Court File No.: M52498

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

ANTHONY WHITEHOUSE, CARRIE COUCH and JASON COUCH

Plaintiffs
(Moving Parties)

- and -

BDO CANADA LLP

Defendant
(Responding Party)

FACTUM OF THE RESPONDING PARTY, BDO CANADA LLP
(MOTION FOR LEAVE TO APPEAL)

July 5, 2021

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FACTUM OF THE RESPONDING PARTY

PART I - INTRODUCTION

1. There is no reason to revisit the unanimous decision of the Divisional Court panel upholding the Motion Judge's ruling. The stringent test for leave to appeal is not met and this motion for leave should be dismissed.

2. This motion arises from a proposed class action brought on behalf of investors in the Crystal Wealth Funds.[1] The respondent, BDO, audited the annual financial statements of the Crystal Wealth Funds between 2007 and 2015 pursuant to the requirements of the Ontario *Securities Act* and related securities regulations. The central issue before the Divisional Court was whether, based on the facts as pleaded in the Amended Statement of Claim, BDO owed a duty in negligence *simpliciter*, not to its audit clients (the audit clients are not a party to the class proceeding) but to *investors* in those audit clients.

3. The Divisional Court properly upheld the underlying decision of the Motion Judge that BDO did not owe any duty to the class. The duty to investors alleged in this case was premised on Crystal Wealth's statutory obligations to deliver annual audit opinions to its investors. The Motion Judge and the Divisional Court followed binding appellate precedents – including jurisprudence from the Supreme Court of Canada – in determining that this statutory requirement was an insufficient basis upon which to establish that BDO owed a duty of care to Crystal Wealth's investors.

[1] All defined terms in this section are defined below.

4. The Plaintiffs have failed to demonstrate a "clear error" by the Divisional Court or any other ground that would warrant further appellate scrutiny. There is no basis here to depart from the strong presumption that appellate decisions of the Divisional Court, particularly unanimous decisions such as this one that involve the application of settled law, are intended to be final.

PART II - SUMMARY OF FACTS

A. Crystal Wealth

5. Crystal Wealth Management Services Limited ("CWMS" or "Crystal Wealth") was a Burlington, Ontario-based Investment Fund Manager, Portfolio Manager, and Commodity Trading Manager. In its role as Investment Fund Manager, Crystal Wealth operated and managed 15 proprietary investment funds (the "Crystal Wealth Funds" or the "Funds" and, together with CWMS, "Crystal Wealth").[2]

B. Regulatory Oversight by the Provincial Securities Commissions

6. As a registrant with provincial securities regulators,[3] Crystal Wealth was overseen by multiple securities regulators, including the Ontario Securities Commission ("OSC"). As part of the Funds' regulatory obligations, the Funds were required to file audited financial statements with the OSC on an annual basis pursuant to the *Securities Act* and National Instrument 81-106.[4]

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[2] Affidavit of Marcel Tillie sworn April 17, 2017 at para. 13 [Tillie Affidavit], Motion Record of the Plaintiffs [MR], Tab 8A, pp. 144-145.

[3] Tillie Affidavit at para. 12, MR, Tab 8A, p. 144; Grant Thornton Limited's First Report dated June 22, 2017 [First Receiver Report] at para. 14, MR Tab 8B, p. 174.

[4] *Securities Act*, R.S.O. 1990, c. S.5, ss. 78-79; Canadian Securities Administrators, *National Instrument 81-106 Investment Fund Continuous Disclosure*, OSC NI-81-106, Part 2, s. 2.7(3).

C. BDO's Audits of the Crystal Wealth Funds

7. BDO is a business advisory firm whose services include audit and assurance work. During the period that encompassed Crystal Wealth's fiscal years 2007 to 2015 (the "BDO Audit Period"), BDO audited the annual financial statements of CWMS and, for differing lengths of time, the annual financial statements of the individual Crystal Wealth Funds. The annual audits of the Crystal Wealth Funds were strictly a function of the OSC's regulatory oversight over the Crystal Wealth Funds.[5]

8. These audits were conducted pursuant to retainer agreements negotiated and signed by Clayton Smith, in his capacity as the principal of CWMS (the "BDO Retainers").

D. OSC Investigation and Crystal Wealth Receivership

9. On April 6, 2017, following an investigation into Crystal Wealth's affairs, the OSC issued a temporary order against Clayton Smith, his personal companies, Crystal Wealth and the Funds that, among other things, ceased all trading of units of the Funds and froze the assets of Mr. Smith and his personal companies. On April 26, 2017, Crystal Wealth was put into receivership on application by Staff of the OSC (the "Receivership"). Also on application by Staff of the OSC, the Ontario Superior Court of Justice (Commercial List) made an order appointing Grant Thornton Limited as receiver and manager of all assets, undertakings and properties of Crystal Wealth, the Funds, Mr. Smith and certain of his personal companies (the "Receiver" and the "Appointment Order").

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[5] See, for example, Reasons for Decision of Justice Perell dated January 8, 2020 [Certification Decision] at para. 98, MR Tab 3, p. 29; and Reasons for Decision of Justices Penny, Bale and Favreau dated April 20, 2021 [Divisional Court Decision] at para. 22.

10. Following the Appointment Order, Mr. Smith reached a settlement with OSC Staff, which was approved by the OSC in May 2018. As part of the settlement, Mr. Smith admitted to committing fraud in his role at Crystal Wealth, namely the direct misappropriation of assets held by the Media Fund and Mortgage Fund. He also admitted to having misled both BDO and the OSC in concealing his fraud.[6]

E. Receiver's Action and Recoveries on Behalf of Unitholders

11. On May 3, 2018, the Receiver commenced a civil action against BDO (the "Receiver's Action"). The Receiver's Action claimed damages against BDO in negligence *simpliciter*, amongst other causes of action, on behalf of CWMS and the Crystal Wealth Funds. Adair Goldblatt Bieber LLP ("AGB"), counsel to the Plaintiffs, was also counsel of record in the Receiver's Action.

12. On January 15, 2020, BDO and the Receiver entered into a settlement agreement in the Receiver's Action (the "Receiver Settlement") pursuant to which BDO agreed to contribute $32.5 million to be distributed to the stakeholders in CWMS and the Crystal Wealth Funds, including investors.[7] The Receiver Settlement was contingent upon $2.5 million being paid to unitholders from a separate contemporaneous settlement between BDO and OSC Staff. The Receiver Settlement was approved by Justice Koehnen of the Ontario Superior Court of Justice on June 2, 2020, and the Receiver's Action was dismissed on consent on July 27, 2020.[8] In approving the Receiver Settlement, Justice Koehnen noted that the settlement was "substantial" and

[6] Settlement Agreement between the OSC and Clayton Smith dated May 28, 2018 [Smith Settlement] at paras. 45-46, MR Tab 9A, pp. 404-406.

[7] Fifth Receiver Report at paras. 72-73, RMR Tab 3, pp. 36-37.

[8] Fifth Receiver Report at paras. 72-73, RMR Tab 3, pp. 36-37; Order of Justice Gilmore dated July 27, 2020, RMR Tab 4, p. 43-44; Order of Justice Koehnen, RMR Tab 1, pp. 1-4.

"represent[ed] a substantial benefit to investors in Crystal Wealth" given the early stage of the Receiver's Action.[9]

13. As a result of BDO's settlement contributions and other significant recoveries obtained by the Receiver, the Receiver has made three interim distributions to unitholders to date totaling approximately $103 million in Fund assets. This amount constitutes 88 percent of Crystal Wealth's assets which the Plaintiffs assert were impaired and resulted in unitholder losses.[10]

F. Overview of Class Action

14. The proposed class action underlying this motion for leave to appeal was commenced by Anthony Whitehouse, on July 20, 2017 and seeks damages in the amount of $275,000,000 (including $25,000,000 in punitive damages) from BDO on the basis that BDO performed its services negligently.[11] Carrie and Jason Couch were added as Plaintiffs by way of Amended Statement of Claim in November 2019. On June 9, 2021, after the Divisional Court's April 20, 2021 decision dismissing the Plaintiffs' appeal, Mr. Whitehouse discontinued his role as Plaintiff.

15. As noted by the Divisional Court in upholding the decision of the Motion Judge, the crux of the Plaintiffs' claim in negligence *simpliciter* is that, in addition to any duty BDO owed to its audit clients (CWMS and the Crystal Wealth Funds), BDO also owed duties to *investors in* the Crystal Wealth Funds. The class is defined as: persons "who invested in any of the Funds … of [CWMS] at any time from April 12, 2007 to April 7, 2017 … and who retained investments in any

[9] Endorsement of Justice Koehnen, RMR Tab 2, pp. 8-10.

[10] Para. 17 of Plaintiffs' factum; Fifth Receiver Report at para. 80, RMR Tab 3, p. 38.

[11] Amended Statement of Claim amended November 13, 2019 [Amended Statement of Claim] at para. 1, MR Tab 4, pp. 45-48.

of the Funds on April 7, 2017, including, without limitation, those persons or entities who filed claims in the Receivership of Crystal Wealth."[12]

G. The Motion Judge's Decision

16. In reasons dated January 8, 2020, Justice Perell (the "Motion Judge") dismissed the Plaintiffs' certification motion. The ratio of this decision was that the Plaintiffs failed to satisfy the cause of action criterion under s. 5(1)(a) of the *Class Proceedings Act* because it was plain and obvious that the pleadings did not disclose a duty of care owed by BDO to the class.[13]

17. In reaching this conclusion, the Motion Judge found that the Plaintiffs had not pleaded any direct relationship, undertaking or representation by BDO to the class members that would properly ground a duty of care. The Motion Judge found that, as pleaded, the basis for the relationship between the proposed class members and BDO was the statutory regime under the Ontario *Securities Act*, which required the Crystal Wealth Funds to file audited financial statements with the OSC on an annual basis. The Motion Judge, in turn, found that the Plaintiffs' claim should be dismissed on the basis of a settled body of appellate-level case law, including the Supreme Court of Canada's decisions in *Hercules*[14] and *Livent*,[15] and this Court's decision in *Lavender*.[16] This jurisprudence establishes that auditors engaged to perform periodic, statutory audits do not owe a duty of care to their client's investors with respect to those investors' personal investment decisions.[17]

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[12] Divisional Court Decision at para. 15. The proposed class excludes BDO, Crystal Wealth and certain entities affiliated or involved with CWMS.

[13] Certification Decision at paras. 4, 94, MR Tab 3, pp. 16, 27.

[14] *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 [*Hercules*].

[15] *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63 [*Livent*].

[16] *Lavender v. Miller Bernstein LLP*, 2018 ONCA 729 [*Lavender*].

[17] Certification Decision at paras. 97-102, 108, 113-114, MR Tab 3, pp. 29-31.

H. The Divisional Court Decision

18. In unanimous reasons written by Justice Penny dated April 20, 2021, the Divisional Court dismissed the Plaintiffs' appeal, upholding the Motion Judge's conclusion that the claim failed to disclose a viable cause of action under s. 5(1)(a) of the *Class Proceedings Act*.[18] The Divisional Court agreed with the Motion Judge's conclusion that BDO's alleged undertaking arose out of the statutory requirement for annual audit reports under the Ontario *Securities Act* and was therefore precluded by *Hercules*, *Livent* and *Lavender* as described above.[19]

19. The Divisional Court agreed with the Motion Judge that there was no pleading of any material facts that might establish any direct undertaking by the auditor to the unitholders that the reports should be used for unitholders' individual investment decisions. The Court specifically found that the Plaintiffs had failed to plead that BDO's audit reports were prepared for this purpose, having regard to the proximity analysis governing the assessment of a duty of care as set out in *Livent*.[20]

20. Further, the Divisional Court found that the Plaintiffs' pleading of a duty of care was undermined by and inconsistent with their definition of the proposed class, which included individuals who acquired units in the Crystal Wealth Fund after BDO ceased to be the auditor (i.e., investors whose identity BDO could not have known when it conducted its audits). The Court noted that this reflected the very problem of indeterminacy at the heart of the Court's decisions in *Hercules*, *Livent* and *Lavender*.[21]

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[18] S.O. 1992, c. 6, s. 5(1)(a) [CPA].
[19] Divisional Court Decision at paras. 46-52.
[20] Divisional Court Decision at paras. 46-52.
[21] Divisional Court Decision at paras. 53-54.

PART III - RESPONDENT'S POSITIONS ON ISSUES

A. Overview: The Test for Leave is not Met

21. Leave to appeal from an order of the Divisional Court acting in its appellate capacity should only be granted in exceptional circumstances, as such decisions are intended to be final.[22]

22. In *Bajouco v. Green*, this Court identified the circumstances in which leave may be granted:

(a) Where the proposed appeal raises an arguable question of law or mixed fact or law on the interpretation of legislation;

(b) Where the proposed appeal raises the interpretation, clarification or propounding of a general rule or principle of law;

(c) Where the proposed appeal raises the interpretation of a municipal by-law where the point in issue is a question of public importance;

(d) Where the proposed appeal raises the interpretation of an agreement which raises a question of public importance;

(e) Where special circumstances make the matter one of public importance;

(f) Where it appears in the interest of justice that leave be granted; or,

(g) Where there is a clear error in the judgment below.[23]

23. The Plaintiffs argue that the proposed appeal engages issues related to the clarification or propounding of a general rule or principle of law and involves a question of public importance.

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[22] *Bajouco v. Green*, 2017 ONCA 493 [*Bajouco*] at para. 24.

[23] *Bajouco* at paras. 25-26.

However, neither criterion is met. As discussed below, the decision of the Divisional Court turned on an appropriate reading of the Plaintiffs' pleading and involved the application of settled appellate jurisprudence dealing specifically with the scope of an auditors' duty of care. There are no exceptional circumstances in this case that warrant any further appellate review.

B. The Divisional Court Correctly Applied the "Plain and Obvious" Test

24. The Plaintiffs argue that the Divisional Court erred in law when applying the "plain and obvious" test under s. 5(1)(a) of the *CPA*. They contend that the Divisional Court failed to read their pleading generously and that any deficiencies in their pleading should be addressed at trial. However, the Divisional Court clearly understood the test and applied it appropriately in this case. Justice Penny, citing to the Supreme Court's decision in *R. v. Imperial Tobacco Canada Ltd.* (*Imperial Tobacco*),[24] held that:

> 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.[25]

25. Justice Penny's statement is in keeping with the Supreme Court's recent decision in *Atlantic Lottery Corp. Inc. v. Babstock*,[26] where the majority held that the low threshold on the plain and obvious test in the class action context does not mean that every claim should be permitted to progress to trial. The test can serve a valuable function in eliminating invalid class action cases at an early stage. As Justice Brown observed:

> Where possible, therefore, courts should resolve legal disputes promptly, rather than referring them to a full trial (paras. 24-25 and 32). This includes resolving

[24] 2011 SCC 42.

[25] Divisional Court Decision at para. 56.

[26] 2020 SCC 19 [*Babstock*].

> questions of law by striking claims that have no reasonable chance of success (S. G. A. Pitel and M. B. Lerner, "Resolving Questions of Law: A Modern Approach to Rule 21" (2014), 43 *Adv. Q.* 344, at pp. 351-52). Indeed, the power to strike hopeless claims is "a valuable housekeeping measure essential to effective and fair litigation" (*Imperial Tobacco*, at para. 19).[27]

26. The approach of the Motion Judge, as affirmed by the Divisional Court, is entirely in keeping with these precedents from the Supreme Court.

(i) Conclusory pleading of an undertaking to investors

27. Turning to the specifics of the Plaintiffs' arguments, they argue that the Divisional Court erred by failing to accept as true the pleaded facts in their Amended Statement of Claim that assert a direct undertaking by BDO to assist unitholders in their investment decisions. As the Divisional Court noted, and as the Plaintiffs emphasize in their submissions, the primary basis for this alleged undertaking is at paragraphs 60 to 64 and 67 of the Amended Statement of Claim:[28]

> 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"

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[27] *Babstock* at para. 18.

[28] Divisional Court Decision at para. 17.

> 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.[29]

28. In considering these allegations, the Divisional Court correctly observed that the plain and obvious test requires a judge to accept material facts pleaded as true but does not require a judge to accept any pleaded legal *characterizations* or *conclusions* based on these facts.[30] Similarly, the Divisional Court correctly noted that courts do not accept as true conclusory allegations that are unsupported by material facts.[31]

29. The approach by the Divisional Court mirrors the approach employed by Justice Perell, and upheld by this Court, in *Das v. George Weston Ltd* ("*Das*").[32] There, Justice Perell, in the context of opposing motions for and against class certification, summarized the law regarding the analysis of facts in pleadings under the plain and obvious test. Justice Perell accepted the pleaded facts as true, but declined to accept as true pleadings of law, pleadings of argument, or conclusory characterizations that were not supported by material facts, writing:

> However, for the purposes of a motion under Rule 21, the court is not obliged to accept as a proven material fact the conclusion that there is a cause of action or a duty of care. Rather, the court must examine whether the genuine material facts,

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[29] Amended Statement of Claim at paras. 60-64 and 67, MR Tab 4, pp. 45-48.

[30] Divisional Court Decision at para. 19; see also *Das v. George Weston Limited*, 2018 ONCA 1053 [*Das*] at paras. 30, 70-78, 91.

[31] Divisional Court Decision at para. 19; *Boudreau v. Bank of Montreal*, 2012 ONSC 3965 at para. 14 [*Boudreau*].

[32] *Das* at paras. 30, 70-78, 91.

> which are not argument or conclusory statements, disclose a reasonable cause of action.[33]

30. The Divisional Court properly applied these principles in finding that the undertaking alleged in the Amended Statement of Claim, namely at paragraphs 60 to 64 and 67 above, arose solely out of the requirement for annual audits in the *Securities Act*, and that the Plaintiffs did not in fact plead any material facts to support their conclusory statement that BDO had undertaken to provide audit reports to guide unitholders' investment decisions.[34]

31. In doing so, the Divisional Court closely considered the Plaintiffs' specific emphasis on paragraphs 62 and 67 of the Amended Statement of Claim, as excerpted above. With respect to paragraph 62, the Court correctly noted that – as reflected by the Plaintiffs' use of the phrase "accordingly" in their pleading – the Plaintiffs' allegation that BDO conducted its audits to enable unitholders to make investment decisions was merely a conclusory allegation, logically unconnected to the premise in the preceding paragraph that Crystal Wealth was required by the *Securities Act* to prepare audit reports.[35] The Divisional Court appropriately observed that the Plaintiffs failed to plead any other material facts to support this conclusion.

32. With respect to the Plaintiffs' allegation at paragraph 67 that BDO "knew and intended" that the unitholders would rely on its audit reports, the Divisional Court properly held that the Plaintiffs' allegation of an "intention" on BDO's part was conclusory and again unsupported by any material facts.[36] The Divisional Court appropriately emphasized Rule 25.06(8) of the *Rules of Civil Procedure*, which requires pleadings alleging any form of intent on a defendant's part to

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[33] *Das v. George Weston Limited*, 2017 ONSC 4129 at para. 21.

[34] Divisional Court Decision at para. 46.

[35] Divisional Court Decision at para. 46.

[36] As discussed below, the Divisional Court properly applied *Hercules* and *Livent* in holding that BDO's mere knowledge of the identities of investors was insufficient to establish an undertaking giving rise to sufficient proximity.

contain particulars in support of that allegation.[37] In asserting that the Divisional Court failed to accept pleaded facts as true, the Plaintiffs ignore the Divisional Court's careful and detailed analysis of the sufficiency of the pleading which affirmed the equally detailed pleadings analysis of the Motion Judge.[38]

C. The Divisional Court Did Not Err in the Duty of Care Analysis

33. The Plaintiffs submit that the Divisional Court erred in determining that the alleged duty of care was precluded by settled appellate jurisprudence, including the Supreme Court's decision in *Hercules*. However, the Motion Judge and Divisional Court carefully analyzed and correctly applied to the Plaintiffs' claim the jurisprudence relating to auditors' duties of care.

34. The Divisional Court's duty analysis turned on two issues:

(a) First, the Divisional Court held that the Plaintiffs' pleadings and arguments failed to provide any basis to conclude that BDO undertook to provide audit reports to guide the personal investment decisions of the unitholders. Absent any such basis, the Plaintiffs' allegation of a duty is precluded by the settled body of case law anchored by *Hercules*, *Livent* and *Lavender*.

(b) Second, the Divisional Court held that the Plaintiffs' arguments on the duty of care were undermined by and inconsistent with the definition of the putative class.

(i) The Divisional Court properly applied case law determined on a full evidentiary record

[37] Divisional Court Decision at paras. 49-52.

[38] Certification Decision at paras. 96 to 102.

35. The Plaintiffs argue that it was inappropriate for the Divisional Court, or the Motion Judge, to rely on the settled law from *Hercules*, *Livent* and *Lavender*, because those cases were decided based on a full evidentiary record. Again, this same argument was considered and correctly rejected by Justice Penny, who wrote:

> 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.[39]

36. As Justice Penny recognized, the application of s. 5(1)(a) of the *Class Proceedings Act* necessarily involves screening out claims with no reasonable chance of success based on settled case law that was determined on a full evidentiary record. This is precisely how courts are supposed to operate in a precedential system; efficiencies are achieved by eliminating the need to litigate issues that have been conclusively resolved.

(ii) The duty of care analysis is covered by settled jurisprudence

37. Canadian courts have developed a clear framework for cases involving allegations that an auditor owes duties to investors or "clients of clients". This framework distinguishes between:

(a) periodic, statutory audits, which are performed so that the audit client can comply with a periodic (typically annual) requirement set out in legislation; and

(b) audits (or similar work) prepared at the discretion of an audit client for a specific business purpose, such as the solicitation of a specific investment from a discrete group of investors.

[39] Divisional Court Decision at para. 58.

38. As the Motion Judge and Divisional Court correctly concluded, this claim as pleaded concerns an audit falling strictly within the first category – an audit that was required, by statute, to be conducted once per year and not in regard to any specific investment event or other undertaking. The Supreme Court's decisions in *Hercules* and *Livent*, discussed below, confirm that, due to policy concerns over indeterminate liability and a lack of proximity, such audits *do not give rise* to a duty to investors in the audit client.

39. Further, the Divisional Court appropriately upheld the Motion Judge's conclusion that *Lavender* precluded any finding of a duty of care owed by BDO to its audit client's investors based on the *OSC's* reliance on BDO's audit work for the purpose of ensuring CWMS's regulatory compliance.

Hercules

40. As described by Justice Penny, the Supreme Court's reasons in *Hercules* explain why statutory audit mandates do not give rise to a duty of care to investors for the purpose of making personal investment decisions.[40] In that case, the Supreme Court considered and rejected the assertion that the defendant auditor – by virtue of having audited annual financial statements pursuant to the requirements of corporate legislation – owed a duty of care to shareholders of its audit client. In *Hercules*, as here, the audited periodic financial statements had been presented to the plaintiff shareholders and the claim was for losses arising from the Plaintiffs' investments in the audit client.[41] In *Hercules*, the Supreme Court rejected the existence of a duty to the investors,

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[40] See in particular *Hercules* at paras. 32-34, 42, and 45-57 and Divisional Court Decision at paras. 34-35. While the *Anns* test has been refined since the Court's reasons in *Hercules* (in particular, with the result that matters previously considered at the "policy considerations" stage are now addressed as part of the assessment of proximity), the Court made clear in *Livent* that the findings in *Hercules* on the scope of auditor duties remain good law.

[41] *Hercules* at paras. 42, 1.

finding that the only actionable duty owed by the defendant auditor was to its audit client, the company.

41. In reaching this determination, the Supreme Court expressly recognized that an auditor will owe a *prima facie* duty of care to myriad groups of persons other than its audit client – including shareholders, creditors, potential takeover bidders, investors and other parties – for a wide variety of purposes.[42] Critically, however, the Supreme Court went on to hold that the *prima facie* duty owed to the Plaintiffs was negated by public policy concerns, specifically the concern over indeterminate liability.[43] The Supreme Court reached this decision, in part, out of concern that imposing a duty on auditors to investors in the context of a statutorily-mandated periodic audit would do widespread economic damage, not just to auditors, but to a range of downstream stakeholders, including corporations and their customers.[44]

42. *Hercules* involved a small group of shareholder investors, all of whom were known to the auditor at the time it completed the audits in issue. Contrary to the Plaintiffs' submissions at paragraph 96 of their factum, the Supreme Court expressly rejected – based on the policy concerns outlined above – the notion that the auditor's mere knowledge of these investors was independently sufficient to ground a potential duty of care. In doing so, the Supreme Court emphasized that the audits – again, being periodic statutory audits – had not been prepared for the express purpose of attracting specific investments from those specific investors.[45]

43. The finding in *Hercules* that no duty was owed *to investors* did not mean that the auditor had no duty at all. On the contrary, the Supreme Court considered the rule in *Foss v. Harbottle* in

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[42] *Hercules* at para. 32.
[43] *Hercules* at para. 33.
[44] *Hercules* at para. 34.
[45] See *Hercules* at paras. 45-47.

explaining that the audit client (directly, or through a proxy such as by way of a derivative action action or, as was the case in *Livent*, a receiver action) would have a claim against the auditor in negligence.[46]

Livent

44. In its 2017 decision in *Livent*, the Supreme Court of Canada again considered the issue of auditor liability arising out of a periodic statutory audit. The relationship between the plaintiff and the auditor in *Livent* was different from the relationship at issue in *Hercules*. Of critical importance, the claim was brought in the context of an insolvency by a plaintiff receiver, acting on behalf of, and asserting rights belonging to, the defendant auditor's corporate client. The claim was, in other words, brought on behalf of the audit client itself – not investors in the audit client, as is the case here.

45. In its reasons explaining why the concerns of indeterminate liability that arose in *Hercules* did not arise in the case before it, the Supreme Court affirmed and emphasized its analysis in *Hercules*. However, and as noted by the Divisional Court in this case, the Court in *Livent* added to the decision in *Hercules* by clarifying that the duty of care is dependent on the specific undertaking given by the defendant, and that, in the words of Justice Penny, "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."[47]

[46] *Hercules* at paras. 58-59.

[47] Divisional Court Decision at para. 40.

46. The Supreme Court reiterated the critical distinction between claims brought by "determinate corporate" claimants, on the one hand, and "indeterminate stakeholder claims", on the other.[48] The Court stressed that while an action brought by a single corporate claimant, such as the claim brought by the receiver on behalf of the audit client in *Livent,* will not attract indeterminacy concerns, claims brought by *investors* in an audit client *will* give rise to indeterminacy. As reasoned by the Supreme Court, "any number of investors could rely on an audit to inform their investment decisions".[49]

47. The Court distinguished the claim brought by Livent's receiver from "indeterminate stakeholder claims" such as those at issue in *Hercules*. The Court stressed that the situation before it was a "far cry" from the concerns expressed in *Hercules* on the facts of that case over a "limitless potential quantum of lost investments by innumerable third parties relying on audit statements for their own investment decisions".[50]

48. As such, the Supreme Court's reasons in *Livent* are entirely consistent with the principles first enunciated by the Court in *Hercules*. In both cases, the Court approved of auditor negligence claims being brought *by or directly on behalf of* the audit client. In *Hercules,* the examples given were claims by a corporation against its auditors, or a derivative action. In *Livent*, the example before the Court was a receiver that had been appointed to stand in the shoes of and act on behalf of the audit client. However, in both cases, the Court made clear that claims brought by *investors* in the audit clients were *not* acceptable as a form of recourse for auditor negligence arising out of a statutory audit.

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[48] *Livent* at para. 88.

[49] *Livent* at para. 70.

[50] *Livent* at para. 72, ABA Tab 7, citing to *Hercules* at para. 32, ABA Tab 11.

Lavender

49. As noted by the Divisional Court, the Amended Statement of Claim also alleges a duty of care on the basis that BDO conducted its audits for the purpose of ensuring that Crystal Wealth continued to comply with Ontario's securities laws and was permitted to offer and redeem units in the Funds.[51] The Plaintiffs allege that that the OSC relied on BDO for this purpose, that Crystal Wealth maintained its operations in light of the OSC's permission, and that investors suffered harm as a result.[52]

50. As correctly determined by the Motion Judge, whose reasons on this point were summarized with approval by the Divisional Court, this alleged duty is precluded by this Court's decision in *Lavender*.[53] In that case, this Court held that proximity considerations negate a duty that is mediated through the purported reliance of the OSC. In making this determination, this Court followed the Supreme Court's guidance in *Livent* regarding the requirements for a "sufficiently close relationship".[54] Applying this guidance, this Court found that there could not be a sufficient relationship of proximity between an auditor and investors of an audit client in connection with the auditor's preparation of a report *for the OSC*.[55] As stated by the Court of Appeal: "the interposition of the OSC and [the audit client] between the Auditors and the Class rendered the relationship between the parties too remote to ground a duty of care".[56]

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[51] Amended Statement of Claim at paras. 61-62; Divisional Court Decision at para. 27.
[52] Amended Statement of Claim at paras. 61-63 and 85-86.
[53] Certification Decision at paras. 116 to 132; Divisional Court Decision at paras. 42 to 44.
[54] *Lavender* at para. 30, ABA Tab 16.
[55] *Lavender* at para. 65, ABA Tab 16.
[56] *Lavender* at para. 66, ABA Tab 16. This passage was quoted by the Divisional Court in its reasons at para. 42.

51. Like the Motion Judge, the Divisional Court declined to distinguish *Lavender* on the basis that the audit work product in that case was "confidential" but BDO's audit opinions were not.[57] The Divisional Court emphasized the Motion Judge's finding that while some Crystal Wealth investors may have been provided with or had access to BDO's audit opinions, this was strictly due to the requirements of the *Securities Act* rather on the basis of any pleaded undertaking to assist unitholders in their investment decisions or to safeguard them from Crystal Wealth's non-compliance with the *Securities Act*.[58] As such, the interface between BDO and the OSC rendered the relationship just as remote as the relationship at issue in *Lavender*.[59]

Cases Where a Duty is Found are Illustrative and Distinguishable

52. Finally, in considering whether BDO owed a duty of care to unitholders based on its delivery of annual audit opinions pursuant to the *Securities Act*, it is helpful to consider the cases in which the courts *have* imposed duties upon auditors to investors. The jurisprudence confirms that, for auditors to owe such a duty, the audit work in question must have been undertaken *not* as a periodic statutory audit but rather in furtherance of a specific, business-driven investment. Further, and consistent with *Lavender*, in no such case has a duty been found to investors based on a regulator's own reliance on an auditor's work, whether for the purpose of confirming an audit client's ongoing regulatory compliance or otherwise.

53. For instance, in *Hercules*, the Supreme Court discussed a prior decision, *Haig v. Bamford*, in which an auditor was found liable to investors in circumstances where the audit was undertaken for the narrow purpose of soliciting a specific, enumerated investment from a discrete class of

[57] *Lavender* at para. 125, ABA Tab 16.
[58] Certification Decision at para. 125; Divisional Court Decision at para. 29.
[59] Certification Decision at para. 128.

investors who directly relied on the audit for that purpose.[60] Another example arose in *Excalibur Special Opportunities LP v. Schwartz Levitsky Feldman LLP*. In *Excalibur*, the motion judge, who was also Justice Perell, considered whether to certify a class action brought against an auditor on behalf of a small group of investors who had purchased shares in the auditor's corporate client pursuant to a private placement. In that case, and in the context of a specific investment-driven engagement rather than a periodic, statutory audit, the Motion Judge determined that the plaintiff's pleading did disclose a reasonable cause of action under s. 5(1)(a).[61]

54. As set out above, the applicable jurisprudence – anchored by the Supreme Court's reasons in *Hercules* – makes it clear that auditors simply do not owe a duty to investors engaged in making personal investment decisions in the context of a periodic, statutory audit. *Lavender* further makes clear that an auditor will not owe a duty of care to investors on the basis that a statutory audit was relied upon by a regulator to the alleged detriment of investors. The Divisional Court correctly applied binding precedent in holding that the Plaintiffs' allegation of a duty of care rooted in Crystal Wealth's delivery of annual audit opinions under the *Securities Act* was therefore untenable and could not succeed.

(iii) The class definition is inconsistent with the Plaintiffs' arguments

55. The pleadings reflect the following:

(a) the Amended Statement of Claim pleads that BDO issued audit opinions only up to and including Crystal Wealth's 2015 fiscal year, yet

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[60] *Hercules* at para. 40, citing *Haig v. Bamford*, [1977] 1 S.C.R. 466.

[61] *Excalibur Special Opportunities LP v. Schwartz Levitsky Feldman LLP*, 2014 ONSC 4118, aff'd 2016 ONCA 916 at paras. 79-99.

(b) the proposed class includes all unitholders who invested in the Crystal Wealth Funds between April 2007 and *April 2017* who retained their investments as of April 2017.[62]

56. Accordingly, on the face of the pleadings – and contrary to the Plaintiffs' arguments regarding a supposed undertaking by BDO – the duty pleaded against BDO would entail obligations to an unknown and unknowable group of prospective investors, including anyone who might have decided to invest in Crystal Wealth *after* the BDO Audit Period.

57. Justice Penny's reasons emphasized this inconsistency because it undermines the Plaintiffs' claims regarding the alleged duty of care and illustrates the very indeterminacy concerns raised by the Supreme Court in *Hercules*:

> 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*.[63]

58. While an auditor's mere knowledge of a group of investors is not independently sufficient to ground a duty of care,[64] the Plaintiffs ignore this deficiency in their pleadings in suggesting that the Divisional Court failed to properly consider and apply *Hercules*.[65]

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[62] Amended Statement of Claim at paras. 1(a)(i) and 78, MR Tab 4, pp. 48, 70.

[63] Divisional Court Decision at para. 54.

[64] See *Hercules* at paras. 45-47.

[65] The Divisional Court's approach was consistent with the accepted principle that courts are not obliged to accept as true allegations that are contradicted by other elements of the pleading (see *Boudreau* at para. 14).

D. The Proposed Appeal Does Not Raise Issues of Public Importance or Novel Principles of Law

59. Two of the enumerated grounds on which leave may be granted are: i) where special circumstances make the matter one of public importance or ii) where the proposed appeal raises general rules or principles of law requiring clarification or interpretation by this Court.[66] These grounds are not present here.

60. As summarized above, the Divisional Court's dismissal of the Plaintiffs' appeal was premised on the following conclusions:

(a) The Amended Statement of Claim failed to include material facts to support the allegation that BDO undertook to the unitholders to provide reports for the purpose of aiding their personal investment decisions;

(b) The Plaintiffs' assertion of a duty of care rooted in BDO's delivery of annual audit reports pursuant to the *Securities Act* is precluded by settled appellate jurisprudence on the scope of auditors' duty of care; and

(c) The proposed class definition is inconsistent with the duty of care as alleged by the Plaintiffs.

61. In carefully analyzing the Plaintiffs' Amended Statement of Claim and applying binding precedent to the specific duty found to be alleged against BDO, the decision of the Divisional

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[66] In *Re Sault Dock Co. Ltd. and City of Sault Ste. Marie*, [1973] 2 O.R. 479 (C.A.), this Court described the special circumstances making matters one of public importance as including the introduction of new evidence, an obvious misapprehension of the Divisional Court of the relevant facts, or a clear departure from the established principles of law resulting in a miscarriage of justice. A more recent example of special circumstances making a matter one of public importance such that leave was granted was where the proposed appeal concerned issues of civil case management during the COVID-19 pandemic (*Louis v. Poitras*, 2021 ONCA 49 at para. 14).

Court did not create or expand any legal principles related to auditors' negligence or invite the opportunity to clarify or interpret an ambiguity in the law. To the contrary, both the Motion Judge and the Divisional Court concluded that it was "plain and obvious" that the Plaintiffs do not have a viable claim.

62. The Plaintiffs also suggest that this case presents an issue of public importance because the putative class members have lost substantial amounts of money. Setting aside that the monetary value of a claim is not a factor considered relevant by this Court,[67] this argument assumes that the putative class members have in fact suffered losses which are attributable to BDO and otherwise compensable in law, two points which are of course contested by BDO and have been dismissed by the courts below. This argument also ignores the fact that class members have already been meaningfully compensated for the precise losses claimed in this class action through the Receiver Settlement and other substantial recoveries made by the Receiver, as outlined above.

63. Finally, the Plaintiffs' arguments regarding recent amendments to the *Class Proceedings Act* are not relevant to the issue of whether this proposed appeal raises an issue of public importance. As acknowledged by the Plaintiffs, these amendments were made after the commencement of this action and are inapplicable to this action. Contrary to the Plaintiffs' arguments, the Legislature made a clear choice to explicitly stipulate that the amendments would not apply in situations like this.[68] As such, it would be contrary to legislative intent for this Court to rely on the amended provisions in granting leave to appeal.

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[67] The 'special circumstances' giving rise to issues of public importance in *Re Sault Dock Co. Ltd. and City of Sault Ste. Marie*, [1973] 2 O.R. 479 (C.A) and *Louis v. Poitras*, 2021 ONCA 49 engage issues of importance to the legal system – not issues of importance to individual litigants.

[68] S. 39 of CPA.

64. The dangers of granting leave on this basis are also evident in that, if leave to appeal was granted on this rationale, it would seemingly be appropriate for the parties to argue the new test for certification under the amended *CPA* rather than the test for certification that actually applies to these proceedings.

PART IV - ADDITIONAL ISSUES RAISED BY THE RESPONDENT

65. BDO does not raise any additional issues.

PART V - ORDER REQUESTED

66. BDO requests an Order dismissing this motion with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of July, 2021.

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SCHEDULE A

LIST OF AUTHORITIES

Jurisprudence	
1.	*Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19
2.	*Bajouco v. Green*, 2017 ONCA 493
3.	*Boudreau v. Bank of Montreal*, 2012 ONSC 3965
4.	*Das v. George Weston Limited*, 2017 ONSC 4129
5.	*Das v. George Weston Limited*, 2018 ONCA 1053
6.	*Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63
7.	*Excalibur Special Opportunities LP v. Schwartz Levitsky Feldman LLP*, 2014 ONSC 4118, aff'd 2016 ONCA 916
8.	*Haig v. Bamford*, [1977] 1 S.C.R. 466
9.	*Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165
10.	*Lavender v. Miller Bernstein LLP*, 2018 ONCA 729
11.	*Louis v. Poitras*, 2021 ONCA 49
12.	*R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42
13.	*Re Sault Dock Co. Ltd. and City of Sault Ste. Marie*, [1973] 2 O.R. 479 (C.A.)
14.	*Whitehouse v. BDO Canada LLP*, 2020 ONSC 144
15.	*Whitehouse v. BDO Canada LLP*, 2021 ONSC 2454

SCHEDULE B

TEXT OF STATUTES, REGULATIONS AND BY-LAWS

1. *Class Proceedings Act, 1992*, SO 1992, c 6, ss. 5, 24

Certification

5 (1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,

(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.

2. *Securities Act*, R.S.O. 1990, c. C.43 s. 134

Interim financial reports

78 (1) Every reporting issuer that is not a mutual fund and every mutual fund in Ontario shall file annually within 140 days from the end of its last financial year comparative financial statements relating separately to,

(a) the period that commenced on the date of incorporation or organization and ended as of the close of the first financial year or, if the reporting issuer or mutual fund has completed a financial year, the last financial year, as the case may be; and

(b) the period covered by the financial year next preceding the last financial year, if any,

made up and certified as required by the regulations and in accordance with generally accepted accounting principles.

Auditor's report

(2) Every financial statement referred to in subsection (1) shall be accompanied by a report of the auditor of the reporting issuer or mutual fund prepared in accordance with the regulations.

Auditor's examination

(3) The auditor of a reporting issuer or mutual fund shall make such examinations as will enable the auditor to make the report required by subsection (2).

"auditor" defined

(4) For the purposes of this Part,

"auditor", where used in relation to the reporting issuer or mutual fund, includes the auditor of the reporting issuer or mutual fund and any other independent public accountant.

Delivery of financial statements to security holders

79 (1) Every reporting issuer or mutual fund in Ontario that is required to file a financial statement under section 77 or 78 shall send a true copy of the financial statement to every holder of its securities whose latest address, as shown on its books, is in Ontario.

Deadline

(2) The reporting issuer or mutual fund in Ontario shall send the true copy of the financial statement no later than the end of the period during which it is required to file the financial statement under section 77 or 78.

Exception

(3) Despite subsection (1), a reporting issuer or mutual fund in Ontario is not required to send a copy of the financial statement to a security holder who holds its evidence of indebtedness only.

Deemed compliance

(4) If the laws of a reporting issuer's jurisdiction of incorporation, organization or continuance impose requirements corresponding to the requirements in subsections (1) and (2), compliance with the requirements imposed by that jurisdiction shall be deemed to be compliance with the requirements in subsections (1) and (2).

ANTHONY WHITEHOUSE et al. -and- BDO CANADA LLP

Plaintiffs Defendant (Respondent)

Court File No.: M52498

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

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