CITATION: Whitehouse v. BDO Canada LLP, 2021 ONSC 2454
DIVISIONAL COURT FILE NO.: 058/20
DATE: 20210420

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Penny, S.T. Bale and Favreau JJ.

BETWEEN:	)	
	)	
ANTHONY WHITEHOUSE, CARRIE COUCH and JASON COUCH, Plaintiffs (Appellants)	)	*Simon Bieber, Nathaniel Read-Ellis, Iris Graham* and *Michele Valentini* for the Plaintiffs (Appellants)
	)	
– and –	)	
	)	
BDO CANADA LLP, Defendant (Respondent)	)	*Andrea Laing, Doug McLeod, Daniel Szirmak* and *Theo Milosevic* for the Defendant (Respondent)
	)	
	)	
	)	**HEARD by videoconference:** February 1, 2021

PENNY J.

Overview

[1] This is an appeal from the decision of Perell J., reported as *Whitehouse v. BDO Canada LLP*, 2020 ONSC 144, 149 O.R. (3d) 85, on a motion for certification under s. 5 of the *Class Proceedings Act, 1992,* S.O. 1992, c. 6 ("*CPA*"). The appeal comes to this Court under the former s. 30(1) of the *CPA*.[1] The motion judge dismissed the Plaintiffs' motion on the basis of s. 5(1)(a) of the *CPA*. The pleadings, he found, failed to disclose a cause of action. Specifically, the motion judge found that settled law on auditor liability precluded a finding that the Defendant owed a duty to unitholders of funds for which the Defendant provided clean audit opinions from 2007 to 2015: see *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165; *Lavender v. Miller Bernstein LLP*, 2018 ONCA 729, leave to appeal to S.C.C. refused, 2019 CanLII 37473.

[2] The principal issue on this appeal is a narrow one: does the Plaintiffs' statement of claim disclose a tenable basis (i.e., an allegation of material fact not plainly and obviously untenable) upon which a court could conclude that the Defendant was in a sufficiently proximate relationship

[1] Section 30 was amended as of October 1, 2020, to direct appeals of this nature to the Court of Appeal for Ontario. However, under the transition provisions (s. 39 of the *CPA*), the former s. 30(1) applies to this appeal.

with the proposed class? In other words, do the allegations support a duty of care owed by the Defendant to the unitholders? The proposed class is generally defined as all unitholders in funds for which the Defendant performed audit engagements.

[3] The Appellants also take issue with three collateral issues arising out of the motion judge's decision having to do with appropriate representative plaintiffs, possible conflicts of counsel, and aggregate damages.

[4] For the following reasons, the appeal is dismissed.

Background

[5] Crystal Wealth was a discretionary portfolio management firm that specialized in creating and managing alternative investment strategies outside of traditional stock and bond portfolios. It was registered with the Ontario Securities Commission ("OSC").

[6] From 2007 to 2017, Crystal Wealth managed proprietary funds, structured as open-ended mutual fund trusts (the "Funds"). Units in the Funds were distributed to unitholders on an exempt-market basis through offering memoranda.

[7] Crystal Wealth grew significantly over time. In 2007, it was operating just one Fund. By 2017, it was operating 15 Funds. As of April 20, 2017, Crystal Wealth claimed that the Funds had an aggregate of approximately $193.2 million in net asset value and approximately 1,250 unitholders.

[8] The *Securities Act* required Crystal Wealth and each of the Funds to prepare annual audited financial statements which were required to be (a) filed with the OSC, and (b) sent directly to every unitholder in the Fund: *Securities Act*, R.S.O. 1990, c. S.5, ss. 78-79; *Investment Fund Continuous Disclosure*, OSC NI-81-106, Part 2, s. 2.7(3).

[9] Crystal Wealth retained the Defendant, BDO, to audit the Funds. Over the course of nearly a decade, BDO provided clean audit opinions in respect of all the Funds that were in existence at the relevant time. By 2015, there were ten Funds and BDO issued clean audit opinions for all of them. BDO was the sole auditor for Crystal Wealth and its Funds from 2007 until 2015.

[10] The OSC issued a temporary order on April 7, 2017, prohibiting trading in the Funds' units and trading in securities held by the Funds. On April 26, 2017, on application to the court by the OSC, Grant Thornton LLP was appointed as Receiver over all assets of Crystal Wealth and the Funds.

[11] As a result of the OSC order, and the appointment of the Receiver, unitholders have been unable to redeem their investments in the Funds since April 7, 2017.

[12] Through its investigation, the Receiver found that Crystal Wealth disclosed false or manipulated net asset values of the Funds. This caused the net asset values of certain Funds to be materially overstated. The Receiver also found that Crystal Wealth's inter-fund investments "may have been used to falsely create liquidity to meet investor distributions and/or redemptions".

[13] Further, the Receiver found numerous conflicts of interest and personal relationships with the directing mind of Crystal Wealth in respect of contracts held by certain Funds, suspicious transactions relating to the underlying assets, and serious deficiencies in Crystal Wealth's books and records to support the Funds' investments and their respective values.

[14] In May 2018, the Receiver commenced a civil action against BDO, effectively standing in the shoes of Crystal Wealth and the Funds. The Receiver's action claimed damages against BDO in negligence *simpliciter*, amongst other causes of action. Adair Goldblatt Bieber LLP, counsel to the Appellants, was also counsel of record for the Receiver in its action. That action has been settled for $32.5 million. The settlement has been approved by the court in the receivership proceeding.

The Amended Statement of Claim

[15] The crux of the Appellants' claim against BDO for negligent performance of a service is that, in addition to any duty BDO owed to its audit client, Crystal Wealth, and its Funds, BDO also owed duties to investors in Crystal Wealth's Funds. As a result, the Appellants seek to make BDO liable for damages arising from investments made by investors who invested in the Funds at any point from 2007 onward, and continued to hold those investments as of April 7, 2017, when the OSC's cease trade order was first issued.

[16] The Amended Statement of Claim (the "Claim") defines the relevant plaintiff class to include:

> [E]very person who: (i) invested in any of the Funds, as that term is defined herein, of Crystal Wealth Management System Ltd. ("Crystal Wealth") at any time from April 12, 2007 to April 7, 2017 (the "Class Period") and who retained investments in any of the Funds on April 7, 2017, including, without limitation, those persons or entities who filed claims in the receivership of Crystal Wealth….

[17] The narrow issue in dispute on this appeal is whether the pleading discloses sufficient "proximity" between BDO and the class members to give rise in law to a duty of care owed by BDO. Proximity has two components in this context: an undertaking by BDO and a reliance by the unitholders. The specific issue in dispute is the pleading of the alleged "undertaking". The foundation for BDO's alleged undertaking is addressed most particularly in paras. 60-64 and 67 of the Claim:

> 60. BDO was engaged by Crystal Wealth to audit each of the Funds.
>
> 61. Crystal Wealth was required to file audited financial statements with the OSC pursuant to s. 21.10(3) of the *Securities Act*, National Instrument 31-103 – *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (ss. 12.10, 12.14, 12.3 and 12.14), and National Instrument 81-106 – *Investment Fund Continuous Disclosure* (ss. 2.1 and 2.2).
>
> 62. Accordingly, BDO was conducting its audits for two purposes: (i) to ensure that Crystal Wealth complied with Ontario's securities laws such that it could continue

> to offer and redeem units in the Funds; and (ii) to allow investors in the Funds to assess the performance of the Funds and fairly value and/or evaluate their investments and to make investment decisions.
>
> 63. BDO knew that the OSC would rely on its audits in making decisions about Crystal Wealth and its ability to offer securities to the public.
>
> 64. In addition, BDO knew that investors were relying on its audits in purchasing units in the Funds and making decisions in respect of their investments. Indeed, BDO specifically addressed each of its audit reports to the "Unitholders" of the particular Fund that it was auditing. Accordingly, BDO intended that the Unitholders receive each audit report and rely on it in making investment decisions.
>
> …
>
> 67. BDO knew and intended for the Class to receive and rely on its audit reports. As part of its audits of the Funds, BDO had access to the individual names and number of units held by each investor of the Funds through the Funds Unit Holder Listing. BDO was aware of the exact amounts held by each investor and in which of the Funds each of the investors had invested.

Decision of the Motion Judge

[18] The motion judge noted that although the tool of a motion to strike for failure to disclose a reasonable cause of action must be used with considerable care, it is a valuable tool because it promotes judicial efficiency by removing claims that have no reasonable prospect of success and it promotes correct results by allowing judges to focus their attention on claims with a reasonable chance of success: *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, at paras. 17-25.

[19] He went on to note that, in a proposed class proceeding, in determining whether the pleading discloses a cause of action, no evidence is admissible, and the material facts pleaded are accepted as true, unless they are patently ridiculous or incapable of proof. The pleading is read generously, and it will be unsatisfactory only if it is plain, obvious, and beyond a reasonable doubt that the plaintiff cannot succeed. However, bare allegations and conclusory legal statements based on assumptions or speculation are not material facts; they are incapable of proof and, therefore, they are not assumed to be true for the purposes of a motion to determine whether a legally viable cause of action has been pleaded.

[20] None of these principles are in controversy.

[21] The motion judge spent considerable time in his analysis locating a claim for pure economic loss based on negligent performance of a service in its proper legal context. Whether a duty of care exists so as to find a cause of action for negligent performance of the service requires, among other things, sufficient proximity and reasonable foreseeability.

[22] In analyzing the basis for a claimed duty of care owed to the class members, the motion judge focused not only on what is pleaded but also on what is not pleaded in the Claim. What is not pleaded, he found, is any direct relationship, undertaking, or representation by BDO to the class members. The relationship between BDO and the class members, as pleaded, finds its source in the *Securities Act*, National Instrument 31-103, and National Instrument 81-106. This required Crystal Wealth to have an auditor perform annual audits of the Funds. Thus, the motion judge found, as described in para. 61 of the Claim, that the statutory regime under the *Securities Act* is the basis of the relationship between the plaintiff class members and BDO.

[23] Whether a duty of care is owed by the company's auditors to the company's investors with respect to their investment decisions is a unique category of claim that has received considerable judicial attention. The leading cases are *Hercules*, *Lavender*, and *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63, [2017] 2 S.C.R. 855.

[24] The motion judge held that the Claim is indistinguishable from the duty of care alleged in *Hercules* and *Lavender* in which the Supreme Court of Canada and Court of Appeal for Ontario, respectively, held that, in the circumstances of those cases, no duty was owed by the company's auditors to investors.

[25] Before the motion judge, the Plaintiffs relied upon *Excalibur Special Opportunities LP v. Schwartz Levitsky Feldman LLP*, 2016 ONCA 916, 135 O.R. (3d) 743, leave to appeal to S.C.C. refused, 2017 CanLII 35115, a case where an action against the company's auditors was not struck under r. 21 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. The motion judge distinguished *Excalibur* because, among other things, the audit work in that case was not a periodic statutory audit but was conducted for the purpose of promoting a specific investment by specific investors. These allegations meant that it was not plain and obvious that there was no proximate relationship and duty of care between the plaintiff investor and the defendant auditor.

[26] Thus, the motion judge found that, without a pleaded basis for sufficient proximity in this case, it was plain and obvious that BDO, in performing statutory audits, did not owe the Plaintiffs a duty of care with respect to their investment decisions.

[27] The motion judge then turned to the alternate ground in the Claim. That ground alleged that the duty of care arose from the other pleaded purpose of BDO's audit: ensuring that Crystal Wealth complied with Ontario's securities laws, such that the OSC would permit it to continue to offer and redeem units in the Funds. However, again, the motion judge found that this alternative ground was indistinguishable from the Ontario Court of Appeal's analysis and decision in *Lavender.*

[28] In *Lavender*, Epstein J.A. concluded that the relationship between the auditor and the class members did not fit within a previously established category of proximity. She conducted a duty of care analysis in light of the Supreme Court's refinements of that analysis in *Livent*. At para. 35, relying on *Livent*, at para. 30, she observed that, in cases of pure economic loss arising from negligent performance of a service, two factors are determinative of the proximity analysis: (a) the defendant's undertaking; and (b) the plaintiffs' reliance sourced within the scope of that undertaking. She found that the defendant auditor had given no undertaking to the investors.

[29] The motion judge found that, in the present case, there was the same interposition of Crystal Wealth and the OSC between the unitholders and BDO, and this degree of separation made the relationship between the parties too remote to ground a duty of care. Although the unitholders were provided with BDO's reports to the OSC, this was because it was a requirement under the *Securities Act*. There was no undertaking by BDO to assist the class members in their investment decisions or to safeguard them from Crystal Wealth's non-compliance with the *Securities Act*. In this case, he concluded, connecting the dots of proximity between the investors in Crystal Wealth's Funds to BDO was analogous to connecting the dots of proximity in the *Lavender* case.

[30] Based on this analysis and these conclusions, the motion judge held that no sufficient basis for a proximate relationship between the investors and BDO had been pleaded that would support a negligence claim by the class members for their alleged pure economic loss. As was the case in *Hercules* and in *Lavender*, the parties were not, as pleaded, in such a close and direct relationship that it would be just and fair, having regard to that relationship, to impose a duty of care in law on BDO.

Analysis

Cause of Action/Proximity

Standard of Review

[31] Whether a pleading discloses a viable cause of action is a question of law. Thus, on appeal from a refusal to certify based on s. 5(1)(a) of the *CPA*, the standard of review is correctness.

The Pleaded Basis for a Duty of Care – Whether the Auditor Gave an Undertaking to Investors Regarding Their Investment Decisions

[32] The Appellants argue that although the motion judge articulated the cause of action test correctly, he failed to apply it correctly because he did not accept the pleaded facts as true. In particular, the Appellants argue that the motion judge failed to accept, as pleaded, that: (a) the audit reports were delivered directly to the unitholders; (b) BDO knew, and intended, that the unitholders would rely on its audit reports in making their investment decisions; and, (c) the unitholders did rely on the audit reports when they made investment decisions. The Appellants submit that these pleadings form a sufficient basis upon which to distinguish *Hercules* and *Lavender*.

[33] The Appellants criticize the motion judge for overreliance on para. 61 of the Claim and for ignoring the other pleaded bases for BDO's proximate relationship with the putative class members. This includes the allegations that the audit reports were delivered to the investors, were intended to be relied upon for investment decisions, and were relied upon for this purpose. The Appellants argue that the motion judge's error was what led him to the incorrect conclusion that the results in *Hercules* and *Lavender* were dispositive of the purported proximate relationship in this case.

The Legal Framework

[34] In *Hercules*, the Supreme Court applied the two-part test in *Anns v. London Borough of Merton*, [1978] A.C. 728. *Hercules* involved a small group of shareholder investors, all of whom were, as is the case here, known to the auditor at the time it completed the audits in issue. As here, the audited periodic financial statements had been presented to the plaintiff shareholders. And, as here, the claim was for losses arising from the plaintiffs' investments in the audit client. In *Hercules*, the Supreme Court rejected the existence of a duty to the investors, finding that the only actionable duty owed by the defendant auditor was to its client, the company.

[35] In reaching this determination, the Supreme Court held that any *prima facie* duty owed to the plaintiffs based on reasonable foreseeability was negated by public policy concerns, specifically, the concern over indeterminate liability. In light of these policy considerations, the Supreme Court expressly found that the auditor's knowledge of the investors was insufficient to ground a duty of care, as the audits – again, being periodic statutory audits – had not been prepared for the express purpose of attracting specific investments from those specific investors.

[36] In *Livent*, the Supreme Court revisited the application of the two-part *Anns* test for claims based on auditor liability. The Court revised the *Anns* test by distinguishing more clearly between foreseeability and proximity, and by placing greater emphasis on a more demanding first stage of the two-stage analysis. This was grounded in the Court's view, at paras. 42-45, that the issue of "indeterminacy" was more appropriately dealt with by a robust analysis of the duty of care based on considerations of sufficient proximity and reasonable foreseeability, with the rare case of true indeterminacy being dealt with in the second stage.

[37] The Court confirmed the result in *Hercules* but, in effect, added a gloss to the analysis by which that result was arrived at.

[38] In cases of negligent misrepresentation or performance of a service, the Court found, at para. 24, that proximity will be more usefully considered *before* foreseeability. This is because what the defendant reasonably foresees as flowing from his or her negligence depends upon the characteristics of his or her relationship with the plaintiff, and specifically, in such cases, the nature and purpose of the defendant's undertaking.

[39] At para. 28, the Court held that where a party seeks to base a finding of proximity upon a previously established or analogous category of claim, the court must be attentive to the particular factors which justified recognizing that prior category in order to determine whether the relationship at issue is, in fact, truly the same as or analogous to that which was previously recognized. And, by corollary, the court should avoid identifying established categories in an overly broad manner because residual policy considerations will not be considered where proximity is found on the basis of an established category. A finding of proximity based upon a previously established or analogous category, therefore, must be grounded not merely upon the identity of the parties, but upon examination of the particular relationship at issue in each case.

[40] In cases of pure economic loss arising from negligent misrepresentation or performance of a service, the Court found, at para. 30, that two factors are determinative in the proximity analysis: the defendant's undertaking and the plaintiff's reliance. Where the defendant undertakes to provide

a service in circumstances that invite the plaintiff's reasonable reliance, the defendant becomes obligated to take reasonable care. And, the plaintiff has a right to rely on the defendant's undertaking to do so. However, the Court noted, at para. 31, that any reliance on the part of the plaintiff which falls outside of the scope of the defendant's undertaking of responsibility – that is, outside of the purpose for which the service was undertaken – necessarily falls outside the scope of the proximate relationship and, therefore, of the defendant's duty of care. At para. 52, the Court concluded that an overly broad characterization of an established category of proximity which fails to consider the scope of activity in respect of which proximity was previously recognized, risks a premature imposition of a *prima facie* duty of care.

[41] In *Lavender*, the Court of Appeal, after a detailed analysis of the *Livent* decision, concluded that the key theme from the Supreme Court's decision is the necessity of ascertaining the scope of an auditor's undertaking when conducting a duty of care analysis: at para. 50. In *Lavender*, the Court observed, at para. 65, that the primary reason proximity has not been established in auditor liability cases turned on the nature of the auditor's undertaking and the connection between that undertaking and the loss claimed.

[42] In *Lavender*, the company retained the auditor to audit Form 9 Reports, which the company then filed confidentially with the OSC. Although the Form 9 Reports were used by the OSC to police securities dealers and their purpose was to protect investor assets, the Court held it did not necessarily follow that the audit of the Form 9 Reports created proximity between the auditor and the investors. The auditor made no representations to members of the class. The auditor did not undertake to assist the class in making investment decisions. The limited scope of the auditor's undertaking and lack of direct connection between the auditor and the class drove a conclusion against a finding of proximity in that case. As Epstein J.A. wrote, at para. 66:

> In my view, the interposition of the OSC and Buckingham between the Auditors and the Class rendered the relationship between the parties too remote to ground a duty of care. The Auditor may well have owed a duty of care to Buckingham to properly conduct the audit. Perhaps an argument could be made that a duty was also owed to the OSC (which provided regulatory oversight and received the audit reports). This, however, is an issue I need not determine. In this case, the Auditor's undertaking did not extend to assisting the Class members – who, as mentioned earlier and as the motion judge noted, never saw the Form 9 Reports and did not even know of their existence – with supervising Buckingham and making investment decisions. As a result, I am of the view that the Auditor's undertaking in this case strongly militates against a finding of proximity.

[43] It is of course true that, in *Lavender*, the investors were not given, and most were not aware of, the audit reports in question. In this case, the Plaintiffs have pleaded that: BDO's audits were sent to the unitholders; BDO intended that the reports be relied on by the unitholders; and the reports were relied on.

[44] The motion judge recognized this. He turned his mind to the fact that, in the immediate case, it was pleaded that the class members were provided with BDO's reports to the OSC and that

they relied on the reports to make investment decisions.[2] However, the motion judge found that material facts had not been pleaded that, if true, would rise to the level of an undertaking by BDO to assist the class members with their individual investment decisions or to safeguard them from Crystal Wealth's non-compliance with the *Securities Act*.

[45] In arriving at this conclusion, the motion judge made no legal error. I come to this conclusion for two reasons: (1) the Plaintiffs' argument fails to appreciate that sufficient proximity turns on *both* the nature and content of the defendant's undertaking *and* the plaintiff's reliance – reliance alone is insufficient; and (2) the Plaintiffs' argument is undermined by, and inconsistent with, the manner in which the Plaintiffs have sought to define the plaintiff class.

Sufficient Proximity

[46] In my view, the motion judge was correct in his conclusion that the alleged undertaking of the auditor to the unitholders arises out of the requirement for annual audit reports under the *Securities Act,* as pleaded in paras. 60-61 of the Claim. This is clear from the use of the word "[a]ccordingly" at the beginning of para. 62, which goes on to plead two alleged "purposes" for the audit. The pleading in para. 62 is conclusory in nature. There are no material facts pleaded to connect the allegation in para. 61, that Crystal Wealth was required by the *Securities Act* to provide audit reports, to the alleged purposes for these reports in para. 62. Paragraphs 63-64 (indeed, paras. 65-66 and 68-69 as well) are indelibly focused on allegations of reliance by the unitholders, not on the nature of the undertaking by the auditors to existing or putative investors.

[47] The law since *Hercules* is well settled on this point. The fact that annual audit reports were required to be provided under the provisions of the *Securities Act* is insufficient to establish a duty of care to investors. Similarly, the fact that the auditor may have known that its reports would come to the attention of investors and be relied upon by them is also insufficient to establish a duty of care, whether those investors relied on the reports or not. The reason, in both cases, these facts (or pleaded facts) are insufficient to give rise to a duty of care is lack of proximity: as per *Livent* and *Lavender*.

[48] The cases where a claim for pure economic loss based on alleged negligent provision of an audit service have succeeded (or met the test for a viable cause of action under r. 21) involve circumstances where a particular audit report was prepared for the particular purpose of soliciting investment from particular investors: *Haig v. Bamford et al.*, [1977] 1 S.C.R. 466; *Excalibur*. This requires some basis (i.e., pleaded material facts) for establishing a proximate relationship. Here there is none. There is merely a conclusory allegation, logically unconnected to the premise: Crystal Wealth was required by the *Securities Act* to prepare audit reports; *accordingly*, the purpose was to enable unitholders to make investment decisions. There is no pleading of any material facts which might establish an *undertaking* by the auditor to the unitholders that the reports should be used for the investor's individual investment decisions.

---

[2] This was the evidentiary premise in *Hercules* as well.

[49] The Appellants argue, however, that para. 67 of the Claim also pleads the basis for an undertaking on the part of BDO to the unitholders. Specifically, that BDO "knew and intended" that the unitholders would rely on the audit reports.

[50] This pleading suffers from the same logical gap as the pleading of an alleged "purpose" arising out of the provisions of the *Securities Act*. Even though pleaded and accepted as true under r. 21, BDO's knowledge that unitholders would receive and might rely on the audit reports is, under the *Hercules/Livent* analysis, insufficient to establish an undertaking giving rise to sufficient proximity.

[51] Intention, on the other hand, could theoretically found a basis from which an undertaking might be inferred. However, intention is not like other facts; it cannot be seen, felt, or heard – it is a state of mind. Intention may unambiguously be manifest in written or oral statements but, most often, it must be inferred from other circumstances. This is why r. 25.06(8) requires that when intent is alleged, the pleading must contain full particulars of the circumstances from which intent is to be inferred. The only pleaded circumstance from which BDO's "intention" can be inferred is the alleged purpose of the audit in para. 62 of the Claim. But, as I have already found, the pleading of that purpose is deficient, being merely an unsubstantiated conclusion of law. Similarly, the pleading of "intention" in para. 67 of the Claim is conclusory in nature. There are no circumstances pleaded from which the alleged intention could be inferred.

[52] Without a pleaded basis for BDO having undertaken to the unitholders to provide audit reports for their personal investment decisions, there can be no basis for the necessary proximate relationship set out in *Hercules*, *Livent*, and *Lavender*.

The Class Definition

[53] It is immediately apparent that, logically, any person who first acquired units in one of the Funds was not a unitholder the day before they acquired the units. More importantly, the pleading alleges that BDO ceased to be the auditor after the 2015 fiscal year. Again, it follows logically that any person who acquired units in one of the Funds after 2015 was doing so after BDO ceased to be the auditor of Crystal Wealth and the Funds. Although the Plaintiffs try to restrict their claims in paras. 60-69 of the Claim to "unitholders" relying on BDO audits, based on the class definition, the plaintiffs could include a large number of people who, obviously, were not unitholders before their first acquisition (and who may have never acquired additional units) and people who became unitholders after BDO was no longer the Funds' auditor. Indeed, one of the proposed representative plaintiffs, Mr. Whitehouse, falls into this category. Mr. Whitehouse invested in the Funds for the first time after BDO issued its final audit opinion.

[54] On the face of the pleadings, therefore, and contrary to the Appellants' submissions on this appeal, the duty pleaded against BDO entails obligations not only to allegedly known "unitholders" but to an unknown and unknowable group of prospective investors, including anyone who might have decided to invest in Crystal Wealth after BDO ceased to be the auditor of the Funds. This raises precisely the problem of indeterminacy that was at the heart of the Supreme Court of Canada's decision in *Hercules* and which lies at the heart of the reformulated proximity test in *Livent*, as applied in *Lavender*.

Rule 21 Motion versus Trial/Summary Judgment

[55] Finally, the Appellants make the point that none of *Hercules*, *Livent*, or *Lavender* were cases involving the sufficiency of the pleading in what was, in effect, a r. 21 motion. The Appellants argue that their pleading meets the low bar for asserting a viable cause of action, and that BDO's concerns are more appropriately addressed at trial or on a motion for summary judgment where a full evidentiary record will be available to test the limits of what the Appellants are able to prove, or not prove.

[56] The Appellants' position is not a frivolous one. However, as the Supreme Court has said in *Imperial Tobacco Canada*, at paras. 17-25, and as noted by the motion judge, while the tool of a motion to strike for failure to disclose a reasonable cause of action must be used with considerable care, it is a valuable tool because: it promotes judicial efficiency by removing claims that have no reasonable prospect of success; and, it promotes correct results by allowing judges to focus their attention on claims with a reasonable chance of success.

[57] In a passage particularly apt for the present case, the Supreme Court said, at para. 22, that:

> It is incumbent on the claimant to clearly plead the facts upon which it relies in making its claim. A claimant is not entitled to rely on the possibility that new facts may turn up as the case progresses. The claimant may not be in a position to prove the facts pleaded at the time of the motion. It may only hope to be able to prove them. But plead them it must. The facts pleaded are the firm basis upon which the possibility of success of the claim must be evaluated. If they are not pleaded, the exercise cannot be properly conducted.

[58] It is true that the law which is central to the determination of this appeal was developed in the context of trials or otherwise significant evidentiary records. However, once the law is clear on an important point of law, it need not necessarily be further adjudicated in future cases in the context of a full evidentiary record. The issue in this case is whether it is clear on the face of the pleading that, assuming the pleaded facts (not conclusory statements or legal propositions) are true, the Plaintiffs would have established sufficient proximity between BDO and the unitholders to constitute a duty of care owed by BDO to those unitholders. I am satisfied, for the reasons outlined above, that the answer to this question is "no".

[59] For these reasons, I conclude that the motion judge committed no error of law in his analysis of the cause of action criterion under s. 5(1) of the *CPA* in this case. I would therefore dismiss the appeal from the motion judge's order on this issue.

Representative Plaintiffs/Potential Conflicts/Aggregate Damages

[60] Because I would dismiss this appeal, it is unnecessary to consider the subsidiary issues of appropriateness of representative plaintiffs, potential conflicts, and aggregate damages.

[61] However, had I been of a contrary view, I would have dismissed the appeals on these issues but referred these matters back to the motion judge for determination. I say this because, although the motion judge made observations about the issues of the representative plaintiffs and potential conflicts, he made no findings. This is clear from his statement, at paras. 166-67, that because he

was not certifying the class action and because of certain concessions made by BDO, the representative plaintiff criterion could be solved:

> I do not propose to say more about the representative plaintiff criterion. I simply conclude that I would have treated the representative plaintiff criterion as conditionally satisfied in the circumstances of the immediate case if the cause of action criterion had been satisfied.

[62] The same thing can be said about aggregate damages. If the cause of action criterion had been held on appeal to be satisfied, the question of aggregate damages would have been referred back to the motion judge.

Conclusion

[63] For the foregoing reasons, the appeal is dismissed.

Costs

[64] The parties agreed that costs of $20,000 should be awarded to the successful party. Accordingly, costs are payable by the Appellants to the Respondent in that amount, inclusive of all fees, disbursements, and applicable taxes.

Penny J.

I agree

S.T. Bale J.

I agree

Favreau J.

Released: April 20, 2021

CITATION: Whitehouse v. BDO Canada LLP, 2021 ONSC 2454
DIVISIONAL COURT FILE NO.: 058/20
DATE: 20210420

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Penny, S.T. Bale and Favreau JJ.

BETWEEN:

ANTHONY WHITEHOUSE, CARRIE COUCH and JASON COUCH, Plaintiffs (Appellants)

– and –

BDO CANADA LLP, Defendant (Respondent)

REASONS FOR JUDGMENT

PENNY J.

Released: April 20, 2021