligent provision of services and negligent misrepresentation),** *the start of the limitation period is June 1, 2017, and* ***therefore the basic limitation period ended June 1, 2019*. Without recourse to s. 22 *LAA* those claims may not be brought after June 1, 2019.**

[114] Since *SWC* made reference to itself as claiming for higher interest financing costs at paragraphs 13 – 14 of the February 26, 2019, Consent Order permitting that amendment based on breach of contract and negligent provision of services, that claim was therefore brought at that time *by SWC*, but will not be "brought" (s. 2(2) *LAA*) *by the new plaintiff parties* until after June 1, 2019.[38]

[38] In the proposed Amended Statement of Claim, SWC is now abandoning that claim, and WP2, SWP Maple, and SWP, are intended to assume it. As noted, to the extent that SWP Maple is as mortgagor claiming damages beyond the higher interest costs, its basic limitation period ends June 1, 2019; however, in relation to any other claim such as lost rental amounts etc., its basic limitation period ends June 1, 2017.

[115] The Notice of Motion to add the new plaintiff parties, their joining in existing claims, and making new claims (negligent provision of services and negligent misrepresentation) in respect of the higher interest costs, was filed on November 1, 2019. Therefore, those new plaintiff parties' proposed claims will be brought *after* the expiry of the applicable limitation period.

[116] Given that these claims were filed *after* the expiry of the limitation period, I must go on to consider Southwest's argument that the usual enforceability of the expiry of the limitation period may be obviated in this case by recourse to s. 22 *LAA*.[39]

Can Southwest rely on s. 22 *LAA* to obviate the limitation period applicable to the claims filed after the relevant limitation period?

[117] For convenience, I will reproduce here that section:

> Claims added to proceedings
>
> 22 ***Notwithstanding the expiry of the relevant limitation period*** *established by this Act,* ***a claim may be added****, through a new or amended pleading,* ***to a proceeding previously commenced if the added claim is related to the conduct, transaction or events described in the original pleadings and if the added claim***

[39] My reasons do generate what might appear to be an anomalous result. For the negligent misrepresentation claim, I have concluded that the basic limitation period for *SWC* is June 1, 2017, and because the new parties (*WP2*, *SWP Maple and SWP*) are primarily claiming "increased debt servicing payments" the basic limitation period for them is June 1, 2019.

> (a) is made by a party to the proceeding against another party to the proceeding and does not change the capacity in which either party sues or is sued;
>
> (b) adds or substitutes a defendant or changes the capacity in which a defendant is sued, but the defendant has received, before or within the limitation period applicable to the added claim plus the time provided by law for the service of process, sufficient knowledge of the added claim that the defendant will not be prejudiced in defending against the added claim on the merits; or
>
> (c) adds or substitutes a claimant or changes the capacity in which a claimant sues, but the defendant has received, before or within the limitation period applicable to the added claim plus the time provided by law for the service of process, sufficient knowledge of the added claim that the defendant will not be prejudiced in defending against the added claim on the merits, and the addition of the claim is necessary or desirable to ensure the effective determination or enforcement of the claims asserted or intended to be asserted in the original pleadings.

[118] Insofar as SWC is concerned, section 22(c) is not applicable to it, since SWC is not being added or substituted as a claimant (in relation to negligent misrepresentation), nor is the capacity in which it sues different. Leave to amend regarding the SWC negligent misrepresentation claim may be granted pursuant to section 22(a) even after the expiration of the relevant limitation period, since SWC is already a party, and I conclude that the negligent misrepresentation claim is "related to the conduct, transaction, or events described in the original pleadings", subject to the application of the general rule discussed earlier, and to CPRs 35 and 83.

[119] As concluded earlier, there are no bars to leave otherwise being granted that would suggest that leave should not now be granted.

[120] By virtue of s. 22(a) *LAA*, there being no enforceable limitation period breached, CPR 35.08(5) is not triggered.

[121] Pursuant to CPR 83.11(1) and (3), I grant SWC leave to amend the pleadings given the relatively early stage of the litigation, and bearing in mind my views of the present and proposed pleadings.

[122] Regarding the proposed adoption by the "new parties" of the "new" negligent misrepresentation claim and the existing negligent provision of services claim, I am satisfied for the purposes of the application of s. 22(c) *LAA* that each claim "is related to the conduct, transaction or events described in the original pleadings." Although the "new" claimants are being added to SWC, I am satisfied that EllisDon had received, before June 1, 2020 (the end of the relevant limitation period regarding the claimed increased debt servicing payments plus 1 year "time provided by law for the service process" per CPR 4.04),[40] sufficient knowledge of

[40] Even if I presume that the relevant limitation period starts June 1, 2015 (the cessation of the wrongful act or omission) rather than June 1, 2017 (the start of the discoverability of the increased interest rate financing costs), and hence ends June 1, 2018, I am satisfied that EllisDon had "received….sufficient knowledge of the added claim that it will not be prejudiced in defending the claim and it is" necessary or desirable to ensure the effective determination or enforcement of the claims…".

that claim such that it will not be prejudiced in defending against that claim on the merits; and that the addition of the claim is "necessary or desirable to ensure the effective determination or enforcement of the claims asserted or intended to be asserted in the original pleadings."

[123] By virtue of s. 22(c) *LAA*, there being no enforceable limitation period breached, CPR 35.08(5) is not triggered. Otherwise, I am also satisfied that the requirements of CPR 83.11 have been met.

[124] Let me briefly elaborate upon the interpretation of the words "if the added claim is related to the conduct, transaction or events described in the original pleadings," in s. 22 *LAA*. Alberta has a similar provision in its *Limitations Act*, RSA 2000 c. L – 12: see Master Mason's recent decision in *Richcrooks Enterprises (2000) Ltd. v Arres Capital Inc.*, 2018 ABQB 84. Justice Chipman of our court referenced the Alberta legislation in *Dyack v Lincoln*, 2017 NSSC 187, albeit in relation to *LAA* s. 22(a) rather than s. 22(c):[41]

> 47 Section 22 of the new *Act* governs the addition of expired claims to an existing proceeding where the amendment would not add a new defendant or change the capacity in which a defendant is sued. Section 22(a) provides:
>
> 48 Counsel for Dr. Lincoln argues that the stipulation in s. 22 that the added claim must be "related to the conduct, transaction or events described in the original pleadings" amounts to the same requirement as under Rule 83.11(3) that

[41] Justice Bodurtha spoke approvingly of Justice Chipman's references in *Bayswater*, at para 27.

the material facts supporting the new cause of action must already have been pleaded. No authorities were cited for this proposition.

49 Although there are no Nova Scotia decisions considering s. 22, the provision was based on similar sections contained in the Alberta and New Brunswick statutes. Courts in Alberta and New Brunswick have considered their respective sections on several occasions.

50 In *Greentree v. Martin*, 2004 ABQB 365, the plaintiffs were injured when their vehicle was struck by a vehicle operated by Slater, an employee of the defendants. Within the limitation period, the plaintiffs brought an action alleging that the defendants were vicariously liable for Slater's negligence. After the limitation period expired, the plaintiffs applied to amend their pleadings to add a claim that the defendants were negligent in hiring Slater. At para. 12, Justice Clackson described the "real issue" as "whether the amendment can be said to be 'related to the conduct, transaction or events described in the original proceeding'". He concluded at para. 13:

> The Plaintiffs bear the onus of establishing that relationship. In this case, it seems to me that the original pleading clearly put the Martins on notice that all aspects of their relationship with Slater both as employee and consensual operator of their vehicle would be under scrutiny. I have no doubt that upon learning of the accident and again upon service of the Statement of Claim, the Martins revisited the circumstances which led to Slater's hiring. I have little doubt that any of the factual underpinnings for the new allegation come as a surprise to the Martins. I think that while the cause of action established by the amendment is different from the cause of action in the original pleading, the Act does not speak of causes of action but rather events and occurrences. In my view, that is a much broader perspective. As such I think it is reasonable that the events or transactions encompassing the employment of Slater in the consensual operation of the Martins' vehicle are related to the event or transaction that encompassed Slater's hiring. That is sufficient to meet the requirements of Section 6 and as such the proposed amendment is not statute barred.

51 In *Calgary Mack Sales Ltd. v. Shah*, 2005 ABCA 304, the Alberta Court of Appeal held that the phrase "related to" has a very broad meaning: para. 14. Subsequent lower court decisions have held that it "does not appear to be a particularly high threshold": *Stolk v. 382779*, 2005 ABQB 440, at para. 36; *Litemor Distributors (Edmonton) Ltd. v. Midwest Furnishings & Supplies Ltd.*, 2005 ABQB 520, at para. 11; *Dow Chemical Canada Inc. v. Nova Chemicals Corp*, 2010 ABQB 524, at para. 69; *Owners Condominium Plan No. 0125764 v. Amber Equities Inc.*, 2015 ABQB 235, at para. 192.

52 In *DeSoto Resources Ltd. v. EnCana Corp.*, 2010 ABCA 110, the Alberta Court of Appeal explained, at paras. 8-10, that the court must consider the total context to determine whether the relationship requirement is met:

> Whether a new pleading arises from the same "conduct, transaction or events" must be based on an assessment of the whole factual and legal context. No firm line can be drawn between an unrelated new claim, and what has previously been pleaded. Too general a definition would give the plaintiff an unlimited ability to add statute barred claims: *C.H.S. v. Alberta (Director of Child Welfare)*, 2006 ABQB 528, 403 A.R. 103, 34 C.P.C. (6th) 378 at para. 32, aff'd 2006 ABCA 355, 401 A.R. 215.
>
> ...
>
> **Section 6 allows the addition of new claims because the defendant will not be prejudiced or surprised since they arise out of the same conduct, transactions and events**. Therefore, one test of whether a new claim is involved is to examine the extent to which a new set of conduct, transactions and events would have to be proven at the trial. The documents and other evidence that would be needed to prove the appellant's new allegations would differ significantly from those required to prove the originally pleaded facts.
>
> [*Emphasis added*]

53 In *Champagne v. Sidorsky*, 2015 ABQB 305, Justice Jones emphasized, at para. 171, that there must be more than a cursory connection between the claims:

> Claims for which facts will have to be proven by new documents and new witnesses are only weakly connected to the original claims and should be closely scrutinized. Where only a cursory, superficial connection exists ... the amendments should not be allowed.

54 In *513320 Alberta Inc. (c.o.b. Interface Financial Group)*, 2015 ABQB 826, Justice Goss wrote that an amendment should not be allowed "where a plaintiff is seeking to substitute one claim for another, essentially re-defining the questions in issue between the parties, by advancing a new set of facts as the basis for their claim, and by abandoning the set of facts alleged as the basis for the original claim in the Statement of Claim": para. 38.

55 The claims Dr. Dyack seeks to add clearly meet the criteria under s. 22(a). The claims are related to the same conduct, transaction or events -- the surgeries -- and do not change the capacity in which Dr. Dyack sues Dr. Lincoln or Dr. Lincoln is sued. Accordingly, even if I had found that the transition provisions under the new *Act* applied, I would have allowed the new claims to be added under s. 22(a).

[125] I adopt Justice Chipman’s interpretation as it impacts both ss. 22(a) and s. 22(c) regarding the phrase “related to the conduct, transaction or events described in the original pleadings”.

[126] Similarly, in relation to the phrase "the addition of the claim is necessary or desirable to ensure the *effective determination or enforcement* of the claims asserted or intended to be asserted in the original pleadings" in Section 22(c), I find helpful Master Mason's reference to the distinction between "true strangers" to the litigation and "other claimants", even though the Alberta statute's wording is slightly different in that it reads, "the added claim is necessary or desirable to ensure the *effective enforcement* of the claims originally asserted or intended to be asserted in the proceeding." In *Richcrooks*, she stated:

> 5 There is no dispute that the limitation period has expired. The addition of a new plaintiff is considered to be an added claim within the meaning of sub section 6(1), and captured under sub section 6(3) of the *Limitations Act*, RSA 2000 c. L-12 which provide:
>
> > 6(1) Notwithstanding the expiration of the relevant limitation period, when a new claim is added to a proceeding previously commenced, either through a new pleading or an amendment to pleadings, the defendant is not entitled to immunity from liability in respect of the added claim if the requirements of subsection (2), (3), or (4) are satisfied.
> >
> > …
> >
> > 6(3) When the added claim adds or substitutes a claimant, or changes the capacity in which a claimant sues,
> >
> > > (a)The added claim must be related to the conduct, transaction or events described in the original pleading in the proceeding,
> > >
> > > (b)The defendant must have received, within the limitation period applicable to the added claim plus the time provided by law for the service of process, sufficient knowledge of the added claim that the defendant will not be prejudiced in maintaining a defence to it on the merits, and
> > >
> > > (c)The court must be satisfied that the added claim is necessary or desirable to ensure the effective enforcement of the claims originally asserted or intended to be asserted in the proceeding.

6 The court must evaluate whether each of the requirements of section 6 are made out in the circumstances of the particular case: *Stout (Estate of) v Golinowski (Estate of)*, 2002 ABCA 49 at paragraph 100.

7 Mr. Serra does not dispute that the requirements of subsections 6(3)(a) and (b) have been met. He asserts, however, that the requirement contained in subsection 6(3)(c) - that the added claims are "necessary or desirable to ensure the effective enforcement of the claims originally asserted or intended to be asserted in the proceeding" - is not satisfied. The burden of establishing this requirement lies with the applicants, pursuant to subsection 6(5)(a)(ii) of the *Limitations Act*.

8 The Alberta Law Reform Institute addressed the addition of claimants after the expiry of the limitation period in *The Report for Discussion of the Law Reform Commission of Alberta on Limitations*, Report No. 55, Dec. 1989, page 84:

> 18.*Addition of true stranger as claimant*. There are two types of cases in which a stranger may wish to add himself as a claimant in an action: "true stranger" and "other claimant". Ss. [6(3)] permits the addition of a claimant who is necessary if the original claim asserted is to be enforced effectively. It does not deprive a defendant of a limitations defence to the untimely claim of an added claimant who is a "true stranger".
>
> > *a. True Strangers*. In this type of case a non-diligent claimant will be attempting to slip his untimely claim into an action in which his defendant is already a party. For example, assume that the original claimant, Tom, brought a timely claim against the defendant, Alice, to recover for personal injuries suffered in an automobile accident, and that later a second claimant, Dave, a co-passenger in the car driven by Tom, sought to add an untimely claim against Alice to recover for Dave's personal injuries. Dave's claim would probably satisfy the relationship requirement and it might satisfy the knowledge to prevent prejudice requirement. However, Dave's claim would be based on a different injury from that suffered by Tom and Dave's added claim would not be necessary to ensure the effective enforcement of the original claim brought by Tom.
> >
> > b. *Other claimants*. In this type of case the added claimant will be necessary if the original claim asserted is to be enforced effectively. The claimant is unlikely to be a "true" stranger. A common example is the case in which a married woman or a child requested damages in a personal injury action based on expenses for items for which a husband or parent was responsible for providing. If the married woman or child suffered no damage because of the expenses, only the husband or parent could suffer damage and recover damages.

9 It seems to me that the applicants are non-diligent claimants who are attempting to slip their untimely claims into this action. I cannot conclude that their claims

are necessary to ensure effective enforcement of the original claim brought by the existing plaintiff investors. While their claims are the same in the sense that they were involved in the same investment opportunity and they are parties to the same form of trust agreements, their losses are personal to each of them. The existing action is a stand-alone claim that does not need the additional investors to proceed with and prove the case at trial. The addition of further investors will result in additional damages payable by the defendants if the claim ultimately succeeds.

10 Justice Kent reached a similar conclusion on similar facts in *Ahmed v Klym*, 2003 ABQB 892. There, only one investor had sued and an additional eight investors sought to be added after the expiry of the limitation period. Each had suffered losses of the same amount. Similar to the action before me, the action addressed by Justice Kent included claims for breach of fiduciary duty, breach of contract, and breach of trust. At paragraphs 8-9, she referred to *The Report for Discussion of the Law Reform Commission of Alberta on Limitations* excerpted above and concluded at paragraph 10:

> In my view, the eight investors are in the same position as Dave. Their claims are not necessary for the effective enforcement of the Plaintiff's claim. As well, even though each invested in the same kind of scheme, their loss is personal to them just as Dave's injuries are personal to him. As a result, the Plaintiff does not satisfy the requirements of s. 6. That then means that s. 3, the general limitation section, applies...

11 This statement in *Ahmed v Klym* was referenced with approval by the Court of Appeal in *Wong v Voong*, 2004 ABCA 216 at paragraph 19.

12 The applicants referred me to their written authorizations to the law firm representing the plaintiffs, indicating their desire to participate in the action, prior to the expiry of the limitation period.

13 In *Wong v Voong*, Ms. Voong was a passenger in a motor vehicle involved in an accident and wanted her claim to be added to the action commenced by the driver she was with. The Court confirmed that the sole fact that a claimant intended to bring an action before the limitation expired does not entitle that claimant to be added to the action. The Court stated at paragraph 14:

> Ms. Voong argues that s.6(3)(c) permits any person who claims to have suffered a loss as a result of the specific event or accident referred to in the Statement of Claim to be added as a plaintiff, provided that the person intended to bring proceedings. This interpretation is too broad and does not reflect the purpose of the legislation or the intent of the legislature.

14 The applicants emphasize that the claim effectively asserts that the defendants intended to deprive all of the investors of trust funds and that the misappropriation affected all the investors equally. They submit that the court should in turn treat all the investors equally by allowing further investors to be added and to receive the same remedy. They suggest that this would simplify the granting of remedies associated with the alleged wrongful conduct.

> 15 It is true that the claim refers to the existence of other investors in the syndicated loan who are not named as plaintiffs. But the claim is not asserted on behalf of all the investors. It is asserted on behalf of the named plaintiffs and seeks judgment for their respective proportionate shares of the fees alleged to have been improperly charged by the trustee. Permitting further investors to be added on the basis suggested would require the Court to disregard the requirements of subsection 6(3)(c) of the *Limitations Act*.
>
> 16 This is consistent with the Court's statements in *Wong v Voong* at paragraph 18:
>
> > Ms. Voong is a true stranger to the proceedings not intended to benefit from the s.6(3) limitation exception. Her claim is not necessary or desirable to ensure the effective enforcement of the claims originally asserted or intended to be asserted by the named plaintiffs. The context of the *Limitations Act* makes it clear that mere untimely claims are not intended to be caught by s. 6(3). Nor does the provision permit the addition of all claims related to the event giving rise to the proceedings merely because they are related. Rather, the added claim must ensure the effective enforcement of the claims originally asserted or intended to be asserted in the proceeding. The phrase "intended to be asserted" refers to claims other than those sought to be added by non-diligent claimants such as misnomers, misdescriptions and "other claimants" as those terms are discussed in Limitations: Report No. 55: see for example, *Stout Estate* and *Plett v Blackrabbit*, 2001 ABQB 843. Any other interpretation would lead to the incongruous result of providing relief to late claimants who were fortunate to suffer loss with others who had promptly pursued their right of action, but not to similarly situated late claimants who alone suffered an injury.
>
> 17 The applicants emphasize that no amendments are required to the body of the amended claim, beyond the addition of their names as plaintiffs. But that goes to the first requirement that the added claims arise from the conduct, transaction or events described in the original pleading: *Stout (Estate of) v Golinowski (Estate of)* at paragraph 106.

[127] I am inclined to characterize the new claimants (WP2, SWP Maple and SWP) as “other claimants”, and further conclude that the Nova Scotia wording (ie. “the effective determination or enforcement of the claims asserted”) was intended to be more inclusive than the Alberta legislation in that respect.

[128] In summary, I am satisfied that the negligent misrepresentation and negligent provision of services claims made by the "new" parties are "related to the conduct, transaction or events described in the original pleadings" and otherwise satisfy the requirements set out in s. 22(c) *LAA*.

Conclusion

[129] I grant leave to Southwest to amend its pleadings as presently proposed.

[130] If the parties are unable to agree on costs I will accept their written submissions: from EllisDon on or before 15 days from release of my decision, and from Southwest on or before 30 days after receipt of EllisDon's brief . The submissions each shall be no longer than 5 pages.

Rosinski, J.