Citation: Cannon v. Funds for Canada Foundation 2012 ONSC 6101
Divisional Court File Nos. 167/12, 168/12, 169/12, 171/12, 173/12
Date: 20121029

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

B E T W E E N:	
MICHAEL CANNON Plaintiff/Respondent	*Samuel S. Marr, Margaret Waddell, Andrew C. Lewis* for the Plaintiff
- and -	
FUNDS FOR CANADA FOUNDATION, MATT GLEESON and SARAH STANBRIDGE as trustees for the DONATIONS CANADA FINANCIAL TRUST, PARKLANE FINANCIAL GROUP LIMITED, TRAFALGAR ASSOCIATES LIMITED, Trafalgar Trading LIMITED, APPLEBY SERVICES BERMUDA LTD. as trustee for the BERMUDA LONGTAIL TRUST, EDWIN C. HARRIS Q.C., PATTERSON PALMER also known as PATTERSON PALMER LAW, PATTERSON KITZ (Halifax), PATTERSON KITZ (Truro), MCINNES COOPER, SAM ALBANESE, KEN FORD, RIYAD MOHAMMED, DAVID RABY and GREG WADE, GLEESON MANAGEMENT ASSOCIATES INC., MARY-LOU GLEESON, MATT GLEESON and MARTIN P. GLEESON Defendants	*Deborah Berlack* for the Defendants Funds for Canada Foundation and Mary-Lou Gleeson *John P. Brown, Meighan E. Leon* for the Defendants ParkLane Financial Group Limited, Trafalgar Associates Limited and Trafalgar Trading Limited *Bradley E. Berg, Charles Dobson* for the Defendant Appleby Services (Bermuda) Ltd. as trustee of The Bermuda Longtail Trust *John P. Rook, Q.C., Eric R. Hoaken, Mark W. Smyth* for the Defendants Edwin C. Harris Q.C., Patterson Palmer also known as Patterson Palmer Law, Patterson Kitz (Halifax), Patterson Kits (Truro), McInnes Cooper *Gary H. Luftspring, Andrea J. Sanche* for the Defendants Gleeson Management Associates Inc. and Matt Gleeson **HEARD: June 28, 2012**

REASONS FOR DECISION ON LEAVE TO APPEAL

M.A. Sanderson J.

INTRODUCTION

[1] From August 22-25, 2011, Strathy J. heard a certification motion and two summary judgment motions. His Reasons were released on January 18, 2012 (2012 ONSC 399).

[2] The Defendants ParkLane Financial Group Limited ("ParkLane"), Trafalgar Associates Limited ("Trafalgar Associates"), Trafalgar Trading Limited ("Trafalgar Trading") (collectively "the ParkLane Defendants"); Edwin C. Harris Q.C. ("Harris"), Patterson Palmer also known as Patterson Palmer Law ("PPL"), Patterson Kitz (Halifax) ("Patterson Halifax"), Patterson Kits (Truro) ("Patterson Truro") and McInnes Cooper ("Cooper") (collectively the "Lawyers"); Funds For Canada Foundation ("the Foundation") and Mary-Lou Gleeson ("Mary-Lou") (collectively the "Foundation"); Appleby Services (Bermuda) Ltd. as trustee for Bermuda Long Tail Trust ("Appleby" or "the Trustee"); Matt Gleeson ("Gleeson") and Gleeson Management Associates Inc. ("Gleeson Management") (collectively "the Gleesons") seek leave to appeal his Order certifying this action.

[3] Speaking generally, counsel for the Applicants submit that Strathy J. erred in certifying the Class Action. A class action is inappropriate under s. 5(1)(c) and (d) to resolve the issues here because in determining liability and damages, it will be necessary for the Court to explore the individual circumstances of each Class Member. Further, under s. 5(1)(a) of the *Class Proceedings Act*, the pleadings are insufficient to disclose triable causes of action.

[4] The ParkLane Defendants and the Lawyers also seek leave to appeal his dismissal of their motions for summary judgment.

THE PARTIES/BACKGROUND INFORMATION RELEVANT TO ALL THE LEAVE MOTIONS

"The Gift Program"

[5] This proposed class action concerns a charitable donation tax shelter marketed across Canada (the "Gift Program.") Participating in the Gift Program, Cannon and other class members (the "Plaintiffs" or "Class Members") paid funds to charities in the hope of receiving enhanced tax benefits.

[6] The Plaintiffs allege that Edward Furtak ("Furtak"), the President and CEO of the Trafalgar Group (a) conceived of the Gift Program; (b) created futures trading software ("computer software"); (c) incorporated Trafalgar Associates, an Ontario corporation that worked with ParkLane to create, market, and operate the Gift Program; (d) created a Bermudan corporation, Trafalgar Trading, allegedly key to moving the proceeds of the Gift Program off-shore; and (e) for the benefit of himself, his wife and their children, settled the Bermuda Longtail Trust.

[7] The Plaintiffs allege that the ParkLane Defendants provided promotional materials to each of the Class Members, representing that (a) the Gift Program was part of a suite of sophisticated products being offered by the ParkLane Defendants; (b) the Donations Canada Financial Trust (the "DCF Trust") "with a funding commitment of $200,000,000 in cash to

promote charitable giving in Canada," would enable participants to "enhance their personal cash contributions" to participating charities through a "gift" of beneficial interests in a Canadian trust; (c) for each $250.00 paid, Class Members would receive a $1,000.00 tax credit; (d) participating charities could use the funds to "finance much needed current and long-term operating and capital requirements."

[8] The Plaintiffs allege that the Defendants did not disclose that the lion's share of the "donations" would be directed offshore to Trafalgar Trading and the Bermuda Longtail Trust, or that the participating charities would keep only $75 or $100 from each $10,000 "donation."

[9] Participating charities were required to enter into a "Royalty Agreement" specifying that 91% of the total "donations" would be paid to Trafalgar Trading, or to direct the Foundation to enter into Royalty Agreements on their behalf. After Trafalgar Trading received $9,100.00 of each $10,000 "donation," it would pay 85% of the gross payments to the Bermuda Longtail Trust pursuant to License Agreements for use of the computer software Furtak had created.

[10] Put differently, under the Gift Program, Class Members would "donate" cash (e.g. $2,500.00) to a charity and apply to become a beneficiary of the DCF Trust; if accepted, would receive a beneficial interest in that Trust; the Trust would distribute units in a sub-trust with a "value" of $7,500.00 for every $2,500.00 cash "donation," Class Members would donate the sub-trust units to the charity; the charity would redeem the sub-trust units for cash and issue two tax receipts: (1) a cash receipt (e. g. in the amount of $2,500.00) and (2) a donation-in-kind receipt (e. g. in the amount of $7,500.00). The Bermuda LongTail Trust would provide funds to the DCF Trust to redeem the sub-trust units. Having received the donations and sub-trust units, the charity would keep 1% of the "donations" received and the remaining 99% would be paid as follows: 8% as commissions to the "Independent" Financial Advisors and ParkLane, 91% to Trafalgar Trading pursuant to the Royalty Agreements. The charity would also be entitled to receive a contingent income stream over twenty years based on the profits generated by the computerized futures trading conducted by Trafalgar Trading using the monies it had received from the charity.

[11] The Foundation obtained registered charitable status on February 10, 2006. The Plaintiffs allege the Foundation was a shell trust, the false front of the Gift Program, posing as a "charitable Canadian trust," the ostensible source of the "matching" payments through which the funds flowed from the Bermuda Longtail Trust.

[12] The Plaintiffs allege that the Foundation was established by Gleeson at the request of the ParkLane Defendants to more effectively market the Gift Program. With its interposition as its receipting agent, mainstream charities were more likely to participate because they would not be at risk with CRA.

[13] After the Foundation was established, unless the Class Members had specifically earmarked their "donations" for a particular charity ["directed donations"], the Foundation would receive payments made under the Gift Program from ParkLane, direct them to a charity of its choice, issue charitable tax receipts and pay 3/4 of 1% to the charity. It would enter into the same Royalty Agreements with Trafalgar Trading for use of the computer

software. The Plaintiffs allege that between 2006 and 2008, the trading profits paid to the Foundation were less than 0.5% of the amounts paid to Trafalgar Trading, annually. Trafalgar Trading has paid the trading profits/royalties to the charities, less a ¼ of 1% "administrative fee." The Foundation gave Matt Gleeson the means of siphoning off profits for himself and Gleeson Management through those "administrative" fees.

[14] The charitable registration of the Foundation has now been revoked.

[15] To participate in the Gift Program, all Class Members, including Mr. Cannon, were required to sign standard form contract documentation, including Donor Declarations and, beginning in 2006, Tax Risk Disclosure Statements. In 2008, after CRA began its reassessments, additional language was added, allegedly in an attempt to limit liability to the Class and reassure Class Members that the CRA reassessments would be unsuccessful.

[16] The Plaintiffs allege that Gleeson and his company Gleeson Management acted in concert with the ParkLane Defendants and his wife Mary-Lou in preparing and disseminating the promotional materials. Gleeson and Gleeson Management marketed the Gift Program to Class Members. Gleeson knew that contrary to the representations in the promotional materials, most of the funds the Foundation received would not benefit the charities. He knew, or should have known, that the Foundation was a sham charity that would not meet its stated charitable objectives and could not meet its distribution obligations under the *Income Tax Act*.

[17] Mary Lou Gleeson was Executive Director of the Foundation and a principal of Gleeson Management. She oversaw the transfer of funds from Class Members to Trafalgar Trading through the Foundation. The Plaintiffs allege that Mary-Lou was aware of the Foundation's role in the Gift Program.

[18] The Defendant Edwin C. Harris, Q.C. ("Harris"), a senior member of the tax bar, was counsel at Patterson Kitz (Halifax) in 2005, and counsel at McInnis Cooper since 2006. The Plaintiffs allege the ParkLane Defendants retained Harris to provide input into the development and marketing of the Gift Program. He reviewed the promotional materials, the contractual documents and the DCF Trust documentation. After the Gift Program was operational, he provided advice, amended documents and attended presentations. In 2005, 2006 and 2007, when Harris wrote tax opinion letters to ParkLane regarding the Gift Program, he knew his name, credentials, photograph, professional profile and his "Comfort Letters" advising prospective participants of the existence of his opinions would be featured in the promotional materials.

[19] Commencing in 2008, the ParkLane Defendants retained Harris to draft notices of objection, and to act as counsel in a "test case" appeal on an appeal from a CRA reassessment.

[20] The Plaintiffs allege that the Defendant Appleby, a Bermudan corporate trustee [authorized by the Supreme Court of Bermuda to attorn to the jurisdiction of Ontario and defend the claims against it relating to the Bermuda Longtail Trust] permitted the Bermuda Longtail Trust to be operated as the alter ego of Furtak. It was a beneficiary of the Gift

Program and a knowing participant in the scheme. The Trust Deed of Longtail Trust directed Appleby to enter into agreements to pay hefty fees to Trafalgar Trading for the use of Furtak's computer software.

[21] The Plaintiffs allege that between October 2005 and January 2009, Appleby transferred $417 million to the Gift Program, and received back $439 million, a profit of $22 million. Appleby did not exercise its discretion independently but acted as directed by Furtak. Appleby advanced funds of the Longtail Trust with the knowledge that they would be used in the Gift Program. They were never at risk. Within a matter of hours, they were returned to the Longtail Trust [together with a guaranteed profit of about $500 for every $10,000 donation.]

THE TEST FOR LEAVE TO APPEAL (Applicable Both On The Certification Motion And The Summary Judgment Motions)

[22] The test for granting leave to appeal from an interlocutory order of a judge is set out in Rule 62.02(4). Leave to appeal may be granted where (a) there is a conflicting decision on the matter involved in the proposed appeal and it is, in the opinion of the judge hearing the motion, desirable that leave to appeal be granted; or (b) there appears to the judge hearing the motion to be good reason to doubt the correctness of the order in question and the proposed appeal involves matters of such importance that, in his or her opinion, leave to appeal should be granted. The issues raised must be of general importance, relevant to the development of the law and the administration of justice, warranting resolution by a higher level of judicial authority. They must transcend the immediate interests of the parties.

MOTION FOR LEAVE TO APPEAL CERTIFICATION DECISION

The Test For Certification

[23] In *Toronto Community Housing Corporation v. Thyssenkrupp Elevator (Canada) Limited Toronto,* 2011 ONSC 4914, Horkins J. set out the appropriate test at paragraphs 98-103:

> [98] Subsection 5(1) of the *CPA* sets out the criteria for the certification of a class proceeding. The language is mandatory. The court is required to certify the action as a class proceeding where the following five-part test for certification is met:
> (a) the pleadings or the notice of application discloses a cause of action;
> (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
> (c) the claims or defences of the class members raise common issues;
> (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
> (e) there is a representative plaintiff or defendant who,
> (i) would fairly and adequately represent the interests of the class,
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
> (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.
>
> [99] These requirements are linked: "There must be a cause of action, shared by an identifiable class, from which common issues arise that can be resolved in a fair, efficient and manageable way that will advance the proceeding and achieve access to justice, judicial economy and the modification

> of behaviour of wrongdoers." (*Sauer v. Canada (Attorney General)*, [2008] O.J. No. 3419 at para. 14 (S.C.J.).)
>
> [100] Winkler J. pointed out in *Frohlinger v. Nortel Networks Group,* [2007] O.J. No. 148 at para. 25 (S.C.J.), that the core of a class proceeding is "the element of commonality". It is not enough for there to be a common defendant. Nor is it enough that class members assert a common type of harm. Commonality is measured qualitatively rather than quantitatively. There must be commonality in the actual wrong that is alleged against the defendant and some evidence to support this.
>
> [101] The decision to certify is not merits-based. The test must be applied in a purposive and generous manner, to give effect to the important goals of class actions - providing access to justice for litigants; promoting the efficient use of judicial resources; and sanctioning wrongdoers and encouraging them to modify their behaviour: *Western Canadian Shopping Centres Inc. v. Dutton,* 2001 SCC 46 (CanLII), [2001] 2 S.C.R. 534, [2000] S.C.J. No. 63 at paras. 26-29; *Hollick v. Toronto (City),* 2001 SCC 68 (CanLII), [2001] 3 S.C.R. 158, [2001] S.C.J. No. 67 at para. 15.
>
> [102] In *Hollick, supra,* at para. 25, the "some basis in fact" test was introduced when the court stated that "the class representative must show some basis in fact for each of the certification requirements set out in s. 5 of the Act, other than the requirement that the pleadings disclose a cause of action."
>
> [103] Since it is not the role of the court on a certification motion to "find facts", I conclude that *Hollick* directs the court to confirm that there is some evidence to support the s. 5 (b) – (e) requirements. This interpretation of the test is consistent with the low burden that rests on the plaintiff as explained in *Hollick* at para. 16 and consistent with how the numerous courts have applied the "some basis in fact" test (for example, see *Fresco v. Canadian Imperial Bank of Commerce*, [2009] O.J. No. 2531 (S.C.J.) at para. 61.)

[24] In respect of certification motions in class proceedings, the appellate courts have repeatedly held that deference should be given to motions judges who have specialized expertise, and extensive factual knowledge of the proceedings by virtue of their case management function: *Anderson v. Wilson* (1999), 44 O.R. (3d) 673 (C.A.) at para.12, leave to appeal to SCC ref'd., [1999] SCCA No. 476; *Cloud v. Canada (Attorney-General)* (2004), 73 O.R. (3d) 401, 247 D.L.R. (4th) 667 (C.A.) at para. 39; *Peter v. Medtronic Inc.*, 2008 CanLII 22910 (Ont. Div. Ct.), at para. 2-3; *Fischer v. IG Investment Management Inc.,* 2012 ONCA 47 at para. 39-40.

[25] Strathy J. set out the test in a similar fashion at paragraphs 132-134 of his Reasons, after quoting the criteria in s. 5(1) of the *CPA*, he continued:

> [133] As Justice Lax observed in *Banyan Tree* at para. 14, these requirements are linked: "There must be a cause of action, shared by an identifiable class, from which common issues arise that can be resolved in a fair, efficient and manageable way that will advance the proceeding and achieve access to justice, judicial economy and the modification of behaviour of wrongdoers": *Sauer v. Canada (A.G.)*, [2008] O.J. No. 3419, 169 A.C.W.S. (3d) 27 (Sup. Ct.) at para. 14.
>
> [134] It has been observed on many occasions that the *CPA* is remedial legislation and that it should be interpreted generously in order to give effect to its objectives: access to justice, behaviour modification and judicial economy: *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 (CanLII), [2001] 2 S.C.R. 534; *Hollick v. Toronto (City)*, 2001 SCC 68 (CanLII), [2001] 3 S.C.R. 158; *Abdool v. Anaheim Management Ltd.* 1993 CanLII 5430 (ON SC), (1993), 15 O.R. (3d) 39 at 47 (Gen. Div.), aff'd 1995 CanLII 5597 (ON SCDC), (1995), 21 O.R. (3d) 453 (Div. Ct.).
> ...

LEAVE ARGUMENTS BASED ON STRATHY J.'S APPLICATION OF SECTION 5(1)(a)

Are the Negligence Claims Against Various Defendants Subsumed in the Claims Against Them for Negligent Misrepresentation?

[26] Strathy J. certified causes of action against the Lawyers, Gleeson/Gleeson Management, the Foundation and Appleby in both negligence and negligent misrepresentation.

[27] He concluded that a plaintiff may plead both negligence and negligent misrepresentation arising out of the same factual circumstances, so long as the claims are distinct. Each case must be individually examined, and should not be disposed of at the pleading stage unless it is plain or obvious that one claim is "subsumed" within another. His reasons on this issue are at paragraphs 144-155 and 169.

[28] On this application for leave, counsel for the Lawyers, Gleeson/Gleeson Management, the Foundation and Appleby renewed their argument made initially before Strathy J. that the Plaintiffs' pleadings of negligence against each of them were subsumed in their pleadings of negligent misrepresentation/were in substance claims in negligent misrepresentation and disclose no separate cause of action in negligence: *Deep v. M.D. Management* (2007) O.J. No. 2392 (S.C.J.); aff'd 2008 ONCA 189 at paras 27-29. They continued to submit that reliance is a necessary element of the misrepresentation claims and that the substance of the negligence claim was really negligent misrepresentation. Strathy J. rejected that argument based on differing factual allegations contained in the pleadings.

The Submissions of Counsel for the Lawyers

[29] Strathy J. held it was not plain and obvious that the claim against the Lawyers in negligence could not succeed apart from the claim in negligent misrepresentation. He set out the factual basis for his conclusion that it would be open for the trial court to hold that the Plaintiffs could succeed in negligence against the Lawyers even if they did not succeed in negligent misrepresentation. His Reasons contain his reasoning for rejecting the Lawyers' legal argument at paragraphs 534-536, 538 and 541.

[30] Counsel for the Lawyers submitted that Strathy J. put too much emphasis on the role of the Lawyers in the design and the content of the program documents and too little on the role of the Financial Advisors. At law, the Plaintiffs were not entitled to rely on the content of the program documents per se, because they had received personalized advice from their Financial Advisors [who unlike the Lawyers were in a direct professional relationship with them.] Class Members in signing donor declarations acknowledged they had received independent tax advice and that they understood the legal and tax consequences. Beginning in 2006, they also signed tax risk disclosure statements acknowledging that they were relying exclusively on advice received from the advisors. The 2008/2009 Donor Declaration mentioned this class action and required participants to declare they would not participate in the within class action.

The Foundation

[31] Counsel for the Foundation Defendants made similar submissions. The breach alleged at paragraph 127 of the Amended Statement of Claim related to "inaccurate, false, deceptive, misleading" information contained in the promotional materials." The cause of damages alleged was reliance on the "accuracy and completeness of the information in the documents used in deciding to invest in the Gift Program."

Gleeson/Gleeson Management

[32] Counsel for Gleeson/Gleeson Management submitted that in substance, the negligence claim against Gleeson/Gleeson Management was based on negligent misrepresentations.

Appleby

[33] Counsel for Appleby submitted that the pleading of negligence *simpliciter* against Appleby amounted only to particulars of an alleged duty of care to provide the proposed class with accurate information and not to make false/misleading statements.

Conclusions re Subsumed Argument

[34] With respect to the pleadings in negligent misrepresentation and negligence, Strathy J. emphasized that the pleadings contain not only allegations that the Defendants in question made negligent misrepresentations, but also that the "product" - the Gift Program - was negligently designed and did not work. At trial, a claim in negligence might succeed and a claim in negligent misrepresentation might fail or vice versa.

The Lawyers

[35] Given that the Plaintiffs have pleaded that Harris provided substantial input into the development and marketing of the Gift Program, the design and drafting of the contractual documents and the DCF Trust documentation, he knew his name, credentials, photograph and professional profile were prominently presented in the promotional materials, he prepared Comfort Letters in 2005, 2006 and 2007 advising prospective participants of the existence of his opinions, he knew that the fact that he had rendered a positive opinion would be featured in the promotional materials, the allegations go well beyond allegations in substance of misrepresentation.

[36] The BCCA decision in *347671 B.C. Ltd. et al. v. Heenan Blaikie* 2002 BCCA 126 supports Strathy J.'s conclusion.

[37] In my view, there is no good reason to doubt the correctness of his conclusion that it is not plain and obvious that the Plaintiffs cannot succeed in negligence against Harris even if they were not to succeed with respect to their allegations of negligent misrepresentation against the Lawyers.

[38] Nor is there good reason to doubt his conclusion that if findings of fraud or certain other legal determinations are made, the Lawyers may not be able to rely on the disclaimers and declarations in the documents.

The Foundation

[39] In my view, there is no good reason to doubt the correctness of Strathy J.'s conclusions that the claims against the Foundation Defendants and Mary-Lou in negligence and negligent misrepresentation were not in substance the same.

[40] I have considered the submissions that he erred in law in failing to follow *Deep v. MD Management*.

[41] In my view, there is no good reason to doubt his conclusion that *Deep v. M.D. Management*, [2007] O.J. No. 2392, aff'd 2008 ONCA 189 is distinguishable on its facts. The Plaintiffs' claim in negligence against the Foundation Defendants was not based solely on their representations or omissions, but also their involvement in the design and operation of the Gift Program and their negligence in failing to ensure that CRA would recognize its charitable donation receipts as valid.

Gleeson/ Gleeson/Gleeson Management

[42] With respect to Gleeson/Gleeson Management, Strathy J., after reviewing the pleadings and the governing law, rejected a similar submission that the Plaintiffs' claim against it for negligence was subsumed in its claim for negligence. Given the allegations that the Gleesons/Gleeson Management were involved in the design of the product, there is no good reason to doubt the correctness of his conclusion. It is not plain and obvious that the claim against them in negligence must fail if the claim for negligent misrepresentation fails, or vice versa.

Appleby

[43] Since the Plaintiffs withdrew their claim in negligent misrepresentation against Appleby on the eve of the certification hearing, but not their claim against it in negligence *simpliciter*, Appleby's argument that the claim against it in negligence is subsumed in a non-existent claim against it for negligent misrepresentation must fail.

Section 5(1)(a) Arguments Based on Lack of Particulars in Specific Pleadings

General Test Under Section 5(1)(a)

[44] Section 5(1)(a) of the *CPA* requires that the pleadings disclose a cause of action. It is uncontroversial that the test under s. 5(1)(a) *CPA* is the same as on a motion under Rule 21: is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? No evidence is admissible on the motion, and the material facts pleaded are accepted as true, unless patently ridiculous or incapable of proof: *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959.

[45] Strathy J held that the Plaintiffs have pleaded tenable causes of action against specified Defendants as follows at paras. 272-275 of his Reasons:

> [272] My conclusions concerning the cause of action requirement in section 5(1)(a) is that the plaintiff has pleaded the following causes of action against the defendants set out below:
> (a) Negligence: the ParkLane Defendants, Appleby, Funds for Canada Foundation, the Gleesons and the Lawyers;

(b) Negligent Misrepresentation: the ParkLane Defendants, the Gleesons, and the Lawyers;
(c) Fraud and Fraudulent Misrepresentation: the ParkLane Defendants, Appleby, and the Gleesons;
(d) Conspiracy: the ParkLane Defendants, Appleby and the Gleesons;
(e) *Consumer Protection Act, 2002*: the ParkLane Defendants, Funds for Canada Foundation, and the Gleesons;
(f) Breach of Contract: ParkLane; and
(g) Unjust enrichment and constructive trust: the ParkLane Defendants, Funds for Canada Foundation, the Gleesons, and Appleby.

[273] The plaintiff has not pleaded a tenable cause of action against Gleeson in his capacity as a former trustee of the Donations Canada Trust and the action against him in that capacity will be dismissed.

[274] The plaintiff has failed to plead a tenable cause of action against the FFC Directors and the claim against them will be dismissed.

[275] To state the obvious, my conclusions on the cause of action requirement are not to be taken as conclusions on the merits of the plaintiff's cause of action against any defendants. Some of the defendants have made submissions going to the merits of the plaintiff's claims, raising numerous factual arguments to show why, in their view, the plaintiff's claims are bound to fail. That issue is not before me on the certification motion. I will deal with the specific motions for summary judgment of the ParkLane Defendants and the Lawyers later in these reasons.

General Principles re Sufficiency of Pleadings Under Section 5(1)(a)

[46] When a defendant submits that a claim does not disclose a reasonable cause or action, it must show that it is plain, obvious, and beyond doubt that the plaintiff cannot succeed in the claim: *Hunt v. Carey Canada,* 1990 CanLII 90 (SCC), [1990] 2 S.C.R. 959. Matters of law not fully settled should not be disposed of on a motion to strike: *Dawson v. Rexcraft Storage & Warehouse Inc.*,[1998] O.J. No. 3240 (C.A.), *Cavanaugh v. Grenville Christian College*, 2012 ONSC 2995, at para. 64-67.

[47] In *Toronto Community Housing, supra* Horkins J. wrote at paragraphs 105-6:

[105] The test under s. 5(1) (a) is well settled and identical to the test under rule 21.01(1)(b) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. The following principles apply to the determination of the issue of whether the pleadings disclose a cause of action under s. 5(1)(a):
- No evidence is admissible for the purposes of determining the s. 5(1)(a) criterion: See *Hollick* at para. 25.
- All allegations of fact pleaded, unless patently ridiculous or incapable of proof, must be accepted as proven and thus assumed to be true.
- The pleading will be struck out only if it is plain, obvious and beyond doubt that the plaintiff cannot succeed: *Cloud* at para. 41.
- Matters of law not fully settled in the jurisprudence must be permitted to proceed: *Ford v. F. Hoffmann-LaRoche Ltd.* 2005 CanLII 8751 (ON SC), (2005), 74 O.R. (3d) 758 at para. 17(e) (S.C.J.).

[106] The pleading must be read generously to allow for inadequacies due to drafting frailties and the plaintiffs' lack of access to key documents and discovery information: *Hunt v. Carey Canada Inc.*, 1990 CanLII 90 (SCC), [1990] 2 S.C.R. 959 at 980; *Anderson v. Wilson* 1999 CanLII 3753 (ON CA), (1999), 44 O.R. (3d) 673 at 679 (C.A.).

Specific Arguments of Specific Defendants re Particularity of Pleadings

Re Adequacy of Pleading of Negligence v. Gleesons/Gleeson Management

[48] Counsel for Gleeson/Gleeson Management submitted Strathy J. erred in failing to find that the cause of action in negligence was not properly pleaded against Gleeson/Gleeson Management. Strathy J. addressed the Plaintiffs' pleadings in negligence in one sentence [at para. 171]: "[f]or the reasons set out in relation to the claim against ParkLane, I find that there is a properly pleaded claim in negligence against Gleeson and Gleeson Management."

[49] The reasoning relating to the ParkLane Defendants does not extend to Gleeson/ Gleeson Management. On the facts, ParkLane and Gleeson/ Gleeson Management were not synonymous. Their relationship to the putative class was not the same.

[50] The "plain and obvious" test does not absolve the class proceedings plaintiff of the obligation to observe the rules of pleadings. The plaintiff cannot rely on bald allegations but must properly make out each cause of action against each defendant, pleading all constituent elements of a tort and providing the factual basis upon which that allegation is founded. *Dobbie v. Arctic Glacier Income Fund et al.*, 2011 ONSC 25 (CanLII) at para. 17; *Balanyk v. University of Toronto*, [1999] O.J. No. 2162 (S.C.J.) at para. 25.

[51] Counsel for Gleeson/Gleeson Management submitted the Plaintiffs were required to properly plead a duty of care was owed and did not plead the *Anns/Kamloops* test. As Gleeson/Gleeson Management were not in a traditional relationship with the Plaintiffs, the Plaintiffs have not adequately pleaded particulars/the facts supporting a duty of care against them.

[52] Having failed to plead the material facts necessary to establish the legal elements of a cause of action, the cause of action asserted should be struck. *Williams v. Canada (Attorney General)*, 2005 CanLII 29502 (ON SC) at para. 17.

Conclusion

[53] Counsel for Gleesons asserted that Strathy J.'s only direct finding regarding Gleeson/ Gleeson Management's negligence was in the last sentence of paragraph 171. However, Strathy J. also referred to Gleeson/Gleeson Management at paragraphs 141, 155, 169-171 and 298.

[54] Strathy J. did summarize the specific allegations against Gleeson/Gleeson Management in negligence at para. 169.

[55] The Plaintiffs did plead the relationship between Gleeson/Gleeson Management and ParkLane. Gleeson/Gleeson Management (a) created the Funds for Canada Foundation and the DCF Trust under the direction of the ParkLane Defendants and the Bermuda Longtail Trust for the purpose of giving the Gift Program the appearance of undertaking legitimate charitable objectives; (b) acted together with other Defendants in creating, marketing and operating the Gift Program; (c) Gleeson Management acted as agent for ParkLane; (d) Gleeson controlled the Funds for Canada Foundation and Gleeson Management, and treated both as his alter ego for the purpose of participating in the Gift Program; (e) Gleeson

participated in seminars and presentations promoting ParkLane, the Funds for Canada Foundation and the Gift Program; and, (f) Gleeson/Gleeson Management benefitted financially from participating in the Gift Program.

[56] Given the pleaded connection with ParkLane, there is no good reason to doubt that it was appropriate for him to refer to his findings respecting the ParkLane Defendants.

[57] In my view, there is no reason to doubt the correctness of his conclusion that the Plaintiffs adequately pleaded that Gleeson/Gleeson Management owed a duty of care that was breached.

[58] While Strathy J. did not specifically address the *Cooper v. Hobart* analysis, he was obviously alive to the required elements of the tort of negligence, including establishment of a duty of care outside of a recognized category. He discussed and analyzed those very issues throughout his Reasons. He spent 70 paragraphs dealing with the establishment of a duty of care of the Lawyers under *Cooper v. Hobart* with respect to the Lawyers' summary judgment motion. There was no need for him to repeat his analysis specifically with respect to the claim against Gleeson/Gleeson Management. It clearly applied.

Adequacy of Pleading of Negligence Per Se v. Lawyers

[59] Counsel for the Lawyers based their motion for summary judgment on the absence of a duty of care, on the lack of a relationship of proximity. They submitted the Plaintiffs failed to properly plead the duty of care. They submitted that in conducting the proximity analysis under *Cooper v. Hobart*, Strathy J. erroneously failed to consider and give effect to the Donor Declarations and Tax Risk Disclosure Statements. They challenged his statement at paras. 542 and 445 that the Donor Declarations and Tax Risk Disclosure Statements will "fall by the wayside if it is established that the Gift Program is impeachable on the ground of fraud or misrepresentation."

[60] Counsel for the Lawyers submitted the Motions Judge also ignored the importance of the evidence of the Financial Advisors. There was no basis to conclude they were not independent vis-à-vis the Lawyers. The individualized information the Financial Advisors provided to donors was highly relevant to the duty of care analysis. The Motions Judge failed to properly consider evidence that certain class members were informed by their Financial Advisors about the "back half" of the Gift Program [evidence relevant to reliance and representations within the proximity analysis and to allegations of non-disclosure].

Conclusion

[61] Counsel for the Lawyers did not challenge Strathy J.'s conclusion following *Banyan Tree*, that there is a "strong argument" that the Lawyers owed a recognized duty of care. Even if they didn't, he held there was a basis for a trial court to find that Harris deliberately placed himself in a relationship of proximity with the Plaintiffs.

[62] In *Banyan Tree*, Lax J. considered and rejected similar allegations against a law firm. Strathy J's analysis respecting certification of the duty of care under s. 5(1)(a) was also consistent with the reasoning of this Court in denying leave to appeal in *Banyon Tree*. There

are no conflicting decisions. There is no reason to doubt the correctness of Strathy J's analysis. The first branch of the Rule 62.02(4) test is not satisfied on this issue.

[63] There was no evidence that any Distributor told any participant that Harris really did not think the Gift Program would work. Distributors were contractually precluded from making representations inconsistent with the written promotional materials.

Adequacy of Negligence Pleading Per Se Against the Foundation Defendants

[64] Counsel for the Foundation also submitted that the causes of action certified against the Foundation Defendants were lumped together with the other Defendants and were not pleaded with sufficient specificity to establish a duty of care relationship. The description of the Plaintiffs' connection to the Foundation and to Mary-Lou was inadequate. Strathy J. erred in law in failing to follow *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.) and *Kamloops (City of) v. Nielsen*, 1984 CanLII 21 (SCC), [1984] 2 S.C.R. 2. He failed to ask whether there was "a sufficiently close relationship between the parties" to justify imposition of a duty and, if so, whether there were policy considerations which ought to negative or limit the scope of the duty, the class of persons to whom it is owed or the damages to which breach may give rise: *Cooper v. Hobart*, 2001 S.C.C. 79, *Anthes v. Canada (Ministry of Health)* (2008) 93 O.R. (ed) 35, C.A., *R. v. Imperial Tobacco Canada Ltd.*, 2011, S.C.C. 2, and *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.* 2011 S.C.C. 23.

Conclusion

[65] There is no good reason to doubt the correctness of the Certification Order. The Plaintiffs have adequately pleaded the material facts.

Adequacy of Plaintiffs' Negligence Pleading Per Se v. Appleby

[66] Counsel for Appleby submitted the Plaintiffs failed to plead the material facts on which they intend to rely, including the material facts to support each of the constituent elements of the negligence alleged: *Shaw v. B.C.E. Inc.*, [2003] O.J. No. 2695 at para. 5 (S.C.J.) Certifying negligence *simpliciter* against Appleby ran contrary to the Supreme Court of Canada's warning in *Imperial Tobacco* against permitting claims of indeterminate liability to proceed to trial.

Conclusion

[67] Strathy J's Reasons deal with Appleby's submissions at paras. 174-177:

[68] In *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, [2008] 2 SCR 114, at para. 3, the Chief Justice wrote:

> A successful action in negligence requires that the plaintiff demonstrate (1) that the defendant owed him a duty of care; (2) that the defendant's behaviour breached the standard of care; (3) that the plaintiff sustained damages; and (4) that the damages were caused, in fact and in law, by the defendant's breach.

[69] The Plaintiffs have pleaded the requisite elements of negligence against Appleby as follows:

> (1) Duty of Care:

> The Bermuda Longtail Trust, with the ParkLane Defendants, were negligent when they together planned, created, controlled, and operated the Gift Program;
> As one of the creators of the Gift Program, the Bermuda Longtail Trust owed a duty of care to the Class to ensure that CRA would in fact recognize the charitable donations (i.e. they had a duty to ensure that the Gift Program would do what it was intended to achieve);
> The special relationship between the Bermuda Longtail Trust and the Class arose because the Class Members participated in the Gift Program it helped to create;
> The Bermuda Longtail Trust had a duty to halt the Gift Program after CRA made its position on the Gift Program known; and,
> The Bermuda Longtail Trust and other Defendants, knew or were wilfully blind to the fact that the Class would lose their entire investment if they participated in the Gift Program, and it knew or ought to have known that the Gift Program would not deliver the promised tax savings;
> (2) Breach of Duty of Care:
> The Bermuda Longtail Trust breached its duty of care to the Class as particularized in paragraphs 29, 39, 65, 124 - 130 and 133 – 140 of the Claim;
> The Bermuda Longtail Trust knew, or ought reasonably to have known that the Gift Program had no genuine charitable or other legitimate purpose, but was created for the purpose of enriching the Bermuda Longtail Trust, among others;
> From and after December 2007, when they became aware of the CRA reassessments, the Bermuda Longtail Trust, and other Defendants, took no steps to warn the Class Members that CRA was taking the position that the donations would not qualify for tax credits;
> Appleby negligently failed to take proper steps to fully investigate the Gift Program to ensure that the CRA would in fact recognize the charitable donation receipts that were issued and the tax credits as claimed by the Class Members.
> (3) Plaintiff and the Class Members were Damaged:
> The Plaintiff and the Class Members did, in fact participate in the Gift Program; and,
> the Representative Plaintiff and Class Members have suffered damages, including the loss of the sums they paid into the Gift Program, the interest and penalties that have been assessed against them by CRA, and special damages incurred as a result of CRA's reassessments;
> (4) The Damages were caused by the Defendants' Breach:
> The negligence of the Defendants in creating, marketing and operating the Gift Program was the proximate cause of the Class' losses.

[70] The Supreme Court in *Imperial Tobacco* did not address the issue of indeterminate liability in cases of negligence *simpliciter*. It dealt with indeterminate liability in relation to negligent misrepresentation. It dismissed the negligence *simpliciter* claim on other grounds.

[71] There is no good reason to doubt the correctness of Strathy J's conclusion that these claims met the s. 5(1)(a) test.

Pleadings re Negligent Misrepresentation Generally

[72] Strathy J's Reasons concerning the adequacy of the misrepresentation pleadings are at paragraphs 178-183.

Sufficiency of Pleading of Negligent Misrepresentation Per Se v. the Lawyers

[73] Counsel for the Lawyers submitted that Strathy J. erred in certifying the claim of negligent misrepresentation against the Lawyers because it was "lacking in 'careful particularity." The "donors" did not rely on the Lawyers.

[74] Strathy J. canvassed those submissions in detail in his Reasons dismissing the summary judgment motion.

Conclusion re Sufficiency of Pleading of Negligent Misrepresentation Per Se v. the Lawyers

[75] Strathy J. had good reason to reject the submission of counsel for the Lawyers that because Harris declined to communicate directly with any donor or professional advisor regarding the Gift Program, he is necessarily immune from liability. Counsel for the Lawyers asserted that Justice Strathy failed to consider and give effect to certain "facts" upon which they continue to rely.

[76] The weighing of that evidence is irrelevant at the s. 5(1)(a) stage of analysis. The Court must consider whether the pleadings disclose a cause of action. There is nothing in the documents clearly negating any *prima facie* proximity between Class Members and the Lawyers as a result of Harris' decision to allow himself, his reputation and his Comfort Letters to be featured in the promotional materials. There is no decision that conflicts with Justice Strathy's analysis and no good reason to doubt its correctness.

Sufficiency of Pleading of Negligent Misrepresentation Per Se v. ParkLane

[77] Relying on *Queen v. Cognos Incorporated,* [1993] 1 S.C.R. 87, counsel for ParkLane submitted the claims in misrepresentation against ParkLane were unsuitable for certification because reliance and causation requirements require individual inquiries.

[78] The 9,926 "donors" differed significantly in profession, age, and amounts donated. Financial Advisors assessed whether the Gift Program was suitable for their individual clients, explained its nature, its risks and recommended it, only if appropriate. Cannon participated in the Gift Program in 2005 and 2006 on the recommendation of his Financial Advisor, Gacich, not on ParkLane's recommendation.

[79] Counsel for ParkLane submitted the Court can only make a determination of materiality on an individual basis after considering the alleged misrepresentation in the context of the entire informational matrix available to a plaintiff.

Conclusion

[80] The issues surrounding reliance as it relates to ParkLane are canvassed elsewhere in these Reasons. Strathy J. recognized that in many factual contexts, individual inquiries would be necessary. However, on the facts here, he was of the view that it is open to the trial Court to find one or two overarching representations and to infer reliance. In so doing it may refer to the direction in the Gift Program documents created by ParkLane to the "Independent Advisors" that the participants were not to rely on any representations not included in the promotional materials. The focus of the inquiry at trial regarding the claims for negligent misrepresentation will be on misrepresentations contained in those documents. There is no good reason to doubt the correctness of that conclusion.

Sufficiency of Pleading of Negligent Misrepresentation Per Se Against the Foundation

[81] Counsel for the Foundation submitted it is plain and obvious that the Plaintiffs' claim in negligent misrepresentation must fail. The Plaintiffs failed to plead against the Foundation with sufficient particularity, especially actual reliance: *Dobbie v. Arctic Glacier Income Fund* (Leave to Appeal Motion) at para. 37, *Sharbern Holding Inc. v. Vancouver Airport Centre Limited* 2011 SCC 23 at para 129. Deemed reliance was insufficient: *Dobbie v. Arctic Glacier*

Income Fund (Leave to Appeal Motion) at para. 39, *Sharbern Holding Inc. v. Vancouver Airport Centre Limited* 2011 SCC 23 at para 129.

[82] In considering the adequacy of the pleading against the Foundation, the learned motions judge failed to apply: *Queen v. Cognos Incorporated* [1993] 1 S.C.R. 87; *Lysko v. Braley* [2006] O.J No. 1137 (C.A), *R. v. Imperial Tobacco Canada Limited* (2011) S.C.C. 42 335 and *Sharbern Holding Inc. v. Vancouver Airport Centre Limited* (2011) S.C.C. 23

[83] There is good reason to doubt the correctness of the Order and leave to appeal ought to be granted.

[84] The Plaintiffs have not pleaded that Mary-Lou Gleeson made any representations to the class or that Class Members relied on such a representation.

Conclusion

[85] There is no good reason to doubt the correctness of Strathy J.'s conclusions in this regard. He properly applied *Queen v. Cognos* and *Imperial Tobacco* in the particular circumstances here.

Sufficiency of Pleading of Negligent Misrepresentation Per Se Against Gleeson

[86] Counsel for Gleeson/Gleeson Management submitted it is plain and obvious that the Plaintiffs' negligent misrepresentation claim against them will fail for lack of particularity. The Plaintiffs have failed to properly plead the constituent elements of the cause of action against Gleeson/Gleeson Management.

Conclusion

[87] I do not accept counsel for Gleeson Management's submission that "the Plaintiff has not pleaded that [Gleeson and] Gleeson Management made any representations to the Class." In the Statement of Claim, the Plaintiffs alleged *inter alia* that Gleeson and Gleeson Management were promoters of the Gift Program, allegedly made negligent misrepresentations to the Class by disseminating the promotional materials, Gleeson Management acted as the agent for ParkLane and, along with Gleeson promoted and marketed the Gift Program to Class members; Gleeson /Gleeson Management with other Defendants created and distributed the promotional materials. They knew or ought to have known that Class Members would rely upon the accuracy of these documents; the promotional materials were inaccurate, misleading, incomplete and designed to convince Class Members of tax benefits which these Defendants knew or ought to have known would not be ultimately realized; they breached their duty of care in providing false, deceptive and misleading promotional materials to the Class and in failing to deliver revised materials after the CRA reassessments began.

[88] Each requisite element of a claim in negligent misrepresentation as set out in *The Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 at para. 33 has been pleaded against Gleeson/Gleeson Management. There is no good reason to conclude that Strathy J. erred in that regard. It is not plain and obvious that the claim will fail. There is no reason to doubt the

correctness of Strathy J.'s conclusion that the negligent misrepresentation claim against Gleeson/Gleeson Management meets the s. 5(1)(a) *CPA* test..

Sufficiency of Pleading of Negligent Misrepresentation Per Se Against Appleby

[89] Counsel for Appleby also submitted that Strathy J. erred in law in failing to require actual reliance. He failed to follow the result on the leave decision in *Dobbie v. Arctic Glacier*. He ignored concerns about indeterminate liability.

Conclusion

[90] I do not accept counsel for Appleby's submission that the leave to appeal decision in *Dobbie v. Arctic Glacier* is a "conflicting decision." A court granting leave to appeal makes no findings on the issues for which leave is sought. The facts are different in any event.

[91] Similarly, the facts in *R. v. Imperial Tobacco,* 2011 SCC 42 are distinguishable from those alleged against Appleby. A trial court might well find that there is nothing indeterminate about the Class here [investors targeted by ParkLane.] Appleby, allegedly a direct participant in the Gift Program, allowed the assets of the Bermuda Longtail Trust to be used to "prime the pump." The scope of liability may be found to be the amount of money the "donors" paid into the Gift Program and their foreseeable losses arising from CRA's disallowance of their "charitable donations." In any event, indeterminate liability falls under the residual policy part of the analysis. It is usually not part of the proximity analysis.

Subsumed Pleadings of Fraud and Fraudulent Misrepresentation

Fraud Subsumed in Fraudulent Misrepresentation

[92] Similar to arguments that the claim of negligence was subsumed in the claim for negligent misrepresentation, counsel for a number of the Defendants including ParkLane, Appleby, the Foundation and Gleeson Management, submitted the Plaintiffs' claim for fraud is subsumed in the claim for fraudulent misrepresentation.

[93] Strathy J. dealt with this issue at paras 184-193 of his Reasons.

Conclusion re Subsumed Argument

[94] Strathy J. carefully reviewed the pleadings, and the law regarding pleadings of fraud and fraudulent misrepresentation. There is no good reason to doubt his conclusion that just as the negligence claim was adequately pleaded as a separate claim from the negligent misrepresentation claim, the fraud allegations are separate from the allegations of fraudulent misrepresentation. A trial court may find these Defendants liable for fraud without necessarily having made fraudulent misrepresentations, and vice versa.

Adequacy of Pleadings of Fraud and Fraudulent Misrepresentation

[95] Strathy J. dealt with the fraud and fraudulent misrepresentation pleadings at paras 184, 186-191 and 193.

Adequacy of Pleadings of Fraud Per Se v. Appleby

[96] Counsel for Appleby submitted that fraud of any kind must be pleaded with full particulars. Rule 25.06(8): Where a pleading is so general as to lack the material facts, the appropriate remedy is to strike the claim rather than proceeding by way of a demand for particulars: *Shaw* at para. 5. The Plaintiffs made no fraud allegations specific to Appleby, but rather lumped Appleby together with other Defendants. In certifying fraud against it, the learned motions judge erred in law by failing to observe the fine line between reading a pleading generously, and projecting basic elements into a pleading to conclude it was legally sufficient. He erred in the extent to which he "generously read" the Plaintiffs' pleading of fraud as against Appleby. Pleading requirements must be maintained to prevent prejudice to defendants resulting from a quagmire of prolix, ambiguous and imprecisely pleaded claims.[1] Fraud is one of the most serious allegations under common law.

Conclusion

[97] The Plaintiffs have pleaded the Bermuda Longtail Trust was affiliated with and acted "as one entity" with the ParkLane Defendants. With others it fraudulently created the Gift Program for profit. It provided the money necessary to prime the pump of funds. It financially benefited overall to the extent of about $20 million. It knew it was assisting in a fraud/that the Gift Program violated the *Income Tax Act*.

Adequacy of Pleadings of Fraud Per Se v. the Foundation

[98] Counsel for the Foundation made a submission similar to that of Gleeson/Gleeson Management.

Conclusion

[99] There was some evidence before the Court about the role that the Foundation played in the marketing and operation of the Gift Program, and the participation of Mary-Lou in the creation of the promotional materials.

[100] There is no good reason to doubt the correctness of the inclusion of "fraud" in the Certification Order.

Adequacy of Pleadings of Fraud Per Se v. Gleeson/Gleeson Management

[101] Counsel for Gleeson/Gleeson Management submitted that a plaintiff cannot plead fraud and fraudulent misrepresentation "broadly." It must plead the full particulars of the material facts alleged to constitute the fraud.

Conclusion

[102] At paragraph 184, Strathy J. parsed out the claims in fraud. As one of the promoters, Gleeson/Gleeson Management allegedly planned, created and marketed the Gift Program as part of an elaborate fraud for the purposes of self-profit.

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[1] *Lo Faso v. Feracuti*, [2009] O.J. No. 4568 at paras. 27-28 (S.C.J; *Homalco Indian Band v. British Columbia* (1998), 25 C.P.C. (4th) 107, [1998] B.C.J. No. 2703 at para. 11 (S.C.)

[103] In my view, the fraud claims as pleaded included the requisite elements. There is no reason to doubt the correctness of the certification order.

[104] There is no good reason to doubt Strathy J's conclusion that the claim of fraud against Gleeson Management was pleaded with sufficient particularity.

Adequacy of Pleadings of Fraudulent Misrepresentation Per Se v. Appleby

[105] Counsel for Appleby submitted that in certifying fraudulent misrepresentation, the motions judge erred in reading the pleading too broadly.

[106] Counsel for the Plaintiffs submitted the Promotional Materials included, *inter alia*, a false representation that the Gift Program had a $200,000,000 funding commitment to promote charitable giving in Canada, and that the Class would receive tax benefits. The omission of material facts from the promotional materials was intended by the Promoters, including Appleby, to mislead the Class.

Adequacy of Pleadings of Fraudulent Misrepresentation Per Se v. Gleesons

[107] Counsel for the Gleesons submitted Gleeson/Gleeson Management were lumped in with the other Defendants. The pleadings did not identify the specific misrepresentations that Gleeson/Gleeson Management allegedly made, making it almost impossible for Gleeson/ Gleeson Management to respond to this claim. A claim of fraudulent misrepresentation requires the plaintiff to plead that a defendant (a) made a false representation of fact; (b) with knowledge of its falsehood or recklessly, without belief in its truth; (c) with the intention that it should be acted upon by the plaintiff; and (d) that actually induces the plaintiff to act on it to his or her detriment.

Conclusions on the Adequacy of Pleadings of Fraudulent Misrepresentation Per Se v. Gleeson/Gleeson Management, Appleby and the Foundation

[108] In respect of the claim for fraudulent misrepresentation against Gleeson/Gleeson Management the pleadings contain the following: members of the Class were not told that the donated money would not be paid to charity or that the primary purpose of the Gift Program was to benefit, among others, Gleeson/Gleeson Management; Gleeson/Gleeson Management had a duty to provide accurate information to the Class; Gleeson/Gleeson Management, along with other Defendants, created and authorized the preparation and distribution of the promotional materials, upon which they knew and intended the Class would rely; Gleeson/Gleeson Management knew or were reckless or wilfully blind to the fact that the promotional materials contained false representations; Gleeson/Gleeson Management failed to correct the information in the promotional materials and continued to sell the Gift Program even after the CRA reassessments began.

[109] It would be open for a trial Court to conclude that the promoters, including Appleby, the Foundation and Gleeson /Gleeson Management fraudulently misrepresented to the Class that they would receive tax benefits, which they knew or ought to have known would not occur. The Class members relied on these representations. They knew, or were reckless or willfully blind to the fact that the representations in the promotional materials were untrue.

[110] I find there is no reason to doubt the correctness of Strathy J's conclusion that the fraudulent misrepresentation claims against Appleby/Gleeson/Gleeson Management/the Foundation met the s. 5(1)(a) test.

Re Conspiracy

[111] Strathy J's Reasons respecting conspiracy are at paragraphs 194-196, 201-202 and 205-223 of his Reasons.

Gleeson/Gleeson Management

[112] Counsel for Gleeson Management submitted that Strathy J. erred at law in failing to properly apply the requirement that conspiracy be a stand-alone claim. The Plaintiffs' conspiracy claim relies entirely upon the same conduct pleaded in support of their fraud and fraudulent misrepresentation claims. It adds nothing and ought to have been struck.

The Foundation

[113] Counsel for the Foundation made a similar submission. The Plaintiffs failed to plead separate allegations and damages relating to a claim in conspiracy. The conspiracy claim is entirely parasitic. Where allegations and damages relating to a claim of conspiracy are the same as those pleaded in respect of another cause of action, the cause of action in conspiracy adds nothing and cannot stand: *McKenna v Gammon Gold Inc.* 2011 ONSC 3782 (Appeal) (C.A.), at paras 32-76.

[114] Counsel submitted that no separate allegations or particulars of conspiracy were pleaded against Mary Lou despite the requirement to plead with particularity. No separate damages were claimed. Strathy J. failed to apply the jurisprudence set out in *McKenna v. Gammon Gold, Normart Management Ltd. v. West Hall Redevelopment Co* and *Silver v. Imax*. Therefore there is good reason to doubt the correctness of the Order in this regard.

Conclusions re Argument re Particularity of Pleadings re Conspiracy

[115] In his Reasons, Strathy J. instructed himself regarding the appropriate test, considered the wording of the Statement of Claim, and held that the claim in conspiracy was properly pleaded. He concluded that it was not "plain and obvious that if none of the several causes of action succeeds, the conspiracy claim could not succeed, or that if one of those claims does succeed, the conspiracy claim would add nothing" in the context of this factually complex case in which many different causes of action have been alleged against the Defendants.

[116] There is no good reason to doubt the correctness of that conclusion. It was not plain and obvious that the conspiracy claim added nothing to the other claims in the sense that if the main tort claim failed, the conspiracy claim must also fail.

[117] He applied the principles in *Hunt v. Carey* recently discussed in *McKenna v. Gammon Gold Inc.*, 2010 ONSC 4068, 2010 CarswellOnt 5389, 103 O.R. (3d) 451 (Div. Ct.)(leave),and by the Court of Appeal in *Agribrands Purina Canada Inc. v. Kasamekas*, 2011 ONCA 460, [2011] O.J. No. 2786.

[118] The doctrine of "merger" [that a claim in conspiracy should be struck if the success or failure of one claim means success or failure in the other] was recently considered by this Court in the *Gammon Gold* case and by the Court of Appeal in *Agribrands*. It now seems at least arguable that unlawful conduct to support a conspiracy claim can (but need not) be a stand-alone actionable tort. When undertaken by two or more tortfeasors in concert, the conduct can also support a conspiracy claim (*Agribrands* at paragraphs 28, 37, 38.) This is a matter for the higher Courts.

[119] The Plaintiffs have pleaded unlawful means conspiracy against Gleeson/Gleeson Management, the ParkLane Defendants and Mary-Lou.

[120] The facts in *Normart* differ from those in the case at bar. Here, a trial court could find that the Gleesons were acting in their personal capacities for their own enrichment.

[121] In *North York Branson Hospital v. Praxair Canada Inc.*, [1998] O.J. No. 5993 (Gen. Div.), Cumming J. wrote at para. 22:

> In truth, the very nature of a claim of conspiracy is that the tort resists detailed particularisation at early stages. The relevant evidence will likely be in the hands and minds of the alleged conspirators. Part of the character of a conspiracy is its secrecy and the withholding of information from alleged victims. ... These considerations and the general theme of *Hunt*, instructing courts not to shy away from difficult litigation, also militate against holding pleadings in civil conspiracy cases to an extraordinary standard.

Re Unjust Enrichment/Waiver of Tort/Constructive Trust

[122] Strathy J's reasons on unjust enrichment/waiver of tort/constructive trust are at paragraphs 261-269.

[123] Counsel for the Gleesons, the Foundation and Appleby submitted that in certifying the claim for unjust enrichment against their clients, Strathy J. failed to apply the applicable jurisprudence including the Supreme Court of Canada decision in *Garland v. Consumer's Gas* 2004 SCC 25 (CanLII), specifying that to succeed in unjust enrichment the plaintiff must prove that (a) the defendant was enriched; (b) there was a corresponding deprivation to the plaintiff; and (c) there was no juristic reason for the enrichment.

Re Unjust Enrichment/Waiver of Tort/Constructive Trust v. The Foundation

[124] Counsel for the Foundation submitted that on a plain and obvious test, the Plaintiffs have failed to establish these requirements against the Foundation in the pleadings. He erred in holding that "an enrichment of the Defendant as a result of class members' intent to benefit a third party, a charity, is not a juristic reason for the enrichment of the Foundation." A general adoption of this approach would have a negative impact on charities.

Re Unjust Enrichment/Waiver of Tort/Constructive Trust v. Gleeson/Gleeson Management

[125] Counsel for Gleeson Management submitted that the Plaintiffs provided no factual support for their allegations that Gleeson Management was remunerated by ParkLane for promoting the Gift Program and that Matt was unjustly enriched as an employee of Gleeson Management.. It pleaded that Gleeson/Gleeson Management received money from Funds for

Canada pursuant to a consulting relationship. The pleaded relationship between Gleeson/Gleeson Management and the Class is insufficient to support a pleading of unjust enrichment. The enrichment was not wrongful. Strathy J. erred in distinguishing the facts in *Peel (Regional Municipality) v. Canada Peel (Regional Municipality) v. Canada* [1992] S.C.J. No. 101 and *Boulanger v. Johnson & Johnson Corp* [2003] O.J. No. 2218 (C.A.) [which require a defendant's "benefit" to be direct to ensure that a plaintiff does not recover from both the person who receives the immediate benefit of the payment and another party who receives an incidental benefit.] Donative intent is a juristic reason for the enrichment of a defendant.

Re Unjust Enrichment/Waiver of Tort/Constructive Trust v. Appleby

[126] Counsel for Appleby submitted donative intent is a juristic reason for the enrichment of a defendant. Thus there is good reason to doubt the correctness of the learned motions judge's finding at para. 330 that "[a]n enrichment of the defendants as a result of a class member's intent to benefit a third party, the charity, is not a juristic reason for the enrichment of the defendant." This proposition could result in absurd consequences that could have a wide-spread and negative impact on charities and their ability to fulfill their charitable aims.

Conclusions re Pleading of Unjust Enrichment v. the Foundation, Gleeson/Gleeson Management and Appleby

[127] At paragraph 44 of *Garland v. Consumers' Gas Co.*' 2004 SCC 25, [2004] 1 S.C.R. 629, Iacobucci J. confirmed that donative intent is a juristic reason for an enrichment, citing *Peter v. Beblow*, [1993] 1 S.C.R. 980 (CanLii) as authority.

[128] It is open for a trial Court to conclude that *Garland* does not support the proposition that Appleby, Gleeson/Gleeson Management or the Foundation can keep their profits from the Gift Program because Class Members may have intended to make a valid gift to a real charity. In *Garland*, the Supreme Court confirmed that once the plaintiff makes out a *prima facie* case of unjust enrichment, the onus shifts to the defendant to show why it should retain the enrichment. The question is to be resolved on a principled basis. The reasonable expectations of the parties are to be determined objectively, and can be applied on a class-wide basis. In *Peter,* McLachlin J. (as she then was) held at p. 16 that the issue with respect to donative intent is whether the plaintiff conferred the benefit as a valid gift upon the defendant. *Peter* does not support the proposition that the Foundation/Appleby/Gleeson/ Gleeson Management can keep profits from the Gift Program because the Class Members intended to make a valid gift to a real charity.

Consumer Protection Act

[129] Counsel for the Foundation submitted that Strathy J. certified an action against it without citing any jurisprudence supporting the proposition that a charitable donation is a consumer protection transaction. He wrote at para 243 of his Reasons that, "an ordinary charitable donation would be highly unlikely to fall within the *Consumer Protection Act, 2002.*" His ruling constituted a significant extension of the law and leave to appeal should be granted.

Conclusions re *Consumer Protection Act*

[130] It may be open to the trial Court on the particular facts here to find that the "donations" here were not "ordinary charitable donations" and that the *Consumer Protection Act* applies. There is no good reason to doubt the correctness of Strathy J.'s conclusion in this regard. If a Court holds the *Consumer Protection Act* applies, that holding will hinge on the unusual facts here. Such a ruling would not be a matter of general importance. It would not apply to "ordinary charitable donations."

SECTION 5(1)(c) – COMMON ISSUES

[131] Strathy J. dealt with s. 5(1)(c) at paragraphs 279-282 of his Reasons.

[132] He summarized the Common Issues he was certifying at paragraph 379:

> [379] In summary, I have certified the following common issues
> (a) breach of contract, against ParkLane;
> (b) rescission, against ParkLane;
> (c) negligence, against the ParkLane Defendants, Appleby, Funds for Canada Foundation and the Gleesons;
> (d) conspiracy, against the ParkLane Defendants, Appleby and the Gleesons;
> (e) fraud and fraudulent misrepresentation, against the ParkLane Defendants, Appleby and the Gleesons;
> (f) unjust enrichment, against the ParkLane Defendants, Appleby, Funds for Canada Foundation and the Gleesons;
> (g) Consumer Protection Act, 2002 claims against the ParkLane Defendants, the Gleesons and Funds for Canada Foundation;
> (h) negligent misrepresentation, against the ParkLane Defendants, the Gleesons, and Harris;
> (i) vicarious liability of the Lawyers;
> (j) waiver of tort;
> (k) aggregate assessment of waiver of tort damages;
> (n) punitive and exemplary damages.

General Observations

[133] A common issue is one that constitutes a "substantial common ingredient" of each class member's claim, the resolution of which is necessary in the resolution of each class member's claim: *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2000] S.C.J. No. 63 at para. 39; *Hollick, supra* at para. 18. The plaintiff's evidentiary burden with respect to common issues was very low. He/She needed only to demonstrate that there was some basis in fact to establish "a sufficient evidential basis for the existence of the common issues" in the sense that there wasome factual basis for the claims made by the plaintiff to which the common issues relate. No merits analysis needed to be undertaken: *Glover v. Toronto (City)*, (2009), 70 C.P.C. (6th) 303 (S.C.J.); *Dumoulin v. Ontario*, [2005] O.J. No. 3961 (S.C.J.) at para. 25, 27; *Fresco v. Canadian Imperial Bank of Commerce*, [2009] O.J. No.2531 (S.C.J.), aff'd (2010), 323 D.L.R. (4th) 376 (Ont. Div.Ct.)at para. 21 SCJ.

[134] The nub of the Defendants' submissions on the appropriateness of certification on these facts was that if liability is not a foregone conclusion based on the signed declarations and acknowledgements, liability will hinge on individual inquiries of each "donor," having regard to the individual advice each Class Member received. Whether the Plaintiffs relied on

ParkLane's promotional materials, the Lawyers' comfort letters, Gleeson or the Foundation cannot properly be determined as common issues. Individual issues will overwhelm the common issues and make a class action inappropriate.

[135] Strathy J. rejected that overall submission, reasoning that in the circumstances of this case, it would be open to the trial Court to construe the promotional materials and the contract as containing one or two overriding and common representations [at para. 350]:

> [350] ... this is a case ... in which there is effectively one, or perhaps two representations, contained in written materials supplied by ParkLane to every Class member: 'This is a legitimate tax avoidance program that has been designed to satisfy the requirements of Revenue Canada. You will receive a tax credit that exceeds the amount of your actual donation'.

Common Issue (a): Breach of Contract v. ParkLane

[136] As set out in para. 132 above, Strathy J. certified the following common issue (a):

> Was it an implied term of the contract between the Class Members and ParkLane Financial Group Limited that the charitable tax receipts received by the Class Members would be accepted by CRA as valid and legitimate claims for charitable donation tax credits, and that the Class Members would receive the tax savings as stated in the promotional materials and the contract.

[137] Strathy J's Reasons on this issue are at paragraphs 285-293.

[138] On this motion for leave, counsel for ParkLane submitted that Strathy J. erred in certifying common issue (a). In *Hawrish v. Bank of Montreal* [1969] S.C.R. 515 at paras. 17-18 and *Bauer v. The Bank of Montreal*, [1980] 2 S.C.R. 102 at 112-113, the Supreme Court of Canada has held that a court cannot imply a term that contradicts the written contract. Cannon and the other Class Members acknowledged in their written donor declarations that they were relying on advice from their Financial Advisors; they had read and fully understood the Gift Program Materials; except for what was contained in the materials provided by ParkLane no other promise, representation or warranty had been made by ParkLane or relied upon by them; they accepted all tax risks related to their participation in the Gift Program including the risk that the charitable donations, or a portion of them, may be re-assessed and even denied. They unconditionally released ParkLane from all claims arising out of their participation in the Gift Program. In their Tax Risk Disclosure Statement, they acknowledged that they fully understood that ParkLane recommended that they review the tax consequences of making a donation with their professional legal, accounting and/or tax advisor; ParkLane could not guarantee that they would receive the favourable income tax consequences contemplated under the Gift Program.

Conclusion

[139] In *Hawrish* and *Bauer*, the Supreme Court ruled that collateral agreements were excluded by the parol evidence rule. It did not deal with implied terms. In *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619 at para. 27-29, it specified that contractual terms may be implied: (1) based on custom or usage; (2) as the legal incidents of a particular class or kind of contract; or (3) based on the presumed intention of the parties:.

[140] Class Members signed the same or substantially the same documentation.

[141] If the trial Court implies the suggested terms, it may conclude that individual inquiries will not be necessary.

[142] The issue before the Court at trial with respect to question (a) will be whether the proposed breach of contract issue is common among the Class Members and whether its resolution would advance the litigation.

[143] Whether the trial Court accepts the submission of the Plaintiffs or the Defendants, the Class will be bound and the litigation will be advanced.

[144] In all the circumstances here, there is no good reason to doubt the conclusion of Strathy J. that if the trial Court holds that the contract was fraudulent, the acknowledgements in the Donor Declaration and Tax Risk Disclosure Statement will have no force and effect.

Common Issue (c): Negligence

[145] Strathy J.'s Reasons deal with common issues relating to negligence at paragraphs 296-303.

(i) The Subsumed Argument

[146] With respect to the common issues, counsel for Gleeson, Gleeson Management and Appleby submitted there is cause to doubt the correctness of the Order certifying a common issue in respect of negligence and negligent misrepresentation because Strathy J. erred in failing to hold that the pleading of negligence was subsumed in the pleading of negligent misrepresentation.

Conclusion

[147] Since I have already rejected that submission, I will not deal with it again here.

(ii) The Lawyers' Standard of Care Argument

[148] Counsel for the Lawyers submitted that Strathy J. should not have certified standard of care on a class-wide basis. Determination of a lawyer's standard of care involves, among other things, a determination of the level of sophistication of his client. The standard of care applicable to the Lawyers, vis-à-vis their obligation (if any) to advise each Class Member of possible consequences of participating in the Gift Program is dependent upon the knowledge and sophistication of each Class Member. Individualized inquiries are needed to determine the Lawyers' standard of care. *Longshaw* v. *Houghton*, [1993] B.C.J. No. 40 (B.C. S.C.V.) at para. 32. *Ormindale Holdings Ltd.* v. *Ray, Wolfe, Connell, Lightbody and Reynolds* (1980), 36 B.C.L.R. 378 (B.C. Sup. Ct.) at para 39.

> The defendants might have said: "This is our opinion; we have complete confidence in it; but you must understand that it could be wrong. No one can be certain what a Court will decide on a question of law, and even when a Court has decided, its decision may be upset on appeal". But I do not think a lawyer is required to give that sort of formalistic warning to experienced business clients.

[149] The Motions Judge's certification of the question of standard of care against the Lawyers as a common issue conflicts with jurisprudence establishing that allegations of duty to warn require individual inquiry into the knowledge and understanding of each class member. *Ormindale Holdings Ltd.* v. *Ray, Wolfe, Connell, Lightbody and Reynolds* (1980),

36 B.C.L.R. 378 (B.C. Sup. Ct.) at para 40, aff'd by the Court of Appeal at *Ormindale Holdings Ltd.* v. *Ray, Wolfe, Connell, Lightbody and Reynolds*, [1982] 135 D.L.R. (3d) 577 (B.C. C.A.):

> While a lawyer might have to warn of consequences unknown to his client which may flow from acceptance of his advice if it proves to be wrong, he is not, I think, normally required to warn experienced business clients of the possibility that the opinion, although firmly held, may not in fact prevail.

Conclusions re Lawyers' Standard of Care Argument

[150] The issue re duty to warn as framed by the Lawyers is not an issue in the litigation. The Plaintiffs do not assert that the Lawyers had some generalized duty to warn the Class Members about the possibility that Harris' Opinion Letters might be wrong, or that there could be adverse tax consequences should the opinions be wrong. Rather, the allegations of negligence against the Lawyers boil down to negligence in the planning and creation of the Gift Program; in failing to ensure that C.R.A. would recognize the charitable receipts issued to Class Members; in issuing their Opinion Letters and Comfort Letters without due care and attention, with the intention that they would be relied upon by the Class, when they knew or ought to have known that they were inaccurate. The allegations of negligence in the Statement of Claim in respect of the Lawyers do include a failure to warn the Class that by 2007, CRA was disallowing the tax credits but, nevertheless, Harris continued to allow his name, reference to his positive opinions and the Comfort Letters to be included in the promotional materials. Harris did not direct ParkLane to remove the Comfort Letter and profile from the promotional materials. Instead, like the defendant lawyers in the *Charette v. Trinity Capital Corporation et al.*, 2012 ONSC 2824 case, Harris put himself into a position of conflict by agreeing to act for ParkLane on a "test case" appeal/reassessment by CRA.

[151] Similar arguments regarding the Duty of Care are addressed under "Adequacy of Negligence Pleading Per Se Against the Foundation Defendants, Appleby, the Lawyers, Gleeson/Gleeson Management" and under the Summary Judgment motions of the Lawyers and ParkLane.

[152] There is no good reason to doubt the correctness of Strathy J.'s conclusions with respect to negligence as a common issue.

Common Issue (d): Are ParkLane, Trafalgar Associates, Trafalgar Trading, Appleby Services, the Donations Canada Trustees, Gleeson Management, Matt Gleeson and Ms. Gleeson (or any combination thereof) liable to the Class Members for conspiracy?

[153] Strathy J. dealt with this common issue at paragraphs 304-311.

[154] Counsel for the Foundation submitted that his certification of a common issue in conspiracy against Mary-Lou conflicts with the decision of the Ontario Court of Appeal in *Chadha v. Bayer* (2003) 63 0R. 3d 22 (C.A.) that holds that a claim in conspiracy is not suitable for certification where liability can be established only on an individualized basis.

[155] Counsel for Gleeson Management submitted that conspiracy is not suitable for certification as a common issue in this case because the unlawful conduct at issue is fraudulent misrepresentation. Individual findings of reliance, materiality, reasonableness, and

causation will be necessary. Conspiracy requires proof of causation and damages, neither of which can be determined on a common basis because the Court will need to examine whether the Defendants' fraudulent misrepresentation caused the Plaintiffs to take actions that resulted in damages.

Conclusions re Conspiracy Common Issues

[156] There is no good reason to doubt the correctness of Strathy J.'s conclusion that a finding of conspiracy need not be based on individual findings of reliance, materiality, reasonableness and causation. He held that "[this] common issue will focus on the conduct of the defendants, without a need for individual inquiries."

[157] The facts in *Chadha v. Bayer* (2003) 63 0R. 3d 22 (C.A.) differ from the facts here. In that case, the plaintiff could not establish actual loss on a class-wide basis. There was no suggested method of proof that could be used to establish loss on a class-wide basis (*Chadha* at paras 30, 46.) Here, it would be open to a trial Court to determine losses arising upon reassessments by CRA on a class-wide basis.

Common Issue (e) Are ParkLane, Trafalgar Associates, Trafalgar Trading, Appleby Services or the Bermuda Longtail Trust, the Donations Canada Trustees, Gleeson Management, Matt Gleeson and/or Ms. Gleeson liable to the Class Members on the basis of fraud or fraudulent misrepresentation?

[158] Strathy J. dealt with this common issue at paragraphs 312-324.

[159] Counsel for the affected Defendants made arguments respecting common issues in fraud and fraudulent misrepresentations similar to those made in respect of negligence and negligent misrepresentation set out in common issue (h).

Gleeson/Gleeson Management

[160] Counsel for Gleesons/Gleeson Management submitted the circumstances in this case are distinguishable from those in *Carom v. Bre-X Minerals Ltd.*, (2000), 51 O.R. (3d) 236, [2000] O.J. No. 4014 (C.A.), rev'g in part (1999), 44 O.R. (3d) 173, [1999] O.J. No. 1662 (S.C.J.), which involved uniform mass market representations originating from a limited number of sources. Where, as here, there are disparate factual circumstances among the putative Class Members, the inevitable need to make individual inquiries in this proceeding concerning materiality, reliance, causation, and damages renders these claims unsuitable for certification. There is good reason to doubt the correctness of the Motions Judge's finding.

Appleby

[161] Counsel for Appleby submitted there is good reason to doubt the correctness of the Certification Order with respect to the certification of a common issue in respect of fraud/fraudulent misrepresentation. His finding that "it is arguable that there was a single misrepresentation 'you will receive a valid charitable receipt much greater than your cash contribution' that permeated every other representation of the Gift Program" was unsupported on the evidence.

[162] The learned motions judge erred in failing to follow *Williams v. Mutual Life Assurance of Canada* (2003), 226 D.L.R. (4th) 112, [2003] O.J. No. 1160 at paras. 44-50 (C.A.) and *Zicherman v. Equitable Life Assurance Co.* (2003), 226 D.L.R. (4th) 131, [2003] O.J. No. 1161 at para. 12 (C.A.) Given the disparate factual circumstances at each point-of-sale transaction, individual inquiries will be required to resolve liability. The common issue in respect of fraud/fraudulent misrepresentation v. Appleby is unsuitable for certification and the learned motions judge erred in concluding otherwise.

The Foundation

[163] Counsel for the Foundation relied on the need for individual inquiries [*Zicherman v. Equitable Life Insurance,* [2003] O.J. No. 1161(C.A.) at para 12] to determine the Class Members' level of sophistication, experience, risk tolerance and financial goals. The learned motions judge dismissed these concerns without justification or analysis. *Fresco v. Canadian Imperial Bank of Commerce* and *Lipson v. Cassels Brock & Blackwell LLP* and *Dennis v. OLG,* 2010 ONSC 1332.

Conclusions on Common Issue (e) re Fraud and Fraudulent Misrepresentation

[164] Appleby's, the Foundation's and the Gleeson Defendants' submission that Strathy J. did not consider the evidentiary records before him when certifying the common issues with respect to fraud and fraudulent misrepresentation ignore his reference to the evidence over 107 paragraphs of his Reasons under "The Facts." Strathy J. held that the Plaintiffs had adduced some evidence to support his certification of fraud and fraudulent misrepresentation as common issues.

[165] The Defendants' submissions on "point of sale" transactions are dealt with in these Reasons in connection with his statements re Common Issue (h) relating to negligent misrepresentation. Strathy J. held it is open to the trial court to conclude that the Defendants made one or two representations in common in the promotional materials to all Class Members. This is a tax avoidance program designed to satisfy the requirements of Revenue Canada. You will receive a tax credit that exceeds the amount of your actual donation. The charity tax receipts will be accepted by Revenue Canada. Class Members will receive tax savings as stated in the promotional materials and the contract.

[166] There was some evidence that reliance on those representations could be inferred on a class-wide basis.

[167] The "conflicting" decisions to which the Defendants have referred are distinguishable on their facts.

[168] There is no good reason to doubt the correctness of Strathy J.'s decision to defer the determination as to whether individual issues remain to be resolved until after the resolution of the common issues. It is not clear at this stage whether there will be any need to determine individual issues. That will depend on the answers to the common issues.

Common Issue (f): Unjust Enrichment

[169] Strathy J. framed Common Issue (f) regarding unjust enrichment, as follows:

> (f) Have ParkLane, Trafalgar Associates, Trafalgar Trading, the Bermuda Longtail Trust, Trustee Gleeson, the Funds for Canada Foundation ("Funds for Canada Foundation"), Gleeson Management, Matt Gleeson, Ms. Gleeson or any one or more thereof, been unjustly enriched?
>
> (i) If so, are the Class Members entitled to an order imposing a constructive trust over the funds held by or for the benefit of Funds for Canada Foundation, or by Trafalgar Trading, or by Appleby in the Bermuda Longtail Trust and an order requiring restitution of the aforesaid funds to the Class?
>
> (ii) If so, are the Class Members entitled to a tracing order tracing any amounts paid by the Class Members into the Gift Program to the current holders of such funds?

[170] Strathy J's Reasons dealt with that common issue at paragraphs 325 to 333.

Appleby and the Foundation

[171] Although no leave was sought to appeal from Strathy J's conclusion that the Plaintiffs have asserted a valid cause of action in unjust enrichment against it, counsel for Appleby challenged the Plaintiffs' unjust enrichment claim within the context of his common issues analysis, submitting that donative intent cannot be determined on a class-wide basis. Certification of a common issue in unjust enrichment conflicts with *Garland v. Consumers' Gas Co.*' 2004 SCC 25, [2004] 1 S.C.R. 629 at para 46.

[172] Counsel for Appleby and the Foundation submitted donative intent cannot be determined on a class wide basis. Unjust enrichment is not suitable for certification as a common issue.

Conclusions on the Common Issue re Unjust Enrichment

[173] The Plaintiffs have alleged that each participant in the flow of funds [the ParkLane Defendants, the Bermuda Longtail Trust, the Foundation, the Gleesons] were involved in the common enterprise of operating the Gift Program. For example, the Bermuda Longtail Trust "primed the pump" to start the flow of funds, allegedly to make it appear that the trust units had value. It received a profit of approximately $500 from every $2500 paid into the Gift Program. The other named Defendants allegedly participated in the common enterprise and benefited from their participation.

[174] There is no good reason to doubt the conclusion of Strathy J. that it would be open to the trial Court to hold that the Plaintiffs' claims in unjust enrichment against all or some of those named Defendants will flow out of any finding that the Gift Program was a fraud. If the Gift Program was invalid, all who profited from it could be held to have been unjustly enriched.

[175] In my view, there is no good reason to doubt the correctness of Strathy J.'s conclusion that the juristic reason for any enrichment must be linked to the parties that received the enrichment, not the charities.

Common Issue (g) Unfair and Unconscionable Practices – *Consumer Protection Act*

[176] Strathy J framed Common Issue (g) as follows:

> "Did ParkLane, Trafalgar Associates, Trafalgar Trading, Trustee Gleeson, Funds for Canada Foundation , Gleeson Management, Matt Gleeson, and/or Ms. Gleeson engage in unfair and unconscionable practices in respect of the marketing and sale of the Gift Program, contrary to s. 17 of the Ontario Consumer Protection Act (and the comparable sections of consumer protection legislation in other provinces as set out in Schedule A to the Fresh Further Fresh as Amended Statement of Claim)?"

In the event the answer were yes, he posed two further questions:

> (i) If so, is it in the interests of justice to waive any requirement for giving notice under s. 18(15) of the Ontario Consumer Protection Act (and the comparable sections of consumer protection legislation in other provinces as set out in Schedule A to the Fresh Further Fresh as Amended Statement of Claim)?
>
> (ii) If so, are the Class Members entitled to an order rescinding the Gift Program contracts and granting to the Class Members: (a) damages, and/or (b) exemplary and/or punitive damages pursuant to s. 18 of the Ontario Consumer Protection Act (and the comparable sections of consumer protection legislation in other provinces as set out in Schedule A to the Fresh Further Fresh as Amended Statement of Claim)?

[177] His reasons for certifying common issue (g) are at paragraphs 334-339.

The Foundation

[178] Counsel for the Foundation submitted that Strathy J. failed to consider the evidence as to who marketed, disseminated or sold the Gift Program. Since the Financial Advisors marketed the Gift Program to the Class, it will be necessary to look behind the Gift Program materials and make individual inquiries about representations made by each Financial Advisor to each Class Member.

Conclusion

[179] Inquiry under the *Consumer Protection Act, 2002* is objective, not subjective.

[180] A Court could find that claims under the *Consumer Protection Act, 2002* meet the s. 5(1)(c) test. There is no good reason to doubt the correctness of Strathy J.'s conclusion on this point.

Common Issue (h) Are Harris, ParkLane, Trafalgar Associates, TTL, Gleeson Management, Matt Gleeson and/or Ms. Gleeson liable to the Class Members for negligent misrepresentations made to the Class?

[181] Common Issue (h) relating to negligent misrepresentations was as follows:

> Are Harris, ParkLane, Trafalgar Associates, Trafalgar Trading, Gleeson Management, Matt and/or Mary-Lou liable to the Class Members for negligent misrepresentations made to the Class?

[182] Strathy J's Reasons on common issue (h) are at paragraphs 340-353.

[183] Counsel for the ParkLane Defendants, Gleeson Management and the Lawyers submitted that the Motions Judge should not have certified the entire claim.

ParkLane

[184] Counsel for the ParkLane Defendants submitted that Strathy J. "misapplied and/or failed to apply the established case law relating to the certification of claims for negligent misrepresentation." Rather than certifying the first three discrete elements of each tort as was done in *Hickey-Button* and *Ramdath*, he certified the issues of negligent misrepresentation in their entirety, including the 4th and 5th elements of the misrepresentation claims, namely, reliance and causation. It was an error to certify the whole of these claims as common issues. Strathy J. should have parsed out the constituent elements of each cause of action and declined to certify reliance and causation as common issues because they are inherently individual issues.

[185] They relied on *Williams v. Mutual Life Assurance Co. of Canada,* [2003] O.J. No. 1160 (C.A.) and *Zicherman v. Equitable Life Insurance*, 2003 CanLII 21250 (Ont. C.A.).

[186] Counsel for the ParkLane Defendants submitted that Strathy J. made another related error. He wrote at paragraph 350:

> "...there is effectively one, or perhaps two representations, contained in written materials supplied by ParkLane to every Class member: "This is a legitimate tax avoidance program that has been designed to satisfy the requirements of Revenue Canada. You will receive a tax credit that exceeds the amount of your actual donation."

This quoted representation did not appear in any of the materials circulated to the Class Members.

[187] Counsel for ParkLane submitted Strathy J. erred in law in holding, based on *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.* 2011 SCC 23, [2011] 2 S.C.R. 17, that "it may be possible *to infer* that each donor relied on the representation."

[188] I note that counsel for the Plaintiffs did not take issue with the general propositions that (a) to succeed in a common law action for negligent misrepresentation, a plaintiff must establish actual reliance; (b) a plaintiff must prove that the misrepresentation was material in the sense that it would be likely to influence the conduct of the plaintiff or would be likely to operate upon his judgment:" *White v. Colliers Macaulay Nicholls Inc.,* 2009 ONCA 444, 95 O.R. (3d) 680, at para. 25. However, she did submit that materiality is to be determined on an objective basis, i.e., from the view of a reasonable Gift Program participant: *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, 2011 SCC 23 at para. 61.

[189] She also relied on *NBD Bank, Canada v. Dofasco Inc.* (1999), 46 O.R. (3d) 514, [1999] O.J. No. 4749 (C.A.) [citing the BCCA case of *Kripps v. Touche Ross & Co.,* [1997] B.C.J. No. 968, 89 B.C.C.A. 288], where Rosenberg J.A. for the Ontario Court of Appeal reasoned as follows:

> [81] ... It was not necessary, for example, for Mr. Hynes to testify that he relied upon the statements by Nicholas on the morning of January 11th. That reliance could be inferred from all the circumstances. ... it was not necessary for the respondent to prove that the statements by Mr. Nicholas were the only factors that induced the respondent to act to its detriment ...

In *Kripps*, the BC Court of Appeal noted at paragraphs 101 and 103:

> Whether a representation was made negligently or fraudulently, reliance upon that representation is an issue of fact as to the representee's state of mind. There are cases where the representee may be able to give direct evidence as to what, in fact, induced him to act as he did. Where such evidence is available, its weight is a question for the trier of fact. In many cases, however, as the authorities point out, it would be unreasonable to expect such evidence to be given, and if it were it might well be suspect as self-serving ...
>
> Where the misrepresentation in question which was calculated or which would naturally tend to induce the plaintiff to act on it, the plaintiff's reliance may be inferred. The inference of reliance is one which may be rebutted but the onus of doing so rests on the representor. (Emphasis added)

The Lawyers re Common Issue (h)

[190] Counsel for the Lawyers echoed the submission that resolving the misrepresentation claim will require individual inquiries. Where multiple statements are made over a lengthy period of time by many different parties (some of whom are defendants and others who are not), certification of a negligent misrepresentation claim as a common issue is not appropriate. The nature and content of the representations concerning the Gift Program varied throughout the class period. Each individual donor received a unique presentation concerning the Gift Program. *Mouhteros v. DeVry Canada Inc.* (1998), 41 O.R. (3d) 63 (Ont. Gen. Div.)

[191] Counsel for the Lawyers submitted that certification of the claim of negligent misrepresentation against the Lawyers as a common issue conflicts with binding jurisprudence.

[192] He submitted there was no common statement made by the Lawyers to the Class. In the absence of a common statement by the Lawyers, the Motions Judge hypothesized with respect to a statement upon which a negligent misrepresentation common issue could be certified:

> As I have indicated above, this is a case, like Ramdath and Hickey-Button, in which there is effectively one, or perhaps two representations, contained in written materials supplied by ParkLane to every Class member: 'This is a legitimate tax avoidance program that has been designed to satisfy the requirements of Revenue Canada. You will receive a tax credit that exceeds the amount of your actual donation.'

There was no evidence to establish that such a representation was made by the Lawyers to Class Members. Such a representation was contrary to the express statements and acknowledgements contained in the Program Documents upon which Harris relied. He erred by focusing exclusively on ParkLane's promotional materials and ignoring the other information received by donors. The Motions Judge appears to have conflated the allegations advanced against the various other defendants with the more limited allegations against the Lawyers.

[193] Actual reliance is required to establish the common law claim of negligent misrepresentation; inferred or implied reliance is not sufficient. *Sharbern Holdings Inc.* v. *Vancouver Airport Centre Ltd.* (2011), 2011 S.C.C. 23 at para. 129; *Dobbie* v. *Arctic Glacier Income Fund* 2012 ONSC 773 (Ont. Div. Crt.) at para. 37; *McKenna* v. *Gammon Gold Inc.* (2009), 88 C.P.C. (6th) 27 (Ont. S.C.J.) at paras. 21 and 138. Strathy J.'s holding that "it may be possible to infer" reliance on a class-wide basis conflicts with established jurisprudence and the written acknowledgements by Class Members. [Class Members from 2008 and 2009

expressly acknowledged that the Gift Program was being audited by CRA; CRA disputed that donations under the Gift Program were "gifts" for tax purposes; and the within litigation had been commenced against the Gift Program;] that certain other class members obtained advice prior to participating in the Gift Program that their participation would result in a challenge by CRA; they participated in any event. Even if the written acknowledgements are held not to be determinative, reliance is a question of fact requiring individual inquiry.

[194] To assess the reasonableness of any reliance, it will be necessary to consider all of the information possessed by each class member concerning the specific alleged misrepresentation. The reasonableness of actual reliance will necessarily depend on what each class member was told by way of the alleged misrepresentation and what he/she otherwise knew or understood. The Motions Judge failed to consider and account for these established principles relating to the tort of negligent misrepresentation in the Decision and failed to identify any methodology by which the reasonableness of any reliance could be assessed on a class-wide basis. *Collette* v. *Great Pacific Management Co.*, [2001], 86 B.C.L.R. (3d) 92 (B.C.S.C.) at para. 93; *Williams* v. *Mutual Life Assurance Company of Canada* (2000), 51 O.R. (3d) 54 (Ont. C.A.) at para. 30; *Moyes* v. *Fortune Financial Corp.* (2002), 61 O.R. (3d) 770 (S.C.J.) at para. 33.

Conclusions re The Lawyers re Common Issue (h)

[195] In my view, counsel for the Lawyers' submission that there was "no common statement made by the Lawyers to the Class" ignored the Comfort Letters and repeated references to the opinion contained in all the Gift Program documents.

[196] In my view, counsel for the Lawyers have failed to demonstrate that there are conflicting decisions involving comparable facts, or that there is good reason to doubt the correctness of the certification of Issue (h) against the Lawyers as a common issue.

[197] In my view, there is no good reason to doubt the correctness of Strathy J.'s conclusion that in some situations reliance may be inferred. A trial Court may agree with Strathy J.'s observation that: "The entire purpose of the elaborate structure was to achieve the ramped-up tax deduction. It can reasonably be inferred that taxpayers did not participate in the Gift Program only because they wanted to make a gift to the underlying charity. They did so due to the representation that they would receive an enhanced tax deduction." A trial Court may conclude that it can and should draw the inference that the Plaintiffs relied upon the one or two representations in the written materials made to each Class Member [to the effect that this was a legitimate tax avoidance program that would pass muster with Revenue Canada] for which the Lawyers, among others, may be held responsible.

Appleby re Common Issue (h)

[198] Counsel for Appleby submitted that the common issues certified against it were "nothing more than similar or parallel issues."

Conclusion

[199] The premise of Appleby's argument was that this is a "point of sale" negligent misrepresentation case. Strathy J. held in effect this is not a point of sale case, given the

existence of one or two overarching representations in the promotional materials and program documents. The certified claim focuses on the Gift Program documents, the written promotional materials, and the manner in which the Gift Program was operated.

[200] The existence of the common statement, "This is a legitimate tax avoidance program that has been designed to satisfy the requirements of Revenue Canada. You will receive a tax credit that exceeds the amount of your actual donation," contained in the written promotional materials and Gift Program documents, is sufficiently supported by the evidence. In all the circumstances here, it would be open for the trial Court to hold that the "point of sale cases" such as *Williams* and *Zicherman* upon which those Defendants rely, have no application.

[201] The inquiry at trial in this regard will be directed at the conduct of the Defendants.

Section 5(1)(d) – Preferable Procedure

[202] Strathy J.'s reasons related to preferable procedure are at paragraphs 380-397.

Preferable Procedure – General Principles

[203] For a class action to be a preferable procedure it must represent "a fair, efficient and manageable procedure, preferable to any alternative to resolving the claim": *Lipson v. Cassels Brock & Blackwell LLP* 2011 ONSC 6724 at para 116; *Cloud v. Canada (Attorney General)* 2004 CanLII 45444 (ON CA), (2004), 73 O.R. (3d) 401 (C.A.) at paras. 73. The court should consider: (a) the nature of the proposed common issue(s); (b) the individual issues which would remain after determination of the common issue(s); (c) the factors listed in the Act; (d) the complexity and manageability of the proposed action as a whole; (e) alternative procedures for dealing with the claims asserted; (f) the extent to which certification furthers the objectives underlying the Act; and (g) the rights of the plaintiff(s) and defendant(s): *Chadha v. Bayer* (2003) 63 0R. 3d 22 (C.A.) at para. 16; *Lipson v. Cassels Brock & Blackwell LLP* [2011] ONSC 6724 at para 119.

[204] The Supreme Court of Canada has written in *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158 at para. 28–32:

> The Act itself, of course, requires only that a class action be the preferable procedure for "the resolution of the common issues (emphasis added), and not that a class action be the preferable procedure for the resolution of the class members' claims. …
>
> [T]he preferability requirement asks that the class representative "demonstrate that, given all of the circumstances of the particular claim, [a class action] would be preferable to other methods of resolving these claims and, in particular, that it would be preferable to the use of individual proceedings."

ParkLane and Appleby

[205] Counsel for ParkLane and Appleby submitted that the individual issues will overwhelm the common issues and make a class proceeding unmanageable as a result. No process has been identified "to ensure that the rights of the defendants are protected and that the process is fair to both parties."

[206] Counsel for the Foundation submitted that the Class would be unmanageable given that it consists of 10,000 taxpayers. The learned motions judge failed to take into account the evidence before him when assessing whether a class proceeding was a preferable procedure including the evidence relating to the Financial Advisors' role in explaining the Gift Program.

Conclusion on Preferable Procedure

[207] The advantage of a class action is that common issues of fact and law that affect a large group of litigants can be addressed together. Strathy J. held there was a workable litigation plan and that a class action was the preferable procedure.

[208] There is no reason to doubt the correctness of his conclusions based only upon the number of affected Class Members.

[209] The Defendants did not suggest any alternative procedure, let alone another preferable procedure for the resolution of the Class' claims.

[210] In all of the circumstances here, there is no good reason to doubt the correctness of Strathy J.'s conclusion that a class action is the preferable procedure.

[211] The goal of judicial economy will be achieved. No purpose would be served if each Class Member were required to advance a separate challenge in respect of the Defendants' conduct. As many issues as possible should be resolved on a common basis.

[212] Access to justice considerations are relevant, including the cost of litigating individual claims against the Defendants. The Gift Program was complex. Experts' evidence on tax issues and the requisite standard of care of the Defendants will be required by Plaintiffs and Defendants alike.

Public Importance Considerations

[213] I do not accept the submissions of several of the Defendants that the issues in the proposed appeal meet the threshold for leave to appeal because the certification order is of importance to taxpayers, tax professionals, financial advisors, charities and those who work for charities, and may "severely impacts charities."

[214] The charitable status of the Foundation has been revoked because the CRA has found it is not a legitimate charity. It therefore seems unlikely that any findings made against it will have broad application to the vast majority of charities, tax professionals, financial advisors and charities who have not participated in programs similar to the Gift Program.

[215] I do not accept the submission of counsel for the Lawyers that the matters at issue are of significant public importance with respect to the duties and responsibilities of the legal profession to non-client members of the public. In this case, the potential liability of the Lawyers turns on the specific facts, including the fact that Harris allowed his identity, reputation and Comfort Letters to be used to sell the Gift Program and thereby deliberately and avoidably placed himself in a relationship of proximity with Class Members. He could have remained anonymous. Had he chosen to advise his clients and keep his advice

confidential, no issues would have arisen related to duties to non-client members of the public.

[216] Dambrot J. noted in denying leave to appeal in *Banyan Tree*, a case having similar facts, that his decision to let the certification decision stand should not unduly trouble any tax or financial professionals [*Robinson v. Rochester Financial Limited et al., 2010* ONSC 1899 (Div. Ct.) at para. 26].

Conclusion on the Motion for Leave to Appeal the Certification Order.

[217] The motion for leave is dismissed.

THE MOTION FOR LEAVE TO APPEAL STRATHY J'S DISMISSAL OF THE LAWYERS' AND PARKLANE'S MOTIONS FOR SUMMARY JUDGMENT

The Lawyers' Motion

Duty of Care Issue

[218] Strathy J.'s Reasons refer to the nature of Cannon's relationship with Harris and the existence of a duty of care at paragraphs 487-489, 500-505, 508-515, 520-555. The Lawyers' argument was that Harris had no relationship of proximity to Cannon and therefore owed him no duty of care. Strathy J. concluded at paragraphs 502-3:

> [502] ... the language of the brochure can be interpreted as leading a reasonable reader to conclude that Harris had given opinions that the Gift Program complied with the *Income Tax Act* and that a donor would receive a valid tax credit for the full amount of the donation.
>
> [503] This conclusion could only have been reinforced by Harris' Comfort Letters, which, together with the other statements in the brochure, were manifestly intended to give the donor reassurance, that:
> (a) the Gift Program had been reviewed by Harris as a "top Canadian tax and legal professional" or "leading Canadian ... tax law professional";
> (b) Harris' tax opinion, which the donor's financial adviser would be permitted to review, was that the Gift Program complied with the *Income Tax Act*; and
> (c) the donor would receive a valid tax credit for a multiple of his or her personal donation.

Also especially noteworthy are the following comments:

> [509] Foreseeability alone is not sufficient, however. The Court must undertake a proximity analysis to determine whether the relationship is sufficiently close to make it fair and just to impose a duty of care.
>
> [510] ... Some well-known categories have been considered to give rise to such a duty, but the law is evolving and new categories will be developed, applying a principled approach. Typically, a duty of care arises where ... the defendant may be said to be under an obligation to be mindful of the plaintiff's legitimate interests in conducting his or her affairs" ...
> ...
> [513] ...[In *Cooper v. Hobart*] "when a case falls within one of these situations or an analogous one and reasonable foreseeability is established, a *prima facie* duty of care may be posited."
>
> [514] If the case does not fall within one of these categories, the Court must determine whether there is ... such close and direct relationship between the parties, that it is fair and just to impose a duty of care.
> ...

> [520] ... The plaintiff argues that this case is analogous to cases that have recognized proximity between a solicitor and investors or between a solicitor and beneficiaries who have suffered loss due to the negligence of the solicitor, even though they were not in a direct solicitor and client relationship.

[219] After referring to *Delgrosso v. Paul* 1999 CanLII 15084 (ON SC), (1999), 45 O.R. (3d) 605, [1999] O.J. 5742 (Gen. Div.) and the reasoning of Dambrot J. on the application for leave to appeal the decision of Lax J. in *Banyan Tree, Robinson. v. Rochester Financial Ltd.,* 2010 ONSC 1899 (CanLII), [2010] O.J. No. 1481, 2010 ONSC 1899, in para. 525 he quoted the reasoning of Dambrot J. in para. 24 of that decision:

> Here, equally, the absence of direct reliance by the plaintiffs on the solicitor's advice may not be determinative. Even without direct reliance on the advice, it remains arguable that when the plaintiffs entered the scheme, they were relying on the legal advisors of the architects of the scheme to ensure that their pledges would qualify as valid charitable donations for tax purposes. If the legal advisors acted negligently in giving their advice to the gift plan defendants, the plaintiffs could have a claim in negligence against those legal advisors.

[220] Strathy J. noted at paras. 528-9 that the case for a duty of care in this case is "even stronger than in *Banyan Tree* and the disappointed beneficiary cases" because "in this case, Harris and the Lawyers knew that the Opinion Letters were being used to market the Gift Program." His reasoning in the subsequent paragraphs included the following:

> [530] ... a strong argument can be made that this is a case that falls within an existing category in which a duty of care has been recognized ...
>
> [531] I will, however, assume that this case does not fall within an existing category in which a duty of care has been recognized and I will ask whether there was a sufficient relationship of proximity between Cannon and Harris to give rise to a duty of care.
>
> ...
>
> [533] ... the express representations made by Cannon are inconsistent with a close relationship with Harris and that, in light of those, Harris could not have contemplated that Cannon would rely on his opinion.
>
> [534] ... the Lawyers' analysis glosses over the significance of Harris in the successful marketing of the Gift Program ... One over-riding representation that was made by the Gift Program brochure was: "This program has the endorsement of a leading Canadian tax expert, Edwin C. Harris Q.C., who has given an opinion that it is legitimate and that it will work." ... Harris permitted this representation to be made.
>
> ...
>
> [536] By permitting himself and his Comfort Letters to be used in the marketing of the Gift Program, Harris intentionally put himself in a close and direct relationship with every donor.
>
> [538] It was reasonably foreseeable that if Harris was negligent in his advice to ParkLane, and the Gift Program did not comply with the *Income Tax Act*, donors such as Cannon would suffer harm. The evidence supports the conclusion that Harris knew, or ought to have known, that his Opinion Letters, and his Comfort Letters, were integral parts of the marketing of the Gift Program and that the whole purpose of his Comfort Letters was to assure donors that he had reviewed the Gift Program and that it was, in his words, *bona fide*.
>
> ...
>
> [540] ... The circumstances suggest that there were expectations on both sides, representations by Harris and reliance by Cannon, sufficient to give rise to a duty of care and to make it fair and just to impose such a duty.

...

[543] I turn to the second stage of the *Cooper v. Hobart* analysis ...

[544] The Lawyers rely primarily on the first consideration – they say that imposing legal obligations on lawyers in these circumstances will impact the ability of lawyers to freely advise their clients ...

[545] In this case, the concern is not that a tax opinion was provided to ParkLane. The concern is that the opinion was provided with the knowledge that ParkLane would advertise its existence to potential donors and would use its author as part of its marketing program. Imposing liability in these circumstances does not interfere with the ability of lawyers to freely advise clients. It may, however, cause lawyers to exercise caution or control when they give an opinion to a client with knowledge that the client proposes to distribute it to numerous third parties for the business purpose of selling the very product of the lawyer's advice. It seems to me that this is a policy reason that would support, rather than limit, the existence of a duty. As a trial is required to fully explore the duty of care analysis, I believe that conclusions on the policy question should be deferred to trial as well.

4. Negligent Misrepresentation: Is a Trial Required

[546] My conclusions with respect to the existence of a duty of care in negligence apply equally to the claim against the Lawyers for negligent misrepresentation.

...

[548] The Lawyers' motion for summary judgment on negligent misrepresentation is based on the assertion that the Lawyers owed no duty of care based on a "special relationship" between Harris and his law firms on the one hand and Cannon on the other hand, as required by *Queen v. Cognos Inc.* ...

[549] I have found that in providing the Comfort Letter, his biography and his photograph for use in the marketing brochure and as part of the sales pitch for the Gift Program, Harris knowingly brought himself into direct proximity with Cannon and Class members. The only purpose of the Comfort Letter was to help ParkLane sell the Gift Program.

[550] It was foreseeable that a donor would rely on the Comfort Letters and it was entirely reasonable that he or she would do so. ...

...

[553] I find, therefore, that there is substantial evidence in support of the existence of a special relationship between Harris and Cannon so as to give rise to a duty of care.

[554] Moreover, on the second aspect of the *Cooper v. Hobart* test, which asks whether there are residual policy considerations that justify denying liability, it seems to me that this is not a case where indeterminate liability would be a concern. ...

[Emphasis added.]

[221] Counsel for the Lawyers submitted there is good reason to doubt the correctness of that duty of care analysis because Strathy J. failed to give effect to the Donor Declaration and Tax Risk Disclosure Statement in conducting the proximity analysis mandated by the Supreme Court of Canada's decisions in *Cooper* v. *Hobart*; failed to give effect to the expectation and reliance evidence reflected by the contents of the Donor Declaration and Tax Risk Disclosure Statement; and failed to give effect to the relevant expectation and reliance evidence of the Plaintiffs' interaction with his Financial Advisor.

Conclusions on Lawyers' Motion for Leave to Appeal the Dismissal of their Summary Judgment Motion

[222] The Lawyers' motion for summary judgment was based upon the submission that the Plaintiffs could not establish that the Lawyers owed Cannon a duty of care with respect to either the negligence or the negligent misrepresentation claims. They once again relied upon the Donor Declaration and Tax Risk Disclosure Statement, and certain evidence of Cannon and his financial advisor.

[223] The Lawyers' factum contained only one paragraph (89) addressing the summary judgment motion. It conflated their attack on the certification of the common issue "did the [Lawyers] owe the Class Members a duty of care?" with the issues to be determined on the summary judgment motion, i.e. whether there was evidence that would support a finding that the Lawyers owed Mr. Cannon a duty of care and whether there were genuine issues requiring a trial.

[224] Counsel for the Lawyers did not submit that Strathy J. incorrectly applied the legal test in *Combined Air Mechanical Services Inc. v. Flesch*, 2011 ONCA 764.

[225] The Lawyers did not challenge Strathy J's conclusion at para. 530, following *Banyan Tree*, that there is a "strong argument" that the relationship between Harris and Cannon is within an existing category in which a duty of care has been recognized. They ignored that the Plaintiffs' claim against the Lawyers was not limited to whether Harris owed Cannon a duty of care in respect of the preparation of the opinion and Comfort Letters, but extended to Harris' overall role in the Gift Program, including permitting his opinion and reputation to be used to market it and intentionally placing himself in a close and direct relationship with every Class Member.

[226] Strathy J.'s conclusions are entitled to deference.

[227] There was some evidence upon which a trial court could find the Lawyers owed Cannon a duty of care, including the language of the Gift Program brochure [that could be interpreted as leading a reasonable reader to conclude that Harris had given opinions that the Gift Program complied with the Income Tax Act and that the donor would receive a valid tax credit for the full amount of the donation], the Comfort Letters [prepared by the Lawyers with the knowledge that they would be used to market the Gift Program]. A trial Court could hold that the limiting language in the Opinion Letter does not limit the Lawyers' liability to the Class Members and/or that Cannon made no representation to the Lawyers.

[228] There are no conflicting decisions having similar facts.

[229] In my view, there is no good reason to doubt the correctness of Strathy J.'s conclusion that the Gift Program documents may be held to be vitiated by fraud or under the *Consumer Protection Act, 2002*, and if they are, the Lawyers may not be able to rely, for example, on the Donor Declaration and the Disclosure Statements as evidence that the Class Members assumed all risks associated with participation in the Gift Program. It may be open for the trial Court to conclude that the Lawyers cannot rely on them if it determines that these

documents were unconscionable, fraudulent or contain glaring omissions or misrepresentations. At a minimum, the issue requires resolution at trial.

[230] The Lawyers' motion for leave to appeal the dismissal of their summary judgment motion is denied.

ParkLane's Motion for Summary Judgment

[231] Strathy J's reasons with respect to ParkLane's summary judgment motion are at paragraphs 436-485.

[232] ParkLane's motion for summary judgment against Cannon was based on the submission that Cannon signed a written release of liability for the benefit of ParkLane. On ParkLane's motion for summary judgment, Strathy J. concluded that determining the enforceability of the Gift Program documents requires a full trial. He dismissed the motion at para. 459 in part on the ground that a finding of fraudulent misrepresentation or fraud could vitiate a "release of liability" clause. Strathy J. erred in dismissing the motion in failing to give effect to the "no reliance" clauses in the contracts signed by Cannon [in which he expressly agreed that except for those contained in the materials provided by ParkLane no other promise, representation or warranty had been made by ParkLane to him or was being relied upon by him; ParkLane could not guarantee that he would receive the income tax consequences contemplated under the Gift Program; ParkLane made no representation in respect of his entitlement to claim the tax credits in respect of any donations made pursuant to the Gift Program; the CRA may re-assess the income tax consequences of his donations under the Gift Program; he may not obtain the income tax results the Gift Program was designed to achieve and may, in fact, incur costs and interest payments upon re-assessment] and in failing to give effect to Cannon's release of ParkLane resulting from his participation in the Gift Program in the Donor Declarations.

[233] Counsel for ParkLane submitted that the motion judge erred in law in relying on the decision of the Supreme Court of Canada in *Tercon Contractors Ltd. v. B.C.*, [2010] 1 S.C.R. 69. *Tercon* was distinguishable because the contract under consideration did not include a "no reliance" clause. Strathy J.'s decision conflicts with the decision of the Supreme Court of Canada in *Carman Construction Ltd. v. Canadian Pacific Ry,* [1982] 1 S.C.R. 958 (CanLII), at paras. 7, 29, 30, 40 and 42, where that Court held that a "no reliance" clause is not a "release of liability" clause. A "no reliance" clause precludes the existence of a duty of care and as a consequence a defence based on alleged misrepresentations cannot lie.

[234] His findings at paragraphs 443, 447, 463, 475, 476 and 479 suggest that an examination of the impact of the conduct and representations of Financial Advisors (e.g., Mr. Gacich) on each "donor" is necessary. As such, his Reasons on the Summary Judgment motion "undermine and contradict" his Reasons on the Certification Decision.

Conclusions re ParkLane Summary Judgment Motion

[235] Counsel for ParkLane made no submissions as to why leave to appeal ought to be granted from Strathy J.'s conclusion that: (1) there is a genuine issue for trial, (2) it is not possible to obtain a "full appreciation" of the evidence on the written record, and (3) it is not

in the interests of justice (to either side) to decide the issues on a motion for summary judgment.

[236] In his summary of the contractual provisions in issue, he specifically referred at paragraphs 110-111 to the "no reliance" clause and the "exclusion of liability clause" and then did so again at paragraphs 428-431 at the outset of his summary of ParkLane's arguments. He gave full consideration to the "no reliance" clause as well as the "exclusion of liability clause."

[237] It will be open to the trial Court to conclude that the Class Members did not accept undisclosed risks. The trial Court may conclude, for example, that the acknowledgements that no promise had been made by ParkLane or relied upon other than what was contained in the documents and that he accepted the tax risks of the Gift Program, related only to the front half of the Gift Program.

[238] There is no good reason to doubt the correctness of Strathy J.'s observation that "fraud vitiates every contract and every clause in it." If the trial Court were to find fraud, all of the contracts, including the "no reliance" clause, could be held to be unenforceable.

[239] ParkLane did not seek leave to appeal Strathy J.'s conclusion that the *Consumer Protection Act, 2002* prohibits contracting out of its provisions. If the Trial Court holds that ParkLane made false, misleading or deceptive representations, then Cannon may be held to have a right to rescind the contracts.

[240] There is no good reason to doubt the correctness of Strathy J.'s conclusion that determining the enforceability of the Gift Program documents requires a full trial.

DISPOSITION

[241] The test for granting leave to appeal has not been met with respect to either the certification order or the summary judgment motions.

[242] All five Applications for leave to appeal the certification order are denied, as are the two Applications for leave to appeal the dismissals of the summary judgment motions.

[243] Costs submissions may be made in writing by November 22, 2012.

M.A. SANDERSON

Released: OCT 29 2012

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Divisional Court File Nos. 167/12, 168/12, 169/12, 171/12, 173/12
Date: 20121029

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

B E T W E E N:

MICHAEL CANNON

Plaintiff/Respondent

- and –

FUNDS FOR CANADA FOUNDATION, MATT GLEESON and SARAH STANBRIDGE as trustees for the DONATIONS CANADA FINANCIAL TRUST, PARKLANE FINANCIAL GROUP LIMITED, TRAFALGAR ASSOCIATES LIMITED, TRAFALGAR TRADING LIMITED, APPLEBY SERVICES BERMUDA LTD. as trustee for the BERMUDA LONGTAIL TRUST, EDWIN C. HARRIS Q.C., PATTERSON PALMER also known as PATTERSON PALMER LAW, PATTERSON KITZ (Halifax), PATTERSON KITZ (Truro), MCINNES COOPER, SAM ALBANESE, KEN FORD, RIYAD MOHAMMED, DAVID RABY and GREG WADE, GLEESON MANAGEMENT ASSOCIATES INC., MARY-LOU GLEESON, MATT GLEESON and MARTIN P. GLEESON

Defendants

REASONS FOR DECISION

M.A. SANDERSON J.

Released: October 29, 2012