IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Shon v. Argo Mezzanine Financing No. 3 Ltd.,* 2014 BCSC 2117

Date: 20141112
Docket: S131239
Registry: Vancouver

Between:

Sun Young Shon

Plaintiff

And

Argo Mezzanine Financing No. 3 Ltd. and Jason Hyunwoo Hong

Defendants

And

Hyo Je Shon

Third Party

Before: The Honourable Mr. Justice Davies

Reasons for Judgment
In Chambers

Counsel for the Plaintiff and Third Party:	T.D. Goepel
Counsel for the Defendants:	A. Morrison
Place and Date of Trial/Hearing:	Vancouver, B.C. October 1, 2014
Place and Date of Judgment:	Vancouver, B.C. November 12, 2014

I. INTRODUCTION

[1] The plaintiff, Sun Young Shon ("S. Shon"), applies to amend her Notice of Civil Claim.

[2] Some of those amendments are not opposed and will be allowed.

[3] The contested amendments are those by which S. Shon seeks to amend her pleadings to allege that the personal defendant, Jason Hyunwoo Hong ("Hong"), as an officer and director of the corporate defendant, Argo Mezzanine Financing No. 3 Ltd. ("Argo No. 3"), owed fiduciary duties to her in her capacity as a shareholder of Argo No. 3.

[4] Additionally and alternatively, S. Shon applies to amend her Notice of Civil Claim to allege that Hong, as an officer and director of Argo No. 3, owed her duties of care as a shareholder of Argo No. 3 which he negligently breached, causing her to suffer damage.

[5] Those two substantive amendments are opposed by the defendants, primarily upon the basis that they fail to disclose a cause of action that can be maintained at law because they run afoul of the rule in *Foss v. Harbottle*, [1843] 67 E.R. 189) (Ch), as interpreted and applied by the British Columbia Court of Appeal in *Robak Industries Ltd. v. Gardner*, 2007 BCCA 61 [*Robak*], and, on the alternative basis that they are an abuse of process.

II. ISSUES

[6] The two issues to be decided are:

1) Do the proposed amended pleadings of breach of fiduciary duty and negligence against Hong as an officer and director of Argo No. 3 disclose causes of action that can be brought by the plaintiff as a shareholder of Argo No. 3?

2) In all of the circumstances do the proposed contested substantive amendments constitute an abuse of process?

III. BACKGROUND

[7] To the extent that I am able to glean from the pleadings and submissions of counsel this litigation arises out of complex financing arrangements for a failed commercial and residential and commercial land development project (the "Project") on lands in False Creek in Vancouver, British Columbia.

[8] In recounting these background facts I will refer to the pleadings of the parties and some of the documents which are in evidence on this application, but in doing so I bear in mind that the allegations are still unproven and disputed. This recitation of background circumstances should accordingly not be taken as constituting findings of proven facts.

[9] In early February 2007 Hong began soliciting investors to raise money for the Project to be developed on lands (the "Lands") that were owned by 0742012 B.C. Ltd.as a bare trustee for the Jameson Argo Projects Limited Partnership in which Argo No. 3 had a 70% interest.

[10] Hong was then the president and a director of Argo No. 3, as well as of 0742012 B.C. Ltd.

[11] Hong's interest and role, if any, in James Project False Creek Ltd. (the other limited partner in the Jameson Argo Projects Limited Partnership), is not clear to me.

[12] It was intended that the Project would be financed through Argo No. 3 acting as an investment vehicle with each investor in the financing of the Project receiving shares in Argo No. 3.

[13] The Third Party, Hyo Je Shon ("H. Shon"), is the father of the plaintiff and in February of 2007, was a friend of Hong.

[14] On February 26, 2007, H. Shon gave S. Shon $510,000 to invest in Argo No. 3, which S. Shon then provided to Argo No. 3 in exchange for 210 shares in Argo No. 3, constituting a proportionate interest of 6% in the company.

[15] In addition to the $510,000 invested by S. Shon, Hong raised a further $7.99 million from 12 other investors who acquired shares in Argo No. 3.

[16] By a Letter of Understanding made as of February 26, 2007 (the "Letter of Understanding"), the 13 investors in Argo No. 3 (defined in the Letter of Understanding as the "AMF3 Investors"), each agreed to terms and conditions that purported to govern their rights and obligations in relation to: each other; Argo No. 3; Jameson Argo Projects Limited Partnership; and Argo Realty Advisors Inc. ("ARAI"), a company also controlled by Hong which was appointed as the Manager of Argo No. 3 for all purposes related to the Jameson Argo Projects Limited Partnership and the development of the Project.

[17] Among other things, the Letter of Understanding included the following provisions:

Clause 2.2 which states:

> AMF3 Investors agree that all profits derived by AMF3LTD from the Asset shall be shared and all losses sustained by AMF3LTD in respect of the Asset shall be born by AMF3 Investors in their Proportionate Shares.

Clauses 3.2 to 3.4 which state:

> The principal of ARAI (namely Jason H. Hong) shall be an acting director of the AMF3LTD, he and/or his extended family shall be invested in AMF3LTD at least Six (6.0%) percent of the total Shares.
>
> ARAI shall carry out all business activities related or incidental to AMF3LTD and the Asset, as ARAI deems, in its sole discretion, to be in the best interests of AMF3LTD. However, ARAI shall obtain a consent, written or verbal, from a majority of the AMF3 Investors for any and each expenditure amount exceeding two hundred fifty thousand dollars (C$250,000.00).
>
> ARAI may borrow money on behalf of AMF3LTD, and, if security is required therefor, mortgage or subject and the Lands to any other security device, obtain replacements of any mortgage or other security device, and prepay, in whole or in part, refinance, increase, modify, consolidate, or extend any mortgage or other security device, all of the foregoing at such terms and in such amounts as ARAI, in its sole discretion, deems to be in the best interests of AMF3LTD. However, ARAI shall obtain a consent, written or verbal, from a majority of the AMF3 Investors for an amount more than two hundred fifty thousand dollars (C$250,000.00) affecting AMF3LTD's book balance per occurrence.

Clause 3.7 which states:

> Each of AMF3 Investors, to the extent of its respective Unit, and AMF3LTD hereby agree to protect, indemnify and save ARAI harmless of and from any and all costs incurred by him in connection with the Investment, AMF3LTD and the Asset, and any and all claims, demands, actions, and rights of action of any nature or kind which may arise out of its position of the principal Manager.

Clauses 9.1 states:

> Each of AMF3 Investors, to the extent of its respective Share, and AMF3LTD hereby agree to protect, indemnify and save ARAI harmless of and from any and all costs incurred by it in connection with AMF3LTD and the Asset, and any and all claims, demands, actions, and rights of action of any nature or kind which may arise out of the PF Agreement and Subsequent Financings.

[18] H. Shon signed the Letter of Understanding on behalf of S. Shon under a Power of Attorney.

[19] The $8.5 million raised by Hong from the 13 investors in Argo No. 3 was originally distributed as follows:

1) $3.5 million to purchase 3,500 units (a 70% interest) in the Jameson Argo Projects Limited Partnership;

2) $4 million to purchase the Lands which was secured by a second mortgage of the Lands in favour of Argo No. 3; and

3) A further $1 million to purchase the Lands which was secured by a third mortgage of the Lands in favour of Argo No. 3.

[20] Subsequent to the investments in Argo No. 3, in July and December of 2007, H. Shon and some of the Argo No. 3 Investors became further involved in the financing of the Project by providing in excess of $11 million to Argo No. 5, another company incorporated by Hong, to raise money for the development of the Project.

[21] It is alleged by S. Shon that Hong then wrongfully caused mortgages of the Lands in favour of Argo No. 5, as well as another company controlled by Hong to be

registered in priority to the mortgages earlier granted in favour of Argo No. 3. She alleges Hong did so while acting in a conflict of interest.

[22] S. Shon also alleges that Hong later wrongfully caused both of the Argo No. 3 mortgages and the Argo No. 5 mortgages to be discharged from the title to the Lands.

[23] The investments made by H. Shon and others in Argo No. 5 subsequently became the subject of litigation commenced in June of 2009 by some of those investors against Argo No. 5 and Hong that I understand has now been settled and in respect of which a release was allegedly given by H. Shon in favour of Argo No. 5, Hong and affiliated entities.

[24] That release by H. Shon is now raised as a defence to S. Shon's claims in this proceeding in which the defendants also allege that H. Shon is the beneficial owner of S. Shon's shares in Argo No. 3.

[25] In paragraph 18 of her Notice of Civil Claim, S. Shon alleges:

> 18. On or about April 28, 2009, and on other dates, the Defendant Hong made the following representations to investors in the Defendant Argo, including Shon, although the representations to Shon were made by Hong largely through Mr. Shon:
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> (a) That the Development was in financial trouble;
>
> (b) That if the investors did not return their shares to Hong that the Development would fail;
>
> (c) That if the investors did not provide Hong with more money, the whole investment would fail and they would lose everything; and
>
> [d] That the investors would be personally liable for any losses on the Development, and that those losses could be substantial.
>
> (the "Representations")

[26] She then alleges at paragraphs 19 to 31:

> 19. The Representations were made by the Defendant Hong to Shon and Mr. Shon with the intention that they would be relied upon.

20. There existed between the Defendant Hong and Shon a special relationship sufficient to establish a duty of care being owed by the Defendant Hong to Shon when he made the Representations.

21. The facts giving rise to the special relationship between the Defendant Hong and Shon and the duty of care being owed by the Defendant Hong to Shon are as follows:

    (a) The Defendant Hong had a direct financial interest in the transaction in respect of which the Representations were made;

    (b) The Defendant Hong held himself out as a professional developer and businessman who possesses a special skill, judgment, or knowledge, with respect to the Representations being made;

    (c) The Defendant Hong made the Representations in the course of his business;

    (d) The Defendant Hong made the Representations deliberately and not on a social occasion;

    (e) The Defendant Hong knew that the Representations were being relied upon by the investors, including Shon; and

    (f) Such further and other particulars that will be provided prior to the trial of this matter.

22. It was reasonable, given all the circumstances, for Shon to rely upon the Representations made by the Defendant Hong, and Shon did in fact rely upon the Representations.

23. The Representations were untrue, inaccurate, and misleading, and did not represent the true state of affairs of Argo.

24. The Representations were negligently made by the Defendant Hong, or in the alternative, the Representations were fraudulently made by the Defendant Hong without any belief in the truth of the Representations, or made recklessly without regard to the truth of the Representations.

25. The Representations were made by the Defendant Hong for the sole purpose of scaring and alarming the shareholders of the Defendant Argo, including Shon, to give up their shares in the Defendant Argo. This was done by the Defendant Hong in order for him to take control of the Defendant Argo, and for his own financial benefit.

26. The Representations were made by the Defendant Hong on his own behalf, and as agent of the Defendant Argo, and the Defendant Hong was acting with the express and implied authority of the Defendant Argo when he made the Representations.

27. On or about April 28, 2009, on reliance of the Representations, Shon, to her detriment, gave to the Defendant Hong her shares in the Defendant Argo. In return for giving up her shares in the Defendant Argo, Shon received a promissory note signed by the Defendant

Hong, in the amount of $510,000.00. The promissory note does not mature until April 28, 2059 (the "Promissory Note Agreement").

28. There was no consideration flowing to Shon for entering into the Promissory Note Agreement.

29. Shon would not have entered into the Promissory Note Agreement and given up her shares in the Defendant Argo, had the Representations not been made, or had she known the true state of affairs of Argo.

30. Shon did not have the opportunity to get independent legal advice before entering into the Promissory Note Agreement.

31. The Promissory Note Agreement is an unconscionable transaction, and should be set aside.

[27] The causes of action alleging breach of fiduciary duty and negligence that S. Shon now wishes to add to those claims and that are opposed by the defendants are pleaded in paragraphs 38 to 53 of her proposed Amended Notice of Civil Claim which state:

Fiduciary Duty

38. Further, or in the alternative, Hong as the President and Director of Argo, and in the circumstances, owed the Plaintiff as a shareholder a fiduciary duty.

39. The circumstances giving rise to the fiduciary duty of Hong to the Plaintiff include the following:

(a) Argo was a closely held private company;

(b) Argo had no assets with the exception of the funds advanced by the Plaintiff and other investors;

(c) Argo was a company set up to arrange financing for a specific purpose;

(d) Hong had complete control over the day to day activities of Argo;

(e) Hong induced the Plaintiffs to rely on his expertise and his loyalty in making their respective investments in Argo;

(f) such further and other particulars that will be provided prior to trial.

40. Further, and in the alternative, that the agreement between the Plaintiff and Argo were governed by the Letter of Understanding dated February 26, 2007 (the "Letter of Understanding"), which is denied, pursuant to clause 2.2, the profits derived from Argo were to be shared and all losses would be borne by the investors proportionate share, and the losses were not going to be Argo's profit or loss. Furthermore, clause 9.2 provided that the Plaintiff, would be

liable to indemnify and save harmless the Defendant Mr. Hong from certain losses on relating to the Development.

41. The fiduciary duty of Hong included the following:

(a) A duty to act honestly and in good faith;

(b) A duty to avoid a conflict of interest;

(c) A duty to make full and frank disclosure with the Plaintiff;

(d) A duty of loyalty; and

(e) A duty not to mislead the Plaintiff,

42. Hong breached the fiduciary duty that he owed the Plaintiffs by doing the following:

(a) Failing to act honestly and in good faith;

(b) Failing to avoid a conflict of interest;

(c) Failing to make full and frank disclosure to the Plaintiffs;

(d) Failing to act in accordance with his duty of loyalty; and

(e) Misleading the Plaintiffs.

(the "Fiduciary Breaches")

42. Particulars of the Fiduciary Breaches of Hong include the following:

(a) Allowing a company under his control, Argo Mezzanine Financing No. 5 Ltd. ("Argo No. 5"), to take out a mortgage on the Lands (the "Argo No. 5 Mortgage');

(b) Allowing the Argo No. 5 mortgage to take priority to the two Argo mortgages on the Lands;

(c) By not notifying the Plaintiff that Argo did not have adequate resources to conduct the Development on the Lands by itself;

(d) By not notifying the Plaintiff that Argo could only fund the Development by raising additional capital from outside sources which would want security on the Lands, in priority to Argo, making the investment that the shareholders made in Argo much less safe than it appears;

(e) By not notifying the Plaintiff that she could have had a complete, or partial, return on her investment in the Lands were sold between November 2008 and April 2009;

(f) By not getting an appraisal of the Lands done between November 2008 and April 2009;

(g) By failing to maintain accounting records;

(h) By misleading the Plaintiff as to the secure nature of her investment;

(i) By misleading the Plaintiff as to his intention to dissolve Argo and protect her investment; and

(i) Such further and other particulars as may be proven at trial.

43. As a result of the Fiduciary Breaches, the Plaintiff has suffered loss and damage.

44. The losses suffered by the Plaintiff arising out of the breach of fiduciary duty are distinct from the losses suffered by Argo, as it lead and caused the Plaintiff to enter into the Promissory Note Agreement, which caused her to give up her shares for no, or minimal, consideration.

45. Furthermore, and in the alternative, if the Letter of Understanding governed the relationship, which is denied, the losses suffered by the Plaintiff arising out of the breach of fiduciary duty are distinct from the losses suffered by Argo, as the profits and losses would be shared not by Argo, but by the investors in their proportionate share, and due to the Letter of Understanding the Plaintiff would be liable to indemnify and save harmless the defendant from losses.

Duty of Care

46. Further, or in the alternative, Hong as the President and Director of Argo, and in the circumstances, owed the Plaintiff, as shareholder, a duty of care.

47. The circumstances giving rise to the duty of care of Hong to the Plaintiff includes the following:

(a) Argo was a closely held private company;

(b) Argo had no assets with the exception of the funds advance by the Plaintiff and other investors;

(c) Argo was a company set up to arrange financing for a specific purpose;

(d) Hong had complete control over the day to day activities of Argo;

(e) Hong induced the Plaintiff to rely on his expertise and his loyalty in making their respective investments in Argo; and

(f) such further and other particulars that will be provided prior to trial.

48. The duty of care of Hong included the following;

(a) A duty to exercise the care, diligence, and skill that a reasonable prudent President and Director would exercise in comparable circumstances; and

(b) A duty to act and make business decisions on a reasonably informed basis.

49. Hong was negligent and breached the duty of care that he owed the Plaintiffs by doing the following:

(a) Failing to exercise the care, diligence, and skill that a reasonable prudent President and Director would exercise in comparable circumstances; and

(b) Failing to act and make business decisions on a reasonably informed basis.

(the "Duty of Care Breaches"

50. Particulars of the Duty of Care Breaches of Hong include the following:

(a) Allowing the Argo No. 5 mortgage to take priority to the two Argo mortgages on the Lands;

(b) By not notifying the Plaintiff that Argo did not have adequate resources to conduct the Development on the Lands by itself;

(c) By not notifying the Plaintiff that Argo could only fund the Development by raising additional capital from outside sources which would want security on the Lands, in priority to Argo, making the investment that the shareholders made in Argo much less safe than it appears;

(d) By not notifying the Plaintiff that she could have had a complete, or partial, return on her investment in the Lands were sold between November 2008 and April 2009;

(e) By not getting an appraisal of the Lands done between November 2008 and April 2009;

(f) failing to maintain accounting records; and

(g) Such further and other particulars as may be proven at trial.

51. As a result of the Duty of Care Breaches, the Plaintiff has suffered loss and damage.

52. The losses suffered by the Plaintiff arising out of the negligence are distinct from the losses suffered by Argo, as it lead and caused the Plaintiff to enter into the Promissory Note Agreement, which caused her to give up her shares for no, or minimal, consideration.

53. Furthermore, and in the alternative, if the Letter of Understanding governed the relationship, which is denied, the losses suffered by the Plaintiff arising out of the negligence are distinct from the losses suffered by Argo, as the profits and losses would be shared not by

> Argo, but by the investors in their proportionate share, and due to the Letter of Understanding the Plaintiff would be liable to indemnify and save harmless the defendant from losses.

IV. POSITIONS OF THE PARTIES

[28] What is most significant about the contested proposed amendments is that in both pleading breach of fiduciary duty and negligence against Hong, S. Shon seeks to impose liability upon him as the President and a Director of Argo arising out of duties that she says are owed to her as a shareholder of Argo. No. 3.

A. Allegations of Breach of Fiduciary Duties

[29] S. Shon submits that notwithstanding the rule in *Foss v. Harbottle*, the law recognizes that a fiduciary duty may be owed by directors to shareholders in certain situations, some of which she says apply in the circumstances alleged in paragraphs 38 to 45 of the proposed Amended Notice of Civil Claim.

[30] In making that submission she relies primarily upon decisions of the courts of British Columbia in *Dusik v. Newton* (1985), 62 B.C.L.R. 1 (B.C.C.A.) [*Dusik*]; *Malcom v. Transtec Holdings Limited*, 2001 BCCA 161 [*Malcom*];*Valastiak v. Valastiak*, 2010 BCCA 71 [*Valastiak*]; and *Samos Investments Inc. v. Patttison*, 2001 BCSC 1790 [*Samos*].

[31] Counsel for S. Shon submits that the following circumstances support the imposition of a fiduciary duty upon Hong as an officer and director of Argo No. 3 in his dealings with S. Shon as a shareholder of that company:

1) Argo No. 3. was a closely held private company;

2) Argo had no assets other than those funds advanced by S. Shon and the other investors sought out by Hong to become shareholders of Argo No. 3;

3) Argo No. 3 was set up to arrange financing for a specific purpose;

4) Hong had complete control over the day to day activities of Argo No. 3; and

5) Hong induced S. Shon and the other investors in Argo No. 3 to rely on his expertise and his loyalty in making their respective investments in Argo No. 3.

[32] Hong does not dispute that in certain situations the law can impose fiduciary duties upon directors in their dealings with shareholders but says that all of the cases and principles relied upon by the plaintiff must be interpreted and restricted in their application because of the 2007 decision of the Court of Appeal in *Robak*.

[33] More specifically, Hong asserts that *Robak* requires that to establish a claim for breach of a fiduciary owed by a director to a shareholder for loss of the value of shares held by the shareholder, that loss must arise from both:

1) an "independent relationship" with the director as a wrongdoer; and

2) an "independent loss" suffered by the shareholder from the wrongs done (by the director) to the company.

[34] Hong says that the amendments to the plaintiff's Amended Notice of Civil Claim alleging breaches of fiduciary duty by Hong as a director are "doomed to fail" because they do not disclose a duty owed by Hong to her that is independent of the duty that he owed to Argo No. 3 and because the plaintiff cannot establish a loss that is separate and distinct from any loss that may have been suffered by Argo No. 3.

[35] Hong says the amendments should not be allowed to proceed because of the combined application of Rule 6-1 which governs the amendment of pleadings, and Rule 9-5(1)(a) which provides that a claim may be struck at any time as disclosing no reasonable claim.

[36] Alternatively, Hong says that to allow the amendments sought would constitute an abuse of process under Rule 9-5(1)(d).

[37] Hong makes that alternative submission because of H. Shon's evidence on examination for discovery (as S. Shon's agent) that when the agreement to

relinquish S. Shon's shares in Argo No. 3 in return for the now impugned promissory note was made, H. Shon then had "no trust in Hong at all"; "did not rely on anything Hong told him"; and "viewed everything Hong told him with suspicion".

[38] Hong says that because a relationship of trust and reliance is fundamental to any finding of a breach of fiduciary duty, S. Shon's pleadings of the existence and breach of fiduciary duties owed by Hong to her are contrary to her father's sworn evidence.

[39] Hong submits that as such they should not be allowed because they constitute an abuse of process by the plaintiff in attempting to gain strategic advantage contrary to the decision in *Halagan v. Reifel* (01 October 1998), Vancouver C945038 (S.C.), recently referred to in *3555 Gilmore Holdings Ltd. v. Cascade Divide Enterprises Inc.*, 2014 BCSC 823 at para. 34.

B. Allegations of Negligence

[40] S. Shon also submits that her proposed amendments to paragraphs 46 to 53 of her Notice of Civil Claim to plead the existence of a duty of care owed by Hong as an officer and director of Argo No. 3 to her as a shareholder and his breach of that duty should be allowed to stand notwithstanding the rule in *Foss v. Harbottle.*

[41] In doing so she relies upon *Festival Hall Developments Ltd. v. Wilkings* (2009), 57 B.L.R. (4th) 210 (Ont. SCJ) [*Festival Hall*], and submits that her claim in negligence should not be dismissed at the pleadings stage.

[42] In response, Hong submits that as with her claim for breach of fiduciary duty, the plaintiff's claims in negligence must also be dismissed by application of the rule in *Foss v. Harbottle*, as interpreted by *Robak*, because they fail to meet the dual requirements of there being both an "independent relationship" from that of director and shareholder and an "independent loss" suffered by her as a shareholder from the wrongs done to Argo No. 3 by Hong as a director.

[43] The defendants further say that any such proceedings could only be pursued as derivative actions.

V. ANALYSIS AND DISCUSSION

[44] It is common ground that amendments to pleadings are typically allowed under Rule 6-1 unless the pleadings do not disclose a reasonable cause of action or if the opposite party will suffer prejudice as a consequence of the amendments.

[45] Applications to amend pleadings are also considered on the same basis as applications to strike pleadings under Rule 9-5. See: *McNaughton v. Baker* (1988), 25 B.C.L.R. (2d) 17 (B.C.C.A.); *Victoria Gray Metro Trust Company v. Fort Garry Trust Company* (1989), 30 B.C.L.R. (2d) 45 (S.C.); and *Shaw Cablesystems Limited v. Concord Pacific Group Inc*., 2009 BCSC 203 at para. 8 [*Shaw Cablesystems*].

[46] Rule 9-5 reads:

> 9-5(1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
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> (a) it discloses no reasonable claim or defence, as the case may be,
>
> (b) it is unnecessary, scandalous, frivolous or vexatious,
>
> (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
>
> (d) it is otherwise an abuse of the process of the court,
>
> and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

[47] The defendants rely primarily upon Rule 9-5(1)(a).

[48] Applications under Rule 9-5(1)(a) must be determined based only upon the pleadings since Rule 9-5(2) states that no evidence is admissible on applications under Rule 9-5(1)(a).

[49] Alternatively, the defendants rely on Rule 9-5(1) – in respect of which evidence is admissible – concerning the plaintiff's allegations of breach of fiduciary

duty because of the aforementioned contradiction in the sworn testimony of H. Shon confirming his total distrust of Hong when the existence of a relationship of trust is fundamental to the existence of any fiduciary relationship.

[50] In considering the defendants' opposition to the proposed amendments I will consider the plaintiff's alleged breach of fiduciary duty and negligence allegations under Rule 9-5(1)(a) (no reasonable cause of claim) before, if necessary, considering the breach of fiduciary duty allegations as being an abuse of process under Rule 9-5(1).

Do the Allegations of Breach of Fiduciary and Negligence Disclose Reasonable Claims?

[51] In *Shaw Cablesystems* at paras. 11 and 12, decided under the substantively identical old Rule 24(1)(a), N. Smith J. stated:

> [11] The test for striking out a pleading as disclosing no reasonable claim or defence was set out by the Supreme Court of Canada in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at 980, 49 B.C.L.R. (2d) 273:
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> > … assuming that the facts as stated in the statement of claim can be proved, it is 'plain and obvious' that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be 'driven from the judgment seat'. Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect ranking with the others listed in Rule 19(24) of the British Columbia Rules of Court should the relevant portions of a plaintiff's statement of claim be struck out under Rule 19(24)(a).
>
> [12] In *Citizens for Foreign Aid Reform Inc. v. Canadian Jewish Congress*, [1999] B.C.J. No. 2160 (B.C.S.C.) at para. 34 Romilly J. said:
>
> > … as long as the pleadings disclose a triable issue, either as it exists, or as it may be amended, then the issue should go to trial. The mere fact that the case is weak or not likely to succeed is no ground for striking it out under the provisions of Rule 19(24).

[52] Also, concerning the question of novel causes of action referred to by the Supreme Court of Canada in *Hunt v. Carey*, in *Bow Valley Resource Services v.*

Kansa General Insurance Company (1991), 56 B.C.L.R. (2d) 237, Chief Justice McEachern for the Court of Appeal stated:

> In my view it is not always appropriate to confine complicated litigation, as this clearly is, within labels or general statements of principle arising out of one or more authorities. My view is that the recent *jurisprudence* particularly, *Hunt v. Carey-Canada Inc.* (1991) 1990 CanLII 90 (SCC), 74 D.L.R. (4th) 321, leave us with a clear message particularly in a case of this kind.
>
> That case confirms the Canadian trend of requiring important and novel causes of action to be resolved at trial. This is not to say that Rule 19(24) does not have many useful purposes as has been shown in fact in this case where one of the claims was in fact struck out. But I read the judgment of Chief Justice Esson and Mr. Justice Taylor each to be premised mainly upon the practice which is set out so clearly in the judgment of Madam Justice Wilson in the *Carey* case.
>
> In my judgment there is no rational chance that a division of this Court would depart from that practice and embark upon and attempt to resolve the novel and difficult questions which arise in this case just on the pleadings. Pleadings have a way of being amended as cases proceed towards trial and sometimes, indeed, even at trial. In my view, it is inevitable that these pleadings will be amended and I do not believe that this Court would purport to decide these vital questions of law without a full investigation of the factual matrix out of which these issues arise. I think the Court would inevitably defer to the trial process as the place where these novel and difficult questions should first be considered.

[53] The various cases relied upon by S. Shon in asserting the existence of a reasonable claim in respect of her allegations of breach of fiduciary owed to her as a shareholder by Hong as a director and officer of Argo No. 3 establish to my satisfaction that:

1) Fiduciary duties can be owed by directors to shareholders where there is a special relationship of trust and dependency between the plaintiff shareholder and the defendant director where the director was seeking to take unfair advantage of the shareholder for personal gain. See: *Dusik* and *Malcom.*

2) A director may assume a fiduciary duty towards a shareholder on the facts of a particular case including in the case of closely held corporations. See: *Valastiak*; and *Coleman v. Myers* [1977], 2 N.Z.L.R. 225 (New Zealand Supreme Court) cited with approval by our Court of Appeal in *Dusik.*

3) Whether a fiduciary relationship will arise between a director and a shareholder will depend on the facts of a particular case. See: *Samos* at para. 184 and cases cited therein.

[54] What is most apparent from those authorities and others on the non-exhaustive situations in which fiduciary duties have been found to be owed by directors to shareholders is that the question of whether fiduciary duties exist is a fact dependent inquiry.

[55] The question in this case is whether that fact dependent inquiry should be allowed to proceed or is precluded at the pleadings stage because of the limiting principles enunciated in *Robak.*

[56] *Robak* involved claims by the plaintiff, John Lepinski and his wholly owned holding company Robak Industries Ltd., against Robert Gardner (as the director of Getty Copper Incorporated, a publicly traded corporation), and others, alleging various causes of action, including breach of fiduciary duty and conspiracy.

[57] The defendants applied to strike those parts of the plaintiffs' statement of claim that they said could not stand in light of the rule in *Foss v. Harbottle*, which has for centuries established that "only the company not individual shareholders can sue for wrongs done to the company". See: *Robak* at para. 4.

[58] The factual background to all of the allegations against the defendants in *Robak* was complex.

[59] At paras. 6 to 10, Levine J.A. wrote for the Court of Appeal:

> [6] Mr. Lepinski was the president of Getty from 1992 to June 29, 2004, and a director of Getty since 1992. Getty was engaged in the acquisition and exploration of mineral properties. Robak owned shares in Getty, and also owned a mineral property known as "Getty South". In 2003, Robak transferred a fifty per cent interest in Getty South to Getty, in consideration for a large number of shares of Getty. Under the "Mineral Property Interest Sale Agreement", Robak ceded control over the development of Getty South, including Robak's remaining fifty per cent interest, to Getty.
>
> [7] In 2004, the respondent, Robert Gardner became a director of Getty. The appellants allege that Mr. Gardner and others planned to seize control of

> Getty by discrediting and ousting Mr. Lepinski, undoing the Agreement, and acquiring one hundred percent of Getty South, while increasing their own shareholding in Getty. They allege that Mr. Gardner set out to implement his plan with the assistance of the respondents, Ross Glanville & Associates and Ross Glanville, and others.
>
> [8] The appellants claim that Mr. Gardner and others conspired to injure them. They pleaded that the "unlawful means" of implementing the conspiracy included the acts set out in the impugned portions of the Further Amended Statement of Claim: obtaining greater control of Getty and the Getty Board of Directors by, among other acts, "applying economic duress to Getty", and "inducing Blake Cassels & Graydon to breach their duties to Getty" (Further Amended Statement of Claim, para. 59(a)(vi) and (vii)). They also alleged conduct in breach of the *Securities Act*, R.S.B.C. 1996, c. 418, concerning undisclosed insider trading, acting as an undisclosed control group in Getty, and conducting unlawful trades in Getty shares (para. 59(c)).
>
> [9] Other acts claimed to further the conspiracy against Mr. Lepinski and Robak were alleged breaches by officers and directors of Getty, influenced by Mr. Gardner, of fiduciary and statutory duties to exercise their powers in the best interest of Getty as a whole, independently, honestly and in good faith. These allegations included the unauthorized withdrawal of funds from Getty to be used for a purpose not in its best interests (para. 77). The appellants alleged further that Mr. Gardner requested the President of Getty to abuse his powers as a director and president to stifle dissent and disenfranchise other Getty directors from voting and participating in meetings designed to advance Getty's affairs, in bad faith and in a manner contrary to the best interests of Getty (paras. 78 and 79).
>
> [10] The appellants also allege that Mr. Glanville and Mr. Gardner made defamatory statements about them in connection with Getty's affairs. Robak's claim for damages for the defamatory statements includes a "loss in the value of…a substantial interest in the shares of Getty" (paras. 88 and 93).

[60] In upholding the decision of the chambers judge striking the impugned portions of the Amended Statement of Claim, Levine J.A. wrote at paras. 13 to 15:

> [13] The chambers judge said that a plaintiff must show both an "independent relationship" or duty between it and the wrongdoer, and "a loss separate from that of the company that is causally linked to the personal wrong done to the plaintiff" (an "independent loss") (para. 9). She cited (at paras. 8 and 9) *Haig* and *Hercules* as cases where investors claimed a loss separate from that of the company. In both cases, the plaintiffs complained that they had been induced to invest in a failing company in reliance on negligently prepared financial statements. The negligently prepared statements had not caused the companies any loss. In *Haig*, the Supreme Court of Canada found that the plaintiff had an independent relationship with the accountants (the accountants had prepared financial statements knowing that potential investors in the company would rely on them), and an independent loss (the plaintiff had relied on the financial statements in making his investment). The plaintiff recovered his lost investment. In *Hercules*, the Supreme Court found

> that the plaintiffs had an independent loss (they made investment decisions relying on the financial statements), but no independent relationship with the accountants (the financial statements had not been prepared for the purpose of making personal investment decisions, but for the purpose "of allowing the shareholders, as a group, to supervise management and to take decisions with respect to matters concerning the proper overall administration of the corporation" (para. 56)). The Supreme Court applied *Foss v. Harbottle* to deny the plaintiffs' claim in *Hercules*.
>
> [14] The chambers judge found (paras. 10 and 11) that Robak has an independent relationship with Getty in respect of the co-ownership of Getty South, and an independent cause of action against the defendants for conspiracy and defamation. She found, however, (at paras. 11, 12, 15 and 16), citing *Rogers*, that the rule in *Foss v. Harbottle* applied to exclude Robak's claim for loss in the value of its shares of Getty, because those damages were a consequence of damage to Getty, not the result of direct damage to the appellants. Neither of the appellants could claim damages for the wrongful acts against Getty alleged to be part of the conspiracy against them, because any damages flowing from those acts would be damages to Getty, and are "only compensable through a derivative claim" (para. 17).
>
> [15] To paraphrase the chambers judge's analysis, the appellants showed an "independent relationship" and an "independent loss" with the respondents with respect to its interest in Getty South. They could show an "independent relationship" with the respondents with respect to the conspiracy and defamation allegations, but the diminution in the value of their shares of Getty was not an "independent loss" in respect of the allegations of wrongdoing to Getty. Any loss suffered from wrongs to Getty was for Getty to claim, and any loss in the value of Getty's shares was not an "independent loss" but a loss suffered in common with all Getty shareholders.

[61] Levin J.A. then went on to consider numerous English and Canadian authorities which counsel for the appellants submitted cast doubt upon whether the rule in *Foss v. Harbottle* should continue to be strictly applied in British Columbia.

[62] She then observed at paras. 35 to 37:

> [35] There are good reasons for not allowing a shareholder to claim the loss in value of its shares where a wrong has been done to the company. As explained by Laskin J.A. in *Meditrust* (at para. 13); La Forest J. in *Hercules* (at para. 59), and McKenzie J. in *Rogers* at 78-81 (citing *Prudential Assurance* and *Green v. Victor Talking Mach. Co.*, 24 F. 2d 378 (1928) (C.A. 2nd Circ.)), the rule avoids a multiplicity of actions. Further, and consistent with the legal theory of *Foss v. Harbottle*, the loss in value of shares of a company is a loss of all of the shareholders, not just one or some of them. There is no logic that would allow only one shareholder to claim that loss, where the claim relates to wrongs done to the company, and all of the shareholders have suffered the loss in value. A single shareholder cannot claim that the loss in value of the shares, *per se*, is a personal, direct loss.

> [36] The appellants suggest that the English cases have exposed the underlying principle of *Foss v. Harbottle*, as interpreted by *Prudential Assurance*, as one of avoiding "double recovery" for the same loss: once by the company and secondly by the shareholders: see *Johnson v. Gore Wood*, *per* Lord Bingham, at para. 44; Lord Cooke at para. 81; Lord Hutton at paras. 97 and 99; Lord Millett at para. 124. Thus, if it can be shown that the company cannot sue for the loss, the shareholder may. The appellants say that Getty cannot sue for the loss in value of the shares; therefore, the appellants may.
>
> [37] Double recovery is a consequence that is avoided by the application of the rule in *Foss v. Harbottle*, but the jurisprudence does not support the appellants' argument that it is the principal reason for its existence. In addition to the reasons for the rule discussed above, as Lord Hutton and Lord Millett pointed out in *Johnson v. Gore Wood*, citing *Prudential Assurance*, the rule bars recovery by one or some shareholders of losses caused by wrongs done to the company, at the expense of creditors and other shareholders of the company. (See also: *Gardner v. Parker*, [2004] 2 BCLC 554 at para. 33 (Eng. C.A.); *Thomas v. D'Arcy & Ors*, [2005] QCA 68 at para. 11 (Queensland S.C., C.A. Div.).

[63] Finally, in concluding that the Chambers judge had not erred, Levine J.A. held at para. 38:

> … The chambers judge did not decide, contrary to the appellants' arguments, that a shareholder may never bring a claim for the diminution in the value of the shareholder's shares, but confirmed, by reference to *Hercules* and *Haig*, that a shareholder may have a cause of action for loss in the value of shares where the shareholder has both an "independent relationship" with the wrongdoer and an "independent loss" from that of the company to whom the wrong has been done. She decided that in this case, the appellants had not shown that they have a cause of action for an "independent loss" in respect of wrongs done to Getty. I agree with her conclusion.

[64] The defendants also rely on the decision of Hinkson J. (as he then was) in *Ohoven v. Vince Estate*, 2009 BCSC 1052 [*Ohoven*], in which plaintiffs sought to add Marilynne Vince as a personal defendant based on allegations of conversion, breach of fiduciary duty, conspiracy and unjust enrichment in what was again complex corporate commercial litigation.

[65] At paras. 3 to 15, Hinkson J. set out the relevant background facts which he recorded as follows:

> [3] The plaintiff Michael Ohoven is a citizen of Germany, but resides in the State of California. He is a motion picture producer and the sole shareholder

of the plaintiff Infinity Media Inc. ("Infinity U.S."), a California motion picture production company.

[4] William Vince was a Canadian citizen and a resident of British Columbia. He was also a motion picture producer. He passed away in June of 2008.

[5] The defendants Infinity Media Canada, Inc. ("Infinity Canada") and Infinity Features Entertainment Inc. are both British Columbia film production companies. The remaining defendants, other than John Doe Company #1 and John Doe Company #2, are what the plaintiffs' counsel described as "special purpose" Canadian companies incorporated for the sole purpose of producing single motion pictures (the "Special Purpose Companies").

[6] The plaintiffs allege that, in 2000, Mr. Ohoven formed Infinity U.S. and Infinity Canada for the purpose of overseeing the production of motion pictures which were being funded by a German investment fund known as Cinerama.

[7] It is further alleged by the plaintiffs that Mr. Vince advised Mr. Ohoven that in order to qualify for Canadian tax credits, the majority of the ownership of Infinity Canada had to be Canadian. Allegedly as a result of that advice, 60% of the shares in that company were issued to Mr. Vince, and the remaining 40% to Mr. Ohoven, with an agreement as between the two men that any profits from the motion pictures would be shared equally.

[8] The plaintiffs allege that William Vince was the sole director of Infinity Canada, while Mr. Ohoven was its secretary until October 2003. The plaintiffs further allege that on August 1, 2005, Infinity Canada was amalgamated with Cinesonic Productions Inc. ("Cinesonic") to become the defendant Infinity Features Entertainment Inc., and that thereafter Mr. Ohoven was to remain as a shareholder of the amalgamated company and entitled to 50% of its profits. It is alleged by the plaintiffs that William Vince was the sole director of the amalgamated company until February 2007, when his sister, Ms. Vince, became a director and the president of the company.

[9] The plaintiffs claim that Mr. Vince and Ms. Vince obtained film production opportunities for the defendant companies, and that as a result the companies made profits which the plaintiffs are entitled to share.

[10] Mr. Ohoven alleges that, without his knowledge or agreement, Mr. Vince transferred Mr. Ohoven's share interests in Infinity Canada to himself. Mr. Ohoven also alleges that Mr. Vince stood in a fiduciary relationship to him, and that Mr. Vince and the corporate defendants hold his share of the profits on a constructive trust for him.

[11] The defendants deny any agreement to share in profits or any fiduciary duty or constructive trust.

[12] The defendants do acknowledge that there was an agreement with respect to the production of motion pictures, but say that it was a part of that agreement that William Vince was to receive 40% of the shares of Infinity U.S. The defendants argue that because Mr. Ohoven refused to transfer the shares in Infinity U.S., he agreed to transfer his 40% interest in Infinity Canada to Mr. Vince. The plaintiffs deny that there was any agreement with respect to Infinity U.S.

> [13] The defendants have also alleged that Mr. Ohoven and Mr. Vince entered into a partnership agreement to share equally in the profits made from motion picture production in both Canada and the U.S.
>
> [14] On April 9, 2009, at the request of the plaintiffs, and with her consent, Ms. Vince was appointed as the personal representative of her late brother's estate in these proceedings.
>
> [15] The plaintiffs now seek to add Ms. Vince as a defendant based on allegations of conversion, breach of fiduciary duty, conspiracy and unjust enrichment.

[66] After allowing the claim of conversion to proceed, Hinkson J. then went on to consider the allegations of breach of fiduciary duty. At paras. 27 to 28 he wrote:

> [27] The foundation for these allegations is set out in para. 47 of the proposed amended pleadings:
>
> > a) she [Ms. Vince] was either an actual or a *de facto* officer and director of Infinity Canada, Cinesonic , and the Special Purpose Companies, and had unilateral authority over the operation and affairs of those corporations;
> >
> > b) she knew that Mr. Ohoven was the beneficial owner of 40% of the shares of Infinity Canada;
> >
> > c) she had the ability to exercise her authority to the detriment of the plaintiffs, who were particularly vulnerable to the misuse of that authority;
> >
> > d) she knew that Infinity Canada, Cinesonic , and the Special Purpose Companies were to be operated in the best interests of the plaintiffs;
> >
> > e) she knew that the profits generated by Infinity Canada, Cinesonic , and the Special Purpose Companies were to be shared equally between the plaintiffs and William Vince;
> >
> > f) she knew that the plaintiffs relied upon her to use her authority in their best interests; and
> >
> > g) she undertook to use her authority to manage Infinity Canada, Cinesonic, and the Special Purpose Companies in the plaintiffs' best interests to ensure that they would receive one half of the film production profits.
>
> [28] Ms. Vince's position was that while it could be argued that Mr. Ohoven suffered a direct loss because of a breach of his contract with Mr. Vince, there was no privity of contract between Mr. Ohoven and Ms. Vince. Mr. Ohoven's claim was thus derivative of the loss allegedly suffered by the company that led to the diminution in the value of his shares.

[67] He next considered Ms. Vince's submissions that those allegations disclosed no reasonable claim by reason of the rule in *Foss v. Harbottle* as applied in *Robak*, and held that the allegations could not stand. In doing so, he said at paras. 34 to 37:

> [34] The plaintiffs' position is that their proposed claims for breach of fiduciary duty against Ms. Vince differ from the circumstances in *Robak* because they are based upon what they allege is an independent duty owed by Ms. Vince and her brother. The basis for this claim, the plaintiffs argue, is due to the misappropriation of the companies' profits by Ms. Vince and her brother, which the plaintiffs argue distinguishes their claim from the claim in *Robak*.
>
> [35] I am unable to see such a distinction. The plaintiffs' proposed claim for breach of fiduciary duty by Ms. Vince, taken at its best, remains a claim with respect to her performance as a director and officer of various of the defendant companies, and I see no basis for the claim that she had an independent duty to the plaintiffs that was any different from her duty to the other shareholders of the various companies.
>
> [36] The British Columbia Court of Appeal has cautioned that the imposition of fiduciary obligations in commercial interactions between parties at arm's length ought to be restricted to relationships in which the parties had a "mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party": see *Perez v. Galambos*, 2008 BCCA 91, 78 B.C.L.R. (4th) 268, leave to appeal allowed [2008] S.C.C.A. No. 172, at para. 21.
>
> [37] While I do not regard this caution as wholly dispositive of the plaintiffs' proposed breach of fiduciary duty claim against Ms. Vince, it is a factor which, when added to the tortuous path that the plaintiffs have attempted to carve out for the fiduciary duty aspect of their proposed claim, persuades me that there is no basis upon which this aspect of the proposed claim by the plaintiffs against Ms. Vince could succeed. This is even given the low threshold to establish the first part of the test set out under Rule 15(5)(a)(iii). I therefore dismiss the plaintiffs' application with respect to these proposed amendments.

[68] The decision of the Court of Appeal in *Perez v. Galamabos* referred to by Hinkson J. was overturned by the Supreme Court of Canada (indexed as *Galambos v. Perez*, 2009 SCC 48), in which the Supreme Court did not, on the facts of the case, accept the existence of the fiduciary duty imposed upon Mr. Galambos by the Court of Appeal and accordingly restored the findings and conclusions of the trial judge.

[69] I am, however, satisfied that the observations of the Court of Appeal relied upon by Hinkson J. in *Ohoven* are consistent with the decision reached by the

Supreme Court of Canada in restoring the judgment of the trial judge, in finding no fiduciary duty was proven to exist in the circumstances of the debtor/creditor relationship between Mr. Galambos and his employee.

VI. DECISION

[70] After considering all of the authorities referred to by both counsel I am persuaded that I am bound to apply the principles enunciated by the Court of Appeal in *Robak* in determining whether the plaintiff, in her capacity as a shareholder in Argo No. 3, has established the existence of a reasonable claim against Hong as a director of the company for either breach of fiduciary duty or for negligence.

[71] Accordingly, to establish reasonable claims as alleged, the proposed amendments must be capable of establishing both:

1) an "independent relationship" between S. Shon as a shareholder and the director Hong as wrongdoer; and

2) an "independent loss" suffered by S. Shon as a shareholder from the wrongs done by Hong to Argo No. 3.

[72] In my view, to the extent that cases in this jurisdiction or others may suggest that a claim for either breach of fiduciary duty or negligence against a director by a shareholder may arise in British Columbia without meeting both requirements, they must be considered to be inconsistent with the Court of Appeal's decision in *Robak*.

[73] In this case, while the plaintiff's allegations of both breach of fiduciary duty and negligence by Hong are lengthy, I must observe that both claims are not only substantively virtually identical but also that the particulars of each claim all relate to matters alleged to have arisen before H. Shon agreed on behalf of the plaintiff, to give up her shares in Argo No. 3 in exchange for the impugned promissory note which is now the subject of a plea for rescission.

[74] Leaving aside the possibility that the plaintiff may be able to establish an independent relationship with Hong because of the existence of the Letter of

Understanding or other circumstances in which a fiduciary duty might arise apart from her relationship as a shareholder, I fail to see how any of the particularized allegations of wrongdoing by Hong, either in breach of alleged fiduciary duties or in negligence, resulted in anything but a diminution of the value of Argo No. 3 suffered by the company and all of its shareholders.

[75] Even if the agreement to give up her shares in Argo No. 3 in return for the impugned promissory note may have arisen as a consequence of Hong's alleged wrongdoing, the loss suffered by the plaintiff still arose and could only have arisen because of Hong's alleged breaches as a director that caused the company and its shares to lose value.

[76] The only remaining issue to decide is whether the plaintiff's alternative pleadings in paragraphs 45 and 53 of her proposed Amended Notice of Civil Claim are capable of establishing the existence of both an independent relationship and independent loss as required by *Robak.*

[77] For ease of reference I will repeat those paragraphs.

[78] Paragraph 45 reads:

> 45. Furthermore, and in the alternative, if the Letter of Understanding governed the relationship, which is denied, the losses suffered by the Plaintiff arising out of the breach of fiduciary duty are distinct from the losses suffered by Argo, as the profits and losses would be shared not by Argo, but by the investors in their proportionate share, and due to the Letter of Understanding the Plaintiff would be liable to indemnify and save harmless the defendant from losses.

[79] Similarly, paragraph 53 reads:

> 53. Furthermore, and in the alternative, if the Letter of Understanding governed the relationship, which is denied, the losses suffered by the Plaintiff arising out of the negligence are distinct from the losses suffered by Argo, as the profits and losses would be shared not by Argo, but by the investors in their proportionate share, and due to the Letter of Understanding the Plaintiff would be liable to indemnify and save harmless the defendant from losses.

[80] While it may be that if the Letter of Understanding is enforceable against the plaintiff it could give rise to the existence of a relationship between the plaintiff and Hong independent of that of shareholder and director, I am unable to discern how it could also serve as the foundation of an independent loss in the circumstances alleged.

[81] If (contrary to the plaintiff's primary pleadings), the Letter of Understanding is or was enforceable, any loss to the plaintiff occasioned by it would be derived from the terms of the document itself and promises made by her to ARAI as the Manager of the Project, not to the defendants Argo No. 3 or Hong, and also not the impugned actions of Hong as an officer and director of Argo No. 3, which caused the company and its shareholders to lose value.

[82] As with the "tortuous path" the plaintiffs in *Ohoven* attempted to "carve out" in their pleading of breach of fiduciary duty, I am satisfied there is no basis upon which the proposed claims against Hong for breach of fiduciary duty or negligence can succeed given the restrictions on such claims enunciated in *Robak*.

VII. CONCLUSION

[83] In result, I find that the plaintiff's proposed amendments to plead breach of fiduciary duty and negligence do not establish reasonable claims and will accordingly not be allowed.

[84] Given that conclusion it is not necessary for me to consider the defendants' alternative abuse of process submissions.

"Davies J."