CITATION: OZ Merchandising Inc. v. Canadian Professional Soccer League Inc., 2019 ONSC 5017
COURT FILE NO.: 04-CV-026293
DATE: 2019/08/27

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
OZ Merchandising Inc. Plaintiff	Nicholas Karnis, Evgeny Kozlov, and Roger M. Mpania for the Plaintiff
– and –	
Canadian Professional Soccer League Inc., Eastern Ontario District Soccer Association, The Ontario Soccer Association, Canadian Soccer Association, Canadian Soccer League Inc., CSL Association Inc., Ira Greenspoon, Vincent Ursini, Cary Kaplan and Stan Adamson Defendants	Jordan Goldblatt for the Defendants Eastern Ontario District Soccer Association and The Ontario Soccer Association Andrew K. Lee for the Defendant Canadian Soccer Association
	HEARD: April 15, 16, 18, 19, 23, 24, 25, 26, 29 and 30, May 1, 2, 3, 6, 7, 8, 9, 10, 13, 14, 15, 16, 21, 22, 23, 24, 27, 28 and 29, June 3, 5, 6, 7, 10 and 11, 2019

REASONS FOR JUDGMENT

RYAN BELL J.

Overview

[1] The Ottawa Wizards were a soccer club in the Canadian Professional Soccer League ("CPSL") from 2001 to 2003. Their home stadium was the OZ Optics stadium in Carp, Ontario. In the fall of 2003, three events occurred. First, in September, the Ottawa Wizards applied to The Ontario Soccer Association ("OSA") to host the OZ Optics Invitational Tournament; the application was not approved, and the proposed tournament was not held. Second, in November, the Canadian Soccer Association ("CSA") issued International Transfer Certificates ("ITCs") for

two Ottawa Wizards' players, Peter Mponda and Macdonald Yobe, which resulted in Mr. Mponda and Mr. Yobe returning to Malawi. Third, in December, the Eastern Ontario District Soccer Association ("EODSA") publicized that OZ Dome Sports Club had not applied to operate an indoor league during the 2003-2004 season and described the potential consequences of participating in "unsanctioned competition" at the OZ Dome facilities.

[2] OZ Merchandising claims:

1) OSA and CSA were negligent and intentionally interfered with its economic interests in relation to the issuance of ITCs for Mr. Mponda and Mr. Yobe.

2) EODSA, OSA, and CSA were negligent and intentionally interfered with its economic interests by not approving the invitational soccer tournament.

3) EODSA, OSA, and CSA were negligent and intentionally interfered with its economic interests in relation to the operation of indoor soccer leagues, rentals, and other soccer-related activities at the OZ Dome facilities as a result of the December 2003 publications.

[3] OZ Merchandising's action against EODSA, OSA, and CSA proceeded to trial before a jury. Jury selection took place on April 15, 2019 followed by a number of preliminary motions. On April 16, 2019, I ruled on certain evidentiary issues and the scope of the trial. In particular, I ruled that the claims against the remaining defendants[1] would not be determined by the jury, and that no evidence would be permitted to be led at trial with respect to such claims.

[4] The jury heard evidence over the course of approximately seven weeks.

[5] On June 3, 2019, after all of the evidence was in, I heard these defendants' motions for non-suit. The non-suit motions of EODSA and OSA were only in respect of certain claims. EODSA, OSA, and CSA also moved for a determination whether, at law, a duty of care existed between OZ Merchandising and each of them. The parties agreed that I should reserve my decision on these matters until after the jury rendered its verdict.

[6] Following the plaintiff's closing address, EODSA, OSA, and CSA moved to strike the jury. On June 11, 2019, I discharged the jury (reasons reported at *OZ Merchandising Inc. v. Canadian*

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[1] The face of the trial record reflects that these defendants have been "noted in default." On the motion regarding the scope of the trial, counsel for OZ Merchandising agreed that the deemed admissions by the defendants noted in default have no application to CSA, OSA, or EODSA. Counsel for OZ Merchandising also agreed on the motion that under Rule 19.05(4), the motion for default judgment in respect of those defendants would have to be heard by the trial judge and not by the jury. Following a contested motion brought by Cary Kaplan, on April 18, 2019, I ordered that the Amended Statement of Defence of the defendants, Canadian Soccer League Inc., Ira Greenspoon, Vincent Ursini, Cary Kaplan, and Stan Adamson (dated June 24, 2016 and contained at Tab 14, volume II of the Trial Record), be restored for Mr. Kaplan only, and that Mr. Kaplan shall be permitted to file written submissions on the law relating to the claims made against him, as set out in the statement of claim.

Professional Soccer League Inc., 2019 ONSC 3882 [*OZ Merchandising Inc.*]). I concluded that given the serious nature and extent of the transgressions in the plaintiff's closing address, the fairness of the trial process and justice to the parties required that the matter not be left in the hands of the jury.

[7] Counsel made no additional submissions after the jury was discharged. The defendants' counsel requested that I address the motions for non-suit within the context of my reasons for judgment.

[8] For the reasons that follow, I dismiss all of OZ Merchandising's claims against these defendants.

[9] The claims in negligence are dismissed because:

- No duty of care existed between OZ Merchandising and any of EODSA, OSA, and CSA.
- If a duty of care existed, there was no evidence adduced at trial that CSA breached its duty of care in relation to any of the three events, nor was there any evidence that OSA breached its duty of care in relation to the claims involving the operation of indoor soccer leagues, rentals, and other activities at the OZ Dome facilities.
- If a duty of care existed, I find that OSA did not breach its duty of care in respect of either the issuance of the ITCs, or the invitational tournament. In addition, EODSA did not breach its duty of care either in relation to the invitational tournament, or OZ Merchandising's operation of indoor soccer leagues, rentals, and other activities at the OZ Dome facilities.

[10] The claims based on the unlawful means tort are dismissed because:

- There was no evidence adduced at trial that any of these defendants intended to cause economic harm to OZ Merchandising.
- There was no evidence that any of these defendants committed an unlawful act against a third party.

[11] I also find that OZ Merchandising failed to prove that it suffered any damages as a result of these defendants' alleged wrongful conduct.

The Issues

[12] Before setting out the issues to be determined, I make the following observations:

- The only plaintiff in this case is OZ Merchandising. Omur Sezerman, a principal of OZ Merchandising and the plaintiff's principal witness, is not the plaintiff. OZ Dome Sports Club is not the plaintiff, nor are the Ottawa Wizards. OZ Optics Ltd. is not the plaintiff.

- The claims against EODSA, OSA, and CSA are claims in negligence and based on the unlawful means tort. The claims against these defendants are only in relation to the ITCs, the invitational tournament application, as well as the operation of the soccer leagues, rentals, and related activities at the OZ Dome facilities.

- The claims asserted against these defendants are not based on vicarious liability. There is no pleading of agency.[2] The group enterprise theory of liability advanced by the plaintiff in its statement of claim, and on at least three motions before me,[3] has been wholly rejected by the Court of Appeal in *Yaiguaje v. Chevron Corporation*, 2018 ONCA 472, 141 O.R. (3d) 1, at paras. 75-76.[4]

- There is no claim against EODSA, OSA, and CSA based on interference with freedom of choice or freedom of association.[5]

- There is no claim against EODSA, OSA and CSA for breach of duty of good faith.[6] On May 7, 2019, the plaintiff moved for reconsideration of a number of my previous rulings, and for leave to amend the statement of claim. The proposed amendments included a plea of agency, as well as a plea that EODSA, OSA, and CSA are vicariously liable to the plaintiff and in breach of contractual obligations and "duty of care, good faith and fair dealing" to the plaintiff. I dismissed the plaintiff's motion. The plaintiff's proposed amendments were substantially the same as those that were considered and refused by Hackland J. in December 2018 (*OZ Merchandising Inc. v. Canadian Professional Soccer League*, 2018 ONSC 7468).[7]

- The claims I must determine are against these defendants, and only these defendants. OZ Merchandising's claims against the remaining defendants will be determined at another time.

- There is no claim against EODSA, OSA, or CSA for the revocation of the Ottawa Wizards' franchise by the CPSL. There is no claim that these defendants are

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[2] During argument on the preliminary motions relating to evidentiary issues and the scope of the trial, counsel for the plaintiff agreed that there was no pleading of agency in the statement of claim.

[3] For instance, on the scope of trial motion, on the plaintiff's motion for recusal (dismissed, April 23, 2019), and on the motion for reconsideration (dismissed, May 10, 2019).

[4] I ordered that the jury be struck in part based on the misstatements by plaintiff's counsel in his closing address as to the nature of the claim in his closing address (see *OZ Merchandising Inc.*, at para. 28).

[5] This was another misstatement as to the nature of the claim in the plaintiff's closing address to the jury (see *OZ Merchandising Inc.*, at para. 30).

[6] This was another misstatement as to the nature of the claim in the plaintiff's closing address to the jury (see *OZ Merchandising Inc.*, at para. 29).

[7] On February 21, 2019, the Divisional Court quashed the plaintiff's appeal from the decision of Hackland J. for lack of jurisdiction and refused to exercise its discretion to transfer the appeal to the Court of Appeal. A motion by the plaintiff to extend the time for filing its notice of appeal was dismissed by Tulloch J.A. on March 28, 2019. Leave to appeal to the Court of Appeal from the Divisional Court's order was refused on July 8, 2019 (M50222).

vicariously liable for the actions of the CPSL or, indeed, the actions of any other defendant.

[13] I am compelled to make these observations because, throughout the course of the trial, the plaintiff persisted in trying to advance issues that are irrelevant to the claims against EODSA, OSA, and CSA. Repeatedly, the plaintiff attempted to adduce evidence that what I had ruled was irrelevant. By way of example, I was required to rule repeatedly that matters leading up to the July 2001 court application before Rutherford J. were irrelevant to the questions to be determined in relation to these claims against these defendants. As I concluded in *OZ Merchandising Inc.*, my previous evidentiary rulings were deliberately ignored by the plaintiff.

[14] I heard from a number of witnesses whose testimony, in whole or in part, was irrelevant to the issues I must determine in this case. Two examples will suffice: First, the plaintiff called as a witness a former player for another CPSL team; his team's franchise was also revoked by the CPSL. This witness offered no relevant testimony regarding the matters before the court. Second, Cary Kaplan, the commissioner of the CPSL from 2005 to 2009, was also called as a witness at trial. The issues in this case relate to events in late 2003. None of Mr. Kaplan's testimony was relevant to these events.

[15] The issues I am required to determine are the following:

1) Did a duty of care exist between OZ Merchandising and EODSA, OSA, and/or CSA?

2) In relation to the issuance of the ITCs in respect of Mr. Mponda and Mr. Yobe:

   a) assuming a duty of care existed, did OSA or CSA breach that duty of care?
   b) did either OSA or CSA commit an unlawful act toward a third party?
   c) if either OSA or CSA committed an unlawful act toward a third party, did OSA or CSA intend, by its unlawful act, to cause OZ Merchandising economic harm?

3) In relation to the invitational soccer tournament submitted to OSA for approval in September 2003:

   a) assuming a duty of care existed, did EODSA, OSA, or CSA breach that duty of care?
   b) did any of EODSA, OSA, or CSA commit an unlawful act toward a third party?
   c) if any of EODSA, OSA, or CSA committed an unlawful act toward a third party, did the association intend, by its unlawful act, to cause OZ Merchandising economic harm?

4) In relation OZ Merchandising's operation of indoor soccer leagues, rentals and other soccer-related activities at the OZ Dome:

   a) assuming a duty of care existed, did EODSA, OSA, or CSA breach that duty of care?
   b) did any of EODSA, OSA, or CSA commit an unlawful act toward a third party?
   c) if any of EODSA, OSA or CSA committed an unlawful act toward a third party, did the association intend, by its unlawful act, to cause OZ Merchandising economic harm?

5) Has OZ Merchandising established that it suffered any losses as a result of the conduct of these defendants?

Issue 1: Did a duty of care exist?

The Anns/Cooper framework

[16] OZ Merchandising's claims are for pure economic loss. The duty of care analysis is therefore governed by the "*Anns/Cooper* framework" (*Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63, [2017] 2 S.C.R. 855, at para. 16, in reference to *Anns v. London Borough of Merton*, [1977] 2 All E.R. 492 (H.L.) and *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537). The *Anns* test asked (i) whether a *prima facie* duty of care exists between the parties; and (ii) if so, whether there are any residual policy considerations which should negate or limit the scope of the duty, the class of persons to whom it is owed, or the damages to which a breach of it may give rise (*Deloitte & Touche*, at para. 19). In *Cooper*, the Supreme Court of Canada revised the *Anns* test by distinguishing more clearly between foreseeability and proximity, and by "placing greater emphasis on a more demanding first stage of the two-stage analysis" (*Deloitte & Touche*, at para. 22).

[17] Foreseeability alone is not enough to establish a *prima facie* duty of care; proximity is also required. In a case such as this, involving an allegation of negligent performance of a service, proximity is more usefully considered before foreseeability (*Deloitte & Touche*, at paras. 23-24).

(i) Proximity

[18] Assessing proximity in the *prima facie* duty of care analysis involves asking whether the parties are in such a "close and direct" relationship that it would be "just and fair having regard to that relationship to impose a duty of care in law" (*Deloitte & Touche*, at para. 25, citing *Cooper*, at paras. 32 and 34). The evaluation of the closeness of the relationship between the plaintiff and the defendant, and the determination of whether it is "just and fair" to impose a duty of care in law on the defendant having regard to that relationship, may involve a consideration of expectations, representations, reliance, and the property or other interests involved (*Cooper*, at para. 34).

[19] Any reliance on the part of the plaintiff which falls outside the scope of the defendant's undertaking – that is, the purpose for which the service was undertaken – falls outside the scope

of the proximate relationship and therefore, outside the defendant's duty of care (*Deloitte & Touche*, at para. 31).

(ii) Reasonable foreseeability

[20] Assessing reasonable foreseeability in the *prima facie* duty of care analysis involves asking whether an injury or a loss to the plaintiff was a reasonably foreseeable consequence of the defendant's negligence (*Deloitte & Touche*, at para. 32). In the case of negligent performance of a service, the proximate relationship is grounded in the defendant's undertaking and the plaintiff's reliance, and informs the foreseeability inquiry (*Deloitte v. Touche*, at para. 34).

(iii) Residual policy considerations

[21] Where a *prima facie* duty of care is recognized on the basis of proximity and foreseeability, the analysis moves to the second stage of the *Anns/Cooper* framework: are there "residual policy considerations" outside the relationship of the parties that may negate the imposition of a duty of care (*Deloitte & Touche*, at para. 37)? These factors are external to the relationship between the parties and include: (i) whether the law already provides a remedy; (ii) whether recognition of the duty of care creates "the spectre of unlimited liability to an unlimited class"; and (iii) whether there are other broad policy reasons that suggest the duty of care should not be recognized (*Deloitte v. Touche*, at para. 40, citing *Cooper*, at para. 37).

Application of the Anns/Cooper framework

[22] In assessing proximity in the *prima facie* duty of care analysis, I am required to undertake a two-step evaluation. First, I must evaluate the closeness of the relationship between OZ Merchandising and each of the defendants. Second, I am required to evaluate whether it would be "just and fair" to impose a duty of care in law on the particular defendant, having regard to that relationship. If a *prima facie* duty of care is recognized based on proximity and foreseeability, I must consider whether there are any residual policy considerations that may negate the imposition of a duty of care.

(i) The plaintiff's relationship with each of the defendants

[23] OZ Merchandising is the plaintiff. However, Mr. Mponda's player's contract was with the Ottawa Wizards Soccer Club. So too was Mr. Yobe's contract. The name OZ Merchandising does not appear anywhere in the contracts; it only appears in the fax header on the documents. OZ Dome Sports Club, not OZ Merchandising, was the intended host of the OZ Optics Invitational soccer tournament. OZ Dome Sports Club, not OZ Merchandising, applied to renew its membership in EODSA in the fall of 2003. The only "OZ" entity referred to in EODSA's December 2003 publications was OZ Dome Sports Club.

[24] OZ Merchandising seeks to avoid these evidentiary hurdles by advancing the following arguments:

- OZ Merchandising owned the Ottawa Wizards.
- The entity that "cut the cheque" for membership in EODSA was the true applicant, and in this case, all the payments were made by OZ Merchandising.
- Services provided to OZ Dome Sports Club as a member of EODSA were provided to it on behalf of OZ Merchandising.
- OZ Optics Ltd. and OZ Merchandising are part of the same corporate group; these defendants were aware of OZ Merchandising and considered all the "OZ entities" to be the same.

[25] I reject these arguments. They are contrary to the evidence, and they ignore the fact that OZ Optics and OZ Merchandising are separate legal entities.

[26] There is no dispute that OZ Merchandising was incorporated in 1993, before the OZ Dome facilities were built, before the OZ Dome Sports Club came into existence, and prior to the creation of the Ottawa Wizards soccer team.

[27] Mr. Sezerman testified that he intended for OZ Merchandising to run a soccer club in the future; however, his intention does not establish that OZ Merchandising had an ownership interest in the Ottawa Wizards Soccer Club. Although there was evidence that OZ Merchandising registered the business name "Ottawa Wizards," the registration of the business name does not establish that OZ Merchandising owned the Ottawa Wizards Soccer Club.

[28] I do not find that OZ Merchandising owned the Ottawa Wizards. The preponderance of the evidence adduced at trial was that the plaintiff was not the owner. When the Ottawa Wizards applied to enter the CPSL in November 2000, OZ Optics was listed as "Applicant (Owner)" on the franchise application. As Vincent Ursini, the commissioner of the CPSL at the time testified, the identity of the franchise's owner was important to the CPSL. The Canadian credit references provided on the franchise application were those of OZ Optics.

[29] The OZ Dome premises and facilities are owned by OZ Optics. OZ Merchandising manages the OZ Dome premises and facilities; however, there was no evidence adduced at trial regarding the terms of management.

[30] On cross-examination, Mr. Sezerman was asked whether he agreed with the following paragraphs of Jim Lianos' September 10, 2001 affidavit (Mr. Lianos being a former general manager of the Ottawa Wizards):

> 7. Regardless of the Club's standing in the EODSA, OSA and CSA, OZ Merchandising and OZ Optics are business corporations with absolutely no affiliation to the EODSA, OSA, and CSA. OZ Merchandising and OZ Optics are neither subject to, nor entitled to be

> heard in any proceeding under, the EODSA, OSA or CSA jurisdictions.
>
> 18. I have attempted to diagram the manner in which OZ Optics, OZ Merchandising, the Wizards, the Club, and the EODSA are or are not connected in Exhibit "B" to this affidavit. Notwithstanding the Club's attempt to be reinstated, **as suggested to OZ Merchandising, the Club and the CPSL by the EODSA the most expedient solution to the CPSL's OSA affiliation requirement,** OZ Merchandising's intent has always been to preserve its own independence from the Club and the EODSA. OZ Merchandising's desire has always been to have any relationship with the EODSA, or jurisdiction of the EODSA over OZ Merchandising's activities, arise only if and when OZ Merchandising chooses to have a relationship arise…
>
> 26. Although OZ Merchandising and OZ Optics have significant economic interests at stake in the outcome of the proceedings concerning the Disputed Fees, they are neither subject to EODSA, OSA, and CSA rules affecting those economic interests, and have no standing to participate in proceedings administered by those associations. [emphasis in original]

[31] Mr. Sezerman testified that he agreed with these paragraphs, (and regarding paragraph 18, he stated "I agree with it in general terms").

[32] In 2003, the following email was sent in response to EODSA's request for further information to support OZ Dome Sports Club's membership application:

> Gillian,
>
> In response to your earlier email, there seems to be a great deal of concussion [*sic*] on part of the EODSA in regards to OZ Dome Soccer Club. Please allow me to clarify some facts in regards to this issue…
>
> 1. OZ Dome Sports Club, not for profit, a member of EODSA;
>
> 2. OZ Merchandising Inc., is a company for profit;
>
> 3. OZ Dome is a the [*sic*] name of the facility that is own and run [*sic*] by OZ Merchandising Inc.
>
> 4. OZ Dome Indoor Soccer League, where all of its games are played at the OZ Dome, is organized and managed by OZ Merchandising Inc.
>
> Therefore, OZ Dome Sports Club has nothing to do with running or managing the indoor soccer leagues.

> Now, the information requested below, non[e] of it being applicable to the OZ Dome Sports Club, should not have any impact or influence over OZ Dome Sports Clubs [*sic*] annual membership renewal status.
>
> ...

[33] OZ Dome Sports Club was the member of EODSA, and it was OZ Dome Sports Club that applied for renewal of its membership for the 2003-2004 year. As early as 2001, OZ Merchandising, as well as OZ Optics, proclaimed that they had "absolutely no affiliation" to EODSA, OSA, and CSA, and professed their desire to preserve their independence from these defendants.

[34] OZ Merchandising is a "for profit" corporation. It was not, at any time, a member of EODSA or a member of OSA, notwithstanding the testimony of several witnesses[8] that OSA and EODSA allowed "for profit" corporations to be members of the associations.

[35] Marc Thibault joined EODSA as its first vice-president in 2000 and served as EODSA's president from 2001 to 2006. OZ Merchandising relies on Mr. Thibault's testimony that he viewed all the OZ entities as the same. However, Mr. Thibault also testified that "we had nothing to do with OZ Merchandising." Considered in context, Mr. Thibault's statement does not assist the plaintiff.

[36] Kevan Pipe was the chief operating officer at CSA from 1985 to 2006. OZ Merchandising relies on Mr. Pipe's testimony that OZ Optics' "information" appeared on the OZ Merchandising website. Mr. Pipe's testimony does not advance the plaintiff's position. The website itself was not in evidence.

[37] The plaintiff's submission that all the payments were made by OZ Merchandising is incorrect based on the evidence adduced at trial. Counsel's submission that whoever cut the cheque was the "true applicant" flies in the face of the efforts made by OZ Merchandising to distance itself from these defendants, and in particular, EODSA and OSA.

[38] I agree with counsel for EODSA and OSA that the absence of membership on the part of OZ Merchandising, coupled with OZ Merchandising's stated intention to preserve its independence from both associations, poses a significant hurdle to the plaintiff in the proximity analysis. I find that OZ Merchandising had no expectations of EODSA or OSA, no representations were made by EODSA or OSA to OZ Merchandising, and there was no reliance by OZ Merchandising on EODSA or OSA. If it could be said that any relationship between either EODSA or OSA and the plaintiff existed – and I do not see how that could be the case in light of OZ Merchandising's efforts to avoid the very relationship it now maintains existed – it was, at its highest, a very indirect and remote relationship.

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[8] Among them were Robert Monaghan, Marc Thibault, Ronald Smale, Bruce Henderson, and Stephen McKetsy.

[39] As for CSA, the evidence compels only one conclusion: there was no relationship of any sort between OZ Merchandising and CSA. OZ Merchandising was not a member of CSA. OZ Dome Sports Club was not a member of CSA. The Ottawa Wizards Soccer Club was not a member of CSA.

(ii) Would it be "just and fair" to impose a duty of care?

[40] Having regard to the nature of the plaintiff's relationship with each of the defendants, would it be "just and fair" to impose a duty of care in law on the particular defendant? In my view, the answer to this question must be a resounding "no."

[41] OZ Merchandising was not a member of EODSA, OSA, or CSA. The evidence before this court is that as early as 2001, OZ Merchandising intended to preserve its distance and independence from these associations, and that it did not consider itself to be associated with or subject to the jurisdiction of any of them.

[42] Counsel for OZ Merchandising submitted that EODSA, OSA and CSA each owed a duty of care not only to their members, but also to those who were not members. It is impossible to reconcile this proposition with the concern, repeatedly expressed in the jurisprudence, about the "spectre of unlimited liability to an unlimited class" (*Deloitte & Touche*, at para. 40).

[43] I conclude, based on the proximity analysis alone, that no *prima facie* duty of care has been established.

(iii) Reasonable foreseeability

[44] While my conclusion on proximity is sufficient to dispose of the duty of care analysis, I have considered whether the plaintiff's alleged losses were a reasonably foreseeable consequence of these defendants' conduct.

[45] The player's contracts were between the player and the Ottawa Wizards Soccer Club. It is not necessary for me to determine which entity owned those contracts – the Ottawa Wizards, OZ Optics (identified as the owner of the Ottawa Wizards when the franchise was accepted into the CPSL), or the OZ Dome Sports Club (an unincorporated association that managed the Ottawa Wizards) – because one thing is clear: there is no reference in the contracts to OZ Merchandising, the plaintiff.

[46] OSA's Policy 24.0 governs international and inter-provincial transfers of players. I will return to Policy 24.0 in my analysis of the claims involving the ITCs; at this juncture, it is sufficient to note that the policy refers to the "Club" providing the reason why a transfer should not be issued or should be delayed. OZ Merchandising was not and is not the "Club."

[47] For these reasons, I find that OZ Merchandising's alleged losses were not a reasonably foreseeable consequence of OSA's or CSA's conduct in relation to the issuance of the ITCs.

[48] The invitational tournament application identifies the Ottawa Wizards as the tournament host. The name of the tournament was the "OZ Optics Invitational Tournament." There is no

reference to OZ Merchandising in the application. There is no evidence that CSA had any involvement with this tournament application whatsoever. I find that OZ Merchandising's alleged losses in relation to the invitational tournament were not a reasonably foreseeable consequence of any conduct on the part of these defendants.

[49] There was evidence that EODSA was advised that OZ Dome's indoor soccer league was organized and managed by OZ Merchandising. There was no evidence that OSA or CSA had even this limited knowledge. There was no evidence adduced at trial that EODSA was aware of any economic relationship between the indoor soccer league participants and OZ Merchandising. There was no evidence that the league participants paid the manager of the league, OZ Merchandising, as opposed to the owner of the league. There was no evidence that EODSA was aware that OZ Merchandising was engaged in soccer activities at the OZ Dome facilities beyond organizing and managing the indoor soccer leagues. For these reasons, I find that OZ Merchandising's alleged losses in relation to these soccer-related activities and its operation of the soccer leagues at the OZ Dome facilities were not a reasonably foreseeable consequence of any conduct on the part of these defendants.

(iv) Residual policy considerations

[50] Stage two of the *Anns/Cooper* framework asks whether there are residual policy considerations that may negate the imposition of a duty of care. As I find no *prima facie* duty of care between the plaintiff and each of these defendants, it is not necessary for me to consider the second stage of the analysis.

Conclusion on duty of care

[51] I find that no duty of care existed between OZ Merchandising and any of EODSA, OSA, and CSA.

[52] Although my conclusion on this issue is sufficient to dispose of the negligence claims, my analysis of the evidence adduced at trial addresses both the claims in negligence (on the assumption that a duty of care existed), and the claims based on the unlawful means tort.

Issue 2: Claims based on the issuance of the ITCs

The evidence

[53] Mr. Mponda and Mr. Yobe each entered into a CPSL "Standard Player's Contract and Agreement" with the Ottawa Wizards Soccer Club: Mr. Mponda signed his contract on January 15, 2002; Mr. Yobe's contract was signed on February 20, 2003.

[54] The term of each contract was from the date of signing until March 31, 2004, subject to rights of prior termination as specified in the contract. Pursuant to article 7.1, the club could renew the player's contract on or before December 15 of the year following the last playing season covered by the contract, on written notice to the player. Mr. Sezerman testified that the "general

contract" was that Mr. Mponda and Mr. Yobe would play for the Ottawa Wizards in the summer and return to play for their club in Malawi (the Bakili Bullets Football Club[9]) in the winter months.

[55] On October 15, 2003, CSA received a fax from the Malawi Football Association requesting the return of Mr. Mponda's and Mr. Yobe's international clearance back to the Malawi Football Association. According to the "official request,"[10] the two players had been playing for the Ottawa Wizards, "whose contracts ended on October 4, 2003 as the season ended, opening your transfer window." The fax cover sheet from the players' manager that accompanied the request similarly referred to the end of the players' contracts "on October 4th, 2003, at the end of the PSL [professional soccer league]." The chairman of the Big Bullets also wrote to Dan Pazuk, the systems regional coordinator for CSA, to provide him with a "loan letter...which clearly states that the loan facilitated was until 4th October, 2003), hence the players are eligible to our club..."

[56] On October 15, Marsha Collier of CSA emailed Stephen McKetsy of OSA to advise that CSA had received a request for clearance, stating "[a]pparently, these 2 players were loaned to the Ottawa Wizards in which their contract ended on October 4th, 2003. They are hoping to have these 2 players play a crucial game this weekend. Please advise as to the current status of the players."

[57] After receiving Ms. Collier's email, on October 15, Mr. McKetsy emailed Alex Stanojevic of the OZ Dome Sports Club:

> Alex,
>
> The O.S.A. has received an international transfer certificate request for Mponda, Peter and Yobe, Macdonald both of whom were last registered to the Oz Dome S.C. (Ottawa Wizards) in the CPSL.
>
> Please advise as to the status of Mponda, Peter and Yobe, Macdonald in terms of either contractual or financial obligations that they may have to the Oz Dome S.C. (Ottawa Wizards).

[58] On October 22, Mike Ozses, the general manager of the Ottawa Wizards, responded to Mr. McKetsy:

> Ottawa Wizards will agree to grant Peter Mponda and Macdonald Yobe's international releases but only for a specific period of time. They will be released from October 15, 2003 until May 15, 2004. When this period has elapsed we expect to have both Peter and Macdonald back in the Wizards lineup.

[59] Mr. McKetsy replied to Mr. Ozses on October 24 as follows:

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[9] Also referred to at trial as the "Big Bullets."

[10] As described by Dan Pazuk. At the time, Mr. Pazuk was the primary person at CSA responsible for ITCs.

> The FIFA Statu[t]es on the Transfer of Players do not allow a country to issue a International Transfer Certificate [*sic*] for a specific period of time. Therefore, your e-mail below cannot be implemented. If you wish the players to be returned to the Ottawa Wizards you must attempt to negotiate an Loan Agreement [*sic*] for these players.
>
> Further, as the players contracts expired on October 14, 2003 they are free to transfer, provided a renewal of the contract has not been signed by the Club and the players.
>
> If the Oz Dome S.C. do not provide a reason why these players cannot be granted an International Transfer Certificate in accordance with Registration Policy 24.4, the OSA will issue the International Transfer Certificate in accordance with its rules.
>
> If you have any questions related to this matter, please do not hesitate to contact me.

[60] There was no response from the OZ Dome Sports Club or the Ottawa Wizards to Mr. McKetsy's October 24, 2003 email.

[61] On November 5, Mr. McKetsy advised Mr. Pazuk that OSA had received no communication from the club to indicate a reason why Mr. Mponda and Mr. Yobe should not be transferred "within the seven day time period as set out in the Published Policies of this Association (Registration Policy 24.4)." At 12:35 p.m. on November 5, 2003, CSA issued the ITCs in relation to Mr. Mponda and Mr. Yobe.

[62] Then, at 6:42 p.m. on November 5, 2003, Mr. Sezerman emailed Mr. Pazuk and advised:

> both yobe and peter [*sic*] are under contract with Ottawa wizards until march 31 2004. you should have a copy of their contracts. we have provided them to osa and cpsl when they signed with us. i will have mike our general manager send the contracts to you again on Thursday, november 6. we will not agree to any transfer until the team negotiate a deal with us. alternative is they could wait until march 31 2004.

[63] Mr. McKetsy testified that he made inquiries of Mr. Pazuk as to whether it was possible to withdraw an ITC after it has been issued; as he put it, he intervened as an "advocate" on behalf of the OZ Dome Sports Club. Mr. Pazuk testified that CSA would not have issued the ITCs if OSA had advised CSA that there was some sort of contractual dispute. He issued the ITCs because he was given the authority to do so by OSA. Mr. Pazuk's evidence was that after the ITCs were issued, there was nothing further that could be done.

[64] Mr. McKetsy testified that he had no information regarding the "option year" for Mr. Mponda and Mr. Yobe until November 21, 2003, when he received an email from "Wizards Management." Mr. Sezerman testified that by October 22, 2003 – the date of Mr. Ozses' response

to Mr. McKetsy – the Ottawa Wizards had every intention of "picking up" the contracts of Mr. Mponda and Mr. Yobe under the renewal clause of each contract. I do not find Mr. Sezerman's evidence in this regard to be credible for two reasons. First, neither Mr. Sezerman nor Mr. Ozses told OSA on October 22, 2003 about the renewal of the contracts or even the intention to renew the contracts; indeed, the alleged renewal of the contracts was not raised by Mr. Sezerman until a full two weeks after the ITCs were issued. Second, it was only on December 2, 2003, a full month after the issuance of the ITCs, that Mr. Ozses emailed Mr. Mponda and Mr. Yobe to advise that the Ottawa Wizards would be picking up their respective contracts for the 2004 season.

[65] I also reject the plaintiff's assertion that CSA and OSA should have understood from Mr. Ozses' October 22, 2003 email that the OZ Dome Sports Club had an existing ownership interest in both players. The contracts for both players required that any renewal be in writing.

[66] Based on the evidence at trial, I make the following findings:

- As of the date of issuance of the ITCs – November 5, 2003 – OZ Dome Sports Club had not renewed the contracts for Mr. Mponda and Mr. Yobe.
- CSA was advised by the players' manager, the players' club in Malawi, and the Malawi Football Association that the contracts between the players and the OZ Dome Sports Club ended on October 4, 2003.
- OSA had, on file, copies of the player's contracts for Mr. Mponda and Mr. Yobe.
- CSA did not have copies of the CPSL player's contracts, including those for Mr. Mponda and Mr. Yobe.
- Mr. Ozses' October 22, 2003 email was not responsive to OSA's inquiry to "advise as to the status of Mponda, Peter and Yobe, Macdonald in terms of either contractual or financial obligations that they may have to the Oz Dome S.C." Mr. Ozses proposed an arrangement regarding Mr. Mponda and Mr. Yobe, an arrangement Mr. McKetsy promptly advised was not allowed under the FIFA Rules governing the transfer of players.
- OZ Dome Sports Club did not provide OSA a reason why ITCs could not be granted in regard to Mr. Mponda and Mr. Yobe.
- At no time did OZ Dome Sports Club or the Ottawa Wizards avail themselves of Mr. McKetsy's offer to contact him should they have any questions.

Negligence claim

[67] The plaintiff's position is that (i) CSA ought to have investigated whether the information provided to it from the Malawi Football Association regarding the players' contracts being at an end was correct; (ii) OSA ought to have checked the players' contracts that it had on file to determine when those contracts expired; (iii) CSA and OSA ought to have explained the time

limits surrounding the issuance of ITCs; (iv) OSA's Policy 24.0 was not adhered to; and (v) there were avenues available under the applicable FIFA Rules that could or should have been offered to OZ Dome Sports Club to resolve the apparent dispute regarding the players' contracts.

[68] Mr. Pazuk testified about the process followed by CSA: when it received a request for a player transfer from another national association, CSA would pass on the request to the appropriate provincial association whose responsibility it was to check with the player's club as to whether the player was free to be released. In this case, the appropriate provincial association was OSA. Mr. Pazuk testified that CSA could not go to the player's club directly; rather, CSA approached the provincial association "because that is the process – they [the provincial associations] are our members."

[69] Mr. Pipe testified that CSA could not access the player's contracts, and CSA could not contact the Ottawa Wizards Soccer Club directly because that was OSA's mandate.

[70] Bruce Henderson, OSA's director of member services from 2001 to 2003, described the process followed in much the same way as Mr. Pazuk: after CSA received a request, CSA would contact the provincial association and ask if there was any reason the player could not be transferred. In the case of a semi-professional player, CSA required OSA to go directly to the club to ask if there was any reason the player could not be transferred.

[71] Mr. McKetsy was CSA's contact person at OSA if an Ontario player was the subject of a request for an ITC. He testified that in the case of a professional player, OSA would go directly to the club as opposed to the district association. OSA has the professional player contracts in its possession in order to determine the player's status as an amateur or a professional.

[72] OSA's Policy 24.0 on transfers provides in part as follows:

> 24.4 International Transfers and Inter-Provincial Transfers
>
> d) If the District Association does not respond within six days, the OSA shall:
> a) not issue a second request to the District Association;
> b) assume a compliance position by the District Association and Club; and
> c) on the seventh day, advise:
> i) the CSA (in the case of an International Transfer); or
> ...
> that the player has no further obligations to her/his former Club and is free to transfer.
>
> e) If a Club or District Association has a valid reason for delaying the issuance of an international Transfer or Inter-Provincial Transfer, the District Association must advise the OSA within six days after the OSA has issued a written request for the transfer to the District Association. In such a case, the Club or District Association must

> provide, in writing, the reason why the transfer should not be issue[d] or should be delayed. Upon receipt of such a request, the OSA shall immediately advise the CSA or the other Provincial Association about the reasons for not issuing the transfer.
>
> f) If the OSA does not respond to the CSA within seven days of a request by the CSA for an International Transfer for a player, the CSA shall assume a compliance position and on the eighth day, shall immediately issue the International Transfer Certificate (for that player) to the other National Association.

[73] Section 24.4e) contemplates either the club or the district association providing, in writing, the reason why the transfer should not be issued. As Mr. Henderson testified, OSA approaches the club directly in the case of professional players because the club is in the best position to know the status of the contracts. Brian Avey was OSA's executive director from 1978 to 2004. As Mr. Avey put it: "OSA was not in a position to interpret the player's contract."

[74] The plaintiff's position is that the time limits in s. 24.4 ought to have been expressly referenced in OSA's email correspondence. I disagree for the following reasons. First, in my view, it was reasonable for OSA to proceed on the basis that the management of the Ottawa Wizards Soccer Club, a professional club, knew or would have informed themselves of the rules governing the transfer of international players. Second, Mr. McKetsy specifically invited Mr. Ozses to contact him if he had any questions. No response was received; no inquiry was made. Third, OSA's initial request regarding the status of Mr. Mponda and Mr. Yobe was made on October 15, 2003. There was no response to this initial request until October 22, a week later. By the time the ITCs were issued on November 5, 2003, almost three weeks had passed from the date of the initial request.

[75] Based on the evidence adduced at trial, I make the following additional findings:

- CSA was under no obligation to "verify" the information provided to it by the Malawi Football Association, the players' manager, and the players' club in Malawi.
- OSA was under no obligation to review and interpret Mr. Mponda's and Mr. Yobe's contracts with the Ottawa Wizards Sports Club.
- OSA followed the prescribed process in making inquiries of the OZ Dome Sports Club and in reporting back to CSA that no communication was received from the club to indicate a reason why Mr. Mponda and Mr. Yobe should not be transferred within the seven day time period as set out in Policy 24.4.
- Upon receiving this information, CSA followed the prescribed process and issued the ITCs.

[76] Counsel for the plaintiff submitted that there were avenues available under the FIFA Rules that could or should have been offered to OZ Dome Sports Club to resolve the apparent dispute regarding the players' contracts. I reject this submission. There was no evidence adduced at trial as to whether the FIFA Rules applied, and if so, in what manner. The plaintiff failed to put questions on these issues to any witnesses who might have been in a position to respond.

[77] CSA moved for non-suit in relation to the claims involving the issuance of the ITCs for Mr. Mponda and Mr. Yobe. On a motion for non-suit:

> [t]he judge must conclude whether a reasonable trier of fact could find in the plaintiff's favour if it believed the evidence given in the trial up to that point. The judge does not decide whether the trier of fact should accept the evidence, but whether the inference that the plaintiff seeks in his or her favour could be drawn from the evidence adduced, if the trier of fact chose to accept it (*Calvin Forest Products v. Tembec Inc.*, 2006 CanLII 12291 (ON CA), at para. 13, citing John Sopinka, Sidney N. Lederman and Alan W. Bryant *The Law of Evidence in Canada* 2nd ed. (Toronto: Butterworths, 1999), at p. 139).

[78] Put another way, is there evidence which, if believed, would form the basis for a *prima facie* case, being no more than a case for the defendant to answer. In determining the motion for non-suit, the trial judge is required to take into consideration the most favourable facts from the evidence led at trial, as well as all supporting inferences (*Calvin Forest Products*, at para. 14).

[79] Considering the totality of the evidence led at trial and all of the supporting inferences, I find that there was no *prima facie* case in negligence for CSA to answer in relation to the issuance of the ITCs. It follows that on this issue, I would have granted CSA's motion for non-suit.

[80] While I cannot say that there was no case for OSA to answer in relation to the ITCs, and while OSA did not move for non-suit on this issue, the evidence is overwhelming that OSA did not breach any duty of care.

[81] These negligence claims are dismissed.

Unlawful means tort

[82] A defendant will have intentionally interfered with the plaintiff's economic interests or caused loss by unlawful means if the defendant (i) commits an unlawful act against a third party; and (ii) in committing that unlawful act, that defendant intended to cause economic harm to the plaintiff. The plaintiff also has the burden of establishing that the defendant's unlawful conduct was the proximate cause of the plaintiff's economic losses (*A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, 2014 SCC 12, [2014] 1 S.C.R. 177, at para. 5).

[83] Conduct is "unlawful" within the meaning of the tort if it would give rise to a civil claim by the third party, or would give rise to a civil claim by the third party had the third party suffered loss as a result of the conduct (*A.I. Enterprises*, at para. 76).

[84] In support of its unlawful means tort claim in relation to the issuance of the ITCs, OZ Merchandising relies on the tort of inducing breach of contract as the unlawful act. However, it is clear that in the circumstances of this case, the tort of inducing breach of contract cannot serve as the unlawful act against a third party.

[85] In order to prove the unlawful conduct element, OZ Merchandising must prove that the conduct of CSA and/or OSA would have given rise to Mr. Mponda and Mr. Yobe having a civil claim against them for inducing breach of contract, or would have given rise to such a claim had Mr. Mponda and Mr. Yobe suffered losses as a result. A civil claim for inducing breach of contract requires that party A establish it had a valid and enforceable contract with party B, that party C was aware of the existence of the contract between A and B, and that C intended to and did procure the breach of the contract between A and B (*Drouillard v. Cogeco Cable Inc.*, 2007 ONCA 322, 86 O.R. (3d) 431 at paras. 26-31).

[86] Under this scenario, the civil claim would be a claim by Mr. Mponda and/or Mr. Yobe against CSA and OSA for inducing them to breach their *own* player contracts with the Ottawa Wizards Soccer Club. But this proposition is nonsensical: the cause of action would lie with the wronged party – the Ottawa Wizards – not with Mr. Mponda and Mr. Yobe.

[87] The second element of the unlawful means tort is intention. The plaintiff submitted that Mr. Thibault's email of July 25, 2001 constitutes evidence of OSA's intention to cause OZ Merchandising economic losses in relation to the issuance of the ITCs. In his email to OSA, Mr. Thibault stated: "I am sorry to be such a stickler in this matter, but the EODSA have been warring with the OZ club for over two years. It is time to remove them from the soccer community until they see fit to follow all of our rules, not just those that they like."

[88] The plaintiff submitted that by taking no action to reprimand Mr. Thibault, OSA "must be assumed to share his intent to cause harm to the plaintiff."

[89] OZ Merchandising's submission is without merit. First, in my view, Mr. Thibault's email is not evidence of any intent on his part to cause economic harm to the "OZ club", let alone the plaintiff. Second, it is certainly not evidence of intent on the part of OSA. In its response to Mr. Thibault, OSA stated, "I do not care if you have been warring with the OZ club"; in other words, OSA did not share Mr. Thibault's point of view. Third, through this submission, the plaintiff appears to be pursuing, yet again, the group enterprise theory of liability. That theory of liability is not tenable in law. Fourth, Mr. Thibault's email was written more than two years prior to the issuance of the ITCs. Whatever else it may be, it is not evidence of intent on the part of EODSA, and it is certainly not evidence of intent on the part of OSA, in relation to events that occurred in the fall of 2003, including the issuance of the ITCs.

[90] The plaintiff's submission that CSA was aware of "issues" between EODSA and the plaintiff as early as 2001, and therefore possessed the requisite intent, suffers from many of the same defects. In particular, CSA's knowledge of "issues" does not constitute specific intent to cause economic harm to OZ Merchandising in relation to the ITCs. And, once again, the plaintiff is attempting to advance the group enterprise theory of liability.

[91] Viewing the evidence led at trial in the most favourable light, there was simply no case for CSA or OSA to answer in relation to this claim based on the unlawful means tort. I would have allowed the motions for non-suit by OSA and CSA in relation to this claim.

[92] These claims based on the unlawful means tort are dismissed.

Issue 3: The OZ Optics invitational tournament

The evidence

[93] The application for the OZ Optics Invitational Tournament, with proposed dates from October 10 to 13, 2003, was submitted to OSA for approval on September 9, 2003. The Ottawa Wizards were listed as the tournament host organization. Mr. Ozses approved the application on behalf of OZ Dome Sports Club.

[94] On September 16, 2003, Mr. Stanojevic emailed OSA and asked for an update on the status of the tournament application. Mr. McKetsy was involved in the sanctioning of tournaments at the provincial level. When he received Mr. Stanojevic's email, Mr. McKetsy responded that tournament approval was first required from "your governing organization, the Eastern Ontario District S.A." Mr. McKetsy advised Mr. Stanojevic that he had forwarded the application to EODSA for approval, and that "[o]nce it is received it will be submitted to this office for approval." Mr. McKetsy characterized this as his "standard response."

[95] In fact, six days before Mr. Stanojevic's inquiry of OSA, Melanie Ireton, who was the district administrator for EODSA at the time, had already been in contact with Mr. Sezerman and Mr. Ozses regarding the tournament application. On September 10, 2003, Ms. Ireton advised:

> Mike,
>
> I have received your tournament application however you still have not submitted an RTD [Request to Deviate] to deviate from our tournament application deadline which is July 15th for an outdoor tournament. Please submit on the attached form so that a decision can be made at tomorrow evenings [*sic*] board meeting as we would very much like to assist you in having this tournament as planned however it must be a board decision.

[96] Ms. Ireton attached to her email a request to deviate form in both Word and WordPerfect format. Ms. Ireton testified that by the time she sent her September 10 email, she had checked to see if the proposed dates for the tournament were available. She testified that they were just "waiting on" the request to deviate, and that EODSA was willing to approve the tournament provided that the procedure was followed.

[97] Ms. Ireton also emailed Mr. Stanojevic on September 17, 2003. In her email, Ms. Ireton explained:

> ...Mike Ozses was called at home on his vacation approximately three weeks ago and informed that we would gladly approve the tournament providing that a Request to Deviate from the EODSA published rule which indicates that all outdoor tournaments must be submitted by July 15th of the current year was received for the EODSA Board Meeting. Also note that their [*sic*] are requirements in applying for a tournament such as the application must be in 90 days before an interprovincial tournament. Our Board meeting was last week and I called and emailed Mike and Omur regarding the RTD which I did not receive. Please submit the RTD for approval and then we will review your tournament application further.

[98] The request to deviate form was not provided. Mr. Sezerman acknowledged that they had missed the tournament application deadline. On cross-examination, he agreed that he did not provide EODSA with a "verbal" request to deviate.

[99] As Mr. McKetsy testified, it is the district association that does "most of the work" regarding tournament approvals, and it is only after the district association has approved a tournament that it comes to OSA for approval. In this case, the tournament was not approved by EODSA.

[100] Based on the evidence at trial, I find that EODSA required a request to deviate in order to approve the tournament, and that the reason EOSDA did not approve the tournament was no request to deviate was provided.

[101] OZ Merchandising's position is that OSA used a "double standard" with respect to tournament approvals. Counsel contrasted the approval process followed for the 2003 CPSL Canada Open Cup tournament with the process followed for the OZ Optics Invitational Tournament.

[102] In my view, the approval process followed in respect of the CPSL Canada Open Cup tournament is irrelevant. Mr. Avey testified that the CPSL's tournament was sanctioned by OSA because the CPSL was, at the time, governed by OSA. Mr. Ursini also testified that OSA was the CPSL's governing body. By contrast, OZ Dome Sports Club, the entity that made the invitational tournament application, was a member of EODSA. Therefore, as Mr. McKetsy advised Mr. Stanojevic, the tournament had to first be approved by the district association, EODSA. EODSA required a request to deviate. Despite several requests, no request to deviate was ever provided.

Negligence claim

[103] The evidence at trial was that EODSA and OSA were required to approve the invitational tournament. OZ Merchandising submits that because the tournament application form includes spaces for approval by the district, OSA, and CSA, there is also evidence that CSA approval was required.

[104] I reject OZ Merchandising's submission. At trial, no witness was asked about this issue. Counsel's assertion does not constitute evidence. The evidence adduced at trial was that CSA had

nothing to do with the invitational tournament or the tournament application. There was no evidence adduced that CSA had any involvement with the application. On this claim, there was no case for CSA to answer, and I would have granted CSA's motion for non-suit. This claim against CSA is dismissed.

[105] EODSA required a request to deviate to approve the tournament. On at least three occasions, Ms. Ireton asked that the request to deviate be submitted. Ms. Ireton checked that the dates proposed for the tournament were available. OSA advised that the tournament had to first be approved by EODSA, and OSA also communicated the need for a request to deviate.

[106] I find that EODSA and OSA met the requisite standard of care. These claims in negligence against EODSA and OSA are dismissed.

Unlawful means tort

[107] In relation to the invitational tournament, OZ Merchandising relies on the tort of civil conspiracy as the unlawful act. Canadian law recognizes two categories of civil conspiracy: (i) whether the means used by the defendants are lawful or unlawful, the predominant purpose of the defendants' conduct is to cause injury to the plaintiff; and (ii) where the conduct of the defendants is unlawful, the conduct is directed towards the plaintiff (alone or with others), and the defendants should know in the circumstances that injury to the plaintiff is likely to and does result (*Agribrands Purina Canada Inc. v. Kasamekas*, 2011 ONCA 460, 106 O.R. (3d) 427 at para. 24, citing *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452, at pp. 471-72).

[108] OZ Merchandising relies on the first category of civil conspiracy. To succeed under this category, the claimant must establish that the predominant purpose of the defendants' conduct was to cause injury to the claimant. OZ Merchandising's position is that the claimants for the purpose of the conspiracy claim – the third parties for the unlawful means tort – are the teams that were invited to the tournament.

[109] The invitational tournament application stated that the competition would involve four teams, including the Ottawa Wizards. In the event any team missed the September 10, 2003 confirmation date, new invitations would be issued to five teams in the order listed in the application form. There was no evidence adduced at trial to support the contention that the predominant purpose of the conduct of any of these defendants was to cause injury to any of the listed teams. With respect to CSA, there was no evidence that it had any involvement with the application or knowledge of the teams proposed to be involved.

[110] As to the intention element of the unlawful means tort, there was no evidence that would form the basis for a *prima facie* case for any of these defendants to answer. Mr. Thibault's 2001 email is not evidence of intent on the part of EODSA or OSA to cause OZ Merchandising economic harm in relation to a 2003 invitational tournament application. CSA's knowledge of "issues" between EODSA and the plaintiff in 2001 is not and could not possibly constitute evidence of an intention to cause the plaintiff economic harm in relation to an application with which CSA had no involvement whatsoever.

[111] There was no case for CSA, OSA, and EODSA to answer in relation to this claim, and I would have granted their motions for non-suit in relation to it. This claim based on the unlawful means tort is dismissed as against each of these defendants.

Issue 4: The claims in relation to indoor soccer leagues and rentals

The evidence

[112] OZ Merchandising also claims that these defendants were negligent and intentionally interfered with its economic interests in relation to its operation of indoor soccer leagues, and its rentals and other soccer-related activities at the OZ Dome facilities. In support of these claims, OZ Merchandising relies on certain EODSA publications and communications in December 2003.

[113] In October 2003, OZ Dome Sports Club applied for the renewal of its membership in EODSA for the period November 1, 2003 to October 31, 2004. The declaration of agreement states: "We, the OZ Dome Sports Club agree to abide by the Constitution and Published Rules of the Eastern Ontario District Soccer Association and the Ontario Soccer Association and the decisions made by the Board(s) of Directors elected to act on their behalf."

[114] Mr. Sezerman signed the declaration of agreement as president of OZ Dome Sports Club.

[115] Based on OZ Dome Sports Club's 2003-2004 application for membership renewal, and the testimony of Ms. Ireton and Mr. Thibault, I make the following findings of fact:

- In October 2003, OZ Dome Sports Club did not apply to operate a league.
- OZ Dome Sports Club was planning to participate in the CPSL with one team, that team being the Ottawa Wizards. Unlike prior years, OZ Dome Sports Club was not offering or participating in a club league or a district league.[11]
- At the time of the membership renewal application, EODSA had a four team minimum requirement for clubs.
- EODSA did not accept "one team" clubs except for those clubs that were grandfathered around 1998.
- Mr. Thibault met with Mr. Sezerman in the October to November 2003 time period to discuss how EODSA's rules regarding membership had to be met.

[116] Ultimately, OZ Dome Sports Club's membership renewal application was not approved by EODSA.

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[11] In the previous year's application for EODSA membership, OZ Dome Sports Club indicated that it would be offering or participating in a club league, with 30 men's and 30 women's indoor teams, one professional league team, and one district league team.

[117] In December 2003, EODSA sent out emails and letters to clubs, and posted on its website, a notice entitled "Indoor 2003 Teams Currently Eligible to Play." The mid-December 2003 website posting stated:

> Please note that OZ Dome Sports Club and Uniglobe Indoor Soccer League have not applied to operate an Indoor League during the 2003-2004 Indoor Season. Therefore, anyone who is registered and is playing or officiating in either of these leagues is participating in unsanctioned competition. They are not covered by OSA Insurance while participating in either of these leagues and registrants who continue to participate in these leagues may be subject to Disciplinary action.

[118] The uncontroverted evidence at trial was that the reason for these notifications and the website posting was to advise EODSA's members of a change in circumstance, that is, that OZ Dome Sports Club was no longer running sanctioned indoor soccer leagues. EODSA considered the notifications and the website posting to be important so that players at the OZ Dome facilities knew that they were not insured under OSA's insurance, and so that EODSA registrants knew that they could be disciplined for participating in unsanctioned leagues.

[119] The EODSA board of directors approved the notices before they were sent out.

[120] Around January 9, 2004, the website posting was modified. The word "registrants" was replaced with the phrase, "registered teams and registered game officials." On the same day, Ms. Troy (EODSA's district registrar), emailed Ms. Ireton stating that she had been explaining to those who had contacted her that "if a group of players get together to form a team they can participate in the OZ Dome or Uniglobe Leagues." Ms. Troy testified that the "clarification" was made because EODSA was trying to be as precise as possible.

[121] The standard penalties for misconduct by a player, as set out in the governing document, OSA's Policy 9.0 – Standard Penalties for Misconduct, revised January 31, 2003 – do not include a player playing in an unsanctioned league.

Negligence claim

[122] For the following reasons, I dismiss these negligence claims.

[123] At trial, EODSA acknowledged that the first website posting in mid-December 2003 could have been more precise by making it clear that the "registrants" to whom discipline could apply were the clubs and referees, not individual players.

[124] That said, I agree with EODSA that the standard of care is not one of perfection. The communications were sent and made to members who were deemed to know EODSA's rules. Ms. Troy testified that she continuously told people who contacted her that players could play where they chose. By January 9, 2004, the posting had been revised to clarify that only registered teams and registered game officials could be disciplined. None of the communications refer to OZ Merchandising.

[125] I find that EODSA did not breach any duty of care to the plaintiff.

[126] Mr. Henderson testified that OSA was not aware of these publications at the time they were made. He recalled a clarification being made to the website posting, but testified that he was not specifically involved with that. There was no evidence of any involvement by OSA in regard to indoor soccer leagues at the OZ Dome facilities, or the rentals and soccer-related activities at the OZ Dome. Viewing the evidence led at trial in the most favourable light, there was no case for OSA to answer in relation to this negligence claim. It follows that I would have granted OSA's motion for non-suit on this claim.

[127] I would have also granted CSA's motion for non-suit on this negligence claim. There was no evidence at trial that CSA had any involvement in the indoor soccer leagues or the rentals and soccer-related activities at the OZ Dome facilities.

Unlawful means tort

[128] The third parties here are said to be the various players, teams, and coaches to whom the communications were directed. OZ Merchandising relies on the tort of intimidation as the unlawful act.

[129] The tort of intimidation requires that A threatens B that A will commit an act or use unlawful means as against B, as a result of which B does or refrains from doing some act which B is entitled to do, thereby causing damage to B or to C. "The tort is one of intention and the plaintiff, whether it be B or C, must be a person whom A intended to injure" (*Central Canada Potash Co. v. Saskatchewan*, [1979] 1 S.C.R. 42, at para. 71, citing Clerk & Lindsell on *Torts*, 14th ed., p. 414 at para. 802).

[130] There was no evidence adduced at trial that any of these defendants intended to cause damage to any player, team or coach. Neither OSA nor CSA were involved in any way with these activities at the OZ Dome facilities. There was also no evidence that EODSA intended to injure those to whom the communications were directed. The uncontroverted evidence was that EODSA's only intent was to inform.

[131] While the importance of knowing about sanctioned as opposed to unsanctioned leagues could be inferred, the testimony of Osman Saatchi confirmed this fact. Mr. Saatchi was a certified and registered referee who was disciplined by EODSA after refereeing at an unsanctioned league game at the OZ Dome facilities. Mr. Saatchi agreed that as a referee, it would be important for him to know which leagues were sanctioned and which were not.

[132] There is also no evidence that EODSA intended to harm OZ Merchandising. As for OSA and CSA, they could not have intended any harm to OZ Merchandising given their lack of involvement with these activities at the OZ Dome facilities.

[133] I would have granted the non-suit motions of EODSA, OSA, and CSA on these claims. There was no case for them to answer. These claims are also dismissed.

Issue 5: Damages

[134] EODSA, OSA, and CSA, are not liable to the plaintiff. I also find that OZ Merchandising has failed to prove it suffered any losses as a result of these defendants' alleged wrongful conduct.

Issuance of ITCs

[135] In relation to this claim, OZ Merchandising seeks damages on account of (i) the loss of its investment (training, coaching, and compensation) in Mr. Mponda and Mr. Yobe; (ii) financial losses in respect of training, coaching, compensation, and player improvement; and (iii) lost revenues arising from the loss of Mr. Mponda and Mr. Yobe from the Ottawa Wizards. OZ Merchandising has not proved that it suffered any losses as a result of conduct by CSA or OSA in relation to the issuance of the ITCs. My conclusion is based on the following.

[136] First, the player contracts are, respectively, between Ottawa Wizards Soccer Club and Peter Mponda and Macdonald Yobe. If there were any losses resulting from the issuance of the ITCs, they would be losses of the owner of the Ottawa Wizards. However, OZ Merchandising has not established that it had an ownership interest in the Ottawa Wizards.

[137] Second, the annual player costs incurred by the Ottawa Wizards have not been proved. I give little weight to Mr. Sezerman's assertion that these costs were around $350,000 to $500,000, approximately 20 to 25 per cent of which were in relation to Mr. Mponda and Mr. Yobe. No specifics in relation to the annual player costs were adduced at trial.

[138] Third, regardless of any act taken or not taken by OSA or CSA, the Ottawa Wizards did not play again in the CPSL after the ITCs for Mr. Mponda and Mr. Yobe were issued. In late 2003, the Board of Directors of the CPSL revoked the Ottawa Wizards' team franchise. There was evidence from Mr. Ursini that once the franchise was revoked, the Ottawa Wizards' players became "free agents." Kevin Nelson testified that after the Ottawa Wizards' franchise was revoked, he went on to play for another CPSL team. In short, there was no Ottawa Wizards team to which Mr. Mponda and Mr. Yobe could have returned. As I stated at the beginning of these reasons, there is no claim against EODSA, OSA, or CSA for the revocation of the Ottawa Wizards' franchise by the CPSL, and there is no claim that EODSA, OSA, or CSA are vicariously liable for the actions of the CPSL.

[139] Fourth and finally, I accept the expert evidence of Francis O'Leary that it would be highly unlikely the Ottawa Wizards would have secured any transfer fee and European move for either Mr. Mponda or Mr. Yobe. Mr. O'Leary opined that in 2003, each player had a nil transfer value.

[140] Mr. O'Leary's testimony as to the value of Mr. Mponda and Mr. Yobe was the only expert evidence led at trial on this issue. Following a *voir dire*, I ruled that the plaintiff's expert, Rasim Kara, would not be permitted to offer expert opinion because Mr. Kara's proposed evidence was not logically relevant to the matters before the court (*White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, [2015] 2 S.C.R. 182, at para. 24). Mr. Kara had no opinion to offer as to the value of either Mr. Mponda or Mr. Yobe.

[141] Mr. O'Leary was qualified as an expert in the financial valuation of professional soccer players. Mr. O'Leary is currently the head coach of the men's soccer team at the University of Massachusetts. His experience includes director of recruitment/assistant coach at Toronto FC and senior scout at the Blackburn Rovers Football Club, a professional level club in England. Mr. O'Leary has valued more than one hundred soccer players at the professional level.

[142] In arriving at his opinion that both players had a nil transfer value in 2003, Mr. O'Leary took into account the gulf in standard of play that existed between the CPSL, a semi-professional league, and the professional leagues in Turkey. In his opinion, given the league in which Mr. Mponda and Mr. Yobe were playing, they would not have made it to the video or trial stage of the scouting process. Mr. O'Leary also considered the issue of supply and demand – simply put, there are many more established full-time professional players than there are available positions.

[143] Mr. O'Leary's opinion also took into account the regulations limiting the number of foreign players allowed into the Turkish football league.

[144] Mr. O'Leary also considered historical data pertaining to transfer fees commanded by players from Malawi, the lack of a track record of Malawian players in Turkey and other European leagues, and the career trajectory of Mr. Mponda and Mr. Yobe upon their departure from the CPSL. Mr. Mponda returned to the Big Bullets club in Malawi. Mr. O'Leary testified that if Mr. Mponda had had "real value," agents would have "hunted down" his agent; however, there is no record of any financial transaction for Mr. Mponda. Mr. O'Leary also testified that Mr. Yobe retired at 23, meaning that Mr. Yobe's value on the soccer market was nil.

[145] Mr. O'Leary's opinion was unshaken on cross-examination. As he put it, the "gap between dreams and value is vast." Mr. Mponda played 70 games for the Malawi national team; despite the opportunity to show case his talent, Mr. Mponda was not scouted and he was not signed.

[146] I find that OZ Merchandising suffered no losses as a result of the ITCs issued in relation to Mr. Mponda and Mr. Yobe.

The OZ Optics invitational tournament

[147] The evidence as to OZ Merchandising's alleged losses as a result of not hosting the invitational tournament can only be described as scant. It consisted of nothing more than Mr. Sezerman's assertion that OZ Merchandising incurred $30,000 in lost ticket, liquor, and food sales, and in the lost opportunity to promote the Ottawa Wizards' soccer players to visiting teams.

[148] OZ Merchandising has failed to prove that it, or any other entity, suffered losses as a result of not hosting the invitational tournament.

Leagues and operations at the OZ Dome

[149] OZ Merchandising seeks damages for lost revenues associated with the following revenue streams:

- indoor soccer leagues

- indoor soccer tournaments
- indoor field rentals
- soccer camps
- restaurant, vending, concession, and event hosting services
- merchandise sales (excluding sales of Ottawa Wizards' merchandise).

[150] The damages claim does not include lost revenues associated with a soccer academy, as there was no evidence adduced at trial in relation to a soccer academy at the OZ Dome facilities.

[151] OZ Merchandising is the manager of the OZ Dome facilities. Its claim for damages in connection with the OZ Dome facilities is predicated on there having been a decline in the number of participants in activities as a result of the defendants' conduct. It was therefore incumbent on OZ Merchandising to establish that its remuneration for managing activities at the OZ Dome was dependent on the number of participants in those activities. However, OZ Merchandising did not produce its contract for management services. This omission is fatal to OZ Merchandising's damages claim in relation to the OZ Dome facilities.

[152] OZ Merchandising's damages claim associated with the OZ Dome facilities also fails on consideration of the expert evidence.

[153] David Clarke, a partner in the Financial Advisory Services group of Baker Tilly Ottawa LLP (formerly, Collins Barrow LLP), was qualified to give expert opinion evidence in the areas of accounting and business valuation. Mr. Clarke was retained by OZ Merchandising.

[154] Mr. Clarke calculated the loss of income related to the OZ Dome facilities for the period from 2003 to 2017 by first, estimating what the profits to OZ Merchandising "should have been" but for the alleged conduct of these defendants based on low end and high end estimates for each of the revenue streams. Mr. Clarke then deducted OZ Merchandising's actual profits from the "should be" profit.

[155] In Mr. Clarke's opinion, the loss of income associated with the OZ Dome facilities for the period 2003 to 2017 ranges from $2.315 million at the low end and $4.425 million at the high end.

[156] Mr. Clarke excluded the Ottawa Wizards' revenues and costs from his loss analysis.

[157] Andrew Cochran, a partner in the Valuation and Business Modelling group at Ernst & Young LLP, was qualified to give expert opinion evidence in the areas of business valuation and damage quantification. Mr. Cochran was retained by OSA and EODSA.

[158] Mr. Cochran's approach to quantifying OZ Merchandising's losses was similar to that followed by Mr. Clarke: the plaintiff was to be put in the same position it would have occupied but for the alleged wrongful conduct of these defendants.

[159] In Mr. Cochran's opinion, the financial losses incurred by OZ Merchandising as a result of the alleged actions of OSA and EODSA for the period October 1, 2003 to September 30, 2015 (from October 1, 2003 to September 30, 2007 in relation to soccer camps) range from nil at the low end to $171,000 at the high end, after taking into account the operating losses of the Ottawa Wizards). Before taking the Ottawa Wizards' losses into account, Mr. Cochran estimated the losses to be $114,000 at the low end to $521,000 at the high end.

[160] I prefer the expert evidence of Mr. Cochran to that of Mr. Clarke.

[161] I agree with Mr. Cochran that it is appropriate to take into account the losses suffered by the Ottawa Wizards because there was an expectation that the presence of the Ottawa Wizards franchise would positively influence the various OZ Dome revenue streams. Mr. Clarke himself testified that the presence of the Ottawa Wizards' franchise could be expected to increase the activity at the OZ Dome facilities. Implicit in this expectation is that the franchise would continue to operate during the period of OZ Merchandising's alleged losses. Putting the plaintiff in the same financial position it otherwise would have been in but for the alleged wrongful actions of these defendants requires that the franchise's losses be taken into account.

[162] The loss period employed by Mr. Clarke was from October 1, 2002 (fiscal 2003) to September 30, 2017, a period of fifteen years. Mr. Clarke gave no satisfactory explanation for including fiscal 2003 in his calculations when the alleged wrongful conduct by the defendants occurred in late 2003, in the subsequent fiscal year. In addition, Mr. Clarke's loss period of fifteen years is excessive and fails to consider adequately the plaintiff's opportunities to mitigate. In any event, based on the evidence adduced at trial, I find that the loss period would be no more than three weeks – from mid-December 2003 to January 9, 2004 when EODSA published its clarification on its website.

[163] Finally, much of Mr. Clarke's opinion evidence lacked a factual foundation. For example, for purposes of both his low and high end estimates of losses in relation to hosting indoor soccer leagues, Mr. Clarke assumed that the OZ Dome had the capacity to host 92 league teams (competitive and recreational) per indoor season. There was, however, no evidence before the court as to the OZ Dome's capacity.

[164] With respect to indoor soccer tournaments, Mr. Clarke assumed four indoor tournaments per year, with 16 teams per tournament. However, Hassan Dayfallah, a former employee of OZ Merchandising, put the number of teams per tournament at 8 to 12. There was no evidence at trial to support Mr. Clarke's assumption (based on advice from management), that during tournaments, daily food and beverage sales would be approximately $2,500.

[165] There was no evidence at trial of the actual indoor field rentals. Mr. Clarke did not "test the market" for indoor field rentals.

[166] There was no evidentiary foundation for Mr. Clarke's assumptions in relation to attendance at soccer camps. Mr. Clarke agreed that he did not know the actual revenues attributable to soccer camps at the OZ Dome, and he had no information about the number of children who actually attended such camps. Mr. Clarke did not conduct any market research in relation to soccer camps.

[167] In the absence of historical information, Mr. Cochran adopted a more conservative approach. For example, in relation to the indoor soccer league revenues (by far the largest revenue stream), Mr. Cochran assumed fewer competitive teams in his low end scenario and a ramp up period of three years.

[168] In relation to indoor tournaments, Mr. Cochran assumed two per year at the low end and four per year at the high end, all with only eight teams per tournament.

[169] As for soccer camp revenues, Mr. Cochran testified that he calculated these alleged losses from 2003 to 2007 only. Mr. Cochran assumed a seven-year tenure for the Ottawa Wizards franchise, based on an average tenure of a team in the CPSL or its successor league being six years. Mr. Cochran also employed a ramp up period in relation to soccer camp attendance.

[170] It is trite to state that an expert's opinion is only as reliable as the facts on which it is based. In this case, the facts underlying Mr. Clarke's opinion have not been proved. I find that OZ Merchandising has not proved it suffered any damages in relation to its operations of the OZ Dome facilities.

Conclusion

[171] As early as 2001, OZ Merchandising proclaimed that it had "absolutely no affiliation" to EODSA, OSA, and CSA. It was not a member of EODSA, OSA, or CSA. However, in this action, OZ Merchandising maintained that this court should impose a duty of care. I find that no duty of care existed.

[172] If a duty of care did exist, I find no breach of any such duty. In accordance with policy and procedure, OSA asked OZ Dome Sports Club if there were any financial or contractual reasons why Mr. Mponda and Mr. Yobe could not be transferred back to Malawi. When OSA received no response to this specific inquiry, OSA advised CSA. Based on the advice it received from OSA, CSA proceeded to issue the ITCs.

[173] OSA specifically advised OZ Dome Sports Club that the OZ Optics invitational tournament application had to first be approved by EODSA. EODSA advised OZ Dome Sports Club, more than once, that it required a request to deviate to permit the continued processing of the application. The evidence is that a request to deviate was never provided.

[174] In the fall of 2003, OZ Dome Sports Club chose to apply to renew its membership in EODSA based on one team – the Ottawa Wizards. It did not apply to operate an indoor soccer league for the 2003-2004 season. While EODSA's initial communications to its members regarding OZ Dome Soccer Club could have been more precise, they were clarified within three weeks.

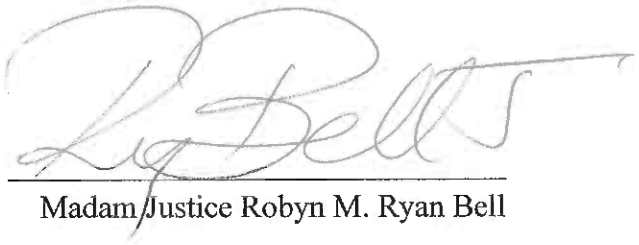
[175] With respect to the claims based on the unlawful means tort, there was no evidence that EODSA, OSA, or CSA acted in a manner that would have given rise to a cause of action on the part of third parties: Mr. Mponda and Mr. Yobe, the teams invited to the invitational tournament, and the recipients of EODSA's publications in December 2003. There was no evidence that EODSA, OSA, or CSA intended to cause harm to OZ Merchandising.

[176] Finally, and in any event, OZ Merchandising did not prove that it suffered any losses as a result of any conduct or omission by EODSA, OSA, or CSA.

[177] I therefore dismiss OZ Merchandising's action against EODSA, OSA, and CSA.

[178] As the successful parties, EODSA, OSA, and CSA are presumptively entitled to their costs of the action. At the conclusion of the trial, counsel agreed that in the event the parties are unable to reach an agreement, costs would be dealt with in writing. Accordingly, failing an agreement, EODSA, OSA, and CSA are to provide their submissions by September 30, 2019. OZ Merchandising is to provide its responding submissions by October 31, 2019. Submissions are not to exceed five pages, excluding any bill of costs and authorities.

[179] I remain seized of this matter for purposes of addressing the claims as against the remaining defendants.[12] There is also an outstanding matter of costs as against certain of the remaining defendants.[13] I have directed counsel for the plaintiff to schedule a case conference through the trial coordinator's office with respect to these matters.



Madam Justice Robyn M. Ryan Bell

Released: August 27, 2019

[12] See footnote 1.

[13] As a result of the endorsement of Master Champagne, as she then was, dated September 20, 2017.

CITATION: OZ Merchandising Inc. v. Canadian Professional Soccer League Inc., 2019 ONSC 5017
COURT FILE NO.: 04-CV-026293
DATE: 2019/08/27

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

OZ Merchandising Inc.

Plaintiff

– and –

Canadian Professional Soccer League Inc., Eastern Ontario District Soccer Association, The Ontario Soccer Association, Canadian Soccer Association, Canadian Soccer League Inc., CSL Association Inc., Ira Greenspoon, Vincent Ursini, Cary Kaplan and Stan Adamson

Defendants

REASONS FOR JUDGMENT

Ryan Bell J.

Released: August 27, 2019