

CANADA / JUDGMENT

Beruschi v. British Columbia

2020 BCSC 1531

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Supreme Court of British Columbia

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2020 BCSC 1531 Beruschi v. British Columbia

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Beruschi v. British Columbia,

2020 BCSC 1531

Date: 20201015

Docket: S102948

Registry: Kelowna

Between:

Anthony J. Beruschi and Power Resources Corp.

Plaintiffs

And

Her Majesty the Queen in Right of the Province of British Columbia,

Doug Sweeney, Greg Reimer, John Cavanagh, Jane Doe and John Doe

Respondents

Docket: S071682

Registry: Vancouver

Between:

Anthony J. Beruschi

Plaintiffs

And

Richard John Billingsley

Defendant

Before: The Honourable Mr. Justice Wilson

Reasons for Judgment

Counsel for the Plaintiffs:

G.J. Roper

Counsel for the Defendant

British Columbia:

G.J. Underwood

Counsel for Richard Billingsley:

G. Cuttler, Q.C.

Place and Date of Trial/Hearing:

Kelowna, B.C.

November 27, 2019

September 18, 2020

Place and Date of Judgment:

Kelowna, B.C.

October 15, 2020

[1] These are cross-applications relating to pleadings in this long-standing dispute regarding mineral tenures. Mr. Richard Billingsley ("Billingsley") applies to strike as an abuse of process certain portions of an expropriation claim brought by Anthony Beruschi ("Beruschi") against the Province of British Columbia. Beruschi applies to amend his notice of civil claim to include a plea of unjust enrichment in the claim he commenced many years ago against Billingsley.

Background

[2] The facts in this matter are disputed, but because these applications relate to pleadings, I assume that the facts as pleaded can be proven, and I make no factual findings.

- [3] There are certain matters on which the parties agree, however. Beruschi was the original holder of certain mineral tenures, referred to by the parties as the "Tony Claims". Those tenures lapsed because no steps were taken to renew them. Beruschi alleges that Billingsley was under contract with him, whether expressly or impliedly, to maintain the tenures and to ensure that they did not lapse. The claims lapsed and the day after they lapsed, Billingsley claimed them as his own and registered them in his name.
- [4] Beruschi says that the day after, on April 12, 2006, the two reached an agreement whereby Billingsley would convey the Tony Claims to Beruschi in exchange for some consideration.
- [5] It is common ground that the Tony Claims remain in the name of Billingsley. Whether a binding agreement was reached for Billingsley to convey the Tony Claims to Beruschi, the terms of any such agreement, and whether one or both of the parties breached the agreement remains in issue.
- [6] On July 27, 2006, Beruschi entered into an asset purchase and sale agreement whereby Beruschi agreed to transfer a number of mineral tenures to Boss Power Corp. ("Boss Power"). However, because the Tony Claims were not registered in Beruschi's name, he was unable to convey them. The arrangement between Beruschi and Boss Power included a number of claims, of which the Tony Claims were but a small part. Because the Tony Claims were held by Billingsley and he had refused to transfer them to Beruschi, Boss Power and Beruschi agreed that certain shares and consideration would be held in escrow to secure Beruschi's obligation to transfer the Tony Claims to Boss Power. Beruschi would transfer the Tony Claims to Boss Power once he was in a position to do so. Beruschi had an outside date of 36 months to transfer the Tony Claims to Boss Power; however, he was never able to transfer them, and they remain registered to Billingsley.
- [7] On March 9, 2007, and shortly after Beruschi took the position that Billingsley had breached the agreement to convey the Tony Claims to him, Beruschi commenced Vancouver action S71682. Beruschi pleaded the claim as breach of contract, breach of fiduciary duty and misuse of confidential information. Beruschi sought specific performance, and in the alternative, damages (the "Vancouver Action").
- [8] In 2008, the Province of British Columbia declared a moratorium on the mining of uranium and thorium in the province. This moratorium is a critical event in the factual background, because it impacted the use and value of the Tony Claims.
- [9] Following the moratorium, the litigation between Billingsley and Beruschi fell silent. This was likely because the moratorium likely lead to both parties believing that the Tony Claims were essentially valueless.

- [10] However, Boss Power brought a claim against the Province of British Columbia for a de facto expropriation of Boss Power's property, and the claim was resolved for approximately \$30 million. Unsurprisingly, this breathed new life into the dispute between Beruschi and Billingsley - each continued to assert that he was the owner of the Tony Claims, with a potential settlement with the Province providing ample motivation.
- [11] On October 24, 2011, Billingsley commenced Vancouver action S117100 against the Province of British Columbia, claiming damages for alleged de facto expropriation of the Tony Claims arising out of the moratorium (the "Billingsley Expropriation Action"). Beruschi was not named as a party to that claim, but it is common ground that he was made aware of the claim shortly thereafter.
- [12] On April 23, 2014, Beruschi commenced Kelowna action S102948 against the Province of British Columbia, also claiming damages for an alleged de facto expropriation of the Tony Claims (the "Kelowna Expropriation Action"). Billingsley was not named as a defendant in the Kelowna Expropriation Action, nor was he made aware of it. Billingsley only became aware that the Kelowna Expropriation Action had been filed some years later.
- [13] On November 29, 2017, Beruschi amended his claims in the Vancouver Action, in which amendments he confirmed that he was no longer seeking specific performance for a transfer of the Tony Claims.
- [14] Billingsley applies to dismiss or stay those portions of the Kelowna Expropriation Action that pertain to the Tony Claims, which are already the subject of litigation between Billingsley and the Province in the Billingsley Expropriation Action.
- [15] Billingsley applies for the following relief in the Kelowna Expropriation Action:
1. A declaration that this Court shall exercise its inherent jurisdiction to hear this application by Billingsley as a non-party, or in the alternative, an order that Billingsley be added as a defendant in this action for the limited purpose of hearing this application, and thereafter, that Billingsley cease to be a party, or in the further alternative, if the orders sought at paragraph 2 seeking to strike the claims are not granted, that Billingsley be added as a defendant to this proceeding and the style of cause be amended to add him as a named defendant;
 2. An order that the portions of the amended notice of civil claim filed in this proceeding on 29/Jan/2015 relating to the "Tony Claims" (as hereinafter defined) including, without limitation, the following portions, be struck out and dismissed:
 - (a) the following portions of paragraph 17(k): "531763" and "531758"
 - (b) the heading "(d) The Tony Claims" above paragraph 22;
 - (c) paragraphs 22 to 26;
 - (d) the following portion of paragraph 32(d): "the Tony Claims,";

- (e) the following portion of paragraph 32(e): "the Tony Claims,";
 - (f) the following portion of paragraph 32(f): "the Tony Claims,";
 - (g) the following portion of paragraph 41(b): "the Tony Claims,";
 - (h) the following portion of paragraph 41(c): "the Tony Claims,";
 - (i) the following portion of paragraph 41(d): "the Tony Claims,";
 - (j) the following portion of paragraph 45(a): "the Tony Claims,";
 - (k) the following portion of paragraph 45(b): "the Tony Claims,";
 - (l) the following portion of paragraph 45(c): "the Tony Claims,";
 - (m) the following portion of paragraph 45(d): "the Tony Claims,";
 - (n) the following portion of paragraph 46: "the Tony Claims,";
- (collectively, the Offending Pleadings");

[16] Billingsley also seeks an order that his costs of the application be paid as special costs.

[17] As for the first item of relief sought, the parties agreed that Billingsley had standing to bring the application, even though he is not a party to the Kelowna Expropriation Action.

[18] Beruschi's application is to amend the Vancouver Action to include a plea of unjust enrichment, and for a declaration that Billingsley holds the Tony Claims in trust for him.

[19] The Province consents to Billingsley's application to strike the portions of the Kelowna Expropriation Action as an abuse of process and takes no position on Beruschi's application to amend the pleadings in the Vancouver Action.

[20] For the reasons that follow, both applications are granted.

Application to strike portions of the Kelowna Expropriation Action

[21] Billingsley argues that the Kelowna Expropriation Action is an abuse of process, and relies on Rules 9-5(1)(a) and (d) of the Supreme Court Civil Rules which state as follows:

9-5(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,

. . .

(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.

[22] An allegation of abuse of process at its simplest is an allegation that the court process is being used for an improper purpose. In *Babovic v. Babowech*, [1993] B.C.J. No. 1802, the Court described abuse of process as follows:

The principle of abuse of process is somewhat amorphous. The discretion afforded courts to dismiss actions on the ground of abuse of process extends to any circumstance in which the court process is used for an improper purpose. I.H. Jacob, in "The Inherent Jurisdiction of the Court", (1970) *Current Legal Problems* 23 at pp. 40-41 provides the following definition of this principle:

It connotes that the process of the court must be used properly, honestly and in good faith, and must not be abused. It means that the court will not allow its function as a court of law to be misused, and it will summarily prevent its machinery from being used as a means of vexation or oppression in the process of litigation. Unless the court had power to intervene summarily to prevent the misuse of legal machinery, the nature and function of the court would be transformed from a court dispensing justice into an instrument of injustice.

It follows that where an abuse of process has taken place the intervention of the court by stay or even dismissal of proceedings may often be required by the very essence of justice to be done, and so to prevent parties being harassed and put to expense by frivolous, vexatious or groundless litigation.

18 The categories of abuse of process are open. Abuse of process may be found where proceedings involve a deception on the court or constitute a mere sham; where the process of the court is not being fairly or honestly used, or is employed for some ulterior or improper purpose; proceedings which are without foundation or serve no useful purpose and multiple or successive proceedings which cause or are likely to cause vexation or oppression. These are discussed by Jacob, *supra*, at p. 43 of his article.

[23] An application under Rule 9-5(1) is an attack on the pleading that argues that the claim has no basis in law and cannot succeed. Courts are reluctant to find that pleadings are an abuse of process, and the applicant bears a heavy onus: *Hare v. Lit*, 2013 BCSC 33 at para. 25.

Positions of the parties

[24] Pleading inconsistent claims can constitute an abuse of process: *Este v. Esteghamat-Ardakani*, 2018 BCCA 290 at para. 83, citing *Pan Afric Holdings v. Athabasca Holdings Ltd.*, 2018 BCCA 113 at para. 37; *Pepper's Produce Ltd. v. Medallion Realty Ltd.*, 2012 BCCA 247 at paras. 25-28.

[25] Billingsley argues that by amending the Vancouver Action to exclude the claim for specific performance, Beruschi is no longer in a position to advance the expropriation claim and that by so doing, Beruschi would be pursuing inconsistent remedies in the two claims which would be an abuse of process.

- [26] Billingsley also argues that Beruschi has not followed the required processes for a beneficiary to sue, relying on the recent Court of Appeal authority in *Price Security Holdings Inc. v. Klompas & Rothwell*, 2019 BCCA 36, wherein Billingsley argues that the prerequisites to a beneficiary's direct action against a third party have not been satisfied. As such, Billingsley argues that Beruschi does not have standing to advance the Kelowna Expropriation Action. Billingsley says the prerequisites for a direct claim by a beneficiary are:
- a) the beneficiary must first ask the trustee to bring the action and be refused;
 - b) the beneficiary must name the trustee as a defendant if it sues the third-party; and
 - c) the beneficiary must exhaust its remedy against the trustee.
- [27] Billingsley concedes there are exceptions to this general rule, but says they do not apply here.
- [28] Beruschi argues that his election to seek damages instead of specific performance has no bearing on his ability to claim for a de facto expropriation as against the Province. He also says that the exceptions to the general rule that prohibit a beneficiary from suing a debtor of the trust directly as summarized in *Price* apply here.

Inconsistent remedies

- [29] It is trite law that when a party to a contract accepts a repudiation by the other, it is no longer open to that party to seek specific performance. This is because the two positions are inconsistent - specific performance is only available for as long as the contract remains alive and capable of performance, and by accepting the other's repudiation, the party has agreed that the contract is at an end. In *Fengyun v. He*, 2017 BCSC 110, Harris J. held the following at paragraph 52:
- [52] I begin by observing that the Court of Appeal and this court have stated on a number of occasions that an innocent party, when faced with a fundamental breach to a contract, may elect to affirm the contract and hold the other party to the performance of its contractual obligations or accept the repudiation of the contract and immediately sue for damages. The innocent party must make its election known and once made the decision is irrevocable. The effect of accepting the repudiation is to bring the contract to an end and both parties are relieved of their obligations under it. The party which has accepted the repudiation cannot afterwards seek specific performance as there is no longer a contract extant. . . .
- [30] The parties do not disagree with this well-established principle; rather, the question is whether by abandoning his claim for specific performance in the Vancouver Action in November 2017, Beruschi is precluded from pursuing a de facto expropriation claim against the Province.
- [31] I conclude that he would not be precluded.

- [32] Beruschi abandoned his specific performance claim by way of his amendment to his pleadings in the Vancouver Action in November 2017. However, if the Province's moratorium constituted a de facto expropriation, which is the basis of both of the expropriation claims, that expropriation would have occurred in 2008. Accepting the pleadings as drafted, Billingsley was the legal owner, but Beruschi was the beneficial owner of the Tony Claims starting in April 2006 when Billingsley registered the claims as his own, and Beruschi continued to assert that he was entitled to an order compelling Billingsley to transfer the Tony Claims to him until November 2017.
- [33] I see no inconsistency between Beruschi asserting that he was the rightful owner of the Tony Claims in 2008 when the moratorium was granted on the one hand, with deciding in November 2017 to abandon his claim for specific performance on the other. If there is any merit to the claim against the Province for damages arising from a de facto expropriation, the party entitled to compensation would be the owner of the tenures at the time of the moratorium. The fact that Beruschi subsequently chose to abandon his claim for specific performance is of no moment unless Beruschi accepted Billingsley's repudiation prior to the moratorium, and there is no suggestion of that being the case.
- [34] A purchaser may choose to abandon a claim for specific performance for any number of reasons - specific performance may no longer be practical, a substitute or replacement property may have become available, the purchaser may prefer to no longer be in a position of being ready, willing and able to complete. By abandoning the claim for specific performance, Beruschi no longer will seek an order from the trial judge for conveyance of the Tony Claims by Billingsley.
- [35] The question of whether it is Beruschi or Billingsley who has the right to bring a claim against the Province arising out of the moratorium will depend on who was the rightful beneficial owner of the Tony Claims at the time of the moratorium. Subsequent events make no difference.

Prerequisites for a direct claim by a beneficiary not met

- [36] Billingsley argues that if Beruschi is the beneficiary of a trust as he alleges in the Vancouver Action, he does not have standing to bring the Kelowna Expropriation Action. He argues that pursuant to the authority in Price, the general rule is that the beneficiaries of the trust cannot directly sue a third party debtor unless three prerequisites are satisfied, or that there are special or exceptional circumstances:
1. the trustee refused the request of the beneficiary to sue;
 2. the trustee was named as a party in the action suing the third party debtor; and
 3. the beneficiary exhausted his remedies against the trustee.

- [37] In *Price*, the plaintiff was a beneficiary of a trust that owned a commercial building and had sued the defendant tenant directly. The summary trial judge concluded that the prerequisites had been satisfied and allowed the claim.
- [38] The Court of Appeal reviewed a number of authorities, the majority of which were decisions from Alberta, before concluding that the chambers judge had erred in failing to consider whether special circumstances existed.
- [39] While the Court of Appeal in *Price* questioned, without deciding, whether the third of the three prerequisites is required when there are special circumstances (at para. 73), a review of the decision makes it clear that the Court of Appeal did not disagree with the first two prerequisites.
- [40] In this case, it is clear that Beruschi satisfies neither of the first two prerequisites - he did not request that Billingsley commence an action on behalf of the trust, nor did he name Billingsley as a defendant in his action against the Province. It is not suggested on behalf of Beruschi that he took either of those steps, and the fact that Billingsley was not aware of the Kelowna Expropriation Action for over two years would lead to the unavoidable inference that Beruschi preferred that Billingsley not know about the Kelowna Expropriation Action for as long as possible.
- [41] What constitutes special or exceptional circumstances will depend on circumstances of the particular case. In *Price*, the Court of Appeal referred to *Kwinter v. Metrowest Development Ltd.*, 2007 ABQB 713, where the Court identified the following possible exceptions at paragraph 36:
- [36] The following possible exceptions relevant to the case at bar have been identified:
1. Where there is alleged to be fraud or collusion between the trustee and the third person (Halsbury's),
 2. Where by reason of conflict of interest or duty it is impossible or difficult for the trustees to sue (Halsbury's),
 3. Where there is a failure by the trustees in performing their duties as trustees to protect the trust estate or to protect the interests of the beneficiary in the trust estate (*Hayim v. Citibank N.A.* [1987] 3 W.L.R. 83 (Eng. Prob. Ct.))
 4. Where the beneficiaries are suing to recover trust property (as opposed to suing debtors of the trust) (*Remmers v. Lipinski* (2001), 293 A.R. 156 (Alta. C.A.), leave to appeal to S.C.C. refused, (2002), [2001] S.C.C.A. No. 502 (S.C.C.)).

To this list I would add statutory exceptions, such as those in the [Business Corporations Act] allowing a beneficial owner of securities of a corporation to bring certain actions.

- [42] The Court of Appeal in *Price* also referred to another Alberta case, *Stoney Tribal Council v. Shell Canada Inc.*, 2017 ABQB 314. In that case, Shell Canada applied for a dismissal of claims brought by three bands for the royalties they argued Shell Canada ought to have paid to the Federal Crown in its capacity as a fiduciary for the bands. In *Stoney Tribal Council*, Justice Poelman of the Alberta Court of Queen's Bench concluded that the plaintiffs had satisfied the prerequisite of exhausting their remedies against the Federal Crown because the Federal Crown was a "recalcitrant trustee" and had failed to perform its duties by securing the additional royalties.
- [43] In addition to questioning whether it is necessary for a beneficiary to exhaust all remedies against the trustee as a prerequisite to a direct claim, the Court of Appeal in *Price* held that equating a failure to act with a special circumstance would have the effect of giving standing to any beneficiary where the trustee refused to act, which would then eliminate the need for special circumstances: *Price* at para. 69.
- [44] Returning to the case at bar, the question is therefore what follows from the fact that Beruschi has not satisfied either of the first two prerequisites.
- [45] The first prerequisite is that the beneficiary must have asked the trustee to sue. There is no issue here with regard to Billingsley pursuing the Province for damages for a de facto expropriation resulting from the moratorium because Billingsley has already brought that claim by way of the Billingsley Expropriation Action. Beruschi's concern is therefore not whether Billingsley has brought a claim against the Province, but rather that he is pursuing the claim for his own benefit. Beruschi's complaint is that he does not control the claim and it is not being advanced on his behalf.
- [46] However, filing another claim for the same relief is no answer to Beruschi's concerns. It is also no answer for a beneficiary to say that requesting the trustee to act would be a pointless exercise. To the contrary, in the circumstances here, the request would undoubtedly have served to focus the parties on the critical question of which of them has the right to bring a claim for compensation against the Province.
- [47] The second prerequisite is that the trustee be named as a defendant. I do not agree that Beruschi's failure to name Billingsley as a defendant in the Kelowna Expropriation Action is equivalent to what Billingsley did by failing to name Beruschi as a defendant in the Billingsley Expropriation Action.
- [48] First, Billingsley did give notice of the Billingsley Expropriation Action to Beruschi, even if the notice was provided after it was filed. Second, if Billingsley is correct and he is the legal and beneficial owner of the Tony Claims, Beruschi would have no role in the litigation. By contrast, Billingsley would be a necessary party in any claim brought by Beruschi because Billingsley is the legal owner, even if Beruschi is subsequently determined to be the beneficial owner. Third, naming the trustee who refused to act as a defendant is one of the prerequisites for a direct claim by a beneficiary against a debtor of the trust as discussed above, but there is no similar requirement for a trustee to name the beneficiary as a

defendant.

[49] The Province of British Columbia supports Billingsley's application. The Province is concerned that there are risks:

- a) of inconsistent verdicts in the two expropriation claims; and
- b) that the Province could have to pay twice.

[50] Both of the Province's concerns are valid. If the Province is liable, either Billingsley is entitled to the spoils of the litigation as the owner of the Tony Claims, or Beruschi is so entitled. But the Province cannot be liable to both. The fact that there are two extant claims arising out of the same subject matter logically precludes either claim from moving forward, at least from the Province's point of view.

[51] I am satisfied that Beruschi has not met the prerequisites as a beneficiary to commence an action directly against a debtor the trustee alleges, and he has not established that there are special or extraordinary circumstances. Beruschi has no standing to bring the Kelowna Expropriation Action as it relates to the Tony Claims, and the Kelowna Expropriation Action is an abuse of process.

[52] While it may be that some safeguards could be put into place to ensure that Beruschi is not prejudiced by any steps Billingsley may take in the Billingsley Expropriation Action, there is no such application before me and I therefore make no orders.

[53] Billingsley's application to strike those portions of the Kelowna Expropriation Action as it relates to the Tony Claims as set out in paragraph two of the notice of application is granted.

Beruschi's application to amend pleadings

[54] Beruschi applies to further amend his notice of civil claim in the Vancouver Action. Beruschi seeks to plead that the Tony Claims are impressed with an institutional constructive trust in his favour, a claim for unjust enrichment, and in addition, seeks a declaration of remedial constructive trust and an accounting.

[55] The application is opposed by Billingsley, who argues that the proposed amendments are an attempt to circumvent the legal implications of Beruschi's previous amendments to his notice of civil claim in which he abandoned the claims for specific performance.

Legal test

[56] The legal test on an application to amend pleadings is not controversial. The general principles governing amendments were summarized in *Peterson v. 446690 B.C. Ltd.*, 2014 BCSC 1531 at para. 37 as follows:

[37] Finally, the general principles arising on an application to amend pleading can be summarized as follows:

- (a) Amendment to pleadings ought to be allowed unless pleadings fail to disclose a cause of action or defence: *McNaughton v. Baker*, [1988] 24 B.C.L.R. (2nd) 17 [(C.A.)].
 - (b) Amendments are usually permitted to determine the issues between the parties and ought to be allowed unless it would cause prejudice to party's ability to defend an action: *Levi v. Petaquilla Minerals Ltd.*, 2012 BCSC 776.
 - (c) The party resisting an amendment must prove prejudice to preclude an amendment, and mere, potential prejudice is insufficient to preclude an amendment: *Jones v. Lululemon Athletica Inc.*, 2008 BCSC 719.
 - (d) Costs are the general means of protecting against prejudice unless it would be a wholly inadequate remedy.
 - (e) Courts should only disallow an amendment as a last resort: *Jones, McNaughton, Innoventure S & K Holdings Ltd. et al. v. Innoventure (Tri-Cities) Holdings Ltd. et al.*, 2006 BCSC 1567.
- [57] Amendments are generally not permitted after the limitation period has expired. In *Byrd v. Cariboo (Regional District)*, 2014 BCSC 2239, *aff'd* 2016 BCCA 69, the Court summarized the principles that apply when the application to add a party after the limitation period has expired at para. 25:
1. The same principles apply regardless of whether the plaintiff seeks to add a new party or add a new cause of action against an existing party.
 2. Where the plaintiff has not exercised due diligence in bringing on its application, it is not an automatic bar to the relief sought. All of the relevant circumstances must be considered.
 3. The Court must exercise its discretion judicially, in accordance with the evidence adduced and the guidelines established in the authorities.
 4. The guidelines to be applied require a consideration of certain factors: (a) "the extent of the delay"; (b) "the reasons for the delay"; (c) "any explanation put forward to account for the delay"; (d) "the degree of prejudice caused by delay"; and (e) "the extent of the connection, if any, between the existing claims and the proposed new cause of action."
 5. What is just and convenient is an overriding question.
 6. There is a presumption of prejudice to the proposed defendant if the limitation period has expired.
- [58] The first issue is whether the proposed claim for unjust enrichment is a new cause of action.

Analysis

- [59] In *Swiss Reinsurance Company v. Camarin Limited*, 2018 BCCA 122, the Court of Appeal considered whether proposed amendments that detailed a claim for failure to warn constituted a new cause of action or whether they were subsumed within a plea of negligence in a claim against an insurance broker. Since any limitation would have long since expired, the first question is whether the proposed amendments plead a new cause of action. The Court of Appeal addressed what constitutes a cause of action and referred to two definitions. The first was from *Danyluk v. Ainsworth*, 2001 SCC 44, in which the Supreme Court of Canada described a cause of action at para. 54 as follows:
- [54] A cause of action has traditionally been defined as comprising every fact which it would be necessary for the plaintiff to prove, if disputed, in order to support his or her right to the judgment of the court: *Poucher v. Wilkins* (1915), 33 O.L.R. 125 (C.A.).
- [60] The Court of Appeal in *Swiss Reinsurance* also referred to Lord Diplock's definition in *Letang v. Cooper*, [1965] 1 Q.B. 232 at 243-243 (Eng. C.A.), in which a cause of action was described as "a factual situation the existence of which entitles one person to obtain from the court a remedy against another person". The Court of Appeal concluded there was no real difference between the two definitions.
- [61] The Court of Appeal in *Swiss Reinsurance* referred to the Ontario Court of Appeal's decision in *1100997 Ontario Ltd. v. North Elgin Centre Inc.*, 2016 ONCA 848. In *North Elgin*, the Ontario Court of Appeal explained the distinction between amendments that seek different relief based upon an alternative legal theory that relies on previously pleaded facts on the one hand and a different claim based upon facts that were not pleaded on the other at paragraphs 20 to 23:
- [20] In *Morden & Perell*, *The Law of Civil Procedure in Ontario*, 2nd ed. (Markham: LexisNexis Canada Inc., 2014), at p. 142, the authors state:

A new cause of action is not asserted if the amendment pleads an alternative claim for relief out of the same facts previously pleaded and no new facts are relied upon, or amount simply to different legal conclusions drawn from the same set of facts, or simply provide particulars of an allegation already pled or additional facts upon which the original right of action is based.

[Footnotes omitted.]

- [21] In *Dee Ferraro Ltd. v. Pellizzari*, this court noted the distinction between pleading a new cause of action and pleading a new or alternative remedy based on the same facts originally pleaded. The appellants had commenced an action against their lawyer claiming damages for breaches of contract, trust and fiduciary duty and for fraud and negligence. The appellants then sought to amend their pleading. This court, in overturning the motion judge's dismissal of the motion to amend, concluded that the proposed amendments, such as claims for a mandatory order and a constructive trust over shares, could be made because they flowed directly from facts previously pleaded.

- [22] By contrast, a proposed amendment will not be permitted where it advances a "fundamentally different claim" after the expiry of a limitation period: *Frohlick v. Pinkerton Canada Ltd.* In that case, the court did not permit the plaintiff in a wrongful dismissal action to amend the statement of claim to assert a claim for damages for constructive dismissal on the basis that the limitation period had expired. This court dismissed the appeal. The amendment regarding constructive dismissal related to events that occurred prior to the events described in the original statement of claim that were unrelated to that claim. The defendant was unaware of the new allegations prior to the plaintiff seeking the amendments, and the events were not put in issue or encompassed within the original claim.
- [23] Based on the foregoing, an amendment will be refused when it seeks to advance, after the expiry of a limitation period, a "fundamentally different claim" based on facts not originally pleaded.
- [62] The question is therefore whether Beruschi's proposed plea of unjust enrichment and for a declaration of trust is an alternative theory based upon previously pleaded facts, in which case there is no new cause of action, or whether it raises new facts that were not previously pleaded.
- [63] The elements of a claim for unjust enrichment are:
- a) enrichment of the defendant;
 - b) a corresponding deprivation of the plaintiff; and
 - c) absence of a juristic reason for the enrichment
- (*Garland v. Consumers' Gas Co.*, 2004 SCC 25 at para. 30). There must be a direct connection between the enrichment of the defendant and the deprivation of the plaintiff.
- [64] Beruschi's notice of civil claim alleged two distinct breaches of two different contracts by Billingsley. In the first, Beruschi alleges that Billingsley allowed Beruschi's registrations in the Tony Claims to lapse and then claimed them for his own benefit, which is set out at paragraph 18 of the notice of civil claim:
18. The defendant, in allowing the surrounding claims to lapse without warning the plaintiff and in recording the Tony Claims over the same ground:
 - a) breached his contractual duty to the plaintiff to monitor the plaintiff's claims and give advance warning of any that were about to lapse;
 - b) breached a contractual duty and fiduciary duty to the plaintiff; and
 - c) misused the confidential information received from the plaintiff.

- [65] The second breach alleged is that Billingsley refused to convey the Tony Claims to Beruschi, contrary to the agreement reached in the days following the lapse in Beruschi's registration and subsequent claim filed by Billingsley. This subsequent breach is set out in paragraphs 32 to 34 of the notice of civil claim:
32. On February 19, 2007 the defendant advised the plaintiff that he would not transfer the Tony Claims to the plaintiff. The defendant asserted that the Contract was no longer binding upon him.
 33. On February 21, 2007 and again on February 23, 2007 the plaintiff advised the defendant that the Contract was in full force and effect and that the plaintiff required specific performance.
 34. The defendant nonetheless continues to assert that he will not perform the Contract. The defendant's action constitutes a repudiation of the Contract. The plaintiff refused to accept the defendant's repudiation and insists on specific performance.
- [66] The provisions of a contract may be sufficient in some circumstances to provide a juristic reason for a benefit and corresponding deprivation. For example, a contract that expressly provides for the parties' remedies in the event of a default may provide the requisite juristic reason. However, it does not necessarily follow that a claim for an unjust enrichment cannot succeed solely because the claim is founded in contract. Similarly, while fiduciary duties do not arise in many contractual arrangements, there are nonetheless many contracts that do give rise to fiduciary duties, the presence of which depends upon the nature of the relationship.
- [67] The facts as pleaded, and which I assume to be true for the purposes of this application, are that Billingsley had agreed to monitor the Tony Claims for Beruschi and ensure they would not lapse, but that he allowed them to lapse and then claimed them for himself. Subsequently, the pleadings allege that Billingsley agreed to convey the Tony Claims to Beruschi but then subsequently refused to do so notwithstanding his agreement. I am unable to say that any new facts would be required in order to make out a claim for unjust enrichment, or for breach of trust. I am satisfied that the proposed claims for unjust enrichment and declaration of trust are alternative legal remedies arising out of the previously pleaded facts.
- [68] Billingsley argues that by abandoning his claim for specific performance, Beruschi's remedy is now limited solely to damages and that the proposed amendments constitute an inconsistent pleading. I do not agree.
- [69] Even though Beruschi does not seek a conveyance of the Tony Claims following his amendment to the Vancouver Action in November 2017, this would not preclude a trial judge from awarding damages based upon unjust enrichment, nor would the judge be precluded from declaring that Billingsley holds the Tony Claims in trust. A declaration of a remedial constructive trust does not require an extant specific performance action in order to succeed.

- [70] Beruschi concedes that his application for the proposed amendments was triggered by Billingsley's application to strike the portion of the Kelowna Expropriation Action that relates to the Tony Claims. However, I see nothing improper in that. As the Court of Appeal said in *Preferred Steel Construction Inc. v. M3 Steel (Kamloops) Ltd.*, 2015 BCCA 16 at para. 47, some flexibility is appropriate: "litigation has an evolutionary quality, and there must be some flexibility in ensuring the pleadings adapt to changing circumstances."
- [71] In the Kelowna Expropriation Action, Beruschi sought compensation from the Province for a de facto expropriation of the Tony Claims by way of a direct claim. Because I have concluded that Beruschi cannot make a direct claim, his claim must be derived through Billingsley as the legal owner instead. The fact that Beruschi no longer seeks to have the Tony Claims conveyed to him does not alter or change the analysis of whether or not Billingsley is the beneficial owner; rather, it only confirms that legal ownership will not be impacted by the Vancouver Action.
- [72] The court may also decline to permit amendments if prejudice can be shown. Prejudice may be presumed if the delay has been inordinate, and no reasonable explanation has been provided: *Byrd* at para. 13. Billingsley argues that it is clear that there may be additional emails from 2005 or 2006 that have not been produced and which Beruschi suggests may have been lost due to a corruption of his computer. Billingsley refers to this Court's decision in *0742848 B.C. Ltd. v. Squamish (District)*, 2018 BCSC 1046, as authority for the proposition that the loss of computer records and the corruption of digital storage may give rise to prejudice.
- [73] However, in *Squamish*, the new proposed pleading was an entirely new cause of action, one of negligent misrepresentation. This is not the case here; as I said earlier, the claim for unjust enrichment is simply a different legal theory arising out of previously pleaded facts. There is no clear evidence that there are emails of a material nature that are missing, and to the extent there could be missing emails, they would presumably be equally material to Beruschi's allegations of breach of contract, breach of fiduciary duty and misuse of confidential information, which claims are in the existing pleading. I do not understand there to be any additional prejudice that will result from allowing a claim for unjust enrichment that does not already exist. There is no pending trial of which I am aware.
- [74] Having concluded that the proposed amendments raise no new cause of action and are not inconsistent with prior pleadings, it is just and convenient to allow the amendments, and Beruschi's application is granted.

Costs

- [75] Billingsley seeks special costs for his application to strike portions of the Kelowna Expropriation Action as an abuse of process. I consider an order for special costs as sought to be appropriate here. Beruschi took no steps to satisfy the prerequisites for a direct claim even though his claim as pleaded in the Vancouver Action makes it clear that he claims to be

a beneficiary of a trust. He did not name the alleged trustee of the claim and did not name him as a defendant. It is clear that only one of Billingsley or Beruschi could ever pursue damages from the Province, but not both of them. The existence of two identical claims has resulted in neither claim being advanced because the Province is, quite reasonably, not willing to deal with either. Billingsley is entitled to special costs of his application brought in the Kelowna Expropriation Action as against Beruschi.

[76] Beruschi is entitled to his costs for his application to amend his pleadings in the Vancouver Action at Scale B.

"Wilson J."

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