2020 ONSC 4054
Ontario Superior Court of Justice

Miller v. FSD Pharma, Inc.

2020 CarswellOnt 10252, 2020 ONSC 4054

Anne Miller (Plaintiff) and FSD Pharma, Inc. (Defendant)

E.M. Morgan J.

Heard: June 23, 2020; June 24, 2020
Judgment: July 21, 2020
Docket: CV-19-614980-00CP

Counsel: Andrew Morganti, Albert Pelletier, Ian Literovich, for Plaintiff
Samuel Robinson, Carlo Di Carlo, for Defendant

***E.M. Morgan J.*:**

Investing is laying out money now to get more money back in the future. [1]

I. The motion for leave

1 The Plaintiff in this proposed class action brings a motion under s. 138.8(1) of the *Securities Act*, RSO 1990, c. S.5 ("OSA"), seeking leave to bring a claim against the Defendant for secondary market misrepresentation under s. 138.3 of the OSA. The claim alleges that in its third quarter Management Discussion and Analysis dated November 29, 2019 ("MD&A"), the Defendant, a new entrant into the cannabis production market, made a statement regarding its 220,000 square foot construction project at its Cobourg, Ontario facility (the "Project") that misrepresented material facts.

2 The central question on which the parties join issue is the meaning of "material", specifically with reference to a statutory action by investors for an alleged misrepresentation by a responsible issuer in a core document such as an MD&A.

3 According to the Statement of Claim issued February 22, 2019, the alleged misrepresentation was corrected in a news release dated January 8, 2019. In its written and oral submissions, Plaintiff's counsel contend that while this news release contained a public correction, it was only a partial one, and was followed up with a series of news releases issued by the Defendant and its Project partner, Auxly Cannabis Group Inc. ("Auxly"), on February 6 and 7, 2019 that completed the correction.

4 It is the Plaintiff's position that the November 29, 2018 misrepresentation and the January-February 2019 public corrections represent multiple misrepresentations or multiple failures to disclose material changes in a timely fashion, as described in s. 138.3(6) of the OSA. As such, the Plaintiff states that they are collectively actionable under s. 138.3(1). While it would appear that the initial correction of January 8, 2019 had little market impact, the Plaintiff alleges that combined with the follow-up releases of February 6 and 7, 2019 the price of the Defendant's shares declined by roughly 20%.

5 These events pose several issues for this motion: (a) did the MD&A of November 29, 2018 misrepresent a material fact as that term is defined in s. 1(1) and applied under s. 138.3 of OSA? (b) was the news release of January 8, 2019 a corrective disclosure, as pleaded, or was it a further misrepresentation as argued? (c) were the February 6 and 7, 2019 press releases part of the corrective disclosure and, if so, can they be included in the claim? In addressing the significance of these statements by the Defendant and its partner, it is important to consider what kind of impact must be demonstrated under the OSC — that is, do they have to be market moving statements, or is it sufficient that they would be considered important by a reasonable investor?

6 The onus is on the Plaintiff to pass the test for leave, which represents a statutory "threshold [that] requires that there be a reasonable or realistic chance that the action will succeed": *Theratechnologies inc. v. 121851 Canada inc.*, [2015] 2 S.C.R. 106 (S.C.C.), at para 38. Accordingly, the moving party must "offer both a plausible analysis of the applicable legislative provisions, and some credible evidence in support of the claim": *Theratechnologies*, at para 39; *Canadian Imperial Bank of Commerce v. Green*, [2015] 3 S.C.R. 801 (S.C.C.), at para 121.

(a) The alleged misrepresentation

7 As indicated, the Statement of Claim alleges that the Defendant's November 29, 2018 MD&A contained an actionable misrepresentation. Section 138.3(1) of the OSA establishes a statutory cause of action for secondary market misrepresentation by a responsible securities issuer for misrepresentations made in a core document — i.e. one required by to be filed or that would be expected to effect the value of the securities of the issuer: OSA, s. 138.1. This includes, *inter alia*, a quarterly MD&A: *Cappelli v. Nobilis Health Corp.*, 2019 ONSC 2266 (Ont. S.C.J.), at para 135. There is no dispute that the Defendant is a responsible securities issuer and that its third quarter 2018 MD&A is a core document.

8 The statutory cause of action provided by s. 138.3 (1) of the Act for secondary market misrepresentation is available to any person who acquires or disposes of an issuer's securities between the time a document containing a misrepresentation was publicly released and the time when the misrepresentation was publicly corrected. The evidence establishes that the Plaintiff falls into that category and brings this action in good faith both personally and in a potentially representative capacity.

9 The Plaintiff has also pleaded misrepresentation in a press release issued by the Defendant on September 20, 2018, but that press release is no longer being pursued by the Plaintiffs as actionable. Plaintiff's counsel explains that this narrowing of the issues has been done for reasons of economy. However, the September 20th press release does provides a convenient business background for understanding the context of the subsequent MD&A.

10 In the first place, on September 20, 2018 the Defendant announced a $7.5 million equity investment made by Auxly in shares of the Defendant. This investment was made as initial funding for the Project, and was earmarked to cover the first phase of construction of the Defendant's production facility. It was, in the scheme of the Defendant's business, a significant infusion of cash and a demonstration of confidence in the Defendant's Project, and was made by Auxly at a 32% premium over the previous day's market price for the Defendant's shares.

11 The investment was itself only a partial fulfillment of Auxly's obligations under its Definitive Strategic Alliance and Streaming Agreement with the Plaintiff dated March 3, 2018 (the "Auxly Agreement"), which made Auxly responsible for the entire financing, design, and building of the Project. Earlier in 2018, Auxly had represented that it was already working on the design drawings, retaining a general contractor, developing a construction budget and timetable, completing an environmental assessment, and obtaining all necessary permits. The initial injection of funds by Auxly was seen as the catalyst propelling the Project forward at that stage.

12 The September 20th press release also made a series of general statements about the progress of the Project. It announced that Phase I of the Project was "currently underway". It also quoted a director of the Defendant as saying "we are moving ahead with plans to build out the world's largest cannabis indoor hydroponic grow operation". And finally, it quoted the President of Auxly as saying that his company was "happy with the construction progress".

13 It should be noted that both sides acknowledge the significance of the Project to the Defendant's ultimate success as a business. At this phase, the Defendant was earning no income, and would not start doing so until the Project was complete, its facility was up and running, and it could harvest its first product. The 2018 third quarter MD&A was issued in the context of this stage in the development of the Defendant's business and its Project.

14 The MD&A contained a financial review of the company for the third quarter of 2018. It then set out the following statement which purported to be a current description of the state of the Project:

> [The Defendant] expects first phase construction to be completed and ready for Health Canada approval by the end of December 2018. Pending regulatory approval, the Company expects to plant the first harvest in the first phase by the end of January 2019.

15 The following day, on November 30, 2018, the Defendant issued a press release which re-iterated the information about the Project that was contained in the MD&A. The press release announced the Defendant's financial results for the third quarter of 2018, and stated that the "construction timeline and budget remain in line with expectations for [Phase 1]" and that the "construction in Cobourg, Ontario remains on schedule with cultivation to commence in the first half of 2019".

16 The Defendant's expert witness, Chartered Business Valuator and Chartered Financial Analysist Bradley Heys, reviewed both of these statements. It was his view that since the MD&A was released after the close of trading on November 29th, the November 30th press release should be taken into account in assessing any market impact of the alleged misrepresentation. Mr. Heys opined that the combined statements had no statistically significant impact on the price of FSD shares. According to Mr. Heys, the projected time line of a 2018 year-end completion date for the Project was known to the investing public and the market had already factored it into the price of the Defendant's shares.

(b) The corrective disclosure

17 The press release identified in the Statement of Claim as the corrective disclosure was issued by the Defendant approximately 6 weeks after the MD&A containing the alleged misrepresentation. Counsel for the Defendant submits that to the extent that the November documents inaccurately predicted that construction of Phase 1 of the Project would be completed by the end of 2018, this was corrected by the Plaintiff's press release of January 8, 2019. That document stated that Phase I was "to be completed in 2019".

18 The Defendant concedes that the completion date identified in the January 8, 2019 press release is different from the Defendant's earlier statements, which had suggested that Phase 1 would be complete by December 2018. In fact, it is up to a year different from the MD&A in terms of when it suggests the Defendant might be in a position to start income-producing activity.

19 Mr. Heys points out, and the Plaintiff acknowledges, that what might have otherwise been considered negative news apparently had no negative impact on the market. According to Mr. Heys' calculation, the day following the January 8, 2019 corrective disclosure, the Plaintiff's stock price rose by 27.6% ($0.10). According to Defendant's counsel, the reason for this is that the news was of a short-term setback, while investors in the still relatively new cannabis industry are interested in the long term. Defendant's counsel contend, therefore, that the revelation that the Plaintiff would endure a lack of income-earning capacity for up to an extra year of start-up time obviously made no difference to the investing public.

20 Counsel for the Plaintiff have a different take on the impact of the January 8th corrective. They contend, in the first place, that regardless of the immediate effect (or lack thereof) on the market price for the Plaintiff's shares, the construction delay was a material fact that would be considered important to the reasonable investor. They are of the view that this alone satisfies the test for leave under s. 138.8(1) of the OSC. They cite *Kauf v. Colt Resources, Inc.*, 2019 ONSC 2179 (Ont. S.C.J.), at para 114, which in turn relies on *Swisscanto Fondsleitung AG v. BlackBerry Ltd.*, 2015 ONSC 6434 (Ont. S.C.J.), at para 30, for the proposition that, "with respect to both the misrepresentation and public correction requirements, the 'reasonable possibility' test applies on a motion for leave."

21 Moreover, they point out that the corrective was all but hidden in the January 8, 2019 press release. The release was headlined: "FSD Pharma Completes Harvest and passes analytical testing of second lot". It was a narrative of good news about the company, lauding its potential product and the Project. Then, after mentioning the Project, in a single footnote, and in parentheses within that footnote, states: "to be completed in 2019". The statement was as physically unobtrusive as could be — one had to literally read the 'fine print' to even see it let alone to register its significance.

22 Thus, the public corrective, by pointing out that the Project would be completed only by the end of 2019, did, as a matter of fact, dispel the false information from the November 28, 2018 MD&A that the Project would be completed by the end of 2018. But its positioning and significant understatement in the January 8, 2018 news release explains why it had no immediate impact on the market.

23 Applying the analysis directed by the Supreme Court of Canada, "the significance of the [different statements] must be ascertained by comparing the omitted information . . . to the disclosed information. As part of this second step, a court may consider contextual evidence which helps to explain, interpret, or place the omitted information in a broader factual setting, provided it is viewed in the context of the disclosed information": *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, [2011] 2 S.C.R. 175 (S.C.C.), at para 59. Further, the broader context in which the alleged misinformation arises must be interpreted for the purposes of the OSC and other analogous legislation in "accord with the investor protection purposes of those Acts": *Ibid*., at para 116.

24 With these principles in mind, Plaintiff's counsel has analyzed Defendant's statements in terms of the roadmap set out by Strathy J. (as he then was) in *Green v. Canadian Imperial Bank of Commerce*, 2012 ONSC 3637 (Ont. S.C.J.), at para 377:

> (a) identify the representation at issue;
>
> (b) determine whether it was a core document or a non-core document or public oral statement;
>
> (c) determine whether there is a reasonable possibility that the plaintiff will establish at trial that the document or statement contains a misrepresentation of material fact;
>
> (d) determine, in the case of each individual defendant, whether there is a reasonable possibility that the plaintiff will establish at trial that the defendant authorized, permitted or acquiesced in the release of the document or the making of the statement;
>
> (e) in the case of non-core documents or public oral statements, determine whether there is a reasonable possibility that the plaintiff will establish at trial that each individual defendant knew of the misrepresentation, deliberately avoided acquiring knowledge, or was guilty of gross misconduct in connection with the release of the document or the making of the misrepresentation;
>
> (f) determine whether there is a reasonable possibility that the defendants will not establish the reasonable investigation defence with respect to the misrepresentation — that is, that they conducted a reasonable investigation and had no reasonable grounds to believe that the document or public oral statement contained a misrepresentation.

25 It is the Plaintiff's position that the answer to each of the inquiries in which Justice Strathy in *Green* directed the court to engage is self-evident. With respect to the MD&A, the representation about the completion date of the Project is readily identifiable [para 377(a)], the MD&A is a core document [para 377(b)], it contained a misrepresentation with respect to the completion date of the Project [para 377(c)], the Defendant authorized its release [para 377(d)], and given the proximity in time between the misrepresentation and the correction the Defendant knew or ought to have known that the MD&A contained a misrepresentation [para 377(f)].

26 Plaintiff's counsel then point out that this is one of those cases where "common sense would indicate that a material misrepresentation had indeed been disclosed by the [MD&A]": *Nobilis*, at para 175. The common sense conclusion, in turn, is said to arise from "a fact-specific inquiry, to be determined on a case-by-case basis in light of all of the relevant considerations and from the surrounding circumstances forming the total mix of information made available to investors": *Sharbern*, at para 61.

27 In the first place, the Plaintiff points out that there is no real controversy about the importance of the Project or the Auxly contribution to the Project in terms of the Defendant's business. In fact, in cross-examination the CFO of the Defendant conceded that the Project was the Defendant's only business operation during the Class Period, and deposed in both his affidavit and his cross-examination that "this was a significant project, which would require substantial capital." The evidence is uncontentious

that the Defendant's license from Health Canada only permitted the cultivation of cannabis at the Coburg, Ontario facility, and that any profitable operation of the Defendant's cannabis cultivation business required the Project build-out of that facility.

28 In the MD&A filed November 29, 2018, the Defendant represented to the market that Auxly had committed to spend $55 million on the Project. In cross-examination, the Defendant's CFO confirmed that, unbeknownst to the market, no funds beyond Auxly's initial $7.5 million advance to the Defendant were being provided by Auxly.

29 Under s. 138.4 of the OSA, it is only where a misrepresentation is alleged to be in a non-core document or public oral statement that the Plaintiff must show that the Defendant knew that the document or statement contained a misrepresentation. For misrepresentations alleged to be in a core document, proof of knowledge is not necessary. Nevertheless, the record contains correspondence between the Defendant and Auxly that makes it clear that the Defendant's statement in the MD&A that construction of the Project was on schedule was not only false, but was known by the Defendant and its partner and manager of the Project, Auxly, to be false.

30 On November 28, 2018, the day before issuing the MD&A, the president of the Defendant emailed the CEO of Auxly to confirm the information about the Project and its scheduled completion. Auxly's response, stated somewhat crudely, was that the Project was in crisis and that the schedule could not be confirmed: "Fuck, bro, we're drinking from a firehose right now. As soon as we have something good I'll give you the heads-up." Despite this being Auxley's only response to the Defendant's inquiry and the Defendant's only information regarding the Project, it represented to the public that, "Construction with our partners Auxly is on schedule and we expect to have our sales licence shortly."

31 Defendant's counsel's response to the MD&A contained a falsehood of which the Defendant was fully aware, is that it was Auxly, not the Defendant, who was in charge of the Project and who had all the information. The Defendant therefore takes the position that any mistaken statements regarding the Project are, in effect, not its fault, but rather are Auxly's responsibility. In fact, the Defendant goes so far as to contend that Auxly had erected a wall around the construction site, so that the Defendant's personnel could not see what was going on with the Project. In this way, the Defendant, a reporting issuer required by the OSA to issue a quarterly MD&A, attempts to deflect responsibility for its own ill-informed document.

32 Frankly, the Defendant's answer is not much of an answer. The Defendant put out a core document on November 29, 2018 that was not only false, but that the Defendant knew it to be false. It conducted no reasonable investigation before doing so, and what minimal inquiry it did make about the veracity of its statement effectively put it on notice that the Project was not proceeding as scheduled. After all, "drinking from a fire hose" is an image of turmoil that is the exact opposite of the well-planned progress that the Defendant conveyed in its MD&A.

33 The Defendant is a reporting issuer regulated by the OSA, and in making this kind of misrepresentation it cannot hide behind a partner and manager that it retained for the Project. In taking the line that it was Auxly's doing and not its own, and that therefore the Defendant is not responsible for its own material misstatement, the Defendant has essentially conceded that it did no due diligence before issuing the MD&A. Thus, although s. 138.4(6) makes available to companies a "reasonable investigation" defense to an allegation of misrepresentation, the Defendant has virtually eliminated any prospect of raising this defense. Having been advised that the Project and its manager was in crisis, the Defendant made no further inquiry and proceeded to publish that the Project was proceeding without a hitch.

34 As previously indicated, the deadline for completion of the Project was said to be December 31, 2018, but that date came and went without any further development on the Project or any statement by the Defendant. In fact, Plaintiff's counsel's access to information request has revealed that it was only on December 21, 2018 that the municipality issued any building permit for the Project. That left the one week between Christmas and New Years for the Defendant to construct all of what the Defendant has described as a 220,000 square foot, $55 million Project.

35 On January 8, 2019, the Defendant finally issued its corrective disclosure. It did so, however, in a small-print footnote buried in an otherwise distractingly positive press release. It is little wonder that the market did not immediately react to what

would otherwise have been new information about the Project — the Defendant's acknowledged sole avenue to profitability — that had until then not been disclosed.

(c) Interpreting the corrective disclosure

36 As Lady Hale has insightfully put it, "In law, 'context is everything'": *Stack v. Dowden*, [2007] 2 A.C. 432 (Eng. H.L.), at para 69. Hidden away in a footnote, the January 8, 2019 corrective disclosure answers the question of the Project's timing raised by the November 29, 2018 misrepresentation, but leaves the context and explanation for that timing, or mis-timing, unstated.

37 In interpreting the materiality of a statement alleged to be a misrepresentation, the Supreme Court of Canada has explained that "[a] court must first look at the disclosed information and the omitted information. A court may also consider contextual evidence which helps to explain, interpret, or place the omitted information in a broader factual setting": *Sharbern*, at para 61. Since "[m]ateriality involves the application of a legal standard to particular facts" it is necessarily "a fact-specific inquiry": *Ibid*.

38 The missing factual context that would make the Defendant's diminutive footnote of January 8, 2019 more fully visible is contained in the press releases by the Defendant and Auxly on February 6 and 7, 2019. While these are not themselves pleaded as being actionable, they provide the fact-specific context which the Supreme Court has determined is required for a proper understanding of the impugned communication. It is the Plaintiff's position that while the Defendant attempted to obscure the true import of its corrective disclosure by placing it in a footnote, this form of context-obscuring communication was, in effect, too clever by half.

39 Following the close of the market on February 6, 2019, the Defendant issued a news release entitled "FSD Pharma Announces Strategic Business Developments". This news release announced, among other things, the termination and replacement of the Defendant's CEO and the termination of the Auxly Agreement. At the same time, it reminded readers that, "Under the terms of the agreement dated March 3, 2018, Auxly was obligated to develop all aspects of the Company's cannabis cultivation facility in mutually agreed upon staged phases".

40 This was followed almost immediately by a news released by Auxly, issued on the morning of February 7, 2019 prior the opening of the market. In its release entitled "Auxly Announces Termination of FSD Pharma Joint Venture", Auxly stated, *inter alia*:

> 'To date, [Auxly] has invested $7.5 million in the development and construction of the JV Facility' [i.e. the Project];
>
> 'In the course of [Auxly's] efforts to advance the JV Facility Development, it identified contractual breaches relating to FSD Pharma's management and staffing obligations of the JV Facility, as well as significant concerns regarding certain aspects of the building's infrastructure';
>
> 'On January 17, 2019, [Auxly] provided notice to FSD Pharma of such breaches in the hopes that FSD Pharma would work with [Auxly] toward a resolution'; and
>
> '[Auxly] subsequently terminated the Agreement effective February 7, 2019.'

41 In other words, the delay was not a *de minimis*, footnote-worthy matter of adjusted timing. Rather, it was a result of the Defendant's entire Project — its financing, its construction, and its important partnership — having collapsed. Without the February 6-7, 2019 information, the January 8, 2019 corrective is without context. It appears to have been intentionally designed to be so. The problems had already begun when the construction deadline was not met on December 31, 2018, and once one sees the February press releases one understands that the January 8 press release was fashioned in a way which disclosed the construction delay but obscured the reasons for and business context in which that delay was taking place.

42 In its defense, the Defendant submits that there is a narrow, or what it calls "targeted" cause of action available to Plaintiffs under s. 138 of the OSA. Defendant's position is that the February 6 and 7, 2019 news releases are too disparate to qualify as part of the corrective disclosure as characterized by the Plaintiff. They cite *Nobilis*, at para 21, to the effect that "while the Ontario *Securities Act* provides a counterattack weapon against corporate misrepresentations that have harmed investors in the

secondary market, the counterattack weapon is a timely Exocet missile of a statutory cause of action, not a cluster bomb of unconnected misrepresentations and unconnected corrective disclosures."

43 While I accept the Defendant's submission, even a well-aimed Exocet needs to take into account the swell of ocean waves on which its target bobs or it will miss the mark. What the courts have said with respect to allegedly defamatory statements applies equally to alleged misrepresentations: "The determination of meaning does not depend solely on the documents, but on an evaluation of those words in their context": *Stocker v. Stocker*, [2019] UKSC 17 (U.K. S.C.), at para 55, approving *Cammish v. Hughes*, [2012] EWCA Civ 1655 (Eng. C.A.), at para 35.

44 This, of course, is not only a matter of legal interpretation; it is a matter of all communication. Context, literally 'with text', is the information needed to comprehend the information. Without context, scholars of language have pointed out, even the most straightforward statement is comprehensible in too many ways to be truly comprehensible.

45 A statement like the Defendant's half-sentence of January 8, 2019 that the Project is "to be completed in 2019" could be a reference to any number of things — a minor scheduling adjustment, a supply or construction delay, the imminent collapse of the financing and management agreement for the Project, or the disaffection of the Defendant with its senior-most executive. "The obviousness of the utterance's meaning is not a function of the values its words have in a linguistic system that is independent of context; rather, it is because the words are heard as already embedded in a context that they have a meaning": Stanley Fish, *Is There A Text In This Class?* (Cambridge, MA: Harvard U. Press, 1980), p. 527.

46 As set out at the beginning of these reasons, it is the Plaintiff's position that the February 6-7, 2019 press releases can be combined with the November 29 2018 MD&A and the January 8, 2019 press release as part of a series of multiple misrepresentations and corrections, thus falling under the rubric of s. 138.3(6) of the OSA. Plaintiff's counsel submits that this makes the February statements actionable under s. 138.1 of the OSA as part of the chain of impugned statements. This position, in turn, has led the Defendant to the accusation that the Plaintiff's claim is a moving target, and that her position on the present motion deviates in a significant way from her pleading. The Statement of Claim does not mention the February 6-7, 2019 press releases as included in the misrepresentations on which the action is based.

47 When asked for a response to this criticism in reply argument, counsel for the Plaintiff answered that the economics of the case did not warrant amending the pleading, and that, in any case, the Plaintiff was not anxious to proceed expeditiously with the present motion but with more time might have been able to better assess whether amending the claim was a worthwhile investment for this case. Needless to say, that answer was not a cogent legal response to the challenge posed by Defendant's counsel's submission about the Plaintiff deviating from the Statement of Claim.

48 The economics of the case and the Plaintiff's complaint about the timing of the motion are neither here nor there from the court's point of view. Plaintiff's counsel assumes financial risk and can reap financial reward in bringing a class action; whether an amendment to a Statement of Claim is 'worth it' is not a consideration of which the court can take account. Moreover, in a case conference several weeks before the hearing of the present motion, the Plaintiff had already advised the court that it was willing to proceed with the motion without a pleading amendment.

49 The fact is, however, that Plaintiff's counsel's detour into his personal reasons for not amending the pleading was unnecessary. The February 6-7, 2019 press releases provided the context in which the corrective disclosure of January 8, 2019 operated; they were not themselves the corrective disclosure. The statement being corrected was the November 29th statement that the Project was proceeding on time, and the correction was the January 8th statement that the Project was delayed. The Statement of Claim identifies the January 8, 2019 press release as the corrective for the November 29, 2018 misrepresentation, and that is accurate.

50 The rest is a matter of interpreting the January 8, 2019 press release and its curt reference to the Project. In order to accurately understand that release, one must take into account the unstated context that only emerged on February 6 and 7, 2019. Otherwise, one no more knows what to make of the January 8, 2019 footnote reference to the delayed timing of the Project than one knows what to make of the reference to multiple misrepresentations in s. 138.3(6) of the OSA without understanding that

this provision is set out in the context of the liability established in s. 138.1. It would have been helpful to the narrative for the Plaintiff's pleading to set out the February 2019 press releases as context for the January 8, 2019 corrective disclosure, but in not doing so it did not omit the corrective disclosure itself.

51 The fact that the February 6-7, 2020 press releases provide relevant context to the January 8, 2019 press release is borne out by the impact of each of those statements on the stock market. The evidence shows that while the market remained relatively flat following the January 8, 2019 corrective disclosure, it dropped nearly 20% following the February 6-7, 2019 contextualization of that correction. That is, the footnote reference of January 8 th was not absorbed until its meaning was revealed the following month, following which there was an immediate adverse market impact.

52 It was on February 6 and 7, 2019 that it became clear that one of the possible meanings of the January 8, 2019 statement was not true — i.e. that the newly stated end date for the Project was a minor change with negligible effect on the Defendant's business — and that another possible meaning was revealed as the accurate one — i.e. that the newly stated end date for the Project signaled the demise of the Project and the potential disintegration of the company's business for the foreseeable future. Those news releases, which provided all-important context for the January 8, 2019 corrective, were the furthest thing from a "cluster bomb of unconnected misrepresentations and unconnected corrective disclosures", to use the *Nobilis* phrase. They were the very context that in which the January 8 th disclosure of the "the 'falsity' in the initial representation" was embedded: *Swisscanto Fondsleitung AG v. BlackBerry Ltd.*, 2015 ONSC 6434 (Ont. S.C.J.), at para 61. They pinpointed what it really was that the corrective disclosure disclosed.

(d) Materiality and the statutory cause of action

53 Section 75(1) of the OSA requires that where a "material change" occurs in the business or other affairs of a reporting issuer such as the Defendant, it must issue a news release authorized by a senior officer of the company which discloses "the nature and substance of the change." The term "material change", when used in relation to a securities issuer other than an investment fund, is defined in s. 1(1) of the OSA as: "a change in the business, operations or capital of the issuer that would reasonably be expected to have a significant effect on the market price or value of any of the securities of the issuer . . . "

54 In addition to annual financial reports and periodic news releases disclosing material changes, the Defendant was obliged under the OSA to distribute an MD&A to shareholders on an annual and quarterly basis. As Justice Strathy pointed out in *Green*, at para 32, the MD&A is to be done in a form prescribed by Form 51-102F1, which requires that the issuer set out a "narrative explanation, through the eyes of management, of how [the] company performed during the period covered by the financial statements and of [the] company's financial condition and future prospects." The form also requires the quarterly MD&A's to, *inter alia*: (a) "discuss material information that may not be fully reflected in financial statements" and (b) "discuss important trends and risks that have affected the financial statements, and trends and risks that are reasonably likely to affect them in the future."

55 Form 51-102F1 then goes on to define "material" in terms of a question: "Would a reasonable investor's decision whether or not to buy, sell or hold securities in your company likely be influenced or changed if the information in question was omitted or misstated?" The problem is that this definition differs in a significant way from the definition of "material" found in s. 1(1) of the OSA.

56 The Form's approach to materiality sets out a "reasonable investor" standard, while the statutory definition section's approach to materiality sets out a "market impact" standard. The Plaintiff advocates for the former while the Defendant advocates for the latter. That is, the Defendant argues that the reported change contained in the news release of January 8, 2019 was not material since it had no significant impact on the market price of the Defendant's securities. The Plaintiff, by contrast, argues that the reported change in the Project's completion may not have had an immediate effect on share price, but it was information central to the Defendant's business and therefore of the sort that a reasonable investor would certainly want to know.

57 In *Kerr v. Danier Leather Inc.*, [2007] 2 S.C.R. 331 (S.C.C.), at paras 18, 32, the Supreme Court of Canada embraced the market impact approach to materiality for the purposes of defining "material change". Likewise, in *Cornish v. Ontario*

(Securities Commission), 2013 ONSC 1310 (Ont. Div. Ct.), at para 52, the Divisional Court came down squarely on the side of a market impact test: "When a reporting issuer is considering material change disclosure, it must apply an objective test as to the expected market impact as it will not have the benefit of actual market impact information."

58 On the other hand, in *Colt Resources*, at para 114, the court embraced the reasonable investor standard for the purposes of a motion under s. 138.3: "Consequently, with respect to both the misrepresentation and public correction requirements, the 'reasonable investor' test applies on a motion for leave." Similarly, in *Nobilis*, at para 177, the court opined that, "Materiality is . . . determined on a case-by-case basis from the perspective of the reasonable investor".

59 With the greatest of respect, either those cases transposed the "reasonable chance of success" test for leave as articulated in *Theratechnologies* with the applicable definition of material change in the OSA, or counsel's reading of those cases transposed those two standards. In any case, a moving party under s. 138.8(1) must establish a reasonable or realistic prospect that she will succeed, while a claimant under s. 138.3 must demonstrate a "material change" that is misrepresented and/or corrected in a core document or public statement. Those are two different matters with two different statutory purposes.

60 As Defendant's counsel and the Ontario Securities Commission have pointed out, the reasonable investor standard is a broader standard than the included, but narrower, market impact standard, and originates in U.S. jurisprudence dealing with the materiality of required financial disclosures: *YBM Magnex International Inc., Re* (2003), 26 O.S.C.B. 5285 (Ont. Securities Comm.) at para 92, citing *TSC Industries Inc. v. Northway Inc.*, 426 U.S. 438 (U.S. Ill. S.C. 1976). One can understand why different jurisdictions might adopt different standards for making a misrepresentation actionable, but that is a policy choice that each jurisdiction makes on its own. The Ontario policy choice in defining materiality for the purposes of a s. 138.3 claim is found in s. 1(1) of the OSA.

61 The Supreme Court of Canada has on a number of occasions observed that the requirement of disclosure of material changes is "a legislative policy that involves '[b]alancing the needs of the investor community against the burden imposed on issuers'": *Sharbern*, at para 40, quoting *Kerr*, at para 5. It is this careful balance between the consumer protection policy of disclosure and the economic policy of fostering a supportive business environment that has produced the definition of materiality found in s. 1(1) of the OSA.

62 Form 51-102F1 requires a broad range of considerations to go into the disclosure contained in a company's MD&A, reflecting that the "reasonable investor" might be investing or divesting because of a broad array of concerns — economic, ethical, environmental, political, religious, etc. Likewise, s. 138.8(1), as a threshold test for leave to commence an action, requires only that there be a "reasonable or realistic chance", reflecting a concern to filter out tenuous cases brought for nuisance reasons or to extract settlements from reporting issuers anxious to get on with their business. On the other hand, the OSA's s. 1(1) definition of "material change" limits actionable statements to those misrepresentations that strike at the one interest which can generally be counted on — i.e. the interest of an investor in a financial return.

63 In essence, the OSA has recognized the rationale for investing that the Ontario Securities Commission identified in *YBM Magnex*, at para 91: "The investor is an economic being and materiality must be viewed from the perspective of the trading markets, that is, the buying, selling or holding of securities." If the change is to be considered material, corporate management must be able to at least focus their consumer protection obligations on the one sphere of activity in which financial investors can be expected to share an interest: the desire for financial return. Accordingly, the market impact definition is the one that the statute embraces.

64 Materiality of an alleged misrepresentation is necessarily fact-based and, insofar as it requires some gazing into the future impact of the impugned statement, it is "determined . . . from the perspective of the reasonable investor and involves the application of a legal standard to specific facts": *Nobilis*, at para 177. But the applicable standard is defined in strictly economic terms: "whether the particular misrepresentations would objectively be expected to have a significant effect on the market price or value of the security": *Ibid*.

65 That said, it must also be recalled that corporate management is in a position to know much more about the company and its economic prospects than the investor in a publicly traded company. The essence of the statutory cause of action for misrepresentation under s. 138.3 of the OSA is to use the prospect of liability to compel disclosure of material changes that management knows or ought to know in this regard that the investing public does not yet know. Accordingly, "materiality is a highly contextual issue that . . . appl[ies] statutory obligations to a particular company in the context of its industry and the market. No single factor will be determinative of whether a material change occurred": *Cornish*, at para 51.

66 As indicated, Defendant's counsel describes the statutory cause of action for misrepresentation as a "targeted" provision. That description is accurate insofar as it identifies material changes with a potential market impact as the focus of the disclosure obligations and of any claim that those obligations were not met. However, the market impact analysis itself is not "targeted" in the sense that it is so narrow that it cannot take the relevant context of an alleged misrepresentation into account. When the contextual analysis is applied to the present case, for example, the market impact of delay in the Project is understood as part of the deterioration of the Auxly relationship, which can then be seen as an event with significant market impact.

67 Plaintiff's counsel appears to have embraced the "reasonable investor" test as opposed to the "market impact" test out of worry that the narrowest, decontextualized reading of the November 29, 2018 misrepresentation and the January 8, 2019 corrective disclosure would not portend any significant market impact. That worry, however, was unfounded. The Divisional Court in *Cornish* has specifically instructed that materiality is a "highly contextualized issue" that takes into account the entire circumstances of the company and its industry and market.

68 The dates for completion of the Project that are referenced in the MD&A and in the press release just over a month later are only the tip of an iceberg. The deterioration of the Auxly partnership, the importance of the Project for a start-up enterprise in a new industry, and the anticipation of future profit in the market, are the added context in which the Defendant was obliged to consider its disclosure obligations. Those business facts, which existed at the time of the misrepresentation and are the context for the corrective disclosure, became visible to the public eye with the February 6-7, 2019 press releases describing the collapse of the Auxly relationship and of the Project for which Auxly had been the responsible party.

69 The investor may be envisioned as an "economic being" acting in rational self-interest, but this rationality cannot be based on partial or decontextualized information. If market impact is to be the measure of materiality, then the analysis of the security's "price in an open market [must] reflect all available information": *YBM Magnex*, at para 91.

70 The Defendant's expert, Mr. Heys, emphasizes that the market for the Defendant's shares did not move on January 9, 2019. However, one needs no expertise at all to figure out why that was: the business context of the corrective disclosure was available to the Defendant but was not available to the investing public.

71 The market moved on February 7, 2019, which was, not coincidentally. the day that the full context of the January 8, 2019 corrective disclosure statement became known to the public. While January 8 th was the date of the corrective statement, February 7 th was the date it became comprehensible.

72 Before February 6-7, 2019, the context of the January 8, 2019 press release was, of course, known to the Defendant as its author. Multi-million dollar business relationships deteriorate over time, and by January 8, 2019 the Defendant already knew that the building permits were issued far too late to meet the end-of-year deadline for the Project's completion. The Defendant also already knew on November 29, 2018 that Auxly was engaged in a futile exercise — "drinking through a fire hose" — in its attempt to reverse the failing Project. But until February 6 and 7, 2019, all of this was obscured from the investing public.

II. Disposition

73 The Plaintiff has acted in good faith in bringing this action. Given the content of the impugned communications from the Defendant and the context in which they were issued, there is a reasonable chance that the action will be resolved at trial in her favour. The Plaintiff is granted leave under s. 138.8(1) to commence an action under s. 138.3 of the OSA.

74 Counsel may make written submissions on costs. I would ask that Plaintiff's counsel provide me with their brief submissions (no more than 3 pages) and any supporting materials within two weeks of today, and that Defendant's counsel provide me with their equally brief submissions and any supporting materials within two weeks thereafter. These materials may be emailed directly to my assistant.

Motion granted.

Footnotes

1 Warren Buffett, "Mr. Buffett on the Stock Market", in: Carol Loomis, ed., *Tap Dancing to Work: Warren Buffett on Practically Everything* (New York: Portfolio-Penguin: 2012), at pp. 166-7.