CITATION: Doyle Salewski Inc. v. Scott et.al., 2020 ONSC 682
COURT FILE NO.: 15-66979
DATE: 2020/01/30

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

DOYLE SALEWSKI INC., in its capacity as Trustee in Bankruptcy of Golden Oaks Enterprises Inc. and Joseph Gilles Jean Claude Lacasse and **DOYLE SALEWSKI INC.**, in its capacity as Receiver and Manager of Golden Oaks Enterprises Inc. and Joseph Gilles Jean Claude Lacasse Plaintiffs/Responding Parties	John D. Dempster and Robert J. De Toni for the Plaintiffs
– and –	
LORNE SCOTT, PATRICK BRUNETTE, ERIC LANDRIAULT, MATTHEW DANIELS, VERICO THE MORTGAGE ADVISORS INC., VINCENT HO, JOHN MCKILLIP and **SUSAN MCKILLIP** Defendants/Moving Parties	Stephen Cavanagh for the Defendant Eric Landriault Denis Cadieux for the Defendant Patrick Brunette Natalie Marie Leon for the Defendants Matthew Daniels and Verico the Mortgage Advisors Inc. Alyssa Tomkins and James Plotkin for Lorne Scott and all other defendants except Vincent Ho

HEARD: September 20, 2019

DECISION ON MOTION TO STRIKE

S. GOMERY, J.

[1] On July 9, 2013, Golden Oaks Enterprises Ltd. ("Golden Oaks") was assigned into bankruptcy, along with its founder and director, Jean-Claude Lacasse. In 2015, Doyle Salewski Inc., the trustee in bankruptcy and receiver/manager, began this action against individuals who had

dealings with Golden Oaks, either in a professional capacity or otherwise, prior to its bankruptcy. In the action, Doyle Salewski claims contribution and indemnity from all defendants for any amounts that it is obliged to pay to the creditors of Golden Oaks in the context of the company's receivership and bankruptcy. In the alternative, it claims damages of $10,000,000. Doyle Salewski also claims disgorgement or accounting from all defendants except John and Susan McKillip.

[2] A Fresh as Amended Statement of Claim (the "Statement of Claim") was served and filed in early September 2019 on consent but without prejudice to the defendants' right to bring these motions. Each of the defendants, except Vincent Ho, now asks this court to strike the Statement of Claim on the basis that it discloses no reasonable cause of action against them. Because the claims against Ho are the same as those against some other defendants, I will also determine whether they can proceed.

[3] For the reasons that follow, I grant the motions in part. The claims for contribution and indemnity are struck, without leave to amend. The claims for damages are struck but leave is granted to Doyle Salewski to amend the Statement of Claim to address the deficiencies in the pleadings with respect to losses suffered by Golden Oaks and the negligence claim against the McKillips. Subject to the defendants' right to move for dismissal based on limitations, the claims for disgorgement and accounting can proceed on the basis of the allegations pled.

Legal principles

[4] On a motion under rule 21.01(b) of the *Rules of Civil Procedure*,[1] the judge must assume that all of the facts pleaded in the statement of claim are true, unless they are patently ridiculous or incapable of proof,[2] or the allegations amount to "bald conclusory statements of fact and allegations of legal conclusions unsupported by material facts".[3]

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[1] R.R.O. 1990, Reg. 194.
[2] *Operation Dismantle Inc. et al v. The Queen et al*, [1985] 1 S.C.R. 441, at pp. 486-87; *Hunt v. T & N plc*, [1990] 2 S.C.R. 959 [*Hunt*], at pp. 977-79; *Connor v. Scotia Capital Inc.*, 2018 ONCA 73 [*Connor*], at para. 3; *Wright v. Horizons ETFS Management (Canada) Inc.*, 2019 ONSC 3827, at para. 70; *Nash v. Ontario* (1995), 27 O.R. (3d) 1 (C.A.), at p. 6.
[3] *Das v. George Weston Ltd.*, 2018 ONCA 1053, 43 E.T.R. (4th) 173 [*George Weston*], at para. 74; see also *Knight v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45 [*Knight*], at para. 22.

[5] Assuming the facts alleged are true, the motion judge must determine if the claim is viable.[4] A claim is not viable if the allegations could not give rise to the judgment sought by the plaintiff in the action.

[6] A motion to strike a pleading can succeed only in the clearest of cases. The statement of claim must be read generously, and the motion will be granted only if it is plain and obvious that the plaintiff cannot succeed.[5] A claim should not be struck just because it is novel, or because the underlying law is unsettled, or because the plaintiff's odds of success seem slim.[6] In short, if there is a reasonable chance that the plaintiff could succeed, the court should allow the lawsuit to go ahead.

Summary of the allegations

[7] Golden Oaks was an Ottawa-based real estate company, operated by Jean-Claude Lacasse, and active between 2009 and 2013. It promoted a residential "rent to own" business that gave tenants in its properties an option to purchase after an initial rental term. As alleged in the Statement of Claim and already found in a companion action, the rent-to-own model was not financially viable.[7] To cover its losses, the focus of Lacasse's activities shifted to the recruitment of investors who loaned money to Golden Oaks in return for usurious rates of interest. Early investors were paid using funds advanced by later or returning investors. This pyramid or Ponzi scheme collapsed in 2013 when fresh investment failed to keep pace with the company's growing debt.

[8] The defendants in this action were investors in Golden Oaks. Aside from the McKillips, each of them also provided professional services to or were employed by the company. Brunette was a senior employee. Ho was a vice-president. Scott was the company's real estate agent. Daniels and Verico provided mortgage brokerage services. Landriault was Golden Oaks' solicitor and corporate counsel.

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[4] *Hunt, supra* note 2 at pp. 977-78; *Connor, supra* note 2 at para. 3
[5] *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68, [2001] 3 S.C.R. 158, at para. 25.
[6] *Hunt, supra* note 2 at p. 979.
[7] *Doyle Salewski Inv. v. Scott*, 2019 ONSC 5108.

[9] The overarching theory of the action is that, by their involvement in Golden Oaks, the defendants gave it a false aura of legitimacy. As a result, they are liable for money owed by Golden Oaks to its unsecured creditors on the company's collapse.

[10] In paragraphs 22 to 28 of the Statement of Claim. Doyle Salewski sets out six central propositions undergirding their claim against all defendants:

a) Golden Oaks operated at a substantial loss. It was only ever able to pay returns to some investors by luring new and returning investors to advance funds to it by selling promissory notes with usurious rates of interest. When the scheme collapsed in 2013, Golden Oaks owed over $10 million dollars to unsecured creditors and investors.

b) Lacasse was able to perpetrate the Ponzi scheme by creating a false aura of legitimacy for Golden Oaks. He did so by assembling a team consisting of professionals, salespeople, and key employees.

c) As members of Lacasse's inner circle, the defendants knew or ought to have known that Golden Oaks was being used as a corporate front for a Ponzi scheme, but were willing to turn a blind eye in order to benefit from it.

d) The defendants also knew or ought to have known that their acts and omissions materially assisted Lacasse in perpetrating the scheme or failed to prevent him from continuing to perpetrate it. They were either participating in the Ponzi scheme or furthering its purpose.

e) When investing or otherwise extending credit to Golden Oaks, its investors and creditors relied on the false aura of legitimacy created by the defendants.

f) Had the defendants not assisted Lacasse, the Ponzi scheme would have collapsed before many investors and creditors loaned money to the company.

[11] Doyle Salewski alleges that, as a result of these acts and omissions, the defendants share liability with Golden Oaks to all of the unsecured creditors, and/or are liable in damages to Golden Oaks, and that their liability is equal to the total proofs of claim submitted in the receiverships and bankruptcies of the company and Lacasse, which exceed $10 million.

[12] At paragraphs 29 to 32, Doyle Salewski makes allegations against all of the defendants. It alleges the following:

- The defendants engaged in various activities with the express purpose of bringing investors into Golden Oaks and selling promissory notes to them. These activities included:
    - directly or indirectly soliciting investors and potential investors;
    - referring them to Golden Oaks;
    - providing information to them;
    - organizing and/or attending meetings or events put on or hosted by Golden Oaks or Lacasse, with the express purpose of soliciting investors; and
    - providing advice, information and assistance to Lacasse.
- These activities resulted in the sale of promissory notes to investors and materially assisted Lacasse in perpetrating the Ponzi scheme "to the detriment of Golden Oaks and all of the investors and creditors of Golden Oaks".
- Through their activities, the defendants each knowingly and materially contributed to the creation of the large number of unsecured creditors who were victims of the Ponzi scheme.

[13] These general allegations are supplemented by specific allegations of fact with respect to each defendant. For example, Doyle Salewski alleges at paragraphs 2, 9, and 33 to 41 that Scott was the primary real estate agent for Golden Oaks and entered into a commission agreement with Lacasse. It further alleges the following:

- Scott located real estate properties for the company's acquisition, even though he knew that the down payments were funded by deposits made by promissory note holders, and he knew or ought to have known that false financial information was being given to mortgage lenders by Lacasse, Daniels and Verico, in order to obtain mortgage loans.

- Scott breached his contractual and ethical obligations to Golden Oaks, as a real estate agent, by helping to perpetuate the Ponzi scheme, thereby causing damage to the company and its unsecured creditors.

- Scott obtained significant personal financial gain, to the detriment of Golden Oaks, its investors and its creditors.

[14] At paragraphs 3, 6, 10, 14, 42 to 57, and 87 to 92 of the Statement of Claim, Doyle Salewski makes additional allegations against Brunette and Ho. It alleges that they were each employees and investors in Golden Oaks, and as such had direct information and insight into the true state of the company's finances and the use of money received from investors. Brunette was also a minority shareholder in the company. As a result, Brunette and Ho were fully aware that Golden Oaks was not a legitimate rent-to-own program but rather was being used as a corporate front for a Ponzi scheme. They knew that the company could not meet its financial obligations as they became due, and that existing investors were being paid with funds received from new investors.

[15] Particularized allegations are similarly made against Landriault, Daniels, Verico and the McKillips.

[16] Based on the factual allegations in the Statement of Claim, Doyle Salewski alleges that each defendant owed a duty of care to Golden Oaks and to its unsecured creditors, and that they were negligent. It alleges more specifically that:

- Each defendant was in a relationship of sufficient proximity with Golden Oaks and with its unsecured creditors to found a duty of care, but none of the defendants took reasonable steps to mitigate or prevent the creditors' losses despite the means and ability to do so.

- The losses claimed by the unsecured creditors in their proofs of claim were a reasonably foreseeable consequence of each defendant's acts and omissions.

- Each defendant failed to warn Golden Oaks, its unsecured creditors or the police of the suspicious activity known to them and/or that the company was being used as a corporate front for a Ponzi scheme, or failed to take other reasonable steps to stop the scheme. Alternatively, they ignored signs that Golden Oaks was being operated as a Ponzi scheme and failed to make sufficient inquiries in the face of suspicious activities, and instead willingly and knowingly participated in furthering the scheme.

- Certain defendants took actions that directly furthered Lacasse's scheme, such as making false representations to mortgage lenders and ordinary lenders (Brunette and Daniels) or participating in giving fraudulent preferences in order to secure loans that were otherwise unsecured (Landriault).

- Defendants providing professional services failed to meet the legal and ethical standards of their respective professions or they acted despite a conflict of interest.

[17] Doyle Salewski alleges that two defendants, Landriault and Daniels, each owed a fiduciary duty to Golden Oaks and that the company was vulnerable to their discretion or power. Landriault and Daniels allegedly breached their fiduciary duties through the same acts and omissions cited in support of the claim in negligence.

[18] Finally, Doyle Salewski alleges that three defendants – Scott, Landriault and Daniels – breached contractual obligations owed to Golden Oaks, again on much the same basis as the negligence claims.

[19] Doyle Salewski alleges that the defendants' acts and omissions give rise to three types of claims:

(a) A claim for contribution and indemnity;

(b) In the alternative, a claim for damages equivalent to the value of claims by unsecured creditors against Golden Oaks and Lacasse; and

(c) As against all defendants except the McKillips, a claim for disgorgement or an accounting of moneys each received from the company.

[20] Although Doyle Salewski alleges that Landriault participated with Golden Oaks in granting fraudulent preferences and refers to defendants "willingly and knowingly participated in furthering" the Ponzi scheme or "turning a blind eye" to suspicious activities, the plaintiff does not assert a cause of action in fraud, deceit or knowing assistance. In its written submissions on this motion, the plaintiff's counsel repeatedly confirmed that the only causes of action alleged are negligence, breach of contract and breach of fiduciary duty.

Are there viable claims for contribution and indemnity?

[21] There are two principal reasons why the claims for contribution and indemnity as framed are bound to fail:

(1) The claims are not in response to claims for which the defendants could share liability with Golden Oaks;

(2) No viable duty of care towards the creditors of Golden Oaks has been pled.

(1) The absence of allegations of claims giving rise to common liability with Golden Oaks

[22] Contribution and indemnity is a restitutionary doctrine that allows a debtor to recover some or all of the amount paid to a creditor on the basis of a common liability to the creditor with another debtor. In the case of contribution, "both A and B are under a common liability to C, and, should A be called upon to pay more than A's proportionate share of the common liability to C, A may

recover the excess payment from B".[8] Indemnity differs only in that B is ultimately liable to pay all of the common debt to C; if A pays it, then it may recover complete reimbursement from B.

[23] The Statement of Claim in this case does not identify specific claims for which the defendants share liability with Golden Oaks. This is a fatal deficiency, as a claim for contribution and indemnity presupposes a common liability shared by the parties to a third party.

[24] In Ontario, the right to claim contribution and indemnity among tortfeasors is recognized in section 2 of the *Negligence Act*:[9]

> A tortfeasor may recover contribution and indemnity from any other tortfeasor who is, or would if sued have been, liable in respect of the damage to any person suffering damage as a result of a tort by settling with the person suffering such damage, and thereafter commencing or continuing action against any other tortfeasor, in which event the tortfeasor settling the damage shall satisfy the court that the amount of the settlement was reasonable, and in the event that the court find the amount of the settlement was excessive it may fix the amount at which the claim should have been settled.

[25] The Statement of Claim does not allege the *Negligence Act*, but the defendants concede that the court could grant leave to add it to the pleading if it concludes that the material facts required for a claim for contribution and indemnity have been alleged.

[26] On bankruptcy, claims for contribution and indemnity that a debtor could make, in response to a claim against it, are property that vests with the trustee.[10] Section 71 of the *Bankruptcy and Insolvency Act*[11] states:

> On a bankruptcy order being made or an assignment being filed with an official receiver, a bankrupt ceases to have any capacity to dispose of or otherwise deal with their property, which shall, subject to this Act and to the rights of secured creditors, immediately pass to and vest in the Trustee named in the bankruptcy order or assignment, and in any case of change of Trustee the property shall pass from Trustee to Trustee without any assignment or transfer.

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[8] Maddaugh & McCamus, *The Law of Restitution, Looseleaf Edition* (Thomson Reuters Limited: 2018), tab 8.
[9] *Negligence Act*, R.S.O. 1990, c. N.1.
[10] *Luckevich v. Ivany*, 2018 ONCA 144 [*Luckevich*], at para. 17.
[11] R.S.C., 1985, c. B-3 [*BIA*].

[27] The Court of Appeal has found that a claim for contribution and indemnity falls within the definition of property in the *BIA*. For example, if a stay is lifted to permit a claim to be advanced against a bankrupt and the trustee knows that the bankrupt has insurance for the claim, the trustee may advance a claim for contribution and indemnity to protect against that claim.[12] The basis for the claim in that case would not be that the insurer was a concurrent tortfeasor but rather that, based on the contract between the bankrupt and the insurer, the insurer is liable for some or all of certain types of claims against the bankrupt.

[28] Doyle Salewski argues that an equitable doctrine of contribution and indemnity allows for a cause of action broader than that set out in section 2 of the *Negligence Act*. It relies on this passage from the English Court of Appeal, quoted by the B.C. Supreme Court in *FBI Foods Ltd. - Aliments FBI Ltée v. Glassner*:

> There is a common law principle of liability, and also a principle of liability in equity, and these two principles differ. The common law principle requires a common liability to be sued for that which the plaintiff had to pay, and an interest of the defendant in the payment in the sense that he gets the benefit of the payment, either entirely … or *pro tanto*… . The principle in equity seems wide enough to include cases in which there is a community of interest in the subject matter to which the burden is attached, which has been enforced against the plaintiff alone, coupled with benefit to the defendant, even though there is not common liability to be sued. In such a case it seems to me a plaintiff may recover in equity, although there is no common liability to be sued. [Emphasis added.][13]

[29] Doyle Salewski argues, on the basis of this passage, that a court could find a sufficient community of interest between Golden Oaks and the defendants to ground claims for contribution and indemnity - even in the absence of a common liability in tort falling within the scope of s. 2 of the *Negligence Act*.

[30] The defendants dispute the existence of an equitable principle of contribution and indemnity in Ontario law that is as broad as the right referred to in *FBI Foods v. Glassner*. They

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[12] *Luckevich, supra* note 10 at para. 18.

[13] *Bonner v. Tottenham and Edmonton Permanent Investment Building Society*, [1899] 1 Q.B. 161 (C.A.), at p. 174 (cited in *FBI Foods Ltd. v. Glassner*, 2001 BCSC 151, 86 B.C.L.R. (3d) 136 [*FBI Foods Ltd. v. Glassner*], at p. 9).

point out that there is provincial legislation in B.C. that extends the right of contribution to any persons who share common liability, and not just joint tortfeasors.

[31] I need not resolve this issue, because there is a more fundamental problem with the claim as set out in the Statement of Claim.

[32] A demand for contribution and indemnity presupposes the assertion of a claim that could give rise to a right of contribution and indemnity, based on a common liability. A demand of this nature is generally made only after a claimant has been sued. In *Lukevich*, the Ontario Court of Appeal confirmed that "a claim for contribution and indemnity does not exist until another claim is launched to which the claim for contribution and indemnity can attach".[14]

[33] The claims for contribution and indemnity advanced by Doyle Salewski in this action are not made in response to lawsuits, real or threatened, against Golden Oaks. The plaintiff argues that a lawsuit is not a necessary precondition to a demand for contribution and indemnity. It contends that claims for contribution and indemnity can also arise as a result of proofs of claim filed in the bankruptcy.

[34] Doyle Salewski has not provided the court with any authority for this proposition. But even assuming, for argument's sake, that a trustee in bankruptcy could make contribution and indemnity claims based on claims of creditors who have not sued the estate, its statement of claim would, at a minimum, still have to identify the source and nature of any alleged common liability.

[35] The Statement of Claim does not describe the creditors who have submitted proofs of claim to the Trustee or describe the types of claims that have been submitted. It does not state whether the liability owed by Golden Oaks to creditors is based in tort or contract or statute.

[36] A court cannot determine whether a given defendant could have any obligation to pay some of a debt owed by Golden Oaks, in the absence of any information about the creditors who have filed claims and the nature of the debts at issue. There are no allegations in the Statement of Claim that permit me to do this. The creditors are treated, to borrow the phrase used by Landriault's

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[14] *Luckevich, supra* note 10 at para. 18.

counsel, as an "undifferentiated group". Neither they nor their claims are not described in any way.

[37] The Trustee has accordingly not pled facts that, if proved true, could lead a court to conclude that the defendants and Golden Oaks share a common liability to any third party. The Statement of Claim therefore does not contain sufficient allegations to ground claims for contribution and indemnity.

(2) Absence of a viable duty of care

[38] Assuming that the claims for contribution and indemnity otherwise met the requirements for pleading a claim under s. 2 of the *Negligence Act*, Doyle Salewski would have to allege a basis for the defendants' common liability towards the company's creditors. The Statement of Claim does not do so.

[39] The only type of claim that could give rise to a common liability for Golden Oaks and the defendants towards unsecured creditors is a claim in negligence. Doyle Salewski does not allege any contracts between the company's creditors and the defendants. It alleges breaches of fiduciary duty by some defendants, but the duty in this case would be owed only to Golden Oaks, as the Statement of Claim does not allege that these defendants were in a relationship with creditors that could found a fiduciary duty.

[40] This is a claim for pure economic loss. As recently noted by the Ontario Court of Appeal, the approach to determining a duty of care in cases of pure economic loss should be the same whether the claim is one for negligent misrepresentation or other cases of negligence. [15]

[41] In assessing whether a duty of care could exist, the court must apply a modified *Anns/Cooper* test. This test addresses the question of whether a duty of care exists in two stages: first, whether a *prima facie* duty exists and, if so, second, whether residual policy considerations should negate or limit the duty. At the first stage, the court considers whether the parties are in

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[15] *Darmar Farms Inc. v. Syngenta Canada Inc.*, 2019 ONCA 789, 148 O.R. (3d) 115 [*Darmar Farms*], at para. 54 (summarizing the principles set out in *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63, [2017] 2 S.C.R. 855 [*Livent*], at paras. 16, 22-23, 25, 32, 41-42).

such a close and direct relationship that it would be just and fair to impose a duty of care in law (the proximity analysis) and whether an injury to the plaintiff was a reasonably foreseeable consequence of negligence of the defendant (the foreseeability analysis). In the second stage, the court must consider whether a *prima facie* duty of care could give rise to indeterminate liability.

[42] In *Livent*, the Supreme Court re-emphasized the need to circumscribe the duty of care at the first stage, using a rigorous proximity analysis. This analysis involves considering factors such as expectations, representations, reliance, and property or other interests involved. The focus is on what, if anything, the defendant undertook, through its acts or representations, and the extent to which the plaintiff reasonably relied on the undertaking. The defendant's undertaking (or lack thereof) limits the scope of any duty of care:

> Any reliance on the part of the plaintiff which falls outside of the scope of the defendant's undertaking of responsibility — that is, of the purpose for which the representation was made or the service was undertaken — necessarily falls outside the scope of the proximate relationship and, therefore, of the defendant's duty of care … .
>
> (…)
>
> [A] plaintiff has a right to rely on a defendant to act with reasonable care for the particular purpose of the defendant's undertaking, and his or her reliance on the defendant for that purpose is therefore both reasonable and reasonably foreseeable. But a plaintiff has no right to rely on a defendant for any other purpose, because such reliance would fall outside the scope of the defendant's undertaking. As such, any consequent injury could not have been reasonably foreseeable. [16]

[43] In the Statement of Claim, Doyle Salewski alleges that the defendants knew or ought to have known that Lacasse was using Golden Oaks as a vehicle for a Ponzi scheme. To that end, it alleges that the defendants engaged in two types of negligent conduct. The first variety was passive: the defendants turned a blind eye to Lacasse's suspicious activities, failing to investigate what was really going on, warn investors or report the activities to the police. The second variety involved active conduct: the defendants directly or indirectly solicited investment, referred investors to Golden Oaks, provided them with information, organized promotional meetings and

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[16] *Livent*, *supra* note 15 at paras. 31, 35.

events, and provided advice and information to Lacasse. Some defendants are alleged to have gone further: for example, they were purportedly involved in transactions, as professionals or employees, which were deceptive, improper or illegal.

[44] As noted earlier, however, there are no factual allegations about the specific creditors and investors who lost money in the Ponzi scheme. There are no allegations of any specific reliance by any creditor or investor on any specific act or omission of any defendant. There are no allegations that specific losses were caused by the conduct of specific defendants. There is only a general allegation that their conduct created a false aura of legitimacy and that, "when investing or otherwise extending credit to Golden Oaks, all of the investors and creditors of Golden Oaks relied on this false aura of legitimacy".

[45] A misrepresentation may be made through conduct, even passive conduct. In such circumstances, however, the pleadings must identify the undertaking allegedly made through the conduct, and how reasonable reliance on the undertaking gave rise to injury.

[46] The duty of care implied in the Statement of Claim is this: a professional such as a mortgage broker or real estate agent or lawyer performing services for a company, or a senior employee or representative of the company, undertakes to the world at large that the company represents a good and sound investment or, in the case of a creditor, that the company is ready and willing to pay its bills as they become due. An investor or creditor could sue any professional who performed services for a company that went bankrupt, or any senior employee of the company, on the basis that the defendant knew or ought to have known that making an investment with or extending credit to the company was risky and unwise.

[47] The proposed duty of care does not come close to surviving the robust proximity analysis dictated by *Livent*. A resulting *prima facie* duty of care would give rise to a vast and indeterminate liability.

[48] A lack of alleged reliance by any specific creditor presents a further problem. There are allegations that that the defendants were negligent in the context of specific transactions. For example, the Statement of Claim alleges that Scott knew or ought to have known that false financial information was being given to certain mortgage lenders. There is however no allegation

that these specific lenders, or any persons or entities with whom Scott interacted, suffered losses that have been claimed in the bankruptcy. There are also no allegations that any defendant undertook to provide professional services for the benefit of any investor or lender.

[49] There are likewise allegations that all defendants solicited investors and referred them to Golden Oaks, and that this resulted in the sale of promissory notes. There is however no allegation of any specific statements or activity by any defendant that resulted in a loss to any particular person.

[50] Under r. 25.06(8) of the *Rules of Civil Procedure*, where misrepresentation is alleged, the pleading must contain full particulars. To properly state a claim for negligent misrepresentation, a plaintiff must plead with particularity the material facts supporting the requisite elements of the tort, specifically: (i) the alleged misrepresentation; (ii) when, where, how, by who and to whom it was made; (iii) its falsity; (iv) the inducement; (v) the intention that the plaintiff should rely on it; (vi) the plaintiffs' alteration of their position in reliance on the misrepresentation; and (vii) the resulting loss or damage to the plaintiffs.[17]

[51] Even if I accepted that the allegations about the defendants' conduct were sufficient, the Statement of Claim provides no particular allegations about the alteration of the position of creditors and investors in reliance on that conduct, or allegations about the losses of particular investors or creditors.

[52] Doyle Salewski argues that allegations that the defendants condoned a Ponzi scheme, or even took acts to further it, are sufficient to ground a finding of proximity, because "it was reasonably foreseeable to the defendants that the scheme would eventually collapse, resulting in Golden Oaks being indebted to a large body of unsecured creditors".

[53] Although I accept that all Ponzi schemes eventually collapse, I do not accept that merely describing a Ponzi scheme, and alleging that defendants provided services to the company through which it was operated, meets the pleading requirement for negligence in a claim for pure economic

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[17] *Lysko v. Braley* (2006), 79 OR (3d) 721 (C.A.), at para. 30; *Horfil v. Queen's Walk*, 2019 ONSC 1381, 94 B.L.R. (5th) 159, at para. 24.

loss. As the Court of Appeal recently observed, the fact that a claim is novel is also not a sufficient reason to allow it to proceed; a novel claim must also be arguable.[18] Something more than an amorphous claim based on community of interest is required.

Conclusions on the claims for contribution and indemnity

[54] The defendants have identified other problems with the contribution and indemnity claims. I decline to deal with these arguments, as the issues already identified are sufficient to grant the motion to strike the claims for contribution and indemnity.

Are there viable claims for damages?

[55] In addition to the claims for contribution and indemnity based on proofs of claim by unsecured creditors, Doyle Salewski advances claims in negligence, contract, and breach of fiduciary duty on behalf of Golden Oaks. There are also allegations that professional defendants breached their respective codes of ethics or were in a conflict of interest.

[56] On their written arguments on the motion, the defendants objected to the claims for damages on the basis that Doyle Salewski sought recovery for Golden Oaks' creditors and not the company itself. At paragraph 58 of its factum, and in its oral submissions, Doyle Salewski confirmed that, through these claims, it is seeking to recover Golden Oaks' losses and not those of the company's unsecured creditors.

[57] The pleadings with respect to the damages claims are nonetheless deficient in two important respects:

(1) There are no allegations of a loss suffered by Golden Oaks as a result of the defendants' alleged acts and omissions; and

(2) There are no allegations of material facts that could found a claim against the McKillips.

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[18] *Darmar Farms*, *supra* note 15 at paras. 50-51 (citing *Knight*, *supra* note 3 at para. 21; *George Weston*, *supra* note 3 at para. 75).

(1) The absence of allegations of a loss suffered by Golden Oaks

[58] The claims for damages suffer from a universal flaw. There is no allegations of material fact setting out how Golden Oaks has suffered a loss as a result of the defendants' alleged acts and omissions.

[59] The Statement of Claim does not allege that the company became insolvent as a result of the defendants' negligence. In fact, it states the contrary.

[60] At paragraphs 20 to 23, Doyle Salewski alleges that Golden Oaks' rent-to-own business was operating at a substantial loss. Only 3% of the funds that came into the company in 2012-13 were generated from its legitimate operations. Likewise, at paragraph 43, Doyle Salewski alleges that Brunette knew or ought to have known in September 2012, when he was hired full-time by the company, that Golden Oaks could not meet its financial obligations as they became due. Similar allegations are made elsewhere against other defendants.

[61] Based on these allegations, the defendants' acts and omissions in furtherance of the scheme did not cause the company to become insolvent. Rather, they allowed Lacasse to hide Golden Oaks' insolvency and continue its operations for a longer period of time than it could have otherwise.

[62] In the argument on the motion to strike, Doyle Salewski contended that this delay gives rise to a compensable loss to Golden Oaks based on the theory of "deepening insolvency". Deepening insolvency has apparently been recognized as a distinct cause of action in the U.S. as well as a measure of damages.[19] A right of action based on deepening insolvency has never been recognized in Canada and appears to have fallen out of favour in some U.S. courts.[20] Furthermore, as a measure of damages, it is not clear whether the doctrine of deepening insolvency adds anything that a conventional damages analysis would not take into account.[21]

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[19] *Livent Inc v Deloitte & Touche LLP*, 2014 ONSC 2176, 11 C.B.R. (6th) 12 [*Livent Inc v Deloitte & Touche LLP*], at para. 344. Although this decision was varied on appeal, the discussion of the theory of deepening insolvency remains informative.

[20] See *Official Comm. of Unsecured Creditors ex rel. Estate of Lemington Home for the Aged v. Baldwin*, 781 F.3d 675, 2015 U.S. App. LEXIS 4943, 60 Bankr. Ct. Dec. 208.

[21] *Livent Inc v Deloitte & Touche LLP*, *supra* note 19 at paras. 349-351.

[63] Regardless of whether the loss is explicitly characterized as deepening insolvency, however, Doyle Salewski must allege, in the Statement of Claim, that the damages claimed are based on the loss suffered by Golden Oaks as result of the delay in discovering Lacasse's fraud and the true state of the company's financial situation. It cannot baldly assert, as it does in the current pleading, that the defendants' conduct worked to the detriment of Golden Oaks. It must allege how it did so. This is the only way that the defendants will understand the case that they must meet.

[64] For this reason, the claims in damages are all, as currently pled, deficient.

(2) The absence of allegations of material facts that could found a claim against the McKillips

[65] At paragraph 93, Doyle Salewski describes the McKillips' interactions with Golden Oaks. It states that they:

> were a significant part of the "sales team" created by Scott as aforesaid. The McKillips, together with their business partners, Andrew Lloyd and Monika Lloyd, jointly solicited approximately $1.2 million in new investor deposits from investors who became victims of the Ponzi Scheme, as well as over $1 million in investment rollovers. The McKillips received significant commissions on these investments.

[66] These are the only particularized allegations of fact made with respect to the McKillips. At paragraph 95 of the Statement of Claim, Doyle Salewski otherwise makes the same broad and conclusory statements about the existence of a duty of care with respect to the McKillips that it makes against each of the other defendants.

[67] The claim for damages against the McKillips is not supported by allegations of material facts that, if proved, could give rise to a finding that they owed a duty of care to Golden Oaks. The McKillips' promotion of investment in the company and receipt of commissions is not enough, by itself, to create a relationship of sufficient proximity between these defendants and Golden Oaks. The allegations could not found a conclusion that the McKillips implicitly undertook to take reasonable care in their acts or omissions with respect to the company, or a conclusion that the company reasonably relied on such an undertaking.

[68] As a result, the claim in damages against the McKillips is deficient as currently pled.

Conclusions on the claims for damages

[69] Aside from the absence of allegations of the losses suffered by Golden Oaks, and the absence of any material facts that could ground a cause of action in negligence against the McKillips, the defendants have not identified other deficiencies with the claims for damages. Given the relationships alleged between the defendants (aside from the McKillips) and the company, a court could find that they each owed it a duty of care and, in the case of Landriault and Daniels, a fiduciary duty. Doyle Salewski also alleges breaches of contract by Scott, Landriault and Daniels. Although there are few particulars about these contracts, these defendants have not argued that the pleading is insufficient to ground a cause of action in contract on behalf of Golden Oaks.

Is there a viable claim for disgorgement or an accounting?

[70] The Statement of Claim includes a claim against all defendants, except the McKillips, for accounting and disgorgement of fees and other money received. This claim was asserted for the first time in September 2019, when the fresh as amended pleading was issued.

[71] The defendants argue that these claims are new causes of action and are time-barred. I will not deal with the limitations argument, as I understand from submissions by counsel that they agreed that this would be the subject of a separate motion.

[72] Daniels, Verico and Landriault argue that the claims for accounting and disgorgement are otherwise not properly pled, because there is no allegation of specific payments made by Golden Oaks to them.

[73] Paragraph 5 refers to brokerage fees paid to either Daniels or Verico. In paragraph 70, Doyle Salewski alleges as follows:

> From February of 2012 through until May 2013, Daniels and Verico provided brokerage services to Golden Oaks on seventy-eight (78) mortgage transactions, fifty-four (54) of which closed and for which Daniels and Verico would have received significant brokerage commissions. The quantum of

> commissions received is more particularly within the knowledge of Daniels and Verico. DSI states and the fact is that these commission costs paid to Daniels and Verico were passed on to Golden Oaks and paid directly or indirectly in ways and by means more particularly within the knowledge of Daniels and Verico.

[74] At paragraph 81, Doyle Salewski further alleges that:

> [A]s set out above Daniels and Verico would have received significant mortgage brokerage commissions for brokerage services they provided to Golden Oaks and for which Golden Oaks received no benefit. As also set out above, these commission costs paid to Daniels and Verico were passed on to Golden Oaks and paid directly or indirectly by Golden Oaks in ways and means more particularly within the knowledge of Daniels and Verico. DSI states and the fact is that Daniels and Verico knew or ought to have known that the brokerage commissions that they received were proceeds of a Ponzi Scheme and essentially came from the promissory note investors. Consequently, DSI pleads and the fact is that Daniels and Verico ought to disgorge and/or account and pay over to DSI, for the benefit of the unsecured creditors of Golden Oaks, any and all brokerage commissions that were paid to them as a result of brokerage services they provided to Golden Oaks.

[75] Daniels and Verico argue that the allegation that Golden Oaks paid the commissions they received is purely speculative. I disagree. There are situations where more detailed allegations cannot be made prior to discovery. It would have been better had the plaintiff simply asserted that Daniels and Verico received commissions rather than framing this as a logical outcome of acting as mortgage brokers. On a motion to strike, however, the court should read pleadings liberally and forgive minor drafting deficiencies. There is enough here, in terms of material fact, to establish that Daniels and Verico received commissions.

[76] The allegation that disgorgement should be ordered "for the benefit of the unsecured creditors of Golden Oaks" could suggest that Doyle Salewski is advancing claims on behalf of unsecured creditors as opposed to the company. Reading paragraph 81 within the context of the pleading as a whole, however, the claim for disgorgement and accounting is being asserted on behalf of the company, to allow it to recover its property. This recovery will be "for the benefit of the unsecured creditors of Golden Oaks" because it will allow Doyle Salewski to increase the pool of funds available to pay creditors who have submitted proofs of claim.

[77] Paragraph 4 of the Statement of Claim refers to legal fees paid to Landriault. The only expansion of this is found at paragraph 69:

> Landriault received significant legal fees acting as a solicitor for Golden Oaks. Landriault knew or ought to have known that the legal fees he received were proceeds of a Ponzi Scheme and came from the promissory note investors and for which Golden Oaks received no benefit. Consequently, DSI pleads and the fact is that Landriault ought to disgorge and/or account and pay over to DSI, for the benefit of the unsecured creditors of Golden Oaks, any and all legal fees that were paid to him as a solicitor for Golden Oaks.

[78] This paragraph does not contain any particulars regarding the transactions in respect of which Landriault provided legal services, nor does it give any indication of ballpark of fees that he might have received. At paragraph 58, however, Doyle Salewski alleges a specific transaction where Landriault, acting as a solicitor for Golden Oaks, took steps to conceal illegality. It also alleges that he was, throughout his retainer for the company, in a conflict of interest, because he received cash commissions from it, attracted other investors and received "criminal interest payments".

[79] In my view, these allegations, like the allegations founding the claims for disgorgement and accounting against the other defendants, contain enough material facts to survive a motion to strike.

Is Doyle Salewski barred from pursuing both claims in damages and claims for disgorgement and accounting?

[80] The defendants argue that Doyle Salewski cannot pursue both a claim for contribution and indemnity and a claim for damages. Since, as explained below, I am striking the contribution and indemnity claim without leave to amend, this argument is no longer relevant. The defendants do not argue that Doyle Salewski must elect between its claims in damages and its claims for disgorgement and accounting.

Should Doyle Salewski be granted leave to amend?

[81] If the motion is granted, Doyle Salewski seeks leave to amend the Statement of Claim. The defendants oppose any leave to amend, but in particular those relating to the claims for contribution and indemnity and damages.

[82] Generally speaking, leave to amend ought to be granted if the pleading can be fixed and the defendant would not be unfairly prejudiced.[22] Leave should be denied only in the clearest of cases.

[83] Doyle Salewski acknowledges that this case does not fit into existing categories, but argues that the question of how the law should deal with participants in a Ponzi scheme is novel. It urges me to err on the side of permitting the plaintiff to present a full case and argue at trial.

[84] Novelty aside, the lawsuit must give rise to an arguable cause of action on principles recognized in Canadian law.

[85] The problems with the claims for contribution and indemnity are not merely cosmetic. Doyle Salewski is seeking indemnification from the defendants for the entirety of the amount that Golden Oaks must pay to its unsecured creditors, on the theory that the defendants, by working for and with Golden Oaks, gave it a false aura of legitimacy that encouraged investors to continue to lend it money and therefore permitted the company to continue to operate. It cannot amend the Statement of Claim to allege specific claims by specific creditors because the theory of the claim is that the defendants are liable for the unparticularized claims of all unsecured creditors, regardless of their nature. Even if it could, Doyle Salewski could not allege additional facts that could ground a duty of care on the part of the defendants towards these creditors, because their relationship is not one that is sufficiently proximate based on a *Livent* analysis.

[86] As a result, the claims for contribution and indemnity are simply untenable. Their deficiencies flow not from inadvertent oversights but from a conscious attempt to extend a right

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[22] *Aristocrat Restaurants Ltd. v. Ontario*, 2003 CarswellOnt 5574 (Ont. S.C.), at paras. 85-86.

of recovery beyond the boundaries recognized by law. These claims are struck, without leave to amend.

[87] The claims for damages suffer from a universal and serious deficiency, the absence of allegations of material facts setting out how the company suffered losses as a result of the defendants' acts and omissions. I see no reason however why Doyle Salewski should be prevented from attempting to address this deficiency, through a pleadings amendment.

[88] With respect to the claim for damages against the McKillips, the required material facts could potentially also be introduced through amendments to the Statement of Claim.

[89] Although this lawsuit has been ongoing for five years, the plaintiff has only amended its pleading once. In these circumstances, I do not think that permitting a further amendment results in undue prejudice to the defendants or is otherwise an abuse of process.

[90] As a result, the damages claims are struck but with leave to amend the Statement of Claim to address the deficiencies identified in these reasons.

[91] Despite the lack of detailed allegations about payments, I cannot conclude that the claims for disgorgement and accounting, as currently pled, are bound to fail. This is of course without prejudice to these defendants' right to seek dismissal on the basis of a limitations argument.

[92] The motions to strike are therefore granted, with leave granted to Doyle Salewski to amend the Statement of Claim to add material facts with respect to Golden Oaks' losses as a result of the defendants' acts and omissions, and with respect to the allegations in negligence against the McKillips.

[93] If the parties are unable to agree on costs, the defendants shall serve and file written cost submissions within the next 14 days. Doyle Salewski shall have 14 days from receipt of the defendants' submissions to serve and file responding submissions. Each cost submission shall be no more than three pages in length but a cost outline and supporting documents may be attached.

Justice Sally Gomery

Released: January 30, 2020

CITATION: Doyle Salewski Inc. v. Scott et.al, 2020 ONSC 682
COURT FILE NO.: 15-66979
DATE: 2020/01/30

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

DOYLE SALEWSKI INC., in its capacity as Trustee in Bankruptcy of Golden Oaks Enterprises Inc. and Joseph Gilles Jean Claude Lacasse and **DOYLE SALEWSKI INC.**, in its capacity as Receiver and Manager of Golden Oaks Enterprises Inc. and Joseph Gilles Jean Claude Lacasse

Plaintiffs/Responding Parties

– and –

LORNE SCOTT, PATRICK BRUNETTE, ERIC LANDRIAULT, MATTHEW DANIELS, VERICO THE MORTGAGE ADVISORS INC., VINCENT HO, JOHN MCKILLIP and SUSAN MCKILLIP

Defendants/Moving Parties

DECISION ON MOTION TO STRIKE

Justice Sally Gomery

Released: January 30, 2020