



SUPERIOR COURT OF JUSTICE COMMERCIAL LIST

COUNSEL SLIP / ENDORSEMENT

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REGISTRAR: Tenelle Cruickshank
& Shefa Talukder

NO. ON LIST: 1

TITLE OF PROCEEDING:

ROYAL BANK OF CANADA v. CHESSWOOD GROUP LTD., et al.

BEFORE: JUSTICE FL MYERS

PARTICIPANT INFORMATION

For Plaintiff, Applicant / Moving Party:

Name of Person Appearing	Name of Party	Contact Info
Doug Mcleod Greg Sheppard Jack Olson	Royal Bank of Canada	doug.mcleod@blakes.com Gregory.sheppard@blakes.com jack.olson@blakes.com

For Defendant, Respondent, Responding Party, Defence:

Name of Person Appearing	Name of Party	Contact Info
Carlo Di Carlo Aimee Huntington	Christopher Wallbank	carlodc@stockwoods.ca aimeeh@stockwoods.ca
Avi Bourassa	Ryan Marr	abourassa@rossnasseri.com
Matthew P. Gottlieb Annecy Pang	Daniel Wittlin	mgottlieb@lolg.ca apang@lolg.ca

Simon Bieber Jocelyn Howell Ana Qarri Emily Vaillancourt	Chesswood Group Ltd. and Tobias Rajchel	sbieber@agbllp.com jhowell@agbllp.com aqarri@agbllp.com evallancourt@agbllp.com
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ENDORSEMENT OF JUSTICE FL MYERS:

1. The individual defendants move to strike the action as against each of them under Rules 21.01 (1)(a) and (b). They submit that it is plain and obvious that the Statement of Claim and the proposed Amended Statement of Claim do not state reasonable causes of action against them. Among other things, they invite the court to determine as a matter of law that on the facts as pleaded or to be pleaded, the individual defendants do not owe the plaintiff a duty of care as there is insufficient proximity as between each of them and the plaintiff. The defendants also submit that it is plain and obvious that the plaintiff cannot succeed in its oppression claim against any of the individuals.
2. No one doubts the applicable rules for a hearing of this type: The facts alleged in the pleading are deemed to be true. (This is not a case where there are any issues of unprovable facts being pled.) The court is to approach the pleading with a generous view towards drafting issues. An otherwise good case is not to be dismissed because of linguistics, diction, or grammar.
3. The plaintiff needs to plead material facts on the constituent elements of the causes of action pleaded. If it fails to do so, the action should be dismissed. Dismissal of actions that are doomed to fail even if all pleaded facts are true is an important

part of access to justice. However, leave to amend is to be granted unless no tenable cause of action *is possible* on the facts as alleged. *Conway v. The Law Society of Upper Canada*, 2016 ONCA 72 (CanLII), at para. 16.

4. As I am dismissing all but one motion, I will say as little as I can about the merits. I am not finding any case to be strong or weak on the merits. That is for others.
5. I am simply looking at whether each claim as pleaded, or to be pleaded, states a reasonable cause of action. If it is not plain and obvious on a generous reading that a claim cannot succeed, it must be allowed to proceed. See: *Conway* at para. 7 and *Hunt v. Carey Canada Inc.*, 1990 CanLII 90 (SCC).
6. I address below the allegations in the draft Amended Statement of Claim as if it has been amended by the court. That is how the parties argued the motions. In some cases, late delivery of a draft amended pleading after a motion to strike has been brought can be abusive. That is not the case here. The amendments added a few allegations and cleaned up some verbiage. But they did not undermine the heart of the motions already brought.
7. I agree with the submissions of Ms. Pang that the claim against Mr. Wittlin as pleaded cannot succeed. The pleading against him is bald. It is devoid of allegations of fact that he did anything that could amount to either an independent tort or oppression.
8. The other individual defendants are all employees and officers of the corporate defendant. They are all alleged to have done specific acts or made identified omissions in relation to the creation and delivery of erroneous borrowing base and

compliance certificates to the plaintiff bank that led to it over-advancing and suffering a loss of approximately \$83 million.

9. The plaintiff pleads about Mr. Wittlin as follows:

83. In the case of Daniel Wittlin, while the plaintiff does not allege that the directors of Chesswood ought to have been aware of the misconduct detailed herein solely by virtue of their roles as directors, Daniel Wittlin was uniquely situated among the directors. Among the directors, Daniel Wittlin was the largest shareholder in Chesswood. Daniel Wittlin was also a Director and/or Officer of Vault Credit and Vault Home, two subsidiaries of Chesswood whose assets were included in the Borrowing Base. Finally, Daniel Wittlin was a close personal friend of Ryan Marr, joining Chesswood within approximately one year of Ryan Marr's appointment as CEO and exercising influence over the operations and business direction of the Chesswood Group during the material time.

84. By virtue of his heightened involvement in Chesswood (relative to other Chesswood directors), Daniel Wittlin owed the plaintiff the duty of care detailed in paragraphs 78-79, above which duty was breached by...[failure to institute quality controls for borrowing base calculations and acquiescing in misrepresentations made by others].

10. Para. 79 sets out the duties of care alleged as follows:

79. The Individual Defendants, as members of Chesswood's senior management, and in Daniel Wittlin's case due to his close relationship with Ryan Marr (discussed below), knew or ought to have known that failure to supervise the preparation of the Borrowing Base and adopt quality control mechanisms to verify the accuracy of Borrowing Base calculations could cause losses to the Lenders.

11. Mr. Wittlin is a member of the board of directors of the defendant corporate borrower. He is a shareholder, a director and officer of two of the subsidiaries whose assets were misstated in the borrowing certificates, and he was a close friend of CEO Mr. Marr. As such, the plaintiff pleads, Mr. Wittlin, was “exercising influence

over the operations and business direction of the Chesswood Group during the material time.”

12. Exercising influence over a person or company that commits a tort is not a recognized head of liability or a cause of action. The plaintiff knows how to plead tortious acts and omissions. It has none to plead against Mr. Wittlin. He is not said to have “caused or procured” tortious misconduct. He is not said to have “acted in concert” with a tortfeasor. There is no conspiracy pleaded.
13. The plaintiff does not plead that Mr. Wittlin actually did anything tortious. Rather, the plaintiff tries to tie him into conclusory paragraphs against “the Defendants,” especially in its pleading of oppression.
14. In paras. 80 to 82, the plaintiff lists particularized allegations against the other individuals dealing with how they negligently performed in their positions with reference to the creation and delivery of borrowing base and compliance certificates.
15. But Mr. Wittlin, as a member of the board of directors, has no personal duty or relationship to institute quality control protocols. Moreover, acquiescing in others’ misrepresentations is an allegation without content. How does an individual member of the board of directors do that any different than anyone else who does nothing in face of statements by others of which he may or may not even be aware? What cause of action does it plead?

16. Even if Mr. Wittlin was buddies with the CEO, a big shareholder, and exercised an influence over the direction of the company, I no of know basis to saddle him with personal tort liability for the company's failure to institute proper quality control protocols for the necessary certificates for the lender. None of Mr. Wittlin's pleaded statuses provides any basis in fact to find proximity as required to state a negligence-based tort.

17. In *ScotiaMcLeod Inc. v. Peoples Jewellers Ltd.*, 1995 CanLII 1301 (ON CA), the Court of Appeal held:

In every case, however, the facts giving rise to personal liability were specifically pleaded. Absent allegations which fit within the categories described above, [fraud, deceit, dishonesty or want of authority] officers or employees of limited companies are protected from personal liability unless it can be shown that their actions are themselves tortious or exhibit a separate identity or interest from that of the company so as to make the act or conduct complained of their own.

18. There is no fraud, deceit, dishonesty, or want of authority pleaded in this case. Therefore to state a claim against the individual officers of the corporate defendant, the plaintiff must plead a tort or wrongful acts that exhibit the individual pursuing a separate interest from the company.

19. The individual defendants submit that the acts claimed against them are the same acts that are pleaded as breaches of contract against their employer. The plaintiff could have just sued the corporate defendant for debt and left claims resulting from the alleged misconduct surrounding borrowing base certificates for the officers. But it chose to pursue the corporate defendant on its monetary debt covenant and for breaches due to the misstatement of its borrowing base. This leads the individual

defendants to submit that they are not being sued for *independent* torts or pursuing an interest independent of their employer's contractual interest.

20. However, the Supreme Court of Canada has held that this is not a proper approach.

In *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, 1992 CanLII 41 (SCC)

the majority of the court held:

Having said this, I wish simply to add what has already become evident by my conclusion. **There is no general rule in Canada to the effect that an employee acting in the course of his or her employment and performing the "very essence" of his or her employer's contractual obligations with a customer does not owe a duty of care, whether one labels it "independent" or otherwise, to the employer's customer.** Our law of negligence has long since moved away from a category approach when dealing with duties of care. **It is now well established that the question of whether a duty of care arises will depend on the circumstances of each particular case, not on pre-determined categories and blanket rules as to who is, and who is not, under a duty to exercise reasonable care.** There may well be cases where, having regard to the particular circumstances involved, an employee will not owe a duty of care to his or her employer's customer...

However, this does not mean that this is the necessary result in all factual situations. Abstaining from commenting on the conclusions reached in the cases cited, I find nothing in any of them, nor have I found anything else, which supports the type of blanket rule advocated by the respondents. **At best, these decisions simply confirm that the question of whether a duty of care arises between an employee and his or her employer's customer depends on the circumstances of each particular case. The mere fact that the employee is performing the "very essence" of a contract between the plaintiff and his or her employer does not, in itself, necessarily preclude a conclusion that a duty of care was present.** [Emphasis added.]

21. It may well be the case that on hearing evidence a judge could rule that one or more of the individual defendants owed no duty of care to the plaintiff. Clause 1.11 of the credit agreement may rule out a duty of care being owed by individuals. But I cannot say definitively today that the clause is intended to provide *carte blanche* for tortious misconduct by the people who sign certificates. Would it allow the CFO to commit intentional torts? How about negligence based misconduct that precludes the plaintiff from obtaining the protections for which it bargained?
22. The SCC says that the existence of a duty of care depends on the circumstances of each particular case i.e. on the facts of the particular case. Moreover, in *Anger v. Berkshire Investment Group Inc.*, 2001 CanLII 24141 (ON CA) the Court of Appeal declined to strike out allegations that were similar to those in this case. Feldman JA first asked the question required by *Hunt v. Carey*:

[9] ...can it be said unequivocally that the directors, officers and compliance officers of the respondent Berkshire did not and could not owe a duty of care to the appellants as investors if they were negligent in their supervision of the sales force, or if they knowingly allowed their employees to engage in sales practices which constituted breaches of the Securities Act, thereby depriving those investors of the protections which the Act provides for them?

23. Then, on much of the same case law as was cited before me, Feldman JA found:

[11] ...The respondents assert that there cannot be a claim against them in tort because as directors, officers and compliance officers of Berkshire, they owed no duty of care to the appellants. Recent case law has made it clear that directors, officers and employees of corporations can be liable for torts they commit personally even if they are acting in the course of their duties or in accordance with “the best interests of the corporation”: *ADGA Systems International Ltd. v. Valcom Ltd.* (1999), 1999 CanLII

1527 (ON CA), 43 O.R. (3d) 101 (C.A.), application for leave to appeal dismissed by Supreme Court of Canada, [1999] S.C.C.A. No. 124; *ScotiaMcLeod Inc. v. Peoples Jewellers Ltd.* (1995), 1995 CanLII 1301 (ON CA), 26 O.R. (3d) 481 (C.A.), application for leave to appeal dismissed by Supreme Court of Canada, [1996] S.C.C.A. No. 40; *Meditrust Healthcare Inc. v. Shoppers Drug Mart, a division of Imasco Retail Inc.* (1999), 1999 CanLII 2316 (ON CA), 124 O.A.C. 137 (C.A.), application for leave to appeal dismissed by Supreme Court of Canada, [1999] S.C.C.A. No. 530; *NBD Bank, Canada v. Dofasco Inc* (1999), 1999 CanLII 3826 (ON CA), 46 O.R. (3d) 514 (C.A.), application for leave to appeal dismissed by Supreme Court of Canada, [2000] S.C.C.A. No. 96; *460635 Ontario Ltd. v. 1002953 Ontario Inc.* (1999), 1999 CanLII 789 (ON CA), 127 O.A.C. 48 (C.A.); *Immocreek Corp. v. Pretiosa Enterprises Ltd.* (2000), 2000 CanLII 14728 (ON CA), 131 O.A.C. 358 (C.A.).

[12] In order to determine whether a person owes a duty of care to another person, the court must apply the two part *Anns/Kamloops* test (*Anns v. Merton London Borough Council*, [1978] A.C. 728; *Kamloops (City of) v. Nielsen*, 1984 CanLII 21 (SCC), [1984] 2 S.C.R. 2): (1) whether the parties are in a relationship of sufficient proximity that a prima facie duty of care is owed; (2) if so, whether the duty is limited or negated by policy considerations. The analysis of the duty of care issue is new legal territory in the context of personal liability of directors and officers of corporations. Certainly, the policy issues raised by the respondent will be very important as part of the application of the two part *Anns/Kamloops* test in the context of this analysis.

24. As in *Anger*, counsel for the individuals argued that finding officers and employees liable in this case would raise policy concerns regarding the separate personality of corporations and their owners under *Salomon v A Salomon & Co Ltd.*, [1896] UKHL 1 (HL). They also raised the policy concern that liability in this case would open the doors to indeterminate liability of all corporate employees and officers.

25. Faced with policy arguments in *Anger*, Feldman JA concluded:

[14] ... The particular policy concern flagged by the respondents in this case is the potential for indeterminate liability of directors and officers in their personal capacities if this action is allowed to proceed. It was the same issue of indeterminate liability of auditors to investors which concerned the Supreme Court in *Hercules Managements Ltd.*, and for which the court required a consideration of the specific facts of each case.

[15] To attempt to apply policy considerations in a vacuum, and without the benefit of a record, would be contrary to the principles upon which our case law has long been understood to develop. That is why *Hunt v. Carey Canada Inc.* provides that a court should strike a claim only if it is clear that in law the case cannot succeed, based on decided principles directly applicable to the case as set out in the pleadings. The court does not develop the law, including policy considerations, in order to strike a claim. That should only be done after a trial.

26. No case was cited to me after *Anger* in which the Court of Appeal has held that officers of a corporation cannot be held liable in negligence for failure to supervise compliance and the competent and comprehensive creation of fundamentally important documents the corporation is required to produce and on which the officers know a contractual counterparty will rely. The bank pleads it cannot determine the corporate defendant's borrowing base without the certificates it agreed to provide. It is not outside the realm of current case law to think that the borrower's officers could be held to have been duty-bound to implement at the outset and properly supervise the due creation and delivery of these documents. The quality control assurances that they finally implemented after the very substantial breaches were exposed may provide a roadmap to the inadequacy of the initial efforts (or lack thereof). Once again,. I make no finding on the strength or

weakness of the case. But it is not impossible to plead a duty of care on managers to make efforts to ensure that the borrowing base and compliance certificates that they produced, signed, and delivered were correct. Put another way, it is not impossible for a court to find that the officers ought to have known that if they took inadequate steps to ensure the correctness of the certificates, the plaintiff would foreseeably suffer damages of the very type it suffered.

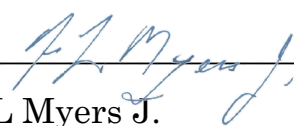
27. A finding of proximity is not impossible on the facts pleaded against the three officers. Therefore, it is not plain and obvious therefore that the negligence claims against them cannot succeed.
28. Similarly, given the agreement that the CFO personally was required to sign borrowing base certificates, it is not impossible to conclude that a court may find it reasonably foreseeable that if he failed to even review certificates before allowing others to attach his electronic signature to them, the plaintiff would claim against him for its resulting, foreseeable losses. Mightn't the purpose of requiring the CFO to sign the documents have been to provide an assurance of quality control and senior level review of the correctness of the contents?
29. I cannot determine today whose conduct amounted to an undertaking of responsibility or who ought reasonably to have foreseen loss to the plaintiff if he or she failed to perform their roles or upon whom the plaintiff reasonably relied in fact. Did any of the officers' actions or inaction deprive the plaintiff of the very security that they negotiated to receive? I can say that Mr. Wittlin is not within that class as he was not an employee and no specific acts or omissions that were

within the duties of his office are pleaded. But the scope of responsibility of the CEO, CFO, and Mr. Wallbank will all depend on the facts to be found.

30. In my view, *Anger*, is also an answer to Mr. Di Carlo's submissions concerning pure economic loss. The scope of any undertaking that may be found and reliance are facts requiring evidence.
31. I find as well that the statements pleaded in para. 69 and 87 make out the tort of negligent misrepresentation. The other elements of the tort (proximity, reliance, causation) are readily found in the pleading. For this tort too, the outcome on evidence may go either way. But the tort is pleaded appropriately for Rule 21 purposes.
32. There is alignment between a representation that the borrowing base certificates were true and the full loss suffered. Whether each or any of the statements alleged, individually or collectively, support that ultimate alignment is a matter for evidence.
33. Mr. Di Carlo submits that I am being asked to give RBC more protection than it sought in the credit agreement. Ms. Huntington submits that I am being asked to provide RBC with personal guarantees of officers that it could have but did not seek. Mr. Di Carlo submits that the claims of personal liability in face of the lack of contractual protections are absurd.
34. At risk of accepting absurd outcomes, I respectfully disagree. A guarantee is a covenant that is not predicated on wrongdoing by the guarantor. He or she just agrees to be responsible for the debt of another. That is not what is sought here.

35. The plaintiff here asks that the officers be held liable for causing it foreseeable loss as a result of negligent performance of their jobs. I suppose RBC could have sought a covenant from the corporate defendant that all its senior officers will take ordinary care in preparing, supervising, signing, and delivering the borrowing base certificates and compliance certificates. RBC could have asked for a covenant that the officers would implement protocols to create the certificates as required by the credit agreement and do their jobs so that statements that they were required to sign personally would not misrepresent the borrowing base by hundreds of millions of dollars. Mightn't that be implied, however? It certainly could be a possible basis for a reasonable expectation if the evidence supports it.
36. Finally, I agree with Mr. Olson that, but for Mr. Wittlin, the draft amended pleading states a case for oppression against the others. The requisite elements are pleaded with particularity including the attribution to individuals required by *Wilson v. Alharayeri*, 2017 SCC 39 (CanLII). Whether judgment is fit against each individual is a question requiring evidence.
37. Once again, there are no facts pleaded against Mr. Wittlin that could lead to him being held liable for oppression like the officers. The pleadings in paras 90 *et seq.* are conclusory. They are supported by prior pleading of particular acts and omissions against the other individual defendants. But no actionable particulars are pleaded for Mr. Wittlin as discussed above.

38. Under *Conway*, I am required to grant leave to amend to the plaintiff to have one last try to plead particular facts against Mr. Wittlin so as to bring him within one or more of the torts pleaded against the others.
39. The claims against Mr. Wittlin are struck out with leave to amend. The other motions are dismissed.
40. The parties agree that costs should go to the successful parties on a partial indemnity basis.
41. RBC will pay costs to Mr. Wittlin fixed at \$30,000 all-in.
42. The three other individual defendants will pay the costs of the plaintiff on a partial indemnity basis jointly and severally. RBC is to exclude any costs specifically related *solely* to Mr. Wittlin. Costs applicable to more than one defendant may be included in the costs claimed against the remaining three even if Mr. Wittlin was among those for whom such group costs were incurred. Nothing prevents these defendants from agreeing to a different sharing of the costs as among themselves and the corporate defendant if they are so inclined. But as against RBC, the individuals' liability is joint and several.
43. If the parties cannot agree on the aggregate costs of RBC, I may be approached at a case conference. Costs of that case conference will also be on the table. It should not be necessary.


FL Myers J.

Justice FL
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