COURT OF APPEAL FOR ONTARIO

CITATION: Darmar Farms Inc. v. Syngenta Canada Inc., 2019 ONCA 789
DATE: 20191004
DOCKET: C66365

Huscroft, Trotter and Zarnett JJ.A.

BETWEEN

Darmar Farms Inc.

Plaintiff
(Appellant)

and

Syngenta Canada Inc. and Syngenta AG

Defendants
(Respondents)

Michael J. Peerless, Matthew D. Baer and Emily Assini, for the appellant

Brandon Kain, Eric S. Block and Stephanie Sugar, for the respondents

Heard: June 25, 2019

On appeal from the judgment of Justice Helen A. Rady of the Superior Court of Justice dated November 28, 2018, with reasons reported at 2018 ONSC 7129, 143 O.R. (3d) 774.

Zarnett J.A.:

I. INTRODUCTION

[1] Commencing in 2010, the respondents, Syngenta Canada Inc. and Syngenta AG (collectively "Syngenta"), sold, to North American corn growers, Agrisure corn seed, which contained a genetically modified trait known as MIR 162.[1] Agrisure had been approved for sale in North America by Canadian and American regulators. However, it had not been approved by regulatory authorities in China, a large and growing export market for North American corn. Such approval was not obtained until December 2014.

[2] In December 2015, the appellant, Darmar Farms Inc. ("Darmar"), an Ontario corn grower, which neither purchased nor planted Agrisure, commenced a proposed class action against Syngenta on behalf of itself and "others similarly situated in Canada".

[3] In the action, Darmar alleges that the North American corn industry is interconnected and interdependent. The traits of genetically modified seeds such as Agrisure inevitably commingle with other corn. Syngenta undertook not to cause damage to the corn market by introducing its product without the necessary global approvals, but then negligently commercialized Agrisure prematurely, without

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[1] The corn seed originally sold was called Agrisure Viptera. For the 2014 crop year, Syngenta also sold a type of corn seed known as Agrisure Duracade to North American corn growers. It also contained MIR 162 and when it was sold in Canada it had not been approved in China. It was withdrawn from the Canadian market in March 2014.

important foreign approvals in place. Syngenta also made negligent misrepresentations about the timing and substance of its application for approval of Agrisure in China.

[4] The commercialization of Agrisure by Syngenta, when it had not been approved for import by Chinese regulators, led to all North American corn being barred from the Chinese market because it had intermingled with Agrisure and its MIR 162 trait. That in turn led to a glut of corn that could be sold only in the North American market, a fall in the price of corn, and losses to Darmar and prospective class members. Darmar alleges the losses are the result of Syngenta's negligence in prematurely commercializing Agrisure, its negligent misrepresentations, as well as conduct that was in breach of the *Competition Act*, R.S.C. 1985, c. C-34.

[5] Syngenta moved successfully under r. 21.01(1)(b) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, to dismiss the action on the basis that the statement of claim did not disclose a reasonable cause of action. The motion judge characterized Darmar's claim as one for pure economic loss. She concluded it was plain and obvious the claims based in negligence could not succeed. And she held the conclusions that underpinned her analysis of the negligence claims were "equally dispositive" of the *Competition Act* claim.

[6] Darmar argues that the motion judge made errors in her application of the law relating to claims for negligence causing economic loss and the law relating to

the proper approach on a r. 21 motion. Its principal arguments are that the categories of claims for economic loss are not closed—its negligence claims for premature commercialization of, and misrepresentations about, a product in the interdependent and interconnected corn market are novel and should be allowed to proceed; the statutory claim under the *Competition Act* was not properly analysed by the motion judge; the motion judge incorrectly ignored the particulars Darmar had delivered and the documents in it, which should have been viewed as part of its pleading; and the motion judge failed to view the claim from the perspective of potential class members such as Quebec residents.

[7] For the reasons which follow I would allow the appeal in part.

[8] Whether the pleading discloses a reasonable cause of action must be assessed by reference to the claim of Darmar, not of potential members of a proposed class. Viewed from that perspective, the key issue in the negligence claims is whether Syngenta owed a duty of care to Darmar, which never purchased Agrisure.

[9] On the facts alleged the misrepresentation claim does not have a reasonable prospect of success, as any reliance by Darmar on the alleged misrepresentations about the timing and substance of Syngenta's application for approvals in China was for a purpose outside the pleaded purpose of those representations, and therefore outside the scope of any duty of care. In a claim for misrepresentation,

the purpose of the representation is determinative of the scope of the relationship of proximity necessary to found a duty of care. Nor on the facts alleged does Darmar have a reasonable prospect of successfully establishing that the civil remedy in the *Competition Act* is available to it. Those claims were properly dismissed.

[10] However, I reach a different result in respect to the claim for premature commercialization. In light of this court's decision in *Sauer v. Canada (Attorney General)*, 2007 ONCA 454, 225 O.A.C. 143, it cannot be said on the facts alleged that Darmar has no reasonable prospect of successfully establishing that Syngenta owed it a duty of care not to negligently prematurely commercialize Agrisure. The motion judge erred in dismissing that claim.

II. THE FACTS AND THE DECISION BELOW

(i) Darmar's Allegations

[11] Syngenta's motion to dismiss was brought under r. 21.01(1)(b) of the *Rules of Civil Procedure* which provides that a pleading may be struck if it discloses no reasonable cause of action. On such a motion, the facts pleaded are assumed to be true unless they are patently ridiculous or incapable of proof: *Nash v. Ontario* (1995), 27 O.R. (3d) 1 (C.A.), at p. 6. However, bald conclusory statements of fact and allegations of legal conclusions unsupported by material facts are not

assumed to be true: *Das v. George Weston Ltd.*, 2018 ONCA 1053, 43 E.T.R. (4th) 173, at para. 74.

[12] The summary below is extracted from Darmar's second amended statement of claim. In the *Analysis* section of my reasons, I discuss the effect of the particulars and the documents referred to in the particulars.

[13] North America is the largest producer and exporter of corn in the world. At the relevant time, China was a large and growing export market for North American corn.

[14] The North American corn industry is interconnected and mutually interdependent. Genetically modified seeds inevitably commingle with other seeds.

[15] Approvals are required before commingled crops can be sold. Major industry associations, of which Syngenta is a member, have publicly recognized that there is a potential for major trade disruptions if approvals in major international markets are not obtained before a product is commercialized.

[16] After being warned by industry associations not to introduce another MIR genetic trait without approval in export markets because of the detrimental consequences that can result from premature commercialization, Syngenta undertook not to cause damage to the corn market by introducing such a product

without necessary global approvals. Darmar and other class members are alleged to have reasonably relied on this undertaking.

[17] In 2010, Syngenta's Agrisure Viptera product containing MIR 162 was approved for use in North America by the relevant American and Canadian regulators. However, in 2010 China had not approved the product. Syngenta only started the approval process in China in 2010, knowing it would take two to three years for approval, or longer if its application was incomplete or incorrect, which it was.

[18] Even though China had not approved Agrisure, Syngenta brought Agrisure to market in North America for the 2011 crop year. As was inevitable, and foreseeable and foreseen by Syngenta, Agrisure "contaminated" the corn supply from the North American market through cross-pollination and commingling.

[19] In November 2013, North American corn exports to China were found to be contaminated with Agrisure resulting in China's rejection of all corn from North America. This led to a glut of corn available for sale in North America and a drop in corn prices. This continued until after December 2014, when Agrisure was finally approved in China.

[20] Syngenta is alleged to have been negligent in commercializing its product when it knew or should have known that doing so before approvals in China had been obtained would have the effect of contaminating the entire North American

corn supply with a genetic trait that would lead to the closing of that export market and a corresponding drop in prices.

[21] Syngenta is alleged to have made negligent misrepresentations about the importance of the Chinese market; the timing and substance of its application for Agrisure approval in China – in particular, the timing of when China was likely to approve Agrisure; its ability to channel Agrisure to non-Chinese markets; and its ability to contain the infiltration of Agrisure to the North American corn supply. The alleged misrepresentations were made "in commercial advertising and/or promotion for MIR 162 corn products, including Agrisure Viptera and Agrisure Duracade."

[22] Darmar and class members relied on Syngenta's representations regarding the market in China and the status of regulatory approvals for Agrisure in China in deciding to plant corn; had they known the true facts they would have planted alternate crops or made other uses of their lands. Such reliance is alleged to have been reasonable on the part of Darmar and class members, as well as foreseeable to Syngenta.

[23] Syngenta is alleged to owe a duty because: (i) the interdependence and interconnectedness of the corn market where genetically modified crops and seeds are sold made Darmar and class members vulnerable, and made the risk of harm from premature commercialization or negligent misrepresentations foreseeable;

and (ii) Syngenta's membership in industry associations, their warnings to Syngenta, and Syngenta's undertaking in response gave rise to an expectation in Darmar and other class members that Syngenta would not release incorrect information and would refrain from selling and distributing Agrisure in a manner that would foreseeably cause harm.

[24] Darmar also alleges that Syngenta's "false or misleading representations" were contrary to s. 52 of the *Competition Act*.

[25] Darmar planted corn in increasing quantities in 2013, 2014, and 2015. It did not purchase or plant any Agrisure. The claim alleges that corn growers who did not purchase Agrisure (such as Darmar), and those who did, were all damaged by the conduct of Syngenta.

(ii) The Motion Judge's Decision

[26] The motion judge identified the claim as one for pure economic loss: at para. 20. She reviewed categories of permitted claims for pure economic loss that have been recognized, noting that one such category was a claim for negligent misrepresentation: at para. 21. She stated that the claim for premature commercialization was a "misnomer" and considered that the claim "is framed in only one previously recognized category of compensable economic loss, namely misrepresentation": at para. 73.

[27] The motion judge concluded that the claim foundered because: the reference to the undefined term "stakeholders" as describing persons similarly situated to Darmar gave rise to the spectre of indeterminate liability to an indeterminate class, and it was illogical that Syngenta would give an undertaking it could not fulfill to a "huge swath of the North American corn market"; Syngenta could not be faulted for failing to prevent commingling when the statement of claim pled it was inevitable due to the interconnectedness of the North American industry and the peculiarities of genetically modified seeds;[2] and giving effect to the claim would elevate the importance of foreign approvals over domestic approvals, since the product had been approved for sale in Canada and the United States: at paras. 82-87. She held that "these conclusions are equally dispositive of the *Competition Act* claim": para. 89.

[28] In reaching her conclusions, the motion judge decided that she could not look at documents referred to in Darmar's response to a demand for particulars: paras 18-19.

[29] The motion judge also noted that a parallel claim in the United States had been allowed to proceed: *In re Syngenta AG MIR 162 Corn Litigation* (2015), 131 F. Supp. 3d 1177 (D. Kan.). However, she had misgivings in relying on it because it was not clear that the test the U.S. court applied was the same or similar to that

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[2] Darmar no longer presses a claim based on negligence in not preventing commingling.

under r. 21, or that Canadian and American law in the area of pure economic loss claims were the same or similar: para. 63.

III. ANALYSIS

A. The Standard of Review

[30] A motion judge's determination that a claim discloses no reasonable cause of action is a determination of law reviewable on a standard of correctness: *Kang v. Sun Life Assurance Co. of Canada*, 2013 ONCA 118, 303 O.A.C. 64, at para. 27. However, a decision denying leave to amend is a discretionary one entitled to deference on appeal: *Mortazavi v. University of Toronto*, 2013 ONCA 655, leave to appeal refused, 2014 S.C.C.A. No. 190, at para. 3.

B. The Appellant's Arguments

[31] Darmar advances the following two main submissions:

A. It was not plain and obvious that either branch of the negligence claim could not succeed—the claim is novel, the jurisprudence is still developing, and the decision in the parallel U.S. claim should have been treated as instructive.

B. The *Competition Act* claim was improperly struck as the motion judge did not undertake any analysis of it.

[32] Darmar adds the following two arguments which are important to the consideration of its main submissions: the motion judge erred in her failure to

consider the documents in the response to the demand for particulars, and the motion judge failed to consider the impact of striking the claim on potential class members such as Quebec residents.

[33] Finally, Darmar argues that the motion judge ought in any event to have granted it leave to amend the claim rather than striking it completely.

[34] I first consider the arguments of Darmar about whose cause of action is to be considered, and then the arguments about what, beyond the statement of claim, is to be looked at, since they set a framework for consideration of the main submissions Darmar makes, to which I then turn.

C. Darmar Must Have A Cause of Action

[35] The argument that the motion judge failed to consider the effect of striking the claim on residents of Quebec posits that although Darmar is not a Quebec resident, there may be class members who are. Darmar argues that the restrictions on claims for pure economic loss, which are set up as an obstacle to Darmar's ability to sue, exist in common law provinces only, and not under the law of Quebec.

[36] Underlying Darmar's submission is the broader premise that when a court considers whether a statement of claim in a proposed class action discloses a reasonable cause of action, the relevant question is whether any potential class

member has a cause of action, rather than solely whether the representative plaintiff does.

[37] I do not accept that submission. As this court noted in *Taylor v. Canada (Attorney General)*, 2012 ONCA 479, 111 O.R. (3d) 161, at para. 21:

> ...[T]he statement of claim must disclose that the representative plaintiff...has a reasonable cause of action against [the defendant]. In the context of a negligence claim, this requirement means that the pleadings must provide a basis upon which [the defendant] could be said to owe a private law duty of care to [the representative plaintiff]. It is not enough that on the pleadings some other member or members of the class may have a cause of action in negligence against [the defendant]...

[38] The adequacy of the statement of claim here must be assessed from the standpoint of whether it discloses that Darmar has a reasonable cause of action. If Darmar does not, it does not matter that other potential class members may.

D. Looking Beyond the Statement of Claim

[39] The motion judge refused to consider documents referred to in a response Darmar had delivered to Syngenta's demand for particulars. She relied on *Pearson v. Inco Ltd.*, [2001] O.T.C. 919, 16 C.P.C. (5th) 151. In that decision Nordheimer J. (as he then was) explained that a document, such as an agreement, referred to in a pleading may be looked at on a r. 21 motion, because the full terms of it are essentially incorporated into the pleading. But, he noted, the situation is different when a party attempts to pick out a statement in a document referred to in a

response to demand for particulars, rely on the statement as though it was a material fact alleged in the pleading, and in that way fill a gap otherwise existing in the pleading.

[40] In oral argument, Darmar further submitted that the motion judge, in refusing to look at the documents attached to the particulars, did not look at the particulars themselves.

[41] Darmar argues that ignoring the particulars and the documents attached to them was wrong. In *Gaur v. Datta*, 2015 ONCA 151, at para. 5, this court held that "[i]n determining whether a cause of action is disclosed, particulars can be considered as part of the pleading." And in *Best v. Ranking*, 2015 ONSC 6269, Heeney J. held that since a motion judge is entitled to consider any document specifically referred to and which forms an integral part of the statement of claim, "[i]t stands to reason that the same principle would apply to documents referred to in a reply to demand for particulars": at para. 126.

[42] For its part, Syngenta also submits that particulars and documents provided by Darmar in response to Syngenta's demand for particulars may be referred to on a motion by a defendant to strike a claim, but that such reference may only be made by the defendant, here Syngenta itself.

[43] Consistently with their positions, in their facta and oral arguments before us, both parties referred to the particulars and certain documents referred to in them.

[44] The question of what may be looked at beyond the statement of claim on a r. 21.01(1)(b) motion to strike is informed by the rule that no evidence is admissible on such a motion: r. 21.01(2)(b). Instead, the facts alleged in the pleading are the basis for the determination to be made. Treating a fact alleged in particulars of a pleading as being part of the pleading is not inconsistent with the prohibition on evidence. Particulars are not evidence: *Janssen-Ortho Inc. v. Amgen Canada Inc.* (2005), 256 D.L.R. (4th) 407, at paras. 89-92. Nor is the rule offended by treating a document, incorporated by reference expressly or impliedly into the pleading, as part of the pleading itself, because documents incorporated this way are not evidence: *Web Offset Publications Ltd. v. Vickery* (1999), 43 (O.R.) (3d) 802, leave to appeal refused, (2000) 43 O.R. (3d) 802, at p. 803. I agree that if a document is incorporated by reference into a response to a demand for particulars it can be treated as part of the particulars and therefore part of the pleading.

[45] But this does not completely deal with the concern that was expressed in *Pearson*. It is one thing to treat a document as incorporated into particulars when it is clear that the particulars are asserting and incorporating the whole document, such as an agreement, but doing so in a summary fashion. It may be quite another to pick out one statement, but not others, from a different kind of document referred to in particulars, and treat that statement as a fact alleged in the particulars, and therefore in the pleading, while not treating other statements in the same document the same way. The situation becomes more complicated when a statement in a

document is subject to interpretative issues that cannot be resolved on a r. 21 motion.

[46] We were taken to documents by both parties essentially for the purpose of emphasizing points in the pleading and particulars. Darmar pointed to documents that it asserted showed that Syngenta made the representations alleged about the timing of Chinese approval for the purpose of stopping the return of Agrisure seeds it had sold. Syngenta pointed to documents it said underscored that Syngenta's representations were made for its own commercial purposes, that is, selling its product. But what we were pointed to in documents made those points no more obviously than already made in the pleading and particulars. And in some cases the documents contained other statements that would require interpretation beyond the purview of a r. 21 motion to fully understand the statements in them to which the parties did direct us.

[47] The issues here can be determined by reference to the pleading and particulars. Given that the documents appended to the particulars were advanced for points already appearing in the pleading and particulars, it is not necessary to further consider the propriety of using them: *Janssen-Ortho*, at para. 92.

[48] I turn now to the main submissions that Darmar raises.

E. The Relevance of Darmar's Claim Being Novel

[49] Darmar emphasizes that its claim is novel, stressing, as the key feature, that it is a claim about the behaviour of participants in an interconnected and interdependent market.

[50] The assessment of whether Darmar has a reasonable cause of action takes place against the standard applicable to a r. 21 motion. A claim will be struck if it has no reasonable prospect of success. Striking such claims is a valuable measure essential to fair and effective litigation. But it is a tool to be used with care, as the law is not static. It is not determinative that the law has not yet recognized the particular claim; the question is whether there is a reasonable prospect that the claim will succeed, erring on the side of permitting a novel but arguable claim to proceed: *R. v. Imperial Tobacco Canada Ltd.,* 2011 SCC 42, [2011] 3 S.C.R. 45, at paras. 17-21.

[51] Darmar puts considerable emphasis on this latter point. The fact that a claim is novel is not a sufficient reason to strike it. But 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. There must be a reasonable prospect that the claim will succeed: *Imperial Tobacco*, at para. 21; *George Weston*, at para 75. Whether there is a reasonable prospect that a plaintiff will succeed in establishing that a duty of care exists on the facts as pleaded can, in an appropriate case, be assessed on a r. 21

motion. *Imperial Tobacco* is but one example of where that has occurred: at para. 60.

F. Does Darmar have a reasonable prospect of establishing that Syngenta owed it a duty of care?

(a) The Competing Positions

[52] Darmar argues that its claims are arguable and should be allowed to proceed. It submits that the interconnected and interdependent nature of the corn market provide the necessary proximity. All corn producers are vulnerable to misrepresentations and to premature commercialization; the damage that occurred was reasonably foreseeable. Accordingly, the requirements for a duty of care are present. Indeterminate liability does not result even though large or extensive liability may. The duty should not be restricted on policy grounds, at least not at this stage of the proceedings.

[53] Syngenta argues that the pleadings do not disclose a reasonable prospect that Darmar will succeed in establishing a duty of care for either aspect of its negligence claim. Syngenta's representations about the timing of approval in China are expressly alleged to have been made for a specific purpose, namely to promote the sale of Agrisure, and any duty in respect of those representations could only have been owed to purchasers of Agrisure. Darmar did not rely on them for that purpose as it did not purchase Agrisure. Reliance by Darmar on Syngenta's

representations to purchase and plant other corn was for a purpose beyond the purpose of Syngenta's representations, and therefore outside of any relationship of proximity that could give rise to a duty of care owed by Syngenta to Darmar to use reasonable care in making representations. Syngenta argues the same analysis should apply to the premature commercialization claim. The timing of commercialization could not involve a duty to non-purchasers of that product. Delimiting the duty in this way is necessary to avoid indeterminate liability, something the law in the area of pure economic loss seeks to avoid.

(b) The Principles Applicable to Determining a Duty of Care in a Claim for Pure Economic Loss

[54] In *Deloitte & Touche v. Livent Inc. (Receiver of),* 2017 SCC 63, [2017] 2 S.C.R. 855, the Supreme Court reviewed the approach applicable to determining the existence and extent of a duty of care in a claim for economic loss. I summarize the principles that are relevant to the analysis here.

- 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.
- The approach is the modified *Anns/Cooper* test, which 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: (i) proximity, namely, whether the parties are in such a close and direct relationship that it would be just and fair to impose a duty of care in law; and (ii) foreseeability of harm, namely, whether an injury to the plaintiff was a reasonably foreseeable consequence of negligence of the defendant. A properly conducted stage one analysis will rarely, if ever, find a *prima facie* duty of care that could give rise to indeterminate liability.
- At the second stage the court considers whether, despite the reasonably foreseeable quality of the plaintiff's injury and the proximity of the relationship, the defendant should nonetheless be insulated from liability. This policy analysis is something which should be relied on narrowly, and rarely if ever due to concerns about indeterminate liability which ought not to persist after a proper stage one analysis.

see *Deloitte*, at paras. 16, 22-23, 25, 32 and 41-42.

[55] I note here two points that arise from the foregoing. First, the approach described above applies to both of Darmar's negligence claims – that in misrepresentation and that for premature commercialization: Lewis Klar, "Duty of Care for Negligent Misrepresentation—and Beyond?" (2018) 48 The Advocates Quarterly 235 at 238. However, this does not mean that applying the same

approach will yield the same result for both of Darmar's negligence claims. Second, the parties' arguments about whether recognizing a duty in this case will or will not give rise to indeterminate liability are largely subsumed in the considerations that go into the question of whether a *prima facie* duty of care exists for either of the misrepresentation or premature commercialization claims in the first stage of the analysis.

[56] Because the two factors relating to the existence of a *prima facie* duty of care, proximity and foreseeability, are central to this appeal, I discuss them further below.

(i) Proximity

[57] In *Deloitte*, two routes to establishing proximity were discussed.

[58] The first route is where a party seeks to base a finding of proximity upon a category established by prior case law to be proximate, or a category analogous thereto: para. 28. As the motion judge noted, where a claim is for pure economic loss, courts have previously recognized certain categories of proximate relationships, one of which is in claims for negligent misrepresentation: *Design Services Ltd. v. Canada*, 2008 SCC 22, [2008] 1 S.C.R. 737, at paras. 30-31.

[59] The second route is where a previously established proximate relationship cannot be found. This does not end the proximity inquiry; the existence of recognized categories does not foreclose finding new categories: *Martel Buildings*

Ltd. v. Canada, 2000 SCC 60, [2000] 2 S.C.R. 860, at paras. 38-39. In such cases "courts must undertake a full proximity analysis. To determine whether the "close and direct' relationship which is the hallmark of the common law duty of care' exists...courts must examine all relevant 'factors arising from the *relationship* between the plaintiff and the defendant'...While these factors are diverse and depend on the circumstances of each case...this Court has maintained that they include 'expectations, representations, reliance, and the property or other interests involved'...as well as any statutory obligations...": *Deloitte*, at para. 29 (internal citations omitted, emphasis in the original).

[60] A further point made in *Deloitte* is that it is not simply the existence of a category of proximate relationship that matters; the scope of that proximate relationship must also be considered. This is illustrated by the following passages from *Deloitte*, which make it clear that conduct that falls outside the scope of the proximate relationship falls outside the scope of the defendant's duty of care:

> [30] In cases of pure economic loss arising from negligent misrepresentation or performance of a service, two factors are determinative in the proximity analysis: the defendant's undertaking and the plaintiff's reliance. Where the defendant undertakes to provide a representation or service in circumstances that invite the plaintiff's reasonable reliance, the defendant becomes obligated to take reasonable care. And, the plaintiff has a right to rely on the defendant's undertaking to do so (W. N. Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913), 23 *Yale L.J.* 16, at pp. 49-50). These corollary rights and obligations create a relationship of proximity (*Haig*, at p. 477; *Caparo*

> *Industries plc. v. Dickman*, [1990] 1 All E.R. 568 (H.L.), at pp. 637-38; *Glanzer v. Shepard*, 135 N.E. 275 (N.Y. 1922) at pp. 275-76; *Ultramares Corp. v. Touche*, 174 N.E. 441 (N.Y. 1931), at pp. 445-46; E. J. Weinrib, "The Disintegration of Duty" (2006), 31 *Adv. Q.* 212, at p. 230).
>
> [31] Rights, like duties, are, however, not limitless. 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 (Weinrib; A. Beever, *Rediscovering the Law of Negligence* (2007), at pp. 293-94). This principle, also referred to as the "end and aim" rule, properly limits liability on the basis that the defendant cannot be liable for a risk of injury against which he did not undertake to protect (*Glanzer*, at pp. 275 and 277; *Ultramares*, at pp. 445-46; *Haig*, at p. 482). By assessing all relevant factors arising from the relationship between the parties, the proximity analysis not only determines the *existence* of a relationship of proximity, but also delineates the *scope* of the rights and duties which flow from that relationship. In short, it furnishes not only a "principled basis upon which to draw the line between those to whom the duty is owed and those to whom it is not" (*Fullowka*, at para. 70), but also a principled delineation of the scope of such duty, based upon the purpose for which the defendant undertakes responsibility. As we will explain, these principled limits are essential to determining the type of injury that was a reasonably foreseeable consequence of the defendant's negligence. [Emphasis added.]

(ii) Reasonable Foreseeability

[61] As noted above, this part of the inquiry asks whether an injury to the plaintiff was a reasonably foreseeable consequence of negligence of the defendant:

Deloitte, at para. 32. The scope of proximity also affects the analysis of reasonable foreseeability. As the court in *Deloitte* explained at para. 35:

> ... Both the reasonableness and the reasonable foreseeability of the plaintiff's reliance will be determined by the relationship of proximity between the parties; 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. [Emphasis added.]

G. Application of the Principles to the Misrepresentation Claim

[62] I begin with an analysis of the negligent misrepresentation claim. This claim involves alleged representations that Syngenta made about the importance of the Chinese corn market, the timing and substance of its application for approval of Agrisure in China, as well as about its ability to contain the infiltration of Agrisure to the North American corn supply. It is alleged such representations were misleading, negligently made by Syngenta, and relied on by Darmar.

[63] But unless Darmar relied on the representations within the scope of a proximate relationship with Syngenta, Sygenta did not owe it a duty of care in respect of those representations. The scope of proximity and of reasonable foreseeability in a misrepresentation case is defined by the purpose for which the representation was made: *Deloitte*, at paras. 24, 31 and 34. In *Deloitte*, that

purpose was derived from the scope or purpose of the undertakings that were given to provide the representations there in issue.

[64] Darmar argues that *Deloitte* is limited in its application to misrepresentations by auditors pursuant to specific prior undertakings to give representations. Because Darmar's case does not involve a representation made by an auditor pursuant to an undertaking, it argues that the analysis in *Deloitte* does not apply. I do not accept that argument. In my view the principle set out in *Deloitte*, that the purpose for which a representation is given determines the scope of the proximate relationship, applies to the misrepresentation claim here.

[65] In *Deloitte*, the undertaking the auditors gave, pursuant to which they performed their services and made representations, defined the purpose for which their representations were given and thus the scope of proximity and of reasonable foreseeability. However, nothing in *Deloitte* suggests that the purpose of the representations is any less important when they are not given pursuant to an undertaking, but the purpose nonetheless can be determined. The purpose of the representation remains determinative in the proximity and foreseeability analysis even where the representation is not the result of a specific prior undertaking to provide it. As long as the purpose for which the representation is given is clear, that purpose defines what is within and what is outside the scope of responsibility, that is, the duty of care relating to the representation.

[66] As the majority stated in *Deloitte*, "the *purpose* of the representation is critical": para. 15 (emphasis in the original). The ultimate question is the purpose of the representation; "[a]ny 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" (emphasis added): para. 31.

[67] Here there is no allegation that Syngenta undertook to provide the specific representations it is alleged to have given and about which Darmar complains. However, the pleading and the particulars expressly state that the representations that Syngenta made about the timing of approvals in China, etc. were for the purpose of selling its own product. The statement of claim alleges that the representations were made "in commercial advertising and/or promotion for MIR 162 corn products, including Agrisure Viptera and Agrisure Duracade". The particulars make the point even more specifically. In them Darmar alleges that the representations it complains of were made by Syngenta "for the purpose of facilitating, promoting and inducing the commercial sale of its products containing MIR 162 maize": para 1(l); and that representations were made "[i]n order to encourage further sales and planting of Agrisure Viptera…": para 1(o).

[68] Darmar's allegation is that it relied on the representations to plant corn, but not to purchase and plant Agrisure. Darmar's allegation is therefore of reliance for

a purpose beyond the purpose of the Syngenta's representations. This is beyond the scope of any relationship of proximity. The purpose of the representation "delineates the *scope* of the rights and duties which flow from that relationship": *Deloitte*, at para. 31. And although reliance on the representation for a purpose other than the one for which it was given may lead to an injury, it does not lead to injury that would be reasonably foreseeable: *Deloitte*, at para. 36.

[69] In my view, this result is not affected by Darmar's allegations that the corn market is interdependent and interconnected. In *Deloitte*, the representations were made to the auditor's own client, Livent. Yet Livent could not rely on the representations for a different purpose than that for which they were given.

[70] It follows that even in an interconnected and interdependent market, a representor's duty does not extend to reliance on its representations by a market member for purposes other than those for which the representations were made. Accordingly, on the facts alleged by Darmar, its reliance on Syngenta's representations was outside the scope of any proximity between it and Syngenta; reliance by Darmar was for purposes other than that for which the representations were made. Nor could injury resulting from such reliance be reasonably foreseeable. Darmar has no reasonable prospect of establishing a duty of care to support its misrepresentation claims.

[71] In light of those conclusions it is unnecessary to consider Syngenta's argument that the timing of Darmar's planting of corn does not indicate reliance on Syngenta's representations. For the reasons above, there is no reasonable prospect that the claim in negligent misrepresentation could succeed. The motion judge reached the correct result in respect of this claim.

H. Application of the Principles to the Premature Commercialization Claim

[72] I reach a different result with respect to the premature commercialization claim. I disagree with the motion judge's characterization of the premature commercialization claim as a "misnomer". It was not determinative that the claim does not fall within a category of claim for pure economic loss which has previously been recognized. In my view the motion judge did not correctly consider this aspect of Darmar's claim because she did not consider whether a full proximity analysis and a consideration of reasonable foreseeability here would reveal a reasonable prospect of success in establishing a duty of care sufficient to support the premature commercialization claim.

[73] I also do not accept Syngenta's argument that this claim is so closely related to the misrepresentation claim as to stand or fall with it. The premature commercialization claim is based on alleged facts that do not completely overlap with those on which the misrepresentation claim is brought, and it is therefore

analytically distinct. Darmar could have been damaged by the commercialization of Agrisure and its timing even if no misrepresentations had been made that it could rely upon.

[74] The claim for premature commercialization requires the establishment of a duty of care that is somewhat different than the duty that would support its misrepresentation claims. Darmar characterizes the duty it contends for as "a duty of reasonable care with respect to the timing, manner, and scope of Syngenta's commercialization of its Viptera and Duracade products", adopting that description from the U.S. Decision.

[75] The U.S. Decision held that the assertion of such a duty passed the test at a pleadings stage of a claim that was "plausible" and that rose above a "speculative level": at p. 1187. Darmar concedes that the law the U.S. Court applied is not identical to Canadian law but argues that, especially as it concerns a novel claim at the pleading stage, the decision of the U.S. Court is instructive. I agree that some guidance can be gleaned from the U.S. Decision. Although the U.S. Court did not precisely apply the *Anns/Cooper* test, what it did apply bears some similarity to it. It cited as relevant factors, among others, the foreseeability of injury by Syngenta, and the existence of an interconnected market that gave rise to expectations among growers and sellers that they would act at least in part for the mutual benefit of all: at p. 1189. The U.S. Court was not persuaded that policy considerations precluded the recognition of a duty: at p. 1189.

[76] More importantly though, there are several factors that Darmar pleads that, under the *Anns/Cooper* test, as it has been applied in this court, arguably support a relationship of proximity:

(a) ***Syngenta gave an undertaking in response to concerns from industry associations***. The industry associations to which Syngenta belonged were allegedly formed for the purpose of protecting the public and participants in the corn market. Those industry associations had warned Syngenta of harm in the form of trade disruptions if a product were commercialized without appropriate steps toward global approvals. In response, Syngenta is alleged to have undertaken not to cause harm to the corn market by commercializing a product with MIR 162 without global approvals. It is not alleged that this undertaking was given for the limited purpose of inducing customers to buy Agrisure, but rather to respond to concerns of those interested in the protection of the public and corn market participants. Darmar alleges it relied on that undertaking, and alleges it had an expectation based on that undertaking that premature commercialization would not occur. Although a bare allegation of reasonable reliance or expectations may qualify as a conclusory statement of fact, here the reliance and expectations are alleged to have arisen from a statement made in response to

concerns from industry associations about the prospect of the very harm that is alleged to have occurred here. Some factual basis for the conclusions is therefore present. Reliance and expectations are important factors in a full proximity analysis: *Deloitte*, at para. 29.

(b) ***The interconnectedness and interdependency of the corn market.*** Syngenta is alleged to have known that upon commercialization its genetically modified product would impart its characteristics on all corn so that even corn not purchased from Syngenta would be vulnerable to be treated by export markets in the same way as Syngenta's products. Proximity is about the nature of the relationship between plaintiff and defendant. The alleged fact that Syngenta's product would inevitably commingle with all other producers' corn, including Darmar's, imparting traits that affect the markets in which it could be sold, and that Syngenta knew this, arguably put Syngenta in a relationship with Darmar, even if Darmar did not purchase Agrisure.

[77] The conclusion that these facts could arguably support a finding of the requisite proximity is supported by this court's decision in *Sauer v. Canada (Attorney General)*, 2007 ONCA 454, 225 O.A.C. 143. In *Sauer*, the claim alleged that a manufacturer, who supplied seed contaminated with "mad cow disease" to an Alberta farmer resulting in the closing of foreign markets to all Canadian cattle

and beef products, owed a duty of care to an Ontario farmer who had not purchased the defendant's feed. This court upheld a decision allowing that claim to proceed.

[78] Goudge J.A. noted that the relationship between, on the one hand, a defendant manufacturer of feed, and on the other, the plaintiff Ontario farmer who did not purchase the defendant's feed, fell outside of any previously recognized category of relationship in which proximity was established. But applying the *Anns/Cooper* test, he found it was not plain and obvious that proximity, and therefore a duty of care could not be established. The defendant and plaintiff were part of an "integrated" industry, the feed component was regulated nationally in the interests of the public and participants in the industry, and "most importantly" the economic effects of a single contaminated cow would be shared by all cattle farmers because foreign sales would be eliminated for all: at paras. 35-39. These factors are similar to what Darmar here alleges.

[79] Goudge J.A. also noted, citing *Donoghue v. Stevenson*, [1932] A.C. 562, at p. 596, that the nature of the product sold—its dangerousness or lack of it—is to be taken into account in determining "the range of persons to whom a duty was owed": *Sauer*, at para. 43. Syngenta seeks to distinguish *Sauer* on the basis that the manufacturer's feed was contaminated with a disease and was therefore dangerous, while here Syngenta's product had regulatory approval for sale in

North America and there is no allegation either it or the genetic trait it imparted to other corn was unsafe.

[80] I am not satisfied that this distinguishes *Sauer* so as to render Darmar's claim one with no reasonable prospect of success. In *Sauer*, the plaintiff did not buy the defendant's feed, and neither that feed or the diseased cow of the Alberta farmer interacted with the plaintiff's cattle. The only negative effect the plaintiff in *Sauer* would suffer from the provision of contaminated feed to others was the economic effect of the closing of the foreign markets to all Canadian cattle. The defendant's product in *Sauer* was dangerous to the plaintiff in the sense that it could have that effect. In this case, Darmar's corn was imbued with a trait by Syngenta's product, but more importantly, the alleged effect of prematurely commercializing Agrisure, when it would commingle with other corn and impart that trait, was exactly the kind of effect present in *Sauer*–the closing of foreign markets. Syngenta's product was dangerous to Darmar, a non-purchaser of it, in the same way as the defendant's feed was dangerous to the plaintiff, a non-purchaser of it, in *Sauer*.

[81] The "range of persons" to whom a duty is owed (in other words the existence and scope of a relationship of proximity) was determined, in *Sauer*, to arguably include cattle farmers who did not purchase the defendant's feed when that feed contained an attribute that could affect the plaintiff and its product by closing foreign markets with consequential economic effects. Applying the same analysis,

Syngenta's product contained and imparted an attribute that would affect Darmar and its product in the same fashion by causing the closing of an important foreign market with consequential economic effects. Darmar would arguably fall within the "range of persons" to whom a duty is owed.

[82] In the proximity analysis, the key question is whether it is just and fair to impose a duty of care on the defendant given the relationship. In my view, especially in light of *Sauer*, it cannot be concluded at this stage that there is no reasonable prospect that Darmar could succeed in establishing that it would be just and fair to impose a duty of care on Syngenta.

[83] Foreseeability of the type of injury that occurred is expressly alleged. If Darmar is within the range of persons to whom a duty is owed, or in other words, if a relationship of proximity exists, nothing alleged takes Darmar outside the scope of the relationship of proximity. The injury that was allegedly foreseeable to Syngenta would thus be "reasonably" foreseeable. A *prima facie* duty of care therefore arguably existed.

[84] Syngenta relies on *Hoffman v. Monsanto*, 2005 SKQB 225, 15 C.E.L.R. (3d) 42, aff'd 2007 SKCA 47, 284 D.L.R. (4th) 190 to counter this conclusion. In my view *Monsanto*, which was distinguished in *Sauer*, does not assist Syngenta at this stage.

[85] In *Monsanto*, one ground of the claim in a proposed class action was that the defendant, a producer of genetically modified canola, had undertaken to develop export rules to ensure its product did not enter the export market due to its lack of approval in Japan and Europe. The claim alleged that the defendant abandoned those rules negligently leading to the loss of the European market to the plaintiff class of organic canola farmers, with whose products the defendant's product intermingled depriving them of their organic status. The court determined that this claim was not a reasonable cause of action within the meaning of Saskatchewan's class proceedings legislation because: (i) it was inconsistent with the claim's principal allegations on the basis of which the export rules would have made no difference to whether the plaintiffs suffered harm; and (ii) the defendant's alleged undertaking was gratuitous and was not alleged to have been relied on by or even known to the plaintiffs: at paras. 83-84 and 88.

[86] This case is different from *Monsanto*. First, there is no inconsistency with Darmar's principal allegation. Second, unlike in *Monsanto* where the plaintiffs were neither aware of nor relied on the defendant's undertaking, Darmar alleges that it was aware of and reasonably relied on the undertaking by Syngenta. Moreover, Darmar pleads not only the undertaking, but other facts, including the interdependency and interconnectedness of the corn market, in support of its claim of a duty of care. As well, as Goudge J.A. noted in *Sauer* in distinguishing *Monsanto*, the test the Saskatchewan court applied in determining whether there

was a reasonable cause of action for the purpose of Saskatchewan class proceedings legislation was different from the test for striking a pleading under r. 21.01(1)(b): *Sauer*, at para. 42.

[87] The arguments of Syngenta that indeterminate liability concerns should prevent the finding of a duty of care not to negligently commercialize prematurely, either at the first stage of the *Anns/Cooper* test or as a residual policy concern at the second stage, are not persuasive at this point. In *Deloitte*, the majority said that where a first stage analysis results in a finding of a *prima facie* duty of care it will rarely be negated by indeterminate liability concerns at the second stage, because the finding of a proximate relationship and of reasonable foreseeability of injury *determine* in important ways the very matters that must be *indeterminate* for the concerns to persist: at para. 44. And even if indeterminacy concerns do persist after a first stage analysis, they will not necessarily negate a duty of care: at para. 45.

[88] Courts should be reluctant to determine at the pleadings phase of an action that indeterminate liability concerns justify negating a duty of care: *Sauer*, at para. 45. Syngenta is alleged to have undertaken not to harm the corn market by prematurely commercializing its product, after receiving warning of the very risks to market participants—commingling and trade disruptions—that are alleged to have actually occurred and to have harmed Darmar. At the pleading phase of this action Darmar has a reasonable prospect of showing that a duty of care arose that

did not give rise to indeterminacy concerns, or that even if it did, any indeterminacy arose from the risk which Syngenta undertook to protect the industry against and thus may "justly and fairly result in liability": *Deloitte*, at para. 45.

I. The *Competition Act* Claim

[89] Darmar argues that the motion judge erred in reaching no conclusion and providing no reason why the *Competition Act* claim could not proceed, other than stating that her conclusions on the negligence claims disposed of the *Competition Act* claim as well. Darmar argues the *Competition Act* creates a distinct cause of action.

[90] The statement of claim does not identify why a *Competition Act* cause of action under s. 36 would apply here. Indeed s. 36, which provides a civil cause of action in some circumstances, is not mentioned. The only section mentioned is s. 52, which does not itself create a civil cause of action.

[91] Nor did Darmar, in its factum or oral argument, outline how the elements of a s. 36 cause of action are met on the facts alleged, let alone in a manner distinct from the basis for its negligent misrepresentation claims. Accordingly, I would not interfere with the motion judge's decision in relation to the *Competition Act* claim.

J. Failure to Grant Leave to Amend

[92] The motion judge's decision not to grant leave to amend the claim, which had already been amended twice before the matter came before her, was a

discretionary one subject to deference from this court. Even though she erred in striking the premature commercialization claim, I am not persuaded there is any basis to interfere with her decision not to allow the claim to be amended in so far as it pertains to the misrepresentation and *Competition Act* claims.

IV. CONCLUSION

[93] I would allow the appeal in part and vary the order below to reinstate the claim for premature commercialization and to limit the claims struck out to the misrepresentation and *Competition Act* claims. I would otherwise dismiss the appeal. Success having been divided, each party should bear their own costs of the appeal and in the court below.

Released: BZ OCT 04 2019

B Zarnett J.A.

I agree. Sossin J.A.

I agree. K.M. Hoy A.C.J.A.