

CANADA / JUDGMENT

Barnes-Morrison v. Kolas

2025 BCSC 715

COURT

Supreme Court of British Columbia

DECIDED

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2025 BCSC 715 Barnes-Morrison v. Kolas

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Barnes-Morrison v. Kolas,

2025 BCSC 715

Date: 20250416

Docket: E48799

Registry: Penticton

Between:

Clair Anita Barnes-Morrison

Claimant

And

Evangelos Kolas

Respondent

Before: The Honourable Justice Hardwick

Reasons for Judgment

Counsel for the Claimant:

D.M. King

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Counsel for the Respondent:

T.R. Bell

W. Fernandes

Place and Date of Hearing:

Kelowna, B.C.

March 13, 2025

Place and Date of Judgment:

Kelowna, B.C.

April 16, 2025

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Overview

- [1] I have previously described this family law action as both factually and legally nuanced. That remains accurate.
- [2] In reasons for judgment indexed as 2025 BCSC 166 (the "Appeal Reasons"), I allowed an appeal filed by the respondent, Evangelos Kolias, which set aside an order made by Associate Judge Schwartz on November 28, 2024 (the "Schwartz Order").
- [3] The Schwartz Order granted the claimant, Clair Barnes-Morrison, leave to amend her notice of family claim originally filed May 31, 2023 (the "NOFC") to plead two new causes of action and to add multiple new parties on a without notice basis notwithstanding my appointment as the case management judge in this proceeding in September 2024.

- [4] The basis for allowing the appeal, as set out in detail in the Appeal Reasons, was procedural in nature arising from how the claimant brought the application on a without notice basis in contravention of certain provisions of the Supreme Court Family Rules [Rules] and without appropriate regard to the role of the case management justice in case managed proceedings.
- [5] The Appeal Reasons did not address the merits of the claimant's pleadings amendment application which resulted in the Schwartz Order. As I expressly stated at para. 54 of the Appeal Reasons:
- [54] Given my ongoing role as the case management judge and, if necessary, the trial judge, I will not and am not reaching any conclusion with respect to the merits of the new claims that Clair is advancing in the Amended Notice of Family Claim
- [6] I made the above statement in anticipation of the claimant bringing back her amendment application (or a substantially similar application), before me on proper notice to the respondent.
- [7] Having predicted the course of events correctly, I now am in a position of having to determine, on the merits, whether the claimant should be granted leave to amend the NOFC to plead the two new causes of action and to add the additional parties.
- [8] Specifically, the notice of application filed by the claimant on February 24, 2025, (the "Application") seeks, in summary form, the following relief.
- a) The addition of Sam Kolas, Vicki Parker ("Ms. Parker") and Monis Uddin ("Mr. Uddin") as parties in their personal capacity in this proceeding;
 - b) The addition of Evangelos Kolas [already the respondent in his personal capacity], Sam Kolas, Melissa Kolas, Samantha Kolas-Gunn, Hugh Kolas, Vanessa Kolas and Isabella Kolas in their capacities as the trustees [collectively, the "Trustees"] of the Sam and Van Kolas 2020 Family Trust (the "Kolas Family Trust") as parties in this proceeding;
 - c) Leave to file an amended notice of family claim (the "Proposed ANOFC") which:
 - i. pleads the tort of conspiracy, both unlawful act conspiracy and predominant purpose conspiracy; and
 - ii. pleads the doctrine of unconscionable procurement.
- [9] With one exception, the Application is opposed in its entirety by the respondent. The exception is with respect to the addition of Trustees in their capacities as the trustees of the Kolas Family Trust. Even that, however, requires certain additional judicial commentary which I will provide in the concluding comments of these reasons for judgment.

The Interim Spousal Support Application

- [10] Moving back in the litigation chronology of this action for necessary context, the first contested application I heard after being appointed the case management justice was the claimant's application for interim spousal support (the "Interim Support Application").
- [11] The Interim Support Application, which had actually been filed the year prior and held in abeyance, followed on the heels of the oral reasons for judgment of Justice Kent, delivered after a 5-day hearing concerning the respondent's jurisdictional challenge in the within proceedings. Justice Kent's reasons for judgment are indexed as 2024 BCSC 1400.
- [12] The reasons for judgment arising from the Interim Support Application, indexed at 2024 BCSC 2033 (the "Interim Support Reasons"), have some particular significance to the Application.
- [13] As noted in the overview section of the Interim Support Reasons, the stakes were particularly high for an interlocutory application:
- [3] As I will articulate in significantly more detail, entitlement to spousal support is highly contested based upon reliance of a written waiver of spousal support made by the claimant in 2013.
- [4] Even in the event entitlement is established, the quantum of interim support proposed versus interim support sought ranges from \$3,937 to \$73,209 per month (albeit with some alternative positions advanced by both counsel as to some middle ground, but on the face of the submissions those are the proverbial "goal posts").
- [14] In reviewing the evidentiary record in the course of the deciding the Interim Support Reasons, I highlighted certain challenges I encountered in trying to understand the complex commercial enterprise which I broadly defined as "Boardwalk". Specifically:
- a) I referred to the "agreements" between the respondent and his brother, Sam Kolas, regarding certain very valuable preferred shares as "murky at best" (see para. 71(f));
 - b) I concluded that the affidavit evidence of Mr. Uddin, vice president of corporate development for Boardwalk, that the respondent trusted Sam Kolas and deferred to his acumen in assuming control over the business side of Boardwalk's operations was extremely difficult to reconcile with the evidence that Sam Kolas was apparently going to effectively turn off the financial tap, which had been running for years, to the respondent, his brother and long-time business partner. I described it as "extremely convenient" (see para. 75); and
 - c) I observed a rather "astounding" change in the respondent's claimed Guideline income as between his August 18, 2023, Form F8 Financial Statement and his September 11, 2024, Form F8 Financial Statement wherein the respondent swore that this income dropped from \$3,804,076 per annum to \$304,078 per annum (paras. 80-82). I ultimately rejected the proposition that the respondent had a Guideline income of \$304,078 for various reasons (see para. 83) including that the respondent had the assistance of Sam Kolas in controlling the

"proverbial tap" arising from the Koliass family enterprise whilst his income is under scrutiny in this proceeding (see para. 83(f)).

- [15] In ultimately concluding that the claimant should continue to receive interim-interim spousal support of \$23,000 per month, which I had originally ordered on a temporary basis as a condition of a brief adjournment request, and adjourning the Interim Support Application generally subject to certain terms, I stated as follows starting at para. 87:
- [87] The difficulty I have is that, even when taking the direction to "not be so cautious as to be timid", I cannot, based on the fragmented documentation, even properly impute [the respondent] an income under s. 19 of the Guidelines. I must, as articulated above, have some evidentiary basis and not purely speculate.
- [88] The level of speculation required here is akin to trying to play the judicial version of pin the tail on the donkey at this particular point of this particular case. The difference in the parties' positions on Guideline income is approximately \$3,400,000.
- [94] In conclusion, I am not satisfied for the reasons identified that the Court is in a position to make a proper and considered determination of the respondent's Guideline income at this juncture.
- [95] The application is thus adjourned generally subject to the below terms.
- [96] Having regard to the fact that I am the interim case management justice, this conclusion does not toss the parties into the judicial ether to start afresh. The matter, with a revised evidentiary record containing more fulsome disclosure, including perhaps third-party documentation and possibly an expertly prepared Guideline income report, can come back before me at a date approved by Supreme Court Scheduling and necessary procedural orders can be made at the upcoming judicial case management conference.
- [98] In the meantime, the interim-interim order that I made on August 28, 2024, for payment of spousal support to the claimant in the amount of \$23,000 per month shall continue pending further court order or, of course, written agreement.
- [99] I do recognize that if one runs reverse support calculations under the SSAG based on a Guideline income of \$40,000 per annum for the claimant, the respondent would need to have a Guideline income of approximately \$1,200,000 per annum to justify spousal support of \$23,000 per month. And that is based on a strict application of the Guidelines in a high-income scenario.
- [16] My above observations and findings (or lack thereof) in relation to the calculation of the respondent's Guideline income for interim support purposes factor significantly into the basis for the claimant's proposed amendments to the NOFC.

- [17] The claimant's theory, stated in broad terms and not yet with precise reference to said proposed amendments, is that the respondent has been "effectively turned into a 'straw man' who is potentially judgment proof from claims by [the claimant] should the Agreement (as defined at para. 22 of the Interim Support Reasons) be set aside": see Appeal Reasons at para. 56.
- [18] In this regard, I noted in the Appeal Reasons that my reference in the Interim Support Reasons to "murky" agreements between the respondent and Sam Kolas was not intended to be exhaustive. Not expressly mentioned in the Interim Support Reasons were two additional handwritten "agreements" as between the respondent and Sam Kolas, alleged to have been made in February 2024 and involving multi-millions of dollars, which were written on "what appear[ed] to be generously described as large post-it notes": see para. 57.
- [19] Ultimately, and without delving into the allegations, I did acknowledge that the claimant's "straw man" theory was not without certain prima facie merit: see Appeal Reasons at para. 58.

The Proposed Amendments

- [20] As indicated above, the NOFC was filed on May 31, 2023.
- [21] The NOFC was referred to by respondent's counsel in the course of submissions as a "full tool kit". I take that to mean that even as originally filed on May 31, 2023, the NOFC sought a very broad array of relief. That is a fair description.
- [22] In addition to seeking to set aside the Agreement (as defined in the Interim Support Reasons) under ss. 93 and 146 of the Family Law Act, S.B.C. 2011, c. 25 [FLA], the NOFC advances:
- a) a claim for an interest in or compensation in lieu of an interest in corporate shares and entitlements and trust interests in which the respondent has a legal or equitable interest, including corporate shares and trust interests yet to be disclosed;
 - b) a claim that the respondent holds in trust for the claimant any interest in family property as a result of direct and indirect contributions such that all shares and entitlements are a joint family venture;
 - c) a claim that the respondent and the family businesses/corporations have been unjustly enriched as a result of the claimant's contributions;
 - d) claims that the respondent holds an undivided half interest in family businesses and trusts pursuant to an express trust, or alternatively a resulting trust or a constructive trust;
 - e) a claim for restitution on the basis of quantum meruit;
 - f) a claim for an accounting; and finally
 - g) the equitable remedy of tracing.

- [23] Most significant for the purposes of considering the amendments set forth in the Proposed ANOFC is Schedule 3 of the NOFC, which details the claimant's spousal support claims under the FLA. Paragraph 2 of Schedule 3 asks for an order for spousal support as follows:
- a) In consideration of the Spousal Support Advisory Guidelines, the respondent's income or imputed income and the respective means and needs of the parties in addition to consideration of factors relating to a compensatory claim for support;
 - b) Interim and indefinite periodic support or lump-sum support and in the event of periodic support such support to be secured by life insurance or such other security as this Honourable Court may deem reasonable and appropriate. The quantum of spousal support as per the Spousal Support Advisory Guidelines on both a compensatory and non-compensatory basis;
 - c) The claimant's claim for spousal support is made in part, in accordance with the Spousal Support Advisory Guidelines and *Moge v. Moge* and the common law to compensate the claimant for the role assumed by her during the relationship, to alleviate the economic disadvantage the claimant has suffered as a result of the relationship and its breakdown, and to relieve economic hardship arising from the breakdown;
 - d) Retroactive and prospective spousal support in accordance with the Spousal Support Advisory Guidelines to the date of separation on April 16, 2023.
 - e) Proper spousal support cannot be calculated until the respondent makes full and proper disclosure of his available income and assets;
 - f) Security for the performance of the respondent's spousal support obligations;
 - g) In the alternative, or additionally, lump sum spousal support;
- [24] Turning now to the proposed amendments themselves, the specific language used by the claimant in the Proposed ANOFC is important. Pleadings must set out the necessary material facts giving rise to a claim, the relief sought by the claimant against each respondent, and a concise summary of the legal basis for the relief sought. The material facts are assumed to be true at this juncture.
- [25] As it relates to the tort of conspiracy, the amendments in the Proposed ANOFC are set out verbatim in Schedule "A" to these reasons for judgment.
- [26] The crux of the conspiracy claims, both predominant purpose conspiracy and unlawful act conspiracy, center around the allegation that the identified conspirators formed a fraudulent plan to swear false affidavits, intended to be relied upon by this Court, that support a fiction that, inter alia, the respondent divested himself of his interest in Boardwalk in 2009, earned little to no income despite his reported taxable income and is wholly financially dependent on Sam Koliass. This conspiracy resulted, it is alleged, in the claimant obtaining the order for ongoing interim-interim support instead of proper interim support based on the respondent's true income. It is also alleged that the claimant will be put to the further

expense of disproving false evidence by the conspirators to prove her support and property claims at trial.

- [27] As it relates to the doctrine of unconscionable procurement, the amendments in the Proposed ANOFC are set out verbatim in Schedule "B" to these reasons for judgment.
- [28] The crux of the unconscionable procurement claim is that, if the respondent did sell his entire interest in Boardwalk to Sam Kolas in 2009 (before the commencement of the marriage-like relationship in 2011) for \$20,000,000, the transaction should be set aside as it was procured by Sam Kolas in an unconscionable manner as a result of, inter alia, the transaction being at well below fair market value and based upon Sam Kolas "gaslighting" the respondent, encouraging "his ignorance" as to the value of his interest in Boardwalk and failing to inform the respondent about certain material tax implications of the transaction.

Amendment of Pleadings and Addition of Parties: General Principles

- [29] The general principles regarding the amendment of pleadings are trite law and the parties are ad idem so I am going to rely quite significantly on both the claimant's legal basis in the Application and the respondent's written submissions in this regard.
- [30] Rule 8-1(1) of the Rules provides that pleadings may be amended after service of a notice of trial only with leave of the court. The significance of the leave requirement is highlighted in the Appeal Reasons.
- [31] As a starting point regarding the principles governing the amendment of pleadings is the helpful summary by the Court in 1305788 B.C. Ltd. v Sodhi Dream Homes Ltd., 2023 BCSC 445:
- [27] Justice Kent helpfully summarized the principles governing amendments to pleadings in Thomas v. Rio Tinto Alcan Inc., 2019 BCSC 107:
- [18] Some of the basic principles governing applications for leave to amend pleadings have been summarized in Continental Steel Ltd. v. CTL Steel Ltd., 2014 BCSC 104 at para. 26 and in British Columbia (Director of Civil Forfeiture) v. Violette, 2015 BCSC 1372 at para. 41 [citations deleted]:
1. the court has a wide discretion to permit amendments so as to enable the real issues between the parties to be determined;
 2. the discretion to permit amendments is unfettered, subject only to the general rule that it be exercised judicially;
 3. the overriding consideration is the interests of justice generally and to direct what is just and convenient between the parties;

4. while useless amendments that do not advance a reasonable cause of action or defence are to be avoided, justice is generally best served by permitting amendments that will allow the real controversy between the parties to be decided on the merits;
5. amendments may not be allowed if they will cause actual and meaningful prejudice to the opposing party--mere potential prejudice is insufficient. Rather the party resisting an amendment must prove actual and significant prejudice;
6. additional considerations include any delays in applying for the amendment, the reasons for such delay and whether deliberate or voluntarily dilatory conduct is involved, particularly when a new cause of action is proposed to be added that would otherwise preclude the operations of a limitation defence;
7. costs are the general means of protecting against prejudice unless it would be a wholly inadequate remedy; and
8. courts should only disallow an amendment as a last resort.

[28] More guidance was provided as to the factors that should be considered in applications to amend pleadings by Madam Justice Ross in *Dawe v. B.C. Children's Hospital*, 2003 BCSC 443 at para. 17 (quoted in *Kwikwetlem First Nation v. British Columbia (Attorney General)*, 2021 BCCA 311 at para. 166):

- (a) amendments should be permitted as are necessary to determine the real question in issue between the parties

The basic rule, set out expressly in the former Rules and no doubt still applicable, is that such amendments should be permitted as are necessary to determine the real question in issue between the parties. Rule 1(5) requires an interpretation of the rules which permit the just and speedy determination of the dispute on its merits. Similarly, the Law and Equity Act, R.S.B.C. 1979, c. 224, s. 10, requires the court to grant all such remedies as any of the parties may appear to be entitled to "so that, as far as possible, all matters in controversy between the parties may be completely and finally determined". *Victoria Grey Metro Trust Co. v. Fort Gary Trust Co.* (1982) 1982 CanLII 227 (BC SC), 30 B.C.L.R. (2d) 45 (S.C.);

- (b) the court will not give its sanction to amendments which violate the rules that govern pleadings, including the prohibition of pleadings which disclose no reasonable claim. In considering this question, the court will apply the same tests and considerations as applicable on an application to strike claims already pleaded, see *Victoria Grey Metro Trust Co. supra*;
- (c) a party is not required to adduce evidence in support of a pleading before trial, see *McNaughton v. Baker* (1988), 1988 CanLII 3036 (BC CA), 25 B.C.L.R. (2d) 17 (B.C.C.A.);
- (d) on an application to amend the facts alleged are taken as established, see *Canada (Attorney General) v. Ellis-Don Ltd.*, 2000 BCCA 111 (CanLII), [2000] B.C.J. No. 492;

- (e) the discretion is to be exercised judicially, in accordance with the evidence adduced and the guidelines of the authorities. Factors to be considered include: the extent of delay, the reasons for delay, any explanation put forward to account for the delay, the degree of prejudice caused by the delay, the extent of the connection between the existing claims and a proposed new cause of action. The over-riding consideration is what is just and convenient, see *Teal Cedar Products (1977) Ltd. v. Dale Intermediaries Ltd.* (1996), 1996 CanLII 3033 (BC CA), 19 B.C.L.R. (3d) 282 (C.A.).
- [29] What is clear from the authorities is that while useless amendments that disclose no reasonable cause of action must be avoided, the overriding principle is that generally amendments should be permitted in the interests of justice, to allow the real questions in issue between the parties to be litigated. Further, a party asserting that it will suffer prejudice due to the amendments must demonstrate actual and significant prejudice.
- [32] As indicated above, in the oft-cited decision of *Victoria Grey Metro Trust Co. v. Fort Gary Trust Co.*, 30 B.C.L.R. (2d) 45, 1982 CanLII 227 at para. 2(S.C.), Justice McLachlin (as she then was) confirmed that "consistency demands" that applications to amend pleadings be resolved under the same principles as applications to strike existing pleadings.
- [33] A fulsome review of these principles is found in *Sahyoun v. Ho*, 2015 BCSC 392:
- [56] This aspect of the defendants' application is based on the difficulties with and inadequacy of the Amended Pleading. Such matters are best addressed through R. 9-5(1). The defendants' R. 22-7(2) application, which allows a court to dismiss a proceeding for non-compliance with the Rules, is in a sense, derivative of and rests on their R. 9-5(1) application. Both applications are focused on the ongoing failure of Dr. and Mrs. Sahyoun to file a pleading that complies with the Rules. Accordingly, I have focused on the R. 9-5(1) application. That rule provides:
- (1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
- (a) it discloses no reasonable claim or defence, as the case may be,
- (b) it is unnecessary, scandalous, frivolous or vexatious,
- (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
- (d) it is otherwise an abuse of the process of the court, and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.
- [57] The test on an application to strike an action under R. 9-5(1)(a), on the basis the pleadings do not disclose a cause of action, is whether it is plain and obvious the claim cannot succeed. It requires a conclusion that, assuming that the facts as stated are true, those facts disclose no cause of action and the pleadings disclose no arguable issue. If there is a chance that the action may succeed, then the action should be allowed to proceed; *Hunt v. Carey Canada*

Inc., 1990 CanLII 90 (SCC), [1990] 2 S.C.R. 959 at 980; *Thompson v. Webber*, 2010 BCCA 308 at para. 11; *Canadian Bar Assn. v. British Columbia*, 2008 BCCA 92 at para. 37.

- [58] The test for striking a pleading under R. 9-5(1)(b), on the basis that it is unnecessary, scandalous, frivolous or vexatious, was recently summarized in *Willow v. Chong*, 2013 BCSC 1083, where Fisher J. said:
- [20] Under Rule 9-5(1)(b), a pleading is unnecessary or vexatious if it does not go to establishing the plaintiff's cause of action, if it does not advance any claim known in law, where it is obvious that an action cannot succeed, or where it would serve no useful purpose and would be a waste of the court's time and public resources: *Citizens for Foreign Aid Reform Inc. v Canadian Jewish Congress*, 1999 CanLII 5860 (BC SC), [1999] BCJ No. 2160 (SC); *Skender v Farley*, 2007 BCCA 629. If a pleading is so confusing that it is difficult to understand what is pleaded, it may also be unnecessary, frivolous or vexatious.

An "embarrassing" pleading, as contemplated by R. 9-5(1)(c), is one that is so irrelevant that to allow it to stand would involve useless expense and would also prejudice the trial of the action by involving the parties in a dispute apart from the issues; *Keddie v. Dumas Hotels Ltd.* (1985), 1985 CanLII 417 (BC CA), 62 B.C.L.R. 145 at 147 (C.A.).

The abuse of process standard under R. 9-5(1)(d) derives from a flexible doctrine. It allows the court to prevent a claim from proceeding where to do so would violate principles of judicial economy, consistency, finality and the integrity of the administration of justice; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 at paras. 35-37.

Though subsections (a)-(d) of R. 9-5(1) address different concerns and different wrongs, there is also some overlap between these subsections. Thus, for example, a pleading that discloses no cause of action, contrary to R. 9-5(1)(a), can also be unnecessary, frivolous or vexatious within the meaning of R. 9-5(1)(b); see e.g. *Virk v. Brar*, 2012 BCSC 1004 at paras. 69-70.

A pleading can be embarrassing if it does not state the real issue in an intelligible form. It can also be embarrassing if it is prolix, includes irrelevant facts, argument or evidence. It can be prejudicial if it is designed to or has the effect of confusing the defendant, making it difficult, if not impossible, to answer; *Virk* at para. 75.

- [34] In terms of adding parties in the family law case, Rule 8-2(7)(c) of the Rules provides that at any stage of a family law case the court may, where it is just and convenient to do so, order that a party be added if there may exist between the parties a question or issue related to or connected with any relief claimed in or the subject matter of said case. Any existing party is entitled to notice of an application to add a party. The significance of this notice requirement is also highlighted in the Appeal Reasons.

- [35] The following general legal principles apply in adding parties:

- a) A party should be added where the party's participation is necessary for the proper determination of the case: *Van de Perre v. Edwards*, 2001 SCC 60 at para. 48;

- b) The discretion to add parties should be generously exercised so as to enable effective adjudication upon all matters: *Northern Construction Co. v. British Columbia Hydro and Power Authority*, 12 D.L.R. (3d) 730 at 738, 1970 CanLII 789 (B.C.S.C.);
- c) In exercising the discretion to add a party, the court should not concern itself as to whether the action will be successful other than to be satisfied that there may exist an issue or question between the applicant and the party being joined: *MacMillan Bloedel Ltd. v. Binstead*, 58 B.C.L.R. 173, 1984 CanLII 351 at para. 14 (C.A.);
- d) Evidence is not required in support of a joinder application. The pleadings may be sufficient to establish that there is a question to be tried between the parties: *Lasik Vision Canada Inc. v. TLC Vancouver Optometric Group Inc.*, [1999] B.C.J. No. 2796, 1999 CanLII 1002 (S.C.) at para. 22; and
- e) A trust is properly added to a family law case by adding its trustees in their capacity as trustees: see *Williamson v. Williamson*, 2020 BCSC 108 at para. 25.

The Law Regarding the Tort of Conspiracy in Family Law Cases

[36] As summarized above, and specifically reproduced in Schedule "A", the claimant pleads in the Proposed ANOFC that:

- a) The respondent, together with Sam Kolas, Mr. Uddin and Ms. Parker, the chief bookkeeping officer for the Kolas Family, were all co-conspirators (the "Co-Conspirators");
- b) The predominant purpose conspiracy is predicated on concerted actions by the Co-Conspirators to swear false affidavits to convince the court that the respondent had divested himself of all ownership of any shares of Boardwalk in 2009 in order to deprive the claimant of the spousal support to which she was entitled. The conspiracy succeeded by virtue of my November 6, 2024 Order for interim-interim spousal support;
- c) The unlawful act conspiracy is predicated upon the Co-Conspirators acting in combination by agreement or common design to have Vicki Parker and Monis Uddin swear false affidavits intended to lend credibility to the "fiction" created by the respondent and Sam Kolas that the respondent divested himself of his interest in Boardwalk in 2009 in order to deprive the claimant of the spousal support to which she was entitled. The conspiracy again succeeded by virtue of my November 6, 2024 Order for interim-interim spousal support; and
- d) The claimant will be put to further expense of disproving the false evidence to support her claims at trial and has been deprived of interest on the spousal support she should have been receiving but for the false affidavits.

[37] In the legal basis for the Application, the claimant primarily relies on the decision of the Ontario Court of Appeal (the "ONCA") in *Leitch v Novac*, 2020 ONCA 257, in support of the proposed amendments.

- [38] In Leitch, the spouses, who are referred to as the "husband" and the "wife" in the reasons for judgment, were both sophisticated. The wife was a former litigation lawyer and the husband a successful entrepreneur in the casino/gaming industry. After separation, the husband's father incorporated a management company to manage a casino in Alberta. There was an informal agreement that the husband would act as project manager and receive 40% of the management fees payable to the company. Approximately two years later, the owner of the casino bought out the management contract, with all the proceeds being paid to the husband's father. The wife amended her divorce application to seek damages based upon the tort of conspiracy from the husband, his parents, certain family trusts and a related corporation. The conspiracy allegations included temporarily diverting a portion of the sale proceeds and concealing management fees to reduce the husband's support obligation to the wife.
- [39] Upon an application for partial summary judgment, the motions judge concluded that there was no unlawful conspiracy and that the wife did not establish damages, but did order that the wife could still pursue her claim to impute additional income to the husband for the purpose of determining support at trial.
- [40] The appeal was allowed by the ONCA on the basis that it was not an appropriate case for partial summary judgment. The ONCA also concluded that the motions judge erred in her analysis of the tort of conspiracy.
- [41] Writing for the court, Justice Hourigan addressed what he referred to as the problem with "invisible litigants" in family law proceedings. Specifically, Hourigan J.A. commented as follows:
- [45] The problem is what I will call "invisible litigants". These are family members or friends of a family law litigant who insert themselves into the litigation process. They go beyond providing emotional support during a difficult time to become active participants in the litigation. Usually, their intentions are good, and their interference makes no difference in the ultimate result. However, sometimes they introduce or reinforce a win-at-all-costs litigation mentality. These invisible litigants are willing to break both the spirit and letter of the family law legislation to achieve their desired result, including by facilitating the deliberate hiding of assets or income.
- [42] In Leitch, the ONCA concluded that the wife should be permitted the opportunity to pursue her claims for damages based on the tort of conspiracy on their merits for two reasons: deterrence and enforceability. In this regard, Hourigan J.A. stated as follows:
- [46] If we were to accept the analysis of the motion judge, co-conspirators who engage in such behaviour could do so with impunity. Contrary to the observation of the motion judge, [page599] conspiracy is not a "blunt instrument" to respond to this misconduct. It is a valuable tool in the judicial toolbox to ensure fairness in the process and achieve justice. If the tort of conspiracy is not available, then co-conspirators have no skin in the game. Their participation in hiding income or assets is a no-risk proposition. If their conduct is exposed,

all that happens is that the payor will be forced to pay what is appropriately owing. If there is to be deterrence, there must be consequences for co-conspirators who are prepared to facilitate nondisclosure.

- [47] There is a further practical reason for permitting the use of the tort of conspiracy in family law claims. Where income or assets have been hidden with the assistance of a co-conspirator, often the family law litigant will be effectively judgment-proof. That, after all, is the whole purpose of the conspiracy. In those circumstances, the imputation of income or the inclusion of hidden assets into the net family property calculation will be a futile exercise, as the recipient cannot collect on what is owing. A judgment against a co-conspirator will often be the only means by which a recipient will be able to satisfy a judgment.
- [43] Of significance, Leitch did not refer to or consider *Waters v. Michie*, 2011 BCCA 364.
- [44] Leitch has been followed in the province of Ontario as standing for the proposition that the tort of conspiracy is available in family law proceedings: see *Edey v. Beccati*, 2024 ONSC 6931 at para. 222. However, in *Edey*, the Court thereafter dismissed the claim for conspiracy on its merits with very brief analysis: see para. 223.
- [45] Leitch has not, to date, been followed in British Columbia. It has, however, been cited in one trial decision which I will refer to below.
- [46] Before turning to the British Columbia jurisprudence, it is of note that Leitch has been followed very recently by the Alberta Court of King's Bench in *Lavoie v Lavoie*, 2025 ABKB 79. Lavoie again considered an application to strike pleadings based on a failure to disclose a reasonable cause of action; being frivolous, irrelevant or improper; or an abuse of process.
- [47] In declining to strike the impugned pleadings in respect of the tort of conspiracy in *Lavoie*, Justice Becker Brookes held as follows:
- [10] While the issue remains unsettled in Alberta, in this case I find it is appropriate to follow *Leitch v Novac*, 2020 ONCA 257 [Leitch]. To not permit the tort of conspiracy in the family law context risks allowing alleged co-conspirators to engage in tortious behaviour with impunity.
- [48] Lavoie does not consider *Waters* or attempt to wrestle with what appears to be at least some degree of conflict between the ratios in *Leitch* and *Waters*, both of which constitute persuasive appellate authority on the issue.
- [49] Ultimately in *Lavoie*, the Court found that the facts plead by the plaintiff addressed the four elements that must be proved to establish the tort of conspiracy with sufficient clarity and precision to allow the claim to pass the required judicial scrutiny at the pleadings phase: see para. 17. Whether the plaintiff could prove the conspiracy claim on the balance of probabilities was left for trial: see para. 19.

- [50] Somewhat interestingly, Becker Brookes J. did strike out the plaintiff's claim for perjury on the basis that it had no reasonable prospect of success: see paras. 45-46. The offence of perjury under s. 131 of the Criminal Code, R.S.C. 1985, c. C-46, includes making a false statement under oath or solemn affirmation by affidavit provided it can be proven beyond a reasonable doubt there was an intent to mislead, which is an essential element of the offence: see *R. v. Regnier*, 112 C.C.C. 79 at 79, 1955 CanLII 475 (O.N.C.A.), (1955), 21 C.R. 374 at 375 (Ont. C.A.). However, as perjury is a criminal offence, it can not establish a civil cause of action: see Lavoie at para. 45.
- [51] As of the date of these reasons for judgment, no other court in Canada appears to have judicially considered or cited Lavoie. Nor does it appear to be under appeal.
- [52] The sole British Columbia decision citing Leitch is *Bordignon v Bordignon*, 2024 BCSC 1226.
- [53] In *Bordignon*, the claims at trial included an allegation by the claimant wife that the respondent husband and his father had engaged in a conspiracy to diminish the value of and/or dispose of family property. However, to appreciate the context of the conspiracy claim it is necessary, in my view, to understand the breadth of the claims being advanced by the claimant as described by Justice Betton:
- [154] The amended notice of family claim contains a sweeping list of assertions and orders sought referencing [various enumerated sections] of the FLA. In it, the claimant seeks declarations that she is the beneficial owner of one-half of the shares in each of the corporate defendants, that the respondents owed her a fiduciary duty to not affect her interests in the family property or devalue the shares, that there is an agreement with [the husband] that [operating company] was held for the joint benefit of the claimant and [the husband], and the [husband] breached his fiduciary duty to the claimant by causing [the operating company] to divest itself of assets and goodwill to avoid the obligation to the claimant, that the respondents, without authority, transferred property or benefits owned [sic] to [the operating company] when it became clear the marriage was failing which affected her legal or beneficial interests and, that the assets of the corporate respondents are family assets subject to division on the basis of unjust enrichment, a constructive trust and/or a joint family venture. The claimant also pleads the tort of conspiracy, seeking declarations that [the husband] and [the husband's father] have conspired to deprive the claimant of her family law entitlements resulting in damages [and] increased legal costs".
- [54] Turning to the conspiracy claim specifically, Betton J. noted that the claimant advanced a predominant purpose conspiracy as distinct from an unlawful conspiracy and outlined the elements of that tort at para. 223. In reviewing the authorities referenced by claimant and the husband's father, Betton J. referred to Leitch, specifically quoting from para. 46 of that decision: at para. 226. The extent of Betton J.'s analysis of the ONCA's decision in Leitch to decline to strike the claim for conspiracy is limited to his comment that "counsel indicate there is no reported decision and it is not known if the issue went on to actually be litigated in Leitch": see para. 227. That comment remains accurate as of the date of these reasons for

judgment.

- [55] After referencing Leitch, Betton J. went on in some detail to review our Court of Appeal's decision in *Waters*, which remains the leading appellate authority in this province regarding the availability of the tort of conspiracy in family law proceedings, and the more recent chambers decision of Justice Giaschi in *Taherkhani v. Este*, 2020 BCSC 101 applying *Waters: Bordignon* at paras. 228 -229. *Taherkhani*, which I will address below, does not refer to or consider Leitch as it was decided several months before that decision was released.
- [56] Returning to *Bordignon*, after reviewing the evidence before him and reaching certain factual conclusions, including a lack of good faith on the part of the husband, Betton J. concluded as follows:
- [253] I will not delve deeply into the question of whether this is one of those rare examples where a conspiracy claim is appropriate from a policy perspective. Even if it is, I am unable to conclude that [husband's father's] conduct was "with a predominant purpose of causing injury to the plaintiff". It is for the claimant to prove the conspiracy.
- [256] My conclusion regarding [the husband's] lack of good faith does not mean that a conspiracy has been established. The onus is on the claimant to prove her claim and she has not.
- [57] While certain orders of Betton J. in *Bordignon* are under presently appeal, the dismissal of the conspiracy claims advanced by the claimant are not. Accordingly, it will not provide our Court of Appeal with the opportunity to opine further on the appropriateness of the tort of conspiracy in family law proceedings beyond the principles set forth in *Waters*.
- [58] Turning then in more detail to the legal analysis in *Waters*.
- [59] *Waters* involved an appeal from an order striking the appellant's claim of conspiracy against her former husband and his current wife for failing to disclose a reasonable cause of action. Justice Levine, writing for the majority, summarized the pleading as a "plea of conspiracy based on a claim that transfers of property [from the husband] to his wife were in violation of the Fraudulent Conveyance Act, R.S.B.C. 1996, c. 163, and other statutes, and were made with the intention of depriving the appellant of child support": see para. 2.
- [60] In this respect, *Waters* is somewhat analogous to the damages sought to be plead by the claimant in the Proposed ANOFC. Namely, a reduced amount of support. However, a distinguishing factor is that in *Waters*, the allegedly hidden assets led to reduced amounts of support in a final settlement thus depriving the recipient parent of child support on a permanent basis as opposed to allegedly depriving the claimant of the appropriate quantum of interim support which is subject to upward or downward adjustment (either prospectively or retroactively) on a further interim application or at trial.

[61] Before addressing that submission of the respondent in due course, it is important to take the analysis to a higher level first, recognizing that the tort of conspiracy has a somewhat complicated judicial history which, *inter alia*, involves the weighing of relevant policy considerations.

[62] In *Waters*, Levine J.A. undertook a detailed examination of the law of conspiracy in Canada, including the Supreme Court of Canada decision in *Frame v Smith*, [1987] 2 S.C.R., 1987 CanLII 74. As a general starting point, *Waters* noted that the tort of conspiracy has been "much criticized": see para. 39. The Supreme Court of Canada levelled these criticisms in both the family law and civil law contexts: see *Waters* at paras. 23, 39-40. Specifically, Levine J.A. noted the Supreme Court of Canada, decision of *Hunt v Carey Canada Inc.*, [1990] 2 S.C.R. 959, 1990 CanLII 90, where Justice Wilson expressed two reservations with extending the tort of conspiracy in the family law context (*Waters* at para. 29):

I note that in *Frame v. Smith*, *supra*, at p. 125, I was not prepared to extend the tort of conspiracy to the custody and access context both because such an extension was not in the best interests of children and because such an extension would not have been consistent with the rationale that underlies the tort of conspiracy: "namely that the tort be available where the fact of combination creates an evil which does not exist in the absence of combination".

[63] In *Waters*, Levine J.A. also noted that there were policy reasons discussed in *Frame* which impact whether conspiracy ought to be extended into family law cases, although the case was not decided on that point: see para. 28.

[64] Justice Levine further cited another Supreme Court of Canada decision, *Cement LaFarge v. B.C. Lightweight Aggregate*, [1983] 1 S.C.R. 452, 1983 CanLII 23, which criticized the tort of conspiracy in the civil context:

[39] The tort of conspiracy has been much criticized. As Estey J. said in *Cement LaFarge* (at 473):

The tort of conspiracy to injure, even without the extension to include a conspiracy to perform unlawful acts where there is a constructive intent to injure, has been the target of much criticism throughout the common law world. It is indeed a commercial anachronism as so aptly illustrated by Lord Diplock in [*Lonrho Ltd. v. Shell Petroleum Co. Ltd.*, [1982] A.C. 173, [1981] 2 All E.R. 456] at pp. 188-89. In fact, the action may have lost much of its usefulness in our commercial world, and survives in our law as an anomaly. Whether that be so or not, it is now too late in the day to uproot the tort of conspiracy to injure from the common law. No doubt the reaction of the courts in the future will be to restrict its application for the very reasons that some now advocate its demise.

[40] Both the majority and Wilson J. referred to this criticism in *Frame v. Smith* (at 109 and 124).

[65] Ultimately, *Waters* directed that chambers judges must wrestle with the policy implications discussed in decisions like *Frame* and *Cement LaFarge* before permitting a claim of conspiracy to proceed. As stated by Levine J.A.:

- [33] Thus, in considering whether the appellant's claim of conspiracy discloses a reasonable claim, the Court must give authoritative weight to the policy implications that would preclude such a claim from succeeding. That is what the chambers judge did in this case.
- [66] Moreover, separate and apart from policy considerations, a chambers judge must apply the ratio from *Frame* to decide whether to strike the conspiracy claim where there is a comprehensive legislative scheme in place. Justice Levine summarized the ratio of the *Frame* decision as follows:
- [22] In *Frame v. Smith*, the Supreme Court of Canada considered whether a parent had a cause of action against his former spouse and her present husband for interfering with his right of access to the children of the marriage. The chambers judge struck the claim as disclosing no reasonable claim, a decision affirmed by the Ontario Court of Appeal. Justice La Forest, writing for the majority of the Court, dismissed the appeal. While he considered there were good policy reasons why no cause of action should lie in such circumstances, La Forest J. ultimately disposed of the appeal on the basis that the legislative scheme governing custody and access was comprehensive. By providing remedies to enforce custody and access obligations and failing to include recourse by civil action to the courts, the legislation precluded a civil action for damages for breach of access rights. Justice Wilson, dissenting, would have permitted a claim for breach of fiduciary duty to proceed to trial.

To deal with this issue, it is important to be clear on what *Frame v. Smith* stands for. In *Frame v. Smith*, the plaintiff sought to bring a civil claim for damages resulting from conduct that was a breach of family law legislation. The majority of the Court dismissed the appeal on the basis that the statutory scheme implicitly precluded a claim for damages for breach of a parent's statutory access rights, and therefore no common law claim could be maintained. While both the majority and Wilson J. (in dissent) questioned whether the tort of conspiracy ought to be permitted in the family law context for policy reasons, the case was not decided on that point.

[Emphasis added]

- [67] Justice Levine determined that this principle, namely that conspiracy actions should not lie where substitutionary statutory remedies are available, meant that the chambers judge in *Waters* correctly struck the conspiracy claim sought to be advanced by the appellant:
- [34] The chambers judge referred (at para. 36) to Mr. Michie's statutory duty to pay child support and the appellant's statutory remedy. It was on the basis of comprehensive statutory remedies that the majority of the Supreme Court of Canada rejected the conspiracy claim in *Frame v. Smith*.
- [35] Is that rationale applicable in this case? In my opinion, based on a consideration of the statutory remedies available to the appellant in the context of the policy considerations that restrict the extension of the tort of conspiracy to the family law context, it is. In addition, applying the concept of "merger" brings about the same result. The appellant's conspiracy pleading raises no reasonable claim.

- [68] Specifically, because the statutory scheme relating to the calculation of child support included provisions that empowered the court to impute income for child support purposes based on a payor's diverted income, the conspiracy action advanced by the appellant could not be maintained to address the alleged harm of inadequate child support. As stated in *Waters*:
- [42] The appellant rightly does not dispute that her conspiracy claim to recover losses for injury caused by the frustration of the proper calculation of child support adds nothing to the statutory scheme under the Divorce Act, R.S.B.C. 1985, c. 3 (2d Supp.) and the Federal Child Support Guidelines. That legislation empowers the court to impute income to a parent and make an order in respect of a parent's retroactive and prospective child support liability. As in *Frame v. Smith*, no claim for damages for the frustration of the proper calculation of child support can proceed in the face of the comprehensive statutory scheme.
- [69] Returning to *Bordignon*, the other case mentioned by *Betton J.* in *Bordignon* which considers *Waters* is *Taherkhani*.
- [70] Like the case at bar, *Taherkhani* was also an application in a family law matter to add parties to the action and to amend the notice of family claim. The proposed new parties were the mother and brother of the respondent, and corporations and trusts controlled by them. The amendments alleged that various properties and bank accounts held in the names of one or more of the proposed parties were, in fact, legally or beneficially owned by the respondent wife. The claimant husband also sought damages for, inter alia, the tort of conspiracy.
- [71] *Taherkhani* had a complicated underlying factual matrix and a very extensive judicial history. Justice Giaschi summarized this at paras. 5-29 of the reasons for judgment.
- [72] The proposed amendment to the notice of family claim in *Taherkhani* to plead the tort of conspiracy, namely predominant purpose conspiracy, was brief. As reproduced at para. 50 of the reasons for judgment:
3. Further or in the alternative, damages for the tort of civil conspiracy by [the respondent], [Mina] and [Francis] on the basis they entered into an agreement to deceive the claimant about the ownership of the properties and the validity of the mortgage with:
 - a. the predominant purpose of [the respondent], [Mina] and [Francis], and each of them was to cause injury to the claimant; and
 - b. [The respondent], [Mina] and [Francis], and each of them should have known that in the circumstances injury to the claimant was likely to, and in fact did take occur because of their unlawful conduct.
- [73] Justice Giaschi expressly rejected Mina and Francis' submission that *Waters* stood for the proposition that civil conspiracy claims cannot properly be made in family law proceedings, specifically citing Madam Justice Levine's comments at para. 31 of *Waters*.

- [74] Continuing in this regard, Justice Giaschi held:
- [52] Waters and the decision of the Supreme Court of Canada in *Frame v. Smith*, [1987] 2 S.C.R. 99 referred to therein, address at some length conspiracy claims in the family law context. I do not intend to address these authorities in detail as only one paragraph was devoted to this issue in the otherwise extensive written submissions of Mina and Francis. However, *Frame* involved a claim of alleged interference with access to children of the marriage and *Waters* involved transfers of property that were alleged to deprive the appellant of child support. Both concerned children and in both the alleged co-conspirator was a new spouse. Moreover, in both, a significant concern was the best interests of the children. This matter does not involve a conspiracy with a new spouse, does not involve children of the marriage, and does not raise any concerns about the best interests of the children. In my view, these differences are such that, at this stage of the proceeding, it is premature to strike the conspiracy claim. In reaching this conclusion, I am guided by the principle that novel or controversial claims should not be struck at the pleadings stage.
- [75] The litigation in *Taherkhani* and a joined counterclaim to a since dismissed civil action continues to present date. In the Court of Appeal decision indexed as 2023 BCCA 290, Justice Dixon observed that Justice Giaschi "considered the proposed amended NOFC to be poorly worded and the conspiracy claim to be controversial, but was not prepared to strike the proposed amendments": see para. 47. In the most recent reported decision, indexed as 2025 BCSC 375, Justice Ahmed dismissed a recusal application brought in course of case management of the ongoing proceedings.
- [76] The result of the foregoing being that *Taherkhani* has not yet proceeded to a further trial and accordingly no further judicial consideration has been given to the merits of the conspiracy claim beyond it surviving the initial scrutiny of a pleadings review amidst the court's consideration of various other legal issues.
- [77] I am aware that Justice B. Smith cited the principles outlined in *Taherkhani* regarding adding additional parties in a family law proceeding quite recently in *Kennedy v. Kennedy*, 2024 BCSC 310: see paras. 35 & 36. The amended notice of family claim that was permitted to be filed in *Kennedy* seeks "a finding and declaration that [the] respondents conspired together to hide money, income and assets from the claimant in the course of these proceedings, so as to shield the respondent [husband] from the claims herein for property division, child support and spousal support, and in so doing, intended to deceive the claimant and commit a fraud upon this Court".
- [78] Upon a review of the decision and the supporting materials, I conclude that *Kennedy* is distinguishable on the basis that the amendment primarily centers upon allegations of fraud and conspiracy to shield the respondent husband from a claim for an interest in family property as opposed to a conspiracy to fraudulently swear false affidavits to support a fictional Guideline income for interim support purposes.

- [79] Further, it does not appear that fulsome legal arguments about the appropriate role of the tort of conspiracy in family law proceedings, including the apparent discrepancy between the ratios in *Waters* and *Leitch*, were put before Justice B. Smith.
- [80] The final portion of the legal analysis from *Waters* which is necessary to consider before applying these principles to the claimant's amendments articulated in the Proposed ANOFC relates to damages. In particular, with the tort of conspiracy there is a specific requirement to plead actual damage as opposed to speculative damage. As stated by Levine J.A.:
- [45] First, the tort of conspiracy requires proof of actual damage suffered by the claimant: *Cement LaFarge; Can-Dive Services Ltd.* At the hearing of the appeal, counsel for the appellant submitted that Mr. Michie has not complied with an order to pay retroactive child support of \$40,000. However, the appellant has not pleaded this allegation, or any other allegation of an outstanding order against Mr. Michie that the appellant has been unable to enforce. Assuming the pleaded facts are true, the appellant is entitled to a monetary judgment against Mr. Michie. Such an order, however, being prospective in nature, cannot form the basis of an allegation of losses for the appellant's inability to execute against Mr. Michie. On the pleadings, any losses that the appellant might suffer from her inability to enforce a monetary judgment against Mr. Michie are entirely speculative.

Conclusion Re Proposed Amendments to NOFC to Plead Tort of Conspiracy

- [81] After carefully considering and applying the above law specifically in relation to the proposed amendments as articulated in the Proposed ANOFC, I conclude as follows:
- a) The policy consideration of deterrence favours permitting the pleaded tort of conspiracy to survive the analysis required under the Rules as against Sam Kolas. As I detailed in the Interim Support Reasons, the respondent himself effectively says that Sam Kolas control's the proverbial financial tap for the family enterprise. At paragraph 83(a)(ii), I specifically quoted from the respondent's September 11, 2024 Form F8 Financial Statement where he deposed that "the income I receive at the end of the year is discretionary and distributed to me in an amount decided by my brother". Accordingly, if there is an agreement with the predominant purpose of intentionally reducing the distributions to the respondent in an effort to reduce the respondent's Guideline income for support purposes, it is to the potential detriment of the claimant and potential benefit of Sam Kolas (through his holding company). The need to avoid "invisible litigants" being able to "escape any negative repercussions" from their alleged "misdeeds" is why *Waters* emphasizes that there is no blanket prohibition on conspiracy claims in family law proceedings;
 - b) As it pertains to the proposed respondents, Ms. Parker and Mr. Uddin, their alleged involvement in both conspiracies is limited to the swearing/affirming of allegedly false affidavits. Very obviously the court does not condone the provision of false or misleading evidence. That is a beyond trite proposition. However, it is not tortious conduct. Rather, it is potentially criminal conduct as noted in my comments regarding the striking of the perjury

claim in Lavoie. Public policy considerations thus weigh strongly in favour of not allowing the pleaded tort of conspiracy against Ms. Parker and Mr. Uddin. The policy consideration of enforceability also does not favour the pleadings amendment as these two individuals are simply senior employees of Boardwalk and/or the Koliass family enterprise;

- c) Despite the policy consideration of deterrence weighing in favour of allowing the claimant to pursue conspiracy claims against Sam Koliass, I conclude that the conspiracy claims as pleaded by the claimant in the Proposed ANOFC simply cannot succeed pursuant to the ratio in Waters, which is binding authority upon me, that conspiracy claims should not lie where substitutionary statutory remedies are available;
- d) Specifically, the damages claimed in the Proposed ANOFC add nothing to the comprehensive statutory scheme already invoked by the claimant in the NOFC to seek spousal support from the respondent. Should the claimant be successful in proving concealed, diverted or otherwise manipulated income on the part of the Respondent (with or without the involvement of third parties), the legislative regime empowers the court to calculate the respondent's Guideline income in a just and appropriate manner for the claimant's pleas for both retroactive and prospective spousal support as already advanced in the NOFC;
- e) Further, the claimant has not plead any material facts in the Proposed ANOFC to ground any actual damage she has suffered as a result of the alleged tortious conduct by the Co-Conspirators pursuant to either the predominant purpose conspiracy or the unlawful act conspiracy. Rather, the claimant simply speculates that the interim-interim support she is receiving is less spousal support than she is entitled to. This is fatal to the proposed amendments for multiple reasons:
 - i. Firstly, it is pure speculation. Even leaving aside the written waiver of spousal support which was relied upon to dispute entitlement to interim spousal support entirely, I noted in the Interim Support Reasons that, upon reserve engineering under the SSAG, the interim-interim support effectively translated to using a Guideline income of approximately \$1,200,000 per annum for the respondent after expressly rejecting the submission that the respondent's Guideline income was only \$304,078 per annum: see paras. 83-99;
 - ii. Secondly, the claimant is not precluded from bringing the Interim Support Application back on for hearing prior to trial to seek additional interim spousal support. I made this clear at para. 96 of the Interim Support Reasons;
 - iii. Thirdly, even if the claimant elects not to bring the Interim Support Application back on for hearing, any under payment (or over payment) of spousal support on an interim basis will be addressed on its merits at the trial of this action. In that event, the interim-interim support has not established any status quo;

- iv. Fourthly, interim support orders are summary in nature and provide "rough justice" at best: see para. 56 of the Interim Support Reasons. Interim support orders are not intended to generate a windfall for the recipient spouse. The claimant has tendered no legal authority to support the proposition that she is entitled to be compensated for interest lost on the interim support she claims she ought to be receiving over and above the interim-interim support she is actually receiving; and
- v. Finally, costs constitute their own distinct and separate regime. If there is misconduct in the course of family law litigation, there are provisions in the Rules which specifically provide for this including, without limitation, awards for increased costs and special costs.
- [82] Having regard to the foregoing, is not necessary to substantively address the respondent's alternative argument that the claimant's conspiracy claims are also defeated by the doctrine of merger. However, the comments of Justice Levine in *Waters* at para. 62 that "for reasons set out above with respect to the effect of the applicable family law and creditor protection legislative schemes, the application of the concept of merger to these facts leads to the same result: the conspiracy claim adds nothing to the statutory claims, and thus raises no reasonable claim" are similarly applicable here.
- [83] Importantly, my above conclusions pertain to the tort of conspiracy claims only as presently articulated in the Proposed ANOFC. Despite this being the fourth lengthy reported decision to date in this family law proceeding, document disclosure remains in its infancy. There are no joint experts yet retained to provide reports on any "financial issues" as defined in the Rules (or consent or leave of the court to tender independently retained experts) and no examinations for discoveries have been conducted.
- [84] It thus remains possible that a future amendment application could be brought which satisfies the judicial scrutiny required by the Rules, at the pleadings phase, to permit the tort of conspiracy to be advanced in the context of a family law proceeding. The proposed claims, as detailed in Schedule "A", simply do not meet the necessary threshold required under the Rules for the reasons I have outlined.

The Doctrine of Unconscionable Procurement

- [85] As summarized above, and specifically reproduced at Schedule "B", the claimant pleads in the Proposed ANOFC that the respondent sold his units in Boardwalk to Sam Kolas for \$20,000,000 in 2009 when the fair market value was in the range of \$145,000,000 to \$238,000,000. Further, because Sam Kolas was permitted to pay the \$20,000,000 over time and still has not, some 15 years later, paid the full amount, the benefit to Sam Kolas was even greater. This transaction, the claimant alleges, was unconscionably procured by Sam Kolas to the detriment of the respondent.

- [86] Unconscionable procurement is an old and quite obscure doctrine. It is an equitable doctrine capable of setting aside an inter vivos gift. The foundational principle is that it is unconscionable for someone to be instrumental in procuring a gift to themselves from a donor who does not fully appreciate his or her actions even in the absence of undue influence.
- [87] The claimant relies extensively upon the recent British Columbia Court of Appeal decision in *Sandwell v Sayers*, 2023 BCCA 147, in support of the proposed amendment.
- [88] In *Sandwell*, a father transferred an interest in his home to his adult daughter for no consideration during a period of calm in an otherwise quite turbulent parent/child relationship. The father argued at the summary trial that the transfer should be voided, primarily on the basis of the doctrine of unconscionable procurement. In the alternative, the father sought a declaration that the daughter held her interest in the property in trust for him and related ancillary relief on the basis that the daughter had been unjustly enriched.
- [89] In the summary trial reasons, indexed at 2022 BCSC 605, Justice Betton reviewed case law in this province, in Ontario, in Nova Scotia and academic commentary authored by John E.S. Poyser on the "rule/doctrine" of unconscionable procurement.
- [90] Ultimately, Betton J. stated that he had "real doubt about the place of the doctrine of unconscionable procurement in British Columbia law." However, he concluded it was not necessary to decide the issue because the father did not make out the elements of unconscionable procurement on the facts and evidence before him: see para. 61.
- [91] The father appealed. The resulting discussion by the Court of Appeal illustrates why there is genuine uncertainty about whether the doctrine of unconscionable procurement is available in this province. Justice Griffin, writing for the Court, ultimately did not rule one way or another on the question. Justice Griffin rather addressed the issue as follows:
- [67] I turn to the doctrine of unconscionable procurement. The judge expressed doubt as to whether the doctrine of unconscionable procurement applies in BC or has been overtaken by other equitable doctrines, including the law of resulting trust and undue influence.
- [68] I am of the view that the case at hand does not require the doctrine of unconscionable procurement to be decided.
- [69] After the judge's decision, John Poyser wrote another article, arguing that the law of unconscionable procurement is the law in BC: John. E. S. Poyser, Case Comment: *Sandwell v. Sayers* - The State of Unconscionable Procurement in British Columbia, 76 E.T.R. (4th) 249. Mr. Poyser suggests that the doctrine has a place in protecting vulnerable people from giving away large amounts of their wealth without being fully informed of all the consequences, in situations where they intend to make a gift and there is no undue influence so other equitable doctrines do not apply.

- [70] Ms. Sayers, who is unrepresented by counsel on this appeal, does not address the existence of the doctrine other than to say the judge made no error. In the response to the summary trial application, her counsel took issue with the existence of the doctrine and argued that it had been subsumed in the law of undue influence. Before the judge, counsel for Ms. Sayers also asserted that, to the extent that the doctrine might apply, at minimum it would require both parties to adduce evidence about the donor's understanding of the gift, and the onus would remain on the party attacking the gift. He cited *Gefen v. Gaertner*, 2019 ONSC 6015 at para. 161 to support his submission, which was a case where a trial judge adopted Mr. Poyser's analysis of the doctrine but, on appeal, the court expressly did not rule on the question of whether the doctrine was the law in Ontario: *Gefen* ONCA at para. 61
- [71] There may be unrecognized concerns about the appellant's liberal description of the doctrine that require careful consideration. The doctrine might be seen as inconsistent with individual autonomy and the freedom of competent persons to choose what they want to do with their assets. History recognizes many people who have given away their material possessions and wealth, whether motivated by goodness, glory, or otherwise. If the doctrine was found to exist, it could upend certainty for recipients of intended gifts, including for charities whose employees cultivate relationships in order to encourage donations. The parameters of such a doctrine would have to be carefully considered, including whether if affirmed, it should be limited to donors who become unconscionably financially vulnerable by the gift at the time it is made. Further, one would expect the approach in *Pecore* to the presumption of resulting trust would equally apply: the presumption would only determine the result where the evidence to rebut it is insufficient on a balance of probabilities, and both parties to the transaction are expected to provide evidence if available.

[Emphasis added]

- [92] In the result, even after careful consideration by our Court of Appeal, the doubt identified by *Betton J.* in *Sandwell* remains as to whether the doctrine of unconscionable procurement applies in this province.
- [93] The fact that this doubt exists does not alone preclude the claimant's proposed amendment to plead the doctrine. As stated by Justice Davies in *British Columbia (Director of Civil Forfeiture) v. Violette*, 2015 BCSC 1372 at para. 40:

Applications for leave to amend pleadings are considered on the same basis as applications to strike pleadings with the question being whether it is plain and obvious that the proposed amendments are bound to fail. In assessing that question, it is not determinative that the law has not yet recognized a particular claim. In its analysis, the court must be generous and err on the side of permitting an arguable claim to proceed to trial. See: *McMillan v. McMillan*, 2014 BCSC 546 at paras. 13-14, and cases cited therein.

[94] However, I conclude that the claimant's claim in the Proposed ANOFC must still fail on the basis that even if the doctrine of unconscionable procurement is available at law in the province, the test to invoke the doctrine cannot be made out on the material facts as plead.

[95] Specifically, in the summary trial reasons from Sandwell, Justice Betton referred to the Ontario Superior Court decision in *Fichera v. McAllister*, 2021 ONSC 2685, as providing a useful summary of the elements of the doctrine of unconscionable procurement. I agree. In *Fichera*, Justice Ryan Bell stated as follows:

31 The doctrine of unconscionable procurement renders an inter vivos gift voidable; at issue is the "donor's necessary understanding to make a transaction conscionable when it takes place in circumstances that suggest, on a prima facie basis, the contrary": *Gefen v. Gaertner*, 2019 ONSC 6015, at para. 158, citing John E.S. Poyser, *Capacity and Undue Influence* (Toronto: Thomson Reuters Canada, 2014), at p. 571.

32. The onus rests on the party attacking the transaction to prove, on a balance of probabilities, that it was unconscionably procured. Once the party challenging the transaction has established a significant benefit and the active involvement on the part of the person obtaining the benefit in the procurement or arrangement of the transfer, then there is a presumption that the donor of the gift did not truly understand what she was doing in making the transaction: *Gefen*, at para. 159. This presumption is not determinative. Both parties must adduce evidence about the donor's understanding of what she was doing; the "issue turns on whether the donor appreciated the effect, nature and consequence of the transaction in a manner sufficient to render it fair, just and reasonable": *Gefen*, at paras. 161-162, citing Poyser, at pp. 570 and 574.

[96] As is apparent, the doctrine is confined to circumstances which involve either gifts, or, at minimum, gift-like transactions. This is a key element of the doctrine. This language carries through in the Court of Appeal's analysis in *Sandwell* in para. 71 where the Court considers the policy considerations arising from the court intervening in circumstances where capable persons elect to gift an asset. Those policy considerations aside, it is clear the doctrine applies to transfers for which there is no consideration provided.

[97] In the Proposed ANOFC, the claimant pleads that the impugned share transfer between the respondent and Sam Kalias was a sale, not a gift. Specifically, as set out in Schedule B, the claimant pleads that "Van's units in Boardwalk had a fair market value of something in the range of \$145-258M in 2009 when he sold them to Sam for \$20M."

[98] Without weighing into the merits of the alleged impugned transaction outside of the scope of the Application, the material facts as plead, which are accepted to be true, assert that the respondent sold his shares in Boardwalk for substantially less than fair market value but still for the sum of \$20,000,000. That is not a gift nor gift-like.

- [99] Consistent with this conclusion is the well settled proposition of law that the court does not interfere in transactions merely because of a question regarding the "adequacy of consideration": see *Darwish v Advancedio Systems Inc.*, 2017 BCSC 2456 at paras. 11-12, wherein Justice Macintosh quotes from *Cheshire, Fifoot & Furmston's Law of Contract*, Thirteenth Edition, (London Butterworth 1996).
- [100] The respondent also submits that the claimant's pleadings are deficient in that they fail to assert any "active involvement" by Sam Kalias in procuring the transfer of the respondent's shares in Boardwalk. I accept that the procurement necessitates some action on behalf of the recipient of the gift. The Court in *Sandwell* makes this clear when addressing the implications of charities whose employees cultivate relationships in order to encourage donations/gifts. This is distinct from gifts made by a donor to a charitable organization to whom the donor had no personal relationship with. There may be other remedies available in law in British Columbia, but a recipient of a gift that they were not involved with whatsoever cannot be said to have procured same. That is not, however, the situation here. Given the sibling and business relationship between the respondent and Sam Kalias, I would be prepared to accept, for the purposes of the Application, that the Proposed ANOFC sufficiently pleads that the impugned transfer was proposed, suggested and possibly encouraged by Sam Kalias such as to constitute "procurement".
- [101] However, further complicating matters is the issue of whether the claimant even has standing to bring a claim under the doctrine of unconscionable procurement.
- [102] Specifically, leaving the gift issue aside, for the claimant to pursue a claim under the doctrine of unconscionable procurement she must have standing to pursue it on the respondent's behalf against Sam Kalias as the claimant was not a party to the impugned transaction. Indeed, the claimant and the respondent were not even in a marriage like relationship as of the date of the alleged impugned transaction in 2009.
- [103] In *A.N.K. v E.K.*, 2024 BCSC 1391, a decision following a very lengthy trial, Justice Ahmed declined to allow "derivative claims" wherein one spouse asserts a claim through the other spouse, as against that other spouse's family members.
- [104] The claimant in *A.N.K.* asserted a claim against the respondent's mother derivatively. Specifically, the claimant alleged that the respondent's mother was unjustly enriched via the contributions of the respondent to his mother's businesses. As a result, the claimant alleged that she herself was entitled to claim as against the respondent's mother's businesses for those contributions. Justice Ahmed quite strongly rejected this argument, citing a consistent line of authority from this Court in doing so:
- [367] This Court has categorically denied derivative unjust enrichment claims brought against parents of a former partner on the basis of the former partner's "inchoate claim": *Sidhu v. Sidhu*, 2023 BCSC 449 at para. 211; *Russo v. Russo*, 2002 BCSC 554 at para. 26; *Douglas v. Douglas*, 2017 BCSC 921 at para. 111; and *Gaerber v. Gaerber*, 2020 BCSC 2080 at para. 69.

- [368] Given the absence of authority or principle supporting a derivative unjust enrichment claim, extending the law to allow the claimant an interest in N.O.'s property on that basis would be akin to "entering uncharted waters without the compass of principle": Russo at para. 26; Douglas at para. 111.
- [105] I can see no principled reason why this Court would treat an unconscionable procurement claim any differently from an unjust enrichment claim in these circumstances.
- [106] In conclusion, the question of whether doctrine of unconscionable procurement applies in British Columbia remains unresolved. The Court of Appeal made this clear in Sandwell even though the factual matrix in Sandwell was much closer to falling within the parameters of the applicable legal test to invoke the doctrine. Moreover, that was without the additional complicating factor of the derivative nature of the proposed claim articulated in the Proposed ANOFC.
- [107] I strongly anticipate there will be, in due course, an appropriate case brought forward in this province in which this issue will be addressed fulsomely on its merits. This is not that case, however, as the claimant's proposed amendment to the NOFC cannot meet the limited judicial scrutiny required under the Rules to disclose a reasonable cause of action.
- [108] In light of the above, I am not going to address the respondent's alternative submission that the claimant's proposed amendment to plead the doctrine of unconscionable procurement is barred by virtue of the Limitation Act, S.B.C. 2012, c. 13.

Other Alternative Arguments/Positions of the Respondent

- [109] As I articulated to counsel at the hearing of the Application, I have also declined to address the respondent's argument with respect to inconsistent pleadings under Rule 4-6(1), as same was not pursued by the respondent in oral submissions. Nor was I prepared to consider the respondent's request for security for costs from the claimant absent an application before the court for such an exceptional order.

Conclusion

- [110] In conclusion, I shall make the following orders in respect of the relief sought in the Application:
- a) the claimant's request for leave to amend the NOFC to plead the tort of conspiracy, including predominant purpose conspiracy and unlawful purpose conspiracy, as articulated in the Proposed ANOFC attached as Schedule "A" to these reasons for judgment, is dismissed;

- b) the dismissal of claimant's request for leave amend the NOFC to claim damages based upon the tort of conspiracy is limited to the pleadings as articulated in the Proposed ANOFC attached as Schedule "A" to these reasons for judgment and does not preclude the claimant from bringing a future application pursuant to the Rules to further amend the NOFC to plead the tort of conspiracy;
- c) the claimant's request for leave to amend the NOFC to plead the doctrine of unconscionable procurement as articulated in the Proposed ANOFC attached as Schedule "B" to these reasons for judgment is dismissed;
- d) by virtue of my decision to not allow the proposed amendments to the NOFC to advance claims pursuant to the tort of conspiracy, as presently plead, or pursuant to the doctrine of unconscionable procurement, the proposed addition of Sam Kolas, Monis Uddin and Vicki Parker as parties to the proceeding in their personal capacity is rendered moot as this relief was directly related to the new causes of action articulated in the Proposed ANOFC. The relevant portions of the relief sought in paragraphs 1 and 2 of the Application is thus dismissed;
- e) leave is granted to the claimant to add the Trustees, in their capacities as trustee of the Kolas Family Trust, as parties to this proceeding and the style of cause shall be amended accordingly;
- f) as it stands presently, the material facts plead in Schedule 5 of the Proposed ANOFC vis-a-vis the Trustees and Kolas Family Trust are somewhat sparse in particulars and likely require some further wordsmithing. Notwithstanding this, I conclude that the appropriate approach is to add the Trustees in their capacity as the trustees of the Kolas Family Trust based upon the pleadings as set out in the Proposed ANOFC;
- g) If there is further particularization of the claims as against the Trustees, same can be addressed in a further amendment by consent or, if necessary a further application before me pursuant to the Rules. However, the proposed amendments in the Proposed ANOFC are sufficient to permit the addition of the Trustees as parties and doing so will permit the Trustees, in their specifically named capacity, to become properly engaged in the litigation. Delaying that process to permit the claimant to tender a further Proposed ANOFC on this issue alone would, in my view, be inconsistent with the foundational principles under the Rules pertaining to efficacy and proportionality.

Costs

[111] I outlined both the applicable rule and certain foundational case authority regarding ordinary costs in family law proceedings in the Appeal Reasons: see paras. 119 and 120.

[112] I am not going to reiterate same here as it would be redundant.

[113] The respondent was the substantially successful party in opposing the Application.

[114] The respondent is thus entitled to his costs of the Application pursuant to the Rules.

[115] In these circumstances, where the parties are still wrangling over the pleadings and the proposed amendments to the NOFC were legally complex, I am simply ordering that the respondent shall be entitled to his costs as costs in the cause.

"Hardwick J."

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