Frank v. Farlie, Turner & Co., LLC, et al.

[Indexed as: Frank v. Farlie, Turner & Co., LLC]

113 O.R. (3d) 25

2012 ONSC 5519

Ontario Superior Court of Justice,
Perell J.
October 2, 2012

Conflict of laws -- Jurisdiction -- Florida-based defendant acting as receiver of Delaware-incorporated company in Florida bankruptcy proceedings -- Shareholder of company bringing proposed class action in Ontario alleging that defendants breached duty to shareholders by selectively informing purchaser of company that company had acquired [page26]U.S. military contract -- U.S. Bankruptcy Court enjoining shareholder from pursuing class action in Ontario -- Ontario not having jurisdiction simpliciter over defendants -- Action against defendants stayed.

Securities regulation -- Punitive damages -- Punitive damages not available for breach of Part XXIII.1 of Securities Act -- Securities Act, R.S.O. 1990, c. S.5.

Securities regulation -- Secondary market disclosure -- Plaintiffs failing to plead material facts of cause of action against defendant under s. 138.5 of Securities Act as they did not plead what defendant did to exercise his influence or power as influential person -- Statement of claim struck without leave to amend -- Securities Act, R.S.O. 1990, c. S.5, s. 138.5.

The plaintiff was a shareholder of PPA, a Delaware-incorporated company. He alleged that PPA had retained the defendants Farlie and Bayshore as its financial advisor and investment banker and that those defendants were instrumental in PPA selling its assets, including a valuable contract with the U.S. Army, in the course of bankruptcy proceedings in Florida. Farlie and Bayshore were based in Florida. The plaintiff claimed that PPA advised shareholders that it was not awarded a particular military contract on which it had bid, but failed to disclose that it was awarded the contract several months later. He brought a proposed class against the directors and officers of PPA, Farlie and Bayshore, and G, a former director and CEO of PPA, claiming that PPA and G violated Part XXIII.1 of the Ontario Securities Act and that Farlie and Bayshore violated a common law duty of care to PPA's shareholders. The U.S. Bankruptcy Court in Florida enjoined the plaintiff from pursuing the class action in Ontario, but the plaintiff persisted. The directors and officers moved to strike the plaintiff's claim for punitive damages. G moved to strike the pleading against him for failure to disclose a reasonable cause of action. Farlie and Bayshore moved to stay the action against them on jurisdictional grounds.

Held, the motions should be granted.

It is plain and obvious that a claim for punitive damages supported only by the predicate wrongdoing of a breach of Part XXIII.1 of the Securities Act is inconsistent with the scheme of Part XXIII.1. Allowing a claim for punitive damages would circumvent the policies of Part XXIII.1 of having caps on the quantum of purely compensatory damages and lifting those caps in exceptional circumstances.

The plaintiff failed to plead the material facts of a cause of action against G under s. 138.3 of the Ontario Securities Act. He did not plead what G did to exercise his influence or power as an influential person. The claim against G should be struck without leave to amend.

Farlie and Bayshore were playing the role of a receiver or

quasi-receiver of a U.S. public corporation in bankruptcy and were not engaged in matters regulated by Ontario's securities regulators. An Ontario court should not interfere in a matter that was closely connected to a Florida bankruptcy proceeding. The court did not have jurisdiction simpliciter over Farlie and Bayshore.

Cases referred to

Amchem Products Inc. v. British Columbia (Workers' Compensation Board), [1993] 1 S.C.R. 897, [1993] S.C.J. No. 34, 102 D.L.R. (4th) 96, 150 N.R. 321, [1993] 3 W.W.R. 441, J.E. 93-674, 23 B.C.A.C. 1, 77 B.C.L.R. (2d) 62, 14 C.P.C. (3d) 1, 39 A.C.W.S. (3d) 600; Asbestos Corp. (Re) (1992), 10 O.R. (3d) 577, [1992] O.J. No. 2232, 97 D.L.R. (4th) 144, 58 O.A.C. 277, 1 C.C.L.S. 300, 36 A.C.W.S. (3d) 497 (C.A.); [page27]Cerqueira v. Ontario, [2010] O.J. No. 3037, 2010 ONSC 3954 (S.C.J.); Club Resorts Ltd. v. Van Breda, [2012] 1 S.C.R. 572, [2012] S.C.J. No. 17, 2012 SCC 17, 291 O.A.C. 201, 2012EXP-1452, J.E. 2012-788, EYB 2012-205198, 429 N.R. 217, 343 D.L.R. (4th) 577, 212 A.C.W.S. (3d) 712, 91 C.C.L.T. (3d) 1, 10 R.F.L. (7th) 1, 17 C.P.C. (7th) 223; Frank v. Farlie, Turner & Co., LLC, [2011] O.J. No. 5567, 2011 ONSC 7137 (S.C.J.); J-Sons Inc. v. N.M. Paterson & Sons Ltd., [2010] M.J. No. 199, 2010 MBCA 67, 255 Man. R. (2d) 149, [2010] 9 W.W.R. 52, 91 C.L.R. (3d) 1, affg [2009] M.J. No. 355, 2009 MBQB 263, 246 Man. R. (2d) 176, 85 C.L.R. (3d) 126, [2010] 5 W.W.R. 750; Jennett v. Federal Insurance Co. (1976), 13 O.R. (2d) 617, [1976] O.J. No. 2265, 72 D.L.R. (3d) 20, [1976] I.L.R. 1-782 at 247 (H.C.J.); Koubi v. Mazda Canada Inc., [2012] B.C.J. No. 1464, 2012 BCCA 310, 95 C.C.L.T. (3d) 195, 325 B.C.A.C. 172, [2012] 12 W.W.R. 53, 35 B.C.L.R. (5th) 74, 218 A.C.W.S. (3d) 502; Lubrizol Corp. v. Imperial Oil Ltd., [1996] F.C.J. No. 454, [1996] 3 F.C. 40, 197 N.R. 241, 67 C.P.R. (3d) 1, 62 A.C.W.S. (3d) 902 (C.A.); Reference re Securities Act (Canada), [2011] 3 S.C.R. 837, [2011] S.C.J. No. 66, 2011 SCC 66, 2012EXP-5, J.E. 2012-4, EYB 2011-199884, 424 N.R. 1, 339 D.L.R. (4th) 577, 519 A.R. 63, 208 A.C.W.S. (3d) 490, 97 B.L.R. (4th) 1; Richard v. Time Inc., [2012] 1 S.C.R. 265, [2012] S.C.J. No. 8, 2012 SCC 8, 427 N.R. 203, 342 D.L.R. (4th) 1, 211 A.C.W.S. (3d) 321; Torudag v. British Columbia (Securities Commission), [2011] B.C.J. No. 2150, 2011 BCCA 458, 313 B.C.A.C. 63, 343 D.L.R.

(4th) 743, 209 A.C.W.S. (3d) 717 [Leave to appeal to S.C.C. refused [2012] S.C.C.A. No. 21]; Whiten v. Pilot Insurance Co., [2002] 1 S.C.R. 595, [2002] S.C.J. No. 19, 2002 SCC 18, 209 D.L.R. (4th) 257, 283 N.R. 1, J.E. 2002-405, 156 O.A.C. 201, 20 B.L.R. (3d) 165, 35 C.C.L.I. (3d) 1, [2002] I.L.R. I-4048, REJB 2002-28036, 111 A.C.W.S. (3d) 935

Statutes referred to

Business Practices and Consumer Protection Act, S.B.C. 2004, c. 2 [as am.]

Class Proceedings Act, 1992, S.O. 1992, c. 6 [as am.], s. 29(1)

Consumer Protection Act, 2002, S.O. 2002, c. 30, Sch. A, s. 18(11)

Discriminatory Business Practices Act, R.S.O. 1990, c. D.12, s. 9

Energy Consumer Protection Act, 2010, S.O. 2010, c. 8, s. 28(3)

Payday Loans Act, 2008, S.O. 2008, c. 9, s. 45(b)

Sale of Goods Act, R.S.B.C. 1996, c. 410 [as am.]

Securities Act, R.S.O. 1990, c. S.5, ss. 1 [as am.], Part XVIII [as am.], ss. 76(5), Part XXII [as am.], 122 [as am.], 127 [as am.], 128 [as am.], 130 [as am.], Part XXIII.1 [as am.], ss. 130.1 [as am.], 131 [as am.], 138.1, 138.3 [as am.], (1) [as am.], (2) [as am.], (4) [as am.], 138.13 [as am.]

Securities and Exchange Act of 1934, 15 U.S.C. 78a

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 2.03, 21.01(1)(b), (2)(a), 25.06(1), 25.11, 39

Authorities referred to

Morden, John W., and Paul M. Perell, The Law of Civil Procedure in Ontario (Markham, Ont.: LexisNexis, 2010)

MOTIONS to strike a claim for punitive damages, strike a claim against one defendant and stay an action against the two other defendants. [page28]

John Archibald, for plaintiffs.

Peter J. Osborne and Rory Gillis, for defendant Stephen

Giordanella.

David W. Kent and Richard McClusky, for defendants Farlie, Turner & Co., LLC, and Bayshore Partners, LLC.

John J. Chapman and Adam J. Stephens, for defendants R. Patrick Caldwell, Larry Moeller, Neil E. Schwartzman, Jason A. Williams, Brian L. Stafford, Henry H. Shelton, Frank E. Jaumot, Keith J. Engel, Richard P. Torykian, Sr., Charles E. Peters, Jr., and Deon Vaughan.

PERELL J.: --

A. Introduction

[1] Michael Frank, Sheldon Zamick and Norman Spurgeon bring a proposed class action under the Class Proceedings Act, 1992, S.O. 1992, c. 6 on behalf of all persons who voluntarily or involuntarily disposed of shares of Protective Products of America, Inc. ("Protective Products") between October 8, 2009 and January 13, 2010. Messrs. Frank, Zamick and Spurgeon were shareholders of Protective Products.

[2] The plaintiffs' action is against certain officers and directors of Protective Products, namely, R. Patrick Caldwell, Larry Moeller, Neil E. Schwartzman, Jason A. Williams, Brian L. Stafford, Henry H. Shelton, Frank E. Jaumot, Keith J. Engel, Richard P. Torykian, Sr., Charles E. Peters, Jr., and Deon Vaughan. The plaintiffs sue for breach of Part XXIII.1 of Ontario's Securities Act, R.S.O. 1990, c. S.5 (the "Act").

[3] The directors and officers move to strike the plaintiffs' punitive damages claim from the Fresh as Amended Statement of Claim.

[4] The plaintiffs also sue Stephen Giordanella, who is a former director and CEO of Protective Products.

[5] Mr. Giordanella brings a motion pursuant to rules 21.01(1)(b), 25.06(1) and 25.11 [of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194] to have the plaintiffs'

pleading against him struck for failing to disclose a reasonable cause of action, and, in the alternative, he moves to have paras. 133-35 of the Fresh as Amended Statement of Claim struck out on the grounds that the paragraphs are scandalous, frivolous and vexatious.

[6] With respect to Mr. Giordanella's motion, the parties consented to the admissibility of his affidavit sworn February 6, 2012 and the transcript of his cross-examination. At the hearing of the motion, Mr. Giordanella sought leave to admit this evidence pursuant to rules 2.03, 21.01(2)(a) and 39. I admitted the [page29]evidence, but I reserved the decision about what proper use could be made of it on Mr. Giordanella's motion.

[7] The plaintiffs also sue Farlie, Turner & Co. LLC ("Farlie Turner") and its affiliate Bayshore Partners, LLC ("Bayshore"), which are investment bankers based in Fort Lauderdale, Florida. These defendants were instrumental in Protective Products selling its assets, including a valuable contract with the U.S. Army, to a new, similarly named corporation, Protective Products Enterprises Inc. That sale was brought about as part of bankruptcy proceedings in Florida.

[8] Farlie Turner and Bayshore bring a motion to either (a) stay the action as against them on jurisdictional grounds; or (b) to strike the claims against them on the basis that they disclose no reasonable cause of action.

[9] Their motion potentially raises four issues: (1) does the court have jurisdiction simpliciter over Farlie Turner and Bayshore; (2) if the court has jurisdiction simpliciter over Farlie Turner and Bayshore, should it decline jurisdiction because Ontario is forum non conveniens; (3) did Farlie Turner and Bayshore have a duty of care to the shareholders of Protective Products; and (4) was Farlie Turner and Bayshores' alleged misconduct causative of any loss to the shareholders of Protective Products?

[10] For the reasons that follow,

-- I strike out the claim for punitive damages as against the directors and officers;

-- I strike out the claims against Mr. Giordanella for failure to plead the constituent elements of a cause of action against him. I do not grant leave to amend and, accordingly, the action against Mr. Giordanella should be dismissed;

-- I permanently stay the action as against the Farlie Turner and Bayshore on the grounds that Ontario does not have jurisdiction simpliciter over the claim against them. In these circumstances, it is not necessary for me to decide the alternate grounds for their motion.

B. Factual Background to the Motions

[11] Protective Products manufactured tactical body armour used to protect police officers and military personnel. With a predecessor corporation in Alberta, Canada, Protective Products had come to be incorporated in the State of Delaware, in the United States. [page30]

[12] Protective Products was a "reporting company" under the American Securities and Exchange Act of 1934, 15 U.S.C. 78a. Protective Products shares traded on the Toronto Stock Exchange, and thus it was a "reporting issuer" under the Ontario Securities Act, s. 1 with disclosure obligations under Part XVIII of the Act. It was also a "responsible issuer" in accordance with s. 138.1 of the Act and is, therefore, along with its directors, officers and influential persons, subject to civil liability provisions for secondary market disclosure under Part XXIII.1 of the Act.

[13] Mr. Giordanella owned directly or indirectly 10.3 per cent of the common shares of Protective Products. He was a member of the board of directors from September 2006 to March 18, 2009, and he also served as CEO during this time. In May 2009, he began acting as a consultant for Protective Products.

[14] R. Patrick Caldwell, Larry Moeller, Neil E. Schwartzman, Jason A. Williams, Brian L. Stafford, Henry H. Shelton, Frank

E. Jaumot, Keith J. Engel, Richard P. Torykian, Sr., Charles E. Peters, Jr., and Deon Vaughan were officers or directors of Protective Products.

[15] The plaintiffs owned shares of Protective Products on and before October 8, 2009.

[16] In 2007, Protective Products bid on a contract with the U.S. Army to supply body armour known as an improved outer tactical vest ("IOTV").

[17] On June 16, 2009, pursuant to a written retainer agreement signed in Florida, Protective Products hired Bayshore to assist in evaluating Protective Products' strategic options with respect to the recapitalization or sale of its business and related assets. Bayshore is an affiliate of Farlie Turner and is a registered securities broker-dealer with the Financial Industry Regulatory Authority, the largest independent regulator for securities firms doing business in the United States.

[18] Farlie Turner is an investment bank in Fort Lauderdale, Florida.

[19] The plaintiffs allege that Protective Products engaged Farlie Turner and Bayshore as its exclusive financial advisor and investment banker in connection with the financial restructuring, recapitalization, reorganization, merger or acquisition of Protective Products.

[20] On June 17, 2009, one day after Protective Properties had retained Bayshore and Farlie Turner, Mr. Giordanella resigned as a director. He became a consultant. Under his consulting agreement, Mr. Giordanella was designated as an independent contractor. The agreement specified that he was not to interact [page31]with employees unless directed to do so by the CEO. The consulting agreement specified that he did not "have the power to bind or represent the Company for any purpose whatsoever".

[21] The evidence admitted for this motion revealed that

following his resignation as director, he did not have an office or e-mail address at Protective Products.

[22] Mr. Giordanella's evidence was that after his resignation as director, he had no communications with any director, officer, or employee about the IOTV contract or about any alleged misrepresentations or omissions in respect of the IOTV contract. He says that he was completely excluded from the affairs and business of the corporation after his resignation from the board. He says that he was not even aware that Protective Properties had been awarded the IOTV contract until he was served with the statement of claim in this action. He says that his only communication with Protective Properties was in his role through Albricas, LLC as landlord of premises leased to the corporation. He says that he had nothing whatsoever to do with the events that form the basis of the claims advanced by the plaintiffs.

[23] During the proposed class period, there is no evidence that Mr. Giordanella released or signed any public documents or [made] any public oral statements about Protective Products.

[24] The plaintiffs allege that Mr. Giordanella wanted to buy Protective Products. The plaintiffs allege that during the class period, Mr. Giordanella remained a consultant to the CEO and an insider with a significant financial stake in the company. Further, he remained the sole owner of Albricas, LLC, which owned the research and development testing facility used to test the vests.

[25] Returning to the narrative of events, pursuant to the retainer agreement, Bayshore prepared a confidential investment memorandum (the "CIM") to assist in marketing Protective Products' assets for sale or to raise additional debt or equity capital. Bayshore contacted over 100 parties, and Bayshore made presentations and answered inquiries by potential buyers and capital providers.

[26] As part of its marketing process, Bayshore communicated with prospective investors and lenders in Ontario. It contacted Protective Product's senior secured lender, CIBC, in Toronto.

[27] In August 2009, the U.S. Army advised Protective Products that it would not be awarded an IOTV contract. Protective Products immediately publically disclosed the bad news that its bid was unsuccessful.

[28] However, soon thereafter, on October 8, 2009, the U.S. Army gave Protective Products the good news that all technically [page32]acceptable bids would be awarded an IOTV contract for vests in amounts that could be as few as 44 and as many as 736,000. A contract could be worth potentially $2.7 billion.

[29] The plaintiffs allege that the good news from the U.S. Army constituted a material change in Protective Products' business, operations and affairs that it was required to disclose to shareholders and investors in a timely manner under Ontario's Securities Act.

[30] Protective Products, however, did not disclose the good news to the public, and the plaintiffs' allege that the price of its common shares was artificially deflated. The plaintiffs allege that the directors and officers of Protective Products caused shareholders to suffer a loss by misrepresenting and failing to publicly disclose the awarding of a contract for the manufacture of body armour. The plaintiffs allege that Mr. Giordanella knowingly influenced the misrepresentations and failures to disclose.

[31] Returning again to the narrative, in its efforts to sell the business of Protective Products, Bayshore communicated with the plaintiff Michael Frank, who works as a merchant banker.

[32] Bayshore also contacted the following: M Partners Inc., a Toronto-based investment firm; Geosam Capital Inc., a Toronto-based private equity firm; representatives of the CIBC; Pacific Safety Products, an Ottawa-based company; Fiera Capital, a Montreal-based investment company which was the second largest shareholder of Protective Products; Edco Financial, a Calgary-based investment company; and Triple 5 Group, an Edmonton-based company.

[33] As a result of Bayshore's marketing efforts, approximately 50 parties entered into confidentiality agreements with Protective Products. The interested parties were provided with the CIM. Five parties were advised that Protective Products had received an IOTV contract. Six parties ultimately submitted written expressions of interest in acquiring substantially all of Protective Products assets in a bankruptcy setting, while two parties indicated an interest in providing subordinated debt capital outside of bankruptcy.

[34] On December 21, 2009, Protective Products accepted an offer to purchase assets made by an affiliate of Sun Capital Partners Group V, Inc. ("Sun Capital"). The parties signed a letter of intent, pursuant to which the affiliate proposed to acquire Protective Products' business and substantially all its assets.

[35] On January 13, 2010, Protective Products filed Chapter 11 bankruptcy proceedings in the U.S. Bankruptcy Court, along with an asset purchase agreement indicating that its assets would be sold to an affiliate of Sun Capital, subject to any higher [page33]and better offers from financially qualified parties and to U.S. Bankruptcy Court approval.

[36] On January 19, 2010, the Toronto Stock Exchange suspended trading of Protective Products' shares. Trading never resumed, and the shares were subsequently delisted on February 19, 2010.

[37] In January 2010, as pleaded in paras. 133-35 of the Fresh as Amended Statement of Claim, Mr. Giordanella was arrested and indicted for engaging in schemes to bribe foreign officials to obtain and retain business between May to September 2009. It is not pleaded, but Mr. Giordanella was acquitted of these charges in December 2011.

[38] Bayshore sought and received approval from the U.S. Bankruptcy Court to permit it to continue to act as Protective Products' investment banker and financial advisor during the bankruptcy. The U.S. Bankruptcy Court also approved the

retainer agreement, including a requirement that Protective Products indemnity Bayshore from and against all judgments arising from Bayshore's engagement. In effect, Bayshore was acting as the receiver to sell the assets of Protective Products.

[39] Bayshore advised most of the potential buyers who had signed confidential agreements and seen the CIM that they were permitted to participate in an auction for the purchase of Protective Products' assets. The IOTV contract was disclosed, but there was no general disclosure of the IOTV contract under the Ontario Securities Act during the Florida, U.S. bankruptcy proceeding.

[40] On February 22, 2010, the U.S. Bankruptcy Court approved the sale of substantially all of Protective Products' assets to Protective Products Enterprises ("PPE"). PPE is an affiliate of Sun Capital, incorporated in Delaware. The asset sale to PPE was completed on March 5, 2010.

[41] On December 6, 2010, after learning of the IOTV contract through access to information requests to the U.S. Army, Mr. Frank issued the Statement of Claim in this action on behalf of all persons who voluntarily or involuntarily disposed of shares of Protective Products between August 14, 2009 and March 5, 2010. The class period was subsequently narrowed to the period October 8, 2009 to January 13, 2010.

[42] In the Fresh as Amended Statement of Claim, the plaintiffs sue the former officers and directors of Protective Products, Mr. Giordanella, Farlie Turner and Bayshore. The plaintiffs allege that the defendants failed to disclose to shareholders that Protective Products had been awarded the IOTV Contract. The plaintiffs further allege that some of the defendants affirmatively misrepresented that Protective Products had not been [page34]awarded the IOTV contract. They plead that the misrepresentations and the failures to disclose violate Part XXIII.1 of the Ontario Securities Act. The plaintiffs plead that Farlie Turner and Bayshore breached a duty of care to the shareholders.

[43] With the class action having been commenced, the bankruptcy proceedings continued in the United States. On December 22, 2010, a third amended plan of liquidation was filed with the U.S. Bankruptcy Court. Among other things, the plan of liquidation vests all rights to commence and pursue any and all causes of action against Farlie Turner and Bayshore in the creditor trustee.

[44] On or about February 24, 2011, Protective Products sued Mr. Frank in Florida seeking to permanently enjoin the proposed Ontario class action, and it moved for a temporary injunction to enjoin the Ontario class action.

[45] On March 1, 2011, at a scheduling hearing, without any notice to Mr. Frank, Protective Products, Farlie Turner and the Creditors Committee made submissions to the U.S. bankruptcy judge, Judge Olson, about the merits of the proposed Ontario class action, how the U.S. bankruptcy judge could assert jurisdiction over Mr. Frank and why an anti-suit injunction was necessary.

[46] The preliminary injunction hearing took place as scheduled on March 17, 2011, and on April 11, 2011, the U.S. Bankruptcy Court issued a temporary restraining order and preliminary injunction enjoining Mr. Frank from prosecuting or pursuing the action in Ontario.

[47] On May 17, 2011, Protective Properties obtained a default judgment for a permanent injunction to prevent the prosecution of the Ontario class action.

[48] The plan of liquidation of Protective Properties was approved by order of the U.S. Bankruptcy Court on October 5, 2011.

[49] Mr. Frank never attorned to the jurisdiction of the Florida court, and he has ignored the injunctive orders made in the Florida bankruptcy proceedings. He and the other proposed representative plaintiffs have pursued the proposed class action.

[50] In their action against the directors and officers, the plaintiffs have agreed to withdraw their common law claims and they now pursue only their statutory claims under Part XXIII.1 of the Ontario Securities Act, including a claim for punitive damages. The claim for punitive damages is for $20 million. The only pleading in support of the claim for punitive damages is para. 182 of the Fresh as Amended Statement of Claim, which states: [page35]

> 182. By virtue of their deliberate or reckless indifference to the rights of and duties owed to the Class Members, including the Plaintiffs, the Defendants are deserving of a civil sanction aimed at specific deterrence. The Class Members are entitled to recover aggravated, punitive and exemplary damages.

[51] It should be noted that although para. 182 of the Statement of Claim refers to aggravated damages, the plaintiff's prayer for relief does not advance that claim.

[52] In their motion, the directors and officers take the position that having withdrawn the common law claims, the plaintiffs cannot make a claim for punitive damages based on Part XXIII.1 of the Ontario Securities Act.

[53] In the Fresh as Amended Statement of Claim, the plaintiffs allege that Farlie Turner and Bayshore were negligent, grossly negligent or reckless in fulfilling their duties pursuant to the retainer agreement. The plaintiffs allege that Farlie Turner and Bayshore were negligent by selectively disclosing the IOTV contract to Sun Capital.

[54] The cause of action against Farlie Turner and Bayshore, which it will be important to keep in mind is not a statutory action but a novel common law claim, is set out in paras. 158 to 165 of the pleading, which state:

> 158. By virtue of the provisions of section 76(2) of the Securities Act:
>
> 76. (2) No reporting issuer and no person or company in a

special relationship with a reporting issuer shall inform, other than in the necessary course of business, another person or company of a material fact or material change with respect to the reporting issuer before the material fact or material change has been generally disclosed.

159. The Plaintiffs on their own behalf and on behalf of the other Class Members expressly plead that, throughout the Class Period, Farlie Turner was in a "special relationship" with [Protective Properties] pursuant to section 76(5) of the Securities Act.

160. During the Class Period, Farlie Turner informed Sun Capital that [Protective Properties] had been awarded the IOTV Contract. This significant positive material information was a material change or a material fact in respect of [Protective Properties] that Farlie Turner had no reason to believe was generally disclosed and in fact knew, or was reckless in not knowing, that [Protective Properties] had not disclosed to the secondary market.

161. This selective disclosure was outside Farlie Turner's necessary course of business for the following reasons, among others:

(a) There was no legitimate business or competitive reason for keeping the material information relating to the IOTV Contract confidential (nor had [Protective Properties] ever applied for an exemption from its obligations under the Securities Act to maintain such confidentiality); [page36]
(b) Farlie Turner did not update its marketing process and materials, in a timely manner or at all, to include the fact that [Protective Properties] had been awarded the IOTV Contract;
(c) Farlie Turner did not send to the parties that had signed an NDA, at all or in a timely manner, an updated CIM including the fact that [Protective Properties] had been awarded the IOTV Contract;
(d) The artificially deflated price of the Shares throughout the Class Period, resulting from non-disclosure of significant positive material

information relating to the IOTV Contract, made it more difficult for [Protective Properties] to raise external financing either in the form of equity or debt and/or worsened the terms (both the price and the covenants) upon which any financing would have been offered.

162. Farlie Turner, having knowledge of the undisclosed material change or material fact relating to the IOTV Contract, owed a duty to each Class Member not to inform Sun Capital of the undisclosed material change or material fact outside the necessary course of business.

163. In breach of that duty, during the Class Period, Farlie Turner informed Sun Capital that [Protective Properties] had been awarded the IOTV Contract outside the necessary course of business. Farlie Turner knew or was reckless in not knowing that this material change or material fact had not been generally disclosed. Its selective disclosure to Sun Capital was deliberate or was made with reckless disregard for the Class Members' interests and therefore meets the threshold for gross negligence or wilful misconduct.

164. By breaching its duty, Farlie Turner allowed Sun Capital to gain an unfair informational advantage over the Class Members regarding the true value of [Protective Properties'] assets. As a result, Farlie Turner knew or ought to have known, or was reckless in not knowing, that the Shares would remain artificially deflated throughout the Class Period through artificial lessening of competition in the purchase of those Shares because the significant positive material information about the Company was never generally disclosed to the secondary market.

165. As a result of Farlie Turner's negligence, gross negligence, or wilful misconduct the Class Members suffered damages. The Plaintiffs plead that:

(a) the damages to Class Members arising from Farlie Turner's misconduct alleged herein are separate and distinct from any damages suffered by [Protective Properties]; or

(b) in the alternative, if the Class Members' damages are reflective of a loss to [Protective Properties], the Class Members can claim for those damages because:

(i) [Protective Properties] has no cause of action against Farlie Turner; or

(ii) [Protective Properties] is impecunious and is unable to pursue its claim against Farlie Turner by reason of Farlie Turner's misconduct alleged herein.

[55] The nub of the plaintiffs' action against Farlie Turner and Bayshore is found in para. 162, which alleges that Farlie Turner [page37]owed a duty to each class member not to inform Sun Capital of the undisclosed material change (the good news about the IOTV contract) outside the necessary course of business.

[56] For the purposes of the jurisdiction simpliciter analysis below, I will assume that there is a cause of action in negligence by a corporation's shareholders against a person who is in a special relationship with the corporation not to inform a potential purchaser of the corporation's assets of an undisclosed material change outside the necessary course of business.

[57] Assuming this novel cause of action exists, it appears that subject to arguments about causation and proof of damages, that Farlie Turner and Bayshore would appear to admit that they breached the duty not to selectively inform.

[58] In their motion that asserts that this court does not have jurisdiction simpliciter, it is admitted that Bayshore did advise the potential purchasers that were still expressing an interest in acquiring Protective Products' assets about the IOTV contract, thus breaching the purported duty not to inform outside the normal course of business. These potential purchasers all were located in the United States.

[59] Finally, before discussing the various mtions, one additional background fact should be noted. In November 2011,

under s. 29(1) of the Class Proceedings Act, 1992, Mr. Frank sought an order granting leave to discontinue the action against the Mr. Giordanella without prejudice to his right to seek an order to add Mr. Giordanella as a defendant should new evidence arise or should circumstances permit.

[60] I dismissed the motion to discontinue without prejudice to a subsequent motion by Mr. Frank to discontinue the action as against Mr. Giordanella. See Frank v. Farlie, Turner & Co., LLC, [2011] O.J. No. 5567, 2011 ONSC 7137 (S.C.J.). By resisting Mr. Giordanella's motion, the plaintiffs now seek to keep him a party to the litigation.

C. Discussion

1. Do the plaintiffs have a claim for punitive damages against the officers and directors of Protective Products?

(a) The argument of the directors and officers

[61] The directors and officers of Protective Products argue that that the plaintiffs do not have and cannot have a claim for punitive damages in the circumstances of this case where no common law but only statutory claims under Part XXIII.1 of the Ontario Securities Act are being advanced. [page38]

[62] Their argument proceeds as follows. The plaintiffs do not advance any common law claims. Their claims are exclusively statutory. The claims being advanced by the plaintiffs are a non-disclosure claim under s. 138.3(4) (failure to make timely disclosure) of the Ontario Securities Act and positive misrepresentation claims under ss. 138.3(1) and 138.3(2) of the Act. All of these sections provide "a right of action for damages". Thus, the question to be decided is whether "the right of action for damages" under ss. 138.3(1), 138(2) and 138.3(4) allows a right of action for punitive damages. The directors and officers submit that the answer to that question is that it is plain and obvious that these sections only authorize compensatory not punitive damages. Punitive damages are not an available remedy under Part XXIII.1 of the Ontario Securities Act because punitive damages would be inconsistent with the specific wording of the Act and also inconsistent with the Act's scheme and purpose, which is to award compensatory

damages but subject to liability limits that restrict the quantum of compensation.

[63] Further, the directors and officers argue that the civil remedy provisions in Part XXIII.1 are a very carefully balanced statutory code designed to create liability for Securities Act violations but not so much liability as to dissuade skilled persons from coming forward to become corporate officers or directors. Punitive damages, it is submitted, do not fit with this scheme.

[64] The directors and officers argue that it was difficult for the legislature to achieve the policy purposes of Part XXIII.1 because, practically speaking, the burden of paying compensation to investors for secondary market misrepresentations will be shifted onto the other shareholders of the company that breached the Act or onto the shareholders of other corporations whose corporations will pay higher insurance premiums for directors and officers insurance. They submit that the equilibrium of the statutory scheme should not be disturbed by a claim for punitive damages.

[65] The directors and officers argue that in order to achieve a balance between on the one hand enforcing the Ontario Securities Act and compensating investors injured by violations of the Act and on the other hand not harming innocent shareholders and investors and not discouraging persons from becoming officers and directors on the other hand, the legislature set a "damage cap" or "liability limit" that normally restricts the quantum of damages to which an officer or director is exposed. Subject to some exceptions, the damage cap exposure of an individual officer or director for a misrepresentation is a maximum of one-half the total compensation received by that individual in the [page39]previous 12 months. The directors and officers submit that awarding punitive damages would disrupt and circumvent the objects of Part XXIII.1 of the Ontario Securities Act.

[66] In further support of their argument that the Ontario Securities Act does not provide for punitive damages under Part XXIII.1, the directors and officers make three general

interpretative points: (1) the Act already expressly provides for punitive sanctions in its enforcement provisions; (2) where in other parts, the Act refers to damages, the damages are only compensatory damages; and (3) consumer protection legislation that gives plaintiffs the right to claim punitive damages typically does so explicitly.

[67] On the first interpretative point, the officers and directors argue that for the purposes of the Ontario Securities Act, there is no need to interpret damages in Part XXIII.1 to include punitive damages, because there are already ample punitive provisions in the Act. Under s. 122 of Part XXII (Enforcement), there are quasi-criminal provisions for Securities Act misrepresentation violations. Under s. 127 of the Act, the Ontario Securities Commission may impose administrative penalties of up to $1 million for each failure to comply with the Act. Under s. 128, the Ontario Securities Commission may apply to the court for compliance order and the court may order a person or the person or company to pay general or punitive damages. Sections 122, 127 and 128 state:

> 122(1) Every person or company that, . . .
>
> . . . . .
>
> (b) makes a statement in any application, release, report, preliminary prospectus, prospectus, return, financial statement, information circular, take-over bid circular, issuer bid circular or other document required to be filed or furnished under Ontario securities law that, in a material respect and at the time and in the light of the circumstances under which it is made, is misleading or untrue or does not state a fact that is required to be stated or that is necessary to make the statement not misleading; or
>
> (c) contravenes Ontario securities law,
>
> is guilty of an offence and on conviction is liable to a fine of not more than $5 million or to imprisonment for a term of not more than five years less a day, or to both.
>
> . . . . .

Directors and officers

(3) Every director or officer of a company or of a person other than an individual who authorizes, permits or acquiesces in the commission of an offence under subsection (1) by the company or person, whether or not a charge has been laid or a finding of guilt has been made against the company or person in respect of the offence under subsection (1), is guilty of an offence [page40]and is liable on conviction to a fine of not more than $5 million or to imprisonment for a term of not more than five years less a day, or to both.

. . . . .

Orders in the public interest

127(1) The Commission may make one or more of the following orders if in its opinion it is in the public interest to make the order or orders:

. . . . .

9. If a person or company has not complied with Ontario securities law, an order requiring the person or company to pay an administrative penalty of not more than $1 million for each failure to comply.

. . . . .

Applications to court

128(1) The Commission may apply to the Superior Court of Justice for a declaration that a person or company has not complied with or is not complying with Ontario securities law.

. . . . .

Remedial powers of court

(3) If the court makes a declaration under subsection (1), the court may, despite the imposition of any penalty under section 122 and despite any order made by the Commission under section 127, make any order that the court considers appropriate against the person or company, including, without

limiting the generality of the foregoing, one or more of the following orders:

. . . . .

13. An order requiring the person or company to compensate or make restitution to an aggrieved person or company.

14. An order requiring the person or company to pay general or punitive damages to any other person or company.

(Emphasis added)

[68] For the second interpretative point, the officers and directors point out that before 2002, when Part XXIII.1 was enacted, the civil remedy sections of the Ontario Securities Act were directed at compensatory damages and they made no mention of punitive damages. The provisions providing for civil liability for prospectus misrepresentation and for misrepresentations in takeover circulars or information memoranda, now found in ss. 130, 130.1 and 131 of the Act, allow claims for "damages" but do not identify punitive damages.

[69] For the third interpretative point, the officers and directors point to the Consumer Protection Act, 2002, S.O. 2002, c. 30, Sch. A, s. 18(11); Energy Consumer Protection Act, 2010, S.O. 2010, c. 8, s. 28(3) [page41;] Payday Loans Act, 2008, S.O. 2008, c. 9, s. 45(b); [and] Discriminatory Business Practices Act, R.S.O. 1990, c. D.12, s. 9 as examples where punitive damages are expressly mentioned.

[70] In still further support for their argument that Part XXIII.1 claims for damages do not include punitive damages, the directors and officers argue that the law reform and legislative history of Part XXIII.1 support its argument that punitive damages are not available. They explain that the policy ideas behind Part XXIII.1 derive their origin from the 1995 Toronto Stock Exchange Committee Report, commonly referred to as the Allen Committee Interim Report and the final version of that report in 1997 entitled "Responsible Corporate Disclosure -- A Search for Balance".

[71] The directors and officers submit that the Allen Committee recommended major changes to the Securities Act that would permit civil claims for damages for secondary market violations. It recommended a highly detailed statutory regime for damage claims. In its Interim Report, at p. 69, the Allen Committee developed what it described as a simple approach to damage assessment but conceded that this approach would exclude some shareholder claims that might be considered legitimate. The committee recommended that damages be calculated on a simple out-of-pocket basis; i.e., damages would amount, in the case of a purchaser (or seller) during the period of misrepresentation or delay of disclosure, to the lesser of actual loss and the difference between the price paid (or received) and a benchmark post-disclosure price. The committee recommended that for a class action, each member of a class applying for payment out of the fund should not receive an amount in excess of actual out-of-pocket damages and should receive an amount pro rata to actual out-of-pocket damages if the damages awarded to the class were less than the total loss claimed. In the Allen Committee's Interim Report, there is no mention of punitive damages being a part of the damages assessment.

[72] After the release of the Interim Report, there was public consultation, discussion and consideration. A final report was issued. In its final report, the Allen Committee stated, at pp. 58-59, that it continued to recommend that damages be calculated on a simple out-of-pocket basis. Once again, there was no suggestion of punitive damages.

[73] The Allen Committee also made recommendations that it believed essential to balance the policies of the proposed legislation. It proposed that the liability of an issuer would be limited to 5 per cent of its market capitalization and that if an officer or [page42]director was liable that the damages available against him or her would normally be capped at 50 per cent of their compensation in the year before the misrepresentation.

[74] The Allen Committee also recommended that the liability limit of officers and directors not apply if the individual

officer or director had knowingly made the misrepresentation. The sanction in the situation of a knowing violation would be the denial of the statutory cap on the officer or director's exposure to compensatory damages. The sanction would remove the cap on the compensatory damages.

[75] The Allen Committee reports were the subject of further debate moderated by the Canadian Securities Administrators ("CSA"). The CSA recommended that legislation be enacted that corresponded, with one exception, to all the major recommendations of the Allen Committee. The CSA explained the rationale for limited secondary market civil remedies, in part, as follows:

> Limited Compensation Model
>
> The CSA's new proposal is based on the belief that significant but limited liability would be an effective deterrent to misrepresentations and would significantly improve the quality of corporate disclosure. The new proposal keeps the limited compensation model, except in the case of a "knowing" misrepresentation or failure to make timely disclosure. In those cases, the liability caps do not apply.

[76] Again, the officers and directors note that there is not one word in the CSA proposals that suggests the availability of punitive damages under what was to become Part XXIII.1.

[77] From all this, the directors and officers argue that punitive damages are not and should not be a part of a claim solely made pursuant to Part XXIII.1 of the Ontario Securities Act.

(b) The counterargument of the plaintiffs

[78] The plaintiffs agree that the "damages" referred to in Part XXIII.1 of the Ontario Securities Act means compensatory damages. However, they argue that explicit authorization to seek punitive damages is not required and that there is nothing in the Act that excludes a plaintiff from seeking punitive damages.

[79] The plaintiffs submit that the remedy of punitive damages is consistent with the objectives of the Act as a whole. In this last respect, the plaintiffs submit that the enforcement of the objectives of the Act is achieved by all of securities regulators, criminal law authorities and private civil law claims through private suits and class action proceedings. The plaintiffs argue that all these mechanisms are important and none of them is mutually exclusive and that punitive damages are part of the private law enforcement of the Act. [page43]

[80] The plaintiffs argue that they have a right at common law to seek the remedy of punitive damages when there is an "actionable wrong", which would include a breach of a statutory duty. They rely on s. 138.13 of the Ontario Securities Act, which states:

> 183.13 The right of action for damages and the defences to an action under section 138.3 are in addition to, and without derogation from, any other rights or defences the plaintiff or defendant may have in an action brought otherwise than under this Part.

(Emphasis added)

[81] Relying on Whiten v. Pilot Insurance Co., [2002] 1 S.C.R. 595, [2002] S.C.J. No. 19; Richard v. Time Inc., [2012] 1 S.C.R. 265, [2012] S.C.J. No. 8, at paras. 149-50; J-Sons Inc. v. N.M. Paterson & Sons Ltd., [2009] M.J. No. 355, 2009 MBQB 263, at para. 49, affd [2010] M.J. No. 199, 2010 MBCA 67; Lubrizol Corp. v. Imperial Oil Ltd., [1996] F.C.J. No. 454, [1996] 3 F.C. 40 (C.A.); and Jennett v. Federal Insurance Co. (1976), 13 O.R. (2d) 617, [1976] O.J. No. 2265 (H.C.J.), at paras. 4-6, the plaintiffs argue that punitive damages are generally available for any civil wrongdoing that merits condemnation by the court. Circumstances where punitive damages are merited will include but are not limited to the commission of intentional torts. Punitive damages are available in cases of defamation, negligence, nuisance, breach of contract, breach of fiduciary duty, infringement of copyright, patents and trade-marks, and in any civil suit in which the plaintiff proves that the defendant's conduct was malicious, oppressive

and high-handed such that it offends the court's sense of decency.

[82] The plaintiffs submit that they should be permitted to seek the remedy of punitive damages in respect of their statutory cause of action under Part XXIII.1. They submit that the availability of punitive damages would reinforce, not undermine, the objectives of the Ontario Securities Act and, at the very least, it is not plain and obvious that the plaintiffs cannot claim such relief.

(c) Analysis

[83] There is some common ground in the arguments and counterarguments of the directors and officers and the plaintiffs. Both sides agree that the express reference to "damages" in Part XXIII.1 of the Ontario Securities Act is to compensatory damages. Both sides agree that compensatory damages and punitive damages [page44]play different roles in the law of remedies. Both sides agree, as they must, that Whiten v. Pilot Insurance Co., supra, is the leading authority about the role played by punitive damages in the law of remedies and the general circumstances when the remedy is appropriate. Both sides agree that it is a matter of statutory interpretation whether the Act excludes or does not preclude punitive damages. I also agree with these points of argument made by both sides.

[84] Both sides make several points of argument that, in my opinion, are either irrelevant or beg and do not answer the question of whether the plaintiffs have a claim for punitive damages supported solely by Part XXIII.1 of the Securities Act.

[85] Thus, I find the directors and officers' arguments that the Act already provides punitive provisions and that consumer protection legislation typically expressly provides for punitive damages not helpful. I find the plaintiffs' arguments that there is nothing the Act that expressly excludes punitive damages; punitive damages are a useful way to enforce the Act; and other statutory claims have been held to support punitive damages unhelpful. I find the plaintiffs' argument that the existence of other punitive provisions in the Act would not

necessarily preclude punitive damages under the common law a correct argument but one that is not helpful in determining whether or not punitive damages are precluded as a matter of statutory interpretation of the Ontario Securities Act.

[86] Accepting the matters of common ground and ignoring the parties' arguments that beg the question, in my opinion, the argument that persuades me is the officers and directors' argument that it is plain and obvious that a claim for punitive damages supported only be the predicate wrongdoing of a breach of Part XXIII.1 of the Ontario Securities Act is inconsistent with the scheme of Part XXIII.1, which carefully calibrates and achieves a balance between compensation for a director's or officer's contraventions of the Act and discouraging persons from becoming officers and directors.

[87] I agree that allowing a claim for punitive damages would circumvent the policies of Part XXIII.1 of the Act of having caps on the quantum of purely compensatory damages and lifting those caps in exceptional circumstances.

[88] The case at bar demonstrates how both policies of the Act would be circumvented by an award of compensatory damages. Visualize: if the court were to determine that a director contravened Part XXIII.1 of the Act, the director's liability would be capped, but that cap would be lifted if the court were persuaded that the contravention of the Act deserved the condemnation of punitive damages. If the court were to determine that a director contravened Part XXIII.1 knowingly, then the cap on compensatory damages would be lifted and then the exposure to liability [page45]of the director would be further extended beyond compensatory damages to add a claim for punitive damages, which are non-compensatory but serve a different purposes.

[89] If the plaintiffs were candid, they would concede that their claim for punitive damages for contravention of Part XXIII.1 is precisely for the purpose of circumventing the caps on liability that is the mechanism used by the legislature in Part XXIII.1 to regulate the heat of exposing directors and officers to more liability (by removing the common law

requirement in negligent misrepresentation cases that the plaintiff prove reasonable reliance) and the chill of discouraging persons from becoming officers and directors by the increased exposure to liability.

[90] If they were candid, the plaintiffs would also concede that they are attempting to circumvent the mechanism used by the legislature to recognize and to moderate the fact that, practically speaking, the increased liability of corporations, directors and officers will be directly borne by other shareholders of the culpable corporation or indirectly borne by the shareholders of other corporations by their corporation's increased insurance premiums.

[91] I agree with the officers and directors' argument that the law reform and legislative history of Part XXIII.1 support their argument that Part XXIII.1 of the Ontario Securities Act will not support a claim for punitive damages and, therefore, this claim should be struck from the Fresh as Amended Statement of Claim.

[92] I also draw support for the conclusion that the punitive damages claim should be struck from the recent decision by the British Columbia Court of Appeal in Koubi v. Mazda Canada Inc., [2012] B.C.J. No. 1464, 2012 BCCA 310. The Koubi case involved a claim for waiver of tort, which is similar to a claim for punitive damages in that it has a deterrent purpose and is measure of liability independent of a plaintiff's compensatory losses. In Koubi, the court decertified a class action and held that a claim for waiver of tort based on the wrongdoing of breaching the Business Practices and Consumer Protection Act, S.B.C. 2004, c. 2 or the Sale of Goods Act, R.S.B.C. 1996, c. 410 did not disclose a reasonable cause of action.

[93] I, therefore, grant the director and officers' motion.

2. Do the plaintiffs plead a reasonable cause of action against Mr. Giordanella?

[94] The Fresh as Amended Statement of Claim alleges that Mr. Giordanella "knowingly influenced" the directors and officers

of Protective Products to misrepresent to its shareholders [page46]and to fail to disclose that it had been awarded the IOTV contract, in contravention of s. 138.3 of the Securities Act.

[95] Section 138.3 of the Act states:

Liability for secondary market disclosure

Documents released by responsible issuer

138.3(1) Where a responsible issuer . . . releases a document that contains a misrepresentation, a person or company who acquires or disposes of the issuer's security during the period between the time when the document was released and the time when the misrepresentation contained in the document was publicly corrected has, without regard to whether the person or company relied on the misrepresentation, a right of action for damages against,

. . . . .

(d) each influential person, and each director and officer of an influential person, who knowingly influenced,

(i) the responsible issuer . . . to release the document, or

(ii) a director or officer of the responsible issuer to authorize, permit or acquiesce in the release of the document; and . . . .

Public oral statements by responsible issuer

(2) Where a person with actual, implied or apparent authority to speak on behalf of a responsible issuer makes a public oral statement that relates to the business or affairs of the responsible issuer and that contains a misrepresentation, a person or company who acquires or disposes of the issuer's security during the period between the time when the public oral statement was made and the time when the misrepresentation contained in the public oral statement was publicly corrected has, without regard to whether the person or company relied on the

misrepresentation, a right of action for damages against,

. . . . .

(d) each influential person, and each director and officer of the influential person, who knowingly influenced,

(i) the person who made the public oral statement to make the public oral statement, or

(ii) a director or officer of the responsible issuer to authorize, permit or acquiesce in the making of the public oral statement; and

. . . . .

Influential persons

(3) Where an influential person . . . releases a document or makes a public oral statement that relates to a responsible issuer and that contains a misrepresentation, a person or company who acquires or disposes of the issuer's security during the period between the time when the document was released or the public oral statement was made and the time when the [page47]misrepresentation contained in the document or public oral statement was publicly corrected has, without regard to whether the person or company relied on the misrepresentation, a right of action for damages against,

. . . . .

(d) the influential person; . . . .

. . . . .

Failure to make timely disclosure

(4) Where a responsible issuer fails to make a timely disclosure, a person or company who acquires or disposes of the issuer's security between the time when the material change was required to be disclosed in the manner required under this Act or the regulations and the subsequent disclosure of the material change has, without regard to whether the person or company relied on the responsible issuer having complied with its disclosure requirements, a right of action for damages against,

. . . . .

(c) each influential person, and each director and

officer of an influential person, who knowingly influenced,

(i) the responsible issuer . . . in the failure to make timely disclosure, or

(ii) a director or officer of the responsible issuer to authorize, permit or acquiesce in the failure to make timely disclosure.

[96] Mr. Giordanella argues that the plaintiffs' pleading does not plead any material facts to indicate when, how or for what reason Mr. Giordanella "knowingly influenced" the directors and officers of Protective Products. He argues that the claim against him should be struck in its entirety because it fails to plead a single material fact or any particulars to support the allegation that he knowingly influenced the alleged misrepresentations and failures to disclose, as required by s. 138.3 of the Securities Act.

[97] In J.W. Morden and P.M. Perell, The Law of Civil Procedure in Ontario (Markham, Ont.: LexisNexis, 2010), I discuss the pleading of material facts and the pleading of evidence, at pp. 344-55, as follows (footnotes omitted):

The Nature of Material Facts

The heart of the system of fact pleadings is that the parties plead the material facts that constitute their claim or defence. The most important rule about pleadings is that "[e]very pleading shall contain a concise statement of the material facts on which the party relies for the claim or defence, but not the evidence by which those facts are to be proved." This rule directs the disclosure of the "material" facts, which include facts that establish the constituent elements of the claim or defence.

In the context of pleadings, "material" means necessary for a complete cause of action[.][page48]

The material facts are to be stated concisely, which is to say that they should be set out with precision and clarity. If a material fact necessary for a cause of action is

> omitted, the statement of claim is bad and the remedy is a motion to strike the pleadings, not a motion for particulars[.]
>
> Material facts include facts that the party pleading is entitled to prove at trial, and at trial, anything that affects the determination of the party's rights can be proved; accordingly, a material fact includes facts that can have an effect on the determination of a party's rights. Conversely, a fact that is not provable at the trial or that is incapable of affecting the outcome is immaterial and ought not to be pleaded. A pleading of fact will be struck if it cannot be the basis of a claim or defence and is designed solely for the purposes of atmosphere or to cast the opposing party in a bad light. As described by Justice Riddell in Duryea v. Kaufman, such a plea is said to be "embarrassing". Justice Riddell said: No pleading can be said to be embarrassing if it alleges only facts which may be proved -- the opposite party may be perplexed, astonished, startled, confused, troubled, annoyed, taken aback, and worried by such a pleading -- but in a legal sense he cannot be "embarrassed". But no pleading should set out a fact which would not be allowed to be proved -- that is embarrassing.
>
> Material Facts, Not Evidence, to be Pleaded
>
> A pleading should not describe the evidence that will prove a material fact. Pleadings of evidence may be struck out. The difference between pleading material facts and pleading evidence is a difference in degree and not of kind. What the prohibition against pleading evidence is designed to do is to restrain the pleading of facts that are subordinate and that merely tend toward proving the truth of the material facts. The classification of a fact as a material fact or as evidence will depend upon the circumstances of the case.

[98] To that discussion, I add that the causes of action must be clearly identifiable from the facts pleaded and the cause of action must be supported by facts that are material: Cerqueira v. Ontario, [2010] O.J. No. 3037, 2010 ONSC 3954 (S.C.J.), at para. 11.

[99] I agree with Mr. Giordanella's essential submission that the plaintiffs have failed to plead the material facts of a cause of action against him under s. 138.3 of the Ontario Securities Act.

[100] In my opinion, there are three constituent elements to claim under s. 138.3 of the Act, namely, (1) the defendant being an influential person; (2) the defendant exercising his or her influence; and (3) the defendant knowingly exercising influence. Section 138.3 involves being a certain type of person (an influential person) knowingly effecting the conduct of others (knowingly influencing). The plaintiffs label Mr. Giordanella an influential person, and they plead the material facts that would explain why he was an influential person; however, the plaintiffs never plead what Mr. Giordanella did to exercise his influence or power as an influential person. The plaintiffs fail to plead the material facts to constitute a cause of action against Mr. Giordanella. [page49]

[101] In circumstances where a reasonable cause of action could be pleaded but the plaintiff has failed to plead the material facts to perfect the constituent elements of that cause of action, the normal order is to strike the plaintiff's pleading with leave to amend.

[102] In the case at bar, however, as noted in the introduction to these reasons, there is the unusual circumstance that the parties consented to the admissibility of Mr. Giordanella's affidavit sworn February 6, 2012 and the transcript of his cross-examination. In making my decision about the adequacy of the plaintiffs' Fresh as Amended Statement of Claim, I have ignored this evidence, and I confined myself to the pleaded material facts. But, I will not ignore the evidence in exercising my discretion to grant or refuse leave to amend.

[103] In this regard, having had an ample opportunity to discover what Mr. Giordanella did beyond just being an influential person, the plaintiffs could not identify any influential conduct, and his evidence is he did nothing and did

not even know about the awarding of the IOTV contract. Based on the evidence introduced on consent, I am satisfied that no useful purpose would be served by granting the plaintiffs leave to amend to plead more material facts against Mr. Giordanella.

[104] The plaintiffs argue, however, that finding that the pleading discloses no reasonable cause of action and not granting leave to amend would be inconsistent with my ruling in December 2011 refusing a discontinuance against Mr. Giordanella.

[105] I see no inconsistency. For the purposes of the discontinuance motion, I assumed that the plaintiffs had or could properly plead all the requisite elements for "influential person" liability under Part XXIII.1 of the Securities Act. Their ability to do so has now been tested, and they have not been able to plead the constitute elements of the claim under s. 138.1 of the Ontario Securities Act.

[106] Accordingly, I grant Mr. Giordanella's motion to strike the claim against him.

3. Are the allegations against Mr. Giordanella in paras. 133 to 135 of the Fresh as Amended Statement of Claim scandalous, frivolous and vexatious?

[107] Although given the above conclusions, it is not, technically speaking, necessary to rule about paras. 133-35 of the Fresh as Amended Statement of Claim, my conclusion is that these allegations are immaterial and ought not to have been pleaded. [page50]

[108] These paragraphs should be struck because they are immaterial and the paragraphs are designed solely for the purposes of atmosphere or to cast Mr. Giordanella in a bad light.

4. Does the court have jurisdiction simpliciter over Farlie, Turner and Bayshore?

[109] To determine whether it has jurisdiction to hear an action against a foreign defendant, an Ontario court must determine if a "real and substantial connection" exists between

the claim against the foreign defendant and Ontario.

[110] In Club Resorts Ltd. v. Van Breda, [2012] 1 S.C.R. 572, [2012] S.C.J. No. 17, 2012 SCC 17, in the context of a tort claim, the Supreme Court held, at para. 90 of its judgment, that a court may presumptively assume jurisdiction on the basis of a real and substantial connection if (a) the defendant is domiciled or resident in the province; (b) the defendant carries on business in the province; (c) the tort was committed in the province; and (d) a contract connected with the dispute was made in the province.

[111] The plaintiffs in the case at bar concede that none of the presumptive factors apply.

[112] The Supreme Court of Canada indicated, however, at para. 92 of its judgment, that the list of presumptive connecting factors is not closed, and a court may identify new factors that will presumptively entitle it to assume jurisdiction.

[113] To identify a new presumptive factor, a court should consider factors that give rise to a relationship with the forum similar in nature to the relationship that emerges from the presumptive factors. Relevant considerations include (a) similarity of the connecting factor with the recognized presumptive connecting factors; (b) treatment of the connecting factor in the case law; (c) treatment of the connecting factor in statute law; and (d) treatment of the connecting factor in the private international law of other legal systems with a shared commitment to order, fairness and comity.

[114] The Supreme Court stated that presumptive connecting factors generally point to a relationship between the subject matter of the litigation and the forum such that it would be reasonable to expect that the defendant would be called to answer legal proceedings in that forum.

[115] The plaintiffs submit that Farlie Turner's and Bayshore's participation in Ontario's capital markets and its engagement of the province's regulatory regime presumptively

connects it to Ontario. They submits that their common law negligence claim arises out of Farlie Turner's alleged failure to meet [page51]its statutory obligations under the Ontario Securities Act and that through its performance of professional services to Protective Products, Farlie Turner was in a special relationship as defined by s. 76(5) of the Ontario Securities Act.

[116] The plaintiffs submit that the proposed connecting factor is similar to the existing connecting factor of "carrying on business" in Ontario and that Protective Products' reporting issuer status and its listing and public trading on the Toronto Stock Exchange were integral aspects of Farlie Turner's retainer, which might include selling its shares or raising equity or debt capital in the Ontario capital market. Indeed, as part of its retainer, Bayshore communicated with Ontario-based prospective investors and lenders, and existing shareholders and lenders, in Ontario and elsewhere in Canada. The plaintiffs submit that Farlie Turner and Bayshore would have reasonably expected that they would be called to answer legal proceedings in Ontario.

[117] The plaintiffs rely on case law about the constitutionality of provincial securities legislation and about the jurisdiction simpliciter of provincial courts over market intermediaries or investors outside of the province. See Torudag v. British Columbia (Securities Commission), [2011] B.C.J. No. 2150, 2011 BCCA 458, leave to appeal to S.C.C. dismissed [2012] S.C.C.A. No. 21; Asbestos Corp. (Re) (1992), 10 O.R. (3d) 577, [1992] O.J. No. 2232 (C.A.); Reference re Securities Act (Canada), [2011] 3 S.C.R. 837, [2011] S.C.J. No. 66, 2011 SCC 66.

[118] New presumptive factors are not ad hoc factors to justify the court assuming jurisdiction in a particular case, and thus Farlie Turner's and Bayshore submit that there is no case for establishing a new presumptive factor to be used for the immediate case and for other cases in the future.

[119] I agree with Farlie Turner's and Bayshore's arguments, and, in my opinion, the plaintiffs have not met the onus on

them of demonstrating a new presumptive factor.

[120] I respect the ingenuity of the plaintiffs' argument, but they cannot demonstrate a presumptive factor by sleight of hand. The plaintiffs submit that Farlie Turner's and Bayshore's participation in Ontario's capital markets and its engagement of the province's regulatory regime is a presumptive connecting factor, but, in truth, Farlie Turner are being sued as a quasi-receiver in bankruptcy for a novel common law tort and they are not being sued for being engaged in or for contravening Ontario's securities legislation.

[121] Farlie Turner and Bayshore are being sued because they allegedly breached a common law duty of care to the shareholders [page52]of Protective Products. As I noted above, the nub of the plaintiffs' action against Farlie Turner and Bayshore is found in para. 162 of the Fresh as Amended Statement of Claim, which alleges that Farlie Turner owed a duty to each class member not to inform Sun Capital of the undisclosed material change (the good news about the IOTV contract) outside the necessary course of business. It is alleged that they were negligent, grossly negligent or reckless in fulfilling their duties pursuant to the retainer agreement by selectively disclosing the IOTV contract to Sun Capital.

[122] The plaintiffs' essential allegation against Farlie Turner and Bayshore is of a breach of a novel common law duty owed shareholders.

[123] Part of the plaintiffs' sleight of hand is their pleading in para. 159 of the Fresh as Amended Statement of Claim that Farlie Turner and Bayshore were in "a 'special relationship' with [Protective Properties] pursuant to section 76(5) of the Securities Act". The sleight of hand is that for the purposes of a duty of care analysis of the common law tort of negligence or negligent misrepresentation, the issue is whether there is a common law special relationship giving rise to a duty of care between the shareholders, but the defendants rather plead a statutory special relationship between Protective Properties (not the plaintiffs) and the defendants as the basis of the duty of care to the plaintiffs.

[124] In the case at bar, it is not alleged that Farlie Turner and Bayshore breached the Ontario Securities Act from which it might be argued that, although there is no nominate tort of breach of statute, the breach of a statute can be evidence of a breach of a duty of care. Nevertheless, by a pleadings sleight of hand, the plaintiffs give the impression that their claim against these defendants is connected to Ontario by Farlie Turner's and Bayshore's participation in Ontario's capital markets and their alleged engagement of the province's regulatory regime over the capital market.

[125] This may be a clever or ingenious pleading, but the material facts pleaded in support of the plaintiffs' novel common law tort reveal and the evidence brought forward on the motion challenging the jurisdiction simpliciter of Ontario's courts reveals that Farlie Turner and Bayshore were playing the role of the receiver or quasi-receiver of a United States' public corporation in bankruptcy and they were not engaged in matters regulated by Ontario's regulators. Farlie Turner and Bayshore were selling a Florida corporation's business or its assets. [page53]

[126] In my opinion, Farlie Turner and Bayshore might anticipate that the arm of Florida corporate or bankruptcy and insolvency law might reach out and grab them, but they should not have reasonably expected that the long arm of the Ontario court's jurisdiction in class actions for violations of Part XXIII.1 of the Securities Act would reach out and grab them, especially when the allegation against them is not in and of itself a contravention of Part XXIII.1, but rather has to do with a pre-existing breach of the Act inherited by a quasi-receiver of the corporate wrongdoer.

[127] While it might have been preferable if the Florida court in bankruptcy had have adopted the convention in Canadian anti-suit injunction jurisprudence of first asking the rival court whether it would decline jurisdiction before issuing an anti-suit injunction (see Amchem Products Inc. v. British Columbia (Workers' Compensation Board), [1993] 1 S.C.R. 897, [1993] S.C.J. No. 34), it is understandable that the Florida

court would protect its jurisdiction, and more to the point, in my opinion, as a matter and comity and so as not to overreach its assumed jurisdiction, an Ontario court should not interfere in a matter that is closely connected to a Florida proceeding in bankruptcy. The class action for violations of Part XXIII.1 can proceed in Ontario against the other defendants.

[128] For the above reasons, I conclude that this court does not have jurisdiction simpliciter over Farlie Turner and Bayshore. It follows that there is no basis for a forum conveniens analysis, which presupposes jurisdiction simpliciter.

[129] It also follows that I need not and in the circumstances of an absence of jurisdiction simpliciter, I think, I should not decide whether the plaintiffs' novel negligence claim is tenable in law. I, therefore, make no ruling on Farlie Turner's and Bayshore's alternative arguments.

D. Conclusion

[130] I, therefore, grant the three motions.

[131] If the parties cannot agree about the matter of costs, they may make submissions in writing within 20 days of the release of these reasons, beginning with the successful moving parties and followed by the plaintiffs' submissions within a further 20 days.

[132] Orders accordingly.

Motions granted.