SUPREME COURT OF NOVA SCOTIA
Citation: *Omega Formwork Inc. v. 778938 Ontario Limited*, 2026 NSSC 316

Date: 2026 10 15
Docket: Hfx No. 492560
Registry: Halifax

2026 NSSC 316 (CanLII)

Between:

Omega Formwork Inc.

Plaintiff

- and -

778938 Ontario Limited o/a Starfish Properties
and The Roy Building Limited

Defendants

- and –

EllisDon Corporation

Third Party

- AND -

Docket: Hfx No. 525995
Registry: Halifax

Between:

778938 Ontario Limited o/a Starfish Properties
and The Roy Building Limited

Plaintiffs

- and -

EllisDon Corporation

Defendant

Judge: The Honourable Associate Chief Justice Darlene A. Jamieson

Heard: September 10, 2026, in Halifax, Nova Scotia

Counsel: Kassandra Kelbratowski for Jamie D. MacNeil and Tracy S. Smith, Counsel for Omega Formwork Inc. (watching brief)

Colin D. Piercey, KC, and Nancy G. Rubin, KC, Counsel for 778938 Ontario Limited o/a Starfish Properties and The Roy Building Limited

George Franklin for Christopher C. Robinson, KC and Michael P. Blades, Counsel for EllisDon Corporation

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By the Court:

Background

[1] This is a motion to amend pleadings.

[2] By Order dated September 21, 2023, two actions, Hfx No. 492560 (the "Omega Action") and Hfx No. 525995 (the "Roy Action"), both related to the construction of The Roy Building, a residential condominium project in Halifax, were consolidated on a motion brought by the owner/developer, 778938 Ontario Limited o/a Starfish Properties ("Starfish") and/or The Roy Building Limited ("The Roy").

[3] In his decision ordering consolidation (2023 NSSC 308), the Honourable Justice Scott C. Norton ordered the Prothonotary to appoint a Case Management Judge pursuant to Civil Procedure Rule 26B.02. I have been case managing the consolidated action since October 2023.

Procedural History

[4] On October 2, 2019, Omega commenced the Omega Action against Starfish and The Roy (collectively, "The Roy Parties") seeking damages for alleged delays and additional work arising from a CCDC 17 contract between it and Starfish. The Roy Parties filed a defence on November 29, 2019, and counterclaimed for damages for alleged deficiencies, cost overruns, and lost revenue.

[5] In its defence to counterclaim filed on January 10, 2020, Omega pleaded that the damages were caused by The Roy Parties, their construction manager, EllisDon Corporation ("EllisDon"), or other trades. The Roy Parties filed a third-party claim against EllisDon on January 24, 2020 (amended June 8, 2020) claiming, among other things, that EllisDon contributed to any loss suffered by Omega by way of breach of the contract between The Roy Parties and EllisDon, or negligence.

[6] EllisDon filed a third-party defence on June 30, 2020, and claimed setoff in the third-party claim. EllisDon also counterclaimed against The Roy Parties, alleging breaches of contract causing significant economic loss, including lost revenue, lost profit, and extended duration and construction management costs.

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The Roy Parties' Prior Ontario Action

[7] On May 29, 2020, The Roy Parties commenced an action in Ontario (the "Roy Ontario Action") against EllisDon for damages of approximately $20 million for alleged delay and mismanagement of The Roy project. On March 22, 2021, EllisDon sought a stay of proceedings on the basis that Nova Scotia was the more appropriate jurisdiction for the claim to be tried. The motion was dismissed and then appealed by EllisDon.

[8] The appeal was heard on February 28, 2023, and on March 17, 2023, the Ontario Court of Appeal allowed the appeal and granted a temporary stay of the proceeding.

The Roy Action

[9] The Roy Parties commenced the Roy Action in Nova Scotia against EllisDon on August 11, 2023, seeking damages for alleged breach of contract and/or negligence and for its contribution to project delay.

[10] On September 15, 2023, EllisDon filed a defence denying breach of contract and counterclaimed for economic loss, including lost revenue, lost profit, and extended project duration and management costs.

[11] The Roy Parties filed a defence to the EllisDon counterclaim on October 11, 2023.

Evidence on the Motion

[12] The Roy Parties filed a solicitor's affidavit of Mr. Colin D. Piercey, K.C., sworn on August 25, 2026. EllisDon filed a solicitor's affidavit of Mr. George Franklin, sworn on September 2, 2026. Omega took no position on the motion.

Positions of the Parties - the pleadings and proposed amendments

[13] In the original Statement of Claim in the Roy Action, The Roy Parties claim against EllisDon for breach of contract and, alternatively in negligence. Under the heading "Contract", The Roy Parties plead a series of 20 contractual terms outlining EllisDon's obligations during the preconstruction and construction phases of the Project. In a section entitled "EllisDon's Default", The Roy Parties plead:

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14. EllisDon breached the Contract by, inter alia, failing to carry out its obligations under the Contract in accordance with accepted industry standards, and by failing to:

    (a) solicit multiple, comparative bids from trade contractors;

    (b) provide a notice of default to trade contractors or recommend that the Owner provide such a notice, when trade contractors delayed the Project, or failed to perform their work in a good and workmanlike manner, in accordance with their contract requirements, including without limitation, the following trades:

        (i) Omega;

        (ii) Harris Rebar;

        (iii) Easco Electric Limited;

        (iv) Flynn Canada;

        (v) Precision Concrete Services;

        (vi) Goodspeeds Manufacturing Services;

        (vii) Floors Plus Commercial;

        (viii) Darim Masonry; and

        (ix) Plan Group;

    (c) coordinate all trade contractors in the performance of their respective work, with one another as EllisDon did not begin holding trade coordination meetings until October 21, 2015 and thereafter, failed to convene the meetings as often, or regularly, as it should have for a project of this size and complexity;

    (d) coordinate the delivery of services by design professionals to ensure that their design and drawings were timely, accurate and complete, as well as identifying and resolving any errors, conflicts and interferences;

    (e) properly prepare contracts for timely execution by trades and ensure the timely delivery and processing of shop drawings, resulting in delay, additional costs, and errors or omissions;

    (f) establish an agreed upon schedule for the delivery, coordination and approval of shop drawings, and failing to provide trade contractors with shop drawings in a reasonably prompt manner, which caused or contributed to trade contractors to be delayed [sic] in the execution of their work;

    (g) adequately monitor the work of each trade contractor, properly review requests and costs for changes in any work, provide suitable recommendations to the Owner and the Consultant with respect to such changes, develop, implement and maintain an appropriate system for quality

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assurance and quality control of trade contractors' work, the costs there-of, and properly administer trade contracts. In particular, EllisDon:

(i) failed to provide timely or any notice to trade contractors to rectify deficiencies with their work;

(ii) approved or recommended that the Owner approve requests for extras submitted by trade contractors to remediate deficiencies caused by other trade contractors, without back charging the responsible trade contractor for the cost of remediating their deficient work. Accordingly, the Owner absorbed the entire cost of remediating the deficiency;

(iii) utilized an inappropriate change order system resulting in increased costs, over-payment of trade contractors, and substitution of inferior materials;

(iv) failed to replace underperforming trades;

(v) failed to provide the Owner with records substantiating its response to trade contractors' claims, thereby compromising the Owner's ability to respond to such claims in a timely and effective manner, and to mitigate the damages caused by EllisDon's failure to properly supervise, manager and coordinate the trade contractors; and

(vi) failed to identify pre-delivery inspection deficiencies, and when certain deficiencies were identified, EllisDon failed to coordinate and require the responsible trade contractor to rectify the deficiency within the applicable period, warranty period, or at all;

(h) achieve the Project In-Use Date by providing appropriate and regular monitoring of the Project schedule as construction progressed, and adjusting the Project schedule as and when appropriate, which resulted in the Project In-Use Date being delayed by over 2 years;

(i) develop, implement and maintain an appropriate system of Project cost control and accounting resulting in accounting errors and poor record keeping, and to properly monitor payments to trade contracts, quantify on-site materials, and track the completion of trade contractors' work including, reconciling trade contractors' invoices with the percentage of work they completed and properly reviewing trade contractors' invoices, all of which resulted in overpayment to trade contractors;

(j) properly monitor the cleanliness, security, and condition of the Project;

(k) follow the direction and advice of design professionals, and consultants; and

(l) commit sufficient resources and expertise to construct the Project in an efficient, orderly and economical manner.

(altogether, the "**EllisDon Default**")

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> 15. EllisDon further failed to assist the Owner in managing disputed issues with trade contractors, including those noted above, and maintaining records for the Project which accurately and fully recorded deficiencies, disputed issues, changes and delays. The Owner delivered written notice of default in that regard on or about February 4 and 26, 2020, which EllisDon failed to rectify within 5 working days, or at all.

[14] Under the heading "Damages", The Roy Parties plead that they suffered damages in the amount of $20 million as a result of the EllisDon Default. The Roy Parties further plead that:

> EllisDon owed it a duty of care from the time that it started performing pre-construction work, in that it was reasonably foreseeable that the actions or omissions of EllisDon could cause harm to the Owner. The Owner further states that EllisDon was negligent in the performance of its work in failing to meet the duty of care it owed to the Owner as a result of the EllisDon Default, causing the Owner damages as aforesaid. (para. 18)

[15] Under the heading "Relief Sought", The Roy Parties plead:

> 20. The Plaintiffs, 778938 Ontario Limited o/a Starfish Properties and The Roy Building Limited, claim:
>
> (a) damages in the amount of $20,000,000.00 for breach of contract, or in the alternative, negligence;
>
> …

[16] On June 22, 2026, The Roy Parties advised of their intention to amend their pleadings. The proposed amendments were circulated to counsel on June 25, 2026. In the proposed Amended Statement of Claim, The Roy Parties seek to add the following as new subpara. 13(e) to plead that it was a term of the Contract that EllisDon would:

> have authority as agent of the Owner as it relates to the services particularized in Schedules A1 and B1 (GC 2.1.4); …

[17] Under the "Damages" heading, The Roy Parties seek to add the following as new para. 18:

> In addition, EllisDon was agent for the Owner under the Contract and as such owed a fiduciary duty to its principal, the Owner, in performing its duties under the Contract. In performing those duties as agent, EllisDon was obliged to, among other things, act in the best interests of the Owner in performing EllisDon's obligations

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> under the Contract, avoid conflicts of interest, and disclose to the Owner all relevant information that could affect the Owner's interests or decisions. EllisDon breached its fiduciary obligations to the Owner as a result of the EllisDon Default, causing the Owner damages as aforesaid.

[18] Under "Relief Sought", The Roy Parties seek to add "breach of fiduciary duty" to former subpara. 20(a).

[19] In the original Amended Third Party Claim against EllisDon in the Omega Action, at para. 11, The Roy Parties plead that if the Plaintiff Omega suffered any injury, loss or damages for which The Roy Parties are found liable, then such injury, loss or damage was caused or contributed to by "the breach of the Construction Management Contract, and/or negligence of the Third Party, particulars of which include failing to, *inter alia*:

a) exercise the care and skill required of a reasonably competent construction manager;
b) coordinate, schedule, and monitor the work of trade contractors on the Project in a good and workmanlike manner or in accordance with the Construction Management Contract;
c) document and coordinate the rectification of deficiencies on the Project;
d) notify The Roy of defaults by trade contractors;
e) hold sufficiently frequent trade coordination meetings;
f) comply with the Project Schedule;
g) properly staff the Project;
h) properly manage and supervise its employees; and
i) such further and other breaches or negligence as may appear.

[20] In the proposed Second Amended Third Party Claim, The Roy Parties seek to amend para. 11 as follows:

> 11. The Defendants state that if the Plaintiff suffered any injury, loss or damages for which the Defendants, or either of them is found liable, in whole or in part to the Plaintiff, all of which is not admitted but denied, then such injury, loss or damage was caused or contributed to by the breach of the Construction Management Contract, the Third Party's breach of its fiduciary duty owed to the Defendants in the Third Party's capacity as agent for the Defendants (as principals) under the Construction Management Contract, and/or negligence of the Third Party, particulars of which include failing to, *inter alia*:

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> (a) act in the best interests of the Defendants as agent to the Defendants while performing its obligations under the Construction Management Contract, avoid conflicts of interest, and disclose to the Defendants all relevant information that could affect the Defendants' interests or decisions;
>
> [Emphasis added]

[21] Neither the Amended Third Party Claim nor the proposed Second Amended Third Party Claim expressly pleads the agency provision of the Contract although the proposed amendments do reference EllisDon being an agent under the contract.

[22] In their motion brief, The Roy Parties explain what prompted them to seek leave to amend their pleadings:

> 3. The proposed amendment was prompted by evidence obtained on discovery in April 2026. Brian Frank Strecko, former Senior Vice President Atlantic Canada & Area Manager, testified that EllisDon adopted a strategy to "align ourselves with the trade contractors" to advance delay claims against The Roy, while ensuring that allegations that EllisDon had mismanaged the Project "come off the table." Mr. Strecko confirmed that this was EllisDon's "go forward strategy."
>
> 4. That evidence brought into focus the fiduciary significance of the agency relationship and conduct already at issue in these proceedings. The Roy raised its intention to amend at the June 22, 2026 case management conference, less than two months after Mr. Strecko's discovery. The amendments now sought expressly identify the fiduciary obligations arising from EllisDon's contractual role as agent under the EllisDon Contract already pleaded and allege that aspects of the EllisDon Default constituted breaches of those obligations.

[23] Although The Roy Parties cite the evidence of Mr. Strecko as the impetus for the amendments, they submit that they are not required to plead that EllisDon aligned itself with the trade contractors against The Roy Parties, its principals, to support their claims for breach of fiduciary duty. They say the material fact giving rise to the agency relationship is the Contract, which expressly provided that EllisDon acted as The Roy Parties' agent in performing the identified services, and the fiduciary obligations that arise as a matter of law from that agency relationship are legal consequences of the pleaded relationship, not additional material facts that have to be pleaded in order for the claim to arise.

[24] The Roy Parties disagree with EllisDon that there is a limitation period issue with the amendments because they do not give rise to a new cause of action. Instead, the amendments merely clarify or expand upon the existing claim for breach of the Contract, which expressly identifies EllisDon as The Roy Parties' agent in providing

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the contracted construction management services. The Roy Parties say in the alternative that expiry of the limitation period is not a bar to the amendments in any event, as they are permissible under either Rule 83.11(3) or s. 22(a) of the *Limitations of Actions Act,* S.N.S. 2014, c. 35.

[25] EllisDon says The Roy Parties are attempting to advance impermissibly vague claims for breach of fiduciary duty to avoid a finding that their amendments contain new material facts. EllisDon states in its brief:

> 36. The insufficient nature of The Roy's pleadings is highlighted by its submission regarding the comments of Brian Strecko. The Roy points to certain comments made by Mr. Strecko during his April 28, 2026 discovery examination as bringing "into focus the fiduciary significance of EllisDon's contractual agency relationship". To be clear, EllisDon strenuously denies that Mr. Strecko's discovery testimony reveals any wrongdoing on the part of EllisDon.
>
> 37. Nevertheless, the Roy submits that Mr. Strecko's evidence "disclosed that EllisDon had adopted a strategy to align itself with trade contractors to advance claims against its own principal, while seeking to remove allegations of its own project mismanagement".
>
> 38. The Roy expressly takes the position, however, that it does not "rely on that evidence as a new material fact necessary to constitute the proposed cause of action." The Roy seeks to distance itself from any suggestion that it would plead material facts related to EllisDon's alleged strategy to align itself with trade contractors. Rather, it prefers to rest on the mere assertion that fiduciary obligations arose and were somehow breached.
>
> 39. It is not surprising that the Roy wants to distance itself from the suggestion that it is relying on the circumstances allegedly articulated by Mr. Strecko to ground its new claim. If the Roy were to plead material facts related to Mr. Strecko's comments, it would be pleading new material facts setting out a new transaction of events. This would in turn make clear that its new claim constitutes a new cause of action that is distinct from the claims already pleaded.

[26] EllisDon argues that the proposed amendments are not justiciable. It says The Roy Parties' proposed amendments baldly assert a claim for breach of fiduciary duty without providing the material facts grounding the scope of the fiduciary duty, the nature of EllisDon's alleged breach of fiduciary duty, the nature of the damage suffered by The Roy Parties as a result of the alleged breach of fiduciary duty, or the connection between the alleged breach and any alleged damage. It says The Roy Parties' proposed amendments are not justiciable as they do not provide sufficient particulars to allow EllisDon to know the case it has to meet.

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[27] EllisDon further argues that it will suffer serious prejudice that cannot be compensated for using the normal rules of costs given the complex nature of the litigation and the current late stage of the litigation process. It says significant prejudice will result from the failure to plead sufficient particulars to allow EllisDon to know the case to be met. It argues that contractual duties and fiduciary duties will not necessarily parallel one another, and that it is not enough to simply assert that each alleged breach of contract equals a breach of fiduciary duty.

[28] EllisDon also argues that the two-year limitation period to bring a new cause of action has long since elapsed and the proposed amendments run afoul of both Rule 83.11(3) and s. 22 of the *Limitation of Actions Act*, *supra*.

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Law and Analysis

Rules and principles governing amendments

[29] Amendments are governed by Civil Procedure Rule 83:

> **83.01 Scope of Rule 82**
>
> (1) This Rule allows a party to amend certain documents the party files.
>
> (2) This Rule requires a party who wishes to amend a court document to obtain permission from the other parties or a judge, except documents may be amended without permission early in an action.
>
> (3) A party may amend a court document filed by the party, in accordance with this Rule.

[30] Civil Procedure Rule 83.02 allows a party to amend a notice by which an action is started if the amendment is made no later than ten days after the filing of all defences or demand of notice, unless the parties agree or a judge permits otherwise.

> **83.02 Amendment of notice in an action**
>
> (1) A party to an action may amend the notice by which the action is started, a notice of defence, counterclaim, or crossclaim, or a third-party notice.
>
> (2) The amendment must be made no later than ten days after the day when all parties claimed against have filed a notice of defence or a demand of notice, unless the other parties agree or a judge permits otherwise.
>
> [Emphasis added]

[31] Rule 83.11(1) states that "[a] judge may give permission to amend a court document at any time."

[32] In this case, The Roy Parties are asking the court to allow the proposed amendments to the Statement of Claim in the Roy Action and to the Amended Third Party Claim in the Omega Action beyond the ten-day period. This court's permission is required.

[33] The parties agree that the law is uncontroversial. Generally, amendments will be allowed where they are: (1) made in good faith, (2) cause no serious prejudice that cannot be compensated in costs, and (3) raise a justiciable issue. In *APA Inc. Experts Conseils/Consultants and Forgeron Engineering Limited v. Fares Construction Ltd.*, 2025 NSCA 42, the court summarized the law of amendment:

> [33] *Civil Procedure Rules* 83.01, 83.02 and 83.11 permit an amendment with the permission of a judge.
>
> [34] A series of rulings by this Court has established the principles that govern the judge's discretion whether to permit an amendment of pleadings: *Stacey v. Electrolux Canada* (1986), 76 N.S.R. (2d) 182 (S.C.A.D.), at pp. 182-3, per Clarke, C.J.N.S; *Point Tupper Terminals Company v. Global Petroleum Corporation*, 1998 NSCA 174, per Bateman J.A.; *Lamey v. Wentworth Valley Developments Ltd.*, 1999 NSCA 69, at paras. 12-23, per Glube, C.J.N.S.; *Garth v. Halifax (Regional Municipality)*, 2006 NSCA 89, at para. 30, per Cromwell J.A. (as he then was); *EllisDon Corporation v. Southwest Construction*, *SWP Maple Operating Partnership and Southwest Properties Limited*, 2021 NSCA 20, at para. 26, per Wood, C.J.N.S.
>
> [35] From these authorities, the following principles emerge:
>
> - An amendment is permissible if it (1) is offered in good faith, (2) would not occasion to the opposing party serious prejudice that is non-compensable in costs, and (3) raises a justiciable issue.
> - Justiciability is assessed by a standard like that on a motion for summary judgment on the pleadings under Rule 13.03, *i.e.* whether the proposed pleading is absolutely unsustainable on its face.
> - "On its face" means the judge on an amendment motion neither hears evidence on the underlying merits, nor decides a contested fact pertaining to the merits, nor forecasts merits-related evidence and potential findings. Rather, the motions judge assumes the facts as pleaded or agreed.
> - A contested allegation of material fact or mixed fact and law, or a debatable submission on an issue of law or contractual interpretation is not absolutely unsustainable on its face for an amendment motion.

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[Emphasis added]

[34] Nova Scotia courts have historically taken a liberal approach to amendments of pleadings (see, for example, *Milner, Re*, (1975), 13 N.S.R. (2d) 378 (S.C.), at paras. 15-17; *Baumhour v. Williams*, 1977 CarswellNS 309 (C.A), at paras. 12-16; *Global Petroleum Corp. v. Point Tupper Terminals Co.*, 1998 NSCA 174, at para. 15; and *Southwest Construction Management Limited v. EllisDon Corporation*, 2020 NSSC 99, aff'd 2021 NSCA 20, at para. 41).

[35] There is no allegation by EllisDon that the proposed amendments are brought in bad faith. It argues instead that allowing the amendments will result in serious prejudice that cannot be compensated in costs and that the amendments are not justiciable. I will begin with the issue of whether the proposed amendments are justiciable.

Are the proposed amendments justiciable?

[36] Justiciability is assessed by a standard like that on a motion for summary judgment on the pleadings under Rule 13.03, which is the same as the test that governed on a motion to strike pleadings under the *Nova Scotia Civil Procedure Rules* (1972). I am to assume the facts pleaded and determine if the claim is sustainable on those facts. The court in *Cooper v. Atlantic Provinces Special Education Authority,* 2008 NSCA 94, ("*Cooper*") described the applicable test as follows:

> [11] For the purposes of the appeal it is appropriate to consider the third amended statement of claim to determine whether it is plain and obvious that it discloses no reasonable cause of action. Although the appellants have not yet applied for leave to amend the statement of claim, the amended claim adding paragraph 20 was apparently considered by the chambers judge. As noted in *Sherman v. Giles* (1994), 137 N.S.R. (2d) 52, at ¶ 11, relying on *Hunt v. Carey*, *supra*, so long as the statement of claim, as it stands or as it may be amended, discloses a reasonable cause of action, it should not be struck out.
>
> [Emphasis added]

[37] More recently, in *EllisDon Corporation v. Southwest Construction, SWP Maple Operating Partnership and Southwest Properties Limited*, 2021 NSCA 20, Wood C.J.N.S. articulated the test as follows:

> [26] A judge should not permit an amendment to add a claim which discloses no cause of action or where the action is obviously unsustainable. This is the same

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> standard applied on a motion for summary judgment on pleadings under Rule 13.03.
>
> [27] In this case, the motion judge described the proposed pleading as "not elegant" and the respondent readily concedes that point. The fact that a proposed pleading sets out allegations which are poorly described or lacking in particulars is not fatal to the amendment motion. The issue is whether the pleading is obviously unsustainable.

[38] The sufficiency of the proposed amendments cannot be assessed without a solid understanding of fiduciary relationships and the duties that accompany them. In *Fiduciary Duties – Obligations of Loyalty and Faithfulness* (Toronto: Thomson Reuters, updated to 2018), Michael Ng explains the origins of fiduciary law at 1:10:

> The area of fiduciary law evolved from the jurisdiction of the Court of Chancery over trusts and confidences. It pertains to the faithfulness or fidelity of a person in whom trust or confidence has been reposed, and renders enforceable the expectations of loyalty and faithfulness arising from such intimate or co-operative relationships.

[39] The text breaks down a claim for breach of fiduciary duty into three stages at 2:10:

> A claim that a defendant has breached a fiduciary duty is a claim that the defendant has contravened reasonable expectations arising from a trust reposed in the defendant. Such a claim may be broken down into several stages: first, identifying the fiduciary relationship; secondly, identifying the applicable standard of fiduciary conduct and any breaches thereof, excusable or otherwise; and thirdly, establishing the appropriate equitable remedy. …

[40] The duty of loyalty is at the heart of a fiduciary relationship. Whether a particular relationship involves the necessary degree of trust or confidence to give rise to fiduciary obligations is a question of fact. In certain categories of relationships, often called *per se* or traditional fiduciary relationships, the requisite degree of trust or confidence will be presumed to exist. As noted by Cromwell J. in *Galambos v. Perez*, 2009 SCC 48:

> [36] Certain categories of relationships are considered to give rise to fiduciary obligations because of their inherent purpose or their presumed factual or legal incidents: *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, *per* La Forest J., at p. 646. These categories are sometimes called *per se* fiduciary relationships. There is no doubt that the solicitor-client relationship is an example. It is important to remember, however, that not every legal claim

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> arising out of a *per se* fiduciary relationship, such as that between a solicitor and client, will give rise to a claim for a breach of fiduciary duty.
>
> [37] A claim for breach of fiduciary duty may only be founded on breaches of the specific obligations imposed because the relationship is one characterized as fiduciary: *Lac Minerals*, at p. 647.

[41] However, even where the evidence discloses that a relationship has elements making it fiduciary *per se*, a defendant may still show that the relationship lacks the requisite trust and confidence to warrant equity's intervention (See *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574 ("*Lac Minerals*"), at pp. 596-98).

[42] The relationship of agent and principal is one of the recognized categories of *per se* fiduciary relationships. In *R. v. Kelly*, [1992] 2 S.C.R. 170, at pp. 183-84, the Supreme Court of Canada set out the definition of agency:

> In *The Law of Agency*, 5th ed. (London: Butterworths, 1983), Fridman suggests at p. 9 the following definition of agency:
>
> > Agency is the relationship that exists between two persons when one, called the *agent*, is considered in law to represent the other, called the *principal*, in such a way as to be able to affect the principal's legal position in respect of strangers to the relationship by the making of contracts or the disposition of property. [emphasis in original]
>
> The principal must be able to place trust and confidence in the agent since the agent has the authority to affect the legal position of the principal. This is perhaps the focus of the relationship. In essence the agent acts to achieve the same results that would have been obtained if the principal had acted on his or her own account. <u>The influence the agent can have on the affairs of the principal and the power to take action on behalf of the principal are significant. They are of such great significance that it follows as the night the day that the agent must always act in the best interests of the principal.</u>
>
> [Emphasis added]

[43] In *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, 2011 SCC 23, the Supreme Court of Canada held that a commercial manager acting as agent was a fiduciary, but that the fiduciary relationship was circumscribed by the management agreement between the parties. The court explained that the nature and the scope of the fiduciary obligations must be assessed in the context of the contract between the parties and its surrounding circumstances:

> 141 <u>That said, the nature and scope of the fiduciary duty owed by VAC must be assessed in the context of the contract giving rise to those duties. As noted by</u>

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> Cromwell J., for a unanimous Court, in *Galambos v. Perez*, 2009 SCC 48, [2009] 3 S.C.R. 247, at para. 75: "... what is required in all cases is an undertaking by the fiduciary, express or implied, to act in accordance with the duty of loyalty reposed on him or her". He also stated that "[i]n cases of *per se* fiduciary relationships, this undertaking will be found in the nature of the category of relationship in issue" and that "[t]he fiduciary's undertaking may be the result of ... the express or implied terms of an agreement" (para. 77). While an express undertaking can be found in the terms of a contract for an agency relationship, an implied undertaking can be found with regard to "the particular circumstances of the parties' relationship" which could include "professional norms, industry or other common practices and whether the alleged fiduciary induced the other party into relying on the fiduciary's loyalty" (para. 79).
>
> …
>
> 143 …. The fiduciary relationship in this case must therefore be circumscribed by the contractual bargain and the knowledge that VAC would be simultaneously balancing fiduciary obligations owed to the Hilton Owners and owners of a competitor: *Galambos*, at para. 79.
>
> [Emphasis added]

[44] A variety of fiduciary obligations may arise depending on the scope of the fiduciary relationship found to exist. Standards of conduct of fiduciaries typically include a duty of utmost good faith, a duty of undivided loyalty, and may also include a duty of disclosure, a duty to avoid conflicts of interest, etc. There is very often overlap. For example, a duty to act in the best interests of the principal or with undivided loyalty can encompass a duty of disclosure and to avoid conflicts. While the duty of disclosure and to avoid conflicts may overlap, they are distinct duties.

[45] The Supreme Court of Canada in *Lac Minerals* stated at p. 646 that the fiduciary obligation imposed to act or refrain from acting may vary in substance depending on the relationship:

> …The focus is on the identification of relationships in which, because of their inherent purpose or their presumed factual or legal incidents, the Courts will impose a fiduciary obligation on one party to act or refrain from acting in a certain way. The obligation imposed may vary in its specific substance depending on the relationship, though compendiously it can be described as the fiduciary duty of loyalty and will most often include the avoidance of a conflict of duty and interest and a duty not to profit at the expense of the beneficiary. The presumption that a fiduciary obligation will be owed in the context of such a relationship is not irrebuttable, but a strong presumption will exist that such an obligation is present. Further, not every legal claim arising out of a relationship with fiduciary incidents will give rise to a claim for breach of fiduciary duty. This was made clear by

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> Southin J. (as she then was) in *Girardet v. Crease & Co.* (1987), 11 B.C.L.R. (2d) 361 at 362 (S.C.). …
>
> [Emphasis added]

[46] EllisDon argues that the proposed amendments are absolutely unsustainable because they do not contain the material facts necessary to support claims for breach of fiduciary duty and to allow EllisDon to know the case to be met. EllisDon says that instead of providing the necessary particulars, the proposed amendments rest on a shortcut, using the alleged existence of the newly pleaded agency relationship as shorthand for a fiduciary relationship. Further, the proposed amendments suggest that every alleged breach of contract making up the "EllisDon Default" is also a breach of the alleged fiduciary relationship. EllisDon says the law of fiduciary duties does not operate at that level of generality. A breach of contract in an agency relationship will not necessarily result in a breach of fiduciary duty.

[47] The Roy Parties argue that the amendments are sufficiently particularized. They say proposed para. 18 identifies the contractual agency relationship from which the fiduciary obligations arise, confines those obligations to EllisDon's performance of its duties under the Contract, and identifies duties concerning The Roy Parties' interests, conflicts of interest and disclosure. It expressly pleads that EllisDon breached those obligations as a result of the EllisDon Default and thereby caused damage to The Roy Parties. The Roy Parties say the EllisDon Default is a defined body of conduct extensively particularized in The Roy Parties' existing pleadings, and the proposed amendment expressly identifies that conduct as the conduct relied upon as constituting the fiduciary breach.

[48] The material facts required to sustain a claim for breach of fiduciary duty were considered in *Cooper*, *supra*. After reviewing the relevant authorities, the court stated:

> [14] From these authorities, it is clear that a statement of claim for breach of fiduciary duty has to set out the material facts to sufficiently identify:
>
> - the nature of the fiduciary relationship,
> - the nature of the duty owed by the fiduciary,
> - how the duty was breached,
> - how the defendant put its own interests ahead of the plaintiff's interests,
> - and the appropriate remedy for the breach.

[49] With respect to pleadings, Rules 38.02(2) and (3) say:

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(2) The pleading must be concise, but it must provide information sufficient to accomplish both of the following:

(a) the other party will know the case the party has to meet when preparing for, and participating in, the trial or hearing;

(b) the other party will not be surprised when the party signing the pleading seeks to prove a material fact.

(3) Material facts must be pleaded, but the evidence to prove a material fact must not be pleaded

[50] During the hearing, counsel for The Roy Parties was asked to identify, in the proposed Amended Statement of Claim, each of the material facts listed in *Cooper*. With respect to the nature of the fiduciary relationship and the duty owed by the fiduciary, Mr. Piercey said:

> **MR. PIERCEY:** We would say we pleaded that in excruciating detail, if you look at the contract. If you look at the case manage… sorry the construction management agreement, you look at clause 2.14, you look at all the services that EllisDon is to provide under the contract, and *as a matter of law*, fiduciary relationships, or fiduciary type duties, attach to the provision of all of those services.

[51] With respect to "how the duty was breached", he directed the court to the proposed para. 18, and said:

> **MR. PIERCEY:** So we say, "In addition, EllisDon was agent for the Owner under the Contract and as such owed a fiduciary duty to its principal, the Owner, *in performing its duties under the Contract*." So, again, that's verbatim from the contract, that's 2.14, that's exactly what the contract says. "In performing those duties as agent, EllisDon was obliged to, amongst other things, act in the best interests of the Owner in performing EllisDon's obligations under the Contract, and avoid conflicts of interests, and disclose to the Owner all relevant information that could affect the Owner's interests or decisions." So those are the duties that are pleaded, in addition to all the duties we would say that follow as a necessary incident of law, but that's essentially what the law is, that when you're acting as a fiduciary.
>
> "EllisDon breached its fiduciary obligations to the Owner *as a result of the EllisDon Default*..." Okay that's where you tie back to paragraph 14. And, this is, so, if you look at paragraph 18, and this is why paragraph 18 in particular resonates for me in the context of Mr. Strecko's discovery evidence, "act in the best interests of the Owner in performing EllisDon's obligations under the Contract, avoid conflicts of interest, and disclose to the Owner all relevant information that could affect the Owner's interests or decisions." So EllisDon, according to Mr. Strecko, made a decision to align itself with the trades. Now look at the EllisDon Default.

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The pleadings say EllisDon did, amongst other things, and some of these would be admittedly solely breaches of contract, but some, we would say, in particular, would sound in fiduciary duty… "failed to provide notice of default to trade contractors or recommend that the Owner provide such notice."

THE COURT: You're at paragraph 14?

MR. PIERCEY: Paragraph 14(b).

THE COURT: Thank you.

MR. PIERCEY: So paragraph 14(b), that's exactly the point. If EllisDon had decided to align itself with the trades and it fails to give notice of default to a trade contractor when, the trade contractor might otherwise properly be in default, *because it had aligned itself with the trade*, that clearly could constitute not just a breach of contract, but a breach of fiduciary duty.

Paragraph 14(g), EllisDon had "failed to adequately monitor the work of each trade contractor, properly review requests and costs for changes in any work, provide suitable recommendations to the Owner and the Consultant with respect to such changes". So this is the trades asking for extras or the trades having deficiencies in their work. The allegation is EllisDon "failed to provide timely or any notice to trade contractors to rectify deficiency with their work". *If the reason EllisDon did that was because it had decided to align itself with the trades,* that's also a breach of fiduciary duty, or a breach of its agency relationship. In addition to we would say a breach of contract. Or a breach of the agency contract.

"Approved or recommended that the Owner approve requests for extras submitted by trade contractors to remediate deficiencies caused by other trade contractors", "failed to replace underperforming trades". So we would say paragraph 14(b) in particular, paragraph 14(g), in particular subparagraph (i), (ii), (v), sorry (iv), (v) and (vi), all of those would equally sound in breach of fiduciary duty.

THE COURT: So you're referring to paragraph (g), (i), (ii), (iv), (v) and (vi)?

MR. PIERCEY: Yes. Paragraph 15…

THE COURT: So can we look at (v), first of all. "Failed to provide the Owner with records substantiating its response to trade contractors' claims, thereby compromising the Owner's ability to respond to such claims in a timely and effective manner…" So, just explain to me how that fits?

MR. PIERCEY: So, one of the duties of a fiduciary is to disclose to the owner all relevant information that could affect the owner's interests and decisions. That's one of the duties of a fiduciary. That is implied as a matter of law as a necessary incident to an agency relationship.

And also we would say paragraph 15, as well. So in the Roy's submission, looking at the amended pleading, as a whole, which includes references to the contract and the EllisDon Default, we would submit that there's more than

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> sufficient particulars to meet that threshold, or those, those elements that are described in the *Cooper* decision.

[52] When asked by the court which material facts addressed "how the defendant put its own interests ahead of the plaintiff's interests", Mr. Piercey replied:

> **MR. PIERCEY**: Right. I think that's encompassed in paragraph 18, My Lady. Could there be further particulars of that? Perhaps. But we do say that paragraph 18 does reference that. "Act in the best interests of Owner", "avoid conflicts of interest".

[53] Counsel explained that The Roy Parties are not advancing a claim for any type of equitable relief beyond the monetary damages claim contained in the pleading. The Roy Parties submit that if the court finds that the proposed amendments are deficient, The Roy Parties should be permitted to file a further Amended Statement of Claim and Second Amended Third Party Claim.

[54] I am of the view that the proposed Amended Statement of Claim provides sufficient material facts to establish the nature of the alleged fiduciary relationship as an agency relationship arising out of a provision in a construction management contract. In addition, the nature of the duties owed by the fiduciary is dealt with in para. 18, which identifies fiduciary duties on EllisDon's part to act in the best interests of The Roy Parties in performing its obligations under the contract, to avoid conflicts of interest, and to disclose to The Roy Parties all relevant information that could affect their interests or decisions as owners.

[55] I will now address whether the proposed pleading meets the third and fourth *Cooper* elements – how the duties were breached, and how the defendant put its own interests ahead of the plaintiff's interests.

[56] Paragraph 18 pleads that EllisDon breached its fiduciary obligations to The Roy Parties "as a result of the EllisDon Default". The EllisDon Default is a list of actions and omissions which The Roy Parties say constitute breaches of contract, or, in the alternative, breaches of EllisDon's duty of care. As drafted, the proposed amendments suggest that every action or omission included in the EllisDon Default was also a breach of fiduciary duty, without specifying which action or omission breached which of the pleaded fiduciary duties. Adding further confusion, The Roy Parties' counsel admitted during the hearing that some of the conduct included in the EllisDon Default would be "solely breaches of contract". Counsel advised that, contrary to a plain reading of the pleadings, the breach of fiduciary duty claims were limited to the conduct alleged in subparas. 14(b) and 14(g), (i), (ii), (iv) and (v), and

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in para. 15 (which is not included in the EllisDon Default). I agree with EllisDon that it should not have to guess which action or omission breached which fiduciary duty.

[57] Notwithstanding the above confusion and lack of detail, I am of the view that the proposed Amended Statement of Claim, when read generously, pleads sufficient material facts (although minimal) to establish how the duty was breached with respect to the claim for breach of the fiduciary duty to disclose all relevant material information that could affect the owner's interests or decisions. For example, subpara. 14(g)(v) states that EllisDon:

> (v) failed to provide the Owner with records substantiating its response to trade contractors' claims, thereby compromising the Owner's ability to respond to such claims in a timely and effective manner …

[58] As I will address further below, some fiduciaries owe a duty of disclosure that requires them to disclose all facts material to any transaction to which their office relates, even in the absence of any conflict of interest and duty. See, for example, *Sharbern Holding*, *supra*, and *Advanced Realty Funding Corp. v. Bannink* (1979), 27 O.R. (2d) 193 (Ont. C.A.).

[59] The fourth *Cooper* element is how the defendant put its own interests ahead of the plaintiff's interests. In my view, the *Cooper* decision does not establish that this element is always necessary to make out a claim for breach of fiduciary duty. *Cooper* involved a claim for breach of the parental fiduciary duty, and the requirements identified must be interpreted in that context. Relying on the Supreme Court of Canada's decision in *K.L.B. v. British Columbia*, [2003] 2 S.C.R. 403, the Court of Appeal noted that the parental fiduciary duty "entails the duty to act loyally and to not put one's interest or another's interest ahead of a child's interest" (para. 13). As McLachlin C.J. explained in *K.L.B.*:

> 49 I have said that concern for the best interests of the child informs the parental fiduciary relationship, as La Forest J. noted in *M. (K.) v. M. (H.)*, supra, at p. 65. But the duty imposed is to act loyally, and not to put one's own or others' interests ahead of the child's in a manner that abuses the child's trust. This explains the cases referred to above. The parent who exercises undue influence over the child in economic matters for his own gain has put his own interests ahead of the child's, in a manner that abuses the child's trust in him. The same may be said of the parent who uses a child for his sexual gratification or a parent who, wanting to avoid trouble for herself and her household, turns a blind eye to the abuse of a child by her spouse. The parent need not, as the Court of Appeal suggested in the case at bar, be consciously motivated by a desire for profit or personal advantage; nor does

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> it have to be her own interests, rather than those of a third party, that she puts ahead of the child's. It is rather a question of disloyalty — of putting someone's interests ahead of the child's in a manner that abuses the child's trust. Negligence, even aggravated negligence, will not ground parental fiduciary liability unless it is associated with breach of trust in this sense.
>
> [Emphasis added]

[60] Outside the parental fiduciary relationship, not every breach of fiduciary duty involves the fiduciary putting its own interests, or the interests of a third party, ahead of the beneficiary's interests. Cases that deal with the duty to disclose material information, for example, can be divided into two categories: cases involving "false" duties of disclosure, and cases involving "true" duties of disclosure. As Michael Ng explains in *Fiduciary Duties – Obligations of Loyalty and Faithfulness* at 10:20.10:

> A false duty of disclosure will arise where any fiduciary enters into an engagement giving rise to a conflict of interest and duty, such that the fiduciary might be said to owe, in such a context, a duty to disclose material conflicts of interest and duty. …
>
> However, a more precise definition would be that the liability of the fiduciary arises from the fiduciary's position of conflict, and the fiduciary's duty to disclose arises from the need to fully disclose all material facts, including the conflict itself, in order to obtain the informed consent of the principal. Where a conflict of interest and duty does not arise, the basis for a false duty of disclosure will disappear.
>
> Even in the absence of a conflict of interest and duty, however, a fiduciary adviser or agent can owe the principal a true fiduciary duty of disclosure. Such a true duty is a positive duty to disclose material facts and circumstances pertaining to any matter within the scope of the confidential position, and it operates independently of the duty to avoid conflicts of interest and duty. The nature of the true duty was described by Wallace J.A. in *Ocean City Realty Ltd. v. A & M Holdings* [(1987), 36 D.L.R. (4th) 94 (B.C.C.A.)]:
>
> > In my opinion, the trial judge's interpretation of the obligation owed to a principal by its agent is too restrictive. The duty of disclosure is not confined to those instances where the agent has gained an advantage in the transaction or where the information might affect the value of the property, or where a conflict of interest exists. The agent certainly has a duty of full disclosure in such circumstances; they are commonly occurring circumstances which require full disclosure by the agent. However, they are not exhaustive.
> >
> > The obligation of the agent to make full disclosure extends beyond these three categories and includes "everything known to him respecting the subject-matter of the contract which would be likely to influence the conduct of his principal" (*Canada Permanent Trust Co. v. Christie*, *supra*), or, as expressed in 1 Hals., 3rd ed., p. 191, para. 443, everything which

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> "…would be likely to operate upon the principal's judgment". In such cases the agent's failure to inform the principal would be material non-disclosure.
>
> [Emphasis added]

[61] In *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534, the Supreme Court of Canada affirmed the duty of fiduciary advisers and agents to disclose material information even in the absence of a conflict of interest when it held that a solicitor could breach a fiduciary duty to disclose information "even when his or her personal interest is not at stake" (p. 573).

[62] Accordingly, whether a particular claim for breach of fiduciary duty requires the plaintiff to plead material facts showing how the defendant put its own interests ahead of the plaintiff's interests depends on the circumstances. I am of the view that this element is not necessary at the pleading stage for breach of the duty to disclose.

[63] As noted above, The Roy Parties have confirmed that they are not advancing a claim for any type of equitable relief beyond the damages claim contained in the pleading of $20,000,000. Damages resulting from a breach of fiduciary duty can be wide ranging and include both financial and non-financial losses. Financial loss can include direct monetary loss. While it would be preferable for The Roy Parties to specify the type of remedy sought with respect to the alleged breach of fiduciary duty, I am satisfied that the pleading does confirm that the damages for breach of fiduciary duty are included in the $20,000,000 claimed.

[64] In short, I cannot conclude that the claim for breach of the duty to disclose all relevant material information that could affect the owner's interests or decisions is absolutely unsustainable on its face.

[65] With respect to the para. 18 claim of breach of fiduciary duty by failure to act in the best interests of the owner, read generously, it is possible that the material facts set out in para. 14(g), (ii), (iv) and (v) could establish how this duty was breached. Again, I am not convinced that the fourth *Cooper* element of how the defendant put its own interests ahead of the plaintiff's interests must be pleaded with respect to this broad claim. While the pleading is not as clear as it should be and lacks specificity, I cannot conclude that it is absolutely unsustainable on its face.

[66] As Michael Ng observes in *Fiduciary Duties – Obligations of Loyalty and Faithfulness* at 4:30, acting in the best interests of the agent's principal is a broad characterization:

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> A fiduciary is often described as someone bound to act in the best interests of that person's principal or beneficiary. This broad characterization is accurate to an extent, but is also potentially misleading. Equity requires that a person in a fiduciary position be faithful to the trust or confidence reposed in him or her. To do this, the fiduciary must perform the fiduciary role with fidelity. This is achieved by fulfilling particular fiduciary duties, or in other words, meeting the terms of the trust imposed on him or her. The content of these duties or terms will depend on the nature of the trust or confidence reposed. The fiduciary will generally owe a duty, for example, to refrain from engagements that have other interests or duties that may interfere with how the fiduciary performs the fiduciary role.
>
> [Emphasis added]

[67] The Amended Statement of Claim pleads a duty to act in the best interests of The Roy Parties as Owner at para. 18:

> In performing those duties as agent, EllisDon was obliged to, among other things, act in the best interests of the Owner in performing EllisDon's obligations under the Contract.

[68] Para. 14 pleads various failures, including a failure to:

> (g) Adequately monitor the work of each trade contractor, properly review requests and costs for changes in any work, provide suitable recommendations to the Owner and the Consultant with respect to such changes, develop, implement and maintain an appropriate system for quality assurance and quality control of trade contractors work, the costs there-of, and properly administer trade contracts. In particular, EllisDon:
>
> …
>
> (ii) approved or recommended that the Owner approve requests for extras submitted by trade contractors to remediate deficiencies caused by other trade contractors, without back charging the responsible trade contractor for the cost of remediating their deficient work. Accordingly, the Owner absorbed the entire cost of remediating the deficiency;
>
> …
>
> (iv) failed to replace underperforming trades;
>
> (v) failed to provide the Owner with records substantiating its response to trade contractors' claim, thereby compromising the Owner's ability to respond to such claims in a timely and effective manner, and to mitigate the damages caused by EllisDon's failure to properly supervise, manager and coordinate the trade contractor's; and
>
> …
>
> (j) develop, implement and maintain an appropriate system of Project cost control and accounting resulting in accounting errors and poor record keeping, and to properly monitor payments to trade contractors, quantify on-site materials, and track the completion of trade contractors' work including, reconciling trade

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> contractors' invoices with the percentage of work they completed and properly reviewing trade contractors' invoices, all of which resulted in overpayment to trade contractors;
>
> …
>
> [Emphasis added]

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[69] The pleadings in support of the general claim of breach of the duty to act in the best interests of the owner and the more specific claim of breach of the duty to disclose all relevant material information that could affect the owner's interests or decisions are not so deficient as to mandate a finding that they are unsustainable on their face.

[70] However, with respect to the claim of breach of the duty to avoid conflicts of interest, the allegations in the EllisDon Default paragraph do not provide sufficient material facts for EllisDon to know how it breached its alleged duty to avoid conflicts of interest nor how EllisDon put its own interests ahead of The Roy Parties' interests. When asked to explain how the relevant actions and omissions identified in the EllisDon Default could amount to breaches of this obligation, The Roy Parties' counsel could not do so without tying each one back to the allegation that EllisDon put its own interests ahead of the interests of its principal by aligning itself with the trade contractors against The Roy Parties, yet this material fact is not pleaded. I cannot find any material facts in the proposed Amended Statement of Claim that set out how this duty was breached nor how EllisDon put its own interests ahead of those of The Roy Parties.

[71] It is clear that if The Roy Parties' proposed amendments had included the material fact that EllisDon put its own interests ahead of The Roy Parties' interests by aligning itself with the trade contractors to advance claims against its own principal, all of its claims for breach of fiduciary duty in the Amended Statement of Claim would be sustainable. It is equally clear that if the Second Amended Third Party Claim included all the material facts set out in the Amended Statement of Claim, along with the material fact that EllisDon put its own interests ahead of The Roy Parties' interests by aligning itself with the trade contractors, its claims would also all be sustainable. In short, it is obvious that sustainable claims exist but have not been sufficiently pleaded.

[72] As to the proposed amendments to the Second Amended Third Party Claim, Counsel for the Roy Parties submitted, without authority, that because the two actions have been consolidated, the court must read the proposed Second Amended Third Party Claim together with the proposed Amended Statement of Claim. The rationale for this approach is that the third party cannot reasonably suggest that it is

unaware of the case it must meet if the allegations against it by the same party are fully set out in the other set of pleadings. Counsel conceded that the Second Amended Third Party Claim does not contain para. 14 of the proposed Amended Statement of Claim outlining the alleged "EllisDon Default".

[73] The proposed amendments to the Second Amended Third Party Claim are set out in para. 11 and include an allegation of breach of fiduciary duty, and, specifically, failing to act in the best interests of The Roy Parties as their agent while performing its obligations under the contract, to avoid conflicts of interest and to disclose all relevant information that could affect The Roy Parties' interests. I am of the view that the proposed Second Amended Third Party Claim provides sufficient material facts to establish the nature of the alleged fiduciary relationship as an agency relationship arising out of a construction management contract. In addition, the nature of the duties owed by the fiduciary is dealt with in para. 11, as noted above.

[74] Paragraph 11 also lists several other alleged failures but it is not clear whether they are intended to describe breaches of contract or fiduciary duty. In any event, they do not set out sufficient material facts to establish how these various alleged duties were breached. There is no amendment relating to any remedy claimed with respect to the alleged breach of fiduciary duty.

The request for further amendments

[75] During the hearing The Roy Parties asked that if this court found the pleadings to be deficient, that it grant them the opportunity for further amendment. EllisDon says the court cannot consider whether the deficient claims would be sustainable with further amendment. Instead, the court must dismiss the motion in relation to any claims that are unsustainable as they stand and The Roy Parties will have to file another motion to amend if they wish.

[76] I am of the view that the test for justiciability allows for the exercise of the court's discretion to permit further amendments, where, as here, such a request has been made. I have discretion to allow amendments at any time. It would be a waste of judicial and party resources to require The Roy Parties to bring a new motion where sustainable claims clearly exist, but where insufficient material facts were pleaded to identify all of the necessary elements. Where it is apparent on either a motion for summary judgment on the pleadings or a motion to amend that a sustainable claim would exist but for the failure to plead certain particulars that are within the moving party's knowledge, the court must have discretion to grant leave

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to amend, or further amend, the claim. Dismissing the motion to amend and requiring the moving party to file another motion would be incompatible with the court's historically liberal approach to amendments and with the just, speedy and inexpensive determination of every proceeding.

[77] I refer again to the statement of the Court of Appeal in *Cooper, supra* that "so long as the statement of claim, as it stands or as it may be amended, discloses a reasonable cause of action, it should not be struck out."

[78] In *Innocente v. Canada (Attorney General)*, 2012 NSCA 36, the court considered whether the chambers judge erred by determining that Mr. Innocente's cause of action, as pleaded, was "clearly unsustainable", and by granting summary judgment without giving him a further opportunity to amend. The court dismissed the ground of appeal challenging the summary judgment which dismissed the claims as pleaded. However, on the issue of whether Mr. Innocente ought to have been permitted to amend, the court held:

> [45] Rules 83(11)(1) [*sic*] and 13.03(4) give the judge a discretion to amend or adjourn and hear a motion for an amendment. No specific amendment was proposed to Justice Coady. Neither was there a request for an adjournment so that a specific amendment could be proposed. In those circumstances, Justice Coady did not err in law by failing to order that Mr. Innocente was entitled to another amendment.
>
> [46] In the Court of Appeal, Mr. Innocente appeared without counsel. He identified specific items of personal property and, for each, described the damage or loss. He did this in response to the Court's questions. The Court's questions were an effort to better understand his claim given that he was unrepresented in this Court. In these reasons there is no need to repeat the particulars of damage that Mr. Innocente mentioned at the appeal hearing. These were just allegations, neither in the record before Justice Coady nor in the form of evidence. But I can say this. Had those same particulars appeared in the Amended Statement of Claim, then the first and second sets of material facts that I mentioned above - identification of the items and description of the damage - would have been sufficiently pleaded to withstand this motion for summary judgment on the pleadings. I reiterate that I am referring only to the claim for damage to personal property.
>
> [47] The question is whether the Court of Appeal should permit Mr. Innocente to amend his Statement of Claim again, to plead the particulars that he recited orally at the hearing before this Court.
>
> [48] As I discussed earlier, a discretionary ruling under the *Civil Procedure Rules,* including one that terminates a proceeding, is reviewable if it results in a patent injustice, even without an associated error of law. Would the chambers

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judge's denial of Mr. Innocente's request to further amend his claim result in a patent injustice?

[49] My view is Yes.

[50] "Injustice" has a flexible meaning for which guidance may be deduced from the *Rules*. Rule 1.01 describes the "Object of these Rules" as:

These Rules are for the just, speedy, and inexpensive determination of every proceeding.

[51] The *Rules* offer litigants the opportunity to shepherd a claim, that is sustainable on its face, toward a proper resolution by settlement or trial. That is a "just determination". The denial of the amendment withdrew that opportunity from Mr. Innocente.

[52] Rule 1.01 directs that the determination also be "speedy, and inexpensive". The Attorney General points out that Justice LeBlanc already gave Mr. Innocente one opportunity to amend, Mr. Innocente was represented by counsel for a period thereafter, and he filed an amendment. Enough is enough, says the Attorney General. Pleading by drawing lines in the sand is neither speedy nor inexpensive.

[53] Rule 1.01 cites "just, speedy, and inexpensive" as guiding principles. When the quest for immaculate justice adds inordinately to the litigation's time and expense, the Rule expects the three factors to be balanced proportionately. A proportionate balance employs a less intrusive judicial tool, like costs, before the ultimate remedy of dismissing the claim. Unless there is bad faith or irreparable prejudice, judicial discretion over amendments should prefer the sting of costs to the guillotine of dismissal.

…

[55] Mr. Innocente has not acted in bad faith. His counsel informed the chambers judge that the list of damaged items existed, but was not pleaded because, in counsel's view, those particulars were disclosable on discovery rather than in the Statement of Claim. Mr. Innocente's counsel said that, if his view was mistaken, the error was with counsel, not Mr. Innocente. (quoted above, para 44)

[56] In these circumstances, to deny the requested amendment would be a patent injustice.

[Emphasis added]

[79] In *MacGregor's Custom Machining Limited v. Sanikiluaq Development Corporation*, 2021 NSSC 159, Norton J., relying on *Innocente*, *supra,* allowed amendments after his decision with respect to a motion for summary judgment on pleadings had been rendered but before an order had issued. He said:

10 The Court cannot distinguish the present facts from those dealt with by Justice Fichaud in *Innocente*. In each case, the Plaintiff did not propose amendment and did not seek an adjournment of the hearing to bring a motion to amend. There

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> is no suggestion that the Plaintiff is acting in bad faith or, that by allowing the motion to amend, irreparable prejudice would be caused to the Defendants. The Court of Appeal has instructed that in such circumstances the Court should permit the amendment and use "a less intrusive judicial tool, like costs, before the ultimate remedy of dismissing the claim." (*Innocente*, paragraph 53)
>
> 11 Absent this appellate direction, the Court would have been inclined to accept the argument of the Defendants that the Plaintiff knew or should have known the deficiencies in its pleading from the Defendants' motion materials; that the time to seek an adjournment was before the hearing of the Defendants' motion; and that the Plaintiff, having taken the position that its pleadings were not deficient, should not have a second chance for relief not already sought.
>
> 12 Accordingly, the Court will permit the Plaintiff to move to amend the Statement of Claim.
>
> 13 The Court finds that the Plaintiff's failure to seek an adjournment to allow amendment before the hearing of the motion for summary judgment on pleadings resulted in a substantial waste of court resources and unnecessary expense to the Defendants. Accordingly, the Court will award costs to the Defendants for the motion for summary judgment on pleadings, this motion by correspondence and the motion to amend. The Court finds that it is appropriate for the quantum of costs to include a substantial indemnity of the expense to the Defendants for the hearing of the motion which could have been avoided by a timely motion to amend. The Court fixes the quantum of those costs at $3,500 inclusive of disbursements and orders that they be paid forthwith.
>
> 14 The Plaintiff shall provide the Defendants with a copy of the proposed amendments attached to a draft order for consent as to form within 7 calendar days of the date of this decision. If the Defendants do not consent to the order, counsel are to contact the Court to schedule a hearing on the motion to amend.
>
> 15 In light of these reasons, there will be no order for dismissal issued resulting from the Decision. I will now consider the companion motion for summary judgment on evidence heard with the motion for summary judgment on pleadings and render my decision on that motion.

[80] As in *Innocente*, *supra*, and *MacGregor's Custom Machining Limited*, *supra*, it would be unjust to apply the Rules in this case in a manner that would prevent sustainable claims from proceeding, as long as there is no evidence of serious non-compensable prejudice. I will, therefore, proceed to consider whether EllisDon has shown that it would suffer serious prejudice that cannot be compensated in costs if the amendments are allowed.

Serious Prejudice that cannot be compensated in costs

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[81] I said the following in *Gardiner v. P.J.C. Land Developments Limited*, 2025 NSSC 210, at paragraph 22, concerning serious prejudice that cannot be compensated in costs:

> The onus to prove prejudice lies with the responding party to the motion. There must be a causal connection between the non-compensable prejudice and the amendment. Non-compensable prejudice does not arise because the amendment may be potentially successful. Nor does it arise because the amendment could lengthen the pre-trial procedures or the trial or increase the complexity of the trial. Demonstrating prejudice alone is not sufficient. The responding party must also demonstrate that the prejudice caused cannot be compensated in costs.

[82] EllisDon argues that it will face two categories of prejudice if the proposed amendments are permitted: (1) prejudice arising from the current state of the proceeding and the complex nature of the consolidated proceedings; and (2) prejudice arising from the failure of The Roy Parties to particularize their claims.

[83] The first category of prejudice can be compensated in costs. I expect that the amendments may require EllisDon to take additional procedural steps within the litigation schedule but note that it already contemplates further discovery and expert evidence and that there is more than a year before trial will commence. There is no serious, non-compensable prejudice that would displace the ordinary presumption in favour of amendment.

[84] The second category of prejudice will be eliminated if The Roy Parties are given leave to further amend the pleadings to add the missing material facts concerning EllisDon's alleged collusion with the trades and to specify that the only other particulars of the breach of fiduciary duty claims are the allegations in subparas. 14(b) and 14(g), (i), (ii), (iv) and (v), and para. 15 of the proposed Amended Statement of Claim. Similarly with respect to the Second Amended Third Party Claim, any prejudice will be eliminated with The Roy Parties further amending the pleading to add the missing material facts including how the duties were breached and any remedy claimed.

[85] In short, I am not satisfied that if the proposed amendments are granted and The Roy Parties are given further time to add the missing material facts, that EllisDon will suffer serious prejudice that cannot be compensated for by way of costs.

Limitation periods

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[86] Section 8 of the *Limitation of Actions Act* states:

> 8(1) Unless otherwise provided in this Act, a claim may not be brought after the earlier of
>
> (a) two years from the day on which the claim is discovered; and
>
> (b) fifteen years from the day on which the act or omission on which the claim is based occurred.
>
> (2) A claim is discovered on the day on which the claimant first knew or ought reasonably to have known
>
> (a) that the injury, loss or damage had occurred;
>
> (b) that the injury, loss or damage was caused by or contributed to by an act or omission;
>
> (c) that the act or omission was that of the defendant; and
>
> (d) that the injury, loss or damage is sufficiently serious to warrant a proceeding.
>
> (3) For the purpose of clause (1)(b), the day an act or omission on which a claim is based occurred is
>
> (a) in the case of a continuous act or omission, the day on which the act or omission ceases; and
>
> (b) in the case of a series of acts or omissions concerning the same obligation, the day on which the last act or omission in the series occurs.

[87] Pursuant to s. 9(1) of the *Act*, The Roy Parties have the burden of proving that a claim was brought within the limitation period established by clause 8(1)(a). If the limitation period has not expired, the court can allow the amendment under Rule 83.11(1).

[88] The Roy Parties say there is no limitation period at issue because the purpose of the amendments is not to plead a new cause of action or claim but rather to clarify or expand upon the existing claim for breach of the Contract, which expressly identifies EllisDon as The Roy Parties' agent in providing the contracted construction management services. The Roy Parties submit that once they pleaded the Contract in the original Statement of Claim, all of its terms, including the agency provision, were incorporated by reference. In other words, The Roy Parties say, the material facts underlying the alleged fiduciary relationship have always been pleaded, as were the alleged breaches making up the EllisDon Default.

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[89] The Roy Parties' alternative argument was difficult to follow. They did not suggest that if the amendments are found to raise a new cause of action or claim, the applicable limitation period has not expired due to discoverability. Instead, they argued that even if the limitation period has expired, the amendments are permissible under either Rule 83.11(3) or s. 22 of the *Limitation of Actions Act*. Indeed, when Counsel for The Roy Parties was asked when the limitation period began to run, he struggled to answer. While he noted that the April 2026 discovery of Brian Strecko brought into focus the fiduciary significance of the agency relationship and the conduct already at issue in these proceedings, he did not suggest that his clients did not discover the claim until that time. Counsel eventually said the court might choose the date that The Roy Parties received EllisDon's affidavit disclosing documents, including Mr. Strecko's diary entries. He could not say, however, exactly when that occurred.

[90] EllisDon says the limitation period expired two years after the Notice of Action was filed in the Roy Action. EllisDon points to The Roy Parties' argument that the breach of fiduciary duty is not a new cause of action but instead arises from the contractual agency clause and the amendments are simply adding better particulars to already existing claims. EllisDon says it necessarily follows that the claims were discoverable in August 2023, when the Nova Scotia action against EllisDon was commenced. As a result, EllisDon says, the limitation period expired in 2025.

[91] The Roy Parties' argument that the proposed amendments raise no new cause of action cannot succeed. The case law is clear that breach of fiduciary duty is a separate cause of action. In *Immocreek Corp. v. Pretiosa Enterprises Ltd.*, [2000] O.J. No. 1405 (Ont. C.A.), the Ontario Court of Appeal stated:

> 32 In my view, Immocreek's pleadings fall afoul of these cases. A cause of action grounded in breach of fiduciary duty is a separate cause of action consisting of identifiable legal components (e.g. special relationship, loyalty and vulnerability): see *Hodgkinson v. Simms*, *supra*. There is nothing in Immocreek's pleadings dealing with these matters. Indeed, in the most specific paragraph in its pleadings dealing with Stoll's personal liability, namely paragraph 2 of the Reply, the language chosen might relate to a claim of negligent misrepresentation, not a claim of breach of fiduciary duty.
>
> [Emphasis added]

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[92] Similarly, in *Iskatewizaagegan No. 39 Independent First Nation v. Winnipeg (City),* 2021 ONSC 1209, the court said:

> 59 Although they may sometimes overlap with other legal obligations, fiduciary obligations are a discrete and independent legal phenomenon with their own quality and characteristics. A breach of fiduciary duty may coincidentally also be negligence, a breach of contract, or a breach of confidence, and then there will be concurrent liability. However, the presence of a claim in tort, contract, or for breach of confidence does not, by itself, entail nor does it rule out the claim for breach of fiduciary duty. Breach of fiduciary duty remains an independent claim with its own unique characteristics and sterner quality.

[93] The Roy Parties provided no Nova Scotia authority for the proposition that pleading the Contract incorporates all of its terms by reference, including the agency provision, and that EllisDon therefore had notice that breach of fiduciary duty claims were on the table. Until The Roy Parties pleaded the agency provision in the proposed amendments, there were insufficient material facts to support a claim arising from a fiduciary relationship. Moreover, as the above case law demonstrates, the presence of a claim for breach of contract, by itself, does not entail a claim for breach of fiduciary duty.

[94] In addition, as I noted earlier, the proposed claim for breach of the fiduciary duty to avoid conflicts of interest is only sustainable if The Roy Parties further amend the pleadings to add the material fact that EllisDon adopted a strategy to align itself with the trades to advance delay claims against The Roy Parties, EllisDon's principals, and to ensure that no mismanagement claims were made against EllisDon itself.

[95] The Roy Parties have not discharged their burden of proving that the limitation period for the breach of fiduciary duty claims has not expired. By taking the position that the proposed amendments are simply better particulars of claims already existing and arising from the breach of contract claim already pleaded, The Roy Parties implicitly acknowledged that they knew or ought reasonably to have known these claims existed when the action against EllisDon was commenced. The same applies to the commencement of the Third Party Claim on January 24, 2020, against EllisDon in the Omega Action.

[96] Having concluded that the limitation period for the proposed new claims has expired, I must determine whether the amendments are still permissible.

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[97] When an amendment is sought after a limitation period has expired, the court's discretion to permit the amendment is limited to cases where the conditions in either Rule 83.11(3) or s. 22 of the *Limitation of Actions Act* are met.

[98] Rule 83.11(3), which refers to "cause of action", was in effect prior to the coming into force of s. 22 of the "new" *Limitation of Actions Act*, which refers to "claims" added to proceedings. Rule 83.11 states:

> 83.11(3) A judge who is satisfied on both of the following may permit an amendment after the expiry of a limitation period, or extended limitation period. applicable to a cause of action:
>
> (a) the material facts supporting the cause are pleaded;
>
> (b) the amendment merely identifies, or better describes, the cause.
>
> [Emphasis added]

[99] In *Automattic Inc. v. Trout Point Lodge Ltd*., 2017 NSCA 52, the court explained that Rule 83.11(3) is not complicated:

> [28] Rule 83.11(3) is not complicated. A motions judge may allow amendments to the pleadings to allow additional causes of action after the expiry of a limitation period if the judge is satisfied that the facts material to the new cause of action are pleaded and the amendment merely identifies or better describes the cause.

[100] While the court's discretion to allow an amendment under Rule 83.11(3) is limited to situations where the material facts underlying the proposed new cause of action are already pleaded, its discretion is wider under s. 22 of the *Limitation of Actions Act*. Section 22 states:

> **Claims added to proceedings**
>
> 22 Notwithstanding the expiry of the relevant limitation period established by this Act, a claim may be added, through a new or amended pleading, to a proceeding previously commenced if the added claim is related to the conduct, transaction or events described in the original pleadings and if the added claim
>
> (a) is made by a party to the proceeding against another party to the proceeding and does not change the capacity in which either party sues or is sued;
>
> (b) adds or substitutes a defendant or changes the capacity in which a defendant is sued, but the defendant has received, before or within the limitation period applicable to the added claim plus the time provided by law for the service of

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process, sufficient knowledge of the added claim that the defendant will not be prejudiced in defending against the added claim on the merits; or

(c) adds or substitutes a claimant or changes the capacity in which a claimant sues, but the defendant has received, before or within the limitation period applicable to the added claim plus the time provided by law for the service of process, sufficient knowledge of the added claim that the defendant will not be prejudiced in defending against the added claim on the merits, and the addition of the claim is necessary or desirable to ensure the effective determination or enforcement of the claims asserted or intended to be asserted in the original pleadings.

[Emphasis added]

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[101] Under s. 22, the court may allow an amendment to add a claim after the limitation period has expired even where the amendment pleads entirely new material facts, if the added claim is related to the conduct, transaction or events described in the original pleadings. Whether a proposed amendment is "related" to the conduct, transaction or events described in the original pleadings has been given a very broad interpretation (see, for example, *Dyack v. Lincoln*, 2017 NSSC 187, at paras. 49-55). The authorities confirm that the threshold to meet this test is "not particularly high".

[102] Dealing first with Rule 83.11(3), as I noted earlier, the proposed amendments to the Statement of Claim clearly plead new material facts, including the existence of the agency provision and the alleged resulting nature of the fiduciary duties, without which the pleadings could not support a claim for breach of fiduciary duty. The same is true of the Amended Third Party claim, which does not even contain a paragraph outlining the details of the EllisDon Default. Rule 83.11(3) has no application here.

[103] I must now consider whether the proposed amendments are permissible under s. 22 of the *Limitation of Actions Act*. I am satisfied that the proposed amendments to the Roy Action Statement of Claim to add breach of fiduciary duty are related to the conduct, transaction or events described in the original pleadings – EllisDon's performance of its obligations as construction manager of the Roy Building condominium project. The alleged breaches of fiduciary duties are said to arise out of the agency relationship that The Roy Parties say was part of the Construction Management Contract. EllisDon's performance under this contract is already in issue by way of the alleged breaches of contract or negligence that have already been pleaded. The objective of s. 22 is to permit new claims where the defendant will not be prejudiced or surprised because the claims arise out of the same conduct,

transactions and events already under scrutiny in the proceeding. That objective is clearly met here.

[104] I am also satisfied that the added claims do not change the capacity in which either party sues or is sued. The proposed amendments do not, for example, change EllisDon's status in either proceeding from a third party to a defendant or vice versa (see *Beasy Nicoll Engineering Limited v. GEM Health Care Group Limited*, 2022 NSCA 44, at paras. 59, 70, and 76).

[105] I am satisfied that the breach of fiduciary duty amendments are saved by s. 22(a) of the *Limitation of Actions Act* and are not statute barred. As stated above, I will allow The Roy Parties time to plead the additional material facts needed to ensure that all of the claims for breach of fiduciary duty in the Amended Statement of Claim and the Second Amended Third Party Claim are justiciable as they stand, and not only as they may be amended.

Conclusion

[106] In summary, I am of the view that the proposed amended pleadings disclose justiciable claims for breach of fiduciary duty. Some of these claims are sustainable on their face, while others require additional material facts that were identified and discussed in both parties' written and oral submissions.

[107] I am prepared to use my discretion in these particular circumstances to allow the motion to amend on the strict condition that within 5 calendar days of this decision, The Roy Parties provide EllisDon with a copy of the further proposed amendments attached to draft orders for consent as to form. The Roy Parties are to provide this court with the orders and amended pleadings within 8 calendar days of this decision. Should there be any issues arising the parties are to seek an immediate appearance before me.

[108] If the parties cannot agree on costs, I will receive brief written costs submissions (no more than 5 pages) within 30 days of this decision.

Jamieson, Darlene, A.C.J.

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