

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *2325524 Ontario Inc. v. Charge Solar
Renewables Inc.*,
2026 BCSC 1237

Date: 20260706
Docket: S246733
Registry: Vancouver

Between:

2325524 Ontario Inc.

Plaintiff

And

Charge Solar Renewables Inc.

Defendant

Before: The Honourable Justice Greenwood

Reasons for Judgment

Counsel for the Plaintiff:

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Place and Date of Hearing:

Vancouver, B.C.
March 3-4, 2026

Place and Date of Judgment:

Vancouver, B.C.
July 6, 2026

Overview

[1] This is an application by the defendant Charge Solar Renewables to strike out pleadings and order that the claim against them be dismissed under Rule 9-5(1), or for the granting of alternative relief.

[2] The plaintiff, 2325524 Ontario Inc., maintains that its notice of civil claim discloses valid causes of action, and that all the defendant's applications should be dismissed.

[3] The plaintiff's claims relate to alleged misrepresentations by the defendant during negotiations leading up to the signing of an asset purchase agreement. As part of the purchase price, the defendant's earnings were to be used to calculate two contingent Earn-Out payments that the defendant might have to pay to the plaintiff in the two years following the agreement. The alleged misrepresentations relate to assurances about earnings, and non-disclosure of management fees.

[4] The defendant's position is that the effect of the asset purchase agreement, which includes an alternative dispute resolution clause and an entire agreement clause, is that the parties chose to be governed solely by the representations and processes set out in the agreement, and therefore none of the claims advanced by the plaintiff can succeed.

[5] The plaintiff's position is that the agreement does not govern the entire relationship between the parties, and the causes of action identified in the NOCC remain open to it.

[6] I conclude that the essential nature of the disagreement between the parties falls within the alternative dispute resolution clause contained in the contract, and that the parties contractually agreed not to be bound by any representations other than those contained in the contract itself. The result of that conclusion is that the pleadings do not disclose a viable cause of action, and the defect cannot be cured by an amendment.

[7] Accordingly, for the reasons that follow, I would grant the defendant's application and dismiss the plaintiff's claim.

Facts

[8] The factual basis of this application is not in dispute. I have relied only on the facts set out in the plaintiff's notice of civil claim and the terms of asset purchase agreement as incorporated by reference. With respect to any disputed facts (such as the alleged misrepresentations made by Mr. Pulver), I have proceeded based on an assumption that they are true.

[9] Until the sale of its assets, the plaintiff was in the business of designing, maintaining and distributing solar energy products and systems for commercial, residential and industrial markets in Canada and the United States.

[10] Sometime around the summer of 2020, the plaintiff began negotiations with the defendant regarding the potential sale of its assets to the defendant. The plaintiff was principally represented by its president Adam Webb, and the defendant was principally represented by one of its directors, Douglas M. Pulver. The negotiations were undertaken with an eye toward agreeing on the terms of an asset purchase agreement.

[11] The defendant was unwilling to pay the minimum price that the plaintiff required in a lump sum. Accordingly, the parties explored bridging the gap with earn-out payments based on the defendant's EBITDA (earnings before interest, taxes, depreciation and amortization) in the two years following the agreement.

[12] Mr. Pulver suggested that the pay out be based on a target EBITDA that both parties agreed could reasonably be achieved.

[13] Mr. Webb provided Mr. Pulver with an analysis and projection of the defendant's EBITDA based on certain assumptions. He requested that Mr. Pulver provide the defendant's financial statements and historical EBITDA to confirm the

accuracy of his projections, but Mr. Pulver declined to provide the material requested.

[14] Mr. Pulver did confirm the accuracy of the facts and assumptions relied on by Mr. Webb in his projections, including the nature of expenses incurred in the operation of the defendant's business, as well as the defendant's historical and current EBITDA. Mr. Pulver led Mr. Webb to trust in the defendant's *bona fides* and assured him that the defendant had budgeted for and planned on achieving EBITDA between 10% and 12.5% in the relevant period.

[15] The parties agreed on a maximum aggregate consideration that the defendant would pay to acquire the assets of the plaintiff. The maximum consideration reflected the fact that the earn-out payments that might become due and payable would be a maximum sum of \$4,000,000.

[16] On May 1, 2021, after approximately nine months of negotiation, the parties entered into the asset purchase agreement. The agreement outlined the purchase price, set out the means by which Earn-Out payments would be calculated, set out a dispute mechanism in the event of disagreement about the earn-out payments, and included an entire agreement clause specifying that no representations were made "in connection with the subject matter" of the agreement other than those that were specifically included.

[17] The Earn-Out payments under the agreement were to be based on the defendant's financial statements and a report setting out the calculation of the defendant's EBITDA for the year in question. Section 3.5(a) of the agreement reads as follows:

Within 90 days following the end of each Earn-out year, the Purchaser will prepare and deliver to the Vendor: (i) Financial statements of the purchaser (on a consolidated basis including the Purchased Business) for the applicable Earn-Out Year, prepared in accordance with the Accounting Principles applied on a basis consistent with prior years; and (ii) a report (each, a "Draft Earn-Out report") setting out the calculation of the Purchaser's EBITDA during the applicable EARN-Out Year ("Earn-Out EBITDA") based on the financial statements referred to in (i) above.

[18] The agreement addressed the process for resolving disputes regarding the calculation of EBITDA. If the plaintiff disputed the EBITDA set out in the report provided, it was required to set out its objection to the report within 15 days in writing, including the basis of any objection, failing which the report would be deemed final. If the plaintiff did set out its objection, the parties were obliged to “work expeditiously and in good faith” within the next 15-day period to attempt to resolve the objection.

[19] The agreement set out the following mechanism to resolve any disputes that could not be resolved by consent:

...failing resolution the matter will be submitted for resolution to an independent accountant mutually agreeable to the Parties (or if the Parties fail to agree, the independent accountant will be KPMG LLP in Vancouver, BC, or if such firm is unable to act, Grant Thornton LLP, in Vancouver, BC). The independent firm of chartered accountants will be deemed to be acting as experts and not as arbitrators. The determination of the independent firm of chartered accounts will be final and binding on the Parties, and will not be subject to appeal, absent manifest error...

[20] The process contemplated in the agreement would result in a final and binding statement of Earn-Out EBITDA, whether by agreement or as resolved under the agreement. Earn-out payment for the first year would then be the amount by which the EBITDA exceeded \$3,500,000 multiplied by 1.25. The Earn-Out payment for the second year would be the amount by which the EBITDA exceeded the greater of \$3,500,000 or the EBITDA from the previous year multiplied by 1.25. The aggregate earn-out payments were not to exceed \$4,000,000.

[21] The agreement also included an “entire agreement clause” that addressed any representations made in the pre-contractual phase in the following terms:

This Agreement, together with the agreements and other documents to be delivered pursuant to this Agreement, constitute the entire agreement between the Parties pertaining to the subject matter of this Agreement and supersede all prior agreements, understandings, negotiations and discussions, whether oral, written or otherwise, of the Parties. There are no representations, warranties, covenants or other agreements between the Parties in connection with the subject matter of this Agreement except as specifically set forth in this Agreement and the Ancillary Agreements.

[22] The agreement does not include any representations that would restrict the defendant with respect to the payment of management fees, or any other aspect of the management of its business during the Earn-Out period.

[23] In year one following the agreement, the plaintiff accepted the defendant's Earn-Out report resulting in an Earn-Out payment of \$2,485,700. The Earn-Out report included a reference to "consulting and management fees" but did not disclose that such fees had historically been paid annually to the defendant's directors for their management of the defendant's affairs, or that they were based on gross revenue irrespective of net earnings and included in the calculation of EBITDA on a yearly basis.

[24] In year two following the agreement, the defendant calculated the Earn-Out payment as \$301,837.36. When the plaintiff made inquiries into the reason why that amount was lower than expected, it learned that the inclusion of management fees in the calculation of EBITDA played a significant role in reducing the payment and the aggregate compensation it expected to receive when years one and two were combined.

[25] The plaintiff challenged the calculation of the year two Earn-Out payment in writing, drawing attention to the non-disclosure and accounting treatment of management fees, and the defendant's emphasis on business growth rather than maximization of EBITDA. The defendant did not agree to adjust the calculation or proposed payment. Despite further correspondence, the parties could not resolve the objection.

[26] The plaintiff did not consider the nature of the dispute suitable for resolution under the alternative dispute mechanism provided for in s. 3.5 of the agreement. It maintained that the defendant's business agenda was inconsistent with representations made by Mr. Pulver, that there was non-disclosure of the scale and accounting treatment of annual management fees, and that the results were inconsistent with what the parties had agreed was fair value for the purchased assets during negotiations.

[27] The management fees paid to the defendant directors in the first year were approximately \$311,280 which reduced the year one Earn-Out payment by 13.5%. The management fees paid to the defendant directors in the second year were approximately \$374,415 which reduced the year two Earn-Out payments by approximately 20.7%. The treatment of management fees by the defendant reduced the aggregate earn-out payment by approximately \$468,000.

[28] The total earn-out payments as calculated under the agreement amounted to \$2,787,537.36, which is approximately 30% less than the maximum payment of \$4,000,000 contemplated in the agreement.

[29] The plaintiff says that the maximum earn out value of \$4,000,000 was based on Mr. Pulver's representations, and that without such representations, Mr. Webb would not have completed the sale. The plaintiff says that neither the quantum of management fees, nor the fact they were included in the calculation of EBITDA was ever voluntarily disclosed, or reasonably discoverable, and if it had been, it would have insisted that such management fees be excluded from the calculation of EBITDA for the purposes of the agreement, or would not have entered into the agreement.

[30] On September 27, 2024, the plaintiff filed a notice of civil claim which advances three distinct causes of action:

- a) Negligent misrepresentation;
- b) Fraudulent misrepresentation; and
- c) Breach of the Duty of Honest Performance of the contract.

Position of the Parties

[31] The defendant maintains the plaintiff has not advanced any reasonable cause of action, and therefore its entire claim is bound to fail and should be dismissed. It says that all the plaintiff's claims are subject to the alternative dispute resolution process set out in the parties' agreement, the court has no role to play in that

process, and as a result lacks jurisdiction to grant the relief sought in the notice of claim.

[32] The defendant further argues that any representations made by the defendant during negotiations were superseded by the terms of the agreement itself, and the parties' intention to be bound by only those representations set out in the agreement.

[33] The plaintiff argues that its claim clearly falls outside of the contractual provisions agreed to by the parties. The claim is not based on the determination or calculation of earn-out payments but is based on the fact that the defendant concealed the existence, quantum and accounting treatment of management fees throughout the process. Therefore, the plaintiff says, the court is the sole forum that can determine what amounts to a justiciable claim for fraudulent or negligent misrepresentation and a breach of the duty of good faith and honest performance.

Legal Framework

[34] The test for striking out a claim is not in dispute. Assuming the pleaded facts to be true, is it plain and obvious that the claim has no reasonable prospect of success: *Airbnb v. Ware*, 2026 BCCA 110 at para. 102. The determination of the issue depends solely on the facts alleged in the pleadings and not on extraneous evidence: *Beach Estate v. Beach*, 2019 BCCA 277 at para. 48.

[35] On a motion to strike pleadings are to be read "as generously as possible" with an emphasis on substance over form. The focus is whether the pleadings are sufficient to place the defendant on notice of the essence of the claim and whether the facts, as pleaded, would support one or more arguable causes of action: *Atlantic Lottery Corp v. Babstock*, 2020 SCC 19, [2020] 2 SCR 420 at paras. 88-89, *North v. Bayerische Motoren Werke AG*, 2025 ONCA 340 at para. 59.

[36] Where a pleading discloses no reasonable claim, the court may grant the application to strike the whole of the pleading and dismiss the claim: *Rule 9-5(1)*.

Issues

[37] I would describe the issues that need to be determined as follows:

- a) Is the disagreement between the parties one that they intended be determined through an alternative dispute mechanism?;
- b) Did the parties intend to limit or negate the right to sue in tort for negligent misrepresentation by virtue of the entire agreement clause?;
- c) Is it plain and obvious that the claim of fraudulent misrepresentation will fail?; and
- d) Is it plain and obvious that the claim of a breach of the duty of good faith and honest performance will fail?

Analysis

Is the disagreement between the parties one that they intended be determined through an alternative dispute mechanism?

[38] In my view, the fundamental dispute between the parties relates to the calculation of EBITDA under the agreement, an issue that the parties agreed should be decided by an independent expert and not the courts.

[39] To determine whether an alternative dispute resolution clause applies to a particular dispute depends on the intentions of the contracting parties. It is a question of contractual interpretation which requires the judge to examine the language of the clause in the context of the agreement as a whole to determine the breadth and scope of the parties' intentions: *Haisla Nation v. Bear Creek Contracting Ltd.*, 2012 BCSC 1912 at para. 15 and *KMH Cardiology Centres Incorporated v. Lambardar Inc.*, 2022 ONSC 7139 at para. 37.

[40] The issue is similar to the determination of whether an issue in dispute was intended to be subject to arbitration, which includes consideration of the nature of the dispute, the words of the arbitration clause, and the terms of the contract as a whole in their factual context: *St. Pierre v. Chriscan Enterprises Ltd.*, 2011 BCCA 97 at para. 21.

[41] In this case, the dispute between the parties began when the plaintiff objected to the year two Earn-Out payment based on the draft report setting out the calculation of Earn-Out EBITDA. In my view, that is the exact scenario contemplated by s. 3.5 of the agreement. According to s. 3.5(c), where such a dispute is not resolved by the parties, it is referred to an independent firm of chartered accountants acting as experts, whose determination is to be “final and binding”.

[42] The plaintiff in fact followed the process in the agreement initially, by delivering a notice of objection within 15 days, and engaging in good faith negotiations with the defendant to resolve the dispute. It was only when the issue could not be resolved that the plaintiff declined to participate in referring the dispute to an independent firm of chartered accountants as envisioned in the agreement.

[43] When s. 3.5 is read as a whole, and giving the words their ordinary meaning, I am satisfied that objectively viewed, the intention of the parties was to resolve all disputes over the calculation of Earn-Out payments by referring them for resolution to an independent firm of accountants, and to exclude recourse to the courts.

[44] This is also the most commercially reasonable interpretation of the parties’ agreement, given the expense involved in court proceedings, and the choice of a speedier, more efficient and less expensive process to resolve the dispute. In that regard, I would adopt the comments of Cavanagh J. in *Avtal Investments Ltd. & Mezuman v. Brault & Bouthillier Ltée*, 2024 ONSC 5370 at para. 71, which I consider equally applicable to this case:

...The parties agreed to this expeditious process and, in so agreeing, must be taken to have agreed that they would not have recourse to the judicial process, with all of its procedural protections, appeal rights, and systemic delays. In so agreeing, the parties must be taken to have preferred the advantages of timely resolution of their disputes over the advantages and disadvantages of a judicial adjudication of their disputes in the courts.

[45] The plaintiff argues that the scope of disputes that were reserved for determination by the accountants were circumscribed by use of the word “calculation”. It argues that the purpose of s. 3.5(c) of the agreement was to resolve disputes “limited to accounting principles and questions of arithmetic” which are

within an accountant's expertise. For several reasons, I do not accept the plaintiff's submission in that regard.

[46] First, it is based on a narrow reading of the word "calculation". The word "calculation" certainly includes mathematical calculations, but it may also be used in a broader sense to refer to the logical process of assessing a situation and arriving at a conclusion.

[47] Second, if referral to an expert accountant was intended by the parties to be limited to "mathematical" calculations, then, as Myers J. pointed out in *KMH Cardiology* at para. 43, an "elementary school math teacher or a high school student" would have sufficed. There would be no need for "experts", "resolution", or "determination" which are all terms used in s. 3.5 of the agreement.

[48] Third, the submission of the plaintiff fails to account for the context that emerges from the contract as a whole, including who was to calculate EBITDA, and how the "calculation" was to take place. The calculation of EBITDA depended on the draft Earn-out report prepared by the purchaser. The report would of necessity include not only mathematical calculations, but what expenses were included, and how EBITDA was calculated. It is not surprising that objections to the calculation of EBITDA might also encompass included expenses and the method of calculation.

[49] Even if the dispute between the parties requires an expert to consider some issues of interpretation regarding management fees, that alone is not a bar to the use of an expert. In *KMH Cardiology*, for example, Myers J. held, at para. 39, that an expert may be called up to consider questions of interpretation or even questions of law. At issue in *KMH* was whether disputes over the "accuracy" of operating costs in a residential lease that were to be referred to an expert were limited to "technical points like adding up a column of numbers drawn from invoices". Myers J. described that approach as "too parochial" (paras. 36-37). The word "accuracy" was not necessarily limited to mathematical correctness (para. 44).

[50] I draw further support from *Avtal*, where the Court enforced an alternative dispute resolution clause in a share purchase agreement. In that case, the court allowed an expert to decide questions of mixed fact and law related to the calculation of earn-out payments despite the respondent's claim of breach of contract.

[51] The *Avtal* decision is similar to the case at bar in that the dispute resolution provisions were expressly applicable in the event of a dispute regarding earn-out calculations, the referral was to an independent firm of chartered accountants, the accountants were to act as experts not as arbitrators, and their decision was to be final and binding.

[52] The plaintiff points out that in *Avtal*, the share purchase agreement specified that the alternative dispute clause “shall apply in the event of any dispute in connection with the TTM calculation statement”. The words “any dispute” were relied on by the judge (paras. 57, 59, 61, 69) as evidence of the breadth of issues that the parties had intended be decided by the expert accountant.

[53] The contractual language in this case is different, but it is also very broad, and I find the effect is the same. Section 3.5(b) simply says “if the Vendor objects to the calculation of Earn-Out EBITDA...” Section 3.5(c) says “if the Vendor objects to the Draft Earn-Out Report...the matter will be submitted for resolution to an independent accountant....” In other words, the agreement contemplates that an “objection” or “matter” in dispute that relates to the calculation of Earn-Out EBITDA in the report will be resolved by an expert. There is no express limit to the scope of objections or “matters” that will be captured by s. 3.5(b). The effect of these provisions is to refer any objection to the way EBITDA has been calculated to an expert accountant. That would include the issue of management fees.

[54] The steps taken by the plaintiff tend to reinforce the conclusion that the dispute is properly characterized as a complaint about the calculation of EBITDA that was intended to be captured by the alternative dispute resolution clause. The plaintiff's initial notice of objection was issued in accordance with s. 3.5 of the

agreement and described the dispute as a challenge to “the calculation of the year two Earn-Out payment proposed in the year two draft earn-out report”. The notice of civil claim asserts refers to the fact that if the calculation of EBITDA had been different there would be no dispute.

[55] The plaintiff characterizes its claim as negligent misrepresentation and a breach of the duty of honest performance, but an objective assessment leads me to conclude that the main disagreement between the parties is about whether or not management fees should have been deducted prior to the calculation of EBITDA. That is an issue that arose from the content of the draft Earn-Out reports, and the objection taken by the plaintiff, as opposed to the parties conduct during negotiations.

[56] The plaintiff relies on *Philips Electronics v. Westinghouse Canada*, [1984] CarswellOnt 104 (Ont.S.C.) which it maintains is closely analogous. In that case, the plaintiff agreed to assume liability for the vacation of pay of certain employees under the terms of an asset purchase agreement. There was a clause under which the seller would prepare a valuation report setting out the net book value of the assets and liabilities purchased, including the vacation pay liability. If the seller and purchaser did not agree on the net book value, then items in dispute would be referred to Price Waterhouse whose determination would be final and binding. Despite the alternative dispute resolution clause, the court declined a stay and allowed the action to proceed.

[57] While the *Philips* decision stands as an example of a case where the dispute between the parties was not captured by the alternative resolution clause, I do not consider it directly analogous. In *Philips* there was an issue of contractual interpretation with respect to other parts of the contract that had to be resolved before the accountants could resolve any dispute about net book value. The defendant’s solicitors admitted that the interpretation of the underlying contract was in issue. Boland J. did not outline the contractual issue in detail but did say that it “required the adjudicator to look at the contract in its entirety” and fell outside of the

“four-corners” of the clause in question. The essence of the ruling in *Philips* is that the parties did not intend for the alternate decision maker to evaluate contractual language outside of its role as described in the alternative dispute resolution clause.

[58] In the case at bar, no issue arises with respect to the need to interpret other aspects of the agreement. The calculation of EBITDA under the agreement was left to the purchaser subject only to objections. The only contractual requirements were that EBITDA be based on financial statements, and that the financial statements be prepared in accordance with accounting principles that were applied consistently with prior years. There would be no need for an expert accountant to go outside the the “four-corners” of the alternative dispute clause to perform their role.

[59] I conclude that the language used by the parties in the asset purchase agreement reflects their intention that all unresolved disputes about the calculation of Earn-Out EBITDA would be determined by an independent accountant, and not the courts. The agreement was the product of negotiations by two sophisticated commercial parties with access to legal advice. As the Supreme Court of Canada stated in the context of commercial arbitrators in *Sattva Canada Corp v. Creston Moly Corp*, 2014 SCC 53 at para. 105, “where parties choose their own decision-maker, it may be presumed that such decision makers are chosen either based on their expertise in the area which is the subject of the dispute or are otherwise qualified in a manner that is acceptable to the parties”.

[60] In short, I find that the chartered firm of accountants acting as experts can decide the real issue between the parties without the need to apply the law of misrepresentation or consider the contours of the duty of honest performance of a contract.

[61] Despite that conclusion, I must examine the merits of each of the plaintiff’s claims as framed in the pleadings. If there is a viable and independent claim based on misrepresentation or breach of contract, that falls outside the alternative dispute resolution clause, then it must be allowed to proceed.

Did the parties intend to limit or negate the right to sue in tort for negligent misrepresentation by virtue of the entire agreement clause?

[62] I am satisfied that a reasonable interpretation of the entire agreement clause in the context of this case precludes a negligent misrepresentation claim.

[63] Determining whether parties to a contract have chosen to exclude tort liability through an entire agreement clause is a case-specific conclusion and not always easily answered: *No. 2002Taurus Ventures Ltd. v. Intrawest Corp.*, 2007 BCCA 228 at para. 58, *Feldstein v. 364 Norther Development Corporation*, 2017 BCCA 174 at para. 57, but in this case all the relevant factors support the conclusion that the parties effectively agreed to exclude liability in tort and rely solely on the contract.

[64] The plaintiff's claim of negligent misrepresentation is based almost entirely on alleged representations that took place during the negotiations process. The difficulty with that position, however, is that no representations relating to management fees or EBITDA were incorporated into the contract that both parties signed, which made it clear that earn-out payments were not guaranteed, and specifically stated that no representations existed between the parties other than those set forth in the agreement.

[65] In my view, the entire agreement clause reflects the intention of the parties that their ongoing financial affairs would be governed by the contract and not ordinary tort. In essence, the plaintiff's claim in tort is barred by the entire agreement clause.

[66] While it is normally open to a party to pursue an action in either contract or tort, an exception arises where the contract indicates that the parties intended to limit the right to sue in tort. This principle was explained by the majority in *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1993] 1 S.C.R. 12 at p. 26-27:

In our view, the general rule emerging from this Court's decision in *Central Trust Co. v. Rafuse* (1986), 1986 CanLII 29 (SCC), 31 D.L.R. (4th) 481, [1986] 2 S.C.R. 147, 34 B.L.R. 187, is that where a given wrong *prima facie* supports an action in contract and in tort, the party may sue in either or

both, except where the contract indicates that the parties intended to limit or negative the right to sue in tort. This limitation on the general rule of concurrency arises because it is always open to parties to limit or waive the duties which the common law would impose on them for negligence. This principle is of great importance in preserving a sphere of individual liberty and commercial flexibility....

Viewed thus, the only limit on the right to choose one's action is the principle of primacy of private ordering – the right of individuals to arrange their affairs and assume risks in a different way than would be done by the law of tort. It is only to the extent that this private ordering contradicts the tort duty that the tort duty is diminished ... In so far as the tort duty is not contradicted by the contract, it remains intact and may be sued upon.

[emphasis added]

[67] The majority went on to explain that whether an action in tort is foreclosed depends on how the parties have dealt with it in the contract (p. 27). Parties can pursue actions in contract and tort concurrently unless there is a valid contractual provision that indicated they intended otherwise (p. 30).

[68] In *Molsberry v. Serge*, 2025 BCSC 2132 at paras. 136-139, Brundrett J., as he then was, reviewed the jurisprudence and extracted some of the factors that may be relevant to whether an entire agreement clause will exclude liability in tort, including:

- a) Whether the contract is a standard-form contract;
- b) The relative sophistication of the parties;
- c) Whether the terms of the contract specifically address the matters that were the subject of pre-contractual representations; and
- d) whether the plaintiff's attention was drawn to the exclusion clause.

[69] In my view, a consideration of those factors supports the conclusion that the plaintiff's claim in negligent misrepresentation is excluded. The contract was not a standard form contract. The terms of the contract specifically addressed EBITDA and Earn-Out payments based on EBITDA, and how they were to be calculated, and

both parties would have been aware of the alternative dispute resolution clause and their respective inability to rely on any representations during the negotiation process.

[70] The parties were sophisticated commercial entities with access to legal advice, and the contract was negotiated over an 8-month period. Unlike an exclusion clause in a standard form contract, there was no real likelihood that the significance of the entire agreement clause would be missed. Nor was the plaintiff in a disadvantaged position in relation to the contract or the negotiations requiring that the clause be specifically drawn to its attention.

[71] In the present case, the plaintiff argues that the entire agreement clause does not expressly exclude liability for negligent misrepresentation, but that is not required. Such clauses may nonetheless apply to exclude liability: *No. 2002 Taurus ventures Ltd. v. Intrawest Corp.*, 2007 BCCA 228 at paras. 54-59.

[72] The entire agreement clause in this case evinces a clear intention on the parties that no representations made in the negotiating phase would govern. The clause specifies that the agreement supersedes any prior negotiations and discussions. It specifically states that apart from the agreement there were “no representations, warranties, covenants or other agreements between the parties in connection with the subject matter of this agreement...”.

[73] The calculation of Earn-Out payments were clearly part of the “subject matter” of the agreement. It is difficult to imagine a clearer statement of intent between the parties that they be governed by the terms of the contract, and not by any representations made during negotiations.

[74] In *Taurus*, the Court of Appeal held that an entire agreement clause in a purchase and sale agreement excluded the purchaser from claiming in tort for negligent misrepresentation. Both parties were sophisticated commercial entities and intended the contract to govern. Levine J.A. stated, at para. 59 that:

...where the contract was clearly intended to govern the relationship between the parties, it would not accord with commercial reality to give no effect to the

entire agreement clause in determining whether Taurus can claim a tort remedy.

[75] In *Marrello v. Okinshaw Water Company Ltd*, 2017 BCSC 1618, Skolrood J. (as he then was) held that the effect of an entire agreement clause was to preclude any claims for negligent misrepresentation in an asset purchase of a water bottling facility and associated property. In arriving at that conclusion, he relied in part on the fact that the purchaser's representative was a sophisticated businessman, and the contract was the result of negotiations between the parties.

[76] The plaintiff understandably relies on authorities that have held that a claim for negligent misrepresentation can be maintained in the face of an entire agreement clause, citing *Zippy Print Enterprises v. Pawliuk*, 1994 CanLII 1756 (BCCA), *Taggart v. No. 236 Seabright holdings Ltd.*, 2008 BCSC 1412, and *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1993] 1S.C.R. 12. However, none of those cases are analogous to the situation in this case.

[77] In *Zippy Print*, for example, the entire agreement clause was contained in a standard form licencing agreement. The plaintiffs were business novices and *Zippy Print* was a large commercial enterprise. The Court of appeal held that a commercial enterprise could not make intentional oral representations designed to induce a customer or other party to enter into a standard form contract, then rely on the written contract to escape liability flowing from the untrue representations. However, the Court held, at para. 42, that liability could be excluded by a properly framed exclusion clause which both parties considered and intended should limit liability flowing from the representation.

[78] In this case, the entire agreement clause was not contained in a standard form contract of adhesion, and there was no analogous power imbalance between the parties.

[79] In *Taggart*, the representation in question related to where a property line was located. The plaintiffs were not sophisticated businesspeople, and they had specifically inquired about the property line and received assurances that were

incorrect. There was nothing in the contract that would alert them to the fact that the property description was wrong, and the entire agreement clause was not brought to their attention.

[80] In *BG Checo*, the facts were very different. While there was a clause requiring *BG Checo* to satisfy itself of any circumstances or risks on a job site where they were to erect transmission towers, BC Hydro negligently misrepresented that the right-of-way site would be cleared, despite knowing that the clearing work performed by the company they hired was inadequate. Moreover, the contract made it clear that BC Hydro was obliged to have the right-of-way cleared. Nothing in the contract purported to exclude liability for representations.

[81] The plaintiff argues that there is an insufficient evidentiary basis to rule on whether the claim for negligent misrepresentation is barred by the entire agreement clause, and that authorities that have excluded liability after trial do not assist the defendant's application.

[82] The issue, however, is one of contractual interpretation and the plaintiff has not identified any evidence that would assist in interpreting the contract. There is no dispute that the parties were arm's length, sophisticated, business entities who negotiated an agreement over several months. There is no suggestion of a power imbalance, or a standard form contract of adhesion that might raise issues as to whether the provision in question was properly drawn to the attention of an unsophisticated customer or individual.

[83] The purpose of an entire agreement clause has been described as lifting the parties' agreement from the "muck of negotiations" to achieve certainty and clarity: *Soboczynski v. Beauchamp*, 2015 ONCA 282 at para. 43. I would adopt what Hourigan J. (as he then was) stated in *National Logistics v. American Eagle Outfitters Canada*, 2012 ONSC 384, at para. 39:

...Where two sophisticated parties enter into a business deal and specifically indicate that they are not relying on any pre-contractual misrepresentations and that the written agreement represents the sum total of their

understanding, it is simply not a commercially reasonable interpretation to find that the parties did not mean to preclude claims of negligent pre-contractual misrepresentations.

[84] The context in which the entire agreement clause arose is clear. The plaintiff did not simply agree that there would be no representations other than those set out in the agreement, it did so knowing that (1) it had not been provided with the defendant's financial statements, (2) the defendant would be in charge of its own business management decisions, (3) Earn-Out payments would be contingent on the defendant's earnings, and (4) EBITDA as reported by the defendant would be the basis for calculating Earn-Out payments, if any, and (5) disputes about EBITDA would be referred to an accountant acting as an expert.

[85] The plaintiff's claim that it would not have entered into the contract were it not for the alleged misrepresentations merely underlines the fact that all the representations it relies on took place before the contract was signed, and before the plaintiff agreed to the entire agreement clause that effectively removed all such representations from consideration. By agreement, all the parties' relevant legal duties flow from the contract the parties signed, not from the "muck of negotiations".

[86] It is plain and obvious from undisputed facts that the plaintiff agreed to bear the risk that Earn-Out payments might be lower than they expected or hoped, knowing and agreeing that there were no guarantees related to those payments other than what was set out in the contract. In those circumstances, I must conclude that there is no reasonable prospect of success to a claim in negligent misrepresentation.

Is it plain and obvious that the claim of fraudulent misrepresentation will fail?

[87] The plaintiff's claim for fraudulent misrepresentation is distinct from the claim for negligent misrepresentation because a fraudulent misrepresentation which induces a party to enter into a contract cannot be defeated by an entire agreement clause: *Van Beek v. Dodd*, 2010 BCSC 1639 at para. 78.

[88] The Court of Appeal set out the test for a claim of fraudulent misrepresentation in *Wang v. Shao*, 2019 BCCA 130 at para. 24:

- a) the wrongdoer must make a representation of fact to the victim;
- b) the representation must be false in fact;
- c) the party making the representation must have known the representation was false at the time it was made;
- d) the misrepresenter must have intended the victim act on the representation; and
- e) the victim must have been induced to enter into the contract in reliance upon it.

[89] Allegations of fraudulent behaviour against other parties are serious. The fact that the grounds alleged in the NOCC are identical to the grounds related to the plaintiff's claim of negligent misrepresentation suggest that the claim of fraudulent misrepresentation was included for strategic reasons, rather than on the basis of a proper legal foundation.

[90] The plaintiff has pleaded that Mr. Pulver "knew" (or ought to have known) that management fees would have a negative effect on EBITDA, that he intentionally withheld information, and that therefore he must have known the representations he was making were false and must have intended Mr. Webb act on them.

[91] However, what is missing in my view, is any clear representation of fact that might be demonstrated to be false and known to be false during the negotiation. The representation must be "false in fact" and known to be "false at the time it was made". It cannot be sufficient to simply assert that the opposing party in negotiations knew their representations were false without identifying any specific alleged false facts and instead relying on projections that did not come true.

[92] To support its claim of fraud, the plaintiff relies on three representations (as outlined in Part 3, para. 2 of the NOCC): (1) the assurances that the assumptions used in Mr. Webb's projections about EBITDA were accurate, (2) that the defendant

was budgeting for and would try to achieve EBITDA of between 10% and 12.5%, and (3) the fact that the agreement of a maximum value for the earn-out payments was based Mr. Pulver's EBITDA projections.

[93] All the alleged representations related not to a state of determinable facts, but to projections about EBITDA. There are no specific allegations that the assumptions made by Mr. Webb were in fact false or known to be false, or that they completely described all expenses or accounting principles that had been applied in the past. While intentional non-disclosure might be fraudulent, there must be some contextual basis that is capable of supporting a conclusion that the non-disclosure amounted to a representation that was false and known to be false.

[94] There are no facts pleaded to establish that the defendant would not be budgeting for or trying to achieve a higher level of EBITDA. I cannot see how an aspirational statement about the future can be construed as a representation that is in fact false, known to be false, and designed to induce the other party to enter into the contract.

[95] The maximum value resulting from the parties negotiations may have reflected the parties' expectations for the potential Earn-Out payments, but it does no more than that. Setting a maximum that may or may not be achieved, cannot amount to a statement or representation that was false in fact, and known to be false.

[96] The plaintiff argues that it would be overly draconian to strike the claim for lack of particulars at this stage and says the pleadings need only set out what is known as of the date of the pleading. I agree that the plaintiff's claim should not be struck out on a technical basis. The proper approach is to grant leave to amend if there is a potential difficulty with the way in which the pleadings have been drafted. However, the plaintiff has not identified any additional information known to be false that would substantiate a claim of fraudulent misrepresentation.

[97] The timing of the plaintiff's claim of fraudulent misrepresentation also suggests that it was included for strategic reasons rather than based on known or suspected fraudulent conduct. The Earn-Out payment in the first year included a reference to consulting and management fees, but the claim of fraudulent misrepresentation only arose after the Earn-Out payment in the second year failed to meet expectations.

[98] The fraudulent misrepresentation claim also arises in the face of contractual terms that are not in the plaintiff's favour, including the entire agreement clause and the alternative dispute resolution process that the plaintiff does not want to pursue. Both of those provisions stand in the way of the plaintiff's claim in negligent misrepresentation, but not with respect to fraudulent misrepresentation assuming an adequate factual basis.

[99] In my view, the real thrust of the plaintiff's claim in tort is negligent misrepresentation, and the claim of fraudulent misrepresentation is not supported by the pleaded facts or any reasonable amendment that might be made. I am satisfied that it is plain and obvious that it has no reasonable prospect of success.

It is plain and obvious that the claim of a breach of the duty of good faith and honest performance will fail?

[100] As a matter of law, it is plain and obvious that the plaintiff's claim that there was a breach of the duty of good faith and honest performance cannot succeed.

[101] The essence of the plaintiff's claim is that the defendant violated the duty of good faith and honest performance of the contract by not disclosing information on how management fees would be included in the determination of Earn-Out payments. However, the alleged non-disclosure and misrepresentations all took place before a contractual relationship existed between the parties.

[102] In *Ocean Pacific Hotels Ltd. v. Lee*, 2025 BCCA 57, the Court of appeal held that the duty of honest performance relates to the performance of an existing contract and does not extend to dishonest conduct in the form of misrepresentations

during pre-contractual negotiations. Butler J.A. described the law in this area in the following terms:

[65] Despite the fact the SCC has not explicitly found there is no manifestation of good faith which could apply to pre-contractual negotiations, there is still a developing consensus, with which I agree, that a claim for breach of the duty of honest performance cannot be based on dishonest conduct connected to contract negotiations. It is my view that in recognizing the contractual duty of honest performance in *Bhasin*, the Court did not intend to establish a contractual duty to negotiate in good faith.

[66] I am also of the view there is no need to expand the contractual duty of honest performance to apply to dishonest conduct during pre-contractual negotiations which is intended to induce a party to enter into a contract. The law concerning the torts of negligent and fraudulent misrepresentation is well-developed and provides an adequate remedy in this situation

[103] The facts alleged to support the claim of a breach of the duty of honest performance include:

- a) The defendant's refusal to provide financial statements in advance of the contract that would have disclosed the treatment of management fees;
- b) The assurance in pre-contractual negotiations that the plaintiff should rely on the defendant's bona fides; and
- c) The continued withholding of information about management fees paid to the defendant directors throughout the Earn-Out period.

[104] Even on the plaintiff's own description of the facts that are said to be relevant to the duty of honest performance, there is no viable cause of action. The only alleged dishonesty during the period of the contract is the "continued" withholding of information. In other words, it relates back to the plaintiff's original complaint that it was misled during negotiations. I do not view that allegation as supporting an independent breach of the duty of honest performance, and the plaintiff has not argued it in that way.

[105] There was no obligation under the contract to disclose the treatment of management fees. Section 3.5 of the contract outlines the Earn-Out procedure agreed to and does not prescribe how management fees would be factored into the determination of EBITDA. In the absence of a contractual obligation related to

management fees, it is difficult to see how there could be a breach of the duty of honest performance related to management fees. None of the pleaded conduct relates to the exercise of the defendant's obligations under the contract.

[106] Nor do the facts support a reasonable argument that there was a breach of good faith based on "continuing" non-disclosure of management fees. The Earn-Out report in year one referred to consulting and management fees and was accepted by the plaintiff.

[107] The plaintiff's claim that the defendant knowingly misled the plaintiff regarding the quantum and accounting treatment of management fees, can only relate to pre-contractual negotiations, and whether they induced the plaintiff to enter into the agreement.

[108] The plaintiff argues that while the Supreme Court of Canada has not yet recognized a general pre-contractual obligation to negotiate in good faith (or outlined how that might apply to the duty of honest performance), it has explicitly left that question open.

[109] I recognize that my approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial: *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 21, but in my view this point has been decided by the Court of Appeal and I am bound by its decision. It is not so much a case of the law not yet having recognized an arguable claim, but a case where the law in British Columbia has foreclosed such a claim.

Conclusion

[110] In sum, it is apparent from the undisputed facts that (1) the parties agreed that any disputes regarding the calculation of EBITDA would be resolved by recourse to an expert accountant rather than through the courts (2), the parties agreed to arrange their affairs so as to be bound only by the representations set out in the agreement and not by any representations that predated the agreement, and

(3) as a matter of law the duty of good faith and honest performance does not extend to pre-contractual negotiations.

[111] The combined result of those three factors leaves the plaintiff without a viable cause of action, and I am bound to conclude that it is plain and obvious that none of the claims have a reasonable prospect of success. I am satisfied that the problems with the defendant's claim are issues of substance not form and cannot be cured by amending the pleadings.

[112] Accordingly, the application to strike the whole of the pleadings is granted, and the claim is dismissed.

Costs

[113] The defendant seeks an award of special costs, arguing that the plaintiff has made serious and unsupportable allegations of fraud, and compelled it to take on substantial expense to defend against an unnecessary proceeding especially given the parties went to great length to construct an agreement that would allow them to resolve disagreements without the necessity of going to court.

[114] In my view, neither the allegations levelled against the defendant, nor the conduct of the litigation is sufficiently "reprehensible" to attract an award of special costs. While I have found the plaintiff's claim to be without legal foundation, I do not consider it akin to an abuse of process, or anything requiring a remedy beyond ordinary costs and dismissal of the claim.

[115] Accordingly, the defendant is entitled to its ordinary costs.

"Greenwood J."